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# The Supreme People's Court of the People's Republic of China

SUSAN FINDER\*

The Supreme People's Court ("the Court") of the People's Republic of China ("PRC" or "China") is a distinctive institution, influenced by China's legal tradition, Soviet Stalin-era legal doctrines, and the twists and turns of the history of China. As this article explains, it has played an increasingly important role in the Chinese legal system since 1979. Although the Court has become less secretive than before, its workings still remain largely unknown to the foreign or Chinese public.

This article will examine the status and functions of the Court, in law and in practice, with a view to understanding its current and future role in the Chinese legal system. First, a brief history of the Court as a central state organ will be given. The second section of this article examines the status of the Court, including its relationship with the Communist Party, National People's Congress, and governmental organs, as well as its internal structure. The third section focuses on the functions of the Court and the way in which it conducts its work. The Court is involved in interpreting law, adjudicating, legislating, as well as administering the judiciary. Because legislation merely sketches a few broad principles for the operation of the Court, the article describes established, but often unwritten practices, generally unknown to the Chinese or Western public. These practices are crucial to understanding the workings of the Court. A theme running throughout the article is that the recent economic and social reforms have profoundly affected the Court.

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\* Lecturer, Department of Law, City Polytechnic of Hong Kong. The author is solely responsible for the views in this article. She wishes to express her gratitude to those persons who shared their insights with her. All translations have been done by the author.

## I. A BRIEF HISTORY OF THE COURT

Some historical background is necessary for understanding the current Court. For most of their history, judicial courts have been regarded an important instrument of the (Party's) people's democratic dictatorship, as an instrument of oppression of the enemy class.<sup>1</sup> For the first thirty years of the People's Republic, the work of the Court was focused on criminal policy. Political qualifications were more important than knowledge of law for appointment to the Court. Its methods of operation differed little from other central organs.

The Court began operations in November, 1950. Of the 17 members of the initial leadership, at least four had no legal background. Rather, most of the staff that was recruited were military officers.<sup>2</sup> In 1951, temporary regulations on the court system were promulgated,<sup>3</sup> and in 1954, the Organizational Law on the People's Courts was promulgated.<sup>4</sup> Both the temporary regulations and the Organizational Law provided that the court system should be administered by the Ministry of Justice and its subordinate organs. At one time the Court and Ministry shared a Party organization.<sup>5</sup> The focus of the work of the Court was criminal policy, which meant that the Court relied heavily on Party policy in its work.<sup>6</sup> Not until the 1980's did the Court disclose its activities to the public on a regular basis.

From 1959 until 1978, the Court and its staff suffered repeatedly. During the anti-rightist movement, much of the Court's staff was removed.<sup>7</sup> With the implementation of more pragmatic policies in the early 1960's, the situation eased for the Court for several years. Some of the current Vice Presidents began their service with the Court at that

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1. Xiong Xianjue, *Zhongguo Sifa Zhidu* [China's Judicial System] 113-14 (1986).

2. *Fayuan Nianjian 1988* [1988 Yearbook of the People's Courts] 10 (1992) [hereinafter 1988 Court Yearbook].

3. *Zhonghua Renmin Gongheguo Renmin Fayuan Zanzing Zuzhi Tiaoli* [Temporary Organizational Regulations of the People's Courts], Sept. 3, 1951, in *Zhonghua Renmin Gongheguo Zuzhi Fagui Xuanbian* [Selected Organizational Laws and Regulations of the People's Republic of China] 79-86 (1985).

4. *Zhonghua Renmin Gongheguo Renmin Fayuan Zuzhi Fa* [Organization Law of the People's Courts of the People's Republic of China], *id.* at 87-95.

5. Hu Jianhua and Li Hancheng, *Tan Fayuan Sifa Xingzheng Gongzuo de Zixing Guali* [A Discussion of Administration of the Judiciary by the Courts Themselves], in *12 Renmin Sifa* 33 (1992).

6. *Zhongguo Fazhi Sishi Nian* [Forty Years of the Chinese Legal System] 115-16 (Zhao Zhenjiang ed. 1990).

7. 1988 Court Yearbook, *supra* note 2, at 11.

time.<sup>8</sup> During the Cultural Revolution, most Court staff was sent down to the countryside. The People's Liberation Army occupied the Court from 1968 to July, 1973. Court personnel returned gradually from the countryside, beginning in 1972.<sup>9</sup>

Changes in the Court came with the Party's 1978 decision to focus on economic reform and establish a socialist legal system. In 1979, the National People's Congress passed seven laws, including the Organizational Law of the People's Court, the Criminal Law and Criminal Procedure. The Organizational Law, which currently governs the Court's operations, is a modified version of the 1954 Law. That year marked the beginning of the Court's focus on technical legal issues. The current Constitution, adopted in 1982, gave the Court greater status than it had enjoyed under either the 1975 or 1978 Constitutions.

The force that changed the Court is the economic reforms. In the early days of the reform period, the 1981 Contract Law and 1982 Civil Procedure Law were promulgated. In 1984, the Central Committee of the Communist Party issued its Decision on Reform of the Economic Structure.<sup>10</sup> This decision formed the policy basis for expanding enterprise autonomy and private enterprise, as well as the drafting and promulgation of legislation on commercial matters. Party policy ever since has stressed the importance of law for economic development. Recent years have seen an outpouring of economic legislation. With the economic and social changes in China has come a great increase in civil (and commercial) litigation. As is explored in the latter part of this article, since 1984, the work of the Court has increasingly involved civil and commercial law.

## II. THE STATUS OF THE COURT

### A. *The Highest Judicial (Adjudication) Organ of the State*

The 1982 Constitution and the 1979 Organizational Law of the People's Courts (amended in 1983) provide the current legislative

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8. They include three of the five vice presidents of the Court: Ma Yuan, Zhu Mingshan, and Lin Huai (who began work in the Court in 1959. Lin has recently stepped down as a vice president). 1988 Court Yearbook, *supra* note 2, at 26.

9. 1988 Court Yearbook, *supra* note 2, at 11.

10. Decision of the Central Committee of the Communist Party of China on Reform of the Economic Structure, reprinted and translated in Foreign Broadcast Information Service Daily Report—China (FBIS), Oct. 22, 1984, at K-1.

framework for the Court. Both are revised versions of 1954 legislation, which in turn are based on Stalin-era Soviet legislation. As both the Constitution and Organizational Law of the People's Courts state,<sup>11</sup> the Court is the highest judicial *organ* of the state, not the highest *court* of the state. Defining the Court as the highest judicial *organ* implies that it is the specialized organ responsible for the coercive adjudication or judicial power of the state. Like the ministries and commissions whose fenced compounds dot the Beijing landscape, it is an organ with a mission, charged with the important task of administering justice. In doing so, it exercises the adjudicatory aspect of the state's unified power.

Under current law, the Court is not one of three co-equal branches in a system based on the concept of separation of powers. It is not independent of other government or political organs and its status and personnel are similar to that of other central government organs and their cadres. However, some changes are underway.

#### *B. The Court and the Communist Party*

As in the traditional Chinese legal system, the Court is not independent of the political leadership. Although the Chinese Constitution and law provide that the "people's courts exercise judicial power independently, in accordance with the provisions of the law, and are not subject to any interference by any administrative organ, public organization or individual,"<sup>12</sup> the preamble to the Constitution emphasizes that the Communist Party of China leads the country in improving the socialist legal system. As the Court is a part of the socialist legal system, it is led by the Communist Party. In fact, like all other state institutions, the Court has a Party organization.<sup>13</sup> It is subordinated to the Central Committee of the Communist Party. The Central Committee has its own bureaucracy to administer Party affairs, the primary organizations among which are the General Office, Organizational Department, Propaganda Department, United Front

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11. Zhonghua Renmin Gongheguo Xianfa [The People's Republic of China Constitution] art. 123 [hereinafter Const.]; Zhonghua Renmin Gongheguo Renmin Fayuan Zuzhi Fa [Organizational Law of the People's Court] art. 1 [hereinafter Organizational Law of the People's Court]. For an English translation, see 2 *The Laws of the People's Republic of China* 39 (1983-86).

12. Const. art. 126; Organizational Law of the People's Courts, art. 4.

13. See 1988 Court Yearbook, *supra* note 2, at 3, in which six members of the Court Party organization in 1988 are depicted.

Department, Political-Legal Committee, and Disciplinary Committee. Of all these organizations, the Court has the most frequent contact with the Central Political-Legal Committee. In effect, that committee supervises the Court and other central legal institutions and sets nationwide legal policy. It leads the Party political-legal committees of various levels of government.

The Court's Party organization is subject to leadership by the Communist Party organization at the central level because the principle of "dual leadership" (*shuang chong lingdao*) operates in the courts.<sup>14</sup> Chinese politics defines "dual leadership" as the "leadership of the local Communist Party Committee and government in matters of organization and personnel, leadership of the hierarchical central organ and hierarchical superiors in substantive matters."<sup>15</sup> Most Party and state organs operate under this principle. The current Party Constitution provides that the Party leadership is primarily concerned with organization, ideology, and policy.<sup>16</sup>

The term "organization" in Communist Party parlance means personnel. The Central Political-Legal Committee, in coordination with the Party's Organizational Department, monitors the personnel of central legal institutions, including the Court. The Committee is more concerned with the leadership of the Court than with ordinary judges, but all are vetted by the Central Committee's Organizational Department before their nominations are placed before the Standing Committee of the National People's Congress ("NPC"), as required by the constitutionally stipulated appointment procedure. Because of the political sensitivity of the work, virtually all judges selected to the Court are Party members.<sup>17</sup>

With respect to ideology, the Central Political-Legal Committee guides the political consciousness of personnel in legal institutions. Judges on the Court and those on other courts are subject to ideological education in the form of regular political study and Party meetings that convey current Party policy.

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14. Gaige Ganbu Tizhi, Jiaqiang Guanli Gongzuo, Baozheng Renmin Fayuan Yifa Duli Shenpan [Reform the Cadre System, Strengthen Administration, Ensure the Courts Adjudicate Independently According to Law], in 9 Renmin Sifa 16-17 (1990) [hereinafter Gaige Ganbu Tizhi].

15. Zhongguo Zhengzhi Zhidu Cidian [Chinese Political System Dictionary] 655 (1990).

16. Zhongguo Gongchandang Dangcheng [Chinese Communist Party Constitution], revised Oct. 18, 1992, reprinted in Shenzhen Shang Bao, Oct. 22, 1992, at 1.

17. See the discussion on the judge selection process *infra* text accompanying notes 43-44.

Most importantly, the Communist Party exercises policy leadership regarding the courts and other legal institutions through the Central Political-Legal Committee, which is responsible for setting legal policy. The Committee's initiatives are most visible in the area of anti-crime offensives. In January, 1989, for example, the Committee announced a two-year initiative to attack serious economic and violent crimes.<sup>18</sup> When a Party policy initiative requires complementary implementation in the court system, the Court must implement those policies. In October, 1989, for example, the Central Committee announced a "six evils campaign" to eliminate prostitution, obscene publications, selling of women and children, consumption and sale of drugs, gambling, and the use of superstitions to defraud. In November of that year, the Court issued a notice to direct the lower courts to coordinate their judicial work with the "six evils" work of the public security organs.<sup>19</sup>

Members of the Political-Legal Committee of the Central Committee of the Chinese Communist Party include the heads of the Court, Supreme People's Procuratorate, Ministry of Public Security, Ministry of State Security, Ministry of Justice, Deputy Director of the Political Department of the People's Liberation Army.<sup>20</sup> The President of the Court, Ren Jianxin, is also the Secretary of the Committee, a position which places him in charge of major policy initiatives. He is also Secretary of the Secretariat of the General Office of the Central Committee, and Secretary of the Central Committee for the Comprehensive Management of Social Order, a Party/Government/Army Committee.<sup>21</sup> His enhanced status indicates the greater importance of professional competence in the formulation of Party policy.

The Central Political-Legal Committee has a permanent professional staff. It is not the only Party organization that issues policy

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18. 1990 Zhongguo Falu Nianjian [1990 Law Year Book of China] 1015 (1990) [hereinafter Law Year Book of China].

19. Zuigao Renmin Fayuan, Guanyu Peihe Gongan Jiguan Kaizhan Chu "Liu hai" Gongzuo de Tongzhi [Notice of the Supreme People's Court Concerning Cooperation With the Public Security Organs in Work Initiated by the Public Security Organs for the Elimination of the "Six Evils"], Zhonghua Renmin Gonghe Guo Zuigao Renmin Fayuan Gongbao [Gazette of the Supreme People's Court of the People's Republic of China], No. 4, 1989, at 17 [hereinafter Zuigao Renmin Fayuan Gongbao].

20. Zhongyang Zhengfa Bumen Ji Youguan Fuze Ren Mingdan [List of the Responsible Persons of the Central Political-Legal and Related Departments], in 1993 Law Year Book of China 1019 (1993).

21. *Id.* at 1020.

guidance to the Court. The Central Committee and General Office also issue policy guidance to the Party organization of the Court.

Since the establishment of the People's Republic, the public security organs, procuratorate, and the courts (often abbreviated as *gongjianfa*) have been called the political-legal organs, and have been led in their work by the Party's political-legal committee. The subsidiary importance of the courts was indicated by its final placement in that phrase. In the past, the secretary of the Central Political-Legal Committee had often been the head of the Ministry of Public Security or a member of the Political Bureau solely responsible for security work. For much of the Court's history, serving the Party center and strictly enforcing Party policy were the basic principles of court work. For example, when Jiang Hua became Court president in 1975, at the tail end of the Cultural Revolution, Party leaders told him that what was important was that he had a good grasp of Party policy.<sup>22</sup>

The working relationship between Communist Party organs and the Court has changed over the last thirteen years, not because of any structural changes but rather because of changes in the nature of the Court's work. Officials of the Central Committee are neither interested nor have the background to involve themselves in issues of civil procedure or contract law, and the Party has become less involved in the technical legal issues regarding criminal and criminal procedure law. Consequently, much of the Court's work is performed without the direct involvement of Party organs. It can be assumed, however, that the Court seeks the advice of the Central Committee staff regarding politically sensitive interpretations of the criminal law. Of course, the overall direction of the Court's work is guided by Party policy.

In the past thirteen years, the Committee and other central organs of the Communist Party have issued documents which the judiciary considers to be normative. The internal handbook for judges, for example, includes a Central Political-Legal Committee interpretation of the terms "returned overseas Chinese" and "relatives of overseas Chinese,"<sup>23</sup> as well as guidelines approved by the Central Committee

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22. Jiang Hua, *Jiang Hua Sifa Wenji* [Collected Works of Jiang Hua on Justice] 1 (1989).

23. Zhonggong Zhongyang Zhengfa Weiyuanhui Guanyu Guiguo Huaqiao he Qiaojuan Zhong de Fanwei de Jieshi [Central Political-Legal Committee Interpretation Concerning the Scope of Returned Overseas Chinese and Families of Overseas Chinese], in 3 *Sifa Shouce* 139 [Judicial Handbook] (1987). Some provisions of this document have been incorporated into the 1990 Law on the Protection of the Interests of Returned Overseas Chinese and Relatives of Overseas Chinese, 3 *Laws and Regulations of the People's Republic of China Governing Foreign-Related*



on the handling of foreign-related criminal cases.<sup>24</sup> In recent years, however, the Central Political-Legal Committee has issued fewer normative documents. Instead, the Committee's policy decisions are incorporated into provisions issued by legal institutions such as the Standing Committee of the NPC, the Court, and the Supreme People's Procuratorate.

The Court clears important policy initiatives with the Party leadership before implementation. As this article discusses later, the Central Committee approved an experiment in personnel reform in the courts initiated by the Court.<sup>25</sup>

While the Court is not independent of the Communist Party, in practice, an increasing number of activities do not involve the Party directly. Party organs are not involved in most quasi-legislation issued by the Court. Party organs are not generally involved in the review of cases considered by the Court.

### C. *The Court and Governmental Organs*

#### 1. The Court and the National People's Congress

The Court is also not independent of the National People's Congress (NPC) and its Standing Committee, in either theory or practice. Article 128 of the Constitution and article 17 of the Court Organizational Law provide that the Court "is responsible to and reports on its work" to the NPC and its Standing Committee. Article 67 provides that the NPC Standing Committee "supervises" the Court. Substantive law requires the President of the Supreme People's Court to deliver a report on the court system to the NPC annual session,<sup>26</sup> but

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Matters 1945 (1991).

24. Zhonggong Zhongyang Bangongting Zhuan Fa Zuigao Renmin Fayuan Deng Wu Dangzu "Guanyu Gaibian Chuli Shewai Xingshi Anjian Shenpi Banfa de Qingshi Baogao" [General Office of the Central Committee of the Communist Party Transmitting to the Party Committee of the Supreme People's Court and Five Other Party Committees the "Report Requesting Instructions Concerning Changing the Method of Approval of Foreign-Related Criminal Cases], in 2 Sifa Shouce 680 (1983). This document was later reprinted in the openly distributed book Xingfa Xingshi Susongfa Sifa Jieshi [Interpretations of Criminal Law and Criminal Procedure Law] 440-44 (1991) [hereinafter Xinfu Jieshi].

25. Gaige Ganbu Tizhi, *supra* note 14.

26. Quanguo Renmin Daibiao Dahui Yishi Guize [Rules of Procedure of the National People's Congress, art. 30], Apr. 4, 1989, in Zhonghua Renmin Gongheguo Falu Quanshu 25 (1989) [hereinafter Falu Quanshu].

does not define "supervision." There is academic debate over whether people's congresses may legally inquire into court handling of cases.<sup>27</sup> In practice, people's congresses at all levels regularly "inquire into" court adjudication.<sup>28</sup>

Actually, the NPC supervises the Court in two ways. The first way is similar to the American practice of referring constituent letters from Congressional offices to the federal bureaucracy. The NPC Standing Committee has a permanent letters-and-visits office which receives hundreds of letters and handles petitioners' visits every day. If a letter or visit raises a problem involving the courts, the matter is referred to the Court's General Office. The General Office refers the matters to the appropriate division.

Secondly, the NPC supervises the Court when NPC representatives submit a proposal to the Court concerning a case. The case is usually one that has been controversial in the representative's district. Twenty to thirty such proposals are submitted annually. The Court has special procedures for dealing with them. A reply to a proposal is required within three months. The case queried is reviewed, usually by transferring the file to Beijing. After review, the Court issues a report to the NPC representative.<sup>29</sup>

In addition, the two cooperate in that the Court frequently participates in the drafting of legislation prepared by the Legislative Affairs Commission of the Standing Committee of the NPC, and in turn may solicit the opinion of the Legislative Affairs Commission staff regarding certain judicial interpretations.<sup>30</sup>

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27. See, e.g., Zheng Zhonghua, Renda Changweihui Dui Sifa Jiguan Jiandu Chuyi [My Humble Opinion Concerning the Supervision of Judicial Organs by the Standing Committee of People's Congresses], in 5 *Xiandai Faxue* 51, 51-53 (1990); Cao Guanxiang and Jiang Weizhong, Quanli Jiguan de Sifa Jiandu Ke Sheji Juti Anjian [Judicial Supervision by Organs of Power can Relate to Actual Cases], in 8 *Faxue* 8, 8-10 (1990).

28. Cao and Jiang, *supra* note 27; interviews with present and former staff members of legislative affairs committees of provincial and municipal people's congresses (1993).

29. Interview with Court official. He commented that the Court finds that a minority of these proposals have merit. In most cases the representative, who usually does not know much about law, believes what one litigant has told him.

30. See *infra* section III.C. for a discussion on the Court's involvement with the legislative process.

## 2. The Court and Administrative Organs

The relationship between the Court and administrative organs is important but scarcely mentioned in either the Constitution or law. A sense of a cooperative relationship between the Court, the Ministry of Public Security, and the Supreme People's Procuratorate (that latter is classified as a judicial organ) can be inferred from article 135 of the Constitution and article 5 of the Criminal Procedure Law, which provide that: "the people's courts, the people's procuratorates, and the public security organs shall, in handling criminal cases, divide their functions, each taking responsibility for its own work, and they shall coordinate their efforts and check each other."<sup>31</sup> Due to the complexities of the relationship between the State Council and its departments and the Court, these relationships will not be discussed separately but rather in the context of examining the status and functioning of the Court.

## 3. The Court as a Special Central Organ

Under current law, the Court is treated like other central state and Party organs in many aspects. As a result, its rank, financing, staffing, recruitment and disciplinary provisions are analogous to that of other organs. The Court and its judges, as well as the lower courts and their judges are each assigned a bureaucratic rank. All Party, governmental, and state-owned corporate units in China have such ranks. The ranking system, derived from the traditional Chinese political and legal system,<sup>32</sup> is divided into thirty levels, enabling state and party entities and their personnel to appraise their status in relation to other units. Rank structures the way a unit and its officials are viewed, its relation to other units, and reflects and plays a part in determining its prestige.<sup>33</sup>

Although the Constitution gives the Court a status equivalent to the State Council, the Court nevertheless is ranked one level below the State Council. The President of the Court has a bureaucratic rank equivalent to a vice premier.<sup>34</sup> A Vice President of the Court has a rank equivalent to that of a deputy minister, while the head of a Division

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31. Const. art. 135.

32. Derk Bodde & Clarence Morris, *Law in Imperial China* 113-16 (1971).

33. See K. Lieberthal and M. Oksenberg, *Policy Making in China* 142-50 (1988).

34. See *Zhonghua Renmin Gongheguo Renshi Zhidu Gaiyao* [Introduction to the Personnel System of the People's Republic of China] 269, 276 (Cao Zhi ed., 1985).

holds the rank of the head of a Bureau. Ordinary judges of the Court hold ranks which are the equivalent of deputy bureau head to division head.<sup>35</sup> The salaries and fringe benefits that Court judges receive are in accordance with their bureaucratic ranks. The impact of the economic reforms has meant that the salaries and fringe benefits of officials of large state-owned corporations and business-related state organs exceed those of judges on the Court.

Because the Constitution provides that the State Council and its ministries are responsible for the financing of state organs,<sup>36</sup> like all central government organs, the Court is funded by the Ministry of Finance.<sup>37</sup> Similarly, the lower courts are funded by the finance departments of the corresponding level of government. Decisions concerning capital expenditures by the judiciary are also subject to the approval of the State Council and its departments.<sup>38</sup>

As with other administrative organs, the State Council decides on the Court's staffing levels (known as *bianzhi*).<sup>39</sup> The State Council bases this on a section of the Constitution which authorizes it to control the size of administrative organs.<sup>40</sup> The State Organ Staffing Commission,<sup>41</sup> an office under the State Council controls the staffing levels of the Court. Recent writings in the Court's journal advocate that the Court itself should control staffing levels of the judiciary.<sup>42</sup>

Under current law, recruitment of Court personnel is similar to that of other officials. Although legal training for judges is not required by the Organizational Law, currently, most Court judges have legal

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35. *Id.*

36. 1982 Const. art. 89 (6).

37. The lower courts have additional income from court fees, which in commercial civil cases are assessed as a proportion of the amount in controversy. Because it hears very few cases, the Court lacks this important source of funding. This in turn affects the fringe benefits available to the Court staff.

38. Zuigao Renmin Fayuan, Guanyu Shenpan Fating Jianshe Wenti de Tongzhi, [Notice Concerning the Question of the Construction of Courtrooms], in 6 Sifa Shouce 761 (1990).

