

# Some Observations about “Judicial Independence” in Post-Mao China

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## **Preface**

As has been pointed out elsewhere, 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 P.R.C. My goal in this paper is to clarify the character of adjudication since that meeting where strengthening “Democracy and Legal System” was declared to be a major goal of the Party. In order to understand adjudication fully, it is necessary to take into consideration such questions as who decides, by what standards, and by what procedure and the extent of jurisdiction of the ordinary court. This paper, however, focuses only on the first question of who is the judicial decision-maker.

In bourgeois society, judicial independence is regarded as the first condition of impartial justice. Nobody but the judge (or jury in Anglo-American systems) decides the case before him. It is a fundamental ideal of bourgeois society that judge owes no man master, and the only subordination he acknowledge is that owed to the existing body of legal doctrine and legislative enactments.

Judicial independence is said to be of vital importance in contemporary society where the executive-administrative power has become predominant. Liberal society presupposes the separation of power. Whether the system of separation of power is in force or not depends upon the independence of the judiciary, because the legislative power has been swallowed up by the executive power under the administrative state. Without judicial independence, the state would tighten its control incessantly and

eventually swallow up almost all aspects of social life.

Communist China does not take such a sceptical attitude toward state power. In China's theory, there can be no separation of state power in China, because the state in China embodies the will of the proletariat and other labouring people. According to official political theory, the National People's Congress represents this will, and is the highest and inseparable organ of state power. The judicial organ as well as the procuratorial, administrative organs is subordinate to the highest organ of state power. In this sense, the judiciary in Communist China is not independent of the state power. However, this does not necessarily mean that there did and does not exist anything like judicial independence. The 1954 Constitution provided that "People's courts shall conduct adjudication independently and shall be subject only to the law." The 1982 Constitution also provided that "The People's courts shall exercise its authority independently according to the law and shall not be interfered by any administrative organ, organization, or individual." At least as far as formal legal provisions are concerned, there is little difference between bourgeois and Chinese Society.

However, as mentioned above, people's courts have to accept the supervision of the people's congresses at the same level, this constitutes a major distinction between the Chinese brand of judicial independence and the bourgeois one. But it seems to be unlikely that the people's congresses, which had been sniffed as "mud idol" in 1950s, have ever held real power. As in other communist countries, it is the communist party who holds the real power in China. What should be addressed, therefore, is the relationship between the Party and the court.

## **I The Relationship between the Party and the Court**

### **A PRACTICE PRIOR TO THE 1978 THIRD PLENARY SESSION OF THE ELEVENTH CENTRAL COMMITTEE**

It was not until the 1954 Constitution that so-called judicial independence appeared in written law in Communist China. Even

after the Communists assumed national power, as well as during the Chinese Soviet Republic (1931–1934) and Yen-an (1935–1945) eras, the courts were integrated into the governmental structure, as shown by 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 concrete cases by any administrative organ, organization, or individual. But neither the Constitution nor commentaries on it mentioned the bearing of article 78 on Party interference. According to J. Cohen, this silence reflected the tensions between the Party and the judiciary.<sup>(1)</sup> 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, and extended to the adjudication of individual cases. The official position is illustrated by the article "Refute Jia Qian's Anti-Party Nonsense about 'Independent Adjudication'" written by Feng Ruquan.

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 illegal phenomena 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 solely problems of political ideology, guideline, or policy, but also concrete cases. By correctly handling individual cases, the Party can demonstrate how to carry out its policies and guidelines concretely. If the Party limits itself to passing on policies and guidelines, its leadership will become abstract and useless.<sup>(2)</sup>

Even after the Anti-Rightist Movement, however, there remained, at least formally, a functional separation between the Party and the judiciary, but the Cultural Revolution led to the

total disintegration of the system of law enforcement, as the slogan of "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 Courts in 1979, there had been no room 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 of a political or important policy nature, cases with far-reaching implications, and criminal cases involving a sentence of three or more years of imprisonment. This intervention in judicial decision-making was accomplished through the system of the examination and the approval by Party committee which had nonetheless never been written into law. And this system was not abolished even by the 11th Central Committee at the end of 1978 which emphasized the strengthening of democracy and the legal system.

