ADJUDICATION SUPERVISION AND JUDICIAL INDEPENDENCE IN THE P.R.C.

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INTRODUCTION

The role of judicial independence and the way in which judges actually decide cases are central in the understanding of any legal system. The concept is that judges should decide cases according to enacted law, and free from outside interference. China has, in recent years, given renewed attention to the issue of judicial independence.¹

Around 1978, under the leadership of Deng Xiaoping, the P.R.C. government began a period of reform and reinstituted its judicial system, which was dismantled during the Cultural Revolution.² The new legal system claimed to ensure for the courts freedom from interference in their work. The 1982 P.R.C. Constitution provided that the people's courts shall “exercise judicial power independently, in accordance with the provisions of the law...”³ The Organic Law of People's Courts similarly proclaimed a guarantee of judicial independence,⁴ and to protect the integrity of a judicial decision, provided for the rendering of final judgments after one appeal.⁵

² The Cultural Revolution spanned the period of 1966-1976 and marked a time of chaos for China. Based on Mao's proposition that the state should “[d]epend on the rule of man, not the rule of law,” there was a complete destruction of the formal law enforcement apparatus in favor of a “proletarian” legal order. See Chen Shouyi, Liu Shengping and Zhao Shenjiang, "Thirty Years of Building Up of Our Legal System," faxue Yanzhu (Studies in Law), No. 4, 1979 at 1; Shao-chuan Leng and Hungdah Chiu, Criminal Justice in Post-Mao China 17-20 (1985).
⁵ People's Court Law, ch. I, art. 12.
Chinese press publicized the asserted independence of the judiciary. 6

But what did the Chinese mean when they proclaimed judicial independence? And what mechanisms have the Chinese put in place to ensure judicial independence? Further examination reveals that continuing limits exist on judicial work, both within and without the institutions of the legal system. Under the Chinese procedural codes, there is liberal institutional supervision of the Chinese judge, reflecting a distinctly Chinese concept of judicial independence. Chinese judges also face the extra-legal influence of the Chinese Communist Party. 7 While explicit party influence on particular cases is now discouraged, 8 party influence on the judicial system as a whole remains, and party influence on particular cases seeps in through the windows opened by the procedural codes. 9

This article examines Chinese judicial decision-making as reflected in the Chinese procedural codes and in the concept of “supervision.” The article focuses on one particular procedure — the procedure of adjudication supervision — which allows a liberal reopening of final judgments. Adjudication supervision while professing to ensure justice by allowing the correction of errors, places enormous institutional constraints on individual judicial work and serves to bring in external influences on the Chinese judge. Adjudication supervision allows numerous actors to “supervise” judicial work and by its flexibility, could be used to undermine the validity of a formal legal system.

Parts I & II of this article will explore the code provisions on this review procedure and the legal actors involved. Parts III examines the Chinese philosophical rationale underlying adjudication supervision. Finally, Part IV analyzes how, apart from the Chinese philosophical rationale, adjudication supervision actually works in


8. However, there continues to be direct party interferences in specific cases and local bureaucrats abusing their positions to dictate judicial decisions. In some instances, judges were dismissed because their decisions were inconsistent with the local party or bureaucrat. Ka Changju, “Court Reform,” Fazue (Jurisprudence), No. 1, 1991 at 147.

China. Ultimately, this article concludes that adjudication supervision exemplifies both the theory and reality of judicial independence in China — a theory that calls for independence, not of individual judges, but of the court system as a whole, and a reality that casts doubt even on this assertion of independence of the court system as a whole.

What is Adjudication Supervision?

Adjudication supervision ("shenpan jiandu"), or supervisory review, is a procedure for additional, but discretionary, reviews of final judgments. Adjudication supervision applies to both criminal and civil cases, with some notable differences. Under the 1982 Chinese law of Civil Procedure, a party to a civil lawsuit may petition the court which originally tried the case, or a court of higher instance, to re-open the judgment.10 Similarly, under the 1979 Code of Criminal Procedure, a party to a criminal case may seek adjudication supervision.11 Additionally, in a criminal case, a victim or his family or any citizen (whether or not a party to the case) may also present a petition to a people’s court to re-open a legally effective judgment or order.12 Hence, in a criminal case, the right to re-open a legally effective judgment is available to anyone, not simply to a party to the action as in the civil context.

A good example of adjudication supervision is the Sun case. In Sun, a faculty member of an agricultural school in Beijing, was trying to stop a disturbance. In the process, Sun killed Zhou, a member of the hooligan gang. The procuracy13 initiated a prosecution of Sun resulting in his conviction and a sentence of 15 years. Sun appealed with the help of a lawyer, who argued that Sun was acting in defense of others. On appeal, the court of second instance, the Beijing Intermediate Court, found that Sun had been acting in self-defense

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12. Criminal Procedure Law, pt. III, ch. V, art. 148. A legally effective judgment is defined to include: (1) judgments and orders which have not been appealed and for which the legally prescribed period for appeal has expired; (2) final judgments and orders; and (3) death sentences approved by the Supreme People’s Court and judgments of death penalty with a two-year suspension of execution approved by a higher people’s court. Criminal Procedure Law, pt. IV, ch. V, art. 151.

13. In a criminal setting, the procuracy is the prosecutorial arm of the P.R.C. justice system. The people’s procuracy is also responsible for “legal supervision.” See 1982 Constitution, ch. III, art. 129.
but determined that the force used by Sun was excessive. The court of second instance reduced the sentence to two years. Still dissatisfied, Sun sought another review, by seeking to reopen the Intermediate Court’s legally effective judgment. The Intermediate Court agreed to reopen the case, retried it and this time, found Sun not guilty. Contrary to the rule that a decision is final after one appeal, Sun had two reviews of his conviction.\textsuperscript{14}

A citizen seeking adjudication supervision may file a petition (“shensu”) with the court or, in a criminal case, with either the court or the procuracy. The court or the procuracy first investigates the case and, if it finds error in the judgment, refers the case to the judicial committee of the court for discussion and decision.\textsuperscript{15} Each level of court has a judicial committee responsible for the supervision of the court’s work.\textsuperscript{16} If the judicial committee decides that the case needs to be reopened and retried, it will direct the court accordingly.\textsuperscript{17}

If a procuracy itself discovers an error in a judgment by a court of its own level, it must also seek adjudication supervision. It must first petition the procuracy at the level above it to protest (“kangsu”) to a higher level court for a reopening of the lower court judgment.\textsuperscript{18} A higher level procuracy, in discovering error in a judgment of a lower court, files a protest to a court of its own level and not directly with the lower court.\textsuperscript{19} Upon receiving the protest from the procuracy, the court conducts a retrial. In a criminal case, the procuracy can file protests seeking reversals of acquittals and increased sentences as well as reversals of convictions and reduction of sentences.\textsuperscript{20}

\textsuperscript{14} The case is reported in Zhang Zhiye, “How Do China’s Lawyers Work?,” 26 Beijing Rev., No. 23 at 26 (June 6, 1983); see also Minzhu Yu Fushi (Democracy and Law), March 1987 at 22-23.

\textsuperscript{15} Civil Procedure Law, pt. 2, ch. 16, art. 177; Criminal Procedure Law, pt. III, ch. V, art. 149.

\textsuperscript{16} People’s Court Law, ch. I, art. 11. The composition of the judicial committee is further discussed infra.

\textsuperscript{17} Criminal Procedure Law, pt. III, ch. V, art. 149.

\textsuperscript{18} People’s Procuracy Law, ch. II, art. 18 [hereinafter the People’s Procuratorate Law], trans. in Laws of the P.R.C. 1983-86. Note that the procuracy and the public security (the police arm) have a four-tier organization paralleling that of the court system.

