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Shao-Chuan Leng Leng

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CRIMINAL JUSTICE IN POST-MAO CHINA: SOME PRELIMINARY OBSERVATIONS*

SHAO-CHUAN LENG**

China's trial of the Gang of Four and six other members of the "Lin-Jiang cliques" has attracted world-wide attention. Chinese press has pictured the trial as a landmark: the end of a lawless era, a successful test of the new legal system and a demonstration that all are equal before the law.¹ Contrary to Chinese leaders' expectations, however, many observers have considered the trial as essentially a political rather than legal exercise.² On the other hand, the holding of this trial appeared to reflect, among other things, Beijing's desire to publicize its commitment to legality, and the controlled and selected reporting of the court sessions has given the outside world glimpses of the judicial process under China's new and emerging legal order.

This article attempts to provide a preliminary and general survey of the procedure through which criminal justice is administered, in law and in practice, in post-Mao China. Special attention will be given to the applicability of certain universal principles of the conception of the rule of law in relation to criminal cases, e.g., public trials, presumption of innocence, equality before the law, right to defense and appeal, judicial independence, etc.

* *The China Quarterly* has granted the *Journal* permission to reprint Professor Leng's article. It appears here as originally published in September 1981, with some minor changes.

** Doherty Professor of Government, University of Virginia; Ph.D. University of Pennsylvania, 1950; M.A. Yale University, 1948; B.A. Faculty of Law, National Central University (China), 1943.

¹ See, e.g., *The Just Court Verdicts*, Renmin Ribao (People's Daily), Jan., 26, 1981, at 1. The cover of 23 BEIJING REV. (No. 48, 1980) has the pictures of the accused: Jiang Qing, Zhang Chunqiao, Yao Wenyuan, Wang Hongwen, Chen Boda, Hung Yongsheng, Wu Faxian, Li Zuopeng, Qiu Huizuo and Jiang Tengjiao.

² See, e.g., Bonavia, *Give Them Rice and Circuses*, FAR EASTERN ECONOMIC REV., Dec. 5-11, 1980, at 12; Butterfield, *Revenge Seems to Outweigh Justice at Chinese Trial*, N.Y. Times, Dec. 6, 1980, at 2; Ching, *Robes of Justice Sit Uneasily on Gang of Four Judges*, Asian Wall St. J., Nov. 18, 1980, at 4; *Peking's Trial, and Error*, N.Y. Times, Jan. 5, 1981, at A14. Professor Jerome A. Cohen, however, considers the trial as China's effort to bring a political case under the legal process. He also would compare the trial to the Nuremberg war crime trials following World War II. Associated Press, Beijing, Dec. 6, 1980.

I. CHINA'S RECENT LEGAL DEVELOPMENT

Until mid-1979, the People's Republic of China did not have a code of substantive or procedural criminal law, although there were a few statutes governing criminal justice such as the Act for Punishment of Counterrevolutionaries of 1951, the Act for the Punishment of Corruption of 1952, the Arrest and Detention Act of 1954 and the Security Administration Punishment Act ("SAPA") of 1957.³ The single most important reason for the PRC's lack of codification in its 30-year history appeared to be Mao Zedong, whose bias against bureaucratization and preference for the mass line accounted mainly for Beijing's past emphasis on the societal (informal) model of law over the jural (formal) model and on the politicization of the legal process.⁴

There was a period in the mid-1950s when the ascendancy of the jural mode was marked by the adoption of a state constitution, organic legislation for the courts and procuracy, and a series of substantive and procedural laws. Effort was also made to draft civil, criminal and procedural codes. China's progress toward a stable legal order, however, was brought to an abrupt end by the Anti-Rightist Campaign of 1957-58, the result of which was the disruption of the codification effort and the assumption of a dominant role in law enforcement by the Party and the police at the expense of the judiciary and the procuracy.⁵ The jural model suffered another serious setback during the Cultural Revolution of 1966-69 when "smashing Gong-Jian-Fa (police, police, and courts)" became the slogan of the day. There is little question that the decade immediately preceding the death of Mao and the subsequent arrest of the Gang of Four in late 1976 was the most regressive period of China's legal life. The current Chinese leadership, in fact, has attacked Lin Biao and the Gang of Four for creating a state of lawlessness and "feudal-facist" rule during the years of 1966-76, subjecting tens of thousands of innocent people to cruel persecution.⁶

³ Texts of the Counterrevolutionaries Act and the Corruption Act are in ZHONGHUA RENMIN ZHENGFU FALING HUIBIAN (COLLECTION OF LAWS AND DECREES OF THE CENTRAL PEOPLE'S GOVERNMENT) Vol. II (1953), at 3-5, and Vol. III (1954), at 25-28, respectively [hereinafter cited as FLHB], and the texts of the SAPA and Arrest Act are in ZHONGHUA RENMIN GONGHEGUO FAGUI HUIBIAN (COLLECTION OF LAWS AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA) Vol. I, at 239-42 (1956) and Vol. VI, at 245-61 (1957), respectively [hereinafter cited as FGHB].

⁴ For a discussion of Mao's impact on Chinese legal development, see Leng, *The Role of Law in the People's Republic of China As Reflecting Mao Tse-tung's Influence*, 68 J. CRIM. L. & C. 356 (1977).

⁵ The PRC's judicial development before the Cultural Revolution is examined in J. COHEN, *THE CRIMINAL PROCESS IN THE PEOPLE'S REPUBLIC OF CHINA 1949-1963* (1968) and S. LENG, *JUSTICE IN COMMUNIST CHINA* (1967).

⁶ See, e.g., *China's Socialist Legal System*, 22 BEIJING REV. 25, 26-27 (No. 2 1979); *Trial of Lin-Jian Chiques: Indictment of the Special Procuratorate*, 23 BEIJING REV. 9, 18-23 (No. 48, 1980).

The purge of the Gang of Four and their followers and the commitment to the modernization of Chinese society by post-Mao leaders have created a new setting for the revitalization and improvement of China's legal system. In the interest of restoring order and morale and of attracting domestic support and external assistance for the modernization program, the Chinese leadership has taken a number of steps to strengthen the Chinese laws and judicial system so as to provide a secure, orderly environment for economic development. A new constitution was adopted in March 1978 to restore many provisions on legality and individual rights contained in the 1954 constitution but omitted in the 1975 document. Among those revived are the rights of the accused to defense and to an open, public trial and the participation of the people's assessor in the administration of justice.⁷ In the judicial field, the new constitution also reinstates the procuracy, victim of the Cultural Revolution, and reestablishes the requirement for the police to have the approval of the judiciary or the procuracy before making an arrest.⁸ Another institutional development was the restoration of the Ministry of Justice in 1979 by the Standing Committee of the National People's Congress ("NPC") to handle judicial administrative work and to manage and train judicial cadres.⁹

As part of the overall plan to win back popular confidence and to right the wrongs of its predecessor, the post-Mao leadership released in June 1978 some 110,000 persons who had been detained as "rightists" since 1957.¹⁰ It also decided in early 1979 to restore political and civil rights to members of former "class enemies:" as long as former landlords and rich peasants and their descendants "support socialism," they would no longer be discriminated against.¹¹ Moreover, the Chinese government has taken measures to rectify the injustice and repressions allegedly committed by the Gang of Four and their followers. As reported by President Jiang Hua of the Supreme Court, by the end of June 1980 the people's courts at various levels had reviewed over 1.13 million criminal conviction cases handled during the Cultural Revolution and had redressed more than 251,000 cases in which people were unjustly, falsely

⁷ CONST. OF THE PEOPLE'S REPUBLIC OF CHINA, art. 41 (1978) [hereinafter cited as PRC CONST.]. English text of the 1978 constitution is in 21 BEIJING REV. 5, 5-14 (1978). A comprehensive analysis of it is available in Cohen, *China's Changing Constitution*, 1978 CHINA Q. 794.

⁸ PRC CONST., arts. 45, 47. SHAO-CHUAN LENG, *Human Rights in Chinese Political Culture*, in THE MORAL IMPERATIVES OF HUMAN RIGHTS: A WORLD SURVEY 89 (K. Thompson ed. 1980).

⁹ *New Minister of Justice Interviewed*, 22 BEIJING REV. 3 (No. 42, 1979).

¹⁰ *China is Said to Free 110,000 in Detention Since '57 Crackdown*, N.Y. Times, June 6, 1978, at 1.

¹¹ *Policy Towards Descendants of Landlords and Rich Peasants*, 22 BEIJING REV. 8 (No. 4, 1979).

and wrongly charged and sentenced.¹² On the legislative front, progress has been made with considerable speed. The NPC adopted in July 1979 seven major legal codes: Criminal Law ("Chinese CL");¹³ Criminal Procedure Law ("Chinese CP");¹⁴ the Organic Law of Local People's Congresses and Local People's Governments;¹⁵ the Electoral Law for the NPC and Local People's Congresses; the Organic Law of People's Courts;¹⁶ the Organic Law of People's Procuratorates;¹⁷ and the Law on Joint Ventures with Chinese and Foreign Investments. This has been followed by a nation-wide campaign to publicize the new legal system and the enactment of other laws and regulations. For instance, four new laws were adopted by the NPC in September 1980: the Nationality Law, the (revised) Marriage Law, the Income Tax Law Concerning Joint Ventures, and the Individual Income Tax Law. According to Peng Zhen, Vice Chairman of the NPC Standing Committee and Director of its Commission for Legal Affairs, work has been advancing in formulating a civil law, a civil procedural law and a number of economic regulations.¹⁸ It should also be noted that the NPC Standing Committee has passed a resolution that all laws and decrees enacted since the founding of the People's Republic in 1949 remain effective if they do not conflict with the present constitution and other laws and decrees.¹⁹

In the meantime, legal education, research and publication have been accelerated by the current leadership with equal vigor. According to a recent report, there are eighteen universities in China with legal departments. In addition, four institutes of politics and law (Beijing, East China, Northwest and Southwest) have resumed operation. Some 2,000 new college students were enrolled in 1979 for legal study. Proposals have been made to add law departments to more universities, to reestablish the Central South Institute of Politics and Law, and to estab-

¹² Foreign Broadcast Information Service, Daily Report: People's Republic of China [hereinafter cited as FBIS-CHI], Sept. 23, 1980 (Supplement), at 42.

¹³ CRIMINAL LAW OF THE PEOPLE'S REPUBLIC OF CHINA (1979) [hereinafter cited as CHINESE CL]. The English translation of the Chinese CL is printed at pp. 138-70 *supra*.

¹⁴ CRIMINAL PROCEDURE LAW OF THE PEOPLE'S REPUBLIC OF CHINA (1979) [hereinafter cited as CHINESE CP]. The English translation of the CHINESE CP is printed at pp. 171-203 *supra*.

¹⁵ ORGANIC LAW OF LOCAL PEOPLE'S CONGRESSES AND LOCAL PEOPLE'S GOVERNMENTS (1979) [hereinafter cited as ORG. L. LOCAL PEOPLE'S CONG. AND LOCAL PEOPLE'S GOV'Ts].

¹⁶ ORGANIC LAW OF PEOPLE'S COURTS (1979) [hereinafter cited as ORG. L. PEOPLE'S CTS.].

¹⁷ ORGANIC LAW OF PEOPLE'S PROCURATORATES (1979) [hereinafter cited as ORG. L. PEOPLE'S PROCURATORATES].

¹⁸ FBIS-CHI, Sept. 23, 1980 (Supplement), at 34-35.