The communique of the 3rd Plenary Session of the 11th Central Committee proclaimed the independence of the judicial and the procuratorial organs as well as the consolidation of the socialist legal system. But the communique did not mention the role of the Party at all. The fact is that the Party's intervention through the examination and the approval system was still regarded as vital. This is shown by many contemporaneous statements:

The people's courts as instrument of 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. (April 25, 1978, then President Jian Hua of

the Supreme People's Court)<sup>(3)</sup>

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 Party internal regulations concerning the authority of approval of arrest. (May 26, 1978, the author unknown)<sup>(4)</sup>

[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. Submitting cases to the Party committee, the courts must accurately report the facts of the cases, the grounds of sentencing, and their opinions on handling of the cases. (October 21, 1978, Zeng Hanzhou)<sup>(5)</sup>

Some cases among those which the courts are handling must be submitted to the Party committee for the examination and the approval. At present, cases involving the death penalty are to be submitted to the provincial Party committee, and ten categories among those (the contents are unknown to us) and criminal cases committed by foreigner are to be reported directly to the Supreme People's Court, which must submit them to the Central Committee of the Party for the approval. If in the next National People's Congress, the Criminal Code and the Code of the Criminal Procedure are adopted, officially the Supreme Court shall 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 the approval of the Party Committee as much as they can. When conflicts are not solved, the courts must report to the Party committee correctly, consult with it unhurriedly, explain the fact and the reason clearly, respect its leadership, and adhere to the

principle rightly. (April 10 and 11, 1979, then President Jian Hua of the Supreme People's Court)<sup>(6)</sup>

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. And the people's courts must voluntarily ask for instructions from the Party. (April 21, 1979, Xu Wulin)<sup>(7)</sup>

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 the 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. (July 1979, Zhan Zipei)<sup>(8)</sup>

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. (July 27, 1979, the then Vice Chairman Peng Zhen of the N.P.C. Standing Committee and Director of its Commission for Legal Affairs)<sup>(9)</sup>

Of what and how does the Party exercise the leadership? First of all, the Party committee should not examine concrete cases. ... [But this] does not necessarily mean that the Party does not intervene at all. In some special cases, the Party committee can not help intervening.

Those cases include: (To sum up, 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 have the initiative and concentrate its energy on dealing with major cases. You, the Party committees, will be able to monopolize all power to yourselves. If you try to deal with every kind of cases, you would be too concerned with trivial cases to deal adequately with important matters. (September 1, 1979, Peng Zhen)<sup>(10)</sup>

From these statements, we can see that many types of cases came under the examination and approval system. They include court decisions to arrest; 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 goes from the arrest decision to the death penalty. This is chiefly because the system's criteria have not been standardized in positive law. We can also see that the Party had (and maybe retains) its own internal regulations on arrest, and that surprisingly the then President Jiang Hua of the Supreme People's Court 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 CHINESE COMMUNIST PARTY IN SEPT. 1, 1979

There is little doubt that the examination and approval system, although originally regarded as a temporary expedient, existed continuously from the Communists' assumption of nationwide power in 1949. Thirty years later, for the first time, this system was officially abolished by an instruction entitled "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”.<sup>(11)</sup> As shown by the title, this instruction aimed at guaranteeing the full implementation of the Criminal Law, especially of the Law of Criminal Procedure. It consists of five items: first, the courts must properly handle the cases in accordance with the Criminal Law and the Law of the Criminal Procedure and fully correct all erroneous thoughts and customs that contradict those laws. Second, the Party must intensify its leadership over judicial work 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 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 organizations at all levels, the Party’s leading cadres, and all Party members must exercise leadership in observing the laws.

