

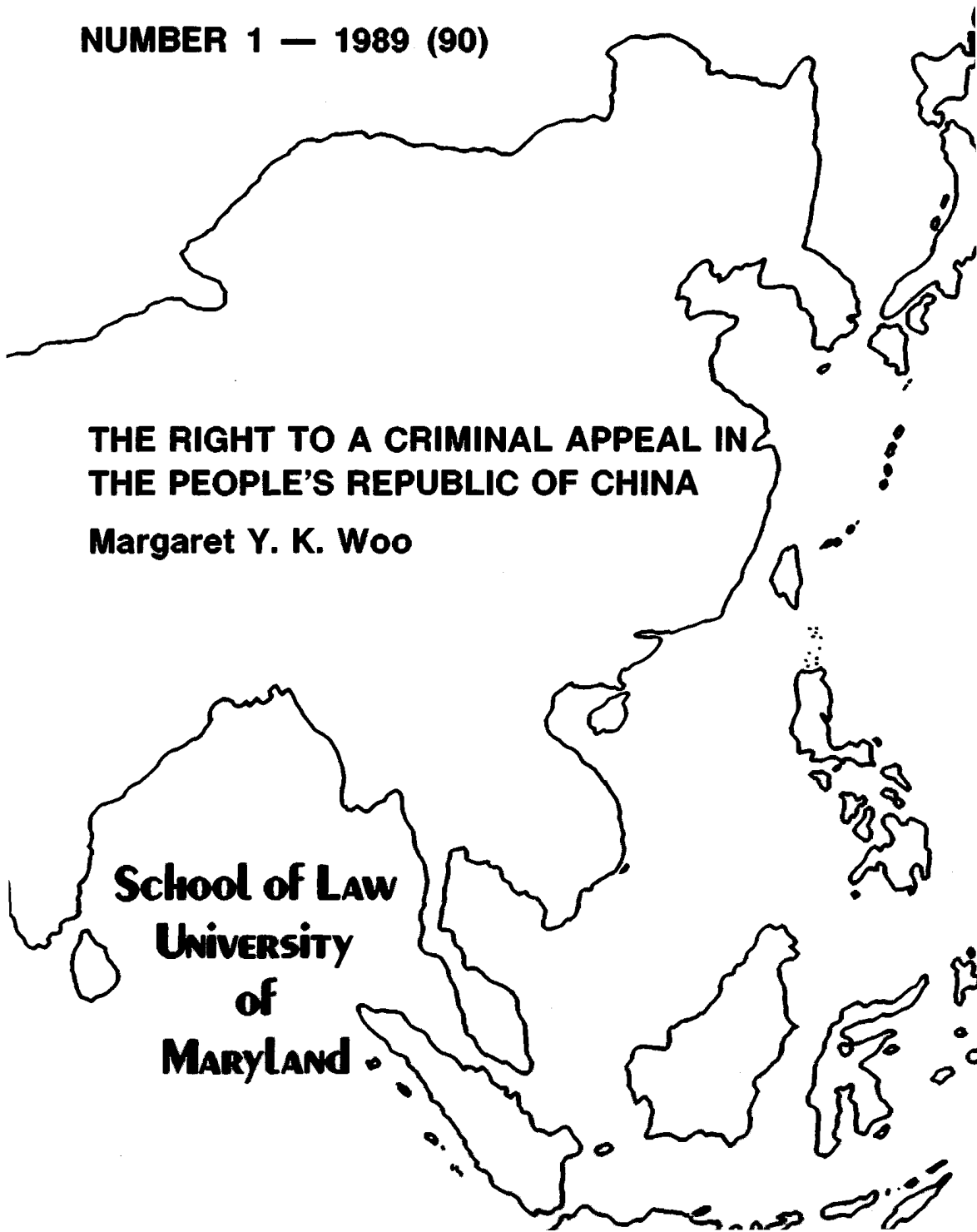
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**THE RIGHT TO A CRIMINAL APPEAL IN  
THE PEOPLE'S REPUBLIC OF CHINA**

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**School of LAW  
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of  
MARYLAND**



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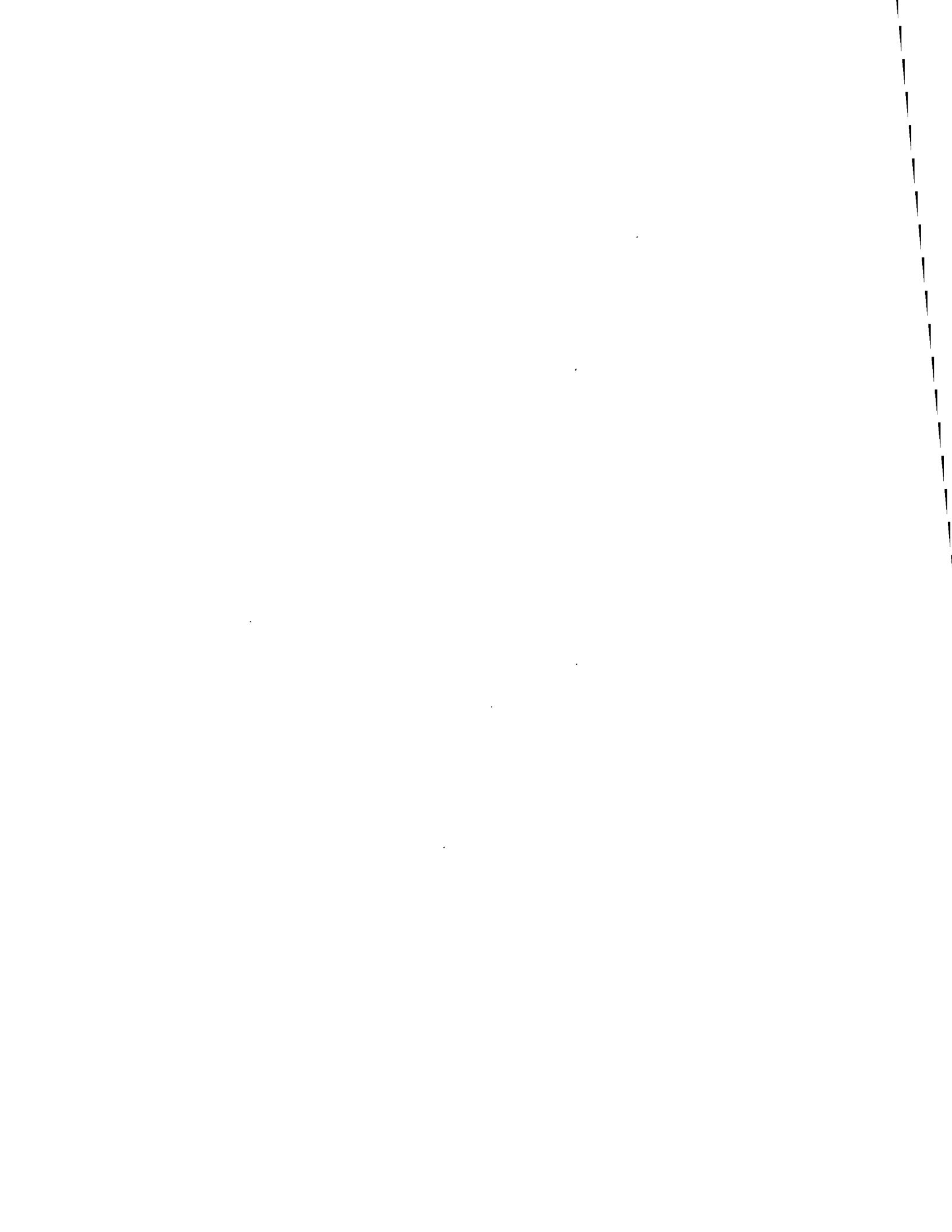
*Margaret Y. K. Woo*

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# The Right to a Criminal Appeal in the People's Republic of China

Margaret Y.K. Woot†

## Introduction

Nineteen-seventy-nine was a watershed year for the People's Republic of China. Recovering from the destructive Cultural Revolution, the nation began its present period of growth and modernization, including the reinstatement of its legal institutions. As part of its attempt to transform itself into a state ruled by law,<sup>1</sup> the People's Republic enacted its first criminal procedure code in 1979, including a detailed formal procedure for criminal appeals.<sup>2</sup>

Prior to 1979, a *de facto* form of criminal appeal had developed in the People's Republic, but it fell into disuse under the pressures of the Cultural Revolution.<sup>3</sup> Even at its height, numerous obstacles grounded in the political philosophy of the People's Republic and in deeply-held Chinese cultural beliefs hampered the use of this appellate procedure. In light of these pre-existing obstacles, the future of the criminal appeal under the 1979 Code depends largely on the role criminal appeals begin to serve in the broader social policies of modern China. This article assesses the emerging role of criminal appeals by analyzing the 1979 Code and its implementation.

† A.B., Brown University (1979), J.D., New York University School of Law (1983). The author wishes to thank Professor Hungdah Chiu, Professor of Law, Maryland University School of Law, for his suggestions and guidance towards the completion of this article. She also wishes to thank Professors Philip Schrag, David Koplow, and James Feinerman of Georgetown University Law Center for their comments on the manuscript.

Unless otherwise indicated, all translations from Chinese sources are those of the author. Titles of Chinese books, newspapers, and periodicals are transliterated and translated; titles of articles in periodicals are only translated. See *infra* note 200 and accompanying text for a description of some of these publications.

1. See *infra* notes 53-58 and accompanying text.

2. Criminal Procedure Law of the People's Republic of China (1979) [hereinafter 1979 Code], *trans. in* THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA 1979-1982 120 (Foreign Languages Press, Beijing, 1987) (compiled by the Legislative Affairs Commission of the Standing Committee of the National People's Congress of the People's Republic of China) [hereinafter LAWS OF THE P.R.C. 1979-82]; also *trans. in* 1 Stat. & Reg. of the People's Republic of China No. 790707 (University of East Asia Press & Institute of Chinese Law Ltd.) [hereinafter Stat. & Reg.]; Foreign Broadcast Information Service, Daily Report: People's Republic of China [hereinafter FBIS-CHI], July 30, 1983, at O 19. Selected articles from this law are set out in Appendix A of this article.

3. See *infra* notes 25-51 and accompanying text.

After noting some characteristics of the legal context in the P.R.C. in Section I, and briefly reviewing the history of criminal appeals in the P.R.C. prior to 1979 in Section II, this article focuses in Section III on the provisions of the 1979 Code and how they address certain problems associated with criminal appeals before 1979. Section IV assesses how effectively the 1979 Code has been implemented by courts since its enactment. Sections V and VI then discuss the degree to which certain basic characteristics of the Chinese legal system continue to minimize the effect of a formalized appellate code. Finally, Section VII offers some speculations regarding the future role of formal criminal appeals in the P.R.C.

Until recently, one problem for students of modern Chinese law has often been finding it:<sup>4</sup> what exists on paper may not be what exists in practice. China did not traditionally publish judicial decisions or make statistics readily available to the public. In 1985, however, the government began publishing selected decisions of the Judicial Committee of the Supreme People's Court in a quarterly gazette.<sup>5</sup> This article draws on these decisions and on numerous Chinese legal publications recently made available to the foreign public.<sup>6</sup> These sources provide new insights into the operation of the Chinese legal system in general, and of criminal appeals in particular.

## I. The Chinese Context

The particulars of criminal appeals in China can only be understood in the context of the forces which shape the administration of law in the P.R.C. generally. Three features stand out as characteristic of the Chinese legal system: the history of dramatically changing legal and social policies of the P.R.C. government, the dominance of the Communist Party and Party policies, and the unique blend of traditional Chinese attitudes towards law with Marxist-Leninist concepts of law and justice.

4. For a detailed description of the frustrations faced by students of Chinese law, see Note, *Concepts of Law in the Chinese Anti-Crime Campaign*, 98 HARV. L. REV. 1980 (1985).

5. ZHONGHUA RENMIN GONGHEGUO ZUIGAO RENMIN FAYUAN GONGBAO (Gazette of the Supreme People's Court of the People's Republic of China) [hereinafter SUPREME COURT GAZETTE]. Although without the precedential value of cases in a common law system, cases published in the *Gazette* serve as models to guide lower courts. The *Gazette* also provides selected laws and regulations, interpretations of legislation by the Standing Committee of the National People's Congress (the NPC), and interpretations of law by the Supreme People's Court. See the announcement for the *Gazette* published in *Zhongguo Fazhi Bao* (China Legal News), Feb. 6, 1985, at 4.

6. For a discussion of the role of legal publications in the P.R.C. as informal alternatives to the appeals process, as well as their place in current "mass education," see *infra* notes 199-210 and accompanying text.