¹⁹ Renmin Ribao, Nov. 30, 1979, at 1. Peng Zhen estimated that over 1,500 state laws, decrees and administrative regulations were promulgated in the 17 years between 1949-1966.

lish a new Northeast Institute of Politics and Law and a new South China Institute of Politics and Law.²⁰ Aside from university legal departments and special institutes of politics and law, there are a number of political and judicial cadre schools as well as part-time colleges and short-term training classes to provide students with legal education.²¹ Research and publication in the legal field not only have been resumed but also are gaining new respectability. Books on the constitution, the Chinese CL, the Chinese CP, and other legal subjects have been published. Several new legal journals have appeared, better known among them being *Faxue yanjiu* (Studies in Law) and *Minzhu yu fazhi* (Democracy and the Legal System).²² To popularize legal knowledge, the socialist legal system has frequently been discussed by PRC news media. Indeed, hardly a day passes now without some new legal materials appearing in the Chinese press or other publications.

II. THE RESURRECTED JUDICIAL SYSTEM

With the coming into effect on January 1, 1980, of the Chinese CL, the Chinese CP and the Organic Laws of Courts and Procuratorates, the PRC's system of criminal justice has entered a new era of operation and development. As in the mid-1950s, the current judicial structure consists of the courts, the procuracy and the police designed to complement and restrict one another. Compared to the 1954 Organic Law of the People's Courts, the new Court Law has made only a few changes. The court system is still composed of the Supreme People's Court, the higher people's courts, the intermediate people's courts and the basic people's courts. In addition, there are special courts that include military courts, railway transport courts water transport courts and new forestry courts. Some 3,100 people's courts at various local levels are reported to have been in operation throughout the country.²³ With minor modifications, the new Court Law reiterates the 1954 provisions concerning judicial independence, equality before the law, public trials, the right to defense, people's assessors, judicial committees and the two-trial (one appeal) system.²⁴

One significant change in the revised Court Law is to make the

²⁰ Zhao Yusi, *Legal Education Should be Greatly Expanded*, Renmin Ribao, Oct. 10, 1980, at 5.

²¹ *Supreme People's Court Meets*, 22 BEIJING REV. 4 (1979); FBIS-CHI June 11, 1980, at L5.

²² FAXUE YANJIU is published by the Legal Research Institute of the Chinese Academy of Social Sciences; MINZHU YU FAZHI is published jointly by the East China Institute of Politics and Law and the Shanghai Legal Society. Many legal books have been published by the Legal Research Institute of the Chinese Academy of Social Sciences and other research institutes and groups in legal affairs.

²³ Renmin Ribao, Aug. 1, 1980, at 1.

²⁴ Arts. 4-12. English text of the new ORG. L. PEOPLE'S CTS. is in FBIS-CHI, July 27, 1979 (Supplement), at 20-27. Text of the 1954 ORG. L. PEOPLE'S CTS. is in 1 FGHB 123-32.

court accountable only to the people's congresses and free the court from direct supervision by local governments. According to articles 35 and 36, the presidents of the people's courts at all levels are elected and recalled by the corresponding people's congresses and their vice presidents, presiding judges and other judges are appointed and removed by the standing committees of the corresponding people's congress.²⁵ Under the 1954 Law, the vice presidents and other officials of the local courts were appointed and removed by the people's councils at the corresponding levels.²⁶ Another noticeable feature of the revised Law is to provide the Supreme People's Court with additional power. While the authority to interpret the constitution and laws in the PRC is reserved for the Standing Committee of the National People's Congress,²⁷ the Supreme People's Court is bestowed with the power to give "explanations on questions concerning specific applications of laws and decrees in judicial procedure" in addition to its adjudication functions.²⁸ The requirement adopted by the NPC in 1957, that all death sentences must have the approval of the Supreme People's Court,²⁹ is also incorporated into the new Organic Law of the Courts as Article 13.

The New Organic Law of the People's Procuratorates retains the same structure of the procuracy established by the 1954 organic enactment, namely, the Supreme People's Procuratorate, local people's procuratorates and special people's procuratorates. Parallel to that of the local people's courts, the hierarchy of the local procuratorates consists of three levels: (1) people's procuratorates of provinces, autonomous regions, and municipalities directly under the central authority; (2) branches of the above and people's procuratorates of prefectures and counties directly under the provincial governments; (3) people's procuratorates of counties, cities, autonomous counties, and districts directly under the city governments.³⁰ In other respects, the new Law on the procuracy introduces some important innovations on the basis of Chinese conditions thus departing from the Soviet model on which the 1954 statute was closely patterned.³¹ First, it drops the controversial

²⁵ ORG. L. PEOPLE'S CTS., arts. 35, 36 (1979).

²⁶ ORG. L. PEOPLE'S CTS., art. 32 (1954).

²⁷ PRC CONST., art. 25 (1978).

²⁸ ORG. L. PEOPLE'S CTS., arts. 32, 33 (1979).

²⁹ RESOLUTION OF THE FOURTH SESSION OF THE FIRST NATIONAL PEOPLE'S CONGRESS OF THE PEOPLE'S REPUBLIC OF CHINA TO THE EFFECT THAT DEATH PENALTY CASES SHOULD BE DECIDED OR APPROVED BY THE SUPREME PEOPLE'S COURT (adopted July 15, 1957), in 6 FGHB 296 (1958).

³⁰ ORG. L. PEOPLE'S PROCURATORATES, art. 2. English text of the law in FBIS-CHI, July 27, 1979 (Supplement), at 27-33. Text of the 1954 Organic Law is in 1 FGHB 133-38.

³¹ For a discussion of the Soviet Procuracy, see H. BERMAN, JUSTICE IN THE U.S.S.R., 238-47 (1963). In an interview with the author in Beijing in November 1979, Mr. Sun, Deputy Chief of the Legal Research Bureau of the Supreme People's Procuratorate, said that

principle of "vertical leadership" adopted in 1954 under which local procuratorates were free of control by local state organs and were responsible only to higher level organs of the procuracy.³² Instead, the new law applies the principle of dual leadership making the procuratorates at all levels accountable to the people's congresses and their standing committees at corresponding levels and at the same time placing local procuratorates in their work under the leadership of the procuratorate at the next higher level.³³ As in the case of court officials, the power to elect or recall chief procurators and to appoint or remove deputy chief procurators and other procurators at various levels is vested in the corresponding people's congresses and their standing committees respectively.³⁴

Second, the new Law removes the 1954 provisions for the power of general supervision whereby the procuracy could supervise the legality of the actions of all state organs.³⁵ The procuratorates are now permitted to deal with state functionaries only when the latter violate the Criminal Law.³⁶ "Ordinary cases concerning breaches of Party or government discipline but no violation of the Criminal Law," in the words of Peng Zhen, "shall all be handled by the discipline inspection departments of the Party or the organs of government."³⁷ Article 1 of the new Organic Law defines the procuratorates as "the organs of the state supervising the administration of justice."³⁸ In that capacity, the procuracy is empowered to carry out investigation of criminal cases, oversee the activities of the police in the criminal process, institute prosecution, scrutinize the trial activities of the courts and supervise the execution of judgments and the activities of correctional institutions.³⁹ Reflecting the current political need in China, the procuracy also has the power to "exercise procuratorial authority with regard to cases of treason, of attempts to split the country and other major criminal cases of serious disruption of the unified implementation of state policies, law, decrees and administrative orders."⁴⁰ The independence of the procuracy is restored in Article 9 which reads: "People's Procuratorates shall exercise their procuratorial authority independently in accordance

rather than follow the Soviet model, China had to make some changes regarding the procuracy in order to meet her specific conditions and needs.

³² For past attacks against the tendency to free the procuracy from local Party cadres' interference, see S. LENG, *supra* note 5, at 114-19.

³³ ORG. L. PEOPLE'S PROCURATORATES, art. 10 (1979).

³⁴ *Id.*, arts. 21-24.

³⁵ ORG. L. PEOPLE'S PROCURATORATES, arts. 3, 4, 8, 19 (1954).

³⁶ *Id.*, arts. 5-6 (1979).

³⁷ Peng Zhen, *Explanation on Seven Laws*, 22 BEIJING REV. 8, 14 (No. 28, 1979).

³⁸ ORG. L. PEOPLE'S PROCURATORATES, art. 1 (1979).

³⁹ *Id.*, art. 5.

⁴⁰ *Id.*, art. 9.

with the law and shall not be subject to interference by other administrative organs, organizations or individuals."⁴¹

There is little doubt that the adoption of the long-awaited Chinese CL and Chinese CP is a very significant development in the Chinese system of justice for these measures define punishable acts and penalties and regularize the sanctioning process in the PRC. The Chinese CL is devised to protect, first of all, the socialist order and next, the people's personal rights, as indicated in the following words of Article 2:

The tasks of Criminal Law of the People's Republic of China are to use criminal punishments to struggle against all counterrevolutionary and other criminal conduct in order to defend the system of the dictatorship of the proletariat, to protect socialist property owned by the whole people and property collectively owned by the laboring masses, to protect citizens' lawful privately-owned property, to protect citizens' rights of the person, democratic rights, and other rights, to maintain social order, order in production, order in work, order in education and research, and order in the lives of the masses of people, and to safeguard the smooth progress of the socialist revolution and the work of socialist construction.⁴²

Under the general provisions of the new Chinese CL Law, punishments are classified as principal and supplementary. The principal punishments are: (1) public surveillance, a special Chinese practice, which ranges from three months to two years of work with pay; (2) detention of fifteen days to six months during which time appropriate pay is given for work done and one or two days leave is granted each month; (3) fixed-term imprisonment from six months to fifteen years; (4) life imprisonment; and (5) the death penalty. The supplementary punishments include fines, deprivation of political rights and confiscation of property.⁴³ The specific provisions of the Law stipulate eight types of offenses and their punishments. They are: (1) counterrevolutionary offenses; (2) offenses endangering public security; (3) offenses against the socialist economic order; (4) offenses infringing upon the personal and democratic rights of citizens; (5) offenses of encroachment on property; (6) offenses against public order; (7) offenses against marriage and the family; and (8) malfeasance.⁴⁴

As in the Soviet Union, severe sanctions are provided for counterrevolutionary crimes in the PRC. Nevertheless, the new Law differs from past practice and defines in clearer terms a long list of acts of coun-

⁴¹ For comparison, Article 6 of the 1954 Law reads: "The Local People's procuratorates are independent in the exercise of their authority and are not subject to interference by local state organs."

⁴² CHINESE CL, art. 2. Consult the LEGAL RESEARCH INSTITUTE OF THE CHINESE ACADEMY OF SOCIAL SCIENCES, XINGFA JIANGHUA (LECTURES ON CRIMINAL LAW) (1979).

⁴³ CHINESE CL, arts. 27-56.

⁴⁴ *Id.*, arts. 90-192.

terrevolutionary offenses, including conspiring with a foreign state to jeopardize the security of China, plotting to overthrow the government or split the country, inciting an insurrection, committing espionage or supporting the enemy, and hijacking ships or aircraft.⁴⁵ Capital punishment is imposed only for those counterrevolutionary offenses "when the harm to the country and the people is especially serious and the circumstances especially evil."⁴⁶ The other grave offenses listed in the Criminal Law as punishable by the death penalty are homicide, robbery, arson, rape, dike-breaching, planting explosives, embezzling public property, etc.⁴⁷ Similar to the requirement of the Court Law, Article 43 of the Chinese CL stipulates that "except for judgments of the Supreme People's Court, all sentences of the death penalty shall be submitted to the Supreme People's Court for approval."⁴⁸ It also reinstates a provision, a unique PRC innovation, to suspend in most cases the death penalty for a two-year period during which reform through labor will be carried out to see if the offender shows evidence of repentance.⁴⁹

To prevent the recurrence of flagrant abuses of the past, the Chinese CL prohibits extortion of confessions through torture or gathering a crowd for "beating, smashing and looting."⁵⁰ There are also penalties against false charges, perjury, unlawful incarceration and illegal searches or entries.⁵¹ The Law further protects citizens from slander and libel, including the use of wall posters.⁵²

As one may note, the application of analogy and retroactivity in China's past criminal legislation has been a main subject of concern and criticism.⁵³ The new Criminal Law eliminates the use of retroactivity by stipulating that offenses committed before the date of its promulgation (January 1, 1980) shall be dealt with in accordance with the laws, decrees and policies at the time when the infractions occurred.⁵⁴ However, the new Law does retain the principle of analogy with certain re-

⁴⁵ *Id.*, arts. 90-102.