\textsuperscript{19} Id. The role of the procuracy in a civil case is a much debated one. See Fang Hong, “Concerning the Role of the Procuracy in Supervising the Legality of Civil Cases,” Xiandai Faxue, (Modern Legal Studies), No. 1, 1988, at 24-26. However, the amended Civil Procedure Law has affirmed the role of the procuracy to intervene in a civil case to seek a re-opening of judgment.

\textsuperscript{20} In an adjudication supervision, there is no prohibition against increased punishment as there is in an appeal. Hence, the defendant runs the risk of having his case heard again and again until a more severe punishment is meted out. See Woo, “The Right to a Criminal Appeal in the People’s Republic of China,” 14 Yale J. Int’l L. 118, 138-40 (1989).
Additionally, in both the civil and criminal settings, the president of any level people's court may *sua sponte* review decisions of his own court and refer the case to the judicial committee for discussion upon discovering an error in a legally effective judgment.\(^{21}\) A court of higher instance may also *sua sponte* review lower court decisions and, in finding error, bring the case up for trial de novo or remand the case to the original lower court for retrial.\(^{22}\) Upon receiving directions from a higher court, the lower court will normally retry the case without first referring the case to the lower court's judicial committee for discussion and decision.\(^{23}\)

Regardless which court conducts the retrial, a new collegiate panel is formed for that purpose.\(^{24}\) The retrial will be a complete re-adjudication of the facts and law.\(^{25}\) If the case to be retried is a case from a court of second instance or if the case is to be retried by a court of higher instance, the judgment may not be appealed again.\(^{26}\) If, on the other hand, the case to be retried is a case from a court of first instance, the judgment may be again appealed.\(^{27}\) The procedure codes impose no limitation on the number of times a case may be reopened pursuant to an adjudication supervision.

If a retrial is deemed necessary in a civil case, the court will issue a ruling to stay the execution of the judgment.\(^{28}\) In a criminal case, by contrast, the execution of the original judgment or order is not suspended during an adjudication supervision proceeding.\(^{29}\) Thus, the convict must serve his sentence even while the court is reviewing his case under adjudication supervision.\(^{30}\)


\(^{24}\) Most cases of first instance in the people's courts are tried by a "collegial panel." It is composed of one judge and two people's assessors (lay people in the community). Simple civil cases, minor criminal cases and cases otherwise provided for by law may be heard by a single judge. Appealed or protested cases in the people's courts are handled by a collegial panel of judges. *People's Court Law*, ch. I, art. 10.


\(^{28}\) *Civil Procedure Law*, pt. 2, ch. 16, art. 183. If the civil judgment has already been executed, the court will order a return to status quo, if possible.


\(^{30}\) Because the execution of a criminal judgment is not suspended during an adjudication supervision, the mechanism of adjudication supervision cannot be effectively used to challenge a death sentence. There is, however, a special review procedure for death sentences. *Criminal Procedure Law*, ch. IV, arts. 144-147.
Under the Criminal Procedure Law, there is no codified restriction on the time or the grounds for the reopening of a legally effective judgment under adjudication supervision. The sole criterion is that the original judgment must have contained "some definite error." The same was true under the Civil Procedure Law until its amendment in 1991, which attempts to limit reopenings of civil cases to circumstances of new evidence, insufficient evidence, erroneous application of law, prejudicial violations of law, and judicial misconduct. Although the asserted policy is that adjudication supervision should not be used to seek a change in the judgment to reflect a change in the law or policy or for complaints that the punishment was too lenient, adjudication supervision has in fact been used to reverse judgments after a policy change as well as to increase punishments.

Adjudication supervision in China is unique in a number of ways. Although the procedural codes of legal systems provide for the reopening of a case on the grounds of new circumstances, the P.R.C. adjudication supervision is unusual in allowing the reopening of a case at any time based solely on the later discovery of "error," though there has been no change in the circumstances of the case.

Adjudication supervision is also distinguishable from an appeal, the review procedure most common in legal systems. Most significantly, adjudication supervision is a mechanism that can be started and carried out by officials and judicial institutions. In an appeal, only parties to the action can seek a review of a court decision. In an adjudication supervision, a court president, a Party or govern-

31. Criminal Procedure Law, pt. III, ch. V, art. 149. The law does not, however, define what "errors" warrant retrial. Ke Gehuang, "On Reasons and Basis for Instituting a Retrial," Zhenguo Luntan (Tribute of Political Science & Law), No. 3, 1988 at 15-16. According to some commentators, only an incorrect determination of the facts at the time of judgment can serve as the basis for the reopening. As to error in the application of law, such errors may include the unlawful imposition of death sentence on a minor, or a judge's improper refusal to withdraw from a case, or a trial unlawfully closed to the public, or the deprivation of a defendant's right to defense. Id.; see also Shendong Renmin Publishing, Zhonghua Renmin Gonghe Guo Xingshi Susong Fa Jianming Jiaocheng 323 (Teaching Material for the P.R.C. Criminal Procedure) (1987) [hereinafter Zhonghua Renmin Gonghe Guo Xingshi Susong Fa Jianming Jiaocheng].

32. Compare Civil Procedure Law (1982 trial implementation), pt. III, ch. 14, art. 157, with Civil Procedure Law (as amended and passed April 9, 1991), pt. 2, ch. 16, art. 179. Because this provision was just adopted, it remains to be seen how well these categories will operate to limit re-openings of civil cases.

33. Id. at 17-18.

34. See discussion of this point in Section IV, infra.

35. See e.g., in the U.S., Rule 59 & 60 of the Federal Rules of Civil Procedure provide for reopening of cases for newly discovered evidence; in Germany, Sec. 578-91 of the Federal Procedure Law allow the reopening of final judgments but limited its availability to a period not later than five years from the time the judgment becomes immune to appellate review.
ment official can *sua sponte* invoke the procedure of adjudication supervision. While an appeal is a procedure primarily driven by one of the parties' sense of justice, adjudication supervision involves the legal system's sense of correctness. A case resolved to the satisfaction of the parties may nevertheless be re-adjudicated until the legal system is satisfied.

Second, although appeals normally involve the participation of the parties, adjudication supervision provides no formal opportunity for the parties to argue for or against re-opening. In the determination of whether a case contains "error," the court may solicit a party's opinion as part of its investigation of the case. However, the procedural codes provide no right for the parties to see or to respond to the record in an adjudication supervision. Although a recent Supreme People's Court directive mandates that the retrial of a criminal case must be public, the decision to reopen a case is normally made behind closed doors by court officials and members of the judicial committee, without the involvement of the parties. More problematically, the judgment can be re-opened ex parte, allowing access to one side but not the other.

Third, while an appeal is a procedure which automatically functions to reopen the ruling below for upper level review upon the timely application of the parties, the decision whether to reopen a case pursuant to adjudication supervision is largely discretionary. The Criminal Procedure Law provides virtually no guidance for when a reopening is appropriate, and the Civil Procedure Law has only recently been amended to set forth broad categories for reopening.

Finally, while an appeal must be raised within a certain time period, adjudication supervision may, with one exception, be invoked at any time. This lack of restrictions, along with the system's right to re-open a case, renders a judgment particularly vulnerable to the legal system's temporal concept of right and wrong.

**The Actors In The Adjudication Supervision Process**

In order to understand adjudication supervision, it is necessary to understand not only how the process works but also who the actors are that make it work. There are three key actors — the judicial committee, the court president, and the procuracy. These three

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37. The one exception enacted in the 1991 revision of the Civil Procedure Law is that a litigant in a civil case must file a petition to reopen within two years of the date of the final judgment. *Civil Procedure Law*, pt. 2, ch. 16, art. 182. This time limitation, however, does not apply in any criminal case, nor for reopenings of civil cases initiated by a procurator or court president.
actors have the powers to petition as well as to control the process of reopening final judgments.

