

Chapter 7 Autonomy, courts and the politico-legal order in contemporary China

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ABSTRACT

Both China's political and constitutional systems demand a compliant and subservient judiciary. Politically, the court is a marginal institution in China's political system and the Party controls the judiciary effectively through the Political-Legal Committee. But political control and a resulting judicial compliance and subservience are not the only story of the past 30 years in China. The political and economic changes in China have generated demands for the rule of law to supply political legitimacy, promote economic development and improve social governance. Within the Party, there has been a reformist tradition which advocates a functional separation between the Party and the legal institutions, an enhanced role of law and an expansive institutional autonomy of the courts. The relationship between the Party and the court is thus a dynamic one. While the Party has the absolute power, it has to refrain itself from intruding into the daily operation of the court and leave judges alone to handle the business of judging. The Party has its own objectives and repeatedly reminds the court of keeping the Party's interest the priority in adjudication, but judges have to follow legal rules, procedures and their own professional standard in handling individual cases.

INTRODUCTION

Building judicial autonomy in China's authoritarian state is an ironic exercise. On the one hand, the Chinese Communist Party (hereafter "the CCP") wields the supreme and overriding power and does not allow an autonomous judiciary. On the other, the CCP has made efforts to develop a limited rule of law and to build a professional court system which may ultimately regulate and limit the exercise of the CCP's unfettered power.

The Party, taking over the state power through many years' bloody armed rebellion, is the leading political party in China and its leadership position is entrenched in the Constitution of the State. According to the Preamble of the Constitution, the CCP has led the Chinese people to victory and will continue to lead the people in building a socialist China. The CCP's power is plenary and ubiquitous with the potential to reach every institution and fabric of the society (Zhu 2008). It is the supreme authority in the country to which the court, like any other institutions, is ultimately accountable. This political supremacy of the CCP allows it to tramp law (Zhu 2008: 541). While the CCP may interact with law in multiple ways, there is no doubt that it is the soul of China's living Constitution (He 2012).

But the Constitution also places certain qualifications on the political power of the CCP over the court. First, Article 126 of the Constitution provides that "[t]he people's courts exercise judicial power independently, in accordance with the provisions of the

law, and are not subject to interference by any administrative organ, public organization or individual.” Article 5 of the Constitution creates a more general constraint on the political power of the CCP by creating a rule of law state and declaring that “[n]o organization or individual is privileged to be beyond the Constitution or the law.” The CCP, in its Constitution (黨章), has also accepted the supremacy of the state constitution and the inviolability of state laws (Chen 2011). The vexing question is, to what extent can independent adjudication of cases by courts be reconciled with the leadership of the CCP? This chapter studies the nature and operation of the political power in the broadly-defined political-legal sector and the potential of the courts to develop a degree of autonomy within the authoritarian political system.

CCP LEADERSHIP AND THE POLITICAL-LEGAL COMMITTEE

CCP leadership is a foundational rule in the Chinese polity. The CCP claims to be the sole representative of the people and the CCP’s interest identifies with that of the people (Nathan 1985). Although the CCP recognizes a degree of social and economic pluralism in the reform era and allows different social groups to articulate and assert their interests, the foundational rule has not changed in the past 30 years. The CCP may be adaptive to changes and innovative in governance strategies, but it is beyond doubt that CCP leads and CCP’s interests are supreme (Shambaugh 2008).

For the CCP, law is subsidiary and subservient, and does not form a separate system (*xitong*, 系统). It does not have a necessary epistemological and institutional autonomy, and is merely part of a much broader political-legal system (政法系统).

The political-legal system has variously been defined as “the civilian coercive apparatus” (Lieberthal 1995: 199; Saich 2004) which is controlled by “the powerful, often brutal men who were responsible for protecting the Party from its enemies” (Tanner 1999: 62). The system includes police, procuracy, court, lawyers, correctional services and, indirectly, People’s Armed Police (PAP) which are broadly defined as political-legal apparatus (政法机关). Individuals working in those political-legal apparatuses are referred to as political-legal officers (政法干警). For the CCP, institutions and individuals within the political-legal system share a common political-legal identity. While sub-division of responsibilities and separate professional characteristics are possible and even necessary, they are nevertheless secondary to, and submerged into, the defining political-legal identity. While recognizing the institutional specialty and professional expertise of courts and judges, the CCP never admits a judicial identity with a strong sense of professionalism and institutional autonomy. The court may have been allowed to manifest some institutional distinctions and procedural uniqueness, but it is defined principally by the common characteristic that it shares with other institutions in the same system, that is, a organ of people’s dictatorship serving the CCP’s interest.