⁴⁶ *Id.*, art. 103. It should be noted that the penalty predominantly listed in the PRC's 1951 REGULATIONS FOR PUNISHMENT OF COUNTERREVOLUTION was capital punishment. *See* REGULATIONS in 2 FLHB 3-5.

⁴⁷ CHINESE CL, arts. 106, 110, 132, 139, 150, 155.

⁴⁸ *Id.*, art. 43.

⁴⁹ *Id.* For discussions of the PRC's past policy regarding the death penalty and its two year reprieve, see AMNESTY INT'L, POLITICAL IMPRISONMENT IN THE PEOPLE'S REPUBLIC OF CHINA 61-69 (1978); S. LENG, *supra* note 5, at 166-68; Cohen, *Reflections on the Criminal Process in China*, 68 J. CRIM. L. & C. 323, 342-43 (1977).

⁵⁰ Beating, smashing and looting were done by the Red Guards during the Cultural Revolution. CHINESE CL, arts. 136-37.

⁵¹ *Id.*, arts. 138, 143, 144.

⁵² *Id.*, art. 145.

⁵³ J. COHEN, *supra* note 5, at 336-41, 348-553; S. LENG, *supra* note 5, at 159-61.

⁵⁴ CHINESE CL, art. 9.

strictions, as Article 79 provides: "A crime that is not expressly provided for in the Special Provisions of this Law may be determined and punished by reference to the most closely analogous article of the Special Provisions of this Law, but the matter must be submitted to the Supreme People's Court for approval."⁵⁵

The retention of analogy in the Chinese CL, although with tighter control than before, is open to criticism.⁵⁶ Some observers also think that the definition of counterrevolution is still somewhat vague.⁵⁷ Despite these flaws, the presence of the Chinese CL itself constitutes a significant advancement in post-Mao China's move toward legality.⁵⁸ The same can be said about the promulgation of the Chinese CP, whose provisions will be analyzed in detail later.⁵⁹ It is generally agreed that by and large the 192-article Chinese CL and the 164-article Chinese CP are impressive and concise pieces of legislation. Together they prescribe appropriate legal standards to guide judicial work and the framework for "due process" to protect the individual. Their enforcement, on the other hand, is certainly no easy task especially in view of the shortage of trained personnel in the legal field.⁶⁰ Along with several others, the two Laws officially came into force in January 1980. Nevertheless, in accordance with the proposal of the Supreme People's Court and the Supreme People's Procuratorate, the NPC Standing Committee decided in April 1980 that if there should be a shortage of judicial personnel to

⁵⁵ *Id.*, art. 79.

⁵⁶ *See, e.g.*, Hungdah Chiu, *China's New Legal System*, CURRENT HISTORY 31 (Sept. 1980). This issue was discussed when the author had a meeting with President Hu Guang and a score of faculty members of the Southwest Institute of Politics and Law (Chongqing) in December 1979. According to the two criminal law professors who participated in drafting the PRC's Criminal Law, China has just begun the codification process and has no time to provide detailed regulations in her criminal legislation; consequently, it is necessary to permit the use of analogy in a "very restrictive" manner to meet practical needs and plug the loopholes in the current law. They expect, however, that in the future China will move to adopt the principle that an actor is held criminally responsible only when his act is punishable according to the provisions of the law in force at the time of its commission.

⁵⁷ *See* Jerome A. Cohen's comment as reported in Butterfield, *Definition of Crime Clarified by Peking*, N.Y. Times, July 10, 1979, at A11.

⁵⁸ As one Western jurist comments, the mere promulgation of the law is already an act of courage on the part of the present government. Meijar, *The New Criminal Law of the People's Republic of China*, 6 REV. SOCIALIST L. 138 (1980).

⁵⁹ *See* sections III-V *infra*.

⁶⁰ In his report on the current situation and tasks to a cadre conference on January 16, 1980, Deng Xiaoping even conceded that "we are at least 1 million short — I think it is 2 million in the number of cadres who can act as judges and lawyers, who have studied law and understand it and who can also enforce the law in a fair and impartial way." FBIS-CHI, March 11, 1980 (Supplement), at 20. Text of Deng's Report first appeared in 1980 CHENG MING (CONTENDING), at 11-23 (No. 29). *Cheng Ming* is a Hong Kong-published magazine sympathetic to the PRC. For more discussion of China's shortage of legal personnel, see Lin Shaoang, *Great Expansion of Political-Legal Education is Our Current Urgent Need*, 1979 MINZHUYU FAZHI 17 (No. 2).

deal with criminal cases, the time limit for handling them as stipulated in the Chinese CP could be extended up to the end of 1980. To prepare for the overall enforcement of the Chinese CP across the country in 1981, the Committee also called upon the courts, procuratorates, public security organs and judicial administrative departments at all levels to draw up, in the light of actual conditions, specific plans to implement the Chinese CP by stages and at different times within 1980 except for a few remote areas.⁶¹

In the following pages, the process through which criminal justice is administered in China and the major issues pertinent to the judicial procedure are examined.

III. PRETRIAL PROCEEDINGS

According to the Chinese CP, "the public security organs are responsible for investigation, detention, and preparatory examination in criminal cases. The people's procuracies are responsible for approving arrest, conducting procuratorial control (including investigation) and initiating public prosecution. The people's courts are responsible for adjudication. No other organ, organization or individual has the right to exercise these powers."⁶² In criminal proceedings, the court, the procuracy and the police should "take facts as their basis and law as their criterion"⁶³ and should "have a division of labor with separate responsibilities and coordinate with each other and restrain each other in order to guarantee the accurate and effective enforcement of the law."⁶⁴

The pretrial proceedings of the Chinese criminal process are composed of two principal parts: (1) arrest and detention and (2) investigation. To prevent illegal arrests and prolonged detentions, proper procedure and strict time limits are set by the Procedure Law as well as by the revised Regulations Governing Arrest and Detention promulgated in February 1979 to replace the old enactment in 1954.⁶⁵ In carrying out an apprehension or in making an arrest, the police must produce a warrant. The family of the detainee or the arrested should be notified of the reasons for the action and the place of confinement within 24 hours. Interrogation must start within twenty-four hours after any apprehension or arrest, and the detainee or the arrested must be immediately released if no legitimate ground is found. When the public

⁶¹ New China News Agency (NCNA), Apr. 6, 1980.

⁶² CHINESE CP, art. 3. Text of the Law of Criminal Procedure is in *Guangming Ribao* (Enlightenment Daily), July 8, 1979, at 1-3.

⁶³ CHINESE CP, art. 4.

⁶⁴ *Id.*, art. 5.

⁶⁵ Text of the revised Regulations is in *Renmin Ribao*, Feb. 25, 1979, at 1. Text of the 1954 Regulations, ignored in the past, is in 1 FGHB 239-42.

security organ deems it necessary to declare a detainee arrested, the matter should be submitted to the procuratorate for approval within three days or, in special circumstances, seven days. The procuracy must either sanction the arrest or order the release of the detainee within three days.⁶⁶

During the stage of investigation, the tasks include interrogation of the accused and witnesses, search and seizure, examination of evidence and preparation of the indictment. Mindful of past abuses, the Chinese CP stipulates that in collecting various kinds of evidence throughout the entire judicial process, the police, judges and procurators are strictly forbidden to extort confessions by torture, threat, enticement, deceit or any other illegal means.⁶⁷ At the time of search, except in emergency situations, investigators shall show the searched a search warrant.⁶⁸ The Chinese CP further provides that detention of an accused pending investigation should not exceed two months. If necessary, a one-month extension may be granted by the procuratorate at the next higher level.⁶⁹ A procuratorate is required to decide whether or not to prosecute a case sent to it by police within one month to one and a half months.⁷⁰

In practice, the shortage of trained personnel and persistence of negative and erroneous views about the law have hampered the full implementation of the provisions of the Chinese CP. Some police and judicial cadres regard the law as a hindrance tying their hands and feet in the fight against crimes.⁷¹ Others cling to the old prejudice that the suspect in a criminal case is guilty and should be dealt with as such.⁷² Consequently, it is not too surprising to find the frequent occurrence of

⁶⁶ See CHINESE CP, arts. 38-52; REGULATIONS GOVERNING ARREST AND DETENTION, arts. 2-8. The difference between "detention" and "arrest" is clearly described in a 1968 study as follows: detention is the emergency apprehension and confinement of a suspect without an arrest warrant for the purpose of investigating whether there is sufficient evidence to justify his arrest while arrest is the apprehension and confinement or the continuing confinement, of a suspect on the basis of an arrest warrant for the purpose of investigating whether there is sufficient evidence to justify prosecution. J. COHEN, *supra* note 5, at 28.

⁶⁷ CHINESE CP, art. 32.

⁶⁸ *Id.*, art. 81.

⁶⁹ *Id.*, art. 92. As explained by a Chinese jurist, the three month period before the trial is needed because China is so vast in size and transportation is difficult. Keith, *Transcript of Discussions With Wu Daying and Zhang Zhonglin Concerning Legal Change and Civil Rights*, 1980 CHINA Q. 112, 120.

⁷⁰ CHINESE CP, art. 97.

⁷¹ Zeng Longyao, *Upholding the Principle of Mutual Coordination and Restriction by the Public Security Organs, Procuratorial Organs, and People's Courts*, 1979 FAXUE YANJIU 44-45 (No. 1).

⁷² Luo Ping, *The Principle of Measuring Penalty in China's Criminal Law*, HONGQI (RED FLAG), No. 9, 1979, at 71-72; TEACHING AND RESEARCH OFFICE OF BEIJING INSTITUTE OF POLITICS AND LAW, *ZHONGHUA RENMIN GONGHEQUO XINSHI SUSONG FA JIANGHUA (LECTURES ON THE CRIMINAL PROCEDURAL LAW OF THE PEOPLE'S REPUBLIC OF CHINA)* 74 (1979).

illegal arrests and detentions and unlawful search and seizure in Chinese society.⁷³ What has happened to some political dissidents is only a part of this phenomenon.⁷⁴

Educational and other efforts have been made by the PRC to combat the negative attitude toward the law. A 1979 textbook on the Chinese CP, for example, warned against the unlawful practice of prolonged detentions and the use of "continuous interrogation" and other forms of "disguised torture" to extract a confession from the accused.⁷⁵ A 1980 article in the *Enlightenment Daily* also took pains to explain the reasons for banning torture in extracting confessions.⁷⁶ Still, violations have been taking place. In one case, an African student in Beijing was allegedly arrested by the police, held in prison six days and tortured because of his supposed relations with several Chinese women.⁷⁷ In another case a policeman in Shanghai was reported to have illegally detained and cruelly beaten a stranger just over a minor dispute.⁷⁸ According to the information of the Supreme People's Procuratorate, between January 1979 and June 1980 procuratorial organs at various levels accepted and heard more than 10,000 cases in infringement upon citizens' personal and democratic rights, such as illegal detention, illegal search, extorting confessions by torture, etc. More than 8,000 such cases have already been handled and over 9,000 persons have been found guilty of violating the law and discipline.⁷⁹

As part of Beijing's effort to publicize its legal system, prominent Chinese jurists in a radio broadcast answered questions concerning the recent trial of the Gang of Four and six others. One of the procedural issues raised was why Jiang Qing and other defendants were only brought to trial recently after having been under detention for several years. In his explanations, Zhang Youyu, Vice President of the Chinese Academy of Social Sciences, said that more time was needed to conduct

⁷³ Qin Huaihe, *Need to Ensure People's Power to Direct State Affairs*, CHENG MING 82 (Nov. 1980).