The contents of the second item, which is relating to the matter of “judicial independence”, are as follows:

The Party committees and the judicial organs must each carry out their own special functions. The 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 the examination and the approval by the Party committees at all levels. Except for the very few cases committed by cadres of county level or higher and well-known personages, which require asking for instructions from higher [courts] because of specific and important situations, every kind of case should be tried independently according to the laws by the courts with jurisdiction over the cases. ... The Party leadership over the judicial work is limited to that of guidance and policy. The Party committees at all levels must firmly correct habits and manners such as the Party replacing the government or words replacing the law or the handling of



cases without regard to the law.<sup>(12)</sup>

However, this epoch-making instruction aiming at judicial autonomy was of no effect. There is evidence that Party officials still continued to interfere in adjudication. For example, Guo Buyue states as follows:

In spite of the proclamation of the abolishment of the system of having cases examined and approved by the Party committee, there still remains deep-rootedly the idea of "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 also are handled not by the courts but by the members of the Party committees. Besides, there are even cases in which comrades of the Party committees or units refuse to execute the legally effective judgements passed by the courts, or attempt to change those judgements.<sup>(13)</sup>

At the same time, it should also be noted that there are not a few judicial officials who are reluctant to carry out their duties independently. Some articles are saying as follows:

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's Party committees or individual leaders. There are also those who are unwilling to carry out their functions given by law and ask for the examination and the approval by the Party in order to avoid the suspicion that "they do not obey the Party leadership".<sup>(14)</sup>

When the opinions of the police, the procuracy, and the court are divided, they [judicial officers] ask for the examination and the approval by political-legal small group [within the Party committee] before deciding

cases.<sup>(15)</sup>

These examples indicate the lack of judicial autonomy. Why are judicial officers apt to rely upon the Party in handling cases? This is chiefly because they do not like to come into conflict with the Party. Furthermore, the judicial officers' level of knowledge and legal technique is not enough to perform the judicial function independently. As is well known, China has been enacting many laws with considerable speed. However, it would be nonsense to attempt to strengthen the legal system without enough legal experts skilled in handling the law. The condition regarding this point is not much better than it was in the pre-cultural revolution period. At that time, it was said that there were judicial officers who did not understand legal terms.<sup>(16)</sup> We can easily find statements like this in recent articles, too. For example, one article stated that there are many judicial officers who can not conduct trials according to legal procedure and that there are even those who have court verdicts written by primary school teachers.<sup>(17)</sup> Another article notes that few judicial officers are said to be able to administer justice independently and draft court verdicts by themselves.<sup>(18)</sup> Moreover, there are even the following reports on illegal activities by judicial officers:

Some judicial officer in Yulin county of Shanxi province unjustly handcuffed the plaintiff's attorney and forced him to sign his assent in court room.<sup>(19)</sup>

The president of the Guannan County Court of Jiangsu province mistakenly sentenced an innocent 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.<sup>(20)</sup>

As long as such conditions persists, it will be extremely difficult to realize judicial autonomy in China. It is very understandable why the Central Committee of the C.C.P., as mentioned

above, emphasized the reconstruction of a contingent of judicial workers. However, it seems that the education for legal experts is not making much progress.

Reportedly, as of 1985, there were 3000 or more people's courts throughout the country, but 60 percent lacked the necessary facilities.<sup>(21)</sup> And as of 1979, very few among the 58,000 judicial officers throughout the country have, it is said, specialized knowledge on law. As of 1983, only 3 or 4 percent among cadres of the police, the procuracy, and the court were graduates of institutes of political science and law or university law departments.<sup>(22)</sup> Even in Beijing, as of 1982, those cadres who had been trained for the legal profession in institutes and universities constituted only 10 percent, those who had received short-time training constituted 20 percent, and the rest had received no legal education.<sup>(23)</sup> It is therefore an urgent task to train legal experts as quickly as possible. However, little progress seems to have been made as shown by the report in 1982 that law department students occupied only 0.6 ~ 0.7 percent of all students nationwide.<sup>(24)</sup> This indicates that legal experts have not been recruited enough, in spite of having put emphasis on strengthening the legal system and the rule by (not of) law. Why are there few candidates for the legal profession? One reason is that the social prestige of judicial officers and lawyers was and is low. Undoubtedly, in a bureaucratic society like China chief concern of social members is on social ranking. This ranking system is politically, economically, and socially of vital importance in bureaucratic society. In China, this ranking is divided into 24 grades, and those lower than the 17th grade are regarded as ordinary cadres, 17th ~ 14th as middle-level cadres, 13th ~ 8th as senior cadres, and 7th or higher as super senior cadres.<sup>(25)</sup> And among these rankings, that of judicial officer is not high, unlike bourgeois society. Even the ranking of judicial officer in higher court as well as in basic-level and intermediate court are all lower than 17th grade which means ordinary, that is, non-prestigious cadres.<sup>(26)</sup> This fact suggests that the prestige of judicial officers in China, where the socio-political authority is derived from the bureaucra-

tic ranking order, is very low.