Between 1949 and 1979, China's domestic policies underwent a series of dramatic changes. From the establishment of a formal government and legal system in 1949 through the total dismantling of that government and legal system in the period 1966 to 1976 (during the Cultural Revolution), the role of positive law in Chinese society fluctuated radically. Indeed, during these thirty years, China promulgated three different constitutions, each reflecting a major policy change and a distinct role for law in Chinese society.<sup>7</sup>

Moreover, prior to 1979, four distinct periods of legal policy can be identified.<sup>8</sup> The first period (1949-53), while a time of social and economic reconstruction, also represented a brief reign of terror during which the P.R.C. government purged its ranks of holdovers from the Nationalist government.<sup>9</sup> During this period, justice was administered outside the courts by the police, the military, and by ad hoc "people's tribunals."<sup>10</sup> The "golden age" or "constitutional era" (1954-56) reflected initial efforts to develop a legal system similar to the Soviet Union's. In 1954, the first constitution of the P.R.C. was promulgated,

7. CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA (1954) *trans. in* SELECTED LEGAL DOCUMENTS OF THE PEOPLE'S REPUBLIC OF CHINA 1 (En-Pao Wang ed. 1976) [hereinafter 1954 CONSTITUTION]; CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA (1975) *trans. in* DOCUMENTS OF THE FIRST SESSION OF THE FOURTH NATIONAL PEOPLE'S CONGRESS OF THE PEOPLE'S REPUBLIC OF CHINA 5 (Foreign Languages Press, Beijing, 1975) [hereinafter 1975 CONSTITUTION]; CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA (1978) *trans. in* 21 BEIJING REV., No. 11, at 5 (Mar. 17, 1978) [hereinafter 1978 CONSTITUTION]. In addition, China promulgated yet another constitution in 1982. CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA (1982) *trans. in* LAWS OF THE P.R.C. 1979-82, *supra* note 2, at 1 [hereinafter 1982 CONSTITUTION]. See Jones, *The Constitution of the People's Republic of China*, 63 WASH. U.L.Q. 707 (1985); Peng Zheng, *Report on the Draft of the Revised Constitution of the People's Republic of China*, reprinted in Renmin Ribao (People's Daily), Dec. 6, 1982, at 1-3, *trans. in* 25 BEIJING REV., No. 50, at 9 (Dec. 13, 1982) (report delivered by Peng, then Vice-Chairman of the Revision of the Constitution, to Fifth Session of the Fifth National People's Congress, Nov. 26, 1982) [hereinafter Peng, *Report to the NPC*].

8. The names and precise dates of these four periods have varied slightly among legal scholars. According to Chen Shouyi, Liu Shengping & Zhao Shenjiang, *Thirty Years of the Building Up of Our Legal System*, FAXUE YANJIU (Studies in Law), No. 4, 1979 at 1, the periods are as follows: the "creation period" (1949-53); the "development period" (1954-56); the "period of stagnation" (1957-65), when the work for building the legal system was subject to interference; and the "period of great destruction" (during the Cultural Revolution, 1966-76). The dates and characterizations used in this article more closely reflect those identified in S. LENG & H. CHIU, *CRIMINAL JUSTICE IN POST-MAO CHINA* (1985) [hereinafter LENG & CHIU], and in J. COHEN, *THE CRIMINAL PROCESS IN THE PEOPLE'S REPUBLIC OF CHINA, 1949-1963: AN INTRODUCTION* (1968) [hereinafter COHEN].

9. LENG & CHIU, *supra* note 8, at 11-12; COHEN, *supra* note 8, at 9-10.

10. COHEN, *supra* note 8, at 10. An unofficial version of Mao Zedong's major speeches gave 800,000 as the number of "class enemies" executed by the security forces up to 1954. A later amended speech simply mentioned that "some" counter-revolutionaries were sentenced to death. *Id.* at 10 n.17 (citing N.Y. Times, June 13, 1957, at 8).

along with a series of organizational laws.<sup>11</sup> Political winds changed, however, in 1957 with the "anti-rightist" movement and the marked decline in the power of the formal legal system under the Party slogans "smashing permanent rules" and "having the courage to innovate."<sup>12</sup> This movement away from formalized law reached its culmination during the Cultural Revolution (1966-76). Based on Mao's proposition that the state should "[d]epend on the rule of man, not the rule of law,"<sup>13</sup> there was a complete destruction of the formal law enforcement apparatus in favor of a "proletarian" legal order.<sup>14</sup> Finally, China turned from the chaotic period of the Cultural Revolution to the present period of growth and modernization.

The erratic development of the P.R.C. legal system is integrally related to the dominance of the Communist Party over all aspects of Chinese public policy. This dominance flows both from the Party's effective control of the government since the 1949 Revolution, and from the Chinese belief that Party leadership is the key to China's modern progress.<sup>15</sup> As a result of this philosophy, the Party controls the state apparatus from the national level down to the most local, creating a hierarchical Party bureaucracy parallel to the system of local, provincial, and national governmental organs.

Hence, although China has an elected legislature, its organs serve simply as a conduit for Party policies.<sup>16</sup> Actual control of the government is

11. See, e.g., 1954 CONSTITUTION, *supra* note 7; Organic Law of the People's Courts of the People's Republic of China (1954), *trans. in* FUNDAMENTAL LEGAL DOCUMENTS OF COMMUNIST CHINA 131 (A. Blaustein ed. 1962) [hereinafter 1954 People's Court Law]; Organic Law of the People's Procuratorates (1954), *trans. in* FUNDAMENTAL LEGAL DOCUMENTS OF COMMUNIST CHINA, *supra*, at 144; Organic Law of the Local People's Congresses and Local People's Councils (1954), *trans. in* FUNDAMENTAL LEGAL DOCUMENTS OF COMMUNIST CHINA 153 (A. Blaustein ed. 1962).

12. COHEN, *supra* note 8, at 17. See also Chang Wu-yen, *Smash Permanent Rules, Go 1,000 Li In One Day*, ZHENGFA YANJIU (Political Legal Studies), No. 5, 1958, at 58.

13. LENG & CHIU, *supra* note 8, at 18 (citing 625 SELECTIONS FROM CHINA MAINLAND MAGAZINE 23 (U.S. Consulate-General, Hong Kong ed. 1968)).

14. "Smash Gongjianfa (police, procuracy, courts)" became the slogan of the day. *Id.* Legal institutions were closed, and the practicing bar was eliminated. See Feinerman, *Law and Legal Professionalism in the People's Republic of China* in CHINESE INTELLECTUALS AND THE STATE: THE SEARCH FOR A NEW RELATIONSHIP 107 (M. Goldman ed. 1987).

15. See Peng, *Report to the NPC*, *supra* note 7, at 10. The belief is that all but one fundamental change in modern Chinese history (the Revolution of 1911 led by Sun Yat Sen) resulted from the efforts of the Chinese people led by the Communist Party, and that "[b]ut for the Chinese Communist Party there would be no New China." *Id.*

16. Jones, *supra* note 7, at 710-11. There are three levels in the structure of the legislature: local congresses, provincial congresses (or their bureaucratic equivalents), and the NPC. Citizens vote directly for members of a local congress, which elects members of a provincial congress, which in turn elects the members of the NPC. See 1982 CONSTITUTION, *supra* note 7, art. 97.



in the hands of the Premier and the top officials of the ministries,<sup>17</sup> who are usually leading members of the Party. This domination by the Party is mirrored on the provincial and county levels. In such a political context, the legal system, including the criminal appeal, remains subservient to Party policies.<sup>18</sup>

A final and important characteristic of the Chinese legal system is its unique blend of traditional Chinese attitudes towards law with Marxist-Leninist concepts of law and justice. Although formal law (*fa*) is not new to the Chinese (and indeed, has roots in the Legalist School of the Qin Dynasty), the Chinese have traditionally eschewed legal formality.<sup>19</sup> This reluctance to utilize formal legal channels has its roots in traditional Confucian morality (*li*) which preferred social pressure to the use of force by the state. Thus *fa*, which connotes a fixed system of written law that relies on government enforcement, has long vied with *li*, which emphasizes compliance through the internalization of accepted values and norms.<sup>20</sup> This traditional preference for informal law has been reinforced by Maoist-Marxist-Leninist thought, which emphasizes a “mass line” approach to the administration of justice.<sup>21</sup>

As a result of the unique Chinese legal context, the legal system that developed under Mao combined two models: the jural and the societal. The jural model stood for “elaborate judicial procedures,”<sup>22</sup> while the societal model stood for the “mass line device in judicial work, the use of mediation for handling civil cases, and the employment of extrajudicial

17. See Jones, *supra* note 7, at 709-10.

18. For the “Four Cardinal Principles” which underlie the current constitutional regime of the People’s Republic, see Peng, *Report to the NPC*, *supra* note 7, at 10 (“adherence to the socialist road, to the people’s democratic dictatorship, to leadership by the Communist Party of China, and to Marxism-Leninism and Mao Zedong Thought”).

19. D. BODDE & C. MORRIS, *LAW IN IMPERIAL CHINA 17-18* (1967). The “Legalist School” (*fa jia*) served a prominent role in the unification of China into the Qin empire around the third century B.C. *Id.* at 50. The Legalists advocated the use of formal, written law to impose tighter political control, rather than to emphasize traditional religious values or to protect private property. *Id.* at 11.

20. *Id.* at 19-27.

21. The principle of “mass line” emphasizes the importance of the masses in the formulation and implementation of law, based on a belief that the authority of law comes from the masses. Under the “mass line” approach, the prescribed method is to seek the advice of the masses both prior to enacting a law and after a law is enacted. This method is called “from the masses and to the masses.” Wu Jianfan, *Building New China’s Legal System*, 22 *COL. J. TRANSNAT’L L.* 1, 15 (1983). This approach may also have been a natural development in a system in which most political and judicial leaders lack legal training. During the pre-1979 period, one half of the judges were promoted from among the workers and peasants of the mass movement. Others were from the law faculties of universities. Judges were appointed by the Judgment Committee of the courts and were approved and assigned by the Revolutionary Committee of the courts. See Lamb, *An Interview with Chinese Legal Officials*, 66 *CHINA Q.* 323, 327 (1976).

22. LENG & CHIU, *supra* note 8, at 11.

organs and procedures in imposing sanctions and settling disputes.”<sup>23</sup> The criminal law has very much fallen into this pattern, with trials that are non-adversarial, inquisitorial, and informal, and which frequently circumvent the formal legal apparatus.<sup>24</sup>

## II. Criminal Appeals in the P.R.C. Prior to 1979

Although the NPC had not codified any criminal appellate procedure prior to the 1979 Code,<sup>25</sup> the judicial apparatus as set up by the P.R.C. government pursuant to the 1954 People’s Court Law<sup>26</sup> did provide for criminal appeals. In the years 1949-53, the central government established a three-level, two-trial, one-appeal judicial system consisting of basic, intermediate, and higher people’s courts (headed by the Supreme People’s Court) and a number of special courts with narrow jurisdiction.<sup>27</sup> At each level, there was a corresponding level of a procuracy (prosecutor) and public security (police) office. Criminal cases generally originated in the basic level courts established in counties, towns, and larger cities. Cases of greater magnitude often began in the intermediate courts.

Under this system, either the defendant or the procurator could appeal from an adverse decision.<sup>28</sup> No attorney or court fees were required for an appeal, and the appeal could be based on any ground—the determination of facts, the application of law, or the sentence imposed.<sup>29</sup> While one judge and two “people’s assessors” jointly presided at trials in courts of first instance, three judges heard appeals.<sup>30</sup>

23. *Id.*

24. Most trials in China are nothing more than sentencing hearings in which the guilt of the defendant was already established or assumed. Chiu, *China’s Changing Criminal Justice System*, 87 *CURRENT HISTORY* 265, 267 (Sept. 1988) [hereinafter Chiu, *China’s Changing System*].

25. See LENG & CHIU, *supra* note 8, at 20-21. However, the NPC did occasionally announce some regulation of appellate procedure. See S. LENG, *JUSTICE IN COMMUNIST CHINA* 167 (1967) (1957 NPC resolution required automatic review by Supreme People’s Court of all death sentences). See also Chiu, *China’s New Legal System*, 79 *CURRENT HISTORY* 29, 30 (Sept. 1980) [hereinafter Chiu, *China’s New System*] (Arrest and Detention Act promulgated on December 20, 1954 provided some procedural safeguards but was never implemented).

26. 1954 People’s Court Law, *supra* note 11.

27. This structure was reflected in the 1954 People’s Court Law, *supra* note 11, ch. I, art. 1. Specialized courts included military courts, railway transport courts, and water transport courts. See LENG & CHIU, *supra* note 8, at 64.

28. 1954 People’s Court Law, *supra* note 7, ch. I, art. 11. See also COHEN, *supra* note 8, at 38-39.

29. COHEN, *supra* note 8, at 39.

30. 1954 People’s Court Law, *supra* note 11, ch. I, art. 9. People’s assessors, unlike judges, were not professional legal personnel; they could be any citizen over 23 years of age who had never been deprived of political rights. COHEN, *supra* note 8, at 11-12.

Generally, criminal appeals were taken to the court of the next highest instance.<sup>31</sup> If that court accepted the case for review, it conducted an independent investigation of the case.<sup>32</sup> The appellate court discussed the case with members of the lower court bench, the procurators, the police, the Party officials, the witnesses, and the defendant.<sup>33</sup> As such, the review was a complete readjudication, without distinction between a review of the facts and of the law. Appellate courts had broad discretion to dispose of cases by dismissing, remanding, modifying, or affirming the judgments of lower courts.<sup>34</sup>

The decision of a court of second instance was considered a "final judgment."<sup>35</sup> However, a case could be reopened long after its "final" disposition by a president of any court, or upon a request by a procurator for an "adjudication supervision," a post-conviction proceeding permitting reconsideration of all substantive and procedural questions.<sup>36</sup> At times, in conjunction with shifts of national criminal justice policy, entire classes of cases could be reopened, and the original judgments and sentences adjusted.<sup>37</sup>

Although there were some appeals under these procedures prior to 1979, a number of factors greatly reduced their application. First, the administration of criminal justice was subject to control by the Chinese Communist Party. From 1949 to 1979, all three branches of the criminal justice system in China—the public security bureau (the police arm), the procurator (a form of public prosecutor and ombudsman), and the courts—were under the direction of Party committees which reviewed all decisions from arrest to sentencing.<sup>38</sup> This system was formalized during the 1957-58 Anti-Rightist period as "*shuji-pi'an*" or "approving cases by

31. 1954 People's Court Law, *supra* note 11, ch. I, art. 11.

32. COHEN, *supra* note 8, at 39.

33. *Id.*

34. *Id.* at 39-40.

35. 1954 People's Court Law, *supra* note 11, ch. I, art. 11.

36. *Id.* ch. I, art. 12. See also COHEN, *supra* note 8, at 40. Adjudication supervisions are more fully discussed *infra* notes 100-09, 134-41 and accompanying text.