⁷⁴ See, e.g., Butterfield, *Four Arrested in China at Democracy Wall*, N.Y. Times, Nov. 12, 1979, at A7; Laduguie, *The Human Rights Movement*, 9 INDEX ON CENSORSHIP 18-26 (No. 1, 1980). According to the report of the underground publication *Dadi* (*Great Earth*) on Nov. 4, 1979, when Wei Jingsheng was arrested on March 27, 1979, he demanded that the public security personnel show him their arrest warrant, but was told "we want to arrest you, why do we need an arrest warrant!" A week later, the arrest warrant was issued by a people's court. Chiu, *supra* note 56, at 32.

⁷⁵ LECTURES ON THE CRIMINAL PROCEDURE LAW, *supra* note 72, at 52, 63-64.

⁷⁶ Wang Shunhua, *Why Is It Necessary to Strictly Ban Torture in Extracting Confessions?*, Guangming Ribao, Mar. 19, 1980, at 3.

⁷⁷ Butterfield, *Chinese Said to Torture African Student in Sex Inquiry*, N.Y. Times, May 31, 1980, at 3.

⁷⁸ 1980 MINZHU YU FAZHI 31 (No. 8).

⁷⁹ NCNA, Oct. 1, 1980.

investigation for this important case and to reconstruct China's badly damaged judicial system and put it back into operation:

The reason for the delay of the trial until now is that the case was of such extraordinary and grave nature and required us to do tremendous work in thoroughly and meticulously checking and verifying the evidence. Moreover, during the ten turbulent years legal organs at all levels in our country had been destroyed and all the laws were abrogated. It was in 1978—2 years after the downfall of the Gang of Four—that the new Constitution was formulated. Also, it took quite some time to set up the organization, train cadres and make other legal preparations.⁸⁰

IV. TRIAL PROCEEDINGS

According to Article 100 of the Chinese CP, when the procuratorate finds conclusive and sufficient evidence for prosecution of the accused, it will initiate a public prosecution by the filing of an indictment with a court.⁸¹ The indictment shall include basic information about the accused, facts and evidence of the offense, and article or articles of the law violated.⁸²

A trial, as stipulated by the Chinese CP, is divided into four stages: (1) investigation, (2) debate, (3) appraisal by the collegiate bench, and (4) judgment.⁸³ Except for minor cases, trials are conducted in cases of original jurisdiction by a collegiate bench of a judge and two assessors. In cases of appeal or protest, a collegiate bench of three to five judges is required.⁸⁴ All cases are heard in public except those involving minors, state secrets, or personal intimacy.⁸⁵ However, at panel discussions held by NPC Deputies in September 1980, a delegate from Tianjin pointed out that the overwhelming majority of the courts in China lacked the necessary facilities and funds for conducting public trials.⁸⁶ Western observers also criticized the recent trial of the Gang of Four as not an open (public) one because of the exclusion of foreigners and severe restrictions on Chinese attendance.⁸⁷ Jurist Zhang Youyu, on the other hand, argued that the limitation of the trial attendance to representatives of selected Chinese groups was fully in accord with the general practice of all states to restrict the number of people attending a court session. As for the exclusion of foreigners, he contended, it was necessitated by the

⁸⁰ FBIS-CHI, Nov. 21, 1980, at L3.

⁸¹ CHINESE CP, art. 100.

⁸² LECTURES ON THE CRIMINAL PROCEDURE LAW, *supra* note 72, at 87.

⁸³ CHINESE CP, ch. II.

⁸⁴ *Id.*, art. 105.

⁸⁵ *Id.*, art. 111. One Chinese writer maintains that "public trial" not only serves educational purposes but also puts adjudication under the people's supervision. Liao Zengyun, *On Public Trial*, 1980 FAXUE YANJIU 35-38 (No. 5).

⁸⁶ NCNA, Sept. 15, 1980.

⁸⁷ Ching, *Justice Must be Seen to be Done to Gang of Four*, Asian Wall St. J., Oct. 3, 1980, at 6.

grave nature of the case and the involvement of many important state secrets.⁸⁸

A. RIGHT OF DEFENSE

Article 41 of the constitution states: "the accused has the right to defense." To elaborate on this point, the Chinese CP provides that besides exercising the right to defend himself, an accused may have for his defense a lawyer, a relative, a guardian, a citizen recommended by a people's organization or the unit he belongs to, or an advocate appointed by the court for him.⁸⁹ The responsibility of an advocate is to present "materials exonerating or extenuating the accused and offers his recommendation for mitigation or remission of punishment and to safeguard the legitimate rights and interests of the accused."⁹⁰

While the Chinese CP permits laymen to act as counsel, its preference is definitely lawyers, who have the right to study case materials and visit and correspond with the accused in custody.⁹¹ Writers on Chinese law have also suggested that lawyers are better equipped than the others to act as defenders.⁹² It should be noted here that before the PRC's move toward a stable legal order was abruptly reversed by the Anti-Rightist Campaign of 1957-58 there were some 3,000 lawyers and 800 legal advisory offices across the country. Now, with the legal profession being rebuilt, China reportedly has 3,000 lawyers working at 380 legal advisory offices.⁹³ According to the Provisional Regulations on Lawyers adopted by the NPC Standing Committee on August 26, 1980, lawyers are "state legal workers" and have the duty to "protect the interests of the state and the collective and the legitimate rights and interests of citizens."⁹⁴ In addition to graduates of law facilities, persons with special training in law or practical experience in legal work are also qualified for lawyer certificates if they meet the requirements and approval of the provincial departments of justice.⁹⁵ The Regulations list a number

⁸⁸ Renmin Ribao, Nov. 22, 1980, at 4. A similar view was expressed by Wang Hanbin, Vice-chairman of the Commission for Legal Affairs of the NPC Standing Committee, when interviewed by a New China News Agency reporter. Renmin Ribao, Dec. 12, 1980, at 4.

⁸⁹ PRC CONST., arts. 26-27.

⁹⁰ *Id.*, art. 28.

⁹¹ *Id.*, art. 29.

⁹² Gelatt, *Resurrecting China's Legal Institutions*, Asian Wall St. J., Mar. 29, 1980, at 4.

⁹³ NCNA, Nov. 4, 1980; Li Yunchang, *The Role of Chinese Lawyers*, 23 BEIJING REV. 24 (No. 46, 1980).

⁹⁴ The 21-article Regulations became effective on January 1, 1982. Its full text is in Renmin Ribao, Aug. 27, 1980, at 4.

⁹⁵ According to the First Vice Minister of Justice, all those who aspire for lawyer certificates shall be subjected to a strict process of scrutiny and evaluation, which may include a formal examination. Le Yunchang, *Several Points of Explanation Concerning the Provisional Regulations on Lawyers of the People's Republic of China*, Renmin Ribao, Aug. 29, 1980, at 4. The 1956

of functions for lawyers, ranging from providing legal advice and drafting legal documents, to participation in litigation, mediation, or arbitration. In performing their functions, lawyers are expected to "act on the basis of facts and take the law as their criterion" and must be "loyal to the cause of socialism."⁹⁶ At the same time, they are to "enjoy the protection of state's law" and be free from interference of any unit or individual in the course of their work.⁹⁷ Chinese lawyers practice collectively in legal advisory offices, which are led and supervised by state judicial organs. The expenditures of the offices are covered by the state and their incomes are handed over to the state. Moreover, lawyers are also organized into revived Lawyers' Associations, whose tasks consist of "protection of lawyers' legal rights, promotion of exchange of work experience, facilitation of development of lawyers' work and expansion of contacts between Chinese and foreign legal practitioners."⁹⁸

One major problem facing the Chinese lawyer in defending a criminal suspect is the traditional prejudice against legal defense. During the years when the PRC was experimenting with the lawyer system, many people regarded the presence of a lawyer at a criminal trial as troublemaking and even traitorous.⁹⁹ This hostile attitude appears to be persisting in China today. For instance, one reader complained to a legal journal that "the negative views on lawyers that some judicial cadres have continued to harbor are the main reason for the difficulty of finding defense attorneys."¹⁰⁰ In an article entitled "Correctly Understand and Support the Defense Lawyer System," a Beijing radio commentator stated "in some places some comrades still do not quite understand the meaning and role of lawyers. Therefore, they take a rather strong dislike to defense lawyers, and, in some places, even openly prevent lawyers from performing their duties. All this is very wrong."¹⁰¹ In a forum on the question of "restoring and strengthening the lawyer system" sponsored by *Democracy and the Legal System* and the Shanghai Legal Society, several speakers emphasized the importance of removing mistaken ideas and lingering fears about defense counsel.¹⁰² One author

regulations made no reference to any examination and had even more flexible standards for lawyers than the current regulations. See S. LENG, *supra* note 5, at 137-39.

⁹⁶ Provisional Regulations on Lawyers, art. 3.

⁹⁷ *Id.*

⁹⁸ *Id.*, art. 19. By comparison, the Lawyers Associations in the 1950s appeared to have more control over Chinese lawyers. As in the past, lawyers are paid by the state, but it is not clear whether a close relation between a lawyer's salary and his performance established by the 1956 Provisional Rules for Lawyers' Fees will be followed. Text of the Rules is in 4 FGHB, 235-38.

⁹⁹ S. LENG, *supra* note 5, at 144.

¹⁰⁰ 1979 MINZHU YU FAZHI 36 (No. 2).

¹⁰¹ FBIS-CHI, Sept. 24, 1980, at L14.

¹⁰² 1980 MINZHU YU FAZHI 10-11 (No. 4).

went to considerable lengths to show that it would be erroneous to "view a lawyer being on the side of the enemy" or to "assume defendants being necessarily the same as criminals."¹⁰³

Another touchy issue is whether PRC lawyers can function independently and how far they may go to defend their clients. One Chinese lawyer is quoted by *Beijing Review* as saying: "There is no such thing as absolute independence. We are government functionaries and as such, must handle affairs strictly in accordance with state laws I think we practise law more independently than those hired by big firms or wealthy people."¹⁰⁴ China's First Vice-Minister of Justice also spoke of the difference between Chinese and Western lawyers. According to him, lawyers in capitalist countries act only in terms of their clients' interest while lawyers in China must proceed from a "proletarian stand" in their work.¹⁰⁵ Commentaries from other Chinese legal sources further suggest that in doing their job as defense counsel "proletarian lawyers" should not act like "bourgeois lawyers" who are willing to manipulate facts and bend the law to win a case and help an accused escape criminal responsibility.¹⁰⁶

Given the various constraints, it is little surprise that defense lawyers in China generally play a passive role in court proceedings. They tend to confine their defense to pleading for leniency and are reluctant to challenge the prosecution or to exercise such rights as cross-examining state witnesses and calling witnesses of their own as provided by the Chinese CP.¹⁰⁷ At a robbery trial in Beijing open to foreign observers, the defense lawyer was reported to have spoken only once during the three-hour session, when he asked for a lighter penalty because of the defendant's confession and contribution. No attempt, however, was made either to examine the two witnesses or to ask questions of the police and the prosecutor.¹⁰⁸ This pattern has been repeated in other reported trials and the two trials witnessed by the author, including the one attended with fellow members of the American Bar Association Delegation in the Shanghai Intermediate Court on June 9, 1981.