The Political-Legal Committee (PLC) (政法委员会) exercises the leadership role in the political-legal system. The PLC has grown into a gigantic organization within the CCP and exists at each level of the CCP Committee. The Central Political-Legal Committee (CPLC) (中央政法委员会) in Beijing is the headquarters of the political-legal system. It has been a convention that the PLC chairman at a local level is a member of the Standing Committee of CCP Committee at the respective level.

The PLC has had a checked history which reflects the larger political development of the CCP. Its prototype was a Central Law Committee (中央法律委员会) which was set up in 1948 to prepare for the establishment of a new government, responsible for “legislative and legal issues” (Ye 2012). In 1949, the new government created a Political-Legal Committee under the State Council (政务院政治法律委员会) to advise the government on legislative and legal matters, with Dong Biwu (董必武), one of the vice Premiers, serving as the Chairman, Peng Zhen (彭真) as a deputy chairman, and Ren Jianxin(任建新) as a secretary (Ye 2012; Yu 2006). The Committee was created to manage the massive transition in the legal system and prepare for the establishment of new legal institutions. Once the new legal institutions were in operation, and especially after the promulgation of the Constitution and other laws in 1954, the Committee was regarded as having finishing the task it was set up for and was abolished (Ye 2012). Dong Biwu became the President of the Supreme People’s Court (SPC) in October 1954.

The predecessor of the current PLC was the Political-Legal Leadership Group (PLLG) (政法领导小组), which was created in 1958 as part of a larger effort to “strengthen the unitary leadership of the CCP” and push back against the legalistic movement since 1954. It was set up directly under the Politburo to exercise oversight over all legal institutions (Li. M 2010). Peng Zhen was named the Head of the PLLG. Those were turbulent years in Chinese politics when legal institutions were virtually shut down and the CPLLG died a natural death. Political-legal leadership was taken over by men with an intelligence and security background, such as Kang Sheng (康生) and Wang Dongxing (汪东兴) (Tanner, 1999). It was not until 1978 when the PLLG was

brought back to life and then upgraded in January 1980 as the Political-Legal Committee. In a document circulated in 1980, the CCP Central Committee set up the CPLC with the terms of references of handling significant matters in the political-legal sector. Peng Zhen, who was one of the Deputy Chairmen of the National People's Congress (NPC) Standing Committee, became the CPLC Chairman . In 1982 the CCP Central Committee issued the Directives on the strengthening of political-legal work to clarify that the PLC was a “working department” (工作部门) within a CCP committee and, for the first time, the terms “liaise” (联系) and “guide” (指导) are used in describing its relations with legal institutions. Its restoration in 1980 coincides with a national effort to re-construct legal institutions and to develop a socialist rule of law.

Guidance or otherwise, the PLC, once in place in the early 1980s, started to develop its own interest. In the process of providing the overall coordination among legal institutions, it set priorities for local institutions and gave instruction on case handling. In doing so, it came into direct conflict with legal institutions, the procuracy and the court in particular. In the late 1980s, the central leadership initiated a range of political reforms to enhance press freedom and judicial independence, with a focus on the separation of the CCP from the government. Under the leadership of Hu Yaobang and Zhao Zhiyang, the policy tilted significantly toward the autonomy of legal institutions, and the PLC was seen as an institutional barrier toward the development of rule of law in China. In 1987, the CCP made a decision to institutionalize the separation of the CCP from the state and in May 1988, the CCP abolished the CPLC but restored a down-scaled central political-legal leading group (Tanner 1999).

That was a short-lived reform and the CCP reversed its reform policies after the 1989 students-led movement and the bloody crackdown in Tiananmen. Seeing the PLC system as a core component of the CCP's political control, the CCP restated the status of the CPLC in 1990, insisting in the Notice on Sustaining Social Stability and Strengthening Political and Legal Work that "Political-legal organizations are an important component of the state machineries, an important tool of people's democratic dictatorship, and a knife in the hands of the CCP and the people" (Li. M 2010: 43).