39. Guojia Jigou Bianzhi Weiyuanhui Gongzuo Guize (Shixing) [Rules of the State Organ Staffing Commission (for Trial Implementation), art. 5], June 23, 1988, in Zhongguo Zhengfu Jigou 1990 [Organs of the Chinese Government 1990] 6 (1990).

40. Const. art. 89 (17).

41. The Commission is an organ of the State Council which oversees and coordinates the reform and management of administrative organs. Its premises are located in the Ministry of Personnel, but its hierarchical status is greater than that of the Ministry, as is indicated by the fact that the Premier, Li Peng, heads the Commission. Zhongguo Zhengfu Jigou, *supra* note 39, at 316.

42. See, e.g., Hu & Li, *supra* note 5, at 34.

training. This was not true for most of the history of the Court. Under the present system, law school graduates with superior credentials are assigned (*fenpei*) directly to the Court.<sup>43</sup> Similarly, law graduates may be assigned to work in state organs such as the Ministry of Justice, Supreme People's Procuratorate, Ministry of Public Security, or state-owned corporations. One leading Beijing law school graduate commented that he and his classmates were reluctant to be assigned to the Court, and labelled it a "clear water yamen" for the low salary, meager fringe benefits, shabby housing, and rigid internal discipline. In practice, graduates from the prosperous coastal regions are reluctant to accept employment in the Court. After several years, recent graduates are generally promoted to be judges, and as a formal matter, their appointment is made by the NPC's Standing Committee. Like senior administrative personnel, outstanding judges in lower courts or other prominent legal specialists may be transferred (*diaodong*) to the Court. As when officials are transferred into other central Party and government organs, the appointment must be vetted by the Communist Party's Organizational Department. The difference is that when judicial appointments are made, the formality of approval by the NPC's Standing Committee is necessary. Drafters of the Judges' Regulations are considering changing the system of appointment to the Court to one based on years of service in the lower courts.<sup>44</sup>

At present, the Court's judges have no greater security in office than any other government official, unlike judges in many other national supreme courts. The Constitution stipulates a limit of two continuous five year terms for the President of the Court.<sup>45</sup> Other high government positions have a similar limitation. Similarly, the President of the Court may be removed from office at any time. Neither the Constitution nor Organizational Law of the People's Court fixes a term of service for other judges of the Court. They, too, have the tenure in office of any other government official. The Court's President mentioned in his 1993 report that the Court has begun preparatory work for revising the Organizational Law of the People's Courts. It is possible that in the

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43. The Court informs the State Education Commission of the number of graduates it needs. The Commission distributes these places among the law schools.

44. Interviews with judges of various levels (1992-93). See *infra* text accompanying note 48.

45. Const. art. 124.

context of that revision, the question of extended tenure for judges may be addressed.<sup>46</sup>

Various personnel policies of the Court are common to other central Party and state organs. For example, similar to other organs, the Court has a policy of "sending younger officials down to the grassroots for experience." The policy involves sending cadres (officials) working in central or high level provincial posts to the local level for a limited time (while retaining their position and salary at the higher level). Graduates from law schools assigned to the Court as clerks are generally required to work for two years in a basic level and in an intermediate court to give them experience "at the grassroots level," while their positions on the Court are retained.<sup>47</sup>

As with other central organs, administrative practice refers to judges and other Court administrative personnel as *fayuan ganbu* (court cadres), cadres being the general term for official. Under current law, judges are called *shenpanyuan* (adjudication personnel) a term consistently used under Communist rule before and after 1949 because it was considered to be more revolutionary. Currently, official titles given to judges are in a period of transition. Symptomatic of the confused designation of titles of judges, in referring to judges in his 1993 report to the NPC, the President of the Court spoke of both "raising the professional quality of [court] cadres" as well as the drafting of the "Judges' [*Faguan*] Regulations of the People's Republic of China."<sup>48</sup>

Under current law, Court officials are treated similarly to other officials in their relations with interested parties. If a case is being considered by the Court, there are few bars on the advocates for the parties from having contact with the judges hearing the cases outside of the courtroom. The practice is tolerated because it is assumed that since the judicial recruitment process has sought those with good political and

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46. It seems there is support within the Court for long-term judicial tenure, either for life tenure or until retirement. Interview with Court officials.

47. Interviews with judges of various levels (1992).

48. Ren Jianxin, *Zuigao Renmin Fayuan Gongzuo Baogao* [Work Report of the Supreme People's Court], *Renmin Ribao*, April 6, 1993, at 2. The title of this legislation has shifted with the political winds. The 1991 Report of the President of the Court to the NPC referred to the legislation as "*Shenpanyuan Tiaoli*" (literally, adjudication personnel regulations). Ren Jianxin, *Zuigao Renmin Fayuan Gongzuo Baogao*, reprinted in *Zuigao Fayuan Gongbao*, No. 2, 1991, at 42, 48. It is said that the future Judges' Regulations will establish three ranks of Court justices (*Dafaguan*). Prior to 1949 (and now in Taiwan), judges were referred to as *Faguan* (law official).

professional qualifications, the judges are necessarily of high moral character who will not succumb to temptation. Furthermore, judicial decision-making can only be enhanced by openness, rather than a "Chinese wall," among the judiciary, litigants, their representatives, and others with an interest in the case.

This relationship may change in the future. The Court is aware of abuses in the judiciary, especially corruption that inevitably comes with the easy access of litigants and lawyers to judges. This is tied in part to past and current civil procedure laws, which permit a judge to investigate, or "discover" evidence. Though current law stresses the litigants' responsibility to provide evidence, judges may still investigate.<sup>49</sup> If court investigation is abolished, a code of ethics forbidding open access to the judiciary will be possible. Any such future reforms would be difficult to implement, however, in view of established patterns of behavior.

On the other hand, disciplinary provisions for Court judges are similar to those of other central government officials. Such provisions are regarded as an internal personnel matter and are not set forth in a publicly accessible code of judicial conduct. Like other central government officials, Court judges are bound by Party discipline and regulations for state officials.

Disciplinary regulations binding the judiciary are collected in a 1991 internal handbook edited by the Court.<sup>50</sup> Regulations of the State Council regulating conduct of state officials are applicable to the judiciary. The handbook thus includes not only the Court's own regulations, but also the State Council's 1988 "Regulations prohibiting state administrative organs and their personnel from giving or receiving gifts in the course of domestic public activities,"<sup>51</sup> and other State Council notices on improper official activities, as well as regulations of the Party Discipline Committee such as the 1988 "Temporary Regulations on the punishment of Party members for violating Party

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49. PRC Civil Procedure Law, art. 54, translated in *China L. & PRAC.*, June 17, 1991, at 15-61.

50. *Jijian Jiancha Gongzuo Shouce* [Discipline and Supervision Handbook] (1991).

51. *Guojia Xingzheng Jiguan Ji Qi Gongzuo Renyuan Zai Guonei Gongwu Huodong Zhong Bu Dei Zengsong he Jieshou Lipin de Guiding* [Regulations Prohibiting State Administration Organs and Their Personnel From Giving or Receiving Gifts in the Course of Domestic Public Activities], *id.* at 233. This regulation does not define "state administrative organs."

discipline in foreign-related activities.”<sup>52</sup> In 1986, the Court and the Labor and Personnel Ministry (as it was then known) issued internal regulations on judicial conduct which are apparently a modified version of personnel regulations for other government cadres.<sup>53</sup> In addition to prohibiting bribe taking and abuse of authority, the measures sanction those who “disobey decisions or orders of higher levels.”<sup>54</sup>

Whether these disciplinary regulations are issued by the State Council, Party Disciplinary Commission, or the Court itself, they are enforced by the same institution. In 1989, in response to the Party’s push for “clean government,” the Court established a supervision office and issued regulations to both the specialized courts and higher people’s courts that required them to establish supervision offices, noting that “at each level of the courts, the supervision organ and the discipline group of the Party Committee should be ‘one team, two nameplates.’”<sup>55</sup>

Some changes in the status of Court judges may occur in the next few years, because the Court is preparing to submit to the NPC a draft law on the status of judges.<sup>56</sup> It is likely that the law will make changes in judicial titles and recruitment. If new regulations for administrative officials are any guide, it is likely that the judges’ law will include provisions on ethics and discipline.<sup>57</sup> The current system of State Council control of staffing levels has also been criticized within the judiciary, but legislative changes appear to be more distant.

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52. Gongchandangyuan Zai Shewai Hudong Zhong Weifan Jilu Dangji Chufen de Zaxing Guiding [Temporary Regulations on the Punishment of Party Members for Violating Party Discipline in Foreign-Related Activities], *Jijian Jiancha Gongzuo Shouce*, supra note 50, at 153.

53. Renmin Fayuan Jiangcheng Zaxing Banfa [Temporary Measures for Rewards and Punishments of the People’s Courts], Dec. 18, 1986, *Jijian Jiancha Gongzuo Shouce*, supra note 50, at 216. In the following year, the Court issued a notice setting forth for court personnel the “Eight Forbiddens.” *Zuigao Renmin Fayuan, Guanyu Yanming Jilu de Tongzhi* [Concerning Strict and Clear Discipline], July 11, 1987, id. at 225.

54. *Jijian Jiancha Gongzuo Shouce*, supra note 50, at 219.

55. *Zuigao Renmin Fayuan, Guanyu Yinfa “Guanyu Jianli Fayuan Xitong Jiancha Jigou Ruogan Wenti de Zaxing Guiding de Tongzhi”* [Supreme People’s Court, Concerning the Distribution of ‘Notice Concerning Temporary Regulations Regarding Some Issues in the Establishment of Supervision Organs Within the Court System’], Aug. 15, 1989, id. at 205. The head of the Court supervision office is Xiang Hua, a member of the Court Party organization, whose background is in Party and personnel affairs. 1988 Court Yearbook, supra note 2, at 25-26.

56. *Zuigao Renmin Fayuan Gongzuo Baogao*, supra note 48, at 2.

57. See, e.g., *Guojia Gongwuyuan Zaxing Tiaoli* [Temporary Regulations on Civil Servants], *Shenzhen Tequ Bao* [Shenzhen Special Zone News], Aug. 19, 1993, at 4.



#### D. Internal Structure of the Court

The organization of the Court distinctly parallels that of other government organs. The Court is at the head of the court hierarchy, or “system” (*xitong*),<sup>58</sup> and refers to itself as such. The Chinese organizing concept of “system” refers to a vertical functional hierarchy such as a ministry and its subordinate bureaus and other lower level units and includes specialized offices within other government units which perform a similar function.<sup>59</sup> The court system includes the hierarchy of people’s courts, funded by local governments of various levels, as well as courts which are nested in other hierarchical systems. Below the Court is a three-tier system of people’s courts, consisting of Higher People’s Courts, Intermediate Courts, and Basic Level Courts. In addition, there are three separate specialized court systems: the Military, Railroad, and Maritime Courts. The Military Courts, for example, are part of the hierarchy of the General Political Department of the People’s Liberation Army,<sup>60</sup> while the Railroad Transportation Courts are attached to regional Railroad Bureaus, part of the Ministry of the Railroads.<sup>61</sup>

The Organizational Law gives the Court flexibility in organizing its internal structure. This has been true throughout the history of the

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58. See, e.g., references in the 1993 report of President Ren Jianxin to “Quanguo Fayuan Xitong,” *Zuigao Renmin Fayuan Gongzuo Baogao*, *supra* note 48, at 2; article on judicial training in *Fayuan Xitong Dingxiang Peiyang Yanjiusheng Biye Zuo-tanhui zai Jing Juxing* [Court System Holds a Conference in Beijing for Graduate Students Completing Training], in 2 *Renmin Sifa* 11 (1991).

59. On the concept of *xitong*, or system, see Lieberthal & Oksenberg, *supra* note 33, at 141.

60. See, e.g., *Zhongguo Renmin Jiefang Jun, Zongzhengzhi Bu, Guanyu Junshi Fayuan Sheli Shenpanting he Shenpanweiyuanhui de Tongzhi* [Chinese People’s Liberation Army, General Political Department, Notice Concerning the Establishment of Adjudicatory Divisions and Adjudication Committees], May 10, 1963, in *Zhonghua Renmin Gongheguo Falu Guifanxing Jieshi Jicheng* [Collection of Normative Interpretations of Law of the People’s Republic of China] 896 (1990) [hereinafter *Jieshi Jicheng*]. Funding and staffing of the civilian courts are controlled by local government, while that of the railroad and military courts are controlled by the Ministry of the Railroads and People’s Liberation Army, respectively.

61. *Zuigao Renmin Fayuan, Zuigao Renmin Jianchaoyuan, Gong’an Bu, Tiedao Bu, Guanyu Tielu Xitong Anjian de Daipu, Qisu, Shenpan Wenti de Tongzhi* [Supreme People’s Court, Supreme People’s Procuratorate, Ministry of Public Security, Ministry of the Railroads, Notice Concerning the Arrest, Prosecution, and Adjudication of Cases in the Railroad System], Dec. 6, 1979, in *Jieshi Jicheng*, *id.* at 750. The funding and personnel appointments in the maritime courts are more complex. The Ministry of Communications funds and controls personnel appointments of some maritime courts, while local government does so in others. Interview with a maritime court judge (1992).

Court. The Organizational Law of the People's Courts is vague about its internal structure, stating only that the Court shall set up a Criminal Division, Civil Division, Economic Division, and such other [adjudicatory] divisions as are deemed necessary.<sup>62</sup> The Court has re-arranged its internal structure since 1979 to accommodate evolving legal needs. In 1987, the Court established both a Complaints and Petitions Division and Communications and Transport Division<sup>63</sup> and, in the following year, the Administrative Division.<sup>64</sup> Currently, the Court includes the following adjudicatory divisions (*shenpanting*): the No. 1 Criminal Division, the No. 2 Criminal Division, the Civil Division, the Economic Division, the Administrative Division, the Communications and Transport Division, and the Complaints and Petitions Division. While the latter three divisions have documents establishing their jurisdiction, there remains a jurisdictional conflict between the Civil and Economic Divisions. The Court's Research Office is also involved in substantive work.<sup>65</sup>

Furthermore, there are several administrative offices, including the General Office, Personnel Department, Judicial Administrative Department, Foreign Affairs Bureau, and Education Department.<sup>66</sup> The administrative apparatus of the Court has existed throughout its history although relevant law has never made relevant provision.

Relevant law is vague as to the staffing and duties of members of the Court. The Organizational Law merely states that there shall be a certain number of vice presidents, chief judges and associate chief judges of divisions, and judges.<sup>67</sup> The law specifies neither their

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62. Organizational Law of the People's Courts, art. 31.

63. As to the establishment of the Communications Divisions, see Zuigao Renmin Fayuan, Guanyu Zuigao Renmin Fayuan Jiaotong Yunshu Shenpanting de Zhize Fanwei he Qiyong Yinzhang de Tongzhi [Supreme People's Court, Notice Concerning Jurisdiction of the Communications and Transport Division and its Seal], in 4 Sifa Shouce 748 (1989). As to the establishment of the Complaints and Petitions Division, see Zuigao Renmin Fayuan, Guanyu Zuigao Renmin Fayuan Gaosu Shensu Shenpanting de Zhize Fanwei he Qiyong Yinzhang de Tongzhi [Supreme People's Court, Notice Concerning the Jurisdiction of the Complaints and Petitions Division and its Seal], *id.* at 744.

64. New Trial Court to Handle Administrative Cases, FBIS-China, Aug. 25, 1988, at 28.

65. See discussion *infra* section III.

66. 1988 Court Yearbook, *supra* note 2, at 14, also lists an Old Cadres Bureau, Departmental Affairs Management Bureau, as well as the Part-Time University, the Training Center for Senior Judges, and the People's Courts Press. For a discussion of the Part-Time University and the Training Center, see *infra* section III.D.4.

67. Organizational Law of the People's Courts, art. 31. The Chinese original states that there shall be *ruogan* (a few), a phrase not conveyed in the English translation.

functions nor the relationship between them. The relationship between judges, chief judges, and the vice presidents and presidents of the courts is strongly influenced by administrative practice.<sup>68</sup> Strangely enough, most publications of the Court are not forthcoming as to the number of its judges.<sup>69</sup> A 1988 Court publication suggests that there are over 120 judges on the Court, not including the 5 vice presidents and 16 chief and deputy chief judges of adjudicatory divisions.<sup>70</sup>

The Organizational Law of the People's Courts obliquely indicates that the Court may have assistant judges on its staff, since the relevant article states that "[p]eople's courts at all levels may, according to their needs be staffed with assistant judges," who are appointed by the courts themselves and with necessary approval, may exercise the function of a judge.<sup>71</sup> Interviews with Court staff reveal that there are approximately as many assistant judges as judges on the Court. Assistant judges are appointed by the Court itself and their nominations need not be approved by the NPC's Standing Committee.

Relevant law is also vague on the functions of the personnel of the Court. What is clear is that the leadership of the Court enjoys powers greater than those of ordinary judges. The Organizational Law provides for a judicial committee of the Court, whose members shall be nominated by the President of the Court and confirmed by the Standing Committee of the NPC. The President generally recommends the Court's Vice Presidents and chief judges of adjudicatory divisions to serve on the Judicial Committee.<sup>72</sup> The law merely says that the judicial committees are responsible for summarizing judicial experience, discussing large, important, and difficult cases and other questions relevant to judicial work and that such committees operate on the

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68. See discussion *infra* section III.

69. See, e.g., The General Office of the Supreme People's Court of the People's Republic of China: A Brief Introduction to the People's Courts of the People's Republic of China.

70. The five vice presidents are listed in the 1992 Law Year Book of China, *supra* note 20, at 904. Two vice presidents recently stepped down. Quanguo Renda Changweihui Renmian Mingdan [List of Appointments and Removals of the NPC Standing Committee], Fazhi Ribao [Legal System Daily], Sept. 3, 1993, at 1. Short interviews with the seven division heads are contained in Wen Shan and Tang Jing, Xin Chun Hua Xin: Zuigao Fayuan Ge Shenpaning Tingzhang Tan Jinnian Gongzuo Zhongdian [Each Division Head of the Supreme Court Discusses the Focal Points of This Year's Work], in 2 Renmin Sifa 8-9 (1993). As to the number of judges, see 1988 Court Yearbook, *supra* note 2, at 27-8.

71. Organizational Law of the People's Courts, art. 37.

72. A list of the 1988 members of the committee also includes the head of the Research Office and one of the deputy heads of the Economic Division. 1988 Court Yearbook, *supra* note 2, at 27.

principle of democratic centralism.<sup>73</sup> The working relationship between the Judicial Committee of the Court, chiefs of division, judges and assistant judges is explained later in this article.<sup>74</sup>

Although the Organizational Law only requires judges "to have an adequate knowledge of law,"<sup>75</sup> most judges serving on the Court have a specialized legal education. For most of the history of the Court, this was not true. As mentioned earlier, in the 1950's a large number of military officers were transferred to the Court. Beginning in the early 1980's, the Court started to recruit law graduates. Most of the old former military men have now retired. Thus there has been a substantial upgrading in the professional competence of the Court.

### III. FUNCTIONS OF THE COURT

The 1982 Constitution is vague about the functions of the Court, merely stating that it "supervises the administration of justice [adjudication work] of the people's courts at various local levels and by the special people's courts."<sup>76</sup> The 1979 Organizational Law of the People's Courts repeats this cryptic statement without elaboration.<sup>77</sup>

The term "supervision" (*jiandu*) is a term in Chinese politics and law which encompasses guiding, monitoring, criticizing, and making charges against, or exposures of a state organ or functionary and may come from the top down or bottom up.<sup>78</sup> It contrasts with the term "lead" (*lingdao*), which implies that the "leading" organ or functionary is empowered to give orders to subordinate personnel or organs which subordinates must obey. "Leadership" means that the leader has the authority to appoint subordinates to, and remove them from, office.

The Organizational Law, like its 1954 predecessor, clarifies somewhat the meaning of supervision by adding a few provisions on the Court's authority. It mentions that the Court is empowered to interpret law, hear cases both in the first instance and on appeal, engage in adjudication (trial) supervision, and review and approve death sentences. In practice, the Court also engages in legislation and acts as chief administrator of the court system.

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73. Organizational Law of the People's Courts, art. 11.

74. See discussion *infra* section III.

75. Organizational Law of the People's Courts, art. 34.

76. Const. art. 127.

77. Organizational Law of the People's Courts, art. 30.

78. Zhonghua Shiyong Faxue Da Cidian [Chinese Practical Law Dictionary] 1522 (1988).

This section analyzes the four main functions of the Court: interpretation of law, adjudication, legislation, and administration of the judiciary. While most of the functions of the Court are not unusual among national supreme courts, the way in which the Court exercises its functions is unique and is connected with the concept of "supervision." As legislation is virtually silent as to Court procedures, established practices of the Court will be described and analyzed.

### A. *Interpretation of Law*

The Court's most important function is to interpret law. Unlike many other legal systems, interpretation of law in the Chinese system is not reserved solely for the nation's judiciary. This has been true for most of the history of the People's Republic.<sup>79</sup>

The 1982 Constitution, like its 1954 predecessor, authorizes the legislature, the Standing Committee of the NPC to interpret national law.<sup>80</sup> In a 1981 Resolution which is still valid, the Standing Committee generously shared its authority with the State Council and its departments, Supreme People's Procuratorate,<sup>81</sup> and the Court. This Resolution is the revised version of its 1955 predecessor.<sup>82</sup>

The Standing Committee retained for itself the power to make interpretations in "cases where the limits of laws and decrees need to be further defined or additional stipulations need to be made."<sup>83</sup> It has rarely exercised that authority.<sup>84</sup> In both the 1955 and 1981

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79. For example, the 1949 Organic Law of the Central People's Government provided that the Committee of the Central People's Government could enact and interpret the laws of the state. A more detailed description of the history of judicial interpretation is provided in Kong Xiaohong, *Legal Interpretation in China*, 6 *Conn. J. Int'l. L.* 491-506 (1991).

80. Const. art. 67 (4).

81. The Supreme People's Procuratorate is the highest procuratorial organ. The people's procuratorates are state organs for legal supervision. Const. arts. 129, 132.

82. The 1955 Resolution gave interpretation authority in adjudication work to the Judicial Committee of the Supreme People's Court.

83. Resolution of the Standing Committee of the National People's Congress Providing an Improved Interpretation of the Law (June 10, 1981), translated in 1 *The Laws of the People's Republic of China 1979-1982* 251 (1987) [hereinafter Resolution].

84. In recent years, the Legislative Affairs Commission of the NPC has issued explanations of law. A recent edition of the Court's Judicial Handbook tartly notes that "there are no legal provisions concerning their validity." Introduction to 8 *Sifa Shouce* (1992). See, e.g., Quanguo Renda Changwu Weiyuanhui Fazhi Gongzuo Weiyuanhui, *Guanyu Ruhe Lijie he Zhixing Falu Ruo Gan Wenti de Jieda (Si)* [Legislative Affairs Commission, Standing Committee of the NPC, Explanation Concerning How to Understand and Implement Some Questions of Law (4)], in *Sifa Wenjian Xuanbian*, No. 4, 1992, at 43.

Resolutions, the Standing Committee delegated to the State Council and its departments the power to interpret "questions involving the specific application of laws and decrees in areas unrelated to judicial and procuratorial work."<sup>85</sup> It authorized the Supreme People's Procuratorate to interpret "questions involving the specific application of laws and decrees in the procuratorial work of the procuratorates."<sup>86</sup> Finally, it authorized the Court to interpret "questions involving the specific application of laws and decrees in court trials [literally 'adjudication work']."<sup>87</sup> Interpretations by the Court and Supreme People's Procuratorate are known as "judicial interpretations." The Resolution states that in the NPC Standing Committee should resolve any conflict in interpretation between the Court and Procuratorate.<sup>88</sup>

Historically, the Court has made full use of its authority, even before the 1955 Resolution.<sup>89</sup> The Court did so because it had the task of leading the adjudication work of the lower courts, but faced a dearth of legislation, both in substantive and procedural law. Such interpretations were in effect substitutes for procedural and substantive laws.