According to the Organic Law of the People’s Courts, courts of every level must establish a judicial committee,⁴⁸ comprised of the president and the vice-presidents of the court, and the chief judge and associate chief judges of each division of the court. Significantly, the chief procurator of the same level may also sit on the judicial committee, albeit as a non-voting member.⁴⁹ The judicial committee of the people’s court at each level is appointed and removed by the standing committee of the people’s congress at the corresponding level.⁵⁰

The general responsibility of the judicial committee is “to sum up judicial experience and to discuss difficult and important cases and other issues relating to judicial work.”⁵¹ Hence, it is the judicial committee, not the panel which actually presides at trial, that discusses and decides all “difficult and important” issues,⁵² including whether a case should be re-opened pursuant to adjudication supervision. The decision made by the judicial committee is binding on the collegiate panel.⁵³

The most critical member of the judicial committee is the president of the court, who is elected by the local people’s congress at the corresponding level of authority.⁵⁴ The court president is responsible for the administration of the court and further, approves all decisions and judgments issued by the court.⁵⁵ With such authority, a

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38. *People’s Court Law*, ch. I, art. 11.
40. Id. Thus, the judicial committee of the Supreme People’s Court is appointed and removed by the Standing Committee of the National People’s Congress.
41. According to some scholars, the judicial committee is the court’s highest research and adjudication unit. Ka Changju, “Court Reform,” *Faxue* (Jurisprudence), No. 1, 1990, p. 150.
42. The deliberations are not made public to the defendant and the decision is reached by a majority vote of members of the judicial committee. *Zhonghua Renmin Gonghe Guo Xingshi Susong Fa Jianming Jiaocheng* at 269. A major criticism about the involvement of judicial committees in judicial work is that it decides the case before trial. See Zhou Shimin, “To Improve the Quality of a Judicial Committee’s Discussion and Review of Cases,” *Zhengfa Luntan* (Tribune of Political Science and Law), No. 2, 1988 at 30.
44. *People’s Court Law*, ch. III, art. 35. The term of the court president is the same as that of the people’s congress which elected him, but the people’s congress has the power to remove presidents from office before the expiration of the term. *People’s Court Law*, ch. III, art. 36. If the people’s congress is not in session, the standing committee can remove the court president by reporting the matter to the people’s court at the next higher level for submission to the standing committee of the people’s congress at the next higher level for approval. Id.
45. *Zhonghua Renmin Gonghe Guo Xingshi Susong Fa Jianming Jiaocheng* at
court president can reassign a case from one collegiate panel to another or to the judicial committee for review, until a decision is reached which meets his approval.\textsuperscript{46} Additionally, even after a final judgment is rendered, the president of the court has the power, \textit{sua sponte}, to seek a reopening of the final judgment or order by the judicial committee, if in his opinion, there is error in the judgment or order.\textsuperscript{47} Most significantly, the president of the people's court presides over meetings of the judicial committees,\textsuperscript{48} and thus controls when and in what manner a request for reopening is taken up.

The third actor in the adjudication supervision process is the procurator.\textsuperscript{49} The institution of the procuracy, as imported from the Soviet Union, has two functions. The procuracy not only investigates and prosecutes crimes, but like the president of the court and the judicial committee, also is responsible for supervising legality in the administration of justice.\textsuperscript{50} In its supervisory role, the procuracy oversees the trial activities of the courts and monitors the execution of judgments,\textsuperscript{51} and may \textit{sua sponte} lodge a protest of a final judgment of a court at a lower level in accordance with the procedures for adjudication supervision.\textsuperscript{52} While a citizen can never participate in a judicial committee discussion on the merits of his petition, the procurator can participate in determining whether a reopening of any case is warranted. In all retrials pursuant to adjudication supervision, the procuracy must send its personnel to appear in court to oversee the process.\textsuperscript{53}

In sum, the adjudication supervision process depends in large part on the discretion of the judicial committee, the court president,

\begin{footnotes}
\footnote{269. Additionally, the president of the court has the power to appoint the presiding judge of the collegiate panel hearing a case, or to appoint himself to that role. \textit{People's Court Law}, ch. I, art. 10.}
\footnote{46. Id.}
\footnote{47. \textit{People's Court Law}, ch. I, art. 14.}
\footnote{48. \textit{People's Court Law}, ch. I, art. 11.}
\footnote{49. Procurators are appointed by the corresponding people's congress and its standing committee. \textit{People's Procuratorate Law}, ch. III, arts. 21-24. Hence, like other members of the judicial committee, the procurator at each level is theoretically accountable to the people's congress and the standing committee at the corresponding level of authority. \textit{People's Procuratorate Law}, ch. I, art. 10.}
\footnote{51. \textit{People's Procuratorate Law}, ch. I, art. 5.}
\footnote{52. The procuracy must accept petitions of grievances from citizens, investigate, and determine whether a petition merits registering a protest in court. \textit{People's Procuratorate Law}, ch. I, arts. 6, 18. The procuracy may also issue a protest a response to grievances made by or against prisons, detention houses or institutions in charge of reform through labor. Id.; see also Shen Jungui, “Legal Relationships in A Criminal Retrial,” \textit{Xibe Zhenfa Xueyuan Xuebao} (Journal of Northwest Institute of Political Science and Law), No. 2, 1988 at 45.}
\footnote{53. \textit{People's Procuratorate Law}, ch. I, art. 18.}
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and the procuracy. These actors hold considerable power over the work of individual judges within each court.\textsuperscript{54}

\textit{Theoretical Underpinnings of the P.R.C. Adjudication Supervision}

Several modern-day theoretical principles underlie adjudication supervision in China. First, according to Chinese scholars, the power of adjudication supervision springs from an individual's constitutional right to petition for redress of grievances.\textsuperscript{55} This constitutional right to petition for redress of grievances (to "shensu") takes several forms.\textsuperscript{56} Shensu may be a complaint by a citizen directed to any state or party organ to contest the validity of an official act, or a complaint against a judicial organ for rendering an unlawful judgment or for violating trial procedures in rendering a judgment.\textsuperscript{57} A petition or "shensu" filed in court challenges a final judgment and activates the procedure for adjudication supervision.\textsuperscript{58}

Second, the ability of citizens to petition for adjudication supervision reflect Mao's theory of mass supervision of justice and law,\textsuperscript{59} which has been incorporated into Article 27 of the P.R.C. Constitution.\textsuperscript{60} The "mass line" approach is based on a belief that the au-

\begin{itemize}
\item \textsuperscript{54} What this means in terms of the individual judicial decision-making is the focus of Part IV of this article.
\item \textsuperscript{55} Article 41 of the Chinese Constitution provides that "citizens have the right to make to relevant state organs complaints or charges against, or exposures of, any state organ or functionary for violation of the law or dereliction of duty." \textit{1982 Constitution}, ch. 1, art. 41. To many Chinese, the fear of the chaotic Cultural Revolution, urges the unfettered maintenance of this constitutional right. See Ruan Shiping "A Discussion of Several Questions Regarding Shensu," \textit{Minzhu Yu Fazhi} (Democracy and Law), No. 5, 1983 at 22. \textit{Zhongguo Fazhi Bao} (Legal System Daily), July 26, 1988 at 4.
\item \textsuperscript{56} According to Chinese scholars, there are four kinds of shensu: (1) shensu against the judiciary; (2) shensu against an administrative agency; (3) shensu against the party; (4) shensu against an electorate. \textit{Zhongguo Fazhi Bao}, (Legal System Daily), April 19, 1988 at 2; see also \textit{Zhongguo Fazhi Bao} (Legal System Daily), March 15, 1988 at 4.
\item \textsuperscript{57} \textit{Zhongguo Fazhi Bao} (Legal System Daily), March 15, 1988 at 4.
\item \textsuperscript{58} This constitutional basis for filing a petition (to "shensu") is reminiscent of the U.S. federal habeas corpus proceedings. See 28 U.S.C. 2255. Federal habeas relief is a post-conviction relief available to persons being held in custody in violation of the laws of the United States. Each state of the United States also has separate post-conviction remedies, but state collateral remedies range from jurisdiction to jurisdiction. State collateral remedies could include (1) writ of habeas corpus, (2) writ of coram nobis, (3) statutory provision modeled after 28 U.S.C. 2255, and (4) the Uniform Post-Conviction Procedure Act. See generally, Wayne LaFave and Jerold H. Israel, \textit{Modern Criminal Procedure} 1009-1084 (1985). The German legal system also provides a similar constitutional petition. Donald Kommers, \textit{The Constitutional Jurisprudence of the Federal Republic of Germany} 15-17 (1969).
\item \textsuperscript{59} Fan Chongyi, "On the Retrial of a Legally Effective Judgment or Order," \textit{Fazue Yanjiu} (Studies in Law), No. 1, 1984 at 60-61; Xu Yichu, "On the Establishment of the Unique Chinese Procedure of Adjudication Supervision," \textit{Fazue Yanjiu} (Studies in Law), No. 4, 1986 at 75.
\item \textsuperscript{60} Article 27 provides that "all state organs and functionaries must rely on the support of the people, keep in close touch with them, heed their opinions and sug-
\end{itemize}
tiority of law comes from the masses and emphasizes the importance of the masses in the formulation and implementation of law. Under the mass line approach, the prescribed policy-making method is to seek the advice of the masses both prior to enacting a law and after a law is enacted. In the context of judicial work, the masses (through mass organizations such as the neighborhood committee or the work unit) are enlisted in the investigation of cases, their opinions are considered, and their service as people’s assessors is solicited.