The restoration of the PLC in March 1990 was followed by a significant expansion and diversification of the PLC's powers. In March 1991, another important organization, the Central Committee on the Comprehensive Treatment of Social Order (中央社会管理综合治理委员会) was set up to be in charge of public order. The Committee operates within, and effectively absorbed into, the PLC system. That is the so-called "*heshu bangong*" (合署办公). The political-legal system received a further momentum in 1995 when the CCP Central Committee enhanced the political status of PLC as a "functioning department of the CCP Committee" and has the power to "lead" political-legal works. With circulation of the 1991 Document, the PLC made the transition from an advisory body to a real power house (Yu 2006). The leadership role of the PLC over legal institutions was thus formally established. In 1999, the CCP issued another decision to solidify the leadership position of the PLC in the political-legal system.

The role of the PLC in relation to legal institutions was contentious throughout the 1990s, reflecting the leadership's ambiguous position on the role of law and CCP

control. CCP leaders were keenly aware of the potential danger of a powerful PLC and the damage that it could do to the Constitutional division of powers and the rule-based governance that the CCP was promoting. Jiang Zemin, for example, was suspicious of a powerful PLC to intrude into legal institutions, warning the PLC cadres at the 1997 National Conference on Political and Legal Work that: “those cadres who replace law with their words and interfere with the independence handling of cases by legal institutions ... must be seriously investigated and punished according to the CCP rules and State law” (Jiang 1997). Jiang’s insistence on socialist legality might have been a strategic move to undercut the power-base of Qiao Shi (乔石), the Chairman of the NPC Standing Committee. Jiang didn’t hesitate to use the CPLC to control the legal institutions when it was necessary. When Jiang ordered the persecution of Falun Gong (法轮功), in 1999, the whole political-legal establishment was mobilized to execute his plan (Peerenboom 2002).

Jiang’s emphasis on the socialist legality had its impact on the relations among CCP elites, the PLC, and legal institutions. The CPLC was probably most “liberal” under Jiang’s leadership because of a unique balance of institutional powers. The CPLC did not have a high political profile during that period of time and the Chairman, Ren Jianxin, was not a Politburo member and did not hold significant political power. Significantly, he was the President of the SPC and indeed the only SPC President who headed the CPLC and outranked the contemporary Minister of Public Security. The Politburo Standing Committee member in charge of the political-legal system was Qiao Shi to whom the court and the entire political-legal system were accountable.

Under that particular political circumstance, the PLC exercised its leadership mainly at the policy level without meddling into the legal process and the particular case handling, as the CPLC Chairman Luo Gan (罗干) reiterated on many occasions (Ye 2012). The whole system anchored its missions and objectives in a rule of law framework. Since the mid and late 1990s, the CPLC started to frame the political and legal work in relation to legal supervision and the primary function of the PLC was to supervise the implementation of law by legal institutions so as to ensure that laws were properly and effectively applied and enforced by legal institutions (Li. M 2010).

In spite of Jiang Zeming's promotion of law-based governance, it was under his watch that the political-legal system gained the most significant institutional powers. In response to the perceived challenge posed by Falun Gong, the CCP set up a Leadership Group on Falun Gong and subsequently an Office on the Falun Gong Issue on 10 June 1999 (referred to as the "610 Office" (610 办公室)). In 2000, the State Council set up a more general Anti-Cult Offices to work jointly with the "610 Office". While anti-cult operation was carried out by the police, it was again absorbed into the PLC system, with the CPLC as the ultimate decision maker on anti-cult matters. Also in 2000, the CCP set up another leading group – the Central Leading Group on Maintaining Stability (中共中央维稳领导小组) and a corresponding Maintaining Stability Office (维稳办公室), which are in charge of the handling of social unrest and operate within the PLC framework (Feng 2011).

The CPLC broke further grounds in expanding its authority in the Hu Jintao era. The appointment of Zhou Yongkang as the Minister of Public Security in the end of 2002 was most crucial in explaining the rise of the PLC powers in China. Zhou Yongkang

proved to be an effective Minister in disciplining the police, improving their public image and enhancing their political standing in the political system (Fu 2005). One significant development during Zhou's tenure was the fact that local police chiefs joined the powerful standing committee of the respective local CCP Committee and also served as the PLC Chairman. The combination of three powerful positions in the hands of a single person created the superiority of police in the legal system.

Apparently, Zhou Yongkang used the police power to challenge the CPLC headed by Luo Gan. Zhou created a police kingdom which was effectively outside Luo's control and then used the police to control the PLC outside Beijing.