In spite of the instruction from the Central Committee of the Party for judicial independence, the people's courts did and do not have enough power and prestige to solve legal conflicts because of their low level of professional ability and their low ranking in the bureaucratic hierarchy. In so far as the conditions of courts in China remains unimproved, the authority of the Party will be incessantly reproduced in the field of adjudication, too.

Since 1981, opinions defending the system of the examination and the approval by the Party have appeared again. One article in the People's Daily as early as in 1980 asserted that the intervention of the Party committee was indispensable for handling important and complicated cases or the cases of far-reaching implications.<sup>(27)</sup> At the end of 1981, even the then President Jiang Hua of the Supreme People's Court, who was said to have had personally opposed it, acknowledged the Party's intervention. In the third national working conference of criminal justice, he delivered a speech that the people's courts in their trials must voluntarily ask instructions from the Party committee, or submit reports on their work to the Party committee when the cases brought before the courts are those relating to the important guideline or policy or important, difficult ones.<sup>(28)</sup> The following statement in 1982 is very suggestive in considering the matter of who is the real decision maker:

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 application of 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 committee or by the manner that "dealing with the case jointly within the Party, each organ

does its own job on the basis of the instruction from the Party committee”.<sup>(29)</sup>

This statement is strange from the view point of the adversary system in bourgeois society. Why should three (the police, the procuracy and the court) organizations be consistent as to fact-finding or application 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, not the court, was and is the real decision-maker in adjudication. This statement shows us clearly the location of judicial power. I have not seen any arguments about the system of the examination and the approval by the Party from 1983 on. It seems to me that this system by the Party has already resumed its function since then.

## **II Arguments for and against the Examination and the Approval by President within the People’s Court**

### **A ARGUMENTS AGAINST**

Soon after the Central Committee of the Party issued the instruction for 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 his opinions are as following:

To be sure, this system played to some extent 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 the 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 authority only to appoint judicial officer to the collegiate 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 fact-finding 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 collegiate bench. This system therefore conflicts with the legally stipulated system of collegiate benches. Second, this system is a barrier to the implementation of jury system (strictly speaking, this is more similar to the schöffengericht system in Germany than Anglo-American jury system). For the president or the chief judicial officer to overturn the jurors' judgement would disregard the right of jurors to decide. 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 collegial 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. And the president of the county court illegally submitted to the intermediate court for reconsideration of the decision. As is shown by this example, it is likely that this system results in the 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 corrections of misjudgements. The president participates neither the trial nor the investigation and can not 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.<sup>(30)</sup>

The most critical of those issues is that the system causes the

abuse known as "xianpan houshen" or "first decide and then try". That is to say, it makes meaningless the rights of the defendant in the public trial. With regard to this point the statement by He Lunqi, who is a member of higher people's court in Hubei province, is suggestive:

A criminal case is in fact predetermined through the system of examination and approval by the president or the chief judicial officer prior to the public trial. As a result, the judgement 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.<sup>(31)</sup>

He cites in his article an example in which the judicial officer tried to persuade the jurors not to oppose the prior decision made by the president or the chief judicial officer.

As long as critics regard the trial and the decision by the collegiate bench as fundamental, it is natural that they criticized not only the intervention by the president or the chief judicial officer but also 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. In performing these functions, however, they asserted, the judicial committee should not determine guilt and sentence prior to public trial.<sup>(32)</sup> But 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.<sup>(33)</sup> As a result the judicial officer can do nothing but try a case nominally in the court, and also the role of counsel is extremely diminished as a result of nullification of trial in the court.<sup>(34)</sup> Of course, *lǚshi* or lawyer in communist China is in its nature quite different from that in bourgeois society where he is expected to defend the accused or the client with partisan zeal. In a totalitarian society like China the lawyer is, first of all, expected to reconcile his activity with the interest of the state and the people.<sup>(35)</sup> So there is little that

*lǔshì* 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 against the system of examination and approval by the president or the chief judicial officer, and against the judicial committee is of importance, because these systems nullify the full implementation of the law of criminal procedure by rendering the public trial a mere formality. But these criticisms were not accepted by the regime.