37. From time to time after 1949, "special appeals of verdicts" were undertaken at the national level by the central government as part of sharp changes in domestic policy. For example, Chairman Mao's proposals in 1956 and again in 1959 to reevaluate "the work of liquidating counter-revolutionaries" resulted in the reduction of many prison sentences to "criticism education" on the basis of a prisoner's conduct while in prison. See AMNESTY INTERNATIONAL, POLITICAL IMPRISONMENT IN THE PEOPLE'S REPUBLIC OF CHINA 59-60 (1978) [hereinafter AMNESTY INTERNATIONAL 1978]. Other "special appeals" included the June 1978 reversals of "wrong verdicts" passed while the Gang of Four was in power, resulting in the release of 110,000 persons detained as "rightists" since 1957. Leng, *Criminal Justice in Post-Mao China: Some Preliminary Observations*, 73 J. CRIM. L. & CRIMINOLOGY 204, 206 (1982). See also *Major Criminals in Tibet Released*, 21 BEIJING REV., No. 47, at 3 (Nov. 24, 1978). Clearly, these were not really "appeals" so much as discretionary general amnesties.

38. LENG & CHIU, *supra* note 8, at 22-23.

the Secretary in charge of political-legal affairs.”<sup>39</sup> No legal procedure secured reconsideration of a *shuji-pian* decision as the system operated under the rule “whatever is approved [by a Party committee] should be executed.”<sup>40</sup> Under these circumstances, it was almost futile for the convicted person to challenge the judgment.

A second obstacle to the use of appellate procedure prior to 1979 was the practice of eliciting confessions.<sup>41</sup> The Chinese emphasized reeducation and rehabilitation as the goal of criminal sanctions; consequently, courts viewed the protestation of innocence as an aggravating circumstance, while they regularly rewarded confessions with more lenient sentences.<sup>42</sup> Accordingly, defendants who appealed a conviction were viewed as refusing to be rehabilitated and often received increased sentences.<sup>43</sup> In this way, rehabilitation and reeducation, although worthy goals, discouraged the invocation of appellate procedures.<sup>44</sup>

In addition to these impediments to criminal appeals, other mechanisms preempted the judicial administration of criminal justice generally. In particular, the broad powers of the police allowed them to deal with many “lesser” crimes before the cases reached the courts. The Public Security Bureau was empowered to impose “administrative sanctions” which ranged from a fine of 30 yuan (approximately one month’s wages)

39. *Id.* See generally Lubman, *Chinese Criminal Process*, 69 COL. L. REV. 535 (1969). During this period judicial independence was considered a “bourgeois” precept.

40. LENG & CHIU, *supra* note 8, at 23 (citing *Looking at Some Existing Problems in Judicial Work from the Practice of Handling Cases*, 1 XINAN ZHENGFA XUEYUAN XUEBAO 26-27 (May 1979)).

41. See AMNESTY INTERNATIONAL 1978, *supra* note 37, at 46, 136-40; COHEN, *supra* note 8, at 30.

42. “The use of criminal punishment at the various levels of people’s court is not for the sake of punishment alone, but rather to educate and unmold offenders through punishment and to prevent crime. If lenient punishment is not given when an offender makes a voluntary confession because he repents his criminal acts, the social humanitarianism and democratic spirit of our criminal law will be obscured.” Ning Han-Lin, *Voluntary Confession in the Criminal Law of the People’s Republic of China*, ZHENGFA YANJIU (Political Legal Studies), No. 4, 1957, at 10, *trans. in* 2 CHINESE LAW & GOVERNMENT, No. 2, 1969, at 34.

43. AMNESTY INTERNATIONAL 1978, *supra* note 37, at 59. “During the anti-rightist movements, lawyers were severely attacked for having groundlessly encouraged the accused to appeal instead of educating ‘the defendant through persuasion to accept his punishment.’” COHEN, *supra* note 8, at 40 n.116 (quoting Wang Chao-sheng, *Refute the Principle of “Not Making the Position of the Defendant Unfavorable in a Criminal Appeal,”* 1 HSI-PEI TA-HSUEH HSUEH-PAO (JEN-WEN K’O-HSUEH) (Northwestern University Journal (humanistic sciences)) 65, 66 (July 1958) (transliteration and translation by Cohen)).

44. This practice of rewarding an admission of guilt with a lenient sentence is reminiscent of the technique of plea bargaining so integral to the American criminal justice system. The difference lies, however, in that plea bargaining involves the defendant pleading guilty to a lesser offense or to only one or some of the counts of a multi-count indictment in return for a lighter sentence than that possible for the graver charge. FED. R. CRIM. P. 11(e). In China, the defendant who admits guilt may receive a reduced sentence for the same crime for which guilt is admitted.

and detention for 15 days to supervised labor without segregation from society to several years in a "reeducation through labor" camp.<sup>45</sup>

Designed to control vagrants and minor offenders, administrative sanctions were often imposed on intellectuals labelled as rightists.<sup>46</sup> Because Party ideology encouraged the flexible application of these sanctions, the Public Security Bureau was vested with a great deal of discretion. Since the Public Security Bureau was not an arm of the judicial branch, there was no judicial review of these public security decisions.<sup>47</sup> Consequently, the defendant faced what was in reality a criminal sanction without any recourse to the courts.

Beyond these specific obstacles to use of the appellate process, the Cultural Revolution almost completely displaced the judicial system as the administration of law came to rest on non-judicial organizations such as the local work unit and residential organizations.<sup>48</sup> The power of these organizations derived from Mao's increased emphasis on "mass line" justice.<sup>49</sup> Indeed, during this period, the procuracy remained paralyzed and was even officially abolished in 1975.<sup>50</sup>

At the height of their power, these mass line organizations held informal trials in their factories, stores, and communes on cases that would

45. Act of the People's Republic of China for Security Administration Punishment (1957), *trans. in* LENG & CHIU, *supra* note 8, at 235 [hereinafter Security Administration Punishment Act]. *See also* Decision of the State Council Regarding the Question of Reeducation Through Labor (1957) [hereinafter 1957 State Council's Decision], *trans. in* THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA 1983-1986 168 (Foreign Languages Press, Beijing, 1987) (compiled by the Legislative Affairs Commission of the Standing Committee of the NPC) [hereinafter LAWS OF THE P.R.C. 1983-86]; LENG & CHIU, *supra* note 8, at 27; Meijer, *The Criminal Law of the People's Republic of China*, 6 REV. SOC. L. 125 (1980).

46. *See* LENG & CHIU, *supra* note 8, at 27; 1957 State Council's Decision, *supra* note 45.

47. The Security Administration Punishment Act provides only a formal route of appeal to the next highest level of the Public Security Bureau. Security Administration Punishment Act, *supra* note 45, art. 18.

48. Residential organizations included numerous committees covering 100 to 600 households. Each committee was further divided into groups of 15 to 40 households. Residential committees were staffed by volunteers and were responsible for the activities of the households under their jurisdiction. COHEN, *supra* note 8, at 19. *See also* LENG & CHIU, *supra* note 8, at 24.

49. *See, e.g.*, 1975 CONSTITUTION, *supra* note 7, sec. V, art. 25 ("The mass line must be applied in procuratorial work and in trying cases. In major counter-revolutionary criminal cases, the masses should be mobilized for discussion and criticism."). To effectuate the mass line approach, minor cases were resolved by mass organizations, and materials on significant cases were disseminated among the people for discussion. Opinions from the discussions were said to be consulted by the court prior to final judgment. LENG & CHIU, *supra* note 8, at 24.

50. The procuratorial system was not mentioned in the 1975 Constitution and did not emerge again until the 1978 Constitution was adopted by the Fifth National People's Congress. *See* 1975 and 1978 Constitutions, *supra* note 7. During the Cultural Revolution, the procuratorial function was exercised by the public security bureaus. For a detailed account of the history of the procuratorial system in the P.R.C., see Hsai & Haun, *The Re-emergence of the Procuratorial System in the People's Republic of China (1978)* (report available at the Library of Congress).

have normally been brought to a court of law. They were able to impose informal sanctions ranging from private criticisms to struggle meetings before a group of peers.<sup>51</sup> With such powers, these organizations resolved many of the minor cases and preempted judicial adjudication. Since the local people had the power to impose informal sanctions, the accused could only appeal to the sympathy of these people, and not to the law.

This history reveals that the judicial appeals process played a minor and steadily decreasing role in the administration of Chinese criminal justice between 1949 and 1976. During most of this period, a criminal defendant's recourse was to her resident organization, to the police, or to the local Party leaders. Moreover, a defendant would often be better off by admitting guilt in return for leniency.

### III. The New Code

The new Chinese leadership which emerged after the death of Mao in 1976 sought to end social experimentation. Primarily, they wished to establish a predictable government which would restore order and morale for the Chinese citizenry, and provide a secure environment for economic development with other countries.<sup>52</sup> A key element of their new domestic policy was the reestablishment and strengthening of the formal legal system.<sup>53</sup>

Between 1979 and 1983, the Standing Committee of the NPC, the State Council, and various ministries and commissions enacted or approved some 700 laws, decrees and regulations.<sup>54</sup> By 1984, China had

51. "Struggle meetings" subjected the accused to public humiliation and intimidation from her peers. It could take the form of shouting, shaking fists, and even hitting or kicking the accused. COHEN, *supra* note 8, at 20.

52. See Communiqué of the Third Plenary Session of the 11th Chinese Communist Party Central Committee, December 22, 1978, reprinted in *Renmin Ribao* (People's Daily), December 24, 1978, at 1.

53. According to Peng Zhen, then Director of the Commission of Legal Affairs of the National People's Congress, law was meant in part to protect China's one billion people against the excesses of irresponsible government "because in some localities and courts, the enthusiasm and initiative of the people are still held in check and their right of person and democratic and other rights are not always secure." Indeed, law is a "weapon to supervise the observance of the laws by the state organs and every individual. . . ." Peng Zhen, *Explanation of Seven Laws*, 22 BEIJING REV., No. 28, at 814 (July 13, 1979) [hereinafter Peng, *Explanation*]. New laws were published in all daily newspapers and broadcast in 20-minute programs by the Central People's Broadcasting Station. Chiu, *China's New System*, *supra* note 25, at 39.

54. In addition to the 1979 Code, these laws include the Criminal Law, the Law of Criminal Procedure, the Organic Law of the People's Court, the new Electoral Law, the Organic Law of Local People's Congresses and People's Governments, the Organic Law of the People's Procuratorates, the new Marriage Law, and the Nationality Law. Zhang Zhiye, *Legislative and Judiciary Work in China*, 26 BEIJING REV., No. 33, at 19 (Aug. 15, 1983). For an official translation of Chinese laws since 1979, see LAWS OF THE P.R.C. 1979-82, *supra* note 2; LAWS

reestablished nine law research institutes and sixty-nine law journals and newspapers. More than 140,000 judges were reinstated or trained to serve at the Supreme People's Court, the 300 Intermediate People's Courts and the nearly 3,000 Lower People's Courts.<sup>55</sup> The country trained a total of 16,000 lawyers and established about 2,500 legal advisory offices.<sup>56</sup> By 1987, these numbers had increased to 3,435 courts with a total of 195,000 court workers<sup>57</sup> and 20,000 registered lawyers.<sup>58</sup>

Foremost among the new codes enacted in 1979 was China's first Criminal Procedure Law,<sup>59</sup> in force today, which granted formal protection to the right to a criminal appeal.<sup>60</sup> Article 129 of the 1979 Code states, in part: "A defendant shall not be deprived on any pretext of his right to appeal."<sup>61</sup> The fundamental nature of this right in China's newly formalized system of justice was emphasized by its restatement in the Organic Law of the People's Courts which gave structure to the reestablished judiciary.<sup>62</sup> The 1979 Code outlines a detailed procedure for bringing appeals,<sup>63</sup> and includes the guarantee that defendant appellants

OF THE P.R.C., *supra* note 45, 1983-1986. See also FBIS-CHI, *supra* note 2, July 27, 1979, at 1; Sept. 19, 1980, at L 22 n.2.

55. *Legal System, Law Education Described*, BEIJING XINHUA (Sept. 21, 1984), reprinted in FBIS-CHI, *supra* note 2, Oct. 4, 1984, at K 14 [hereinafter *Legal System & Education*]. The Ministry of Justice had been restored in 1979 by the Standing Committee of the NPC to handle administrative work and to manage and train judicial cadres. Peng, *New Minister of Justice Interviewed*, 22 BEIJING REV., No. 42, at 3 (October 19, 1979).

56. *Legal System & Education*, *supra* note 55. The number of trained lawyers is expected to increase to 50,000 by 1990. People's Daily, July 14, 1986, at 4 (overseas ed.). The disparity between the number of judges and the number of lawyers may be a reflection of the minor role played by the lawyer and, in particular, the defense attorney in the P.R.C. criminal justice system. In an inquisitorial system such as the P.R.C.'s, the judge, the police, and the prosecutor are jointly responsible for investigations and "seeking the truth" from facts.

57. *Supreme Court President Gives Report to N.P.C.*, BEIJING XINHUA, Apr. 2, 1988, reprinted in FBIS-CHI, *supra* note 2, Apr. 4, 1988, at 17.

58. *New Justice Minister Discusses Legal Services*, BEIJING XINHUA, Apr. 14, 1988, reprinted in FBIS-CHI, *supra* note 2, Apr. 15, 1988, at 19. For an interesting account of the growth of the legal profession in the P.R.C., see Feinerman, *supra* note 14.

59. 1979 Code, *supra* note 2.

60. *Id.* pt. III, chs. III-V. Note that under the 1979 Code the word "appeal" is reserved for requests for second instance proceedings made by defendants; "appeals" by procurators are called "protests." This article uses "appeal" to cover both appeals and protests.

61. *Id.* art. 129.