Since the early 1980's, the Court has increasingly exercised its power to interpret law. The number and breadth of Court interpretations must be viewed in light of how legislation has lagged greatly behind economic and social change. Litigants in the lower courts have not waited for the NPC or its Standing Committee to pass relevant legislation before filing suit. Since the beginning of the economic reforms, the lower courts have found themselves in a position of trying cases in which relevant legal rules were insufficiently detailed, missing, or obsolete.<sup>90</sup> This has been true in all areas of law, including criminal and civil law, criminal and civil procedure, administrative procedure, and especially economic law. The Court has been forced to issue

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85. Resolution, *supra* note 83, at 251. Both in the period preceding the Cultural Revolution and since 1979, government ministries have also made use of this authority.

86. Resolution, *supra* note 83, at 251. This authority is not mentioned in the Organizational Law of the People's Procuratorates.

87. Resolution, *supra* note 83, at 251. This language is repeated in the Organizational Law of the People's Courts, art. 33.

88. Resolution, *supra* note 83, at 251.

89. Since the establishment of the People's Republic, the Supreme People's Court has been very active in issuing interpretations of law, interpreting law even before legislation authorized it to do so. Kong, *supra* note 79, at 492-93.

90. Examples will be given below.

interpretations to enable the lower courts to do their work. The effect of Court interpretations, of course, goes beyond the judicial system.

Both the 1955 and 1981 Resolutions provide that the Court's authority to interpret law is limited in its scope and validity. On the other hand, the Standing Committee has retained the authority to interpret the Constitution, while giving the authority to interpret provincial legislation to the standing committees of provincial people's congresses and competent departments of provincial governments. The Court's broad interpretation authority is limited to laws promulgated by the National People's Congress and its Standing Committee. Interpretation of law, however, does not include the power of invalidation.

With respect to the forms of these interpretations of law, neither the 1981 Resolution nor its 1955 predecessor specify their required forms. Neither law sets forth procedures for drafting or issuing interpretations. The consistent practice of the Court has been to issue interpretations as administrative documents, in the same forms as administrative documents (*wenjian*), bearing numbers indicating the issuing office and conforming with bureaucratic practice.<sup>91</sup> Currently, the Court issues at least nine types of documents: "official opinions" (*yijian*), "explanations" (*jieda* or *jieshi*), "official answers" (*pifu* or *dafu*), "letters" (*fuhun*, also sometimes *han*), "notices" (*tongzhi* or *tonggao*) and "conference summaries" (*jiyao*).<sup>92</sup> All of these forms are used by state and Party organs to guide their subordinate units. The following section analyzes these interpretive documents in detail.

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91. The State Council has issued regulations to standardize document forms. Those regulations provide that regulations for handling judicial documents should be stipulated in accordance with its provisions. Guojia Xingzheng Jiguan Gongwen Chuli Banfa [Method for Handling Official Documents of State Administrative Organs], art. 35, in Falu Quanshu, supra note 26, at 1372 [hereinafter Gongwen Chuli Banfa].

Each government department has its own document series that it circulates to its subordinate organs and organs within its system. On bureaucratic document systems, see Lieberthal and Oksenberg, supra note 33, at 152.

An example of a document numbering system is the 1991 Zuigao Renmin Fayuan, Guanyu Jingji Shenpan Gongzuo Jiji Canyu Qingli Qiye "Sanjiaozai" de Tongzhi [Supreme People's Court, Notice on Economic Adjudication Work Enthusiastically Participating in the Clearing up of "Triangular Debt"], Zuigao Renmin Fayuan Gongbao, No. 3, 1991, at 38, which bears the number Fa (Jing) Fa [1991] #24, indicating that it is a document of the Supreme People's Court, Economic Division, and is the twenty-fourth document issued in 1991.

92. Documents issued by the Court which take the form of regulations (*Guiding, Gutze*, or *Biaozhun*) will be discussed in the context of the Court's legislative function, infra section III.C.

The fact that the Court uses the same document forms as state and Party organs reflects the administrative functioning of the Court. As will be explored, these documents uniquely combine the functions of interpreting law with legislation, adjudication, and administration.

### 1. Official Opinions and Explanations

The most important interpretive documents issued by the Court are those titled "official opinion" (*yijian*) or "explanation" (*jieda*). State administrative organs, too, issue documents in the form of "official opinions" and "explanation."<sup>93</sup> The use of the same document forms indicates that the Court often functions like a state administrative organ. The Court has issued "official opinions" and "explanations" throughout its history.<sup>94</sup> Since 1979 the issuance of "official opinions" has become a focal point of the Court's work because lower courts have found NPC legislation too vague to implement without further guidance. "Official opinions" are general statements of normative rules. They are not made in connection with pending litigation. Some provide an authoritative opinion concerning the whole of a major new law, others are issued in the absence of relevant law, while yet others interpret a section of existing legislation. Interpretations concerning a portion of a major law are titled *jieda* or *jieshi*, the former often in question and answer form. The Court is not entirely consistent, however, in its terminology. The Court has issued "official opinions" interpreting virtually all important laws which involve the courts, including procedural and substantive law, criminal and civil (including economic) law. The Court has also issued "official opinions" (or explanations) of the General Principles of Civil Law, Administrative Litigation (Procedure) Law, Economic Contract

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93. See, e.g., Guowuyuan Bangongting Zhuanfa Jianshe Bu Guanyu Jinyibu Qingli Zhengdun Fangdichan Kaifa Gongsu Yijian de Tongzhi [Notice of the State Council General Office Transmitted to the Ministry of Construction Concerning its Opinion Regarding the Further Rectification of Real Estate Development Companies], in *Zhonghua Renmin Gongheguo Faguihuibian 1990* [Laws and Regulations of the People's Republic of China 1990] 501.

94. See, e.g., Zuigao Renmin Fayuan Guanyu Dangqian Renmin Fayuan Xingshi Shenpan Gongzuo de Ruogan Yijian [Supreme People's Court, Official Opinion Concerning Current Criminal Adjudication Work], June 26, 1962, in *Jieshi Jicheng*, supra note 60, at 7; Zuigao Renmin Fayuan Guanyu Guanche Zhixing Minshi Zhengce Shenpan Gongzuo Ruogan Wenti de Yijian (Xiugai Gao) [Supreme People's Court, Official Opinion Concerning the Strict Implementation of Some Questions of Civil Policy Adjudication Work (revised draft)], Aug. 28, 1963, in *Jieshi Jicheng*, supra note 60, at 867.



Law, Foreign-Related Contract Law, Civil Procedure Law, Criminal Law and Criminal Procedure Law, among others.

These “official opinions” have distinctive characteristics. Some of these “official opinions” are longer and more detailed than the original statutes. For example, the “official opinion” interpreting the 1986 General Principles of Civil Law includes 200 articles, in comparison to 156 in the statute itself.<sup>95</sup>

In “official opinions” the Court often establishes new legal rules and sometimes contradicts NPC legislation. Some “official opinions” are issued because there is insufficient or no relevant legislation.<sup>96</sup> Others widen the scope or supply new provisions where the original legislation was silent, going beyond mere “interpretation” of legislative articles. For instance, because the 1989 Administrative Litigation Law used the phrase “concrete administrative act” without definition, the Court supplied one in its 1991 interpretation.<sup>97</sup> In another instance, at least one section of the 1988 “official opinion” interpreting the General Principles of Civil Law contradicts the law itself.<sup>98</sup>

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95. Zuigao Fayuan Guanyu Guanche Zhixing “Zhonghua Renmin Gongheguo Minfa Tongze” Ruogan Wenti de Yijian (shixing), Zuigao Fayuan Gongbao, No. 2, 1988, at 17-35. Translated in Whitmore Gray and Henry Ruiheng Zheng, Opinion (for trial use) of the Supreme People’s Court on Questions Concerning the Implementation of the General Principles of Civil Law of the People’s Republic of China, 52 Law and Cont. Prob. 59-88 (1989). Similarly, the “official opinion” interpreting the 1991 Civil Procedure Law includes 320 articles, while the Law itself has 270. Zuigao Renmin Fayuan Guanyu Shiyong “Zhonghua Renmin Gongheguo Minshi Susongfa” Ruogan Wenti de Yijian [Opinion of the Supreme People’s Court on Questions Concerning the Implementation of the “Civil Procedure Law of the People’s Republic of China”] (1992).

96. Zuigao Renmin Fayuan Guanyu Shenli Nongcun Chengbao Hetong Jiufen Anjian Ruogan Wenti de Yijian [Supreme People’s Court’s Official Opinion Concerning Some Questions on the Adjudication of Village Leasing Contract Disputes], Apr. 14, 1986, Zuigao Fayuan Gongbao, No. 3, 1986, at 3-7.

97. Compare Administrative Litigation Law, art. 2, with art. 1, Zuigao Renmin Fayuan Guanyu Guanche Zhixing “Zhonghua Renmin Gongheguo Xingzheng Susong Fa” Ruogan Wenti de Yijian (Shixing) [Supreme People’s Court, Official Opinion Concerning Some Questions Regarding the Implementation of the Administrative Litigation Law of the People’s Republic (for Trial Implementation)], Zuigao Fayuan Gongbao, No. 3, 1991, at 23.

98. Articles 31 and 33 of the law provide that the “partners must draw up a written agreement providing for such matters as the shares of capital contribution . . . and upon approval and registration in accordance with law, it may conduct business operations . . . .” The interpretation, in contrast, states that where “parties lack a written agreement and have not received certification and registration by the administrative agencies . . . but have fulfilled all of the other requirements of a partnership, the People’s Court may consider the relationship among the parties as a partnership if it is provided by two or more persons without a direct interest in the partnership that there is an oral partnership agreement.” Gray and Zheng, *supra* note 95, at 67. One participant in the drafting of the opinion suggested that the Court contradicted the legislation because it was “out of touch with the reality” of groups of individuals engaging in

Both Chinese and foreign academics have questioned the Court's expansive "official opinions," faulting it for making law.<sup>99</sup> Most legal professionals in China nonetheless consider such interpretations by the Court necessary, because they regard laws passed by the NPC and its Standing Committee as inadequate. In substance, such interpretations are "quasi-legislation," combining interpretation of law with legislation.

Unregulated by law, the drafting process mirrors Chinese practice in drafting legislation. A work group within the relevant substantive division of the Court is given responsibility for an opinion. Responsible divisions may include the adjudicatory divisions and the Research Office. The work group drafts an opinion after surveying the lower courts to determine the major issues. Once the division arrives at a consensus on a draft opinion, the work team solicits feedback from the lower courts. After the draft is revised, the views of those outside the court system—including affected ministries and experts at research institutes and law schools—are solicited. As in the drafting of administrative rules and regulations, the views of the public are not solicited. Once a consensus on the draft opinion is reached, it is submitted to the Court's judicial committee for approval.<sup>100</sup>

The entire process may take from six months to two years. The drafting of the 1988 "An Opinion Concerning Some Questions Involving the Implementation of the 'General Principles of Civil Law of the People's Republic of China (for trial use)'"<sup>101</sup> took nearly two years after promulgation of the original legislation by the NPC in 1986, because of the many complex issues involved. The Opinion is currently being revised.

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business together without a written agreement.

99. See, e.g., P. Keller, *Legislation in the People's Republic of China*, 23 U.B.C. L. Rev. 654, 667 (1989); Kong, *supra* note 79, at 501; Wang Haosheng, *Guanyu Woguo Falu Jieshi de Ruogan Wenti* [Concerning Some Questions of the Interpretation of our Country's Law], in 4 *Zhongguo Faxue* 49, 51 (1990).

100. Interview with Supreme People's Court official.

101. *Zuigao Renmin Fayuan, guanyu Guanche Zhixing "Zhonghua Renmin Gonghe Guo Minfa Tongze" Ruogan Wenti de Yijian* (Shixing), *Zuigao Renmin Fayuan Gongbao*, No. 2, 1988, at 16, *fa (ban) fa* (1988) No. 6. Similarly, to clarify further the 1989 Administrative Litigation Law, in 1991 the Court issued *Zuigao Renmin Fayuan guanyu Guanche Zhixing "Zhonghua Renmin Gonghe Guo Xingzheng Susong Fa" Ruogan Wenti de Yijian* (shixing) [An Opinion Concerning Some Questions Involving the Implementation of the Administrative Litigation Law of the People's Republic of China], *Zuigao Renmin Fayuan Gongbao*, No. 3, 1991, at 23, *fa (xing) fa* (1991) No. 19.

The Court occasionally has issued “official opinions” with other organs, including Party organs, when compliance by various organs is necessary, although they may lack the legal authority to make “judicial interpretations.”<sup>102</sup> Responding to persistent academic criticism on this issue,<sup>103</sup> the Court is abandoning the practice of issuing judicial interpretations with organs other than the Supreme People’s Procuratorate, which does have such authority. The Court has on at least one occasion ceded its authority to issue “official opinions” to a lower specialized court, without apparent legal authority,<sup>104</sup> although it has criticized the civilian courts for engaging in a similar practice.<sup>105</sup>

Most, but not all, official opinions and explanations are published in the Court’s official gazette, the *Gazette of the Supreme People’s Court* [*Zuigao Renmin Fayuan Gongbao*]. A few “official opinions” are considered too sensitive for distribution to the general public. One example is the August, 1989 opinion on the application of law to criminal cases arising during the “counterrevolutionary turmoil and political rebellion,”<sup>106</sup> which was distributed only within the court system.<sup>107</sup>

Judges rely heavily on “official opinions” to provide relevant legal rules in making their judgments. There are limitations to the extent to

102. Zhongyang Jilu Jiancha Weiyuan Hui, Zhongyang Zhengfa Weiyuan Hui, Zuigao Renmin Fayuan, Zuigao Renmin Jiancha Yuan, Guojia Waihui Ju, guanyu Danwei, Qiye Weifa Maimai Waihui Wenti de Jidian Chuli Yijian [Central Disciplinary Inspection Committee, Central Political-Legal Committee, Supreme People’s Court, Supreme People’s Procuratorate, State Bureau for Foreign Exchange Administration, Opinion Concerning Some Points in Handling Problems of Units and Enterprises Illegal Buying and Selling Foreign Exchange], Apr. 20, 1986, in Xingfa Jieshi, supra note 24, at 180-81.

103. See, e.g., Zhang Jun, Zuigao Shenpan Jiguan Xingshi Sifa Jiguan Xingshi Xifa Jieshi Gongzuo Huigu yu Sikao (1980-90) [A Review and Thoughts about Judicial Interpretation of Criminal Law by the Highest Judicial Organs], 3 Faxue Yanjiu 46 (1991).

104. Zhongguo Renmin Jiefang Jun Junshi Fayuan guanyu Shenli Junren Weifan Zhizhe Zui Anjian zhong Jige Juti Wenti de Chuli Yijian [PLA Military Court, an Opinion Concerning the Handling of Some Detailed Problems in the Adjudication of Military Personnel Who Commit the Crime of Violation of Duty] (Oct. 19, 1988), in Xingfa Jieshi, supra note 24, at 251-52.

105. Guanyu Difang ge ji Renmin Fayuan bu ying Zhiding Sifa Jieshixing Wenjian de Pifu [Official Reply that the Civilian Courts of Various Levels Should not Stipulate Judicial Interpretation Documents], 1987 Zuigao Renmin Fayuan Gongbao, No. 2, at 19.

106. See Zuigao Renmin Fayuan, Zuigao Jianchayuan, Guanyu Banli Fangeming Baoluan he Zhengzhi Dongluan zhong Fanzui Anjian Juti Yingyong Falu de Ruogan Wenti de Yijian [Supreme People’s Court, Supreme People’s Procuratorate, Opinion Concerning Some Questions of Application of Law to Dealing with Counter-revolutionary Uprising and Political Turmoil Criminal Cases] (Aug. 1, 1989), in Xingfa Jieshi, supra note 24, at 267.

107. For a discussion on how the Court distributes interpretations, see *infra* section III.A.4.

which official opinions may be cited in rulings or judgments.<sup>103</sup> Because the judiciary relies on “official opinions,” other legal professionals rely extensively on them when making arguments in court.

In sum, “official opinions” and “explanations” illustrate one of the distinctive ways in which the Court *makes* law. Because Chinese legislation lags far behind the needs of the courts, “Court-made law” is expanding in scope as well as quantity. Unless the Chinese legislative process is able to supply detailed legal rules in a timely fashion, the issuance of “official opinions” is likely to remain an important function of the Court. It should be noted, however, that it is a function which usually does not involve Party officials.

## 2. Official Replies and Letters

The second type of interpretive document that the Court issues is the form of an official reply or letter that responds to a lower court’s request for advice on a specific legal question. The Court has issued such documents throughout its history.<sup>109</sup> Some official replies are issued in the form of an “official reply” (*pifu*) in response to a “request for instructions” (*qingshi*) regarding a specific legal question submitted by lower courts. A *qingshi* is a type of document submitted by an subordinate to a superior state or Party organ to request instructions or approval. In response, the superior organ issues a *pifu*, according to which the subordinate organ is obligated to act.<sup>110</sup> Like their bureaucratic counterparts, official replies issued by the Court are binding on the requesting lower court.

Other Court responses are made in the form of a “letter” (*fuhan*) or an advisory reply to a letter containing a request for advice concerning the interpretation of a provision of law. A “letter” is also a form of Party or government document, in which a superior organ answers a question raised by either a subordinate organ or other organs

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108. See discussion *infra* section III.A.4.

109. See, e.g., Zuigao Renmin Fayuan guanyu Siying Qiye Puochan Huanzhai zhong de Wenti de Pifu [Supreme People’s Court, Official Reply Concerning Some Questions Concerning the Repayment of Debts by a Bankrupt Private Enterprise] (Jan. 26, 1956), in *Jieshi Jicheng*, *supra* note 60, at 529; Zuigao Renmin Fayuan guanyu Jige Jicheng Wenti de Pifu [Supreme People’s Court, Official Reply Concerning Some Inheritance Questions] (Sept. 13, 1962), *id.* at 1247.

110. Gongwen Chuli Banfa, *supra* note 91, art. II (7), (8). The Chinese for reply, *pifu*, has the connotation of approval as well as answer.

outside its system. However, the requesting body is not obligated to obey the advice in a "letter."<sup>111</sup> There are no laws or rules regulating the process of "asking for instructions."

In the late 1980's, many criticized the Court for violating the principle of independent adjudication by issuing "official replies" which were binding on the requesting lower court.<sup>112</sup> Since 1989, the Court has reformed its practices by issuing advisory "letters" (*han*, *fuhan*, or *dafu*) when lower courts solicit the Court's views in actual disputes, because those documents do not bind the court which is deciding the case. The Court now uses "official replies" (*pifu*) for answers to theoretical questions submitted by lower courts.

Although there is no clear legal basis for asking higher level courts for instructions on deciding cases that they consider difficult, for most of their history the Chinese courts have engaged in the practice and continue to do so. Lower court judges sometimes seek guidance from their counterparts at higher levels by telephone, other times in writing.<sup>113</sup> The structure of the Chinese court system induces courts to request instructions during the course of litigation. Because the legal system allows the litigant only one appeal, it means that virtually all cases receive a final hearing in either an Intermediate or Higher People's Court. Lower courts thus feel extremely obligated to decide cases "correctly."

If the request relates to pending litigation, the court will suspend proceedings and await the reply, rather than make a judgment, for were a court hearing a case in the second instance to make its judgment and then request instructions, it would be too late, because final judgment in the case would have been made. In other cases, making a final judgment before a request is answered is practically impossible. Requests may concern either procedural or substantive law.

A case may be difficult to decide correctly for several reasons. Relevant law or interpretation may be too sketchy to allow lower court judges to make their decisions with confidence. This is increasingly evident in the area of commercial law, in which litigation arises before the legislature has established relevant legal rules. Sometimes the

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111. Id. art. II (9).

112. See, e.g., Zhongguo Fazhi Sishi Nian [Forty Years of China's Legal System] 130 (Zhao Zhenjiang, ed., 1990).

113. The practice is mentioned in Wen Jing, Fayuan Shenpan Yewu Guanli [Management of Court Adjudication] 130 (1992).

provision in question may be ambiguously drafted or use terms without defining them, creating problems for judges who apply the law.<sup>114</sup> At other times courts may find it necessary to request instructions when cases involve sensitive matters such as foreign relations. Finally, complex personal and institutional relations can also make decisions difficult. If a case has engendered pressure from local Party or government authorities, a lower court may submit a request for instructions to circumvent such intervention. In such cases, the requesting court asks for instructions because it is practically unable to make a final judgment.<sup>115</sup> In general, when the requesting court receives instructions regarding a case from a higher court, those officials who have pressured the requesting court will no longer prevent the requesting court from deciding the case according to the "instructions" of the higher court. In their understanding, courts are obliged to follow the "instructions" of their superiors.

The Court's responses are unique in that their explanations have legal binding force. The Court will not accept requests submitted directly from intermediate or basic level courts.<sup>116</sup> It will only accept ones which have been considered by a provincial Higher People's Court and discussed by its judicial committee.<sup>117</sup> The Court requires this to encourage the lower courts to resolve cases themselves. If it is a question in which the courts and procuratorate have differing views, a provincial higher people's court and procuratorate may submit a joint request.<sup>118</sup> The request is made in the form of a report requesting

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114. Interviews with judges of various courts.

115. Interviews with judges of courts of various levels.

116. Zuigao Renmin Fayuan Bangongshi, Guanyu Qingshi Wenti de Tongzhi [General Office, Supreme People's Court, Notice Concerning the Question of Requesting Instructions] (Nov 7, 1973), in *Jieshi Jicheng*, supra note 60, at 1475.

117. Zuigao Renmin Fayuan, Guanyu Baosong Qingshi Anjian ying Zhuyi de Wenti de Tongzhi [Supreme People's Court, Notice Concerning the Some Questions to be Considered in Submitting Cases for Requesting Instructions] (March 24, 1986), in *Jieshi Jicheng*, supra note 60, at 1519. This notice provides that the requesting court may also set forth the opinion of the Party Political-Legal Committee.

118. See, e.g., Zuigao Renmin Fayuan, Zuigao Jianchayuan, guanyu Ruhe Shiyong Xingfa de Yibai Wushi San Tiao de Pifu [Supreme People's Court, Supreme People's Procuratorate, Official Reply Concerning the Application of Article 153 of the Criminal Law] (March 16, 1988), in *Xingfa Jieshi*, supra note 24, at 241; Zuigao Renmin Fayuan, Zuigao Jianchayuan, guanyu Ruhe Jisuan Danwei Toujidaoba Fanzui Anjian Huoli Shue de Pifu [Supreme People's Court, Supreme People's Procuratorate, Official Reply Concerning the Calculation of the Amount of Profit Gained in Criminal Cases of Units Engaging in Speculation] (Dec. 26, 1989), *id.* at 294.

instructions (*qingshi baogao*), drafted by the provincial higher people's court. Subordinate government or Party organs also submit reports requesting instructions to their hierarchical superiors.<sup>119</sup> The way the report is drafted affects the answer that the Court ultimately gives.