## B COUNTER-CRITICISM BY PROPONENTS OF THE SYSTEM

As mentioned above, the examination and approval system has been practiced since the founding of the P.R.C., and as early as in 1950's some persons eagerly defended this system.<sup>(36)</sup> And in 1980's, too, not a few proponents have defended this system. For example, Wen Shi, who was the then judicial officer of higher court in Beijing city, refuted criticism of system as follows:

Although Liu Chunmao attacks this system on the ground that no law provides for it, non-existence of legal provisions does not necessarily mean illegality. Otherwise, any criminal justice undertaken prior to the enactment of the criminal law and the law of criminal procedure would become invalid. But this would be ridiculous. Next, opponents presuppose that the examination and approval system allows the president or the chief judicial officer to reject the decision made by the collegiate bench. But this is not true. ... The majority of opinions presented by the collegiate bench or independent judicial officer are approved by the president or the chief judicial officer. If conflict occurs between them and the collegiate bench or independent judicial officer adheres to his own opinion, 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". ... But the leadership of our party committee at every level aims at supporting and guaranteeing judicial independence. It is very exceptional that the Party committee interferes wrongfully.<sup>(37)</sup>

In addition to these opinions, proponents eagerly defended this system as follows: First, owing to the Constitution and the Organizations of the People's Courts Code, the court is responsible to the National People's Congress or lower levels' 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 the article 107 of the law of criminal procedure, any important or difficult case shall be brought to a judicial committee for discussion and decision. And nobody 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.<sup>(38)</sup> Second, article 14 of the Organizations of the People's Courts Code provides that when the president of any level discovers there is definite mistake in any decision made by his court which has already taken legal effect, he has the authority to supervise and correct it. If so, it is natural that his authority extends to any decision which has not taken legal effect yet.<sup>(39)</sup> Third, the law allows the president to organize, take leadership of, and supervise judicial work including that of the collegiate bench. Therefore, before the collegiate bench starts the trial, the president can hear the report from the collegiate bench as to the details of the case and can express his own preliminary view on the scope of determination of guilt and the weighing of the penalty for the

reference of the collegiate bench.<sup>(40)</sup>

Besides, these proponents all view the people's court as an organic whole (*youji zhengti*). In their view, judicial independence means not that of the individual judicial officer but that of the people's court as a whole.<sup>(41)</sup> 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 under the principle that the minority should be subordinate to the majority, the lower to the higher, the individual to the organization, and the locality to the centre.<sup>(42)</sup> Since the collegiate bench is only "one link" (*huanjie*) 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.<sup>(43)</sup>

The then President Jiang Hua of the Supreme Court is one of the proponents of this system and has delivered speeches 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 people's court.<sup>(44)</sup> And in the Hexi District Court of Tienjin Municipality he also stated that "[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. And finally the president affixes his signature and seal. A court verdict does not have legal effect without having taken these steps. This is the actual manner in which we have been dealing with the cases thus far."<sup>(45)</sup> His statements are undoubtedly based upon the idea of "an organic whole". And we can say that the idea like this leads to justification of the system of the examination and the approval by the president. The problem is, however, that the idea of organic whole is likely to

nullify the right of the defendant. It is unclear how far proponents based upon the organic thinking understand the serious problem that the accused and the defence lawyer can not participate in the stage of the examination by the president or of the discussion by the judicial committee.