62. Organic Law of the People's Court of the People's Republic of China, ch. I, art. 12 (1979), *trans. in LAWS OF THE P.R.C. 1979-82*, *supra* note 2, at 71 [hereinafter *People's Court Law*] ("After a judgment or orders of first instance of a local people's court, a party may appeal to the people's court at the next higher level in accordance with procedures prescribed by law, and the people's procuratorate may present a protest to the people's court at the next higher level in accordance with procedures prescribed by law.")

63. 1979 Code, *supra* note 2, pt. III, chs. III-V. These portions of the Code are reproduced in Appendix A to this article. A chart summarizing these provisions is reproduced as Appendix B.

may not receive an aggravated punishment from courts of second instance.<sup>64</sup>

The right to appeal, moreover, is not limited to the defendant. Indeed, any "party or his legal representative" may seek an appeal.<sup>65</sup> Article 58 of the 1979 Code defines a party to include private prosecutors<sup>66</sup> and defendants, as well as plaintiffs and defendants in any incidental civil action.<sup>67</sup> Additionally, the state may also appeal. Under article 130, when a procurator believes that a first instance judgment or order is erroneous, she must present a protest to the people's court at the next highest level.<sup>68</sup> Because a procurator must correct any erroneous judgment or order, a procurator's protest may at times be consistent with, instead of contrary to, the defendant's interests.<sup>69</sup> Any party wishing to file an appeal must do so within ten days of the judgment or within five days of the order to be appealed.<sup>70</sup>

64. *Id.* art. 137. *But see infra* notes 129-33 and accompanying text for a discussion of the state's circumvention of this guarantee.

65. *Id.* art. 129. Note that the tasks of a lawyer in a second instance proceeding are: (1) if the findings of fact and the application of law are correct and the punishment meted is appropriate, to "educate" the defendant to accept the judgment; (2) if there was insufficient evidence in the first instance, to petition the court of second instance for additional investigation and to re-investigate the case himself; (3) if the findings of fact are correct but the application of law is erroneous, to make the appropriate argument pursuant to law; (4) if the findings of fact and application of law are correct but the punishment meted is inappropriate, to argue for leniency under law in accordance with the circumstances of the crime, the lack of danger to society, the lack of criminal attitude, the repentant behavior of the defendant, and the prescriptions of law; (5) if the trial procedure in the first instance was improper, to petition the higher court for a correction pursuant to its supervisory powers. Li Kuoji & Dong Minhua, *Role of A Lawyer in A Second Instance Proceeding*, FAXUE (Jurisprudence), No. 12, 1984, at 32.

66. For minor offenses, the victim can act as the private prosecutor in bringing the accused to court. 1979 Code, *supra* note 2, pt. III, ch. II, art. 127.

67. *Id.* pt. I, ch. IX, art. 58. Plaintiffs and defendants in an incidental civil action may only appeal the civil decision. *Id.* pt. III, ch. III, art. 129. In sum, there are nine possible classes of private appellants: (1) the private prosecutor; (2) the private prosecutor's legal guardian; (3) the defendant in a private or public prosecution; (4) the defendant's legal guardian; (5) the defendant's legal representative; (6) the defendant's near relative (with permission of the defendant); (7) the plaintiff in an incidental civil action; (8) the plaintiff's legal guardian in an incidental civil action; and (9) the defendant in an incidental civil action. SUN FEI, WOGUO XINGSHI SUSONG DI ER SHEN CHENG XULUN (Treatise on Our Country's Criminal Appellate Procedure) 48-49 (1986).

68. 1979 Code, *supra* note 2, pt. III, ch. III, art. 130; *see also* Li Hongju, *The Role of a Procurator in a Second Instance Proceeding*, FAXUE (Jurisprudence), No. 3, 1983, at 30.

69. Article 130 provides that the procurator must file a protest in cases of error. Thus, the procurator is required by law to file a protest in a case even if the protest benefits only the defendant. *See* SUN FEI, *supra* note 67, at 48-49. About 10 percent of all protests filed by all procurator's offices were reported to be beneficial to the defendant. *Id.* *See generally* Yang Youjun, *Explanation of the Protest in Criminal Procedure*, FAXUE YANJIU (Studies in Law), No. 3, 1984, at 39-42.

70. 1979 Code, *supra* note 2, pt. III, ch. III, art. 131. These time periods begin to run from the day after the party has received a written judgment or order. If a party for some reason is prevented from filing a timely appeal, the party may have an additional five days after the expiration of the circumstances justifying delay. XINGSHI SUSONG FA JIAOCHENG (Textbook



Significantly, article 137's prohibition against increased punishment does not apply when the *state* files a protest. A procurator who finds the lower court too lenient may file a protest to a higher court and successfully have the original judgment modified to impose a more severe punishment. This is true even in a case where *both* the defendant and the state appeal.<sup>71</sup>

The 1979 Code is also quite detailed as to the scope of a second instance proceeding. Under article 134, a court of second instance in a criminal case is not bound by the scope of the matters appealed, and may conduct a complete review of both the facts and the law.<sup>72</sup> Indeed, the prescription of "seeking truth and correcting errors" compels just such a "complete review" (*quan-mian shen-cha*).<sup>73</sup> Even in cases of joint crimes in which only one of the defendants appeals, the 1979 Code requires that the case be handled as a whole, and a review of the entire case be conducted.<sup>74</sup> To accomplish this goal of a complete review, the court of second instance follows procedures similar to those of the original trial court.<sup>75</sup> The court of second instance reviews the entire record for error (*shu-mian shen-li*), and in the majority of cases, readjudicates the entire matter (*zhi-jie shen-li*).<sup>76</sup>

on Criminal Procedure) 299 (Qunzhong Publications 1982) [hereinafter TEXTBOOK ON CRIMINAL PROCEDURE].

71. XINGSHI SUSONG WENTI JIE DA (Explanations of Questions Relating to Criminal Procedure) 124 (Shao Wenjin ed. 1986) [hereinafter EXPLANATIONS RELATING TO CRIMINAL PROCEDURE]. This reading of article 137 is supported by a statement issued by the Supreme People's Court on December 30, 1983. SUN FEI, *supra* note 67, at 254 (citing RENMIN SIFA (People's Judiciary), No. 2, 1983, at 21-22). The Supreme People's Court noted, however, that where a procurator protests and the punishment is increased to a life sentence or the death penalty, the procedure of articles 15 and 129 apply. *Id.* Under those articles, the judgment may be appealed again as a judgment of first instance.

72. 1979 Code, *supra* note 2, pt. III, ch. III, art. 134.

73. The P.R.C. rejected the distinction made by common law countries between appeals of fact and appeals of law, adopting instead the philosophy of *quan-mian shen-cha*. The belief is that errors normally arise out of a lack of understanding of the case by the court of first instance and require total readjudication. SUN FEI, *supra* note 67, at 137-47; *see also* EXPLANATIONS RELATING TO CRIMINAL PROCEDURE, *supra* note 71, at 119-20.

74. 1979 Code, *supra* note 2, pt. III, ch. II, art. 134. According to one commentator, an acquitted defendant may not be found guilty by a court of second instance where he did not appeal but his codefendants did. SUN FEI, *supra* note 67, at 260-61. However, since there is no double jeopardy protection, a court of second instance can circumvent this provision by remanding the case for retrial. *See infra* note 129 and accompanying text.

75. 1979 Code, *supra* note 2, pt. III, ch. III, art. 141.

76. *See* SUN FEI, *supra* note 67, at 148; TEXTBOOK ON CRIMINAL PROCEDURE, *supra* note 70, at 302-03. Article 141 has been interpreted as mandating a *de novo* review for all appeals or protests. Some commentators believe that a court of second instance, in simply reviewing the record without conducting its own hearing, fails to protect adequately the rights of criminal defendants. Qiu Kuoqing, *Review on the Record Is Inappropriate for Criminal Appeals*, FAXUE (Jurisprudence), No. 10, 1985, at 21. There may also be a third method (*diao cha xun wen*) in which the court reinvestigates only those areas unclear from the record. *See* Xu

The second instance proceeding is normally conducted by a panel of three to five judges,<sup>77</sup> and must be completed within one month.<sup>78</sup> The appeal may be filed either in the court which originally adjudicated the case or with the court of next highest instance.<sup>79</sup> Within three days of the filing of the request for an appeal, the original court must transmit the case file and evidence to the appellate court.<sup>80</sup>

The review process generally consists of three stages<sup>81</sup> during which the appellate court may review old evidence, conduct a new investigation, and receive new evidence.<sup>82</sup> First, the panel reviews the record (*shu-mian shen-li*). If the record on its face reveals error in the application of law or procedure, the court may immediately correct the judgment or remand the case for further proceedings.<sup>83</sup> If the court of second instance retains the case, it may proceed to conduct an out-of-court investigation (*ting-wai diao-cha*).<sup>84</sup> At this stage, the panel leaves the courtroom to inspect the crime site and interview the victim and any witnesses. Finally, the court will normally hold an in-court adjudication (*kai-ting shen-li*)<sup>85</sup> at which it examines the defendant and any witnesses.<sup>86</sup> At this stage, the parties, including the procurator, may present arguments.<sup>87</sup>

The court of second instance has a wide range of options if it finds that the original judgment is erroneous in any way. If it finds that the facts do not support the original judgment, the court can either remand for a new trial or find its own facts and amend the judgment.<sup>88</sup> If the original judgment is incorrect only in its application of the law or in the sentence, the

Yichu, *On the Trial of the Second Instance Proceeding*, FAXUE YANJIU (Studies in Law), No. 1, 1984, at 53, 56.

77. 1979 Code, *supra* note 2, pt. III, ch. I, art. 105. While a trial of first instance may be conducted by a judge and/or people's assessors, judges must preside over trials of second instance. EXPLANATIONS RELATING TO CRIMINAL PROCEDURE, *supra* note 71, at 78-79. The presence of assessors at proceedings of first instance mirrors the pre-1979 appellate procedure. See *supra* text accompanying note 30. It has been reported that the burden of review often falls on one judge with the other two judges simply deferring to her decision. SUN FEI, *supra* note 67, at 162.

78. 1979 Code, *supra* note 2, pt. III, ch. III, art. 142. Article 142 allows some leeway for decisions within "one and a half months at the latest."

79. *Id.* arts. 129, 132.

80. *Id.* art. 132.

81. See SUN FEI, *supra* note 67, at 168-71.

82. *Id.*

83. *Id.* See also XINGSHI SUSONGFA JIANGYI (Explanations of Criminal Procedure) 247-48 (Zhongguo Renmin University Press 1981) [hereinafter EXPLANATIONS OF CRIMINAL PROCEDURE].

84. SUN FEI, *supra* note 67, at 168-71.

85. *Id.*

86. *Id.*

87. *Id.*

88. 1979 Code, *supra* note 2, pt. III, ch. III, art. 136(3).

appellate court may amend the judgment.<sup>89</sup> Finally, if the court discovers that the original court has made a procedural error that materially affected the adjudication, it must quash the original judgment and remand the case to the lower court for a new trial.<sup>90</sup> Although judgments or orders rendered by a court of second instance are "final," judgments rendered by a court upon remand are not final, and all parties may appeal them according to the same appellate procedures.<sup>91</sup>

Death sentences receive special treatment under the 1979 Code. Articles 144 and 145 of Chapter IV of the new Criminal Procedure Code provide for mandatory review by the Supreme People's Court of all death sentences.<sup>92</sup> This provision, however, was modified by the 19th Session of the Standing Committee of the Fifth National People's Congress.<sup>93</sup> Since 1981, approval only of the Higher People's Court is required for death sentences in cases of murder, robbery, rape, bombing, arson and sabotage, while death sentences rendered for counterrevolutionary crimes and embezzlement require approval by the Supreme People's Court.<sup>94</sup> In addition, the appeals period for death sentences has been shortened from ten to three days.<sup>95</sup> However, the substantive criminal code passed as a companion to the 1979 procedural code provides for the possibility of a two-year reprieve of death sentences.<sup>96</sup>

The finality of appellate decisions appears to be settled by the 1979 Code. Article 143 specifies that the judgment of the court of second instance shall constitute the final judgment in a case.<sup>97</sup> Similarly, article 12 of the People's Court Law provides for the rendering of final judgments after two hearings,<sup>98</sup> while article 151 of the 1979 Code defines a legally effective judgment to include: (1) judgments and orders which have not been appealed and for which the legally prescribed period for appeal has

89. *Id.* art. 136(2).

90. *Id.* art. 138.

91. *Id.* art. 139.

92. *Id.* ch. IV, arts. 144, 145.

93. Decision of the Standing Committee of the National People's Congress Regarding Approval of Cases Involving the Death Sentence (June 10, 1981), *trans. in LAWS OF THE P.R.C. 1979-82*, *supra* note 2, at 250 [hereinafter NPC Death Sentence Decision].

94. *Id.*

95. Decision of the Standing Committee of the National People's Congress Regarding the Procedure for Prompt Adjudication of Cases Involving Criminals Who Seriously Endanger Public Security (Sept. 2, 1983), *trans. in LAWS OF THE P.R.C. 1983-86 supra* note 45, at 35 [hereinafter NPC Dangerous Criminals Decision]. *See also* SUN FEI, *supra* note 67, at 92.

96. Criminal Law of the People's Republic of China, ch. III, art. 46 (1979), *trans. in LAWS OF THE P.R.C. 1979-82*, *supra* note 2, at 87 [hereinafter Criminal Code]; *also trans. in 1 Stat. & Reg.*, *supra* note 2, No. 790706. *See also Article 46 of China's Criminal Law Stipulates 2-Year Reprieve for Death Penalty*, FBIS-CHI, *supra* note 2, Jan. 21, 1980, at E 11.

97. 1979 Code, *supra* note 2, pt. III, ch. III, art. 143.