Some reports request instructions regarding a pending case. In some very complicated cases, the entire case file is submitted with the report. Other reports request instructions on a theoretical question. Whether a request for instructions is considered to involve an actual case or theoretical question depends upon the way the lower court submits the request. In fact, the theoretical questions generally relate to a major issue in a pending case.<sup>120</sup>

It is up to the requesting court to decide whether counsel for the litigating parties should be informed about the request. If a lawyer has a good relationship with the presiding judge, he would generally be told about the request. Otherwise, neither he nor his clients would know.

The Court has evolved a protocol in answering requests for instructions and letters. A request (or letter) submitted by a particular division of a Higher People's court is answered by the corresponding division of the Court. Hence requests submitted by civil, economic (except for maritime and railroad transport issues), and administrative divisions of higher courts are answered by the Civil, Economic, and Administrative Divisions of the Court. The Research Office generally replies to requests regarding criminal law issues, while the Transport and Communications Division responds to requests originating in the Maritime and Railroad Courts. The Economic Division replies to requests submitted by economic divisions of higher courts. Divisions are further divided into teams specializing in a particular area.<sup>121</sup>

In practice, the chief judge of the relevant division gives one judge, known as a *chengbanren*, responsibility for drafting a reply. In most cases, he formulates the reply based on the report submitted by the requesting court, his own legal research and current policy. In some

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119. See, e.g., Gong'an Bu, guanyu Feifa Daomai Gezhong Piao Zheng er you Lujiaobugai de Weifa Fenzi Geiyu Shourong Laodong Jiaoyang de Pifu [Ministry of Public Security, Official Reply Concerning Those Lawbreakers Who Illegally Speculate in All Sorts of Tickets and Who Do Not Reform After Admonition Should be Taken in for Re-education Through Labor] (Dec. 9, 1988), in *Jieshi Jicheng*, supra note 60, at 1424; Zhongyang Zhengfa Weiyuanhui, guanyu Chuli "Huitou An" Wenti de Pifu [Central Political-Legal Committee, Official Reply Regarding the Handling of Question "From the Very Beginning Cases"] (June 13, 1984), in *Xingfa Jieshi*, supra note 24, at 125.

120. Interview (1992).

121. Interviews with Supreme People's Court officials.

difficult or important cases, the division head will authorize one or more judges to investigate the situation in person. Depending on the issue, the judge responsible for a reply may consult with the NPC Legislative Affairs Commission, the Bureau of Legislative Affairs of the State Council, or relevant government departments. In drafting replies, Court judges rarely consult with Central Committee officials. Judges responsible for a reply may even meet with the parties to a case or their legal representatives, and, in practice, they may be lobbied by the parties involved or their lawyers.<sup>122</sup>

Once the reply has been drafted, it must first be cleared by the team responsible and be submitted for approval to the chief judge of the relevant division. If the reply does not involve any difficult or sensitive issues, the chief of the relevant division can issue a reply, which bears the seal of that division. If the chief judge of the relevant division is unsure of how to decide the issue, he may transfer the case to the Court President or responsible Vice President, who may in turn refer the question to the Court's Judicial Committee.<sup>123</sup> Those replies which have been reviewed by the Court President or Judicial Committee are issued under the seal of the Court and are considered to be more authoritative.<sup>124</sup> If a joint request has been made to the Supreme People's Procuratorate, the two institutions must concur on the reply. The entire process is so painstaking that during the 1993 National Court Work Conference, presidents of provincial courts complained about the Court's slowness in issuing replies.<sup>125</sup>

More than one division may issue official replies on the same law. For example, the Economic, Civil, and Transport and Communications Divisions issue replies which interpret the principles of Civil Law and the Civil Procedure Law. In practice, however, the Civil and Economic Divisions do not agree on all issues. Some conflicting interpretations have resulted. In 1985, the Economic Division of the Court interpreted the Civil Procedure Law to mean that a party who had withdrawn his original complaint could not file suit again on the same issue, while in

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122. Interviews with judges and lawyers.

123. Interviews with Supreme People's Court officials.

124. Official replies issued by the Court carry a number indicating its place in the document series issued by the Court.

125. Fuwu yu Gaige: Di Shiliu Quanguo Fayuan Gongzuo Huiyi Daibiao Fangtan Lu [Service and Reform: Notes on Interviews with Delegates to the 16th National Court Work Congress] 2 Renmin Sifa 4 (1993) [hereinafter Fuwu yu Gaige].



1990, the Civil Division of the Court decided that the party could file suit. The issue was finally resolved in the revised Civil Procedure Law.

For many years, the Court issued "official replies" in conjunction with institutions which lack the authority to make judicial interpretations<sup>126</sup> because although "official replies" are legally interpretations of law, in practice they act as administrative documents. For the Court to require other bureaucratic systems to comply with its replies, it solicits the opinion of their head institutions. Thus in the past the Court and other institution would issue a joint reply, as state and Party organs commonly do. But currently, just as it has curtailed joint opinions, the Court also limits its joint interpretations to those with the Supreme People's Procuratorate. Instead of issuing a joint reply, the Court replies to the relevant Higher People's Court while the other institution, whose opinion has been solicited on the reply, informs its subordinate institutions.

As with "official opinions," not all "official replies" are published. If the Court does not regard a reply as relevant to other courts, it issues it only to the requesting court. One former provincial court official cited a request on which he had worked, which involved a situation peculiar to his border province. The Court reply to his court's request was issued in the form of a document, directed only to his court.<sup>127</sup> Other replies are distributed within the court system, while a limited number are published in the *Gazette of the Supreme People's Court*. Replies which are distributed are considered to be interpretations of law. Distribution of interpretations is explained later.<sup>128</sup>

The following recent reply and letter which have been distributed within the court system are typical examples of the genre. They illustrate

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126. In 1985, for example, it issued a reply in conjunction with the Ministry of Justice, Supreme People's Procuratorate, and Ministry of Public Security directed to the Xinjiang Autonomous Region Department of Justice, Higher People's Court, Higher People's Procuratorate, Department of Public Security, and Labor Reform Bureau of the Xinjiang Production Construction Corps. Sifa Bu, Zuigao Renmin Fayuan, Zuigao Renmin Jiancha Yuan, Gong'an Bu Guanyu Xinjiang Shengchan Jianshe Bingtuan Laogai Jiguan Zaiya Sihuan Fan Zhixing Sixing de Chuli Chengxu Wenti de Lianhe Pifu [Joint Official Reply of the Ministry of Justice, Supreme People's Court, Supreme People's Procuratorate, Ministry of Public Security Concerning the Question of How to Handle the Procedure for Implementing the Death Sentence for a Criminal Sentenced to Death With a Two Year Suspension Being Held in a Xinjiang Production Corps Reform Through Labor Organ] (Sept. 21, 1985), in Xingfa Jieshi, supra note 24, at 498-99.

127. Interview (Oct. 1992).

128. See infra discussion in section III.A.4.

how official replies and letters combine interpretation of law and adjudication in an administrative context. The first case involves a question of interpretation of the Food Hygiene Law, while the second involves the Criminal Law. In each case a request was submitted because the law was unclear. In form, the replies appear to be administrative documents interpreting points of law:

SUPREME PEOPLE'S COURT<sup>129</sup>

Answer Concerning whether Epidemic Prevention Departments can use the Measure of "Sealing Up" in Implementing the "Food Hygiene Law (for trial implementation)"

To the Xinjiang Uighur Autonomous Region Higher People's Court:

Your request report "Concerning whether Epidemic Prevention Departments can use the Measure of "Sealing Up" in Implementing the "Food Hygiene Law (for trial implementation)" (Xin Fa Xing (1991) 027 has been received; after consideration and solicitation of the opinion of the Ministry of Health, we answer as follows:

1. When food hygiene inspection organs enforce "decisions to control foods" under article 38 of the "Food Hygiene Law of the PRC (for trial implementation), they may directly seal up foods and instruments used for production and distribution.
2. As concerns the case of Ma Cheng disputing the decision of the Xin Yuan County Epidemic Prevention Station to seal up the cold drinks shop of which he is the operator, your court should deal with it in accordance with the law based on the circumstances of the case.

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129. Zuigao Renmin Fayuan, Guanyu Shishi "Shipin Weisheng Fa (shixing) zhong Weisheng Fangzhi Bumen Nengfou Caiyong "Chafeng" Cuoshi de Dafu [Supreme People's Court, Answer Concerning Whether Epidemic Prevention Departments Can Use the Measure of "Sealing Up" in Implementing the "Food Hygiene Law (for Trial Implementation)"] 8 Sifa Wenjian Xuan 42 (1992). See also 8 Sifa Shouce 722 (1992).

SUPREME PEOPLE'S COURT<sup>130</sup>

Official reply to the question as to how law should be applied to criminals who have reached fourteen years but not sixteen years and have committed the crimes of smuggling, trafficking, transporting, and manufacturing narcotics

May 18, 1992

To the Yunnan Higher People's Court:

We have received your request report "Concerning how law should be applied to criminals who have reached fourteen years but not sixteen years who have committed the crimes of smuggling, trafficking, transporting, and manufacturing drugs," Yun Fa Jiu (1991) 005, after consideration, we reply as follows:

Those persons who have reached fourteen years but not sixteen years who smuggle, traffic in, transport, and manufacture drugs, have violated one of the provisions of article 2 (1) and (2) of the "Decision of the Standing Committee of the National People's Congress concerning the Prohibition of Drugs (Decision);" they belong in the category of "other crimes seriously undermining social order" of Art. 14 (2) of the Criminal Law and should bear criminal responsibility. However, in dealing with actual cases, regard should be had to the varying situations of cases and the following should be treated differentially: as to those who have reached fourteen but not sixteen and have been utilized, instigated, coerced, or induced to participate in the aforementioned criminal activity, generally, criminal liability should not be imposed, [those cases] should be handled in accordance with the provisions of art. 14 (4) of the Criminal Law.

The first case is a letter issued in an administrative litigation case, China's version of judicial review. It illustrates the Court's distinctive procedures. The issue raised in the letter was whether the defendant had legal authority to seal up the plaintiff's property. Before issuing its decision, the Court consulted with the hierarchical superior of the defendant, the Ministry of Health, to solicit the Ministry's understanding of its authority, but not with the plaintiff. In contrast to the U.S. or U.K. legal system, there is no need to hear both sides. As seen from the

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130. Zuigao Renmin Fayuan, Guanyu yi Man Shisi Sui bu Man Shiliu Sui de Ren Fan Zousi Fanmai Yuntuo Zhizao Dupin Zui Yingdang ruhe Shiyong Falu Wenti de Pifu [Official Reply as to the Question of How Law Should be Applied to Criminals Who Have Reached Fourteen Years but not Sixteen Years and Have Committed the Crimes of Smuggling, Trafficking, Transporting, and Manufacturing Drugs], 1992 Zuigao Renmin Fayuan Gongbao, No. 3, at 96.

Court's perspective, the issue involves a technical issue within the competence of the Ministry of Health. For the Court's opinion to be binding on the bureaucratic system subordinate to the Ministry of Health, the Court needs the Ministry's concurrence. Because this document is a "letter," it is technically not binding, but remains highly persuasive to the requesting court. In general, although not always, the requesting court will follow the answer in the letter.

The second document is an official reply issued to the Yunnan Higher People's Court and concerns whether juveniles who have reached fourteen years but not sixteen years and have committed various narcotics crimes bear criminal responsibility. Article 14(2) of the Criminal Law provides that juveniles of such an age bear liability for certain specified crimes and "other crimes seriously undermining social order." The Yunnan Higher People's Court submitted the request because the border province has encountered a significant number of narcotics cases involving juveniles in some of its lower courts,<sup>131</sup> but the law is unclear. The Court made use of this catch-all phrase to expand the criminal liability of juveniles. The expansion of criminal liability in drug crimes is part of the Court's implementation of current government and Party policy to punish drug offenses harshly. The interpretation is drafted in the form of legislation. Like much legislation in China, the language of the interpretation is vague. Because this document is an official reply, the Yunnan Higher People's Court is bound on the points of law it raised.

The two replies also illustrate peculiarities in the distribution of legal interpretations. The first reply was distributed solely within the court system.<sup>132</sup> The latter reply was distributed first in the Court's internal bulletin and subsequently in the Court's publicly distributed *Gazette*. By distributing both replies to the rest of the court system, the Court is informing the nation's courts of new legal rules. Some replies, while relied upon by judges, are not made publicly available.

The Court has begun redrafting the Organizational Law of the People's Courts. Whether the procedures for requesting instructions and for subsequent reply will be formalized in legislation remains to be seen, but the suggestion has been made within the court system. At the 1993 National Court Work Conference, the president of the Hainan Higher

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131. Interview with Yunnan Province Judges (Jan. 1993).

132. It was published first in the Court's internal bulletin, *Sifa Wenxuan*, and subsequently in the handbooks *Sifa Shouce*. 8 *Sifa Shouce* 722 (1992).

People's Court suggested that the practice should be proceduralized.<sup>133</sup> As long as Chinese legislation remains insufficiently detailed and lags behind the needs of the courts, the procedure seems destined to continue as an important function of the Court.

### 3. Notices (Circulars) and Conference Summaries

In addition to official opinions and explanations, official replies and letters, the Court issues documents in the form of notices (*tongzhi* or *tonggao*) and conference summaries (*jiyao*); both are forms of administrative documents. In bureaucratic practice, a notice (*tongzhi*) is a document in which a higher level organ transmits regulations or other measures to its lower level organs, requiring them to implement or enforce such measures.<sup>134</sup> A *tonggao* is a notice transmitting regulations or other measures whose distribution is limited.<sup>135</sup> A conference summary is a document which transmits important conference decisions for implementation or enforcement.<sup>136</sup> The Court does not give them the status of judicial interpretations, although in practice many serve that function. In effect, these notices and conference summaries combine interpretation and legislation. And once again, they are unregulated by law.

Not all notices issued by the Court interpret law. Some are administrative circulars. Virtually all divisions of the Court, including those concerned with administrative matters, issue notices. Some notices inform the lower courts of their duties in implementing Party policy initiatives.<sup>137</sup> Other notices are informational, transmitting relevant regulations of administrative agencies.<sup>138</sup> The latter is necessary

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133. Fuwu yu Gaige, *supra* note 125, at 6.

134. Gongwen Chuli Banfa, *supra* note 91, art. II (5).

135. *Id.* art. II (4).

136. *Id.* art. II (10).

137. See, e.g., a 1991 notice concerning regulation of certain criminal activity. Zuigao Renmin Fayuan, Guanyu Yanli Daji Puohuai Kanghong Jiuzai de Fanzui Huodong de Tongzhi [Supreme People's Court, Notice on Severely Striking at Criminal Activity Which Harms Flood Prevention and Disaster Relief], 1991 Zuigao Renmin Fayuan Gongbao, No. 3, at 33.

138. See, e.g., Zuigao Renmin Fayuan Bangong Ting, Zhuanfa Guojia Gongshang Xingzheng Guanli Ju "Guanyu Chuli Geti hu, Hehuo Jingying ji Siying Qiye Lingyou Jiti Qiye 'Yingye Zhizhao' Wenti de Tongzhi [General Office of the Supreme People's Court, Transmitting the Notice of the State Administration for Industry and Commerce's "Concerning the Handling of the Question of Individual Businesses, Partnerships and Private Enterprises Which Have Obtained Business Licenses for Collective Enterprises"] 1988 Zuigao Renmin Fayuan Gongbao, No. 1, at 16.

because publication and distribution of administrative regulations is chaotic. The Court therefore distributes certain administrative regulations that it considers crucial for the lower courts to decide cases.

Other notices do interpret law. The Court frequently uses notices to "amend" the Criminal Law. Because a comprehensive revision of the 1979 Criminal Law has not been made, judicial interpretations have been used to criminalize certain activity, clarify vague provisions such as "circumstances are particularly odious," and expand criminal liability.<sup>139</sup> Some other interpretations are designed to reinforce Party policy initiatives. For example, a 1989 Court and Supreme People's Procuratorate Notice was issued to reinforce the Communist Party's post-June 4 anti-corruption movement.<sup>140</sup> The notice provided that specified categories of persons who had committed certain crimes, had until October 31, 1989 to voluntarily surrender in order to be given a lesser punishment. The notice interpreted article 63 of the Criminal Law, which states "[t]hose who voluntarily surrender after committing a crime may be given a lesser punishment," despite the fact that article 63 neither places restrictions on the time period within which voluntary surrender must be made nor limits the types of crime eligible for lesser punishment.

The Court's practice in issuing notices is analogous to that in administrative organs. The Court issues notices by itself when the matter

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139. See, e.g., *Zuigao Renmin Fayuan, Tongzhi Yaoqiu Yifa Yancheng Liesha da Xiongmao Daomai Zousi da Xiongmao Pi de Fanzui Fenzi* [Supreme People's Court, Notice Requiring Criminal Elements Who Kill Pandas, Speculate and Smuggle Panda Fur to be Punished Severely According to Law] (July 14, 1987), in *Xingfa Jieshi*, supra note 24, at 204. This notice criminalizes the killing pandas and selling of panda fur, imposing criminal penalties under article 117 of the Criminal Law, which imposes liability upon those who "violate the laws and regulations on the control of monetary affairs, foreign exchange, gold and silver, or industrial and commercial affairs, engaging in speculation...." Criminal Law of China, art. 117, as translated in *The Criminal Law and the Criminal Procedure Law of China (1984)*. *Zuigao Renmin Fayuan, Zuigao Renmin Jianchaoyuan, guanyu Yangge Yifa Chuli Daolu Jiaotong Zhaoshi Anjian de Tongzhi* [Supreme People's Court, Supreme People's Procuratorate, Notice Concerning the Strict Handling According to Law of Cases of Those Caused Traffic Accidents] (Aug. 21, 1987), in *Xingfa Jieshi*, supra note 24, at 206. This notice defines "circumstances are especially odious" under article 113 of the Criminal Law and extends criminal liability to the responsible person in a [work] unit or the person who hired personnel to violate rules and cause major accidents.

Other "amendments" of the Criminal Law are issued as "official opinions" or "replies."  
140. *Zui Gao Renmin Fayuan, Zuigao Renmin Jianchayuan, guanyu Tanwu Shouhui, Toujidaoba deng Fanzui Fenzi bixu zai Xianqi nei Zishou Tanbai de Tonggao* [Notice that Those Criminal Elements Engaging in Corruption, Acceptance of Bribes, Speculation and So Forth Must Voluntarily Surrender Within a Limited Period of Time] (Aug. 15, 1989), in *Xingfa Jieshi*, supra note 24, at 271.

concerns solely the court system.<sup>141</sup> On the other hand, when the matter involves hierarchical systems other than the courts, the Court and the concerned organ jointly issue a notice. Such jointly issued notices are a means of coordinating relations among the issuing organs. The Court, therefore, has issued notices with other Party or state organs, although often these organs do not have the authority to make “judicial interpretations.” The Court often issues notices with the Supreme People’s Procuratorate, Ministry of Public Security, Ministry of Justice, the Political Department of the People’s Liberation Army, as well as Party organs, such as the Party Disciplinary Inspection Commission.<sup>142</sup> Since the Court does not consider notices to be interpretations, it plans to continue the practice of issuing joint notices.

The drafting process for joint notices mirrors administrative practice. In general, one institution is responsible for drafting the notice and then will solicit concurrences from the other institutions. The draft may be revised to incorporate their views. Occasionally, there are joint drafting teams.<sup>143</sup>

Although lower courts do not have the authority to issue interpretations of law, higher people’s courts issue notices, often, but not always, with the approval of the Court. The Court of the People’s Liberation Army (“PLA Military Court”), the highest military court, has

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141. See, e.g., the notice issued regarding the implementation of the New York Convention on the Recognition and Enforcement of Arbitral Awards, *Zuigao Renmin Fayuan guanyu Zhixing Woguo Jiaru de “Chengren ji Zhixing Waiguo Zhongcai Caijue Gongyue” de Tongzhi* [Notice of the Supreme People’s Court Concerning the Implementation of Our Country’s Accession to “the Convention on the Recognition and Enforcement of Foreign Arbitral Awards”] (April 10, 1987), in *Falu Quanshu*, supra note 26, at 466. The notice was addressed to the higher and intermediate people’s courts, maritime courts, and intermediate railroad transportation courts. See also, e.g., *Zuigao Renmin Fayuan, Guanyu Jinyibu Guanche Zhixing Haishi Fayuan Shou Anjian Fanwei de Tongzhi* [Supreme People’s Court, Notice Concerning the Further Implementation of the Scope of the Maritime Courts’ Accepting Cases] (Dec. 23, 1989), in *Jieshi Jicheng*, supra note 60, at 786.

142. See, e.g., *Zhongyang Jiwei, Zuigao Renmin Fayuan, Zuigao Jianchayuan, Gong’an Bu, Guanyu Jilu Jiancha Jiguan yu Fayuan, Jianchayuan, Gong’an Jiguan zai Chachu Anjian Guocheng zhong Huxiang Tigong Youguan Anjian Cailiao de Tongzhi* [Central Disciplinary Inspection Commission, Supreme People’s Court, Supreme People’s Procuratorate, Ministry of Public Security, Notice Concerning Mutual Provision of Relevant Case Materials Among the Disciplinary Inspection Organs and the Courts, Procuratorates, and Public Security Organs in the Investigation and Handling of Cases] (Sept. 17, 1989), in *Jieshi Jicheng*, supra note 61, at 723.

143. Interview with Supreme People’s Court official (1992).

issued notices regarding the application of law in the military courts.<sup>144</sup> The Higher People's Courts issue notices setting standards of which cases tried under the Civil Procedure Law are "large or important," and thus should be tried in the first instance in the Intermediate or Higher People's Court.<sup>145</sup>

In addition to notices, the Court has issued documents as a "conference summary" (*jiyao*), a document form also used by Party and state organs. The Court does not regard them as having the status of judicial interpretations, although in practice they serve that function.<sup>146</sup> In general, the summaries state some legal rules. An important conference summary was issued in 1993, on the adjudication of economic cases.<sup>147</sup> It provided rules on bankruptcy, commercial paper,

144. See, e.g., Zhongguo Renmin Jiefang Jun Junshi Fayuan, Junshi Jianchayuan, guanyu Banli Daoqie, Zhapian, Qipian, Toujidaoba Anjian de shue Biaojun Wenti de Tongzhi [The PLA Military Court, PLA Military Procuratorate, Notice Concerning How to Handle the Question of Amounts in Cases of Theft, Swindling, Fraud, and Speculation] (June 24, 1987), in Xingfa Jieshi, supra note 24, at 198; Zhongguo Renmin Jiefang Jun Zhong Zhengzhi Bu Baowei Bu, Zhongguo Renmin Jiefang Jun Junshi Fayuan, Zhongguo Renmin Jiefang Jun Junshi Jianchayuan, Guanyu Chengzhi Junren Weifan Zhize Zui Zanxing Tiaoli suolie Anjian de Guanxia Fanwei de Tongzhi [Security Department of the General Political Department of the Chinese People's Liberation Army, Military Court of the People's Liberation Army, Military Procuratorate of the People's Liberation Army, Notice Concerning Jurisdiction in Cases of Military Personnel Who Violate the Temporary Regulations on the Crime of Violation of Duty] (March 27, 1986), id. at 503.

145. In Guangdong, cases involving 100 million yuan and over are tried in the first instance in the higher people's courts, 1,000,000 yuan in the intermediate courts. In Beijing, for example, cases in which the amount in dispute is 500,000 yuan will be heard in the intermediate courts. The Court delegated this authority to the higher people's courts. Zuigao Renmin Fayuan guanyu Shiyong "Zhonghua Renmin Gongheguo Minshi Susong Fa" Ruogan Wenti de Yijian [Supreme People's Court, Opinion Concerning Some Questions of the Application of the "Civil Procedure Law of the People's Republic of China"], art. 3, at 2 (1992).