In the recent trial of ten former radical leaders, five defendants did appoint or accept the court's appointment of two defense lawyers each, while Jiang Qing and four others did not accept or request the appoint-

¹⁰³ Xiao Yang, *We Should Correctly Treat Lawyers' Work*, *id.* at 14-15.

¹⁰⁴ *China's Lawyers*, 23 BEIJING REV. 26 (No. 23, 1980).

¹⁰⁵ Renmin Ribao, Aug. 29, 1980, at 4.

¹⁰⁶ Gelatt, *supra* note 92, at 4.

¹⁰⁷ CHINESE CP, arts. 115, 117.

¹⁰⁸ Butterfield, *Peking Criminal Trial, in Bank Robbery Case, Opened to Foreigners*, N.Y. Times, June 18, 1980, at A3.

ment of defense counsel.¹⁰⁹ Judging from the limited office news release, the lawyers appeared to be not too active during trial proceedings and made statements for their clients only at the time when the court was concluding the debates on each defendant. There are no reports of objection to the prosecution's questions, or cross-examination of witnesses, or evidence presented by the defense.¹¹⁰

A uniform line of defense was essentially used by the attorneys for Chen Boda, Li Quopeng, Jiang Tengjiao, Wu Faxian and Yao Wenyuan. The lawyers basically agreed with the state that the defendants had committed serious crimes but argued that they were not "principal culprits" and should be given lenient punishment because of their guilty pleas and repentent attitudes.¹¹¹ Minor exceptions, however, were taken to some specific charges made by the prosecution against the accused. Li Zuopeng's lawyers, for instance, pointed out that as shown in the court investigation, he did not participate in drawing up the project for the armed coup, nor was there any evidence showing that he had taken a direct part in the counterrevolutionary activities of engineering the coup.¹¹² Lawyers for Chen Boda said the defendant should bear "an unshirkable responsibility" for making a speech to "trump up" a case against the party organization of eastern Hepei Province. Nevertheless, they argued that there was no evidence to show that his speech alone caused the death of thousands of people and the persecution of tens of thousands.¹¹³ Yao Wengyuan's lawyers also said that it "could not be established" that Yao was involved in a plot by two other members of the Gang of Four, Zhang Chunqiao and Wang Hongwen, to stage an armed rebellion in Shanghai in October 1976, as charged in item forty-six of the indictment.¹¹⁴

B. PRESUMPTION OF INNOCENCE

The real importance of the presumption of innocence, as observed by a group of international jurists, lies not in the abstract principle but in the extent to which in actual practice an accused person is in a position to "assert the principle against an over-eager prosecutor or police official who may find it easier to build up a case by intimidation of the

¹⁰⁹ Jiang Qing initially wanted lawyers to represent her but failed to reach an agreement with the three lawyers recommended by the court. Guangming Ribao, Nov. 11, 1980, at 1.

¹¹⁰ Butterfield, *Revenge Seems to Outweigh Justice at Chinese Trial*, N.Y. Times, Dec. 6, 1980, at 2; Rodenick, *Gang of Four: Baffling Trial in China*, AP, Dec. 6, 1980.

¹¹¹ See FBIS-CHI, Dec. 29, 1980, at L11-12; Dec. 22, 1980, at L6; Dec. 19, 1980, at L2, L4-5; Dec. 2, 1980, at L2-3. Shorter summaries are in 23 BEIJING REV. 20 (No. 50, 1980) and *id.* at 18-21 (No. 52, 1980).

¹¹² FBIS-CHI, Dec. 29, 1980, at L11.

¹¹³ *Id.*, Dec. 19, 1980, at L2.

¹¹⁴ *Id.*, Dec. 22, 1980, at L6.

accused, based on an assumption of guilt, than by laborious collection of independent evidence."¹¹⁵ In the past the assumption of guilt and emphasis on confessions have been the prevailing mode of the PRC's criminal justice.¹¹⁶ One noticeable change found in the current Chinese CP is the premium now placed on facts and hard evidence. Article 31 of the Chinese CP stipulates that evidence can be used as the basis of judgment only after it has been verified. In collecting various kinds of evidence to prove the innocence or guilt of the accused, use of illegal means including extortion of confessions by torture is strictly forbidden.¹¹⁷ The Law also provides that in all cases "stress should be laid on evidence, investigation, and study, and credence should not be given too readily to confessions. The accused shall not be convicted without evidence other than his confession but he may be convicted when there is conclusive evidence even without his confession."¹¹⁸

However, there appears to be still considerable resistance to the adoption of the presumption of innocence in China's criminal procedure.¹¹⁹ During 1956-57 some liberal Chinese jurists did urge the acceptance of this principle, but it was rejected as a "reactionary bourgeois doctrine" in the ensuing Anti-Rightist Campaign. The official line was that to assume the accused innocent in penal prosecution would only mean "the protection of guilty persons from punishment" and "the restriction of the freedom of the judicial organs and the masses in their fight against counterrevolutionary and other criminal elements."¹²⁰ Since 1979 the debate on this principle has been again revived among Chinese legal circles. This time, nevertheless, it has been conducted on a broader scale and in a more open atmosphere.

Among the proponents of the presumption of innocence, some advocate its critical assimilation into the Chinese criminal process. Despite certain contradictions that this principle contains, they argue, China should selectively absorb its spirit and essence and reject its "dregs" and unreasonable elements so as to insure the protection of the innocent and keep wrong or unjust judgments to a minimum.¹²¹ Others even go a step further to urge the adoption of the presumption of innocence as one

¹¹⁵ GENEVA INT'L COMM'N OF JURISTS, *THE RULE OF LAW IN A FREE SOCIETY: A REPORT ON THE INTERNATIONAL CONGRESS OF JURISTS* 249 (1979).

¹¹⁶ J. COHEN, *supra* note 5, at 49-50; S. LENG, *supra* note 5, at 164-65; Luo Ping, *supra* note 72, at 71-72.

¹¹⁷ CHINESE CP, art. 32.

¹¹⁸ *Id.*, art. 35.

¹¹⁹ See, e.g., Gelatt, *The People's Republic of China and the Presumption of Innocence*, 73 J. CRIM L. & C. 259 (1982).

¹²⁰ S. LENG, *supra* note 5, at 63,165.

¹²¹ Chen Guangzhong, *The Principle of Presumption of Innocence Should Be Critically Assimilated*, 1980 FAXUE YANJIU 34-36 (No. 4); Liao Zengyun, *View on the Principle of Presumption of Innocence*, *id.* at 32-34 (No. 5).

of the basic principles of China's criminal procedure without qualifications. They justify their stand not only in terms of the importance of this principle in guiding the correct handling of cases but also in terms of its compatibility with the socialist legal system. First of all, according to them, the principle of presumption of innocence is a true expression of materialism, because it insists that a judgment can only be made by reliable, objective evidence rather than by subjective views inherent in the feudalistic tradition of "presumption of guilt." Moreover, what the presumption of innocence stands for is in complete accord with a number of principles in the Chinese CP such as "seeking truth from facts," "taking facts as the basis and law as the criterion," "putting emphasis on evidence and investigation and not giving ready credence to confessions," etc. Therefore, the incorporation of the presumption of innocence into Chinese law, in the eyes of its advocates, would have the benefits of reinforcing the aforementioned democratic principles and facilitating the full realization of the PRC's socialist legality.¹²²

Those who hold an opposite view on this issue may also be divided into two groups. The hardliners brand the presumption of innocence as a legacy of the capitalist countries, used by the bourgeois class as a means to oppress the people. Unscientific and reactionary, it violates the fundamental spirit of the Chinese CP. To adopt this principle would create much confusion, tie the hands of law enforcement personnel, and leave many criminals unpunished.¹²³ Some even raise the following question: If the defendant is "innocent," why has he been arrested and a public charge preferred against him?¹²⁴

Others tend to take a more moderate position by saying that there is no need for socialist China to adopt either the feudal principle of presumption of guilt or the bourgeois principle of presumption of innocence although an analysis of both may be useful. The primary responsibility for Chinese judges in a criminal trial, as suggested by the argument, is to investigate the facts and evaluate the evidence with an open mind and from all sides so that the accused's guilt or innocence can be rightfully

¹²² Wang Bingxin, *Exploration on the Principle of Presumption of Innocence*, 1979 XINAN ZHENGFA XUEYUAN XUEBAO (J. SW. INST. POL. & L.) 10-15 (No. 1); Wang Xizohua & Ma Qingguo, *Argue for the "Presumption of Innocence"*, 1980 FAXUE YANJIU 63-64 (No. 1); Zhao Hong & Don Jixiang, *Comprehension on the Principle of Presumption of Innocence*, 1979 FAXUE YANJIU 47-48 (No. 3).

¹²³ LECTURES ON THE CRIMINAL PROCEDURE LAW, *supra* note 44, at 55; Wang Zhaosheng & Wei Ruoping, *A View on the Principle of Presumption of Innocence*, 1979 FAXUE YANJIU 47-48 (No. 2); Yu Zhi, *Presumption of Innocence Cannot Serve as a Guiding Concept in Criminal Procedure*, 1980 MINZHU YU FAZHI 10-21 (No. 3); Zhang Zipei, *Analysis of the Principle of "Presumption of Innocence"*, 1980 FAXUE YANJIU 30-33 (No. 3).

¹²⁴ Yi Xiaozhong, *Principle of "Presumption of Innocence" is Poles Apart From Our Country's Regulations on Arrest and Detention*, 1980 FAXUE YANJIU 63 (No. 1); Zhang Zipei, *supra* note 123, at 32.

proven and a correct verdict can be rendered.¹²⁵ This position seems to reflect somewhat the current official line, even though the debate on the presumption issue is continuing. In a New China News Agency reported interview on the trial of the Gang of Four, jurist Zhang Youyu explained the Chinese attitude toward the principle of presumption of innocence. According to him, China's criminal procedure operates neither on the presumption of guilt nor of innocence but adheres to the principle of "basing ourselves on facts and taking law as the criterion." In so doing, "we can insure the correctness of the judgment and avoid an erroneous judgment arising from preconceived ideas. The exercise of this principle can avoid wronging the innocent and allowing the guilty to go unpunished. This complies to the social system and concrete conditions of China."¹²⁶

C. QUESTION OF JUDICIAL INDEPENDENCE

The 1954 Organic Law of People's Courts had, as does the current Law, the provision that "the People's Court administer justice independently and are subject only to the law."¹²⁷ Unfortunately, those legal scholars and practitioners who took this provision seriously were branded in the late 1950s as "rightists" challenging Party leadership.¹²⁸ As a result, in the ensuing years Party control over judicial work continued to be so dominant that the Party committee examined and approved cases tried by the court at the same level. This system has come to be known as "Shuji pian" (approving cases by the secretary) since the Party committee frequently delegated the decision making authority to its secretary in charge of political-legal affairs.¹²⁹

Several problems arising from this past practice have been pointed out by critics in the post-Mao era. First, it is impossible for the Party committee (*i.e.*, its political-legal secretary) to have time to investigate all the cases, thus often resulting in either unreasonable delays of administering justice or making careless and erroneous decisions. Second, the Party committee's direct involvement in concrete court cases has tended to weaken the spirit and enthusiasm of judicial personnel in their work. Third, this has had the effect of rendering court trials a mere formality and causing the people to lose confidence in the PRC's legal

¹²⁵ See, e.g., Yang Guanda, *A Concrete Analysis Should be Made of "Presumption of Innocence"*, 1980 FAXUE YANJIU 63 (No. 1).