Once Zhou was promoted to the Standing Committee of the Politburo and became the CPLC Chairman, he developed a broader view beyond the police and became more focused on the power of the PLC itself. Under the pressure of other legal institutions, he first undercut police power within the PLC system by removing police chiefs from the PLC chairmanship, hence striking a power balance in the PLC system which allowed the courts and the procuracy to have more voices. But police remain powerful and, after leaving the PLC chairmanship, a police chief routinely holds position as deputy mayor/governor in the respective level of government, though the police power and influence lie outside the political-legal system.

Zhou's legacy will be his willingness and ability to turn the legal system against law and create a culture of contempt of law within the political-legal system. Under his leadership, it becomes an accepted view that law can be qualified and tramped by CCP rules. He makes an implicit rule explicit that the CCP, not the law, is supreme. For the PLC, legal institutions may perform different functions according to their

respective division of labour, but CCP leadership is the underlying rule. As Zhou allegedly said at one of the CPLC meetings: The PLC's surname is CCP and nothing else really matters (Ye 2012).

THE FUNCTIONS OF THE PLC

The PLC oversees a wide range of institutions and broad oversight responsibilities. The CPLC, for example, oversees *Legal Daily* and controls China Law Society, and through which, the entire legal academy. The PLC's role varies in different historical time, as mentioned above, but broadly speaking, its core functions include legal policy making; coordination inter-institutional relations; and decision-making in individual cases.

Legal Policies. The first role of the CPLC is the policy-making, which is defined as “assisting the CCP Central in formulating directives and policies on political-legal work” and “planning the overall political-legal work within a certain period of time.” The PLC makes criminal policies and provides coordination among legal institutions in implementing the policies that it has made. Traditionally, it was crime, major ones in particular, that the PLC was concerned with. While the PLC has tried to expand to the areas of commercial and economic law during the past two decades, its focus however remains decisively within the traditional criminal justice matters.

China now operates a dual criminal justice system: a routine, ordinary one which follows the legal rules and procedures with relative stability and predictability; and an *ad hoc* extraordinary one which relies on periodical campaigns against crimes. The

two systems adhere to different ideologies and have different institutional bases. The routine system, despite of its drawbacks and abuses, is characterized by increasing regularity, professionalism and relative institutional autonomy, while the extraordinary system, driven by the PLC, is characterized by periodical external shocks into the normal criminal justice system. When the PLC intervenes in response to *ad hoc* political contingency, the criminal justice institutions lose their institutional autonomy: rules are suspended and professional identity is swept away. The institutional mandate gives way to political expediency, hence resulting in a political takeover of the criminal justice system (Trevaskes 2007).

The PLC's grip on courts is limited because the court's jurisdiction goes far beyond crime. Indeed, the percentage of criminal cases in the overall caseload of Chinese courts has been declining steadily and now it only counts for less than 10 percent of the overall court cases. Criminal trial is no longer the court's central role as it used to be the case (Fu 2011a). The post-Mao economic reform has witnessed a surge of civil and commercial cases which occupy most of the court docket and over which the PLC does not have the necessary competence. The social and economic transition necessarily marginalizes the PLC.

Even within the criminal justice system, the PLC's policy role is diminishing because of the de-politicization of crime and the increasing substantive and procedural regularity in the criminal process. The post-Mao reform has introduced a degree of certainty and regularity in the legal system. Consequently, crime is now defined largely as a violation of the criminal law and the court, by and large, is able to conduct criminal trials within the legal framework. The business of adjudication relies

on certainty, continuity and predictability, and the more stable the court is, the less room there is for the PLC to intervene.

As mentioned above, the PLC's traditional policy tool in the criminal justice sector is the launching of periodical campaign against crimes. While there had been frequent *ad hoc* campaigns in the 1980s and early 1990s, since the middle of the 1990s, campaign has played only limited role in criminal justice in China. Over the decades, the politically-oriented criminal process is diluted and *ad hoc* campaigns against crimes have become smaller in scale, less aggressive in style and operate largely within the legal framework. Campaigns-driven criminal justice policy remains active, but its impact on the criminal justice institutions has been reduced. Courts in particular keep a degree of distance from the politics of crime, such as limiting the use of the death penalty, more rigorous requirement of evidence and prohibition of parading offenders, sentencing rallies and other shaming punishment. In their institutional and procedural design, the courts are able to factor-in, internalize and absorb the arbitrariness of the political process.