146. Conference summaries have been issued on such matters as the trial of foreign (including Hong Kong and Macao)-related commercial cases, drug cases, and parole and reduction of sentence cases. Quanguo Yanhai Diqu Shewai, She Gang Ao Jingji Shenpan Gongzuo Zuotan Hui Jiyao [Conference Summary of a Work Conference on Foreign-related, Hong Kong and Macao-related Economic Adjudication Work in the Whole Country and in Coastal Areas] (June 12, 1989), in Jieshi Jicheng, supra note 60, at 1321; Zuigao Renmin Fayuan, Guanyu Shi'er Sheng, Zizhiq Fayuan Shenli Dupin Fanzui Anjian Gongzuo Huiyi Jiyao [Conference Summary Concerning a Work Conference of the Courts of Twelve Provinces and Autonomous Regions on the Trial of Narcotics Crimes Cases], 1992 Zuigao Renmin Fayuan Gongbao, No. 1, at 20; Zuigao Renmin Fayuan, Guanyu Yinfa "Quanguo Fayuan Jianxing Jiashi Gongzuo Zuotan Hui Jiyao" de Tongzhi [Supreme People's Court Notice Concerning the Transmission of "the Conference Summary Concerning a National Court Work Conference on Parole and Reduction of Sentences Work"] (Feb. 14, 1989), 1989 Zuigao Renmin Fayuan Gongbao, No. 1, at 13.

147. Zuigao Renmin Fayuan, Guanyu Yinfa "Quanguo Jingji Shenpan Gongzuo Zuotan Hui Jiyao" de Tongzhi [Supreme People's Court, Notice Concerning the Distribution of the Conference Summary on "the National Economic Adjudication Work Conference"] 9 Sifa Wenjian



legal persons, and other important commercial issues.<sup>148</sup> The Court issues conference summaries when its leadership feels insufficiently informed about practice to draft an opinion yet the vagueness of relevant law requires some action. It also issues conference summaries when it regards gaps in legislation as “too obvious” to require issuance of an opinion.<sup>149</sup> Although from the Court’s point of view, the authority of a conference summary is not as great as that of an “official opinion” or “official reply,” the lower courts generally implement its legal provisions. An official opinion may be subsequently issued based on a conference summary and subsequent judicial practice.<sup>150</sup>

In conclusion, although notices and conference summaries do not have the status of law or even of a judicial interpretation, the lower courts will generally decide cases according to its provisions. The lower courts will consider them a form of guidance, analogous to the way subordinate Party or state organ treat conference summaries issued by their hierarchical superiors. If a notice runs counter to local interests, however, such as those on the enforcement of non-local judgments, local courts may be less diligent in its enforcement. Notices and conference summaries represent another way in which the Court combines interpretation and legislation to guide the lower courts.

#### 4. Legal Interpretations: A Summary

Interpretation of law is an important means by which the Court guides the lower courts. Relevant law gives the Court interpretation authority, but without further details. Thus, for example, the law does not specify what form interpretations may take, who may issue interpretations, or how interpretations should be distributed. The Court has evolved certain practices in the exercise of its interpretation authority but they do not compensate for inadequate legislation. The following problems have arisen.

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Xuan 36-48 (1993).

148. *Id.*

149. Interviews with Supreme People’s Court officials.

150. See, e.g., *Zuigao Renmin Fayuan, Guanyu Banli Jianxing, Jiashi Anjian Juti Yingyong Falu Ruogan Wenti de Guiding* [Supreme People’s Court, Regulations Concerning the Some Questions of the Application of Law to the Handling of Reduction of Sentence and Parole Cases] 1991 *Zuigao Renmin Fayuan Gongbao*, No. 4, at 3, which was issued after an earlier conference summary.

Firstly, it is problematic that neither the Interpretation Resolution nor any Court document specifies what documents are judicial interpretations. Although Court judges say privately that only documents which have been approved by the Judicial Committee and published in the *Gazette* are judicial interpretations, court documents published only in the Court's internal bulletin are also included in judicial handbooks and are relied on by judges in deciding cases. Furthermore, while "official opinions" have unquestioned authority within the court system, there are questions about the authority of other types of documents. Although Court judges privately discount the authority of notices and conference summaries as interpretations, they are nevertheless included in the compilations of legal documents edited by the Court's Research Office as handbooks for judges.<sup>151</sup> Related to the uncertainty of which documents are judicial interpretations is the question of which Court bodies have the authority to issue judicial interpretations. Documents which have been approved by the Court's Judicial Committee or by the Court President and issued under the Court's seal are considered, unofficially, more authoritative than those issued by a division. In fact, all adjudicatory divisions, the Research Office, and the Personnel Division issue official replies. All divisions and many administrative offices within the Court issue notices.

Secondly, many interpretations exceed the scope of the Court's legal authority. The Court has issued many interpretations with organs which lack the authority to make judicial interpretations. In the eleven year period since 1980, for example, 62 of 152 Criminal Law interpretations were issued with other administrative organs.<sup>152</sup> The Court has done so to secure the implementation of its interpretations by the relevant administrative organs because, in practice, officials in state and Party organs view Court interpretations as administrative orders or circulars rather than interpretations. They will consider an interpretation binding only if it has been issued to them by their own superiors. The distribution of interpretations by the Court is identical to that of other bureaucratic documents, so that officials in other systems will in fact not be informed of documents issued solely by the Court, except through the Court's Bulletin. Even though the Court now limits its issuance of joint "official opinions" and "official replies" to those with the Supreme People's Procuratorate, it continues to issue many notices that act as

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151. See, e.g., Sifa Shouce, vols. 1-7.

152. Zhang Jun, *supra* note 103, at 52.

legal interpretations jointly with non-judicial organs. Another aspect of the Court's exceeding its legal authority is that many interpretations are disguised forms of legislation, rather than interpretation. The Court has been forced into the role of legislating in the guise of interpretation by the inadequacy of the legislative process, which is unable to provide sufficiently detailed legal rules to meet the needs of the court system.

Even lower courts issue judicial interpretations when they legally lack the authority. Occasionally the Court encourages this practice, while at other times, especially when the Court has its own relevant interpretation, the Court criticizes lower courts for doing so.<sup>153</sup> For example, the PLA Military Court interprets criminal law relating to military personnel, apparently with the concurrence of the Court. The Court does not criticize the PLA Military Court for doing so because the Court recognizes that in practice PLA Military Court personnel often consult with its officials when drafting interpretations. The Court also recognizes that the lower military courts are bound to obey their military superiors. Although the Court has criticized the civilian courts for issuing interpretations, a recent conference summary delegated authority to provincial Higher People's Courts to establish sentencing guidelines for capital punishment in narcotics cases.<sup>154</sup>

Thirdly, no fixed rule on the distribution of Court interpretations within the court system or to the general public exists. The Interpretation Resolution is silent on this point. For many years, interpretations were distributed only within the court system. There are two internal channels for distribution. Like all central Party and state organs, the Court issues to its next-ranking subordinates (the Higher People's Courts and PLA Military Court) official documents headed with its title and its seal in red. The scope of distribution depends on the document. The Higher People's Courts transmit the documents to their subordinates, generally compiling them in handbook or bulletin form.<sup>155</sup> When interpretations are in document form they are awkward

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153. See *supra* note 105.

154. See Conference Summary of the Courts of Twelve Provinces and Autonomous Regions on the Trial of Narcotics Crimes Cases, *supra* note 146.

155. In a 1989 article, restricted channels within the courts were mentioned. The author mentioned that each province and the three directly administered municipalities print materials in which internal documents are collected, generally categorized as "Study Materials for Adjudication." While these bulletins are not necessarily issued under that title, internal bulletins are compiled by Higher People's Courts. Liu Nanping, *An Ignored Source of Chinese Law: The Gazette of the Supreme People's Court*, 5 *Conn. J. Intl. Law*, 271, 296-97 nn. 149 & 150 (1989).

for the lower courts to use because they must be handled according to special regulations.<sup>156</sup>

In addition to distributing interpretations in document form, the Court also issues an internal bulletin titled *Sifa Wenjian Xuan(bian)* (*Selection of Judicial Documents*),<sup>157</sup> a monthly compilation of Court documents, laws, administrative rules and regulations and other materials which the Research Office considers useful to the lower courts. If an official reply or other document is considered to be relevant to only one or a limited number of courts, it would not be included. The compilation sometimes includes draft versions of judicial interpretations.<sup>158</sup> All lower courts are encouraged to subscribe.

Until 1985, the distribution of all interpretations was limited to officials. Because of persistent complaints,<sup>159</sup> in 1985 the Court began public issuance of an official gazette, the *Gazette of the Supreme People's Court*. It includes some, but not all of the interpretations issued by the Court. Of the over 90 interpretations issued by the Court between 1985 and 1990, 51 were published in the *Gazette*.<sup>160</sup> The Court's Judicial Committee selects those documents which it regards as suitable for public distribution. In 1989, for example, the Court issued an interpretation on the application of Criminal Law to the "counterrevolutionary turmoil and political rebellion" which was published in *Sifa Wenjian Xuan* but not in the *Gazette*. The Judicial Committee apparently concluded that it was unnecessary for the public (especially the foreign public) to be informed of the document. The Court has decided that if there are inconsistencies between documents published in *Sifa Wenjian Xuan* and the *Gazette*, which do occur, the

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156. Falu Quanshu, *supra* note 91, arts. 30-34.

157. The title of the periodical was changed from *Sifa Wenjian Xuanbian* to *Sifa Wenjian Xuan* in 1992. It is generally known as the "little yellow booklet" because it is printed with a yellow cover.

158. In his 1989 article, Liu Nanping discussed the fact that judicial interpretations which are considered "not yet matured" are distributed through court internal channels. Such opinions are draft opinions which the Court distributes to the lower courts to solicit their reactions. While Mr. Liu draws the conclusion that the "Court emphasizes the document's secret character in order to draw the full attention of lower courts," comments by current and former judges suggest that the Court is emphasizing the fact that it is a draft, rather than its secret nature. Liu, *supra* note 155, at 297.

159. Kong, *supra* note 79, at 499.

160. Zhang Jun, *supra* note 103, at 52.

version in the *Gazette* would be official.<sup>161</sup> Recently, previously unavailable interpretations have become accessible. Several publishers, eager to make money by publishing law reference books (Chinese copyright law does not give copyright protection to legislation),<sup>162</sup> have unearthed many of the formerly inaccessible interpretations and made them available to the book-buying public.<sup>163</sup>

Yet a fourth problem is presented when the lack of consistency in issuance and authority makes it difficult for the lower courts to know when an interpretation is no longer valid. Mr. Ren Jianxin, current President of the Court, recognized this openly for the first time in his 1993 report to the National People's Congress.<sup>164</sup> The Court tries to cure these problems by issuing handbooks for adjudication in various subject areas,<sup>165</sup> an approach typically used by Party and state organs to guide their subordinate staff. In the spring of 1993, the Court convened a meeting to discuss, among other issues, the review of previously issued judicial interpretations.<sup>166</sup> In an important development, the Court will soon publish its own collection of interpretations.<sup>167</sup>

Court policy on the lower courts' citation of Court interpretations is in a state of flux. In 1986, the Court standardized lower court practice by issuing an official reply: "the various (official) opinions and official replies etc. that the Supreme People's Court has issued for

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161. Zuigao Renmin Fayuan, Guanyu Benyuan Fachu de Neibu Wenjian fan yu "Zhonghua Renmin Gonghe Guo Zuigao Renmin Fayuan Gongbao" bu yizhi jun yi Gongbao wei Zhun de Tongzhi [Supreme People's Court, Notice that If Internal Documents Issued by This Court are Not Consistent with the Gazette of the Supreme People's Court of the People's Republic of China, the Gazette Shall be Regarded as the Standard] (July 2, 1985), in *Jieshi Jicheng*, supra note 61, at 1510. For example, the version of the Yunnan request for instructions discussed earlier contained an additional final sentence in its internal version. See 8 *Sifa Wenjian Xuan* 41 (1992).

162. See, Copyright Law of the People's Republic of China (adopted Sept. 7, 1990), art. 5, translated at 3 *Laws and Regulations of the People's Republic of China Governing Foreign-Related Matters* 1801 (1991).

163. See, e.g., *Falu Quanshu*, supra note 26; *Xingfa Jieshi*, supra note 24; *Jieshi Jicheng*, supra note 60.

164. *Zuigao Renmin Fayuan Gongzuo Baogao* [Work Report of the Supreme People's Court], *Renmin Ribao*, April 6, 1993, at 2.

165. For example, *Jingji Shenpan Shouce*, *Xingzheng Shenpan Shouce*, *Minshi Shouce*, *Xingshi Shenpan Shouce* [Economic Adjudication Handbook, Administrative Adjudication Handbook, Civil Handbook, Criminal Handbook].

166. Interview with Court officials (1993).

167. "Zuigao Renmin Fayuan Sifa Jieshi Quanji" jiang Chuban ["A Complete Collection of the Judicial Interpretations of the Supreme People's Court" Will be Published] 9 *Sifa Wenjian Xuan* 48 (1993).

implementation should be implemented thoroughly, but it is not appropriate for them to be cited directly.”<sup>168</sup> In 1993, the Court reversed its policy on the citation of interpretations in economic cases in a conference summary on economic adjudication work: “those legislative interpretations made by the Standing Committee of the National People’s Congress and judicial interpretations of the Supreme People’s Court concerning to the actual application of law must be strictly enforced by all levels of the people’s courts and they may be cited in legal documents.”<sup>169</sup> Moreover, concerns about the authority of different interpretations and lack of public access to judicial interpretations have been overcome by certain developments in the past seven years. During these years, the Court has issued many interpretations in the area of economic law establishing legal rules where the NPC or its Standing Committee has not yet legislated. The lower courts rely on these interpretations in making their decisions. It is obviously difficult for lower courts to cite national legislation if it does not exist. The policy has not yet changed with respect to criminal law, where many interpretations expand the scope of existing criminal statutes.<sup>170</sup> In criminal cases, such interpretations remain the courts’ “secret weapon.”<sup>171</sup>

It seems that the NPC Standing Committee has never monitored the Court’s exercise of its authority to interpret law, although the 1981 Interpretation Resolution provides that the NPC Standing Committee should resolve disputes between the Court and Procuratorate if conflict arises. It has not intervened on occasions when the Court has issued interpretations which directly conflict with the original legislation or with one another. In 1988, for example, the Court issued an official reply which interpreted article 127 of the Criminal Law, by providing that *any persons* (emphasis added) who violate trademark regulations by fraudulently using another’s registered trademarks shall be punished

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168. Zuigao Renmin Fayuan, Guanyu Renmin Fayuan Zhizuo Falu Wenshu ruhe Yinyong Falu Guifanxing Wenjian de Pifu [Reply of the Supreme People’s Court Concerning How People’s Courts Should Utilize Normative Legal Documents when Providing Legal Documentation (Drafting Legal Documents)] (Oct. 28, 1986), in *Jieshi Jicheng*, supra note 60 at 406.

169. Zuigao Renmin Fayuan, Guanyu Yinfa “Quanguo Jingji Shenpan Gongzuo Zuotan Hui Jiyao” de Tongzhi, supra note 147, at 42.

170. See, e.g., Zhao Binzhi, Zhang Zhihui, Wang Yong, Zhongguo Xingfa de Yingyong yu Wanshan [Application and Improvement of the Criminal Law] 24 (1989); Wang, supra note 99, at 53; Keller, supra note 99, at 668.

171. Li Li & Luo Shuping, Lun Sifa Jieshi [A Discussion of Judicial Interpretation] 7 *Renmin Sifa* 20, 22 (1989). The authors are higher court judges.

according to article 127 of the Criminal Law for the crime of fraudulent use of a trademark. Article 127 itself, however, only makes "directly responsible personnel of an industrial or commercial enterprise" liable for the fraudulent use of another's registered trademark.<sup>172</sup>

The Court's interpretative authority is derived from the Interpretation Resolution. The Resolution gives the Court maximum flexibility in implementing the state's judicial powers. The Resolution views interpretations as documents issued for internal use by the courts; public distribution is completely discretionary. Discussions with Chinese legal professionals and a review of the legal press reveal that many view interpretation of law according to the model of the 1981 Resolution as problematic.<sup>173</sup> But as long as Chinese legislation remains insufficiently detailed and lags behind the needs of the courts, the Court is likely to continue its role of legislating in the guise of interpreting law. Furthermore, even though Party officials are not usually closely involved in the interpretation process, some interpretations reflect current Party policy concerns. In interpreting law, the Court may consult with the Bureau of Legislative Affairs of the State Council, ministries and commissions under the State Council, and the Legislative Affairs Commission of the NPC. In turn, drafters of legislation and regulations look to Court interpretations.<sup>174</sup>

It is more likely that some of the technical problems associated with interpretation may be resolved, perhaps when the Organizational Law of the People's Courts is revised, as these issues have been raised within the court system. Some work has begun on the standardization of document forms and regulations are contemplated.<sup>175</sup> Perhaps a revised Organizational Law of the Courts will impose publication requirements, set forth procedures for issuance, and specify which institutions can interpret law. For now, it seems likely that the Court will continue to issue interpretations in document form.

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172. Zhang Jun, *supra* note 103, at 53.

173. See, e.g., Zhang Jun, *supra* note 103; Kong, *supra* note 79; Li & Luo, *supra* note 171; Zhao Gang, *Dui Woguo Sifa Jieshi Gongzuo zhong Ruogan Wenti de Guanjian* [My Humble Opinion Concerning Some Issues of My Country's Judicial Interpretation Work] 5 *Faxue Pinglun* 43-45 (1991). Also, interviews with judges and lawyers (1991-92).

174. 1988 Court Yearbook, *supra* note 2, at 13.

175. *Jiaqiang Zhidu Jianshe Zuohao Renmin Fayuan Gongwen Chuli Gongzuo* [Strengthen the System Construction, Do the Work of Handling the Documents of the People's Courts Well] 10 *Renmin Sifa* 31 (1991).

## B. Adjudication

In the context of adjudication, the Court supervises the lower courts by engaging in typically bureaucratic procedures, rather than by hearing cases. Although the Court has both original and appellate jurisdiction, it hears very few cases. The Court decides cases through procedures designed to monitor the correctness of important lower court decisions. They include: the issuance of "official replies," discussed earlier, the review of certain death sentences, adjudication supervision, and the review of imposition of criminal liability by analogy. The following section explains how the Court supervises the lower courts in adjudication.

### 1. Hearing Cases

The Organizational Law authorizes the Court to try cases of first instance when other laws and decrees give it jurisdiction. The Criminal, Civil, and Administrative Procedure Laws give the Court jurisdiction to hear major cases with an impact on the entire country, or those which it considers the Court should try.<sup>176</sup> In reality, however, the Court rarely hears cases. Until recently, it did not even have a courtroom. A few criminal cases were heard in the first instance by the Court, primarily in the 1950's. In 1980-81, the Court organized a special panel that tried Jiang Qing and other members of the "Gang of Four."<sup>177</sup> Otherwise, apparently no criminal cases have been heard in the first instance since the adoption of the Criminal Procedure Law.

The Court may also consider appeals or procuratorial protests from decisions by Higher People's Courts.<sup>178</sup> It decides appeal cases based on written submissions, with no oral arguments.<sup>179</sup> Appeals of cases

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176. See, e.g., Criminal Procedure Law, arts. 17 and 18; Civil Procedure Law, art. 21; Administrative Litigation Law, arts. 16 and 23.

177. See 1988 Court Yearbook, *supra* note 2, at 12; Zhonghua Renmin Gongheguo Zuigao Renmin Fayuan Tebie Fating Shenpan Lin Biao Jiang Qing Fan Geming Jituan An Zhufan Jishi [Record of Actual Events of the Special Panel of the Supreme People's Court of the People's Republic of China Trial of the Lin Biao Jiang Qing Counter-revolutionary Group] (1982); Zhengyi de Shenpan [The Just Trial] (1990).

178. Organizational Law of the People's Courts, art. 32.

179. In a report on the 1993 National Court Work Conference, some delegates to the conference suggested that when the Court considers second-instance cases, it should hear oral arguments: "when the Court's courtroom is finished, it should not only be beautiful, but should be used as a place for court hearings." *Fuwu yu Gaige*, *supra* note 125, at 6.



originating in the basic level and Intermediate Courts are blocked by the two-instance system. Although the Court does not itself publicize such information, the Court may hear as many as twenty appellate cases each year, the majority of which are heard in the Economic Division. These cases are appeals from cases heard in the first instance in a Higher People's Court because of the large sums of money in dispute.

Appeals are heard by panels of three judges, as the Organizational Law specifies that all cases shall be heard by a collegial panel.<sup>180</sup> As is the practice in the lower courts, one member of the collegial panel is generally designated the *chengbanren*, the person in charge of the case. He assumes primary responsibility for reviewing the relevant factual and legal materials.<sup>181</sup> The designation of a *chengbanren* to assume responsibility for a matter is typical of Chinese administrative practice.

Reports of judgments by the Court are generally not published because publication is not legally required. Several have been published in the *Gazette* and other Court publications.<sup>182</sup> The number of appeals heard in the Court can be expected to grow as the number of cases heard in the first instance in the Higher People's Courts increases because of the large amounts of money in dispute.<sup>183</sup>

## 2. Supervising the Lower Courts in Litigation

The Court's main objective in adjudication is to supervise the lower courts. It does so by monitoring the correctness of certain important decisions by the lower courts, issuing official replies and letters, approving certain death sentences, engaging in adjudication supervision, and approving the use of analogy in criminal cases.

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180. Organizational Law of the People's Courts, art. 10.

181. General practice discussed in Wen, *supra* note 113, at 140-41.

182. A case described as an appeal by Liu Nanping, *Liao Changyi v. Liao Lunwan*, was actually a case of adjudication supervision. Compare Liu, *supra* note 155, at 271, 292, with *Liao Changyi v. Liao Lunwan*, 1985 *Zuigao Renmin Fayuan Gongbao*, No. 1, at 25. For an example of an appeal heard by the Supreme People's Court, see *Xingli Gongsì, Guangao Gongsì yu Yindu Guomao Gongsì, Malaixiya Balapuer Gongsì, Kupake Gongsì, Nalin Gongsì Huowu Suoyou Quan Zhengyi Shangsu An* [Case of an Appeal of a Dispute Over the Ownership of Goods Between Xingli Company, Guangao Company and the Indian State Trading Company, Malaysian Balapur Company, Malaysian Kupake Company, Malaysian Nalin Company] 1991 *Zuigao Renmin Fayuan Gongbao*, No. 1, at 44.

183. See *Fuwu yu Gaige*, *supra* note 125, at 6.

*a. Reviewing and Approving Death Sentences*

The No. 1 Criminal Division of the Court is responsible for reviewing and approving death sentences.<sup>184</sup> The review is required by law. The system has its roots in the traditional Chinese legal system and is intended to assure accuracy in administration of capital punishment.<sup>185</sup> Unlike the traditional legal system, which required that the Emperor review and approve all capital sentences, the Court currently reviews and approves a minority of all capital sentences imposed.

The Criminal Law provides for two types of capital sentences: those sentences to be immediately implemented and those with a two year suspension.<sup>186</sup> According to article 13 of the Organizational Law, as amended in 1983, for certain crimes, capital sentences to be immediately implemented are subject to automatic review by the Court.<sup>187</sup> For many other crimes, article 13 allows the Court to delegate authority to review and approve death sentences (for immediate execution) to the provincial Higher People's Courts.