¹²⁶ FBIS-CHI, Nov. 20, 1980, at L2; see also Renmin Ribao, Nov. 22, 1980, at 4.

¹²⁷ Article 4 of both the 1954 LAW and the 1979 LAW. For reference to the two legal texts, see note 24 *supra*.

¹²⁸ J. COHEN, *supra* note 5, at 483-506; S. LENG, *supra* note 5, at 61-63, 98-101.

¹²⁹ Liao Junchang, *Independent Adjudication and Approval of Cases by the Secretary*, 1979 XIAN ZHENGFA XUEYUAN XUEBAO 6-9 (No. 1).

system.¹³⁰

In view of all this, the Central Committee of the Chinese Communist Party explicitly abolished the practice of examining and approving cases by Party committees in an instruction issued in September 1979 on the full implementation of the Chinese CC and the Chinese CP.¹³¹ President Jiang Hua of the Supreme Court also urged at a criminal trials conference in August 1980 that the Party Central Committee's instruction be resolutely carried out. According to him, it was necessary for Party committees to examine and approve cases during the war and in the early years of the People's Republic. After the principle that "the People's Court administer justice independently according to the law" was established in 1954, the practice of examining and approving cases by Party Committee should have been gradually changed. However, for various reasons it was not done. Now, the Party Central Committee's decision to revoke the system of examining and approving cases by Party Committee is a major step of reform to insure "independent court trial according to the Law" and "proper Party leadership over judicial organs in principles and policy lines and not in concrete and routine matters."¹³²

Along the same line other official statements and legal writings have tried to reconcile the principle of judicial independence with the principle of Party leadership, by allowing some functional freedom for judicial organs without relinquishing the leadership of the Party. To begin with, the Chinese point out that insofar as their judicial system operates within the framework of Party leadership, it would be wrong to equate the socialist principle of "administering justice independently" with "the separation of the three powers" and "the independent judiciary" proclaimed by the bourgeoisie.¹³³ Equally mistaken, from their perspective, is to interpret Party leadership to mean substituting the Party for the courts and interference by Party committees in the details of judicial operation.¹³⁴ Moreover, they stress the fact that insistence on the principle of "administering justice independently according to the

¹³⁰ *Id.* at 7-9; Chiu Min & Wang Liming, *Strengthen Party Leadership; Adjudicate Independently According to the Law*, 1979 MINZHU YU FAZHI 13 (No. 2); Special Group Assisting the Handling of Cases from the Southwest Institute of Politics and Law, *Looking at Some Problems Existing in Judicial Work from the Practice of Handling Cases*, 1979 XIAN ZHENGFA XUEYUAN XUEBAO 26-27 (No. 1).

¹³¹ Yu Haocheng, *Party Committees Should Not Continue Examining and Approving Cases*, Beijing Ribao, Jan. 23, 1981, at 3.

¹³² Renmin Ribao, Aug. 25, 1980, at 1.

¹³³ Liu Guangming, *The People's Courts Administer Justice Independently*, 1979 FAXUE YANJIU 31-32 (No. 3).

¹³⁴ Chen Shouyi, *A Review of New China's Research in Law During the Past Thirty Years*, 1980 FAXUE YANJIU 6 (No. 1).

law" is entirely consistent with the strengthening of Party leadership in legal work:

Our country's law is made by the National People's Congress under the guidance of the Party. It embodies the will of the people and the policy of the Party. Determination to carry out the law is determination to carry out the people's will and the Party's policy. Therefore, independent adjudication by the courts according to the law really stands for accepting Party leadership and not seeking independence from the Party With the strengthening of the socialist legal system, Party leadership over the people's courts must be strengthened, not weakened. This leadership, however, is exercised primarily to strengthen the Party's political-ideological guidance so as to make the people's courts to see the right direction in the complicated class struggle and resolutely implement the Party's political line, principles, and policies. . . . In the meantime, Party committees must also be required to select and train a large group of proletarian judges, who are loyal to the law, to the system, to the people's interests, as well as to true facts.¹³⁵

By following the above prescriptions and refraining from handling concrete cases, Party committees are said to be in a position to assert more effective leadership in the legal field, as they can concentrate on what is essential without getting bogged down by trivial matters.¹³⁶

In spite of all this, there is evidence that Party officials have continued to interfere in the performance of adjudication functions by the judicial organs. At a panel discussion held by NPC delegates in September 1980, Yang Xiufeng from Tianjin suggested, among other things, that the PRC must guarantee the independence of the People's court in administering justice:

Some cadres do not grasp the principle of independent trial according to the law and adopt an attitude of passive resistance. Others even interfere with the courts' judicial authority and seek to replace the law with words. In some cases, judicial cadres who have held firmly to principles and handled cases according to the law have been transferred or replaced. Such a situation must resolutely be rectified.¹³⁷

In an informal discussion session sponsored by the *Enlightenment Daily* in October 1980, Ma Rongjie, Editor of *Studies in Law*, also called attention to the continued practice of substituting the Party for the government in judicial work. This usurpation, as he observed, manifests itself principally in two areas: (1) in some localities, the election, appointment and removal of presidents and judges of the people's courts and chief procurators and other procurators of the people's procuratorates are actually decided by Party committees, contrary to

¹³⁵ Chang Gong, *A Fine Statute on the People's Judicature*, 1979 FAXUE YANJIU 35-36 (No. 4).

¹³⁶ Peng Zhen, *Several Questions on the Socialist Legal System*, HONGQI, No. 11, 1979, at 7.

¹³⁷ NCNA, Sept. 15, 1980. For similar complaints on the legal system by other deputies, see Renmin Ribao, Sept. 16, 1980, at 3 and Sept. 18, 1980, at 3.

the provisions of the Organic Laws of the Courts and the Procuracy. Ma cited a case in which the president and vice president of a municipal intermediate court were removed by the first secretary of the municipal Party committee because of their refusal to bend the law to change a judgment. (2) The supposedly abolished practice whereby cases are examined and approved by Party committees is still in effect in certain localities.¹³⁸

The same problem was raised by an article in the *Beijing Daily* on January 23, 1981, which pointed out the revocation of the practice of reviewing cases by Party committees "has been passively resisted by some comrades and overtly challenged by others." Two instances were cited. One responsible person of a certain county party committee interfered in a trial and unjustifiably dismissed the chief procurator from his post. Another county Party committee seriously infringed upon the right of a court to conduct adjudication independently and refused to carry out the verdict so as to prevent the close of case.¹³⁹

To combat unlawful interference in judicial work and to overcome the passive attitude of some judicial personnel, Chinese leaders like Ye Jianying and Jiang Hua have called for fearless judges and procurators ready to sacrifice their lives for the dignity of the legal system.¹⁴⁰ While there are reports about courageous and model judicial workers on the one hand, there are also reports concerning those judicial cadres who have been slow, reluctant, or unable to carry out their duties on the other. In Pingding county of Shanxi province, a demobilized soldier was reported to have been unjustly arrested, tortured and sentenced to prison during 1976-78 because of his criticism of Dazhai and its leaders. Even after his release he failed in his attempts to have the verdict reversed by the courts. Finally the intermediate court of Jingzhong did so in August 1980 after a rehabilitation meeting called by the Pingding

¹³⁸ *Strengthen Theoretical Study: Promote Institutional Reform: Excerpts of Comments from the Theoreticians Forum Held in the National Capital, I*, Guangming Ribao, Oct. 10, 1980, at 2.

¹³⁹ Yu Haocheng, *Party Committees Should Not Continue Examining and Approving Cases*, Beijing Ribao, Jan. 23, 1981, at 3. The first example Yu cited apparently refers to an episode that occurred in Fuding County of Fujian Province. Ji Zhili, secretary of the county Party committee, came into conflict with Zhou Zongshuang, chief procurator of the county, over the disposal of a case. Ji questioned Zhou "which is superior, the law or the Party committee secretary?" and had Zhou dismissed on the pretext of his "resistance to Party leadership." This was reported in Beijing's ZHONGGUO FAZHI BAO (CHINESE LAW WEEKLY) and also in Hong Kong's 1980 CHENG MING 87 (No. 35). Because of the wide publicity of the incident, Zhou has since been reinstated to his post as chief procurator and Ji has been under investigation. For a comment on this episode, see Mao Rongjii, *Which is Superior, the 'Official' or the Law?* Renmin Ribao, July 29, 1981, at 5.

¹⁴⁰ *Speeding the Work on Law Making*, 22 BEIJING REV. 3 (No. 9, 1979); FBIS-CHI, Sept, 23, 1980 (Supplement), at 44.

County CCP committee had completely exonerated him.¹⁴¹

In a letter to a law journal, one reader reported another victim of unjust imprisonment in Qingpu County near Shanghai. Even after the facts became known, the county court continued to delay any action to "rehabilitate" him for fear of the opposition of certain Party committee members. Only after the repeated urging of the municipal higher court did the county court eventually reverse the verdict.¹⁴² Writing to the same journals, two members of the people's court in Jingan district of Shanghai complained that a legally effective judgment of their court could not be executed due to the resistance from some cadres in the branch office of the China Shipping Fuel Supply Company.¹⁴³

D. EQUALITY BEFORE THE LAW

Article 5 of the Organic Law of the People's Courts as well as Article 4 of the Chinese CP provide that in judicial proceedings all citizens are equal before the application of law, irrespective of their nationality, race, sex, occupation, social origin, religious belief, education, property status, or duration of residence.¹⁴⁴ The same principle of equality was stipulated in the 1954 constitution¹⁴⁵ and in the 1954 Organic Law of the People's Courts.¹⁴⁶ However, it never took root in Mao's China and was repudiated as a bourgeois concept in the 1957-58 Anti-Rightist Campaign. During the Cultural Revolution the radicals attacked Peng Zhen for, among other things, advocating this anti-Party principle.¹⁴⁷ In fact, Chinese justice under Mao put so much stress on an individual's class background that persons from the "enemy" class usually received harsher sanctions for the same offense than those among "the people."¹⁴⁸

The post-Mao leadership, on the other hand, has attempted to change the past policy both in law and in practice. As mentioned before, Beijing declared in early 1979 that former landlords, rich peasants, and their descendants would no longer be discriminated against "[a]s long as they support socialism."¹⁴⁹ According to the author of a legal article, conditions in China are now ready for the application of the principle of "equality before the law." "The broad masses of the

¹⁴¹ *Strange Injustice of Taihang*, Guangming Ribao, Sept. 20, 1980, at 3; Renmin Ribao, Sept. 21, 1980, at 3.

¹⁴² 1980 MINZHU YU FAZHI 24-25 (No. 6).

¹⁴³ *Id.* at 25 (No. 3).

¹⁴⁴ CHINESE CP, art. 4; ORG. L. PEOPLE'S CTS., art. 5 (1979).

¹⁴⁵ PRC CONST., art. 85 (1954).

¹⁴⁶ ORG. L. PEOPLE'S CTS., art. 5. (1954).

¹⁴⁷ Leng, *supra* note 4, at 365.

¹⁴⁸ AMNESTY INT'L, *supra* note 49, at 7-13; Cohen, *supra* note 49, at 335-37; Leng, *supra* note 4, at 363-65.