In present day China, the residue of the mass line approach is reflected in the belief that a people’s court, in administering justice independently, is nevertheless still subject to the supervision of the people. The right of any citizen, whether or not a party to the action, to seek an adjudication supervision in a criminal case is thus consistent with Mao’s theory of mass line approach to legal work. This mass line theory is especially applicable in a criminal case since criminal law is directly concerned with the protection of interests common to the public at large.

It is also important to consider the origins of adjudication supervision in Soviet law. In the early years of the People’s Republic, the Chinese government formulated its legal institutions and procedures based largely on the Soviet experience. Historically, supervisory review, or its predecessor, ex officio reopening of a finally decided case, as existed under Russian imperial laws, was exercised by the Ruling Senate as the only supreme court and guardian of the uni-

61. This method is called “from the masses and to the masses.” Wu Jianfan, “Building New China’s Legal System,” 22 Col. J. Transnat’l L. 1, 15 (1983). During the Cultural Revolution, this “mass line” approach was carried to its extreme and informal courts and trials were held at factories and neighborhood units.

62. See A Brief Introduction to the People’s Courts of the P.R.C. at 7.


64. Any legal system has to balance the fact that immediate parties to a lawsuit have a great stake in the lawsuit against the fact that other people, too, may have a stake. Anglo-American law comes down strongly in favor of litigants, with fairly tight rules on intervening, filing amicus, bringing class actions, etc. U.S. jurisprudence basically sees litigation as a contest between two entities, with the rest of society free to observe but not to participate. But the P.R.C. has a very different ideology, reflecting in a different balance.

form application and interpretation of law. At the time of its reappearance in the USSR in 1923, supervisory review was limited to the supreme courts, which could set aside a decision if there was error or if high policy required a change. The Ukrainian and the R.S.F.S.R. (largest of the unions in the U.S.S.R.) supreme courts declared in 1924 and 1925 that this remedy was "established by no means in the interest of the litigants but exclusively for coordinating the judgments and orders of the courts in the interest of the state and the toiling masses." In part, the retention of a process for reopening a final judgment reflects the Communist Party's distrust of its judges in the lower courts, and desire to preserve a method for revising their decisions. Additionally, supervisory review reflects the preference of socialist legal system for the dominance of the state in every aspect of a legal case. Indeed, supervisory review was viewed, in early Soviet laws, as a flexible mechanism allowing supervision of the judicial activities by the state.

In a similar vein, adjudication supervision in China is rooted in the strong desire for informality in Chinese law. While the Soviet system has since its early days moved toward more formality, Chi-

67. Ex officio reopening of cases was temporarily abolished in 1912 when the Soviet revolutionaries rejected procedural formalities as bourgeois, but reappeared in 1923 with the Soviet Union's return to legal formality. See generally, John Hazard, The Communists and Their Law 103-116 (1948).
68. Id. at 110.
69. Although the translation applies the label "ex officio reopening of finally decided cases," the process described is identical to the process deemed in modern day Soviet laws as supervisory review. Vladimir Gvoski and Kazimierz Grzybowski, Government, Law, and Courts in the Soviet Union and Eastern Europe 538 (vol. 1 1960). In deciding to seek supervisory review, an officer must conclude that a judgment "involves a particularly essential violation of laws in force or a plain violation of the interests of the workers and peasants' state or the toiling masses." Vladimir Gvoski, Soviet Civil Law 902 citing to Section 254b of R.S.F.S.R. Laws 1926, texts 315, 666. Interesting to note, this statute originally read that ex officio re-opening was permissible in cases of "particularly essential violation of the law in force or a plain violation of the interests of the workers and peasants State and the toiling masses contrary to the direct requirements of the statutes." (highlights added). However, the last eight words were deleted in 1929.
70. Supra n. 68 at 115-116. This need was felt particularly strongly since in the early years of the new codes, only 36% of the lower court judges in the U.S.S.R. were members of the Communist Party, while all of the court presidents were party members. Id. at 90. By 1954, however, only 2.3% of the full time judges were not party members and almost all the judges at higher levels belong to the party. Id.
71. Id. at 69-101.
72. Supra n. 69 at 538. During periods of seeking stability in law, there were discussions of abolishing these extraordinary measures. While they never abolished, these measures exist in the Soviet legal system today. Id. at 91.
73. Western Chinese scholars have explained this preference for informality as reflective of the historical tension between two schools of traditional Chinese legal thought: the Legalist school favoring (fa) formal law and the Confucian school favoring (li) morality and social pressure to the use of force by the state. See Derk Bodde and Clarence Morris, Law in Imperial China 17-27 (1967). This Confucian
Chinese adjudication supervision has followed the Chinese preference for informality, and specifically, the principle of "seeking truth from facts and correcting mistakes whenever discovered."

According to Chinese theory, the principle of "correcting error" is the cornerstone of socialist legal work. Under the principle of "correcting errors," a court must review petitions challenging final judgments or orders and upon finding "error," must re-adjudicate the case pursuant to adjudication supervision. In this scheme, the correction of "errors" in a judgment is more important than preserving the finality of the judgment. Adjudication supervision, in short, reflects the priority the Chinese place on flexibility over stability in law.

What Interests Does Adjudication Supervision Serve?

Of course, these theoretical underpinnings must be measured against what is known of the implementation of adjudication supervision. Undeniably, adjudication supervision provides an opportunity for "supervision" of judicial work by the individual, the masses, legal institution, and the state. An examination of how adjudication supervision is working in China, however, reveals that it serves less as a mechanism to vindicate individual rights or to uphold mass line justice and more, as an institutional check on judicial work. Ultimately, adjudication supervision is a flexible mechanism by which decisions can be brought in line with the external policies of the central government identified by the CCP. It is one additional mechanism by which the line between law and policy is blurred.

ethnic was molded by Mao into Maoist-Marxist-Leninist thought, which emphasizes a "mass line" approach to the administration of justice.

74. Supra n. 68 at 138-139. Hence, the Chinese legal system that ultimately developed under Mao combined two models: the jural (formal) and the societal (informal). The jural model stood for "elaborate judicial procedures," while the societal model stood for the "mass line device in judicial work, the use of mediation for handling civil cases, and the employment of extrajudicial organs and procedures in imposing sanctions and settling disputes." Supra n. 2 at 11.


Supervision by Individuals

In theory, one important function of adjudication supervision is to give individual litigants a check on abusive judicial work. Support for this theory could be found in the enormous increase there has been in the number of “shensu” petitions filed in recent years. In 1988, the Chinese courts received 3,570,685 letters and 4,175,204 visits of which 75% constituted shensu petitions.