98. People's Court Law, *supra* note 62, ch. I, art. 12.

expired; (2) final judgments and orders; and (3) death sentences approved by the Supreme People's Court.<sup>99</sup> Interestingly, however, there may be an avenue for additional appeals.

Under the 1979 Code, "a party or a victim and his family or other citizens" may petition the people's courts or the people's procuracies to reopen a legally effective judgment or order.<sup>100</sup> Thus *any* citizen, whether or not she participated in the case, as well as the procurator, may petition for "adjudication supervision" of any legally effective judgment or order.<sup>101</sup>

In addition, presidents of the people's courts must reopen a case for adjudication supervision whenever they find error in a legally effective judgment.<sup>102</sup> Similarly, the Supreme People's Court and higher level courts can correct errors in any lower court judgment either by reversing or modifying the judgment or ordering a retrial.<sup>103</sup> Significantly, adjudication supervision is not restricted by any statutory time limitations and may be requested at any time.<sup>104</sup>

A case reopened under adjudication supervision is normally readjudicated by a new panel or referred to the judicial committee.<sup>105</sup> The judicial committee is usually composed of the president, vice president, chief judge, and associate chief judges of the court, with the chief procurators of the corresponding level having the right to participate as non-voting members.<sup>106</sup> The judicial committee's task is to "sum up judicial experience and to discuss important or difficult cases and other issues relating to the judicial work."<sup>107</sup>

If the case was not originally appealed, the adjudication supervision is conducted according to the procedure of the court of first instance, and the judgment or order may again be appealed or protested. If the case was one of second instance, the adjudication supervision is conducted

99. 1979 Code, *supra* note 2, pt. IV, ch. V, art. 151.

100. *Id.* pt. III, ch. V, art. 148.

101. Adjudication supervision is a carryover from pre-1979 appellate procedure. See *supra* notes 36-37 and accompanying text.

102. 1979 Code, *supra* note 2, pt. III, ch. V, art. 149; People's Court Law, *supra* note 62, ch. I, art. 14.

103. 1979 Code, *supra* note 2, pt. III, ch. V, art. 149; People's Court Law, *supra* note 62, ch. I, art. 14.

104. SUN FEI, *supra* note 67, at 40.

105. 1979 Code, *supra* note 2, pt. III, ch. V, arts. 149-50.

106. People's Court Law, *supra* note 62, ch. I, art. 11. The power of the procuratorate to invoke and to participate in adjudication supervision arose out of its supervisory function over the proper implementation of law by the courts. See Xu Yichu, *On the Establishment of the Procedure with Chinese Characteristics for Adjudication Supervision*, FAXUE YANJIU (Studies in Law), No. 4, 1986, at 74, 79-80; see also *infra* note 138.

107. People's Court Law, *supra* note 62, ch. I, art. 11. See also LENG & CHIU, *supra* note 8, at 66.

according to the procedure of second instance, and the judgment or order is final.<sup>108</sup> The execution of the legally effective judgment or order, however, is not suspended during this period.<sup>109</sup>

As the foregoing paragraphs reveal, the 1979 Code represents an effort to systematize the appeals process. Its provisions reflect substantial changes from the criminal appeals process as originally developed during the 1950s. Most importantly, the Code on its face guarantees the criminal defendant's right to appeal an adverse decision, and to do so without the risk of increased punishment. In other ways, however, the Code simply preserves many aspects of the old appeals process: the procurator's right to appeal; the *de novo*, inquisitorial nature of the appeals process; and, despite provisions for final judgment after two hearings, the practice of adjudication supervision as an additional avenue of appeal.

#### IV. Application of the 1979 Code

Beyond the written provisions of the 1979 Code lies the question of its application: Has the Code been applied? If so, how? What issues have come up as the appeals provisions have been applied?

##### A. *Have the Appeal Provisions Been Applied?*

As an initial matter, an increase in the percentage of criminal cases appealed since the adoption of the Code seems to indicate that the Code *is* being applied and is not simply paper law. The rise in appeals also suggests a return to the courts by both the state and citizens. It appears that prior to the Cultural Revolution only five percent of criminal verdicts were "appealed," and of those, less than twenty percent were "reversed."<sup>110</sup>

108. 1979 Code, *supra* note 2, pt. III, ch. V, art. 150. If a court of first instance discovers error in a judgment reviewed by a court of second instance, it should raise the issue with the court of second instance. The court of second instance decides whether or not to reopen the case. That court may readjudicate the case itself or remand it to the lower court for retrial. See EXPLANATIONS RELATING TO CRIMINAL PROCEDURE, *supra* note 71, at 131.

109. 1979 Code, *supra* note 2, pt. III, ch. V, art. 148. See Yin, *The Verdicts and Rulings of the People's Court Must Be Executed*, Renmin Ribao (People's Daily), Jan. 10, 1980, *trans. in* FBIS-CHI, *supra* note 2, Jan. 23, 1980, at L 10 (legally effective verdicts and rulings must be carried out until a new decision by courts). Indeed, if the court's verdict is not carried out, the official may be committing a crime of "disrupting the administrative order of society" under Part II, Chapter VI, article 157 of the Criminal Code, *supra* note 96.

110. See COHEN, *supra* note 8, at 38 n.111 (citing E. SNOW, *THE OTHER SIDE OF THE RIVER, RED CHINA TODAY* 355 (1962)). Bear in mind, of course, that to speak of "appeals" and "reversals" of "criminal verdicts" during the Cultural Revolution is to stretch these terms considerably.

In the years 1980 and 1981, however, the percentage of appeals increased to 22 percent.<sup>111</sup> From October 1980 to September 1981, the Supreme People's Court alone completed 632 appeals and retrials,<sup>112</sup> and handled some 158,000 letters of criminal complaint.<sup>113</sup> More recent statistics indicate that during 1986, the courts accepted 299,720 criminal cases of the first instance, 49,822 criminal cases of the second instance, and 461,778 criminal cases for adjudication supervision.<sup>114</sup>

#### B. *How Has the Appeals Process Been Working?*

An indication of *how* the criminal appeals process has been working can be gleaned from China's *Supreme Court Gazette*.<sup>115</sup> From 1985 to 1987, the *Gazette* published decisions of twenty-four selected criminal cases reviewed by the Judicial Committee of the Supreme People's Court. The Court selected these cases for publication for their educational value as examples of properly adjudicated cases.<sup>116</sup>

In seventeen of the twenty-four cases, a court of second instance reviewed the case pursuant to an appeal.<sup>117</sup> In fifteen of the seventeen cases reviewed by an appellate court, one or more defendants (and not the procurator) appealed the original decision.<sup>118</sup> In one of the fifteen deci-

111. SUN FEI, *supra* note 67, at 43. From January 1978 to December 1982, it was reported that the people's courts heard 939,000 criminal cases and conducted about 157,000 reviews of second instance, an average of 16.7 percent. *Id.* From October 1980 to September 1981, the people's courts heard 209,000 cases of the first instance, and 41,000 cases of the second instance. Renmin Ribao (People's Daily), Dec. 16, 1981, at 2.

112. Renmin Ribao (People's Daily), Dec. 16, 1981, at 2.

113. Letters of criminal complaint are "[m]inor criminal cases that are to be handled only upon complaint or do not require an investigation." 1979 Code, *supra* note 2, pt. I, ch. II, art. 13.

114. ZHONGGUO FA LI NIAN JIAN (Law Year Book of China) 883-84 (Law Publishing House 1987) [hereinafter 1987 LAW YEAR BOOK]. For 1986, the Chinese courts completed adjudication of 298,291 cases of first instance, 49,426 cases of second instance, and 457,783 cases of adjudication supervision. The Chinese courts also accepted 4,734,847 letters of complaint (civil and criminal) and answered 4,736,491 letters. *Id.*

115. SUPREME COURT GAZETTE, *supra* note 5. In addition to selected decisions in criminal cases, the *Gazette* also publishes selected civil decisions and important interpretations of law.

116. The Court's publication of these decisions is in furtherance of its roles of supervising the administration of justice and interpreting the law. See People's Court Law, *supra* note 62, ch. II, arts. 30, 33; see also the announcement for the *Supreme Court Gazette*, *supra* note 5.

117. The remaining seven decisions were not appealed. See SUPREME COURT GAZETTE, *supra* note 5, cases of *Su Feng*, May 20, 1985, at 24-25; *Guo Dexian*, June 20, 1985, at 23-24; *Wang Ping*, June 20, 1985, at 25; *Alimuladuofu-Shamili-Haji-Aogelei*, June 20, 1986, at 36-38 (although no appeal filed, case appears to have been approved by court of second instance); *Pan Fengcai*, Sept. 20, 1986, at 26-28; *Zhao Hengdong*, Mar. 20, 1987, at 14-17; *Yang Yuanzhang*, Mar. 20, 1987, at 17-19.

118. See *id.* cases of *Fan Ming*, May 20, 1985, at 22-24; *Li Ronghui*, Sept. 20, 1985, at 39-40; *Li Fuyong*, Dec. 20, 1985, at 30-31; *Li Jincheng*, Mar. 20, 1986, at 23-27; *Zhang Jangsheng*, June 20, 1986, at 34-36; *Lin Taosen*, Sept. 20, 1986, at 20-22; *Luo Guoyang*, Sept. 20, 1986, at 22-26; *Lu Shunxu*, Dec. 20, 1986, at 23-25; *Cheng Guoyi*, Dec. 20, 1986, at 25-26;

sions, the defendant filed an appeal and the procurator filed a protest.<sup>119</sup> In another of the fifteen decisions, only the procurator appealed.<sup>120</sup>

In the two cases protested by procurators, the procurators complained only of the sentence. Of the cases appealed by defendants, only five contained a defendant's appeal solely for leniency and a reduced sentence.<sup>121</sup> In the remaining eleven cases, the defendant or defendants challenged the judgment as well as the sentence, arguing that "the findings of fact do not coincide with the crime."<sup>122</sup>

Of the seventeen decisions that were appealed, fourteen were affirmed, none was reversed, and three resulted in a modification of the sentence.<sup>123</sup> In the cases in which the sentence was modified, the Court increased the sentence in one case<sup>124</sup> and reduced it in two others.<sup>125</sup>

These figures demonstrate that defendants have been appealing not only their sentences, but the underlying judgments as well. These cases also suggest that, despite the increased number of appeals, higher courts are still reluctant to modify a sentence and even more reluctant to overturn a conviction.<sup>126</sup> Procurators, on the other hand, generally appear to have more success during appeals. According to the 1983 report of the Supreme People's Procuratorate, about 66 percent of the protests filed by

*Wen Yuanhe*, Mar. 20, 1987, at 12-13; *Guo Yong*, June 20, 1987, at 32-36; *Chen Geyi*, Sept. 20, 1987, at 28-29; *He Dexu*, Sept. 20, 1987, at 29-30; *Wang Gende*, Dec. 20, 1987, at 25-27; *Li Jianan*, Dec. 20, 1987, at 27-29.

119. See *id.* case of *Zuo Chenghong*, Sept. 20, 1985, at 37-39.

120. See *id.* case of *Sun Mingliang*, June 20, 1985, at 26-28.

121. *Li Fuyong*, *Li Jincheng*, *Zhang Jangsheng*, *Luo Guoyang*, and *Chen Geyi*, *supra* note 118.

122. *Fan Ming*, *Li Ronghui*, *Lin Taosen*, *Lu Shunxu*, *Cheng Guoyi*, *Wen Yuanhe*, *Guo Yong*, *He Dexu*, *Wang Gende*, and *Li Jianan*, *supra* note 118; *Zuo Chenghong*, *supra* note 119.

123. The three cases that resulted in sentence modifications were: *Sun Mingliang*, *supra* note 120; *Zuo Chenghong*, *supra* note 119; *Guo Yong*, *supra* note 118.

124. In *Zuo Chenghong*, *supra* note 119, pursuant to a procurator's protest, the appellate court eliminated a two-year reprieve on a death sentence.

125. In *Sun Mingliang*, *supra* note 120, the appellate court rejected a procurator's protest that the sentence imposed at trial was too light and, instead, reduced the defendant's sentence from 15 to 2 years; in *Guo Yong*, *supra* note 118, the original sentence was reduced pursuant to the defendant's appeal.

126. This conclusion is also supported by the statistics for the Beijing Intermediate Court. Of the 7,456 appeals heard by that court between 1980 and 1987, the court amended or reversed a judgment in only 576 cases. Of the defendants involved in these 576 cases, 21 were acquitted on appeal, 77 were found to have received an incorrect judgment, and 398 were held to have been incorrectly sentenced. In 16 of these cases, the penalty for the defendant was increased. *Zhongguo Fazhi Bao* (China Legal News), June 4, 1987, at 2. Interestingly, according to one Chinese researcher, in 1980-81, the Beijing Intermediate Court heard 1537 appeals. Of these appeals, the Beijing Intermediate Court affirmed 1226 (about 79.8%) and modified or remanded 311 cases (about 20.2%). SUN FEI, *supra* note 67, at 43. The statistics cited by Sun may indicate a drastic reduction of reversals after 1982 by the Beijing Intermediate Court. They may also reveal the high numbers of "wrongly decided" cases left over from the Cultural Revolution. See *supra* note 37.

the procuratorate's office resulted in either a modification of the judgment or a reversal and remand of the case.<sup>127</sup> Some courts of second instance believe that because a procurator represents the country, a protest filed by the procurator merits more attention than an appeal filed by an individual party.<sup>128</sup>

C. *What Issues Have Been Raised in the Functioning of the Appeals Process?*

An examination of four specific appeals raises some interesting issues about the efficacy of the 1979 Code. The first case, *Wang Li and Meng Xiaohang*,<sup>129</sup> questions article 137's prohibition against increased punishments by courts of second instance. On January 22, 1980, the Beijing Municipal Intermediate People's Court convicted Wang Li and Meng Xiaohang of embezzlement and sentenced them to imprisonment for 15 and 5 years, respectively. Wang appealed to the Beijing Municipal Higher People's Court, which decided that the evidence supporting the verdict was insufficient, voided the original sentences of both defendants (although only Wang had appealed), and remanded the entire case for readjudication. On remand, the Intermediate Court organized a new bench and tried the case *de novo*. That court again convicted Wang and Meng of embezzlement and imposed stiffer punishments. Wang was given a death sentence with a two year reprieve during which he was to be "reformed through labor," and he was also deprived of his political rights for life. Meng Xiaohang was sentenced to imprisonment for twelve years.