¹⁴⁹ *Policy Toward Descendants of Landlords and Rich Peasants*, 22 BEIJING REV. 8 (No. 4, 1979).

working class have already become the masters of China; the political dominance of the exploiting class has been overthrown; private ownership of the means of production has been eliminated; public ownership under socialism has been established; the toiling masses have achieved economic equality. All this has wiped out the social roots for inequality before the law."¹⁵⁰ In administration of criminal justice, another author writes in the *Red Flag*:

[T]he criterion for measuring the penalty for a criminal is determined by the extent of harm to society caused by the nature of the crime and the criminal offense itself as well as by the extent of the offense. It is not determined by whether his class element is good or bad, whether his years of revolutionary experience are long or short, or whether his work position is high or long.¹⁵¹

Since the law in China reflects the will of the Party and the people of the whole country, Peng Zhen asks: "Before this law, how can there be any inequality? . . . How can a landlord be found guilty and a worker or a poor peasant not guilty after committing the same crime of murder? How can an ordinary person be found guilty and a cadre not guilty after committing the same crime of murder?"¹⁵²

Indeed, that "no special privilege is allowed before the law" is specifically incorporated into the respective "equality" provisions of the current Organic Law of the Courts¹⁵³ and the Chinese CP,¹⁵⁴ in contrast to the 1954 relevant legal provisions that contained no such statement. This reflects the present leadership's concern about the abuse of power by Party and state officials without regard for the law. In an address delivered at the fifth NPC, Ye Jianying said:

All citizens are equal before the law, whether or not they are Party members and whatever their rank, social position and social origin All leading cadres, no matter how highly placed, are public servants of the people. They are under obligation to serve the people diligently and conscientiously and have no right whatsoever to place themselves above the law While most of our leading cadres at all levels are good or fairly good, it is also true that there are a few who, by flouting the laws and institutions of the state or by taking advantage of certain imperfections in our legal system, have abused the power entrusted them by the people to seek personal gain. With regard to such bad practices as bureaucracy, the pursuit of privilege, "back-door dealings" and suppression of democratic rights, the Party and government must take resolute and effective measures

¹⁵⁰ Chang Gong, *supra* note 135, at 36.

¹⁵¹ Luo Ping, *The Principle of Measuring Penalty in China's Criminal Law*, HONGQI, No. 9, 1979, at 75. A similar stand is taken in He Bingsong, *On the Democratic Principle of Our Country's Criminal Law*, 1980 FAXUE YANJIU 26 (No. 4).

¹⁵² Peng Zhen, *1980 Several Questions on the Socialist Legal System*, HONGQI, No. 11, 1979, at 5.

¹⁵³ ORG. L. PEOPLE'S CTS., art. 5 (1979).

¹⁵⁴ CHINESE CP, art. 4.

to rectify them.¹⁵⁵

Ye's view has been echoed by journal and press articles. The "equality before the law" is described as a sharp weapon against special privileges.¹⁵⁶ To think that one is above the law and cannot be restrained by law "reflects actually the mentality of the ruling feudal landlords in China thousands of years ago."¹⁵⁷ The socialist legal system, on the other hand, is said to be "applicable to all men."

Whoever breaks the law and commits a crime, no matter how high his seniority, how important his office and how great his contributions, shall not be shielded but shall be punished according to the law. Otherwise, the principles of the socialist legal system will be undermined, the Party's prestige impaired, and the authority of judicial organs defied.¹⁵⁸

Concrete cases have been used by the press to show the actual application of the "equality" principle in China today. Three rapists of a gang of seven, for instance, were sentenced to death in June 1980 by the intermediate people's court in Changchun, Jilin, with the chief culprit being the son of a leading cadre at the municipal level. In a commentary, the *China Youth News* said: "Gone are the days when Lin Biao and the Gang of Four lorded it over the people. In the eighties of socialist China, no one who breaks the law can escape the arms of justice."¹⁵⁹ The Beijing intermediate people's court also sentenced on August 9, 1980, four young men, three of whom were the sons of high-ranking officials, to imprisonment for illegal detention and extortion. This case has been the talk of the town and cited as yet another example of upholding the principle of "equality before the law."¹⁶⁰ A dramatic demonstration that no one is above the law was the punishment of top officials responsible for the offshore drilling rig disaster in Bohai Bay that claimed seventy-two lives on November 25, 1979. Not only was the Minister of Petroleum Industry removed from office by the State Council, but four oil industry supervisors were also given prison sentences for criminal negligence by the intermediate people's court of Tianjin on

¹⁵⁵ Ye Jianying, *Closing Address*, in MAIN DOCUMENTS OF THE SECOND SESSION OF THE FIFTH NATIONAL PEOPLE'S CONGRESS OF THE PEOPLE'S REPUBLIC OF CHINA 225-26 (1979).

¹⁵⁶ Yuan Xiaofan, *On the Equality of the Application of Law*, 1980 FAXUE YANJIU 26 (No. 2).

¹⁵⁷ Pan Nianzhi & Qi Naikuan, *On "Everyone is Equal Before the Law"*, Guangming Ribao, Feb. 9, 1980, at 3.

¹⁵⁸ Cui Min, *How Should We Interpret "Everyone is Equal Before the Law"*, Renmin Ribao, July 24, 1979, at 3.

¹⁵⁹ FBIS-CHI, July 2, 1980, at L6.

¹⁶⁰ For this case, Beijing Ribao on August 9 carried a commentator's article entitled *Warn Those Cadres Children and Younger Brothers Who Violate the Law and Commit Crimes*, cited in Renmin Ribao, Aug. 9, 1980, at 4. See also *High Officials' Sons Punished*, 23 BEIJING REV. 7-8 (No. 35, 1980).

September 2, 1980.¹⁶¹ Radio Beijing praised the verdicts as giving expression to the sanctity of the socialist legal system and upholding the principle of "equality before the law."¹⁶²

On January 25, 1981, China's special court concluded the well-publicized trial of ten leaders of the Cultural Revolution with guilty judgments against the defendants. Jian Qing and Zhang Chunqiao, former Vice Premier, received death sentences suspended for two years, while eight others got sentences ranging from sixteen years to life in prison. In an editorial entitled, "The Just Court Verdicts," the *People's Daily* called the trial a great victory for the socialist legal system and for the principle that all are equal before the law.¹⁶³ Also in an editorial, the *Red Flag* said that the trial

swept away the long standing pernicious influence of feudalism and shattered the decadent idea that 'penalties are not imposed upon officials.' All ten principal defendants occupied top leadership positions in the Party, government, or Army. Throughout the trial they were not given special consideration or protection because of their former high positions or previous merits. The court stood firm in protecting the people's interests and pronouncing the appropriate judgments according to the law.¹⁶⁴

Official statements notwithstanding, the trial of the Gang of Four and others appears to be a poor case to show off Chinese legality. Most foreign observers regard the trial as primarily political.¹⁶⁵ Even a Chinese writer in a Hong Kong-based pro-PRC journal criticizes the political interference in the trial. He wonders how it is possible for the Chinese authorities to reconcile their commitment to the principle of "equality before the law" with the fact that they have routinely executed embezzlers and rapists while sparing the life of Jiang Qing who persecuted thousands of people and caused the death of many of them during the Cultural Revolution.¹⁶⁶ As regards the handling of the oil rig disasters two NPC deputies, speaking at a panel discussion in September 1980, stated that they and many of their colleagues were not fully satisfied. In their view, "we have attacked just flies but not tigers" and only

¹⁶¹ NCNA, Sept. 2, 1980; *Oil Rig Accident Sternly Dealt With*, 23 BEIJING REV. 7-8 (No. 36, 1980).

¹⁶² FBIS-CHI, Sept. 4, 1980, at L23.

¹⁶³ Renmin Ribao, Jan. 26, 1981, at 1, 4.

¹⁶⁴ *Advance in the Direction of Strengthening Socialist Democracy and the Legal System*, HONGQI, No. 3, 1981, at 15.

¹⁶⁵ The delay in the Court's sentencing of the radicals, for instance, was reported to have been caused by the split of the Chinese leadership over the fate of Jiang Qing, and the final judgments were said to have been a compromise approved by the CCP's Politburo. See Sterba, *Former Chinese Leaders Given Long Prison Terms*, N.Y. Times, Jan. 26, 1981, at A1; *China's Leaders Said to be Split on the Sentencing of Jiang Qing*, *id.*, Jan. 11, 1981, at 7.

¹⁶⁶ Li Mingfa, *The Chinese Leadership's Dispute Over the Sentencing of Jiang Qing*, 1981 CHENG MING 23 (No. 40).

by discontinuing the "feudal" practice favoring the privileged "can we truly succeed in having everyone equal before the law."¹⁶⁷

V. APPEAL AND REVIEW

Under the two-trial system as stipulated in Article 12 of the Organic Law of the People's Courts, a judgment or ruling of the court of first instance may be appealed to the court of the next higher level. An appeal may be initiated by the dependent or the procuracy. In the past, the fear of incurring heavier punishment seriously deterred the Chinese from exercising their right of appeal.¹⁶⁸ To remedy the situation, Article 137 of the Criminal Procedure Law specifically provides that in its judgment of a case based on appeal by the accused or his advocate, the court of a second instance is not allowed to aggravate the original punishment.¹⁶⁹ With this protection, more people have now sought redress through appellate proceedings. In his report to the NPC on September 2, 1980, Jiang Hua said that the courts at all levels "have in the past two years and more handled over 290,000 appeals of court decisions on criminal cases tried before and after the Cultural Revolution."¹⁷⁰

A legally effective judgment in the PRC is also subject to a form of review called judicial supervision if some definite error in the determination of facts or application of law is found. Article 149 of the Chinese CP provides the following procedure of judicial supervision for such a situation:¹⁷¹ (1) The court which gave the judgment in question may refer it to the judicial committee for disposal; (2) the Supreme People's Court or an upper court may review the case themselves or direct the lower court to conduct a retrial; (3) the procuratorates may lodge a protest against the given judgment in accordance with judicial procedure. This system of review, says one authoritative publication, insures that erroneous or unjust judgments are to be corrected and that criminal offenders are to be duly punished.¹⁷²

In fact, the post-Mao leadership has taken vigorous steps to reverse unjust and wrong verdicts of the past. As reported by Jiang Hua, by the end of June 1980, the people's courts had reviewed over one million criminal conviction cases handled during the Cultural Revolution and

¹⁶⁷ See remarks made by Deputy Yang from Yiangxi and Deputy Zhang from Sichuan in Renmin Ribao, Sept. 18, 1980, at 3.

¹⁶⁸ J. COHEN, *supra* note 5, at 556-63; S. LENG, *supra* note 5, at 151-53.

¹⁶⁹ CHINESE CP, art. 137. This stipulation is interpreted as important to the removal of defendants' fear to appeal and to the protection of innocent people against unjust and wrong verdicts. Tao Mao & Li Baoyue, *The Principle of "Not Increasing Sentences on Appeal" Should Not be Negated*, 1980 MINZHU YU FAZHI 25-26 (No. 2).

¹⁷⁰ FBIS-CHI, Sept. 23, 1980 (Supplement), at 42.

¹⁷¹ CHINESE CP, art. 149.