Recent statistics also suggest that the courts are acting on petitions that are being filed. In 1986, the courts acted on 478,383 adjudication supervision cases, a larger number even than the 121,223 appeals filed that year. In 1988, the people’s courts reopened 119,315 criminal cases and 116,315 civil and economic cases. In the criminal cases, the courts affirmed 74,339 original judgments and corrected 31,134 judgments. In the civil and economic cases, the people’s courts affirmed 9,040 and corrected 2,947 judgments. At first blush, these statistics suggest that adjudication supervision is being used to vindicate individual rights. To the credit of some diligent judges, adjudication supervision has been used to correct abuses.

The statistics, however, do not tell whether the judgments that have been reopened and modified were modified to the benefit of the individual seeking adjudication supervision. Unlike the procedures for appeal in China, the procedures for adjudication supervision do not prohibit a retrial or an eventual judgment detrimental to the individual seeking review. On the contrary, some scholars have noted that the allowance of a petition for adjudication supervision in a criminal case gives a court the opportunity to increase a defendant’s sentence.

77. Unfortunately, the statistics do not provide a clear delineation between the numbers of petitions filed by individual litigants and those filed by non-party citizens nor between those which are repetitious filings and those which are not.


79. The People’s Procuracy also receive shensu petitions. In 1984, the procuracy received over a million oral or written petitions relating to legal suits by citizens. In the course of handling these complaints, the procuracy was able to discover clues to a number of bona fide crimes, gathered evidence to rectify wrongly given sentences, and solved some cases that had been shelved. “Report on the Work of the Supreme People’s Procuratorate,” Zhongguo Fashi Bao (Legal System Daily), April 11, 1985 at 2-3.

80. 1987 Law Year Book at 883-84.


82. The Supreme People’s Court has also been inundated, receiving about 37,000 petitions in person and about 170,000 letter. This is reminiscent of the imperial Chinese legal tradition of sending all but minor criminal cases upwards to higher levels for final ratification, capital cases to the emperor in Beijing. Derk Bodde and Clarence Morris, Law in Imperial China 113-143 (1967).

This, coupled with the procurator’s right to seek adjudication supervision, renders the criminal defendant susceptible to successive trials with the potential of greater punishment.84 Indeed, the statistics indicate that the courts are more inclined to modify decisions pursuant to a procurator’s protest (kangsu) than a shensu petition filed by an individual.85 Thus, on close examination, the statistics do not present a compelling argument that adjudication supervision is being used effectively for the vindication of individual rights.

Two specific cases also demonstrate how procurators have used adjudication supervision to successfully prosecute criminal defendants. The first case, the case of Sun Liqiang, involved a defendant convicted of robbery and sentenced to five years imprisonment. After his conviction by the district court in Liaoyang Municipality, Sun appealed the judgment to the Liaoyang Municipality Intermediate People’s Court, which annulled the lower court’s sentence and sentenced Sun to two years of imprisonment. At that point, however, the Provincial Higher People’s Procuratorate filed a protest to the judgment. In response to the protest, pursuant to the procedures of adjudication supervision, the Higher People’s Court annulled the decision of the Intermediate People’s Court and resentenced Sun to seven years imprisonment, an increase of two years from the original sentence.86

In a case reported in the Legal System Daily, a procurator was able to use adjudication supervision to reopen an acquittal to convict a defendant. In 1987, the procuratorate’s office brought suit against Mo Jinyu for corruption and receiving bribes. The court imposed a sentence of 6 years on Mo, who appealed and won an acquittal from the Qiongbei Intermediate Court. The provincial level procurator then filed a protest with the Henan Provincial People’s Court, which directed the Intermediate Court to reopen the case. In 1990, the

84. For example, on August 2, 1980, Weng Guixiang was sentenced to death by the Shanghai Intermediate Court. Upon appeal by Weng, the Higher People’s court reversed the original sentence and commuted the death sentence to a sentence with a two-year reprieve. The People’s Procuratorate re-examined the case and sought adjudication supervision from the Supreme People’s Court. The Supreme People’s Court set up a collegiate panel to retry the case. After retrial, the Supreme People’s Court changed the sentence to immediate execution. See Law Annual Report of China 1982/3 (Eng. version) 138 (1982).

85. The Supreme People’s Court reported that in 1989, the people’s court investigated 1,074,983 shensu petitions, the people’s court retried 109,498 through adjudication supervision and affirmed 62.49 percent and modified 22.53 percent of the cases after retrial. For that same year, the people’s procurator filed 2,014 protests seeking reopening of final judgments, the people’s courts reopened 2,057 cases (including cases left over from previous year) and affirmed 37 percent and modified an almost equal 39 percent of the cases after retrial. Ren Jianxin, “Supreme People’s Court Report,” Fazue (Jurisprudence), No. 5, 1990, pp. 53-54.

Qiongbai Intermediate Court readjudicated the case and sentenced Mo to three years.\textsuperscript{87}

Additionally, while the large number of petitions may reflect to some degree the public's growing awareness of law, it also appears that many shensu petitions are repetitious filings.\textsuperscript{88} According to 1988 figures, about 30\% of the petitions for adjudication supervision in the basic people's courts and about 40\% of the petitions for adjudication supervision in the higher people's courts are repetitious filings.\textsuperscript{89} In one case, the petitioner filed 1,300 petitions for adjudication supervision before he succeeded in having his conviction reversed,\textsuperscript{90} and only after the petition had attracted the attention of a Party official.\textsuperscript{91}

Supervision by the “Masses”

The treatment being accorded to petitions filed by citizens as members of the “masses” is not unlike the treatment accorded petitions filed by individuals.\textsuperscript{92} When a petition seeking redress is filed by a citizen, these petitions are often ignored or summarily rejected by the courts or the procuracy.\textsuperscript{93} Even when the petition is actually referred to the judicial committee, the judicial committee's review of the case is often limited.\textsuperscript{94} This practice is contrary to the prescrip-

\textsuperscript{87} “Kangsu, To Protect the Legitimacy of Law,”  \textit{Fashi Ribao} (Legal System Daily), October 24, 1990 at 3. The Legal System Daily is a popular law newspaper with a circulation of two million and published under the direction of the Ministry of Justice.

\textsuperscript{88} \textit{Zhongguo Fashi Bao} (Legal System Daily), June 14, 1988 at 4. \textit{Zhongguo Fashi Bao} (Legal System Daily) recently published a series discussing this problem of the high numbers of shensu. Some believe that individuals see the need to file repeatedly because of the summary fashion in which individual petitions are often decided. See \textit{Zhongguo Fashi Bao} (Legal System Daily), March 15, 1988 at 4; April 19, 1988 at 2; May 17, 1988 at 4; June 4, 1988 at 4; July 26, 1988 at 4; August 23, 1988 at 4. Note this view is not unlike the view taken by some in the U.S. today toward habeas corpus petitions.

\textsuperscript{89} \textit{Zhongguo Fashi Bao} (Legal System Daily), August 23, 1988 at 4. According to the Supreme People's Procuracy, repetitious filings of shensu to the procurator’s office numbered one-fourth to one-third of all complaints. Id.

\textsuperscript{90} The Party's intervention helped petitioner to obtain a change in a 26 years old conviction to an acquittal. \textit{Minzhu Yu Fashi} (Democracy and Law), No. 9, 1989 at 4-7.

\textsuperscript{91} In another case, the standing committee of the Henan province intervened on behalf of a petitioner which resulted in the Higher's People's Court annulling the 1985 lower court judgment and the 1986 appellate decision. \textit{Minzhu Yu Fashi} (Democracy and Law), No. 2, 1990 at 36. Finally, some individuals have turned to the press as the most effective forum to appeal neglected by the authorities. See Woo, “The Right to a Criminal Appeal in the People's Republic of China,” 14 \textit{Yale Int'l L.J.} 118, 148-151 (1989).