The *Wang Li* case illustrates the risks still faced by defendants who invoke their right to appeal. Although article 137 prohibits appellate courts from increasing punishments in appeals by defendants, courts of first instance are not so limited when retrying cases on remand. Courts of second instance have apparently used the excuse of insufficient evidence to remand cases when they wish to see heavier punishments imposed.<sup>130</sup> Consequently, the protection offered by article 137 can easily be circumvented, possibly discouraging the use of the appeal mechanism

127. Renmin Ribao (People's Daily), June 26, 1983, at 3.

128. SUN FEI, *supra* note 67, at 146-47.

129. The description of the case is taken from *Beijing Court Issues Death Sentences in Case Retrial*, Beijing Xinhua, May 30, 1980, *trans. in* FBIS-CHI, *supra* note 2, June 4, 1980, at R 2. See also AMNESTY INTERNATIONAL, CHINA: VIOLATIONS OF HUMAN RIGHTS 67-68 (1984) [hereinafter AMNESTY INTERNATIONAL 1984].

130. See SUN FEI, *supra* note 67, at 249-50; for a specific case of improper remand, see *infra* notes 207-08 and accompanying text.



by defendants. Whether this result is consistent with the intention of the 1979 Code is a current topic of debate among Chinese jurists.<sup>131</sup>

The second case, *Zuo and Liu*,<sup>132</sup> demonstrates another mechanism for circumventing article 137's prohibition against increased punishment upon a defendant's appeal. In the *Zuo* case, Zuo and Liu were convicted of conspiracy and the murder of Zuo's husband; the court sentenced Zuo to death and Liu to life imprisonment. Both defendants appealed the judgment, and the procurator filed a protest on the ground that Liu's sentence was too lenient. After reinvestigating the case, the Yunnan Higher People's Court determined that although Zuo and Liu had an affair, Liu alone plotted and murdered Zuo's husband. Consequently, the Yunnan Higher People's Court found Zuo innocent of any crime, but increased Liu's sentence from life imprisonment to death.

The *Zuo* case demonstrates another problem with the protection of article 137. In a case in which the procurator and the defendant both appeal, the defendant can still face increased punishment. Thus, a clever procurator could discourage a defendant's appeal simply by filing a protest to the judgment.<sup>133</sup>

Moreover, as the *Sun Liqiang* case<sup>134</sup> demonstrates, even favorable decisions by courts of second instance do not guarantee a defendant's final success. On April 12, 1979, Sun was convicted of robbery and sentenced by the Baita District People's Court in the Liaoyang Municipality to five years imprisonment. Sun appealed the judgment to the Liaoyang Municipal Intermediate People's Court. On June 5, 1979, that court annulled the lower court sentence and sentenced Sun to two years of imprisonment. The Liaoyang Municipal People's Procuratorate, believing the new sentence too lenient and wishing to prosecute Sun for other related offenses, requested the next highest procuracy, the Liaoning Provincial People's Procuratorate, to file a protest to the judgment. In February

131. See *Zhongguo Fazhi Bao* (China Legal News), Apr. 28, 1986, at 3; May 16, 1986, at 3; May 26, 1986, at 3; June 2, 1986, at 3. Some scholars believe that only adjudication supervision can give a court authority to increase a defendant's sentence after a defendant's appeal. SUN FEI, *supra* note 67, at 253.

132. The description of the case is taken from SUN FEI, *supra* note 67, at 43-44 (citing RENMIN SIFA (People's Judiciary), No. 3, 1984, at 5).

133. It has been reported that some trial courts, after discovering that a defendant is appealing the judgment, have encouraged the procurator or the victim to register a protest in order to legally increase the defendant's sentence in an appeal. *Id.* at 247.

134. *Liaoning Higher Court Annuls Municipal Court Decision*, Beijing Domestic Service, May 20, 1980, *trans. in* FBIS-CHI, *supra* note 2, May 21, 1980, at S 1. Note that it appears that the second instance proceeding of this case took place prior to the promulgation of the 1979 Code. It is not unusual in China for draft codes to be utilized before their official promulgation in final form. See, e.g., 1982 Civil Procedure Law of the People's Republic of China (For Trial Implementation) (1982), *trans. in* LAWS OF THE P.R.C. 1979-82, *supra* note 2, at 259 [hereinafter 1982 Draft Civil Procedure Code].

1980, the provincial procuratorate filed a protest with the Liaoning Province Higher People's Court in accordance with the procedures for adjudication supervision.<sup>135</sup> In April 1980, the Higher People's Court held a hearing on this appeal and annulled the decision of the Intermediate People's Court. Sun was subsequently resentenced by the Higher People's Court to seven years imprisonment, an increase of two years from the original sentence.<sup>136</sup>

Beyond raising doubts about the effectiveness of article 137's prohibition against the increase of punishments on appeal, the *Sun* case also brings into question the guarantee by article 143 of the 1979 Code and article 12 of the People's Court Law of the finality of a two-trial judgment. Indeed, the provisions for adjudication supervision provide that a case may be reopened at *any* time after a judgment has been rendered legally effective. These provisions are in direct contradiction to the protections afforded by the finality of a two-trial judgment.

Adjudication supervision, by providing any citizen, the procurator and even the courts, the right to request a reopening of a judgment,<sup>137</sup> can subject the defendant to successive trials with the potential of greater punishment. In addition, a defendant's successful appeal may be further endangered by the right of the chief procurator of each corresponding level to participate in the discussion at the judicial committee meetings as a non-voting member.<sup>138</sup>

The impact of adjudication supervision on the effective use of appeals may not be trivial. As reported above, it appears that adjudication supervision has been used with great frequency.<sup>139</sup> It is not clear how many of these cases include reviews of second instance proceedings. However, the numbers reflect that adjudication supervision constitutes the final step in

135. 1979 Code, *supra* note 2, pt. III, ch. V, art. 149.

136. A case similar to the *Sun* case is that of *Weng Guixiang*. On August 2, 1980, the Shanghai Intermediate Court convicted Weng of murder and sentenced him to death with deprivation of political rights for life. Upon appeal by Weng, the Higher People's Court repealed the original sentence and commuted the death sentence to a sentence with a two-year reprieve. The People's Procuratorate reexamined the case and sought adjudication supervision from the Supreme People's Court which set up a collegiate bench to retry the case. After a discussion by the Trial Committee, the Supreme People's Court changed the sentence to immediate execution. See LAW ANNUAL REPORT OF CHINA 1982/3 (Eng. version) 138 (1982).

137. 1979 Code, *supra* note 2, pt. III, ch. V, arts. 148-49.

138. People's Court Law, *supra* note 62, ch. I, art. 11. According to one writer, the chief procurator's participation places the judicial work under the supervision of the procuracy and helps the procuratorates and courts "complement, coordinate and restrict each other." LENG & CHIU, *supra* note 8, at 66 (citing Xu Lisheng, *The Role of the Adjudication Committee*, Renmin Ribao (People's Daily), Feb. 5, 1980, at 2).

139. See *supra* note 114 and accompanying text.

the majority of cases.<sup>140</sup> Since even successful appeals are not protected from additional reviews, defendants may well hesitate to file appeals.<sup>141</sup>

Another case, *Wang Guoying*,<sup>142</sup> indicates the continuing relevance of two factors that undermined the efficacy of appeals prior to 1979: the prevalence of social and legal pressures encouraging convicts to confess, and a preoccupation with reform and rehabilitation. Wang was convicted of stealing state property,<sup>143</sup> and was sentenced to one to three years imprisonment. In preparing the appeal of the sentence, Wang's lawyer compiled a portfolio of evidence from Wang's teachers, coworkers, neighbors, and friends. The lawyer then grounded his plea on Wang's overall good character, his willingness to reform, and the fact that this was his first offense. Based on this showing, Wang's sentence was reduced to a two-year suspended prison term and two years on probation.<sup>144</sup>

Undeniably, Wang's appeal shows an exercise of the formal legal system. However, the approach taken by Wang's lawyer reflects the strong "rehabilitation" philosophy that still prevails.<sup>145</sup> Indeed, in China, confessions and surrenders are still favorably regarded, and the policy continues to be "giving lenient punishment to those who frankly confess their crimes."<sup>146</sup> For instance, when the Standing Committee of the NPC passed a resolution to increase the punishment for economic

140. 1987 LAW YEAR BOOK, *supra* note 114, at 883-84.

141. Another case demonstrates the lack of finality of judgment, but this time to the benefit of the accused. Sun, a faculty member of an agricultural school in Beijing, tried to stop a disturbance. In the process, Sun killed Zhou, a member of a hooligan gang. Sun was prosecuted, convicted, and sentenced to 15 years. Sun appealed with the help of a lawyer, who argued that Sun was acting in defense of others. The appellate court held that Sun was acting in defense of others but that the act was excessive. The Court reduced Sun's sentence to two years with a two year reprieve. Still unsatisfied, the lawyer objected and helped Sun to appeal to a higher judicial department. The Beijing Intermediate Court retried the case and pronounced Sun not guilty. Contrary to the provision that a decision of the court of second instance is final, Sun had two reviews of his conviction. Zhang Zhiye, *How Do China's Lawyers Work?*, 26 BEIJING REV., No. 23, at 26 (June 6, 1983) [hereinafter Zhang, *China's Lawyers*]; see also case reported in MINZHU YU FAZHI (Democracy and Legality), No. 3, 1987, at 22-23.

142. The description of the case is taken from Snyder, *Shanghai: A Case on Appeal*, 66 A.B.A. J. 1536 (1980).

143. See Criminal Code, *supra* note 96, pt. II, ch. V, art. 151.

144. Snyder, *supra* note 142, at 1538-39.

145. Between 1980 and 1982, 289 people in Wuxi were treated leniently because their misdeeds were not terribly serious, or because they had shown repentance. Of these, 209 were not arrested, 53 were exempted from prosecution, and no charges were filed against 27. Zhang Zhiye, *Legislative and Judiciary Work in China*, 26 BEIJING REV., No. 33, at 21 (Aug. 15, 1983).

146. *Beijing Chief Procurator's Work Report*, Beijing Ribao (Beijing Daily), Mar. 23, 1987, at 4, *trans. in* FBIS-CHI, *supra* note 2, Apr. 24, 1987, at R 1. In 1985 alone, 79 of the 963 prisoners at the Seventh Detachment of the Reform Through Labor Bureau of the Jiangxi Province had their sentences reduced because of good behavior, positive work, and by demon-

crimes, effective April 1, 1982, it added a provision which promised more lenient treatment to those who surrendered by May 1.<sup>147</sup> In contrast, those who refuse to confess may be regarded as insufficiently "reformed" and may receive more severe sentences.<sup>148</sup> Hence, those who appeal the judgment and sentence on any grounds other than leniency may still be unfavorably regarded; the 1979 Code has done little to alter this situation.

The four cases analyzed in this section demonstrate that China is indeed using its formal legal procedure to review criminal convictions. They also illustrate, however, certain problems inherent in the 1979 Code which have impeded the effective application of the formal appeal by defendants. The protection against increased punishment in a defendant's appeal can be circumvented by lower courts on remand, the defendant's right to appeal can be chilled by the procurator's simultaneous right to protest, and the finality of a second instance judgment can still be upset by adjudication supervision. Indeed, the *Sun Liqiang* case<sup>149</sup> demonstrates the particular power of adjudication supervision as a formal procedure by which a case with a legally effective judgment can be reheard to ensure that a "correct" judgment is rendered. These factors, combined with the persisting systemic emphasis on reeducation and rehabilitation, can hinder seriously those who might wish to appeal.

#### V. Remaining Obstacles to Use of the Formal Appeals Process

Apart from the problems inherent in the 1979 Code, certain remaining systemic impediments continue to provide powerful deterrents to the use of the formal appeals procedure by defendants. One impediment, closely related to the notion of rehabilitation, concerns administrative sanctions by the Public Security Bureau.<sup>150</sup> As discussed earlier, the Public Secur-

strating that they regretted their crimes. Wu Naitao, *Prisoner Reform Turns Towards Education*, 29 BEIJING REV., Nos. 6 & 7, at 23 (Feb. 10, 1986).

147. See *Renmin Ribao Editorial on Punishing Criminals*, Beijing Xinhua (Beijing New China), Mar. 9, 1982, trans. in FBIS-CHI, supra note 2, Mar. 10, 1982, at K 4.

148. For example, the Shanghai Intermediate People's Court once openly tried a murder case involving three defendants: Fang, Wang, and Cai. Fang's lawyer argued that Fang took part in the murder, but pointed out that Fang surrendered himself to the public security, confessed his crime and showed repentance. Wang's lawyer claimed that although Wang had participated in the planning, he did not actually commit the murder. Wang also had surrendered himself and disclosed the crimes of the other offenders, resulting in a rapid resolution of the case. Thus, both Fang and Wang's lawyers argued for mitigation. The Court sentenced Cai to death, Fang to seven years and acquitted Wang. Zhang, *China's Lawyers*, supra note 141, at 25.