## **Conclusion**

Returning to the question of who is the judicial decision maker in China, I have examined the characteristic element of adjudication in the P.R.C., especially in the post-1978 periods. Both the 1954 and the 1982 Constitution provided for judicial independence. But it would be mistaken to interpret this independence to mean the elimination of the Party's intervention in the judicial decision-making process. Rather the court was and is required to ask instructions from the Party in handling important or difficult cases. But officially the court is the sole judicial decision-maker, however substantially decisive in decision making the role of the Party may be. And yet, curiously, it is extremely difficult to identify the judicial decision-maker in the court which is composed of individual judicial officer, the collegiate bench, the chief judicial officer, the president, and the judicial committee. Rather, accurately speaking, it would be nonsense to try to identify 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, an 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 suggestive.<sup>(46)</sup> In what sense is it administrative? He does not fully explain. In this respect, the argument by W. Robson is useful. In his book *"Justice and Administrative Law"*, he points out clearly the differences between judicial and administrative decision-making processes. He enumerates nine points proper to 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 the decision according to the evidence. The eighth is the case in hand. And the last is a final decision.<sup>(47)</sup> 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.<sup>(48)</sup> 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 the decision making.<sup>(49)</sup>

If, as W. Robson pointed out, the manner in which he is subordinated to higher authority and receives instructions from above or the manner in which he is only a single link in a long chain of delegated work is proper to the administrative function, decision-making in China's judicial organs is undoubtedly administrative. In China's judicial decision-making, it is expected to ask the instructions from higher authorities in handling important, difficult cases, whereas the standard of importance or difficulty remains vague. Furthermore, in China, it is also expected to make a judicial decision in a long chain consisting of many links such as independent judicial officer, collegiate bench, chief judicial officer, president, judicial committee, and furthermore

the Party committee. It would be meaningless to try to identify the decision-maker. And importantly, the final decision is substantially made by the president, judicial committee and the Party committee, all of which discuss and decide in secret: Parties such as the accused and defence attorney are completely excluded from the process of substantial decision-making. In my opinion, this manner of decision-making is administrative rather than judicial.

## Notes;

- 1) Jerome A. Cohen, “The Chinese Communist Party and ‘Judicial Independence’: 1949–1959,” *Harvard Law Review* Vol. 82, (1969), p. 984.
- 2) Feng Ruoquan, “Refute Jia Qian’s anti-Party nonsense about ‘Independent Adjudication’,” *Zhengfa yanjiu*, No. 1, 1958, p. 20. And also see Kang Shuhua, “Reactionary essence of ‘Independent Adjudication’,” *Zhengfa yanjiu*, No. 2, 1958, pp. 49–55.
- 3) Jiang Hua, “Report in the eighth national people’s judicial working conference,” *Zhongguo Renmin Daxue Falü Xi*, Law Department of Chinese People’s University, *Zhonghua Renmin Gongheguo Xingshi Susongfa Xuexi Cankao Ziliao*, *The Reference Materials for Studying of Law of Criminal Procedure in the People’s Republic of China*, [hereinafter cited as *Reference Materials*], vol. 1, p. 295.
- 4) “Summary of the eighth national people’s judicial working conference,” *Reference Materials*, vol. 1, pp. 284–285.
- 5) “Report in the national criminal justice working conference,” [excerpt], *Reference Materials*, vol. 1, p. 326.
- 6) “Comrade Jiang Hua’s address to some comrades of responsible positions in the higher, the intermediate people’s courts and the military courts at the end of the informal discussion,” *Reference Materials*, vol. 1, pp. 197–198.
- 7) “Judicial independence and the Party’s leadership,” *Guangming ribao*, 21 April 1979.

- 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*, p. 4 (1980).
- 9) "Comrade Peng Zheng's speeches at the forum of national procuratorial working, the meeting of the presidents of national higher people's courts and military courts, and the meeting of the third national pretrial work," *Reference Materials*, vol. 1, p. 101.
- 10) "Some problems on the socialist legal system," *Reference Materials*, vol. 1, pp. 112–113.
- 11) *Reference Materials*, vol. 1, pp. 49–56.
- 12) *Ibid.*, p. 52.
- 13) Guo Buyue, "Handling cases strictly according to the law," *Faxue zazhi*, No. 1, 1981, pp. 8–9. And also see Leng Shaochuan, "Criminal justice in post-Mao China: some preliminary observations," *The China Quarterly*, No. 87, 1981, pp. 458–461.
- 14) Guo Buyue, *supra* note (13), pp. 8–9.
- 15) "Political-legal group can neither examine nor approve cases any longer," *Zhongguo fazhi bao*, 13 March 1981.
- 16) Fa Yanshi, "Let's make effort to improve the quality of judicial documents," *Reference Materials*, vol. 2, p. 271.
- 17) Jiang Hua, "Let's correct the ideological line and greet new Long March," *Minzhu yu fazhi*, No. 2, 1979, p.3.
- 18) "Comrade Chen Pixian had talks with people of legal circles in Shanghai, and had a lively discussion concerning the matter of improvement of legislative, judicial and political-legal works," *Minzhu yu fazhi*, No. 3, 1983, p. 5.
- 19) "Yulin county court detained illegally an attorney," *Zhongguo fazhi bao*, 29 October 1984.
- 20) "How can the person like this serve as a president of people's court?" *Zhongguo fazhi bao*, 1 July 1985.