Inter-institutional Relations. Coordination of inter-institutional relations is the second major role of the PLC. The inter-institutional relations in the criminal justice system are characterized by mutual support and mutual supervision. Significantly, the court is not supreme and does not have the final say in controversial matters. Consensus develops through negotiation and compromise between state institutions through joint conferences and issuing legal interpretations jointly. But when institutions fail to achieve a consensus, the matter cannot be resolved within the system and the PLC intervention becomes necessary.

There is usually little controversy at the policy level and irreconcilable disputes are more likely to occur on more technical issues that concern with institutional interests. One dramatic example is about the courtroom formalities after the amendment of the Criminal Procedural Law (CPL) in 1996. Upon the implementation of the revised CPL on 1 January 1997, the SPC and Supreme People's Procuratorate (SPP) disagreed on certain courtroom formalities, including whether the benches for the prosecutors and judges should be of the same height; whether prosecutors should rise when judges enter the courtroom; and whether prosecutors should leave the files and evidence behind for judges to study after the end of a trial. Practices varied widely from one place to another and the SPC and SPP could not reach an agreement. As a result, the matter was referred to the CPLC for a decision. The CPLC ruled that judicial bench should be higher and placed in the centre of the courtroom; no one would rise when judges enter the courtroom, and prosecutors should leave files behind for judges to study after completing a trial (Editorial, 1997).

But increasingly disputes between legal institutions are caused by different interpretations of legal provisions, such as different understandings of the elements of a crime or the type of crime that a particular act may constitute. When the SPP and SPC find themselves in opposite position in legal disputes, they invite the Standing Committee of the NPC to intervene and to offer an authoritative decision through legislative interpretation. On legal interpretation, the NPC Standing Committee has become the ultimate authority and the rise of the NPC and its ability to bring the criminal justice system into the legislative system (which is outside the political-legal system) that poses the most significant limit on the PLC's coordination power.

With legal disputes going to the NPC Standing Committee, the SPC finds itself more accountable to the Congress than to the CPLC. Significantly, the court is principally a judicial organ and receives mandates from the Constitution and law as made by the congress. The court applies law through resolving disputes and that core judicial functions are now set in stone. The Chinese court system is stabilizing despite changes in political circumstances. There is little that can be done in term of further institutional reform which needs the CPLC endorsement. While the CPLC leads, its leadership is more issue-limited, and it is the NPC Standing Committee that has become the routine arbitrator of legal disputes through its legal interpretation power. The congress has emerged as an important institution in coordinating the inter-institutional relations.

Deciding Hard Cases. As a sub-category of inter-institutional coordination, coordination of individual cases is the most active and also controversial responsibility of the PLC. The PLC intervenes into individual cases in two broad circumstances. Firstly, it intervenes in cases with significant impact. No doubt, legal institutions continue to be subjected to political control in a variety of sensitive cases. When a real or perceived crisis emerges, the moment comes when the PLC, or the CCP Committee itself, decides on the individual case concerned. Judges, and for this matter, everybody else, acknowledge the political reality that the CCP trumps the law in special circumstances.

Secondly, there is the traditional conflict resolution which takes place when different institutions have drastically different views on a criminal case and a persistent

disagreement invites the PLC's intervention. As mentioned above, China runs a legal system that is not court-centric and the judiciary does not contradict significantly decisions made by institutions in an earlier stage of the criminal process. It happens that most conflicts take place mainly between the police which investigate the case and the procuratorate which refuses to prosecute or an appellate court which refuses to approve a conviction. When the institutions disagree to a compromise, the case enters a stalemate and the suspect would linger in the process.

When that happens, the case would be referred to the PLC for coordination. The PLC coordination is a dynamic process and the extent to which the PLC is able to persuade or force an institution to give in and reach a decision depends on the prevailing political atmosphere, the relative political status of the PLC Chairman and the bargaining power of the institutions involved in the dispute (Ying 2012). Case handing is often regarded as the most substantive power of the PLC at the local level.