149. See supra notes 134-36 and accompanying text.

150. See discussion supra notes 45-47 and accompanying text; see also *Continue to Do a Good Job on Re-Education*, Renmin Ribao (People's Daily), Feb. 25, 1980, (editorial) trans. in FBIS-CHI, supra note 2, Feb. 26, 1980, at L 6. See also Wu Gaocheng, *Opposing the Practice*

ity Bureau has long been authorized to impose "administrative" sanctions of monetary fines and/or short detentions for minor offenses.<sup>151</sup> The power of the Public Security Bureau to impose administrative penalties was reaffirmed when the 1957 Security Administration Punishment Act was republished in 1980.<sup>152</sup> In addition, regulations on "reeducation through labor" which had been adopted in 1957<sup>153</sup> were again widely circulated around the time the new criminal codes were promulgated in 1979.<sup>154</sup>

As noted earlier,<sup>155</sup> although the accused did have recourse to a review of an administrative sanction imposed by the public security office by the next highest level of the Public Security Bureau, she was not protected by judicial review.<sup>156</sup> In 1986, however, the government revised the 1957 Security Administration Punishment Act to grant power to the courts to review administrative sanctions.<sup>157</sup>

Effective January 1987, article 39 of the 1986 Security Administration Punishment Act provides that an accused may seek judicial review of a

*of Imposing Fines Instead of Punishment: Insists on Punishment Accordance to Law*, MINZHU YU FAZHI (Democracy and Legality), No. 4, 1986, at 17. Note that public security sanctions can be more serious than other administrative sanctions because public security sanctions can include short detentions.

151. See, e.g., Security Administration Punishment Act, *supra* note 45 (authorizing police to issue warnings, fines, and short detentions up to 15 days). These penalties are often accompanied by the "Four-in-One Education Method." The detainee is educated once upon his entrance into detention, is issued one regulation book, attends reeducation class once a day, and is educated once again upon his release. The recidivism rate is claimed to be quite low as a result of this program. In Su City, only 6 out of 307 detainees were reported to have committed another crime after release. Zhongguo Fazhi Bao (China Legal News), June 10, 1987, at 1.

152. *1957 Public Security Regulations Published* (radio broadcast) OW231425 Beijing Xinhua (Domestic Service) (Chinese), 1131 GMT 22 Feb. 80 OW, *trans. in* FBIS-CHI, *supra* note 2, Feb. 26, 1980, at L 8 [hereinafter *1957 Regulations*].

153. Decision of the State Council Regarding the Question of Rehabilitation Through Labor (Aug. 1, 1957), *trans. in* LAWS OF THE P.R.C. 1979-82, *supra* note 2, at 168 (enabling public security and local administrative committee for rehabilitation through labor to send "offenders" to special work camps for reeducation); see also Supplementary Provisions of the State Council for Rehabilitation Through Labor, *trans. in* LAWS OF THE P.R.C. 1979-82, *supra* note 2, at 167.

154. *Beijing Papers Reprint Regulations on Reform Through Labor*, Beijing Xinhua (in English), Feb. 26, 1980, *reprinted in* FBIS-CHI, *supra* note 2, Feb. 27, 1980, at L 1.

155. See *supra* note 47 and accompanying text.

156. See Security Administration Punishment Act, *supra* note 45, art. 18, para. 4; *1957 Regulations*, *supra* note 152. Although the Public Security Bureau is not part of the judiciary, the Bureau, the procuratorate, and the people's courts are to work as "three workshops at one factory" towards fulfilling one task—that of "striking at the enemy." *Peng Zhen Discusses Task of Public Security Organs* (radio broadcast), OW291932 Beijing Xinhua (Domestic Service) (Chinese), 1658 GMT 28 Jul. 79 OW, *trans. in* FBIS-CHI, *supra* note 2, July 30, 1979, at L 1.

157. Security Administration Punishment Act, *reprinted in* Zhongguo Fazhi Bao (China Legal News), Sept. 6, 1986, at 2, *trans. as Regulations of the People's Republic of China on Administrative Penalties for Public Security in* LAWS OF THE P.R.C. 1983-86, *supra* note 45, at 271 [hereinafter 1986 Security Administration Punishment Act].

public security sanction imposed under the Security Administration Punishment Act.<sup>158</sup> The accused must first appeal the Security Administration Punishment Act sanction to a higher level public security office and then, within five days of an adverse decision by the higher level office, she may initiate a proceeding in a court of law to challenge the imposition of the sanction.<sup>159</sup> The court must make a determination on the legality of the sanction within ten days of the filing of the action in the case of administrative detention, and within twenty days if the sanction is a fine or a warning.<sup>160</sup>

This revision represents an important effort by the state to bring the public security apparatus within the ambit of the judiciary. Indeed, although citizens have been able to bring actions against certain administrative agencies since 1982,<sup>161</sup> that right was not, before January 1987, extended to include administrative sanctions imposed by the Public Security Office. On March 16, 1987, the Highest People's Court of Jiangsu Province reported one of China's first cases of judicial review of an administrative sanction imposed by a Public Security office.<sup>162</sup> That court affirmed a lower court's decision overturning an administrative sanction of seven- and twenty-day detentions imposed on two defendants.<sup>163</sup>

Despite this judicial review, it remains unclear whether article 39 will eliminate abuses in sanctions imposed by the Public Security Bureau. In the first place, the right to judicial review is limited to sanctions imposed

158. *Id.* ch. 4, art. 39. See also Zhang Yuoyu, *China's First Case Overturning Public Security Decision*, MINZHU YU FAZHI (Democracy and Legality), No. 5, 1987, at 17.

159. 1986 Security Administration Punishment Act, *supra* note 157, ch. 4, art. 39. China's courts now have special sections to handle disputes over administrative decisions. Citizens or organizations who refuse to accept administrative decisions handed down by government offices can seek review by these courts as provided under law. See Renmin Ribao (People's Daily), Feb. 10, 1987, at 4. To date, about one-third of China's courts, including the Supreme People's Court, have formed administrative trial courts, and about 500 more are being prepared. *Crackdown on Crime Stressed*, 31 BEIJING REV., No. 32, at 6 (Aug. 8-14, 1988).

160. 1986 Security Administration Punishment Act, *supra* note 157, ch. 4, art. 39. See also 1987 LAW YEAR BOOK, *supra* note 114, at 574. The courts will determine whether the public security decision was procedurally and substantively correct. Zhao Kang, *Adjudicating Administrative Cases Involving Public Security Regulations*, FAXUE (Jurisprudence), No. 1, 1987, at 31-32.

161. The draft P.R.C. Civil Procedure Code promulgated in 1982 empowers the court to hear actions challenging certain administrative sanctions provided that there is a law or regulation authorizing suit against the administrative agency involved. 1982 Draft Civil Procedure Code, *supra* note 134, arts. 3, 81. See Zhongguo Fazhi Bao (China Legal News), May 16, 1986, at 3. See also Zhongguo Fazhi Bao (China Legal News), Oct. 9, 1986, at 1 (Wuhan Automotive Research Institute brought action contesting fines imposed by the Wuhan City Planning Department).

162. See MINZHU YU FAZHI (Democracy and Legality), No. 5, 1987, at 17.

163. *Id.* On February 10, 1987, the Yangpu People's Court also heard one of its first cases appealing a ten-day detention order imposed by the Public Security Office. That court, however, affirmed the administrative sanction. MINZHU YU FAZHI (Democracy and Legality), No. 3, 1987, at 38.

under the Security Administration Punishment Act. Second, abuses of civil administrative sanctions continue despite the similar availability of judicial review under the draft 1982 Civil Procedures Code.<sup>164</sup> Finally, government departments are known to be reluctant parties to litigation, often refusing to appear in court and defying unfavorable court rulings.<sup>165</sup>

Another remaining impediment to the use of the formal criminal appeals is the influence of the Chinese Communist Party on the judicial process. Although the practice of *shuji-pi'an*<sup>166</sup> seems to have been abolished,<sup>167</sup> the power of the Party continues to be felt. Judicial officers continue to seek Party approval to demonstrate their loyalty to Party leadership.<sup>168</sup> In part, this may be due to the fact that judges are appointed and removed by the people's congresses or their standing committees.<sup>169</sup> In addition, the Party itself intervenes whenever it finds the case to be important, difficult, or to have socially important implications,<sup>170</sup> although no official provision for such intervention appears in the statutory scheme.<sup>171</sup>

Moreover, Party discipline continues to be used in place of criminal sanctions for crimes committed by Party members, especially for leading cadres.<sup>172</sup> For example, in June 1980, the leading cadres of a construc-

164. See Wu Gaocheng, *supra* note 150, at 17-18. According to Wu, in an unnamed city 96 economic crimes were investigated in 1985, but none of the 96 cases was prosecuted. Instead, the majority of these cases was dealt with by administrative fines without affording the accused the protections of the judicial system.

165. See *People's Court Can Check Government Power*, Beijing Xinhua, Jan. 26, 1988, *trans. in* FBIS-CHI, *supra* note 2, Jan. 29, 1988, at 6-7.

166. See discussion *supra* notes 38-40 and accompanying text.

167. In an instruction issued in September 1979 on the full implementation of the Criminal Law and the 1979 Code, the Central Committee of the Chinese Government Party explicitly abolished the practice of *shuji-pi'an*. A translation of the instruction may be found in Koguchi, *Some Observations About "Judicial Independence" in Post-Mao China*, 7 B.C. THIRD WORLD L.J. 195, 208-13 (1987).

168. *Id.* at 200 (citing Guo Buyue, *Handling Cases Strictly According to the Law*, FAXUE ZAZHI, No. 1, 1985, at 8).

169. Presidents of people's courts at various levels are elected by the people's congresses at the corresponding levels. All other judicial officers are appointed and removed by the standing committees of people's congresses at the corresponding level. People's Court Law, *supra* note 62, ch. III, arts. 35, 36.

170. Koguchi, *supra* note 167, at 202. One explanation may be the continued lack of legal expertise and relatively low social status of judicial officers. Koguchi notes that the People's Courts have neither the power nor the prestige to deal with complex cases.

171. Neither is there any strong protection against the abuse of this Party power. In Henan, for example, a party committee ordered the court to sentence an innocent man to prison. When the president of the court refused, the committee dismissed him. On appeal, the case was reversed. No sanction was imposed on the party committee except that it "accepted the reprimand" of its superior organ. Chiu, *China's Changing System*, *supra* note 24, at 267.

172. *Minzhu Yu Fazhi* reported a case in which a group of leading cadres sought to frame an innocent man. The public security officer involved was removed from his job and expelled

tion team violated safety measures resulting in a serious accident in which four persons were killed. The persons in charge were punished only with disciplinary demerits and were not prosecuted.<sup>173</sup> Similarly, in Putuo District, a Party member who took construction materials from the collective units for his own purposes was given Party discipline instead of criminal sanctions.<sup>174</sup> To the extent that party discipline is used in place of criminal sanctions, the protections afforded by the 1979 Code, including the appeal, are again circumvented.

There has been movement towards reducing the role of the Party under the Code. Recent criticism of these other forms of discipline and of Party committees interfering in judicial matters shows a commitment to giving the judiciary a role independent of local Party control.<sup>175</sup> The acceptance of the principle that the law must be followed because it represents the true policies of the state has been recently emphasized as a major reform at the highest level.<sup>176</sup>

In addition to the "rule by law" ideal, there have also been recent efforts to propagate the idea that "everyone is equal under the law," including Party cadres.<sup>177</sup> Public procurators have been called upon to persist in prosecuting criminals even if they are high-ranking officials or their children, or other well-known people.<sup>178</sup> Increased prosecution of economic crimes, many of which are committed by high level officials, will assist in furthering the rule of law among Party leaders.<sup>179</sup>

from the Party, while the cadre who was involved was removed from his job but allowed to remain in the Party on probation. Neither was subjected to criminal prosecution. Note, *supra* note 4, at 1899 n.43 (citing Lu Zhengqiu & Mou Chunlin, *Report of an Investigation Into a Case of Utter Disregard for Human Life*, MINZHU YU FAZH I (Democracy and Legality), No. 3, 1982, at 37).

173. Chen Maodi, *Party Discipline Should Not Replace State Law*, Shanghai Jiefang Ribao, Oct. 20, 1980, at 2, *trans. in* FBIS-CHI, *supra* note 2, Oct. 21, 1980, at L 5. Article 114 of the Chinese Criminal Law provides that a worker who disobeys orders or who arbitrarily orders other workers to engage in hazardous conditions thereby causing accidents shall be punished with detention of no more than three years. If the accident is serious, then the detention shall be no less than three years and no more than seven years. Criminal Code, *supra* note 96, art. 114.

174. Chen, *supra* note 173.

175. *Id.* See also *Party Committees Should Not Continue Examining and Approving Cases*, Beijing Ribao (Beijing Daily), Jan. 23, 1981, *trans. in* FBIS-CHI, *supra* note 2, Feb. 2, 1981, at L 8.

176. See *Leaders Lectured on Law*, 29 BEIJING REV., No. 29, at 5 (July 21, 1986) [hereinafter *Leaders Lectured*].

177. As part of a recently initiated five-year program to propagate legal education in China, 80 percent of leading bodies at or above the prefectural level and 90 percent of those at the county level have drawn up plans for their members to attend legal lectures. *Id.* at 6.

178. *Id.* See also *Shanghai Executes Rapists*, 29 BEIJING REV., No. 9, at 5 (Mar. 3, 1986) (influential parents and relatives of accused rapists barred from intervening in pending trials); *Laws to Be Strictly Applied*, 29 BEIJING REV., No. 12, at 5 (Mar. 24, 1987).

179. During the 1982 anti-crime campaign, according to Wang Congwu, Secretary of the party's Central Commission for Discipline Inspection, more than 164,000 cases of economic



Although there have been some efforts to decrease the use of Party discipline as a substitute for legal sanctions, there have been fewer efforts to reduce the influence exerted by the Party through state policies. Indeed, the influence of the Party has made itself felt most strikingly in national policies as expressed through political campaigns.<sup>180</sup> Due to the philosophy that the legal system is a tool to carry out state policy,<sup>181</sup> the legal system is susceptible to swings in national policy. Thus, when the country launched a national campaign to combat crime, the procedural protections guaranteed by the criminal code, such as the appeal, sometimes received short shrift.