\textsuperscript{92} This is a limited category of cases because citizens (non-parties) may seek a reopening of final judgment only in criminal cases.

\textsuperscript{93} \textit{Zhongguo Fashi Bao} (Legal System Daily), August 23, 1988 at 4; see also \textit{Zhongguo Fashi Bao} (Legal System Daily), March 15, 1988 at 4.

\textsuperscript{94} The judicial committee's review is limited, because (1) members of the judi-
tion that every petition must be thoroughly investigated by the receiving body.95

This practice is, on the other hand, consistent with the Chinese view of citizens' rights. In the Chinese view, citizens' rights are granted by the state and, hence, subject to limits by the state.96 The purpose of the Constitution is to promote the collective welfare, and a fundamental right under the Constitution is valid only to the extent that it "contributes" to the nation.97 The exercise of rights is limited, both by law and by citizens' morals, to actions that are constructive to society as a whole and not self-seeking.98 Where citizens' petitions can be channeled in a unified direction to accomplish some state goal, the right is more readily recognized and allowed to be exercised freely. Because state goals in China are defined by the Chinese Communist Party,99 the ultimate authority and interest served by mass supervision is that of the Chinese Communist Party.100

95. This problem may be compounded by the fact that few lawyers participate in adjudication supervision. Zhongguo Fashi Bao (China Legal News), June 14, 1988 at 4. Some scholars believe that because the law does not provide for lawyers' participation in adjudication supervision, lawyers have no role in the process. Others argue that, particularly in the criminal context, a defendant has a right to a defense and should have a lawyer in all steps of the criminal process, including adjudication supervision. See Shen Jungui, "Legal Relationships in Criminal Retrials," Xibei Zhengfa Xueyuan Xuebao (Journal of Northwest Institute of Political Science and Law), No. 2, 1986 at 40.


97. Id. at 121-122.

98. This is consistent with the Marxist heritage, which blends politics and economics and treats legal problems as social problems. Harold Berman, Justice in the USSR 166 (1966). Hence, Lenin himself stated that "all law is public" by which he meant that the state has an interest in every litigation, even those between two private persons. Supra n. 68 at 77, citing to V. Lenin, Sochinenia 419 (3d ed. 1928-37).

99. As the highest organization for the proletariat, the Chinese Communist Party is historically considered the leader of all organs of the state. The accepted belief is that without the Party's leadership of the Chinese people, there would be no modern China. See Peng Zhen, "Report on the Draft of the Revised Constitution of the People's Republic of China," reprinted in Renmin Ribao (People's Daily), December 6, 1982, trans. in 25 Beijing Review, No. 50 at 9 (December 13, 1982) (report delivered by Peng, then Vice-Chairman of the Revision of the Constitution, to Fifth Session of the Fifth National People's Congress, November 26, 1982) [hereinafter Peng].

100. Liao Guangsheng, "Independent Administration of Justice and the PRC Legal System," XVI Chinese Law & Government, No. 203, Summer-Fall 1983 at p. 129. During the first few years of the PRC government, stress was laid on courts conducting trials independent of party influence. The 1958 Anti-rightist Campaign unleashed attacks on those seeking judicial independence as "attempting to reject
The short shift being given to individual and citizens' petition is attributable to both practical and philosophical causes — the number of these petitions is overwhelming the courts, and the courts are more inclined to find merit when a petition taps into a state interest or party principle. That the latter is the stronger of the two causes is clear from the efforts that were made to reform or regulate shensu petitions in the years prior to the harsh government crackdown on the Pro-Democracy movement in the spring of 1989.

At that time, there were specific discussions about modifying the “shensu” rules to make petitions a more effective tool for vindicating individual rights and serving mass supervision. Toward that end, some Chinese courts established special divisions, called “shensu ting” or “men’er ting,” expressly to screen petitions challenging final judgments prior to sending the petition to the court’s judicial committee. Additionally, some Chinese scholars proposed guidelines or rules on who could bring a shensu petition, on what grounds a petition could be based, what court could consider a petition, when a petition could be brought, and how long it would take to investigate a petition. Others, however, opposed the imposition of guidelines on the grounds that such guidelines, like those in “class party leadership by stressing the independent administration of justice” and “pitting the law against the party.” Id. Hence, from 1988 to 1979, all three branches of the criminal justice system in China — the public security, the procurator, and the courts were under the direction of Party committees which reviewed all decisions from arrest to sentencing, under a process called “shuji-pl’an” or “approving cases by the Secretary in charge of political-legal affairs.” Supra n. 2 at 22-23.

101. See e.g., Zhongguo Faishi Bao (Legal System Daily), March 15, 1988 at 4; April 19, 1988 at 2; March 17, 1988 at 4; June 14, 1988 at 4; July 20, 1988 at 4; August 23, 1988 at 4.

102. Zhonghua Renmin Gongheguo Zuzigao Renmin Fayuan Gongbao, (Gazette of the Supreme People’s Court of the P.R.C.), No. 3, 1987 at 12. By 1988, the Supreme People’s Court, 20 higher people’s courts, and a number of intermediate and basic people’s courts had established shensu divisions. Zhongguo Faishi Bao (China Law Gazette), August 23, 1988 at 4. Shandong Province was one of the first to establish in its intermediate courts a special division to handle shensu petitions challenging final judgment of civil cases. “Shandong Establishes Special Organ to Handle Petitions of Grievances in Civil Cases,” Faxue (Jurisprudence), No. 5, 1985 at 26.

103. Liu Wan, “A Discussion of the Reforms for Shensu in the Criminal Context,” Faxue Zashi (Law Magazine), No. 2, 1988 at 26. This author also suggests the following reforms for shensu of a criminal case: (1) limit those citizens who can file shensu to the parties, the victim, and their families; (2) limit filings to only those cases with sufficient evidence to support a finding of error in the law or in the facts; (3) as to jurisdiction for shensu, clearly define that the petition should be filed in the procurator’s office first and, if the procurator refuses to file a protest, in the court which rendered the original judgment; (4) limit the time for filing shensu to within 1 year of discovery of new evidence, and within 6 months if improper application of law or procedure (if the petition is filed beyond this period, upper level courts and procurators can still sua sponte give directions according to adjudication supervision); and (5) limit the investigation time by the procuratorate to 3 months, after which a protest seeking adjudication supervision must be filed with the courts. Id. at 27.
societies," would simply work to the advantage of the wealthy and privileged who could take advantage of the technicalities in guidelines.104

When in 1989, the Supreme People's Court published provisional stipulations for the handling of shensu petitions in criminal cases, it was clear that the latter view had prevailed.105 The newly published provisional stipulations simply reiterated the hierarchical jurisdiction of each level court to review shensu petitions challenging final judgment, and encouraged each court to educate and "persuade" persistent petitioners to withdraw their petitions. The new stipulations did not impose restrictions on when and who could bring petitions, and did not give specific guidance on when petitions should be granted or denied.106

At base, the new shensu stipulations failed to make adjudication supervision a more effective procedure serving individual rights. Without adequate guidelines regulating the handling of shensu petitions seeking retrial, many individuals and citizens' petitions are simply neglected and the legal system is clogged with repetitious filings. Instead, the generality of the stipulations exemplified the continuing Chinese preference for informality over formality, discretion and flexibility over stability and finality.

Supervision by the Legal Institutions

There is less empirical evidence to assess the power that adjudication supervision gives to the institutions functioning inside the legal system. However, an examination of the rules binding some of the actors within these legal institutions suggests that they wield


105. The provisional stipulations provide that if a petition is found to be invalid, the courts should persuade and educate the petitioner. In serious cases, the petitioner could also be criticized and educated by the masses and the relevant work unit. In extreme cases of persistent criminal law, the petitioner may be administratively detained, reeducated, or arrested for trial. The people's courts should provide the necessary evidence to the public security for handling in accordance to law. Provisional Stipulation of the Supreme People's Court on the Handling of Petitions in Criminal Cases, Section 15, published in Fazhi Ribao (Legal System Daily), October 25, 1989, p. 2; Provisional Stipulation of the Supreme People's Court on the Handling of Petitions in Civil Cases, published in Fazhi Ribao (Legal System Daily) August 26, 1989 at 2.