For much of the history of the People's Republic, the need to administer the ultimate punishment efficiently has outweighed concerns about accuracy. Thus for the first thirty years of the People's Republic, procedures used to report capital cases stressed efficiency while legislatively required procedures were minimal. From 1949 to 1979, death sentences were reported to higher courts by telegram, similar to what had been done in the Communist-ruled liberated areas.<sup>188</sup> Rather

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184. Interview with Supreme People's Court officials (1992-93); and implied in Wen & Tang, *supra* note 70, at 8.

185. Bodde & Morris, *supra* note 32, at 131-134.

186. Criminal Law, art. 43.

187. Art. 13 provides:

[c]ases involving sentences of death, except for cases with sentences imposed by the Supreme People's Court, shall be submitted to the Supreme People's Court for approval. The Supreme People's Court may, when it deems it necessary, authorize Higher People's Courts of provinces, autonomous regions, and municipalities directly under the Central Government to exercise the power to approve cases involving the imposition of death sentences for homicide, rape, robbery, causing explosion and others gravely endangering public security and disrupting social order.

188. In 1959, Supreme People's Court President Xie Juezai attempted to abolish the telegram reporting system, prohibiting it except if a case "needed to be handled urgently." In the early 1960's the Court issued several notices to that effect. However by the time of the Cultural Revolution, telegram reporting was again the main method. Xiao Shengxi, *Sixing Fuhe Chengxu Lun* [A Discussion of Death Sentence Reporting Procedure] 74-76 (1989).

than transferring the file to the Court, reporting courts sent telegrams with the name and subject matter of the case, often omitting the facts and principal evidence. As one commentator stated, "this method without doubt affected the quality of the review and approval of capital cases, even to the point of the occurrence of mistaken executions."<sup>189</sup>

The 1979 Organizational Law of the People's Court and the Criminal Procedure Law provided a more comprehensive legislative framework for the review of death sentences. The laws permitted death sentences with a two-year suspension, if it was imposed by an Intermediate Court, to be approved by a Higher People's Court.<sup>190</sup> Death sentences for immediate execution, death sentences with a two-year suspension imposed by Higher People's Courts, and death sentences imposed by an Intermediate Court and reviewed in the higher courts were made subject to the Court's approval.<sup>191</sup> The Criminal Procedure Law also required higher courts and the Court to form three-judge collegial panels when reviewing death sentence cases.<sup>192</sup>

In that same year, the Court finally abolished "reporting by telegram."<sup>193</sup> It issued new procedures to the lower courts for reporting death sentence cases, which required the reporting higher courts to submit comprehensive reports and the entire case files.<sup>194</sup> Because the law was silent on the Court's authority to review, the Court decided that in cases where the facts were unclear or insufficient, it could order a remand to the original court. The Court also stated that if the law had been misapplied or sentencing was improper, it could either remand or revise the judgment itself.<sup>195</sup>

Almost immediately after the promulgation of the Criminal Procedure Law and Organizational Law of the People's Courts, provincial Higher People's Courts were authorized to exercise part of the Court's authority to review death sentences. Delegation of the authority to approve capital sentences came in a series of amendments to the Criminal Law. The first amendment has only recently been made

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189. *Id.* at 76.

190. Criminal Procedure Law, art. 146.

191. Criminal Procedure Law, arts. 144 and 145.

192. Criminal Procedure Law, art. 147.

193. Xiao, *supra* note 188, at 79.

194. Zuigao Renmin Fayuan, Guanyu Baosong Sixing Fuhe Anjian de Jixiang Guiding de Tongzhi [Notice of the Supreme People's Court Concerning Some Rules for the Submission of Death Sentence Review Cases] (Dec. 12, 1979), in *Jieshi Jicheng*, *supra* note 60, at 941.

195. *Id.*

public. Within a year of the passage of the Criminal Law, the Standing Committee of the National People's Congress promulgated a decision authorizing the Court for the remainder of 1980 to delegate to Higher People's Courts the authority to approve death sentences (for immediate execution) for the crimes of homicide, rape, robbery, causing explosions and other crimes gravely endangering public security and disrupting social order.<sup>196</sup> It can be safely assumed that the impetus for this legislation came from the Central Political-Legal Committee. In 1981, the Standing Committee promulgated a decision that authorized the Court to delegate to the higher people's courts, for the years 1981 through 1983, authority to review and approve certain capital sentences.<sup>197</sup>

In 1983 the Standing Committee of the NPC amended article 13 of the Organizational Law of the People's Courts to make the temporary changes permanent.<sup>198</sup> That year, the Court issued a notice authorizing Higher People's Courts and the PLA Military Court to approve death sentences in the above mentioned cases,<sup>199</sup> but retained the authority to approve death sentences imposed by lower courts in cases involving the crimes of counter-revolution, bribery, smuggling, speculation,

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196. Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Tongzhi [Notice of the Standing Committee of the National People's Congress] (March 6, 1980), *id.* at 942. The Court followed with an explanatory notice less than two weeks later. Zuigao Renmin Fayuan, Guanyu dui Jilei Xianxing Fan Shouquan Gaoji Renmin Fayuan Hezhun Sixing de Ruogan Juti Guiding de Tongzhi [Notice of the Supreme People's Court Concerning Some Concrete Measures Regarding Delegating to Higher People's Courts Review and Approval Authority in Death Sentences in Several Types of Crimes] (March 18, 1980), *id.* at 943.

197. Decision of the Standing Committee of the National People's Congress Regarding Approval of Case Involving the Death Sentence June 10, 1981, 1 *The Laws of the People's Republic of China* 250 (1979-82). The following day, the Court issued an explanatory notice to the Higher People's Courts and the People's Liberation Army Military Court. Zuigao Renmin Fayuan, Guanyu Zhixing Quanguo Renmin Daibiao Dahui "Guanyu Sixing Anjian Hezhun Wenti de Guiding" [sic—jueding] de Jixiang Tongzhi [Notice of the Supreme People's Court Concerning the Implementation of the Decision of the Standing Committee of the NPC Regarding the Question of Approval of Cases Involving Death Sentences] (June 11, 1981), in *Jieshi Jicheng*, *supra* note 60, at 944.

198. Decision of the Standing Committee of the National People's Congress Regarding the Revision of the Organic Law of the People's Courts of the People's Republic of China Sept. 2, 1983, 2 *The Laws of the People's Republic of China* 37 (1983-86).

199. Such crimes may include homicide, rape, robbery, causing explosions and other crimes gravely endangering public security and disrupting social order.

transport, sale, and manufacture of narcotics, as well as the transport and smuggling of antiques.<sup>200</sup>

In 1991 and 1993, the Court made use of the flexibility inherent in article 13. In 1991, it authorized the Yunnan Province Higher People's Court to approve death sentences in most cases involving the smuggling, sale, transport and manufacture of drugs.<sup>201</sup> In 1993, the Court delegated similar authority to the Guangdong Province Higher People's Court.<sup>202</sup> When courts in other provinces impose death sentences for narcotics offenses, they must still submit the case to the Court for approval. A Yunnan lawyer attributed the delegation of authority to approve capital sentences in drug cases to a combination of policy and administrative factors that would equally account for the delegation of authority to the Guangdong Province Higher People's Court:

The Central Committee and State Council are particularly concerned about public security and cracking down on drugs. 90% of the drug cases occur in Yunnan, and they've been skyrocketing in the last few years. Death sentences are often imposed, and the Supreme People's Court had to allocate a group of people solely to review Yunnan drug cases. It meant the materials had to be sent up to Beijing, sometimes additional information was necessary, so it made it difficult for the Yunnan authorities to schedule public rallies to

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200. *Zuigao Renmin Fayuan, Guanyu Shouquan Gaoji Renmin Fayuan Hezhun Bufen Sixing Anjian de Tongzhi* [Notice of the Supreme People's Court Regarding the Authorization of Higher People's Courts to Approve Some Death Sentence Cases] (Sept. 7, 1983), in *Falu Quanshu*, supra note 26, at 236.

201. *Zuigao Renmin Fayuan, Guanyu Shouquan Yunnan Sheng Gaoji Renmin Fayuan Hezhun Bufen Dupin Fanzui Sixing Anjian de Tongzhi* [Notice of the Supreme People's Court Regarding Authorizing Yunnan Province Higher People's Court to Approve Death Sentences of Some Drug Crimes] 1991 *Zuigao Renmin Fayuan Gongbao*, No. 2, at 64. Foreign-related cases and cases decided by the Court itself are excluded.

202. *Zuigao Renmin Fayuan, Guanyu Shouquan Guangdong Sheng Gaoji Renmin Fayuan Hezhun Bufen Dupin Fanzui Sixing Anjian de Tongzhi* [Notice of the Supreme People's Court Regarding Authorizing Guangdong Province Higher People's Court to Approve Death Sentences of Some Drug Crimes], 1993 *Zuigao Renmin Fayuan Gongbao*, No. 3, at 91. Foreign-related cases and cases decided by the Guangdong Higher People's Court in the first instance are excluded. The delegation of authority to Yunnan Province is broader than that to Guangdong, because the Yunnan Higher People's Court has the authority to review and approve death sentences in cases in which that court heard the case in the first instance but the defendant did not appeal.

announce sentences. So the authority was “delegated down.”<sup>203</sup>

Thus politics explain why the authority to review and approve capital cases has been transferred to and from the Court. In order to provide swift administration of justice at times of increased crime and social instability, the authority is delegated. On this delegation of the authority and its correlation with increases in serious crimes and the complexity of cases, an author of a monograph on the review and approval of capital sentences commented:

[w]hen criminal activity diminishes and there is better social order, generally the authority to review and approve capital cases is carried out by the Supreme People's Court. At that time there are fewer death sentences, so the capital cases are cases in which the facts of the case are more important, complex, and have a great effect on society. It is only if the Supreme People's Court reviews and approves [the capital sentences] that the quality of the cases can be guaranteed. At times when criminal activity increases greatly and . . . [criminals] are swollen with arrogance, the masses' senses of security is not guaranteed. We then generally employ a line of severe measures against criminal elements. At this time the number of cases in which death sentences are imposed increases. In these cases, the facts of the cases are generally more clear, the evidence is conclusive, and it is more appropriate for the authority to review and approve capital cases to be transferred to higher people's courts, in order to strike at criminal elements in a timely manner.<sup>204</sup>

Politics has also determined why some offenders require special procedures.<sup>205</sup> For example, capital cases involving foreigners are subject to stringent procedures. Such cases may involve either a foreign defendant or a victim who is an important foreign official or personage;

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203. Interview (February, 1992).

204. Xiao, *supra* note 188, at 73.

205. Zhonggong Zhongyang Zhengfa Weiyuanhui Guanyu Guiguo Huaqiao he Qiaozhuan Zhong de Fanwei de Jieshi [Central Political-Legal Committee of the Chinese Communist Central Committee, Interpretation of the Scope of Returned Overseas Chinese and Relatives of Overseas Chinese], in *Jieshi Jicheng*, *supra* note 60, at 1716.

the political leadership views them as being such sensitive matter that it has decided to retain the actual authority to decide such cases. Consequently, the Court consults with the Ministries of Public Security, Foreign Affairs, Justice, and Supreme People's Procuratorate and seeks approval for the decision from the Central Committee of the Communist Party.<sup>206</sup>

The Court's procedure for reviewing and approving capital sentences is similar to its practice in other functions. The sole responsibility of the No. 1 Criminal Division is to review and approve capital sentences. The division is divided into three geographical teams.<sup>207</sup> The Criminal Procedure Law requires that collegial panels be formed to review death penalty cases. One member of the division is designated as the person in charge of the case (*chengbanren*) unless the case is extremely complex or sensitive, in which case more persons may be made responsible. The *chengbanren* of the case sits on the collegiate panel and is responsible for reviewing the complete file. When necessary, the judge in charge may request lower courts to provide additional materials. Occasionally, the judge in charge may engage in additional investigation by interviewing the defendant or witnesses. Once the review is completed the judge in charge drafts a report. While the law does not specify what should be reviewed, the judge in charge evaluates the evidence, applies the law, and proposes a preliminary decision in the case. The other judges in the collegial panel review the report of their colleague and report their review of the case, including dissenting views, for review by the division director.<sup>208</sup> If the division director does not agree with the conclusion of the collegiate panel, he will refer the case to the Court Vice President in charge of capital sentence reviews. That Vice President or the Court President is

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206. Zuigao Renmin Fayuan Dangzu, Zuigao Renmin Jianchayuan Dangzu, Gongan Bu Dangzu, Wajiao Bu Dangzu, Sifa Bu Dangzu, Guanyu Gaibian Chuli Shewai Xingshi Anjian Shenpi Banfa de Qingshi Baogao [Supreme People's Court Party Organization, Supreme People's Procuratorate Party Organization, Ministry of Public Security Party Organization, Ministry of Justice Party Organization, Report Asking for Instructions Concerning Changing the Method of Approval of Handling of Criminal Cases Involving Foreign Elements], in *Xingfa Jieshi*, supra note 24, at 441, 443.

207. Interview with a Supreme People's Court official (1993).

208. See Xiao, supra note 188, at 105-06.

authorized to approve capital sentence cases if there is no controversy about the case.<sup>209</sup>

The Court President or a Vice President may review important or difficult capital cases, and may submit the case to the judicial committee for discussion and decision.<sup>210</sup> In general, those are limited to cases on which the responsible staff of the No. 1 Criminal Division and the chief judge differ as to whether the capital punishment is merited, or to cases involving high officials.<sup>211</sup> In a 1988 article, a deputy chief judge of the No. 1 Criminal Division revealed that they occasionally receive instructions (*pishi*) from central leading comrades on the handling of cases.<sup>212</sup>

When review of capital cases take place, no oral or written representations by defense counsel are required. Academics have suggested that lawyers be allowed to make representations in capital sentence reviews.<sup>213</sup> In any case, applicable law gives the Court flexibility to determine procedures for reviewing capital cases. The law provides for Court review in cases in which death sentences are imposed in non-violent crimes, while offering those convicted of violent crimes less procedural protection. In practice, Court staff meet with defense lawyers, the family of a defendant, representatives of the defendant's former work unit, victim's family, and sometimes the representatives of the local government (although this is not legally required). Court staff suggest that they do generally meet with concerned parties, because they see it as a form of "taking heed of the opinion of the masses."<sup>214</sup>

Additionally, because the review of capital sentences is related to the needs of Party and national policy, Party authorities have decided that the more difficult and important cases, such as those involving persons with ties outside of China, require special and full evaluation since they may affect the country's foreign relations. Decisions involving foreigners are made by the Court leadership, other legal

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209. Zuigao Renmin Fayuan, Shenpi anjian banfa (shixing) [Supreme People's Court, Measures for the Review and Approval of Cases (for Trial Implementation)], (April 16, 1981), in *Jieshi Jicheng*, supra note 60, at 684.

210. *Id.* See also Xiao, supra note 188, at 106.

211. *Jieshi Jicheng*, supra note 209.

212. Wang Yongcheng, Guanyu Shenli Xingshi Daan Yaocan de Qingkuang he Wenti [The Situation and Problems in Adjudicating Large and Important Criminal Cases] *Shenpan Gongzuo Zhuanti Jiangzuo Jingxuan* [Selections from a Specialized Seminar on Adjudication Work] 324, 326 (Supreme People's Court Personnel Department, ed., 1988).

213. See, e.g., Xiao, supra note 188, at 191.

214. Interview with Supreme People's Court official.



institutions, and the Central Committee of the Communist Party. These special procedures are omitted from the law, and the public is not informed of them.

There is no statutory time limit on capital sentence reviews. Academics have suggested a one month limit, with a one month extension.<sup>215</sup> The Court foresees that a time limit for reviewing capital sentences may be included in a future revision of the Criminal Procedure Law. Although review of capital sentences is perceived to be a mere formality, lower court recommendations are often overturned. One Court staff member commented: "It can be that the higher court looks at the crime from the provincial perspective and believes that what the person did is so serious that it requires immediate execution, but from the national perspective we don't think it is necessary to execute the defendant immediately."<sup>216</sup>

At times, the Court imposes the death penalty with a two year suspension rather than immediate execution, although the Criminal Procedure Law does not explicitly give it such authority.<sup>217</sup> The number of cases approved for immediate execution is unknown, such statistics being confidential information.<sup>218</sup> In determining whether a capital case should be approved, the Court is sensitive to current state and Party policy, as well as nationwide imposition of the death penalty.<sup>219</sup>

In most published accounts of the Court's capital case reviews, the original sentence is approved because the Court prefers to publicize models as an example. For instance, a leading monograph on capital sentence review describes a case in which the Court decided that the lower courts misapplied the law.<sup>220</sup> In that case, there was no dispute

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215. Xiao, *supra* note 188, at 103.

216. Interview with Supreme People's Court official.

217. Chen Weidong & Zhang Tao, *Xingshi Tebie Chengxu de Shijian yu Taolun* [Practice and Discussion of Special Criminal Procedures] 204 (1992).

218. Zuigao Renmin Fayuan, Guojia Baomi Ju, Guanyu Yinfa "Renmin Fayuan Gongzuo Zhong Guojia Mimi Jiqi Miji Juti Fanwei de Guiding" de Tongzhi [Supreme People's Court, State Secrets Bureau, Notice Concerning the Distribution of "Regulations Concerning Actual Scope of State Secrets in the Work of People's Courts and Their Level of Secrecy"], in *Jijian Jiancha Gongzuo Shouce* 259 (1991).

219. Xiao, *supra* note 188, at 107.

220. Xiao, *supra* note 188, at 114-16, contains the following case summary:

Defendant: Guan Qingchang, 53 years old, formerly head . . . of the production planning department of a Shenyang factory.

Defendant: Huang Suzhen, wife of Guan, formerly worker at the same factory.

about the facts. The single legal issue was whether a worker in a state-owned factory can commit the crime of corruption. Article 155 requires that, to find corruption, a person has to be a state personnel (*guojia*

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In 1961, when Huang was a factory worker, Guan compelled Huang to steal two pieces of gold from the factory. In March of that year, Guan discovered that in the there was a box of packed gold which had not been stored in the warehouse and conceived of a plan to steal the gold. On April 18, . . . at 7 p.m., Guan stole . . . two ingots of gold weighing 807 oz. [Chinese *liang*].

In April, 1980, Guan and Huang learned that the state had raised the price of gold and silver, and that when banks bought gold they weren't checking as closely as before...On April 15, Huang took a piece of gold weighing 58.3 oz. and went to the sales department of the Shenyang branch of the People's Bank of China to sell it. The bank worker noticed that the purity of the gold was very high, unlike most civilian gold, but like industrial gold, and immediately informed the public security organs. The public security organs immediately investigated . . . That evening in a search of the defendant's home they turned up all the stolen gold.

The Shenyang Municipal Intermediate People's Court sentenced Guan to death and deprivation of political rights for the rest of his life for corruption according to article 9 of the Criminal Law and Articles 2, 3, and 12 of the Regulations on the Strict Punishment of Corruption; the Court sentenced Huang to death with a two year suspension of execution and deprivation of political rights for the rest of her life. After the verdict was announced, the defendants did not appeal. The Shenyang Intermediate People's Court reported the cases to the Higher People's Court for review.

After the Liaoning Higher People's Court reviewed the cases, it agreed that the cases should be classified as the crime of corruption, and sentenced Guan to death and deprivation of political rights for the rest of his life; changed the sentence of Huang to a life sentence, with deprivation of political rights for the rest of her life, and reported the cases to the Supreme People's Court for review and approval.

After review of the case and discussion by the 140th session of the its judicial committee, the Court decided that according to article 155 of the Criminal Law, the crime of corruption applies to state personnel who take advantage of their office, who use embezzle, steal, or cheat to illegally seize public property. According to article 152 of the Criminal Law, the crime of theft is a done with the goal of illegally seizing, secretly swindling a relatively large or huge amount of public or private property. In 1961 when Huang Suzhen stole the gold, although she took advantage of her office she was not considered to be state official, but a worker directly engaged in production, and the crime should be classified as the crime of theft, not of corruption. Guan and Huang did not commit the crime of corruption, therefore the "Act for the Punishment of Corruption" should not be applied. Moreover, as to the crime of theft, the highest penalty provided by the Criminal Law is life imprisonment (at that time the Criminal Law had not been amended), a lighter penalty than previous laws, decrees, and policy had provided, and the penalty provisions of the Criminal Law should be applied. Therefore, the original judgment is inappropriate in its determination of the crime and application of law. According to the provisions of the Criminal Procedure Law the Supreme People's Court quashed the original judgment and ordered that the Liaoning Higher People's Court retry the case.

After the Liaoning Higher People's Court retried the case on November 11, 1980, Guan Qingchang was sentenced to life imprisonment according to articles 152 and 157 of the Criminal Law and deprivation of political rights for the rest of his life and Huang Suzhen was sentenced to ten years fixed-term imprisonment.

*gongzuo ren yuan*) and has abused his office. Article 83 of the Criminal Law defines “state personnel” as “all personnel in state organs, enterprises, and [social] institutions and other personnel engaging in public service according to law.”<sup>221</sup> The Court decided that a worker in a state-owned factory should not be considered state personnel and therefore the defendant was guilty of theft rather than corruption. Instead of revising the judgment, the Court remanded the case to the Liaoning Higher People’s Court.

The procedure for reviewing and approving death sentences seems likely to remain as long as the death penalty is retained by China. Future revisions of the Organizational Law of the People’s Court and Criminal Procedure Law will probably clarify technical questions such as whether the Court can revise a judgment, and whether in cases in which some co-defendants are sentenced to death the files for those not sentenced to death must also be submitted. There seems to be little support in the judiciary, at least, for establishing formal hearing procedures that would permit lawyers to participate in the process.

#### *b. Adjudication Supervision*

The Organizational Law of the People’s Courts gives the Court special authority in adjudication (also known as judicial or trial) supervision, a procedure by which decisions in civil, criminal, and administrative cases which have already gone into effect may be reexamined and re-decided by courts at various levels.<sup>222</sup> The Court devotes substantial institutional resources to adjudication supervision; thus the Petitions and Appeals Division’s sole responsibility is to handle the enormous amount of petitions submitted daily to the Court. It examines and routes petitions for adjudication supervision. Also, adjudication supervision in criminal cases is the primary responsibility of the No. 2 Criminal Division.

The criteria of the criminal and administrative procedure laws for the Court’s reexamination of cases in adjudication supervision essentially repeat the Organizational Law provisions.<sup>223</sup> If the Court determines that “definite error” has been made in a lower court’s judgment or order, it may review the case itself or direct a lower level court to retry

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221. Criminal Law, art. 83.

222. Organizational Law of the People’s Courts, art. 14.

223. Administrative Litigation Law, art. 62; Criminal Procedure Law, art. 148.

the case and state that the execution of such judgments or orders cannot be suspended.<sup>224</sup> The recently revised Civil Procedure Law (1991), in contrast, provides that a civil case shall be re-opened under adjudication supervision if it is shown that there is: substantial new evidence, the original judgment was based on insufficient evidence, erroneous application of law, prejudicial violations of law and judicial misconduct.<sup>225</sup>

The Court has had such authority since the establishment of the People's Republic, but the roots of the practice may be traced to the capital appeal system of the imperial legal system.<sup>226</sup> Under adjudication supervision, the Court may reexamine a judgment or order of a lower court of any level that has already become legally effective and either retry the case itself, or instruct a people's court at a lower level to conduct a retrial.