- 21) “Basic working condition of courts should be improved urgently,” *Zhongguo fazhi bao*, 3 April 1985.
- 22) *Guangming ribao*, 25 July 1983.
- 23) Li Yuan, “Let’s make effort to usher in a new epoch in judicial-administrative work,” *Faxue zazhi*, No. 6, 1982, p. 3.
- 24) Zhu Qiwu, “It is an urgent task to educate legal personnel,” *Faxue zazhi*, No. 6, 1982, p. 11.
- 25) Yoichi Funabashi, *Naibu (Neibu or the Inside) — A China Report*, (Tokyo: Asahi Shinbun Sha, 1983), pp. 104–105.
- 26) Wan Chengzhi, “People’s courts, too, must implement the policy for intellectuals,” *Zhongguo fazhi bao*, 10 August 1984.
- 27) Ma Rongjie, “Is government officer stronger or is law stronger?” *Renmin ribao*, 29 July 1980.
- 28) *Zhongguo fazhi bao*, 27 November 1981.
- 29) Tao Mao, “Comments on the principle of judicial independence,” *Beijin zhengfa xueyuan xuebao*, No. 4, 1982, p. 51.
- 30) “Inquiry into the system of examination and approval of cases by the president or the chief judicial officer,” *Faxue zazhi*, No. 2, 1980, pp. 34–36.
- 31) “View and opinion on the system of examination and approval of cases by the president or the chief judicial officer,” *Faxue zazhi*, No. 3, 1981, p. 46.
- 32) Li Jieyun, “The principle of judicial independence and the leadership of the Party committee,” *Beijin zhengfa xueyuan xuebao*, No. 3, 1980, p. 55.
- 33) Li Shenyao, “Preliminary analysis on the abuses of ‘being determined prior to trial’,” *Faxue*, No. 3, 1985, p. 29.
- 34) Song Fanxiu, “A talk about a decrease of cases in which lawyers appear in criminal court,” *Faxue*, No. 10, 1984, p. 41.
- 35) Song Zhansheng, “The stand of lawyer chosen as an advocate,” *Faxue yanjiu*, No. 4, 1982, p. 42.

- 36) See e.g. Zhu Yun, "Implement the principle of collective leadership and strengthen the judicial work based on the collegiate system," *Zhengfa yanjiu*, No. 3, 1957, pp. 30-33.
- 37) Wen Shi, "The examination and approval of cases by the president or the chief judicial officer of the people's court is never illegal," *Faxue zazhi*, No. 2, 1981, p. 39.
- 38) *Ibid.*, p. 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," *Faxue zazhi*, No. 3, 1981, p. 45.
- 40) Tao Mao, *supra* note (29), p.50.
- 41) Wen Shi, *supra* note (37), p. 40.
- 42) Wen Shi, "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*, 24. April 1981.
- 43) Sung Changli, *supra* note (39), p. 45.
- 44) "Comrade Jiang Hua's speech on the problem of judicial independence in the people's court," *Minzhu yu fazhi*, No. 6, 1981, p. 4.
- 45) *Ibid.*, pp. 4-5.
- 46) *Supra* note (30), p. 34.
- 47) W. Robson, *Justice and Administrative Law*, 3rd ed., pp. 42-87.
- 48) *Ibid.*, pp. 43-44.
- 49) *Ibid.*, pp. 67-69.