The recently exposed cases of wrongful conviction, such as the cases of She Xianglin (佘祥林) who was wrongfully convicted of murdering his wife in 1994 and the case of Zhao Zuohai (赵作海) who was also wrongly convicted of murdering his fellow villager in 2002, have shed some light on the lengthy process of the PLC coordination and the PLC strategies in bypassing legal rules in achieving convictions. They also place the PLC in the lime light of public outcry (Li. M 2010; Zeng and Shi 2012; Yan 2010). As the cases illustrated, the PLC intervention became necessary because the prosecution and the appellant court no longer took police investigation for granted and raised questions that the police could not answer and required evidence that the police could not provide. Unfortunately, when conflicts happen and the PLC intervenes, it

would rule in favour of the police because of the political position and ideological orientation of the PLC and the knowledge base of the PLC Chairmen. Once the CCP has spoken, the legal institutions would give in to political pressure, give up their legal principles and dutifully prosecute and convict as instructed.

Increasingly, there are more proactive interventions and the CPLC, in the name of maintaining stability, has become eager to use criminal punishment in achieving its policy goal, in particular against chronic petitioners. Under Zhou Yongkang's leadership, the whole PLC system has gained tremendous political power and the PLC at the local level is able to push those cases through the criminal justice system and secure criminal convictions over the objections of the prosecution and the courts (Shen 2010).

The Structural Constraints on the PLC Powers. The political position of the PLC Chairman has evolved over the past decades and China has in the recent few years witnessed the concentration of political power at the PLC at every level. But the PLC's power is structured limited in a one Party system which strives for a degree of rule of law.

First of all, while CCP leadership is absolute, the PLC's is not. At the central level, the Chairman of the CPLC has gathered significant political power when the office holder is elevated to the Standing Committee of the Politburo. But the political stature of the CPLC Chairman cannot be replicated at local levels where the political power of the PLC Chairman is more limited. Local CCP secretary tends to take a more

hands-on approach and would not allow the PLC Chairman to share significant political powers.

While the PLC may lead, guide or coordinate political-legal work, it does not have control over the nomination, appointment or removal of leaders in legal institutions (Ye 2012). Personnel power firmly belongs to the Standing Committee of the CCP, administered by the Organization Department and placed under the tight control of, and jealously guarded by, the CCP Secretary. Nor does the PLC have any control over budget. That explains the fact that the PLC at local levels is a place ambitious politicians try to avoid, and consequently, it has become a place for retirement in the same way as the local people's congress does.

Further, it is important to look at the PLC and the court not as a dyadic relationship but as a sub-set of a larger political network involving multiple organizations at different levels. Behind the PLC is the CCP Secretary where the real power lies, especially at the local level; and behind a legal institution, there is a corresponding superior organization on the vertical line. For important decisions, a legal institution may directly report to the CCP Secretary, leaving the PLC to implement a decision that has already been made. Alternatively, an institution may approach its own vertical line of authority for guidance, further undercutting the authority of the local PLC. Indeed, the PLC is actually sandwiched in between and does not have the necessary power to make important decisions.

Finally, the PLC's power is mainly supervisory. The PLC is not part of the legal system and does not have its own institutional base. It cannot usurp the police or the

court and does not have the substantive powers to make a legally binding decision. It is a popular view among the PLCs that their power is secondary and derivative. According to that view, legal institutions under the PLC supervisions are real decision-makers with real power. As powerful as the PLC is, its power derives from the decisions made by other institutions. A PLC without an institutional anchor is necessarily weak in the Chinese political system.

THE CCP, THE LAW AND THE JUDICIARY

There has always been a reform tradition within the CCP in which a group of senior CCP members occupying legislative or legal positions advocate legal reforms. The reformist tradition shares many common characteristics. First, all legal reformers were dedicated and loyal Communists and wholeheartedly embraced the overall leadership role of the CCP in legal institutions. Their starting point in initiating legal reform was certain degree of functional separation of institutions and a more structured and self-restrained political leadership that allowed a higher degree of autonomy in the operation of legal institutions. CCP leadership was internalized and exercised through a CCP group (党组) and CCP members within a legal institution. The reformers took state constitutional design seriously and advocated the exercise of political power within and through the constitutional structure instead of outside of it (Potter 2003). As Xiao Yang (肖扬) (2005) pointed out, the ruling Party must exercise its political power in according with the law. While the CCP leads the legislative, judicial and law enforcement bodies, it cannot replace them.