¹⁷² LECTURES ON THE CRIMINAL PROCEDURE LAW, *supra* note 72, at 118.

had rectified more than 251,000 cases of injustice involving over 267,000 persons.¹⁷³ The guiding principle has been to "seek truth from facts and correct mistakes whenever discovered."¹⁷⁴

It should be noted here that besides the appeal procedure, there are special review procedures for death penalty cases. Article 43 of the Criminal Law stipulates that except for those imposed by the Supreme People's Court, all other death sentences should be submitted to the Supreme People's Court for examination and approval.¹⁷⁵ According to Articles 15-17 of the Chinese CP, the court of first instance for capital crime cases is the intermediate people's court or above.¹⁷⁶ Part III, chapter IV of the same Law provides detailed review procedures for death sentences. Whether appealed or not and whether passed or imposed by a higher people's court, a death sentence has to be ratified by the Supreme People's Court.¹⁷⁷ As to death sentences with a two-year reprieve handed down by the intermediate people's court, only the approval of the higher people's court is required.¹⁷⁸

Chinese officials and jurists generally agree that it is necessary to retain capital punishment in China because of its deterrent value in dealing with major counterrevolutionary crimes and other most heinous offenses that seriously endanger society or incur great popular indignation.¹⁷⁹ Nevertheless, they contend that the underlying principle of China's criminal legislation is to reduce and restrict the use of the death penalty and to combine punishment with leniency in the spirit of revolutionary humanism. As evidence, they cite the special review procedures provided for death penalty cases, the two years' reprieve of death sentences for the convicted to reform, and the exemption from capital punishment of young people committing crimes while under eighteen years of age and of women found to be pregnant during trial.¹⁸⁰

¹⁷³ See note 170 *supra*.

¹⁷⁴ *Continue to Reverse Unjust and Erroneous Verdicts Based on False Charges*, Guangming Ribao, June 28, 1979, at 1.

¹⁷⁵ CHINESE CL, art. 43.

¹⁷⁶ CHINESE CP, arts. 15-17.

¹⁷⁷ *Id.*, art. 145.

¹⁷⁸ *Id.*, art. 146. This provision is described as a design to simplify procedures and to reduce the work load of the Supreme People's Court. The decision on this arrangement was first made by the Supreme People's Court in 1958 and is now confirmed by this article. LECTURES ON THE CRIMINAL PROCEDURE LAW, *supra* note 72, at 112.

¹⁷⁹ See Ge Ping & Wang Honggu, *On Capital Punishment*, FAXUE YANJI 29-32, 44 (No. 1, 1980); Zhao Canbi, *Strengthen the Concept of the Legal System and Act According to the Law*, HONGQI, No. 8, 1979, at 42-43; Chen Yiyun & Kong Qingyun, *On Capital Punishment*, Renmin Ribao, Feb. 25, 1980, at 3.

¹⁸⁰ The provision concerning the underage youth and pregnant women is in CHINESE CL, art. 44. CHINESE CP, art. 154 also provides that execution will be stayed if the condemned is found to be pregnant and the case will be submitted to the Supreme People's Court for resentencing according to law.

Undoubtedly, the legal provisions mentioned above reflect the current Chinese leadership's policy to employ capital punishment with care and to avoid the past abuses in mass trials and "exemplary" public executions. There is, however, still a tendency on the part of the PRC to use harsh measures and to depart from legal requirements on occasions of political and social tensions. Chinese authorities, for instance, were reported to have increased the use of executions in 1970-80 against a wave of violent crimes. A check of official press and courthouse notices revealed that at least 198 persons had been executed for crimes ranging from murder to gold speculation in the year ending June 30, 1980.¹⁸¹ An embezzler named Wang Shouxin was executed in February 1980 for taking about \$350,000 from the fuel company where she was manager. According to a western observer, what may have proved fatal was that she seemed to have been a protégé of the radical Maoist clique purged in 1976.¹⁸²

In several of the reported mass sentencing meetings, requirements for the Supreme People's Court's review of death sentences appear to have been ignored. The most well-publicized case was the trial of the Hangzhou rape gang and the execution of Xiong Ziping, leader of the gang. On November 14, 1979, the intermediate court of Hangzhou convened a mass sentencing meeting, attended by some 6,000 people, to announce the sentencing of Xiong Ziping to death. The condemned was immediately executed and later the whole proceedings were shown in a four-minute report on China's television news.¹⁸³ There was no mention of approval of the death sentence by the Supreme People's Court. While it is true that the Chinese CL and Chinese CP did not enter into force until January 1, 1980, the fact remains that as early as July 1957 the National People's Congress adopted a resolution requiring all death sentences of the lower court to be submitted to the Supreme People's Court for approval.¹⁸⁴

In a latest move to mete out swift punishment to criminals who seriously endanger the social order, the NPC Standing Committee adopted a resolution on June 10, 1981, granting for the period of 1981-83 the right to approve death sentences on murderers, robbers, rapists, bomb throwers, arsonists and saboteurs to the higher people's courts of the provinces, autonomous regions and municipalities directly under the

¹⁸¹ Mathews, *Plagued by Crime, Chinese Increase Use of the Executions*, Washington Post, Aug. 5, 1980, at A13.

¹⁸² *Id.* This case was well publicized in China. For the Chinese account, see *Embezzler Sentenced to Death*, 22 BEIJING REV. 7 (No. 45, 1979).

¹⁸³ FBIS-CHI, Dec. 6, 1979, at L9-10.

¹⁸⁴ LECTURES ON THE CRIMINAL PROCEDURE LAW, *supra* note 72, at 108; J. COHEN, *supra* note 5, at 541-42.

central authorities. Approval of Supreme People's Court shall continue to be required for death sentences passed on counterrevolutionaries and embezzlers.¹⁸⁵

VI. CONCLUSION

In the few years since coming into power, the PRC's present elite has clearly made conscientious and determined efforts to elevate the jurial model of law and to institute a more stable and equitable system of criminal justice. To be sure, by Western standards there are still many deficiencies in the current Chinese legal order. Moreover, the major codes governing the criminal justice system only became effective on January 1, 1980, and the full implementation of the Chinese CP has been particularly hampered by technical and practical difficulties. Nonetheless, even at this stage of its development, the criminal process in the PRC today is already a substantial improvement over the Maoist system of justice in the protection of the individual against the arbitrary power of the state. Certainly, the presence of legal codes, the stress on evidence rather than confessions and the de-emphasis of class justice all appear to give the accused in a criminal case a more meaningful opportunity to defend himself now more than before in the history of the People's Republic.

On the other hand, thirty years of political uncertainty and policy shifts have instilled a sense of cynicism in the people of the PRC about the durability of the current regime's commitment to the rule of law. Their confidence has not been enhanced by the trials of Wei Jingsheng and Fu Yeuhua and the administrative sanctions applied against other political dissidents. On November 29, 1979, the Standing Committee of the National People's Congress adopted a resolution to revive a 1957 State Council decision on "Reeducation and Rehabilitation through Labor," permitting administrative agencies to confine without trial a wide range of offenders to labor camps for a period of one to four years.¹⁸⁶ Reports indicate that Chinese authorities have used this administrative measure to detain in rural labor camps thousands of people from dissidents to vagrants to those merely unemployed.¹⁸⁷

Recently, in an effort to counter incidents of social and political

¹⁸⁵ Renmin Ribao, June 11, 1981, at 1.

¹⁸⁶ For the NPC Standing Committee's resolution ratifying the State Council's Supplementary Regulation concerning Reeducation and Rehabilitation Through Labor, see Renmin Ribao, Nov. 30, 1979, at 1. The text of the original decision of August 1957 is in VI FGHB 243-44 (1957).

¹⁸⁷ Butterfield, *Hundreds of Thousands Toil in Chinese Labor Camps*, N.Y. Times, Jan. 3, 1981, at 1, 4; Johnson, *China Dissidents Fall Through Cracks in New Legal Code*, Christian Science Monitor, June 18, 1980, at 4; Mathews, *China Revives Labor Camp System*, Washington Post, June 1, 1980, at A1.

unrest, Beijing has tightened controls over political and cultural life and threatened to crush antigovernment demonstrations and other "illegal" activities.¹⁸⁸ Given this situation, many Chinese understandably often wonder whether the pendulum of Chinese politics may again swing to the left, bending the law to the political wind and to the dictates of a major mass campaign as in the past.¹⁸⁹

Another troubling question is the relationship between the Party and the judicial organs. Despite the prescription of official spokesmen that Party leadership over the judiciary should be exercised in areas of guidelines and policies and not in the handling of individual cases, some Party cadres have continued to intervene in the administration of justice. Furthermore, there are cases where Party discipline has replaced state law in applying sanctions against criminal offenders.

A serious incident at a construction site in Shanghai resulted in loss of lives. The two persons in charge were only given disciplinary demerits and were not prosecuted according to Article 114 of the Chinese CL.¹⁹⁰ A Party official in Xiyang County, Shanxi, allegedly committed many crimes, including rape and extortion. Again, he was reported to have been subjected to Party disciplinary sanctions and not legal punishment.¹⁹¹ These and other similar occurrences have prompted critical comments in the press and legal journals. The consensus is that Party discipline and state law are two different things and that one cannot be used to substitute the other. In order to consolidate the socialist legal system, judicial cadres are urged to resist any power or pressure to uphold the principle that "Law must be enforced strictly and all lawbreakers must be punished."¹⁹²

The fact that these criticisms and others cited elsewhere in this article can be freely voiced in China today is itself an encouraging sign. Undoubtedly, the bitter experience of the negative past and the pressing

¹⁸⁸ Weisskopf, *China Ends a Fling at Free Thinking*, Washington Post, Mar. 13, 1981, at A1, A10. Bomb explosions in Beijing and Shanghai were interpreted by Chinese police as counterrevolutionary activities. For reactions to the explosion in the Beijing Railroad Station, see *Resolutely Strike at Criminal Elements*, Renmin Ribao, Nov. 11, 1980, at 1. For Agence France Presse (AFP) Reports on the possibility of clampdown in the face of growing social unrest, see FBIS-CHI Mar. 3, 1981, at R1 and Mar. 4, 1981, at L8.

¹⁸⁹ For instance, several writers in their communications to Democracy and the Legal System agree that to maintain the dignity of the law, it should never again be dictated by the "requirements of circumstances" or be "blown in the direction of the wind." 1980 MINGHU YU FAZHI 38 (No. 2); *id.* at 48 (No. 1).

¹⁹⁰ *Party Discipline Should Not Replace State Law*, Jiefang Ribao (Liberation Daily), Oct. 7, 1980, at 3. See CHINESE CP, art. 114.

¹⁹¹ Renmin Ribao, Oct. 4, 1980, at 3.

¹⁹² Jiefang Ribao, Oct. 7, 1980, at 2; Chiu Min, *Insist That Lawbreakers Must be Punished*, Renmin Ribao, Oct. 3, 1980, at 5; Wu Yaohui, *Stress on Mandatory Punishment for All Lawbreakers*, 1981 MINZHU XU FAZHI 24 (No. 2).

demands of the four modernizations have provided the post-Mao leadership with some vested interest in instituting a regular and stable legal order. For all its shortcomings, the current system of criminal justice in China has a good foundation on which to build and develop. Much remains to be done for Beijing to expand legal education, to train more lawyers and competent judicial cadres, and to cultivate a more positive attitude toward the law among the bureaucracy and the population alike.

As in the case of the Soviet Union, China can and must give its courts and procuracy sufficient and functional independence to administer justice within the broad framework of serving socialism under Party leadership. Special efforts also ought to be made to implement fully the penal codes, both substantively and procedurally, and to reduce, if not to eliminate, the use of extrajudicial measures in dealing with political dissidents. Only through such development can the credibility of the Chinese leadership and socialist legality be enhanced and legal rights of the accused in criminal justice be genuinely protected. This, of course, is a big order but may not be outside the realm of possibility.