106. Although the shensu stipulations were not narrowed, it should be noted that the 1991 amendments to the Civil Procedure Law do attempt to narrow the grounds upon which petitions to reopen may be brought. As noted above, this amendment does not apply to the significant number of petitions brought to reopen criminal cases, and in the civil context, it remains to be seen whether the rather broad provisions will in fact be effective in channeling reopening requests.
considerable authority. Indeed, the most important actor in the Chinese courts is the judicial committee including the court president and the procurator, and not the individual judge. In an adjudication supervision, the individual litigant and the individual judge have a minor role.

Adjudication supervision serves very directly as an institutional check on individual judges. As an initial matter, every decision of a judge or a panel of judges must be approved by the court president, and complex and important cases must be reviewed by the judicial committee before a judge issues the decision.\textsuperscript{107} Adjudication supervision is the final institutional check in this process. Under adjudication supervision, even when a final decision is rendered, if the decision is contrary to the opinions of the president of the court, the procurator, or the judicial committee, the judgment can be reopened and re-adjudicated by a new panel.

This function of adjudication supervision as an institutional check is fully supported by the Chinese view of judicial independence. While judicial independence in Western nations means that a judge administers justice independently, subject to no outside interference, the Chinese concept is one of “the people’s courts shall exercise judicial power independently, in accordance with the provision of the law.”\textsuperscript{108} According to the Chinese, judicial independence relates simply to the independence of the court as a whole, not the individual judge.\textsuperscript{109}

The concept of the “independence of the court” lies in the idea of youji zhengti [organic whole]. Under youji zhengti, the individual judge is not independent; he or she is but one component of the judicial system.\textsuperscript{110} In China, it is the court and not the judge who has the power to administer justice. Indeed, according to Jiang Hua, then President of the Supreme People’s Court, a court administering justice independently, subject only to the law, “refers to the relationship between the court and other administrative organs, organizations or individuals, and not to the relationship between the collegiate bench and the court president or presiding judge.”\textsuperscript{111}

\textsuperscript{107} This system of approval and examination of cases by court presidents has caused judges to seek approval prior to trial and thus, creating a situation of “xianpian houshen” [first decide, then try]. Koguchi, “Judicial Independence in Post-Mao China,” \textit{7 B.C. Third W. L. J.} 195, 205 (1987).

\textsuperscript{108} \textit{People’s Court Law}, ch. I, art. 4.

\textsuperscript{109} Liao Guangsheng, “Independent Administration of Justice and the PRC Legal System,” XVI Chinese Law & Government, No. 2-3, Summer-Fall 1983 at 148-149. As discussed in the next section, however, even the concept of “independence of the court” is a qualified one.


\textsuperscript{111} See Jiang Hua, “Issues Relating to the Independence of the People’s Courts,”
This concept of the court as an organic whole is consistent with the principle of democratic centralism, which applies to the operation of all governmental units in the People’s Republic. The principle of democratic centralism functions to ensure that the minority is subordinated to the majority, and the locality to the center. Thus, for instance, within the collegiate panel, the principle of democratic centralism dictates that the judge or judges in the minority subordinate their views to those of the majority. Similarly, under the principle of democratic centralism, the collegiate panel must subordinate its views to the views of the judicial committee.

By contrast, in the Anglo-American legal system, the concept of judicial independence means the independence of the individual judge in deciding cases. In general, only a higher court can change the judgment of a lower court, and only in accordance with appellate procedures at the instigation of the parties. In the Chinese setting, meanwhile, a verdict rendered by a Chinese court is not valid until after it has been examined and approved by a court president or reviewed and discussed by the judicial committee. Adjudication supervision is one more mechanism to reaffirm this relationship by limiting the authority of the individual judge and placing greater discretion in the judicial committee and the court president.

The Chinese claim that adjudication supervision ensures consistency in judicial work. Yet, adjudication supervision has no provisions to ensure consistency from judicial committee to judicial committee. Additionally, the theory of the court as an organic whole leads to less, and not more, judicial independence in decision-making by individual judges and panels. Rather than administering justice independently according to law, some judges in China prefer to defer much of the decision-making autonomy to judicial committees, relegating themselves to simply an administrative role.

Supervision By The State

Beyond the theory of judicial independence as an organic whole is a reality that suggests a further check on judicial independence — a check by the state to ensure compliance with central policy, or more particularly, with the policies enunciated by the Chinese Communist Party. The dominance of the Communist Party in all public

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FaLu (Law), No. 9, 1981 at 68; see also Liao Guangsheng, “Independent Administration of Justice and the PRC Legal System,” XVI Chinese Law & Government, No. 2-3, Summer-Fall 1983 at 147.

112. Article 3 of the P.R.C. Constitution provides that “the state organs of the P.R.C. apply the principle of democratic centralism...” 1982 Constitution, ch. I, art. 3.

113. A Brief Introduction to the People’s Court of the P.R.C. at 18.

policy flows both from the Party's effective control of the government since the 1949 Revolution, and from the belief within the Chinese leadership that the Party is the key to China's modern progress.\textsuperscript{115} Hence, while de jure power lies with the people's congresses and theoretically with the Chinese populace who elected them, de facto control remains in the hands of the Chinese Communist Party.\textsuperscript{116} Similarly, while courts are expected to be accountable to the people's congresses,\textsuperscript{117} it is expected that courts will follow Party and state directive.\textsuperscript{118} Adjudication supervision is but one mechanism by which flexibility in the system is maintained allowing for greater control by the Party and the government.

A recent incident in Shanxi Province reveals the developing role of the people's congress in supervising judicial work and how adjudication supervision fits into this role. In August, 1989 the standing committee of the Shanxi Provincial People's Congress along with local governments formed a subcommittee of 134 to review cases adjudicated by the intermediate courts in the past two years.\textsuperscript{119} Four months after the review, the intermediate courts using adjudication supervision corrected 26 of the 38 cases that the

\textsuperscript{115} The belief is that all but one fundamental change in modern history (the Revolution of 1911 led by Sun Yat Sen) resulted from the efforts of the Chinese people led by the Communist Party. See Peng Zheng, "Report on the Draft of the Revised Constitution of the People's Republic of China," \textit{Remnin Ribao} (People's Daily), December 6, 1982. Hence, the 1975 Constitution institutionalized the Party's direct control of the state. Article 2 declared: "The Communist Party of China is the core of the leadership of the whole Chinese people." Article 16 stated that "The National People's Congress is the highest organ of state powers under the leadership of the Communist Party of China." The 1982 Constitution while abolishing these formal articles retained the supremacy of the CCP in its preamble, stating that improvement of the legal system is to be performed under the leadership of the Communist Party of China and the guidance of Marxism-Leninism and Mao Zedong Thought. See \textit{1982 Constitution}, Preamble.

\textsuperscript{116} Control of the legislative process, for example, theoretically lies with the National People's Congress, but in reality, is very much in the hands of the CCP. In an article by Francis Foster-Simon, the legislative process is described as follows: the CCP sets the whole process in motion by issuing a directive calling for legislation to regulate or safeguard a particular principle. In response, the Politiburo member Chairman of the Legislative Committee of the NPC appoints a committee to draft the legislation. The legislation is submitted to various interested parties for comment. The final draft is sent to CCP leadership for approval. Formally, the draft must be approved by the NPC. Clearly, the likelihood of the NPC rejecting a party-supported draft is slim. Foster-Simon, "Codification in Post-Mao China," \textit{30 Am. J. Comp. L.} 395, 413-414 (1982).