Second, reformers in that tradition promoted the rule of law. As Xiao Yang (2005) reiterated “the CCP should act within the scope of the Constitution and the laws, not outside the Constitution and the laws. The CCP must not place itself above the Constitution and the laws.” However, legal reformers have advocated the rule of law with different motivations and objectives in response to the prevailing political circumstances. When Peng Zhen and his comrades carried out legislative and legal reform in the early 1980s, they intended to use law to constrain despotism within the CCP which was regarded as the root cause of the political chaos in the 1960s and 1970s (Fu 2011b; Potter 2003). In that sense, rule of law was regarded as a catalyst to promote democratic values and an integral part of a concerted effort of political liberalization.

After China initiated the market reform in the 1990s, the rule of law was revived to serve primarily the economic function. For ex-Premier Zhu Rongji, rule of law was an additional regulatory tool to facilitate his economic reform and reduce local resistance and distortion. It was commonly believed that a market economy required a sound legal framework to offer stability and predictability for market transactions. As noted by Ginsburg, law serves a market-enhancing function without posing a fundamental political challenge, that is, “to help provide predictability in the economic sphere without hindering core regime policies or interfering in the political sphere” (Ginsburg 2008).

Finally, reformers advocated the development of legal expertise and professionalism. Instead of the broad identity of political-legal officers, reformers nurture a creeping professional identity and pride for lawyers, prosecutors and judges. Institutional

innovations, such as the common judicial examination, have introduced a professional standard into the old political-legal world, and through which nurtured and developed a legal community with common identity, interest and mission. By nurturing a professional identity of legally-trained professionals, the reformers effectively divided the political system by separating the more repressive arm of the state (including the police, the PAP and the prisons officials) from the legal professionals. Reformers envisaged a stronger legislature, an institutionalized court and a more rule-based legal system.

INSTITUTIONALIZATION OF THE COURTS

The PLC does not settle disputes or try cases. The court does and it does so in according to a unique set of rules and procedures. It is this institutional distance that allows the court to develop a degree of autonomy and professionalism. . The best defense of judicial autonomy is legal rules and the application of those rules in concrete cases, as requested by litigants and their lawyers, which form the barbwires to keep the PLC at a distance. The court hears over 12 million cases in 2011 including over 840,000 criminal cases (Wang 2012). There are now near 200,000 judges working in 10,000 courts. Over the past three decades, the courts have developed a comprehensive, largely cohesive, stable and self-referencing body of judicial rules.

Given the volume of the cases, a well-established judicial structure and a wide ranging judicial law making power (Ip 2011), it is the court, not any CCP organization, which has the power, interest and knowledge to try the vast number of cases. Firstly, the power lies with the court and under the law, only the judges have the power to

adjudicate and render legally authoritative decisions on disputed cases. The PLC and other authorities may give instructions and guidance, but only the court can rule. Secondly, judges also have the incentive to exercise the power in a way that is legally accountable and there is adequate accountability mechanism in place to ensure most of the judges comply with the legal requirement in most of the cases to avoid disciplinary actions (Minzner 2009). Finally, legal rules have been developing for three decades and there is a body of specialist knowledge and expertise which are indispensable in the adjudicative process. Lawyers, broadly defined to include people with specialist legal training and experiences, have become indispensable for court-based dispute resolution. As long as the CCP maintains the course of building a socialist rule of law and a functional legal system, the judicial role is irreplaceable and the court has to be allowed to develop its institutional capacity and professional standard to perform its functions.

While Chinese courts have been developing professional capacity and institutional autonomy, the development also reflects the larger political and economic circumstances in which the court operates and the level of maturity of China's legal development. There will be abundance Chinese characteristics.

One of the defining characteristics is the collective identity that a Chinese court will take. The Chinese court builds external autonomy by strengthening the internal bureaucratic structure at the cost of the discretion of individual judges and developing judicial legitimacy through enhanced internal judicial management. The court as a collective, not the judges as individuals, is the embodiment of judicial autonomy. One way to build judicial strength and autonomy in China is the creation of a collective

body in a court, the Adjudicative Committee (AC), to ensure internal bureaucratic control and fend off external interference. Doubtlessly, in major cases such as those involving political dissidence, major corruption, and other sensitive and high profile cases, the court remains deferent to the PLC. But in the vast majority of cases, the court has to make its own decisions and the court's answer to outside challenges is that it has the capacity to deliver quality judgment through rigorous internal control (Peerenboom 2007). The AC may not be able to give much guidance to judges and only rubber-stamp whatever trial judges recommend (He 2013), but as a symbol of collective decision and internal accountability, the AC has played an essential legitimacy role.