Adjudication supervision apparently runs counter to the principle of finality of court judgments and, in particular, to the Chinese system whereby the second instance is the final instance.<sup>227</sup> Nonetheless, adjudication supervision harmonizes conflicting judicial values of efficiency and accuracy identified by the Constitution. Several factors justify having adjudication supervision. Several judges have pointed out in private discussions that:

the history of justice in the People's Republic is filled with cases decided incorrectly because of political movements. Each time China has a political movement some people are unfairly sentenced. Judicial supervision can correct historical [i.e., political] mistakes.<sup>228</sup>

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224. Organizational Law of the People's Courts, art. 14.

225. Civil Procedure Law, art. 171, *supra* note 49.

226. For a discussion of the capital appeal system, see J. Ocko, *I'll Take It All the Way to Beijing: Capital Appeals in the Qing*, 47 *J. Asian Studies* 291-315 (1988). At least one Chinese author traces the roots of adjudication supervision to "appealing to the emperor" as far back as the Zhou dynasty. See Wang Jiancheng (ed.) *Xingshi Shenpan Jiandu Chengxu Zhuanlun* [Monograph on criminal adjudication supervision procedure] 22-25 (1990). An American writing recently traced the origins of adjudication supervision instead to the Soviet Union. See M. Woo, *Adjudication Supervision and Judicial Independence in the P.R.C.* 39 *Am. J. Comp. L.* 95, 105-06 (1991).

227. Organizational Law of the People's Courts, art. 12.

228. Interview with judges of various levels (1991-92).

Although adjudication supervision began as a vehicle to correct criminal cases that have been decided incorrectly due to political reasons, its broader rationale should be attributed to the Chinese sense that genuine justice should be served despite the cost to administrative regularity and efficiency, that social harmony means that substantive justice deserves a place higher than procedural justice.<sup>229</sup> It could be seen as analogous to a habeas corpus petition in Anglo-American systems, but extends both to civil cases and criminal cases. It acts as an antidote not only against political injustices but also the low level of professional competence in the legal profession.

The Court may begin review of a case in adjudication supervision when: (1) the Supreme People's Procuratorate lodges a protest with the Court, (2) it takes its own initiative, or (3) it wants to respond to a petition or application by a party to the case, victim, their family members or other persons.<sup>230</sup> The Supreme People's Procuratorate rarely lodges protests with the court.<sup>231</sup> The Court initiates cases on its own when it "discovers" them, either through articles in the press<sup>232</sup> or in Court-organized work teams. The Court periodically sends work teams of Court judges to lower courts to monitor work (*kaocha gongzuo*).<sup>233</sup> This practice of sending work teams to the "grassroots" is a typical practice of the Party and state organs as well. If in reviewing a lower court's case files a work team discovers significant error in the handling of a case, it may recommend that the case be re-opened in accordance with adjudication supervision. The host court for its part can ensure positive reviews by offering warm and generous hospitality to the Beijing visitors, who are invariably dependent

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229. R. Randle Edwards, *Civil and Social Rights: Theory and Practice in Chinese Law Today*, in *Human Rights in Contemporary China* 47 (1986).

230. Organizational Law of the People's Courts, art. 32 (3); Organizational Law of the People's Courts, art. 14; Criminal Law, art. 148.

231. 1988 Court Yearbook, *supra* note 2 at 12. A case of a protest lodged by the Supreme People's Procuratorate was recently reported in the Chinese press. *Zuigao Renmin Fayuan Caiding Li Fuxing Anjian Chong Shen* [The Supreme People's Court Rules that the Li Fuxing Case Should be Re-Adjudicated], *Fazhi Ribao* [Legal System Daily], Sept. 28, 1993, at 1.

232. See, e.g., case discussed *infra* in this section.

233. The practice of sending *kaocha* or *jiancha* teams is discussed in Wen, *supra* note 113, at 128-129. An article in the Court's Economic Division bulletin gives a report from a work team from the Anhui Higher People's Court Civil Division. *Guanyu 1991 Niandu Jingji Jiufen Anjian Zhiliang Chiucha de Baogao* [A Report Concerning a Sample of the Quality of 1991 Economic Dispute Cases], in 3 *Jingji Shenpan Ziliao Xuandu* [Readings in Economic Adjudication Materials] 1-6 (1992).

on the locals for arrangements. For this reason, relatively few cases are "discovered" this way.

Most adjudication supervision cases examined by the Court arise from applications (petitions) submitted to the Court. Although many petitions are submitted by aggrieved persons or their families, increasingly lawyers resort to it as an additional instance when a second-instance decision by a provincial Higher People's Court is not in their favor. High Party and state leaders may also refer cases to the Court.<sup>234</sup> As in traditional times,<sup>235</sup> aggrieved persons, unable to obtain justice in their hometown petition high leaders, petition high leaders in writing or by traveling to Beijing.<sup>236</sup> As a general rule, how a petition will be treated depends on whether it has been submitted by a petitioner or lawyer, or forwarded by a high Party and State leader.

In 1987 the Court established the Petitions and Appeals Division to handle petitions and appeals for adjudication supervision and guide petitions and appeals work in the lower courts.<sup>237</sup> The Court has established premises for accepting petitions of aggrieved persons near the Yongdingmen Railroad Station in the southern end of Beijing, far from the Court building near Tiananmen Square. Petitioners submit their materials through a small barred window, and the staff is imperious to unwelcome visitors and petitioners. The Petitions and Appeals Division receives several thousand letters daily as well as visits from aggrieved persons, which it deals with itself or routes to the substantive divisions of the Court or lower courts.

Because most civil cases are heard in the second instance in the intermediate courts, the Civil Division handles few petitions, while the Economic Division handles many. The division also routes petitions referred to the Court by "central leading comrades," the Standing Committee of the NPC, and leaders of the Court.<sup>238</sup> The No. 2 Criminal Division and other substantive divisions deal with petitions of cases in which the party is dissatisfied with a judgment or decision made

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234. *Zuigao Renmin Fayuan, Guanyu Zuigao Renmin Gaosu Shensu Shenpanting de Zhize Fanwei he Qiyong Yinzhang de Tongzhi* [Notice of the Supreme People's Court Concerning the Terms of Jurisdiction and Seal of the Supreme People's Court Petitions and Appeals Division], *supra* note 63, at 744.

235. *Ocko*, *supra* note 226.

236. See, e.g., *Awaiting Uncertain Justice*, *South China Morning Post*, May 17, 1992, at 11.

237. *Sifa Shouce*, *supra* note 64.

238. *Id.*

by a higher people's court, or with a decision made by the Court.<sup>239</sup> Although theoretically the Court may engage in adjudication supervision of decisions by the military courts, in practice the Court does not directly re-open military cases but rather makes its view on the handling of a case known to the PLA Military Court.<sup>240</sup>

For many years, substantive law provided no limits or rules on who could file a petition, the time period within which they could file, the minimum evidence necessary, or level of court at which a petition could be filed. That situation was nicknamed "the four limitless" within the court system.<sup>241</sup> The "four limitless" are now reduced to "two limitless and two halves." The law still provides that in a criminal case, a party to a case, victim, family member, or any citizen can petition to re-open a case in adjudication supervision.<sup>242</sup> The law is silent as to minimal evidentiary standards. Furthermore, neither the Criminal Procedure Law nor Administrative Litigation Law imposes time limits on filing petitions. Only the revised Civil Procedure Law places a time limit (of two years) on filing petitions for adjudication supervision. On the other hand, with respect to which level of court should consider various sorts of petitions, some provisions on their handling have been supplied in recent regulations (1987 and 1989).<sup>243</sup> While an improvement over the sketchy documents of the past, the regulations still omit procedures, provisions on standards for re-opening a case, geographical jurisdiction, and standards for when a court will retry a case itself or remand it to a lower court.

The Court retains much flexibility in deciding how to handle adjudication supervision petitions. Some Chinese lawyers have privately commented that without connections and without making a commotion

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239. *Id.* at 745-47.

240. Interview with Supreme People's Court official.

241. Zhang Zhigang, Shenpan Gongzuo Zhuanti Jiangzuo Jingxuan [Selected lectures on Special Topics in Adjudication Work] 349, 354 (1988).

242. Criminal Procedure Law, art. 148.

243. In 1987, the Court issued regulations on the handling of criminal petitions. Zuigao Renmin Fayuan, Guanyu Geji Renmin Fayuan Chuli Xingshi Shensu de Zanxing Guiding [Supreme People's Court, Temporary Regulations on the Handling of Criminal Petitions and Appeals in all Levels of the People's Courts], (Oct. 10, 1987), in Falu Quanshu, *supra* note 26, at 295-297. In 1989 the Court issued similar regulations for the handling of petitions in civil and economic cases. Zuigao Renmin Fayuan, Guanyu Geji Renmin Fayuan Chuli Minshi he Jingji Jiufen Anjian Shensu de Zanxing Guiding [Supreme People's Court, Temporary Regulations on the Handling of Petitions and Appeals in Civil and Economic Cases in all Levels of the People's Courts], July 12, 1989, Zuigao Renmin Fayuan Gongbao, No. 3, 1989, at 14-15.

to catch the leaders' or the public's attention, petitioning is useless. For their part, Court judges also complain about the difficulty of handling petitions.<sup>244</sup>

If the Court decides that a petition has merit, it retains flexibility to decide whether to retry the case itself or remand it to the court which originally heard the case.<sup>245</sup> If it remands, the original court often defends its earlier handling of a case by making a similar decision in the retrial. Retrying a case, on the other hand, is more burdensome for the Court because it means the original court has to transfer the case file and that the Court has to form a collegial panel. Connections of the party or his representative, and the notoriety of a case, can make the difference in whether the Court retries a case itself. "Important and difficult" cases of adjudication supervision are reviewed by the Court's judicial committee. In 1989, for example, it discussed the petition submitted by Ni Xiance, former governor of Jiangxi Province, to overturn his 1987 conviction for self-seeking misconduct.<sup>246</sup> The case was considered "important" because Ni was a high official.

A few accounts of cases re-opened by the Court under adjudication supervision have been published by the Court in either the *Gazette* or other Court publications. Although the Court has published some civil cases in which it reversed a lower court's decision,<sup>247</sup> the published criminal cases generally indicate that the Court has upheld the lower court's decision. The rationale guiding the selection is that such cases are representative (*daibiaoxing*) of the accurate work of the courts.

A case published in the Court's journal, *Renmin Sifa (People's Justice)*, illustrates this thinking. In a magazine story on a criminal trial in the Liangshan Yi Nationality Autonomous Prefecture Intermediate Court, one writer charged that the court had violated the law by trying the supplementary civil case after the criminal case, exceeding the legally stipulated time limits in trying the case, committing irregularities in ordering a mental competency test, and casting a "relationship net"

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244. Interviews with Supreme People's Court officials (1992-93).

245. Falu Quanshu and Zuigao Renmin Fayuan Gongbao, *supra* note 243.

246. Ni Xiance Shensu Bei Buohui [Petition by Ni Xiance rejected], in 10 *Renmin Sifa* 15 (1989).

247. See, e.g., Zuigao Renmin Fayuan Gongbao, *supra* note 182; Wang Aiyong yu Li Baosheng Juji Jiufen Chiangzhixing An [Wang Aiyong v. Li Baosheng, A Compulsory Enforcement of a Residence Dispute Case], Zuigao Renmin Fayuan Gongbao, No. 2, 1986, at 38-39.



that was used to protect the defendants.<sup>248</sup> This story and the controversy that followed led the Court to re-examine the case. Several months later, within *Renmin Sifa*, the Court published an interview with the trial court president, who refuted the charges made in the magazine article.<sup>249</sup>

Although the defendants had not petitioned the Court, the Court President ordered the case file transferred to Beijing for review. Because the case had achieved national prominence and the Court saw that the court system's reputation was at stake, the Court initiated adjudication supervision and examined the case, even to the extent of discussing the case in the Court's Judicial Committee. Three months later, *Renmin Sifa* published an article summarizing the results of the Court's decision. The Court decided that according to article 54 of the Criminal Procedure Law, the Intermediate Court could postpone the civil case and need not notify the victim's family of the trial, that the trial delay was legal, that the competency test was "scientific," and that the charge of a "relationship net" was groundless.<sup>250</sup>

Judging from all available evidence, adjudication supervision is likely to remain a responsibility of the Court. The trend of greater proceduralization of adjudication supervision is likely to continue. The future may see limits placed on at least three of the "four limitless"—persons, evidence, and courts. In the area of criminal law, however, concerns about substantive justice are likely to militate against placing time limits on petitions.

### c. *Reviewing and Approving the Use of Analogy in Criminal Proceedings*

A theoretically important but practically unimportant function of the Court is reviewing and approving the use of analogy in criminal proceedings. Article 79 of the Criminal Law provides that "a crime that is not expressly stipulated in the Special Provisions of this Law may be determined and punished according to the most closely analogous article of the Special Provisions of this Law, but the matter shall be submitted

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248. Dai Huang, Zai Cengceng Hou Gang de Fugai Xia [A Many-Layered Net Under a Cover], in 6 Xingancha [New Observer] 2-8 (1989).

249. Ji Xiaoyong de Shenli Shi Gongzheng Hefa de [The Trial of Ji Xiaoyong Was Just and in Accordance with Law], in 7 Renmin Sifa 10-13 (1989).

250. Zuigao Fayuan dui Ji Xiaoyong An Zuochu Shencha Jielun [The Supreme Court has Come to a Conclusion of Its Review of the Ji Xiaoyong Case], in 10 Renmin Sifa 14-15 (1989).

to the Supreme People's Court for approval."<sup>251</sup> Analogy—imposing punishment for an act not directly prohibited but analogous to an act prohibited by law—was a feature of traditional legal codes<sup>252</sup> and also existed in the Stalin-era Soviet criminal code,<sup>253</sup> to which Chinese drafters looked when drafting their own code.

The provision in the Criminal Law on analogy does not contain specific procedures. It thus gives the Court a great deal of flexibility to determine appropriate procedures and the significance of cases which it approves. In 1980, the Court issued a notice stating procedures for the submission of cases decided by analogy to guide the lower courts on the use of analogy.<sup>254</sup> Whether the defendant appeals and whether the procuratorate protests the decision in the first instance, the court at the next higher level (either an intermediate or higher people's court) is required to review the case, including the use of analogy. If the appellate court determines that analogy was inappropriate, it should remand the case for retrial. If the appellate court determines the case was decided properly and analogy was used properly, it should add its opinion to the file and submit to the case to the Court.<sup>255</sup>

The No. 1 Division of the Court reviews analogy cases. If it determines that analogy was used improperly, the Court may either issue a new judgment or remand to the original court for a retrial.<sup>256</sup> According to 1981 Court regulations, criminal cases in which the use of analogy must be approved is subject to discussion by the Court's Judicial Committee.<sup>257</sup>

An average of five cases of analogy are submitted for approval each year.<sup>258</sup> Several have been published.<sup>259</sup> One case involved Alimuradov Shamid Gadzhilogli, a Soviet man who hijacked a passenger

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251. Criminal Law, art. 79.

252. Like the current Criminal Law, the Qing Code required that all cases judged by analogy had to be submitted to Beijing for approval. Bodde and Morris trace the Qing statute to the Tang Code. Bodde and Morris, *supra* note 32, at 117, 176.

253. Harold Berman, *Justice in the USSR* 56 (1963).

254. *Zuigao Renmin Fayuan, Guanyu Shiyong Falu Leitui de Anjian Baosong Hejun Wenti de Tongzhi* [Notice Concerning the Question of Submitting for Approval Cases Decided by Analogy], (Jan. 14, 1980), in *Jieshi Jicheng*, *supra* note 60, at 753.

255. *Id.*

256. *Id.*

257. *Jieshi Jicheng*, *supra* note 209.

258. *Xingfa Xiugai Yanjiu Zongshu* [Summary of Research on the Revision of the Criminal Law] 108 (Zhao Binzhi & Zhao Guoqiang, eds., 1990).

259. See, e.g., *Xingfa Anli 96-99* (Central Political-Legal Cadre School Criminal Law and Criminal Procedure Law Research and Teaching Office ed., 1982).

airplane from the Soviet Union that landed in China's Heilongjiang Province. The Intermediate Court of Harbin Municipality tried the case and applied article 107 (counter-revolutionary hijacking) by analogy. The Heilongjiang Higher People's Court reviewed the case and used analogy to determine the crime and sentence. It approved and submitted the case to the Court. The Court's Judicial Committee approved both the use of analogy and the eight year sentence imposed on the defendant.<sup>260</sup> Such use of analogy has been opposed by many Chinese academics.<sup>261</sup>

The 1979 Criminal Law has not yet been revised, despite substantial legal and social changes. The Court has avoided extensive use of analogy by "legislating" new offenses through the issuance of interpretations. Punishing criminal behavior through the use of analogy has a long history in China, but perhaps it will come to an end with a future revision of the Criminal Law.

### 3. The Court and the Adjudicatory Process: A Summary

The Court has an important role in adjudication through issuing official replies, reviewing and approving death sentences, engaging in adjudication supervision. Although the number of appeals that it hears is likely to increase, hearing cases will remain a relatively unimportant function of the Court, unless the two-instance system is abolished. The Court's main adjudication activity is likely to remain guidance and monitoring of lower court cases. This means exercising approval power in certain sensitive criminal cases, guiding the lower courts in deciding many other cases, and correcting courts when they go wrong and come to its attention.

The way the Court adjudicates reflects its bureaucratic nature. In all types of adjudicatory proceedings, the Court uses internal institutional procedures which are flexible but closed to interested parties (except for those with connections), and relies on a review of written materials rather than on hearing. The future may see the abolition of analogy, but it is likely that the other adjudicatory functions will continue, possibly with more detailed procedures.

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260. Alimuradov Shamid Gadzhi ogli jiechi feiji an, [Alimuradove Shamid Gadzhiogli Airplane Hijacking Case], *Zuigao renmin fayuan gongbao*, No. 2, 1986 at 36-38.

261. See, e.g., the summary of the academic debate in *Xingfa Xiugai Yanjiu Zongshu*, *supra* note 258, at 101-9.

### C. *The Court and the Legislative Process*

The Court is actively involved in legislation and quasi-legislation, although the Organizational Law of the People's Courts has no relevant provisions. Its legislative work can be divided into three areas: general legislation, court rules and quasi-legislation. The Court has issued court rules and quasi-legislation for most of its history. In the post-1979 period, it has been increasingly active in general legislation.

General legislation may be divided into two types. Occasionally, the Court submits draft legislation to the National People's Congress and its Standing Committee, as the Organizational Law of the National People's Congress gives it such authority.<sup>262</sup> The draft legislation generally relates to the court system. At the present, the Court is involved in drafting the "People's Republic of China Judges' Regulations" and the "Organizational Regulations of People's Tribunals."<sup>263</sup> The Court has an important role in the current revision of the Organizational Law of the People's Courts. Instances in which the Court takes the lead in legislative drafting, however, are relatively rare.

The more usual context in which the Court participates in general legislation occurs when the Court participates in drafting legislation when other organs have primary drafting responsibility. This is a function of the Court but has no basis in law. The Court participates in writing comprehensive laws that involve the interests of many departments, such as the General Principles of Civil Law and the Civil Procedure Law, in which the NPC Legislative Affairs Commission takes the lead in drafting. The Commission's practice is to organize persons from relevant government departments, experts, professors, and staff from the Court to participate in the drafting process. Court personnel provide a perspective to the drafters on what needs to be considered in terms of future judicial practice. Those from the Court who work on the drafting of a law generally are asked to work on drafting the Court's interpretation of that law.

The Court is also often asked to comment on draft legislation or administrative rules and regulations prepared by the State Council, although there is no legal basis for such activity. In China, the State Council and its departments have an important role in drafting legislation

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262. Organizational Law of the National People's Congress, art. 9, 1 *The Laws of the People's Republic of China* 334, 336 (1979-82).

263. 1993 *Zuigao Renmin Fayuan Gongzuo Baogao*, *supra* note 48.

for proposal to the NPC or its Standing Committee, and in drafting State Council rules and regulations. Depending on the subject of the law involved, a government ministry or group of ministries may take the lead in drafting a law, with the Bureau of Legislative Affairs of the State Council assuming a coordinating role. The Bureau of Legislative Affairs of the State Council, in turn, often forwards draft legislation or rules and regulations to the Court for its comments. The Research Office of the Court has responsibility for such work. This practice has become increasingly important to the ministries under the State Council because the 1989 Administrative Litigation Law has changed the relationship between the courts and administrative organs. In particular, the law provides that courts need not enforce ministerial regulations.

A second legislative activity of the Court is issuing court rules to establish procedures for the court system. Such rules have included courtroom rules, procedures for the handling of petitions, and rules for the submission of death penalty cases. The Court has also issued regulations on the jurisdiction of various specialized courts as well as measures on court fees,<sup>264</sup> and has promulgated jurisdictional regulations jointly with other institutions when the rules involve issues of mutual involvement.<sup>265</sup> The Court does not have explicit legal authority to issue court rules, but apparently no questions have been raised about this practice. The practice began in the 1950's when the Court was faced with the practical task of guiding the lower courts while lacking procedural law. During the pre-Cultural Revolution period, the Court issued a "Summary of Criminal Trial Procedure for all Levels of Courts" and "Summary of Civil Trial Procedure for all Levels of Courts."<sup>266</sup>

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264. See Guanyu Haishi Fayuan Shouan Fanwei de Guiding [Regulations Concerning the Scope of Cases Accepted by the Maritime Courts], *Zuigao Renmin Fayuan Gongbao*, No. 2, 1989, at 31; Guanyu Tielu Yuntuo Fayuan dui Jingji Jiufen Anjian Guanshan Fanwei de Guiding [Regulations Concerning the Jurisdictional Limits of the Railroad Transport Courts in Economic Disputes], *id.* No. 3, 1990, at 11; as to court fees, see *Renminfayuan susong shoufei banfa* [Measures for Assessing Court Fees in the People's Courts], *id.* No. 3, 1989, at 8.

265. See, e.g., *Zui Gao Renmin Fayuan, Zuigao Jianchayuan, Gongan Bu, Zhongzhengzhi Bu Guanyu Jundui he Difang Hushe Anjian Jige Wenti de Guiding* [Supreme People's Court, Supreme People's Procuratorate, Ministry of Public Security, General Political Department, Regulations concerning some questions of cases which relate to the military and civilians], Nov. 25, 1982, in *Xingfa Jieshi*, *supra* note 24, at 444.

266. *Geji Renmin Fayuan Xingshi Anjian Shenpan Chengxiu Zongjie*, and *Geji Renmin Fayuan Minshi Anjian Shenpan Chengxiu Zongjie* [Summary of Civil Trial Procedure for the People's Courts of All Levels], (Oct. 17, 1956), in *Jieshi Jicheng*, *supra* note 60, at 627, 637.

Thirdly, the Court issues "quasi-legislation." Prior to 1979, the Court had issued regulations on substantive law to compensate for the inadequacies of legislation. The Court fills gaps in legislation by providing legal rules in the form of regulations. Examples of Court "legislation" include: regulations on the adjudication of administrative cases challenging public security penalty decisions, issued to the courts to provide guidance in the absence of the administrative procedure (litigation) law; regulations on the compulsory sale of ships issued to the maritime courts in the absence of the maritime law; and regulations on the handling of reduction of sentence and parole cases issued in the absence of a revision of the Criminal Law and Criminal Procedure Law.<sup>267</sup>

Unless the Chinese legislative process can provide legal rules in a more timely fashion, the Court will probably continue to have an important role in issuing legal rules. What is more probable is that a revised Court Organizational Law will mention explicitly the Court's power to promulgate court rules. It is possible that the future will see greater standardization in the terminology given to court rules and quasi-legislation,<sup>268</sup> which, like other Chinese legislative terminology, is not standardized.