\textsuperscript{117} \textit{1982 Constitution}, ch.I, art. 3.

\textsuperscript{118} The "Four Cardinal Principles" underlying judicial work are adherence to the socialist road, to the people's democratic dictatorship, to leadership by the Communist Party of China, and to Marxism-Leninism and Mao Zedong thought. Peng, Report to the NPC at 10; see also Preamble to 1982 Constitution; Chang Gong, "a Fine Statute on the People's Judicature," \textit{Fazue Yanjiu} (Studies in Law), No. 4 1979 at 35-36; "Independent Adjudication and the Party's Guidance," \textit{Fazue Yanjiu} (Studies in Law), No. 2, 1980 at 27-28.

\textsuperscript{119} "To Complete The Workings of Law," \textit{Fashi Ribao} (Legal System Daily), Oc-
subcommittee found to be incorrectly adjudicated. Satisfied with the success of this effort, Shanxi province conducted another review of judicial work in May 1990.

Undeniably, the flexibility offered by adjudication supervision can give bite to the people’s congress’ ability to be involved in judicial work.\textsuperscript{120} Adjudication supervision may be used to strip away the protection that the finality of judgment offers to the integrity of judicial work against political forces. The people’s congress’ supervision of judicial work in conjunction with adjudication supervision could further politicized judicial work in China.

Adjudication supervision has also been used to advance central policy. Thus, for example, after the chaos of the Cultural Revolution, thousands of convicted “criminals” were able to successfully petition for the reversal of their convictions pursuant to adjudication supervision.\textsuperscript{121} A recent report of the Supreme People’s Court specifically articulates the view that adjudicated supervision should be used to reverse judgments rendered under the old “incorrect” policies of the Cultural Revolution.\textsuperscript{122}

Similarly, adjudication supervision is now being called upon to serve another new policy of the state — to facilitate the reunification of Taiwan with mainland China.\textsuperscript{123} Toward that end, the Supreme People’s Court invited the courts, in deciding whether to re-open cases, pursuant to adjudication supervision, to give attention to shensu petitions relating to Taiwan or Taiwan compatriots.\textsuperscript{124} Hence, in an era where large numbers of petitions seeking retrials are being filed, the ones that are being given attention are those that help advance central policy.

tober 15, 1990 at 2; see also case discussed in Minzhu Yu Fazhi (Democracy and Law), No. 2, 1990 at 36.

120. A recent editorial conceded that supervision of the courts by the people’s congress remains a controversial question, but quoted Peng Chong of the National People’s Congress “in major cases, the people’s congress may request a report from the procuratorate and the courts, and also conduct its own investigation. If [the people’s congress] finds error, it may ask the procuratorate or the courts to correct the case according to law.” “A Discussion of the Various Kinds of Supervision By The People’s Congress,” Fazhi Ribao (Legal System Daily), November 1, 1990 at 3.


122. Report of the President of the Supreme People’s Court at the 14th Judicial Work Conference in Beijing on July 18, 1988, reprinted in Supreme Court Gazette, No. 3, 1988 at 12; see also Report of the President of the Supreme People’s Court, April 1, 1988, reprinted in Renmin Ribao (People’s Daily), April 18, 1988 at 2.


124. Report of the President of the Supreme People’s Court at the 14th Judicial Work Conference in Beijing on July 18, 1988, reprinted in Supreme Court Gazette, No. 3, 1988 at 12; see also Report of the President of the Supreme People’s Court, April 1, 1988, reprinted in Renmin ribao (People’s Daily), April 18, 198 at 2.
Indeed, the Supreme People's Court reported that in 1988, the nation's courts received 197 criminal and 26 civil shensu petitions relating to Taiwan. According to the Supreme People's Court, "the people's courts handled petitions relating to Taiwan compatriots in accordance to law and to the policy relating to Taiwan. Following the spirit of seeking truth, the people's courts investigated these historical cases and corrected wrongs. This helped improve mutual understanding and friendship between the straits..., and advanced the goal of unification of China." In this instance, shensu petitions and adjudication supervision can be seen as a mechanism to effectuate the central policy of reunification of Taiwan with mainland China.

Ultimately, the emphasis on ensuring that judicial decisions comply with central policy is consistent with the socialist view that "law is a political instrument. It is politics." Undeniably, adjudication supervision has the potential to redress individual wrongs against abuses of judicial power, or for that matter, to ensure uniform interpretation of law throughout the country. Yet, before adjudication supervision can serve such purposes, more attention needs to be given to limiting its discretionary application and to limiting the state's right to obtain reopenings. Until such modifications are made, the most effective use of adjudication supervision may be the ultimate curtailment of judicial independence, to bring court decisions in line with central policy.

CONCLUSION

Finality of judgments has to be accepted if the idea of law and

126. Supra n. 68 at 69.
127. Professor Harold Berman, in discussing the supervisory power of the procurecy to protest administrative abuses, pointed out that Soviet law presents a paradox of an autocratic central authority that has been successful in crushing human rights and that nevertheless "has established intermediate administrative officials." Berman, "Human Rights in Soviet Union," 11 Howard L. J. 333, 340 (1965). Professor Berman attributes this paradox to what he called concept, rights do not inhere in the individual, but are conferred upon the individual by the state in order to encourage him to be a loyal, hard-working, well-disciplined, virtuous citizen. Hence, a duality exists where both rights and repression are used by the state to achieve its objective: repression as an instrument of political and ideological discipline, rights as an instrument of moral and social discipline. Id.
128. Indeed, recent Soviet scholars maintain that supervisory review does not compromise the independence of an individual judge, but rather is necessary to ensure correct outcomes. Articles 314 & 331, C. Civ. P. R. RSFSR, see also Milnikov, "The Constitutional Foundations of Soviet Civil Procedure," in Justice and Comparative Law: Anglo-Soviet Perspective in Criminal Law, Evidence, and Sentencing Policy 176-177 (William Butler ed. 1987). The rationale is that a court in considering a case by supervisory review shall not prejudge what decision shall be rendered by the court on remand. Id.
of having disputes settled by the judicial process are to be accepted. By contrast, China remains a legal system dominated by the state where judicial “flexibility” is given precedence over stability. This “flexibility” is evident in the procedural rules and in particular, in the provisions for adjudication supervision. By allowing the flexible re-opening of final judgments, adjudication supervision in China serves as an institutional limit on the autonomy of judges in China. While adjudication supervision can serve to vindicate individual rights and serves as mass supervision, it also opens the door to influences on specific judicial work by numerous actors, including the court president, the judicial committee, the procurator, the people’s congress and the Communist Party.

Indeed, adjudication supervision exemplifies the Chinese concept of judicial independence as the “independence of the court as an organic whole.” Yet, “independence of the court as an organic whole” serves to discourage independent judicial work by individual judges and encourages individual judges and collegiate panels to abdicate responsibility for decision-making to the judicial committee. Ultimately, even the “independence of the court as an organic whole” is not ensured by adjudication supervision. Adjudication supervision, by allowing broad discretion in the reopening of judgments, renders case results vulnerable to temporal changes of state and party policy.

Undeniably, the recent changes in the Civil Procedure Law take one step in limiting the grounds for reopening in civil cases. Yet, the new categories are broad and no change has been made in the power of the procurators and court presidents to seek reopening without limitations as to time. Until the Chinese tighten the procedure for reopening both civil and criminal cases, and for all types of petitioners, it remains unclear what validity a judgment has in China, and indeed, what the rule of law means in China.

In sum, adjudication supervision remains a lively and timely issue. As currently crafted, adjudication supervision reflects the Chinese preference for informality and flexibility. It also points to the internal limitation of the individual judge within the Chinese judicial system. On a practical level, litigants should bear in mind the lack of finality in judgments obtained in Chinese court. On a broader level, observers of the Chinese legal system must bear in mind that the judge hearing the case is constrained, not only the informal external forces of party influence and politics, but also by internal, institutional forces codified in the court and procedural rules.