Another important characteristic of an emerging judicial autonomy is the non-confrontational approach that a court may take in asserting authority. The cooperative ethos within the legal system and a politically weak court necessitates a consensual approach in which judicial authority is exerted through negotiation, compromise and subtle pressure. One of the key mechanisms of consensus building is to invite the procuracy to join judicial deliberation before the court announces a significant adverse decision against the procuracy (Opinions of SPC and SPC 2009). A not-guilty verdict, for example, is an open challenge to the prosecutorial and police authority and has been used with great caution to maintain inter-institutional comity. Armed with an enhanced legal requirement in the criminal process, judges are asserting their authorities through other means, notably informal negotiation through which judges compel prosecutors to back-off from weak cases with sufficient notice and respect (Fu 2011a).

Political intervention is part of the judicial process and a reality that the court knows how to live with. But whether the level of judicial autonomy is to increase or to decrease depends on the ability of the court to pass two competence tests (Fu and Cullen 2012). The first one is a judicial effectiveness test. PLC intervention is more likely to occur when the court's effectiveness is in doubt. As it happens, a final legal decision does not bring an end to the dispute and parties, after going through the adjudicative process, continue to petition non-judicial organs. Petition has become the defining characteristics of the Chinese judicial landscape and to an embarrassment to courts, for a substantial part of the petitioners' cases are made against a court decision. The inability to bring a dispute to an effective end has been an on-going difficulty for courts, and is regarded as a judicial failure with significant political implications. Thus, when the formal judicial process is regarded to have failed to contain and result in social conflict, the PLC intervenes and pushes the court toward mediation and informal settlement (Fu and Cullen 2012; Minzner 2011).

The second one is a judicial integrity test. Judicial autonomy is not possible if judges are perceived as biased or simply crooks. Corruption undermines well-designed reform programs, destroys confidence in the judicial process and invites political control. Judicial corruption is well exposed in China although there is no evidence to show corruption is worse in courts than other sectors (Li, L 2010). Because of the nature of judicial work and the large number of cases that come in and out of the courts, corruption is more visible in courts and attracts more political attention. The higher the perceived corruption in courts, the more intense will be the political control, and the less autonomous the court becomes.

CONCLUSION

The court is a marginal institution in China's political system and the CCP controls the judiciary effectively through the PLC. The Chinese Constitution does not admit the separation of powers doctrine and instead, it subjects the court to enhanced legislative scrutiny. Under these political circumstances, it is unlikely that China will develop a robust judiciary which will then play a meaningful role in limiting state power. In that sense, judiciary independence, however defined, is unlikely to grow robust in an authoritarian setting.

But political control and a resulting judicial compliance and subservience are not the only story of the past 30 years in China. The political and economic changes in China have generated demands for the rule of law to supply political legitimacy, promote economic development and improve social governance. Within the CCP, there has been a reformist tradition which advocates a functional separation between the CCP and the legal institutions, an enhanced role of law and an expansive institutional autonomy of the courts. When the reformist tradition gains political strength and becomes influential, it brings about institutional innovations and creates more breathing space for the legal system to grow.

The relationship between the CCP and the court is thus a dynamic one. While the CCP has the absolute power, it has to refrain itself from intruding into the daily operation of the court and leave judges alone to handle the business of judging. The CCP has its own objectives and repeatedly reminds the court of keeping the CCP's interest the priority in adjudication, but judges have to follow legal rules, procedures

and their own professional standard in handling individual cases. The PLC may narrow the application of legal rules and the court's jurisdiction by forcing judges to settle cases through court-mediation; reorient judges from legal procedures toward the substantive goals beyond those procedures; or render police-friendly decisions in controversial cases. But for the vast majority of cases, the CCP has to be content to leave adjudication to judges.

For judges, a degree of judicial autonomy, narrowly defined, is consistent with the CCP leadership. After all, the vast majority of them are CCP members who take it for granted that the CCP leads. Judicial socialization has taught judges that the enemies of judicial autonomy are numerous, and the CCP may not be the worst one. On the contrary, autonomy can be achieved in the Chinese context only when there is sufficient political support from the CCP and the CCP can rule in a way that can facilitate judicial professionalism and autonomy. But that would necessitate a limitation of the PLC powers on judicial operation and push the PLC back to its original advisory and policy role.

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