#### D. Administration

One of the Court's important functions is to administer the court system. The Court has administered the judiciary for much of the history of the courts, although its legislative authority for doing so has been minimal.

During the 1950's, the Ministry of Justice engaged in administration of the courts. After the Ministry was abolished in 1959,

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267. Zuigao Renmin Fayuan, Renmin Fayuan Shenli Zhian Xingzheng Anjian Zhuti Yingyong Falu de Ruogan Wenti de Zanxing Guiding [Temporary Regulations on the Application of Law to Some Questions Regarding the Adjudication of Security Administration Administrative Cases], Zuigao Renmin Fayuan Gongbao, No. 4, 1986, at 3; Zuigao Renmin Fayuan, Guanyu Qiangzhi Bianmai Bei Kouya Chuanbo Qingchang Zaiwu de Zhuti Guiding [Specific Regulations on the Compulsory Sale of Ships Which Have Been Seized to Pay Off Debts], Zuigao Renmin Fayuan Gongbao, No. 3, 1987, at 14; Zuigao Renmin Fayuan, Guanyu Banli Jianxing Jiashi Anjian Zhuti Yingyong Falu Ruogan Wenti de Guiding [Regulations Concerning Some questions of the Application of Law to Reduction of Sentence and Parole Cases], Zuigao Renmin Fayuan Gongbao, No. 4, 1991.

268. It includes regulations (*guiding*), measures (*banfa*), rules (*guize*), and standards (*biaozhun*).

the authority to administer the courts was transferred to the Court where it remained until 1979. The 1979 Organizational Law of the People's Court transferred the authority back to the Ministry of Justice. With the Ministry of Justice and its subordinate departments in charge of judicial administration, many problems and abuses occurred. In 1982 the Court obtained the approval of the Central Committee to administer the judiciary again. In 1983, the Organizational Law of the People's Courts was amended to eliminate the authority of the Ministry of Justice to administer the courts.<sup>269</sup>

The Organizational Law of the People's Courts refers only to the authority of the Court to supervise the lower courts and makes no explicit mention of administration. In any case, the Court administers the court system chiefly through controlling the flow of information, convening court system conferences, engaging in administration, training employees, monitoring lower court activities, and coordinating relations with foreign courts and judges.

### 1. Information Control

Since no law requires the Court to distribute its documents, decisions, interpretations, or judicial statistics, the Court has in the past made information available on a "need to know" basis, reflecting an underlying view that the courts are state organs whose operations need to be public information only when necessary. Historically, the Court's distribution of court documents, including interpretations of law, case decisions, and speeches by Court leaders has been made through vertical internal channels. This system is common to other administrative organs. Those channels are vertical in that information is distributed from higher to lower courts or lower to higher courts, but not horizontally among courts of the same level.

The Court distributes information internally through the document system,<sup>270</sup> the internal bulletin on legal developments *Sifa Wenjian Xuan*, internal court newsletters, and the formerly internal journal *Renmin Sifa*. Many provincial higher people's courts and the maritime courts have followed the Court's lead by publishing their own internal

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269. Hu & Li, *supra* note 5, at 33.

270. See discussion *infra* section III.A.4.

journals.<sup>271</sup> The Research Office and other divisions of the Court compile adjudication handbooks such as *Sifa Shouce (Judicial Handbook)*, many of which are internal publications. While these internal channels of communication still exist, today the Court distributes more information to the general public. In 1985, the Court began publication of the *Gazette of the Supreme People's Court*. Its contents include a selection of important legislation, speeches of Court leaders, a selection of interpretations, and accounts of selected cases. In 1987, it established its own press, the People's Court Press.<sup>272</sup>

The Court distributes accounts of certain cases to the lower courts. Although several accounts of Court decisions have been published, the majority of cases distributed by the Court have been decided by lower courts. The case accounts are not the original judicial decision of a case, but rather are edited accounts. Court decisions, whether of the Court or of the lower courts, are inaccessible (except for litigants) to those outside the court system.

In the past, the Court had distributed to the lower courts collections of cases it considered significant through internal channels such as documents or the monthly *Sifa Wenjian Xuan*. This practice has diminished. *Sifa Wenjian Xuan* no longer publishes cases. While at least one substantive division distributes cases in internal bulletins,<sup>273</sup> the Court's public distribution of accounts of cases has increased.

Cases that the Court considers most significant are published in the *Gazette*. Those published have generally come to the Court's attention through adjudication supervision or requests for instructions.<sup>274</sup> For publication, a case must be a paradigm case (*dianxin anli*), both legally and politically, and must have been decided properly without errors of procedural or substantive law.

The Court increasingly utilizes other open channels to publish cases. Among the reasons for case publication are the societal demand for greater openness and the realization that the Court can make money from their publication. The Court's official magazine, *Renmin Sifa*,

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271. These journals seem to be internally published for reasons having to do with the sizeable fees assessed on publicly distributed publications rather than concerns about secrecy.

272. 1988 Court Yearbook, *supra* note 2, at 11.

273. The Economic Division's *Jingji shenpan ziliao xuandu* [Selected Readings of Materials on Economic Adjudication] is an example.

274. This information runs counter to the opinion of a scholar of the Supreme People's Court *Gazette*. See Nanping Liu, "Legal Precedents" with Chinese Characteristics: Published Cases in the *Gazette of the Supreme People's Court*, 5 *J. Chinese L.* 106, 115 (1991).



regularly includes accounts of cases decided either in the Court or lower courts. Various substantive divisions of the Court also have edited and published collections of cases, such as the Criminal Division's *Detailed Analysis of Difficult Criminal Cases*. In 1992, the Court began publication of *Renmin Fayuan Anli Xuan (Selection of Cases of the People's Courts)* (a semi-annual to quarterly publication), the *People's Court News* (a newspaper) and a yearbook.<sup>275</sup>

As the announcement of *Selection of Cases of the People's Courts* states, the Court publishes cases "to summarize previous [positive] experience and [negative] lessons, to guide [future] adjudication work, to publicize the socialist legal system, and to increase the social effectiveness of judicial work."<sup>276</sup> Case decisions published by the Court do not directly have binding force in that the courts do not cite them, but that they are indirectly binding as correctly decided models.<sup>277</sup> The increasing distribution of cases by the Court and lower courts<sup>278</sup> is evidence that the Chinese judicial system is in a transition period from complete reliance on statute law to a mixed system of statute and case law.

While the Court is making more information about the court system publicly available, it still limits significantly the distribution of information. The Court and the State Secrecy Bureau have issued regulations on the confidentiality of certain judicial information.<sup>279</sup> For example, information concerning criminal adjudication is strictly controlled. This reflects the Chinese government's sensitivity toward the use of the death penalty, reports, policy statements and statistics on the number of death sentences which are carried out, and the number of cases involving serious crimes that are classified at varying levels of

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275. Qing dingyue "Renmin Fayuan Bao," [Please Order and Read "People's Court News"], in 8 Sifa Wenjian Xuan 48 (1992).

276. Shuxun [Book News], in 6 Sifa Wenjian Xuanbian, inner back cover (1992).

277. Interview (1992). Liu, *supra* note 274, at 117-122, discusses the question of "guidance" or "precedent" at some length, concluding that Gazette cases are a form of precedent.

278. One writer suggested that "no lower courts are allowed to publish their decisions." Liu, *supra* note 274, at 107, 117. However, most provincial high courts have journals, which are distributed within their court systems and to law faculties. These journals frequently publish accounts of cases. See, e.g., Shenli "Gaowen Ji" An Tihui [The Experience of Trying the "High Temperature Chicken" Case], in Shanghai Shenpan Shijian [Shanghai Adjudication Experience], No. 1, 1990, at 30. Such accounts also guide the lower courts.

279. Zuigao Renmin Fayuan, Guojia Baomi Ju, *supra* note 218.

secrecy. The regulations classify court plans on carrying out anti-crime campaigns and reports on their progress as confidential.<sup>280</sup>

Furthermore, the regulations restrict the distribution of information concerning how cases are considered within the court system. Consequently, internal court discussion by collegiate panels and judicial committees, requests for instructions, and draft decisions are all considered state secrets; the degree of secrecy depends on the importance and sensitivity of the case.<sup>281</sup>

## 2. Court Conferences

Another important way through which the Court guides the lower courts is national court conferences. The National Court Work Conference is the most influential, at which the current Party and government leadership generally appear.<sup>282</sup> Participants of the conference are limited to the leadership of the Court, provincial Higher People's Courts, PLA Military Court, specialized courts, and special economic zone intermediate courts. At the Work Conference, the Court leadership summarizes the achievements and problems of the previous year, and transmits and mobilizes support of the Party's policies and goals for the courts in the upcoming year.<sup>283</sup> Naturally, national court conferences are not limited to the yearly National Court Work Conference. The Court convenes meetings on specialized judicial work on a less regular basis. The Economic Division, for example, has convened general meetings on economic adjudication and specialized conferences on maritime adjudication.<sup>284</sup> The Court uses these meetings to transmit central legal policy, unify court practices in accordance with such policy, and obtain an overview of current court practices and problems. Conferences provide a forum for representatives

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280. *Id.*

281. *Id.*

282. The 1988 Court Yearbook recognized this in the entry on the Court, *supra* note 2, at 13. In recent years, National Court Work Conferences have been held every two years.

283. See, e.g., a report on the 15th National Court Work Conference *Di Shiwuci Quanguo Fayuan Gongzuo Huiyi Zai Jing Zhaokai* [The 15th National Court Work Conference is Held in Beijing], in 2 *Renmin Sifa* 3 (1990); a report on the implementation of the conference's decisions in *Guanche Huiyi Jingshen Tuidong Shenpan Gongzuo* [Implement the Spirit of the Conference, Advance Adjudication Work], in *id.* No. 5, 1990, at 8.

284. *Di Erci Quanguo Jingji Shenpan Gongzuo Huiyi, Haishi Shenpan Zhuanti Yantao Hui* [The Second Economic Adjudication Work Conference, Seminar on Maritime Adjudication], in 1992 *Law Year Book of China*, at 713, 718 (1992).

of lower courts to voice criticism of Court policies and to learn about the judicial developments in other areas of the country. The Court sometimes uses the consensus achieved at a conference as a basis for a legal interpretation, resulting in the conference summary.<sup>285</sup> Sometimes the Court uses the results of a conference as the basis for a policy consensus; the results of a 1986 Changchun conference on adjudication supervision guide the re-opening of Cultural Revolution era counter-revolution cases.<sup>286</sup>

Specialized work conferences are an important means for the operation of Party and state organs in China, true to what the political scientists Lieberthal and Oksenberg have written, "leaders communicate their policies at these meetings, mobilize support, respond to criticism, and seek to cultivate a consensus, get voicing of different viewpoints, and exposure of conflicting interests."<sup>287</sup>

### 3. Chief Administrator of the Court System

Like many national supreme courts, the Court acts as the chief administrator of the court system, although it lacks explicit legislative authorization to do so.<sup>288</sup> Its judicial administration and personnel offices are primarily responsible for administrative affairs. The judicial administration office is in charge of court equipment, such as motor vehicles, and uniforms. That office has issued guidelines on necessary facilities for courts and stipulated uniforms for judges and other court personnel.

Similar to the practice in administrative organs, the Personnel Office of the Court establishes personnel guidelines for the lower courts, such as the regulations on rewards and punishments. The Personnel Office, along with the Party Organizational Department, is working on personnel reforms in the courts. In late 1988, the Party Organizational Department and the Court's Personnel Office initiated an experiment in reforming judicial selection to diminish local protectionism, selecting

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285. See *infra* section III.A.3.

286. Conference described at Quanguo Fayuan Luoshi Zhengce Huiyi [National Court Conference on Implementing Policy], in 1987 Law Year Book of China, at 711. Implementation of the Changchun conference spirit mentioned in Zhang Zhigang, *supra* note 241, at 358, 360.

287. Lieberthal & Oksenberg, *supra* note 33, at 152.

288. For example, the Administrative Office of the U.S. Courts. The director and deputy director are appointed by the Supreme Court of the United States and administer the lower federal courts. H. Abraham, *The Judicial Process* 175 (1986).

four provinces as test sites. The experiment involved transferring authority to appoint judges in the intermediate and basic level courts from the local level to the provincial Higher People's courts and people's congress.<sup>289</sup> The experiment's aim was to find alternative solutions to the current system in which local judges are vulnerable to pressure by local authorities because they have no tenure and are appointed locally. This has led to widespread "local protectionism" in the courts. The experimental system will receive consideration in the revision of the Organizational Law of the People's Courts.

The lack of formal legal authority to engage in judicial administration has been recognized by Court officials. A recent article in the Court's official journal suggested that future legislation should authorize the Court to be in charge of judicial administration and control the staffing levels of the lower courts. It is possible that a revised Organizational Law of the People's Courts may include some provisions on court administration.<sup>290</sup>

#### 4. Training

Like other administrative organs, the Court engages in extensive cadre training. In recent years, the Court has initiated efforts to bolster the educational level of the judges and other court personnel. In 1985, it instituted the "Part-time University" to train judges and other court personnel, commissioning law institutes and departments around the country to provide training.<sup>291</sup> Part-time University courses provide students with training in basic legal subjects. Graduation from Part-time University is a requirement for court personnel seeking to advancement. It is possible for court clerks to become assistant judges or even judges, provided they have sufficient work experience and have completed the Part-time University or its equivalent.

The University has helped raise the educational level of the serving judiciary. The Court estimated that in 1987 approximately 17% of all Chinese judges had received some university law training. That figure has risen to approximately 66% in 1993 because over 70,000 court personnel judges had completed the University's three-year evening

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289. Gaige Ganbu Tizhi, *supra* note 14, at 16-17.

290. See Hu & Li, *supra* note 5, at 34.

291. Shenpan Jiguan ji qi Gongzuo [The Judicial Organs and Their Work], in 1987 China Law Yearbook, at 8, 11 (1987).

course.<sup>292</sup> The Court is also seeking to bolster the corps of highly qualified judges by establishing a Training Center for Senior Judges in Beijing. At the Training Center for Senior Judges, younger and university educated judges are given advanced training in substantive law at two of China's leading law schools, the law departments of Peking and People's Universities.<sup>293</sup> In 1988, the Court established an Education Division to administer court cadre training.<sup>294</sup>

## 5. Monitoring Activities of Lower Courts

The Court also guides the lower courts by monitoring their activities. Like other administrative organs, the courts have practiced a system that requires regular reporting on a yearly basis, level by level, of court developments since the early years of PRC judiciary.<sup>295</sup> The Court especially requires the lower courts to report certain "large and important" commercial cases. In 1989, for example, the Court issued a notice to the economic divisions of the higher courts, requiring them to report the acceptance and resolution of certain "large or important" commercial cases. The notice defined "large and important" commercial cases as those which have attracted international attention; are foreign-related and Taiwan-related cases; are Hong Kong and Macao-related cases with amounts in controversy of 2,000,000 *yuan* or more; are nationally or provincially controversial; or are significant as paradigm cases or forefront cases.<sup>296</sup> One judge had the following comment on reporting:

As to the meaning of "reporting," sometimes it just means report the situation, and sometimes it really includes asking for instructions. It depends on the case, whether it is

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292. Ren Jianxin, *supra* note 48, at 2. That meant that in 1987 nearly 85% of Chinese judges had received a secondary school education or less.

293. Chinese Training Centre for Senior Judges (1990).

294. 1988 Court Yearbook, *supra* note 2, at 11.

295. This reporting (*baogao*) system was established in 1950. Yu Jianping, Zhao Kunpo, Wang Keqin, and Dai Xia, *Jianguo Yilai Fazhi Jianshe Jishi* [Events Pertaining to the Construction of the Legal System Since the Founding of the Country] 31 (1986). Nanping Liu confused the reporting system with the grounds on which provincial courts submit *qingshi* (requests for instructions). Liu, *supra* note 274, at 116.

296. Zuigao Renmin Fayuan, *Guanyu Jianli Jingji Jiufen Daan Yaoan Baogao Zhidu de Tongzhi* [Supreme People's Court, Notice concern the establishment of a reporting system for large and important economic disputes], Jan. 31, 1989, in *Jieshi Jicheng*, *supra* note 60, at 719.

complicated or not. Some cases may have a lot of money in dispute but the underlying legal questions are straightforward.<sup>297</sup>

The Court issued the notice as a means of asserting some control over the adjudication of important litigation in the lower courts. If Court leaders consider a case sufficiently important, they may send Court personnel to monitor the handling of the case.<sup>298</sup>

## 6. Foreign Relations

The Court acts as a liaison between foreign and domestic courts. This role is most visible in the areas of judicial assistance and reception of foreign legal dignitaries.<sup>299</sup> As part of the country's increasing integration into the international legal community,<sup>300</sup> China has in recent years signed judicial assistance agreements with other countries.<sup>301</sup> In 1991, China acceded to the Convention on the Service Abroad of Judicial or Extrajudicial Documents in Civil or Commercial Matters ("the Convention"). These treaties and China's accession to the Convention stipulate the Ministry of Justice as the central authority for receiving requests for judicial assistance. The Court coordinates the implementation of these treaties, as well as the Convention. A 1988 Court notice provides procedures for implementing Sino-foreign judicial assistance treaties.<sup>302</sup> If a foreign request for judicial assistance is received from a treaty state, the Ministry of Justice transfers such requests to the Court, which in turn transfers them to the relevant lower courts. A request from a Chinese court for judicial assistance from a

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297. Interview with an intermediate court judge (1992).

298. Personal experience (October, 1992).

299. The Court's contacts with foreign courts can be dated from 1983. In 1988, the Court elevated the former foreign affairs office under the General office to the status of a bureau. 1988 Court Yearbook, *supra* note 2, at 11.

300. See, e.g., Chiu, *Chinese Attitudes Toward International Law in the Post-Mao Era*, 1978-87 21 *Int'l Lawyer* 1127, 1151-1159 (1987).

301. Among the countries with whom China has signed judicial assistance agreements includes France, Poland, Mongolia, Belgium, Romania, Italy, Spain, and Russia. See *Zhongguo Sifa Xiezu de Lilun yu Shijian* [Theory and Practice of Judicial Assistance in China] 242, 253, 262, 272, 286, 297, 313, 323 (Fei Zongyi & Tang Chengyuan, eds., 1992).

302. *Zuigao Renmin Fayuan, guanyu zhixing zhongwai sifa xiezu xieding de tongzhi* [Supreme People's Court, Notice concerning the implementation of Sino-foreign judicial assistance agreements], Feb. 1, 1988, *id.* at 235.

treaty state is subject to review by the relevant Higher People's court and the Court itself, before the Court transfers the request to the Ministry of Justice.<sup>303</sup> A 1992 Court notice sets forth procedures for the implementation of the Convention.<sup>304</sup> Similar to judicial assistance treaties, the Ministry of Justice transfers foreign requests for the service of judicial and extra judicial documents in civil and commercial matters to the Court, which in turn transfers them to the relevant lower courts. Requests from Chinese courts are transferred to convention member states through the Court and the Ministry of Justice.<sup>305</sup>

#### IV. CONCLUSION

For most of its history, the status of the Court has been similar to other central Party and administrative organs. It has not been independent of the Communist Party or of other state organs. Its staff have been treated as central government officials. Its internal structure has been similar to that of other state and Party organs. Its authority and status have lagged behind the Ministry of Public Security and the Supreme People's Procuratorate. It has functioned much as any other central state organ.

This article has suggested that the economic and social reforms of the last thirteen years have brought a greater degree of autonomy to the Court. The increasing specialization of the Court, in particular its growing preoccupation with issuing legal rules, has meant that in practice the Party is not involved in much of the ordinary work of the Court. The activities of the Court, however, are still subject to Party leadership. The Court implements Central Political-Legal Committee and other Party initiatives and clears important policy decisions and other critical decisions with the Party leadership.

The Court is not content with its status as central state organ and is drafting legislation to set itself apart from the State Council and its departments. In 1987, the Court began drafting a law on the status of

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303. *Id.*

304. *Zuigao Renmin Fayuan, Wai Jiao Bu, Sifa Bu, Guanyu Zhixing "Guanyu Xiang Guowai Songda Minshi huo Shangshi Sifa Wenshu he Sifa Waiwenshu Gongyue" Youguan Chengxu de Tongzhi* [Supreme People's Court, Ministry of Foreign Relations, Ministry of Justice, Notice Concerning Relevant Procedures for the Implementation of the "Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters"], March 4, 1992, *id.* at 240-41.

305. *Id.*

judges.<sup>306</sup> This law will differentiate the status of judges from that of administrative officials, who are bound by the Civil Service Regulations (*Gongwuyuan Tiaoli*) recently promulgated by the State Council. The Judges' Regulations of the PRC is expected to be promulgated in the near future. In addition, the Court has recently begun work on revising the Organizational Law of the People's Courts.<sup>307</sup> A revised law may be expected to set the courts apart from administrative organs and expand the authority of the judiciary, including the Court.

Recent years have seen an expansion of the authority of the judiciary at the expense of the ministries of the State Council. This is due to the 1989 Administrative Litigation Law, which provides that the courts need only consider but not necessarily enforce ministerial regulations. The Bureau of Legislative Affairs of the State Council often solicits the views of the Court regarding draft regulations and the Court, in turn, consults the Bureau.

In the last thirteen years there has been an exponential expansion of the Court's activities. As discussed, the Court is involved in interpreting law, legislating, adjudicating, as well as administering the judicial system. The increasing involvement of courts in resolving social and economic disputes, and the slowness of Chinese legislation have meant that the Court has an increasing role in making, as well as enforcing, legal rules. Those Court-made rules are not made through Court decisions but are issued in forms typical of administrative organs. When the Court interprets, it solicits the views of those whom it chooses. It is particularly solicitous of the views of government departments. The greater importance of the courts means that the Court is increasingly active in the drafting of legislation. As part of its work to establish procedures for the judiciary, the Court has issued a variety of court rules.

While a profound increase in litigation in the lower courts has meant a rapid increase in the Court's adjudication activity, the Court generally adjudicates through typical Chinese administrative methods, such as replying to requests for instructions, reviewing and approving death sentences and the use of analogy, and examining petitions. It tries few cases. When the Court adjudicates, it relies almost entirely on the

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306. Ren Jianxin, *supra* note 48, at 2.

307. Renda Changweihui Jiang Zhiding Yipi Jingji Fangmian Falu [The Standing Committee of the NPC Will Draft a Group of Economic Laws], *Fazhi Ribao* [Legal System Daily], July 16, 1993, at 1.



review of written documents, operating according to procedures closed to both the parties and the outside world. If the experience in the lower courts is any guide, however, as the Court becomes increasingly involved with litigation, it will have to face the problem of corruption.

The Court guides the activities of the lower courts through administration. Many of its methods are common to administrative organs, such as holding regular work conferences to publicize current policies and goals, and requiring the reporting of important cases. The Court is attempting to increase its control over the lower courts by initiating changes in the method of judicial appointments. It is also guiding the courts by selecting decided cases that serve as models.

In short, the increased activism of the Court, as a result of the economic reforms, has given it enhanced status. The appointment of Ren Jianxin, the current President of the Court, as secretary of the Party's Central Political-Legal Committee, symbolizes the greater importance of the law (and the judiciary) in formulating Party policies that will guide China's shift to a socialist market-oriented economy.