Specifically, in 1981 and again in 1983, the Political Legal Committee of the Communist Party Central Committee called for strong measures against crime, which were promptly approved by the Standing Committee of the National People's Congress.<sup>182</sup> During the 1983 anti-crime campaign, emergency measures were adopted for the purpose of "swiftly and severely punishing criminals who jeopardize public security."<sup>183</sup> Quotas for arrests and executions were reported to have been assigned to provinces and municipalities.<sup>184</sup> By January 1984, the foreign press reported that the campaign may have resulted in 100,000 arrests and 5,000 to 10,000 executions.<sup>185</sup>

crime were investigated. Of these, 54 percent were "wound up," 30,000 resulted in criminal sentences, and 5,500 resulted in expulsions from the Party. *Embezzlers Executed*, 26 BEIJING REV., No. 9., at 7 (Feb. 28, 1983). See also *Crackdown on Economic Crimes*, 26 BEIJING REV., No. 33, at 7 (Aug. 15, 1983).

But economic crimes remain a problem. In 1987, the Supreme People's Court reported that the courts handled 18,133 cases of economic crime in 1986, an increase of 55.5 percent from the previous year. *Zhongguo Fazhi Bao* (China Legal News), Apr. 16, 1987, at 2. Examples of economic crime prosecutions against party members are numerous. In 1983, Wang Zhong, a Party member and deputy director of the public security and judiciary committee under the Party Committee of Shantou Prefecture, Guangdong, was executed for taking advantage of his position and pocketing 69,749 yuan worth of smuggled goods and bribes. *Embezzlers Executed*, *supra*, at 7.

180. Another distinctive feature of the P.R.C. government is its use of the mass mobilization technique of campaigns. In China, no significant government activity has ever taken place without the use of the campaign, with its big wall posters, slogans, mass meetings, etc. The campaign in the Chinese legal system has been compared with the trial of a case in the West, because, officially at least, all conflicts in China are regarded as class conflicts and must be resolved by the masses under Party leadership. Jones, *On the Campaign Trail in China*, 6 REV. SOCIALIST L. 457, 458-59 (1979). See generally G. BENNETT, *YUNGDONG: MASS CAMPAIGNS IN CHINESE COMMUNIST LEADERSHIP* (1976).

181. H. ZHENG, *CHINA'S CIVIL AND COMMERCIAL LAW* 25 (1988). Thus, if a conflict exists between law and broadly stated policy, policy takes precedence.

182. NPC Death Sentence Decision, *supra* note 93, at 1; NPC Dangerous Criminals Decision, *supra* note 95.

183. NPC Dangerous Criminals Decision, *supra* note 95.

184. LENG & CHIU, *supra* note 8, at 137.

185. See AMNESTY INTERNATIONAL 1984, *supra* note 129, at 55.

During the years 1981 to 1983, a person convicted of a crime and sentenced to death was deprived of her right to appeal to the Supreme People's Court; approval of only a provincial Higher People's Court was required in cases of murder, robbery, rape, bombing, arson and sabotage.<sup>186</sup> At times, even this guarantee of mandatory review for death sentences by another court was ignored.<sup>187</sup> Furthermore, the 1979 Code's provision for a ten-day period for appeal was shortened to three days.<sup>188</sup> As a result, a criminal could be arrested, tried, and executed in only eight days.<sup>189</sup> During these anti-crime campaign periods, even abbreviated procedural protections were sometimes ignored. For example, summary executions were reported to have been reviewed and approved by the higher people's court in advance.<sup>190</sup>

The inevitable influence of the Party is compounded by the lack of judicial independence, even from other judges on the bench.<sup>191</sup> Although there have been attempts to limit judges' ties to outside institutions, groups, and individuals,<sup>192</sup> there is little separation between judges of the same court and between judges of different courts. Internally, decisions of individual judges and collegiate benches in "important or difficult cases" must still be approved by court presidents or chief judges and/or judicial committees.<sup>193</sup>

186. See discussion *supra* notes 93-95 and accompanying text.

187. There were reported cases in which the accused was executed based solely on a lower court's decision. A law student wrote to the *China Legal News* complaining of a case in which the accused was convicted of murder on July 7, 1985, and executed on July 18, 1985. The execution took place after the ten day appeal period had run, but without the mandatory approval of a higher people's court as provided by the modified articles 144 and 145 of the Criminal Procedure Code. *Zhongguo Fazhi Bao* (China Legal News), Mar. 3, 1987, at 4.

188. See NPC Dangerous Criminals Decision, *supra* note 95.

189. On June 23, 1981, the Nanjing Municipal Intermediate People's Court convened a 10,000 person rally at which a murderer named Luo received the death penalty and was immediately executed. The whole process from arrest to appeal to execution only took eight days. LENG & CHIU, *supra* note 8, at 134. In another case, two young men, Cao Guorong and Xu Xianping, were officially reported to have been arrested on September 4, 1983, and executed on September 10, 1983. The High Court of Jiansu reviewed and approved the verdict within the six days between arrest and execution. See AMNESTY INTERNATIONAL 1984, *supra* note 129, at 69-70.

190. See cases cited in LENG & CHIU, *supra* note 8, at 134-35. As recently as 1987, twenty-two people were publicly tried and convicted of crimes including murder, rape, and robbery in Liaoning Province. Seventeen of the convicted were immediately executed. *Report on Executions, Law, Order Measures*, Hong Kong A.F.P. (English), Jan. 5, 1988, in FBIS-CHI, *supra* note 2, Jan. 7, 1988, at 19.

191. See Koguchi, *supra* note 167, at 205-06.

192. See, e.g., *Party Committee Should not Continue Examining and Approving Cases*, Beijing Ribao (Beijing Daily), Jan. 23, 1981, *trans.* in FBIS-CHI, *supra* note 2, Feb. 2, 1981, at L 8.

193. "All major or difficult cases that the president of the court believes should be referred to the judicial committee shall be submitted by him to the judicial committee for discussion and decision." 1979 Code, *supra* note 2, pt. III, ch. I, art. 107. This is consistent with the view that the People's Court is *youji zhengti* (an organic whole). Under this view, judicial indepen-

In addition, before rendering a judgment, lower court judges often seek informal approval from courts of the next highest instance in a process loosely called *tong qi*.<sup>194</sup> *Tong qi*, or "to clear the air" takes the form of lower court judges asking for guidance from higher court judges. These communications may be spurred by the view of many judges that reversals constitute "mistakes" which lead to "loss of face."<sup>195</sup> Undeniably, to the extent that lower court judges discuss their cases with appellate judges before entering judgment, appeals from original judgments are likely to be uphill battles.<sup>196</sup>

## VI. Other Routes of Appeal

Perhaps the greatest hindrance to the development of the criminal appeals process in China is the profound social aversion to the formal legal system *per se* and the resulting search for alternative informal mechanisms to appeal criminal sanctions. Thus, although the use of the legal system has increased since 1979, informal routes of appeals persist, operating side by side with the formal legal system. These informal appeals are sometimes integrated into the formal system in remarkable ways.

For example, neighborhood organizations and mediation still play a major role in resolving minor criminal cases. The 1979 Code has integrated mediation into its system. Under the Code, minor offenses may be privately prosecuted (that is, the victim can serve as the prosecutor in bringing the accused to court) and mediated under the auspices of the court.<sup>197</sup> An appeal from a private prosecution case may also be mediated, rendering the appeals process in such instances more informal and less of a review of the merits of the case.<sup>198</sup>

dence denotes not that of the individual officer, but that of the People's Court as a whole. Koguchi, *supra* note 167, at 205-06.

194. See SUN FEI, *supra* note 67, at 69.

195. See Zhongguo Fazhi Bao (China Legal News), Apr. 28, 1987, at 1. Some view criminal appeals as an indicator of a poorly functioning legal system. Thus a decline in the number of appeals from a court of first instance is attributed to "improvement of the legal system and judicial work." Zhang Zhiye, *Legislative and Judiciary Work in China*, 26 BEIJING REV., No. 33, at 20 (Aug. 15, 1983).

196. The practice of *tong qi* developed very early in the post-revolutionary P.R.C., and the problems associated with it apparently received some attention at the outset. See SUN FEI, *supra* note 67, at 70 (reporting remarks of Wu Gai of the Supreme People's Court at a judicial conference in July 1950).

197. 1979 Code, *supra* note 2, pt. III, ch. II, art. 127. There remains the problem of parties privately settling a matter which should be prosecuted as a major crime. Zhongguo Fazhi Bao wrote disapprovingly of a rape case in which the family of the victim settled with the offender for 3,000 yuan (approximately \$810). Zhongguo Fazhi Bao (China Legal News), Aug. 12, 1986, at 1.

198. Sun Fei, *Some Questions About the Appeal From Private Prosecution*, FAXUE (Jurisprudence), No. 8, 1986, at 26-28. However, it has been suggested that the informal procedure

Another informal route of appeal can be found in China's legal periodicals. In an attempt to propagate the idea of "rule of law" to China's one billion citizens, the Standing Committee of the National People's Congress authorized a five-year program to educate the Chinese public about the nation's laws and legal systems.<sup>199</sup> As a result, there are more than 70 legal journals and newspapers in circulation in China today, ranging from academic publications to popular periodicals for the general public.<sup>200</sup> Popular periodicals inform the public about new laws and encourage the use of the legal system by publicizing "correct" cases. For example, articles from these newspapers often provide the focus for small group discussions held in work units and Party committee meetings.<sup>201</sup>

Most of the popular legal periodicals contain a legal advice column to which a reader can write with legal questions.<sup>202</sup> Interestingly, however, these legal advice columns do not simply provide answers to general questions of law; rather, they often offer advice about specific situations and sometimes even comment on the validity of a judicial determination. Since such public comments can often affect the outcomes of cases, both in and out of court, letters to legal advice columns sometimes function as an informal form of appeal.

For example, a young woman named Qian Xueping from the Wu District of the Jiangsu Province wrote to *Minzhu Yu Fazhi* (Democracy and Legality), a popular legal periodical, to complain about an incident in which she was beaten and humiliated by a theatre employee named Huang.<sup>203</sup> Qian complained to Huang's work unit, which forced Huang to compensate Qian for her medical bills, sick pay, and the cost of her torn blouse. Dissatisfied, however, Qian wrote to *Minzhu Yu Fazhi*, asking whether Huang's actions were lawful. The legal staff published

of mediation can only be applied upon appeal if the court of second instance finds error necessitating rescission of the original judgments. *Id.*

199. See, e.g., *Cadres Lead in Learning Law*, 29 BEIJING REV., No. 4, at 28 (Jan. 27, 1986).

200. The most authoritative of these publications is *Zhongguo Fazhi Bao* (China Legal News), a daily newspaper published by the Ministry of Justice. Altogether, six major legal periodicals are published: *Faxue Yanjiu* (Studies in Law), a bimonthly publication by the Legal Research Institute of the Chinese Academy of Social Sciences; *Minzhu Yu Fazhi* (Democracy and Legality), a monthly publication of the Shanghai Law Society and the East China Political-Legal Institute; *Faxue Zazhi* (Law Magazine), a bimonthly publication of the East China Political-Legal Institute; *Faxue* (Jurisprudence), a monthly publication of the East China Political-Legal Institute; *Faxue Yicong* (Law Translation Series), a bimonthly publication of the Legal Research Institute of the Chinese Academy of Social Sciences; *Guowai Faxue* (Foreign Law), a bimonthly publication of the Beijing University Department of Law and Commercial Press. LENG & CHIU, *supra* note 8, at 49-50.

201. See, e.g., *Zhongguo Fazhi Bao* (China Legal News), Aug. 7, 1981, at 1.

202. See, e.g., *Minzhu Yu Fazhi* (Democracy and Legality), *Zhongguo Fazhi Bao* (China Legal News), *Shanghai Fazhi Bao* (Shanghai Legal News).

203. *MINZHU YU FAZHI* (Democracy and Legality), No. 10, 1985, at 45.

Qian's letter in October 1985 and informed her that Huang's act constituted hooliganism under article 160 of the Criminal Code. In April 1986, the Women's Association of the Wu District wrote to *Minzhu Yu Fazhi*, indicating that after reading Qian's letter in the journal, the Association further investigated and then mediated with Huang's work unit. The Association reported that the work unit had decided that in addition to compensating Qian, Huang would be docked three months' pay and would have to apologize publicly to Qian.<sup>204</sup>

Here, a case which would normally require a formal legal proceeding was resolved through a legal periodical and community groups. By writing to the publication, the victim not only had the case informally reviewed, but also succeeded in having her complaint publicized and, as a result, resolved. In this way, letters to legal periodicals offer some attractive advantages to citizens seeking redress of grievances.

Indeed, some letters seeking legal advice raise issues clearly appropriate for judicial action and review. In 1986, for example, a woman named Yu Fengqin wrote to *Zhongguo Fazhi Bao* (China Legal News) to complain that her husband had been detained pending a decision for more than six months.<sup>205</sup> The legal staff of the publication replied that the court's failure to act for more than six months violated article 125 of the 1979 Code, which prescribes that a court must pronounce judgment within one and a half months of accepting a case for trial.<sup>206</sup>

In another instance, a writer asked *Zhongguo Fazhi Bao* whether an appellate court had acted correctly when it remanded for retrial a case appealed by the accused.<sup>207</sup> The court's stated reason for remand was that the facts of the case were not clear, but the writer believed that the court had in fact remanded because it believed the eight-year sentence was too light. At the retrial, the defendant was resentenced to fourteen years of imprisonment. *Zhongguo Fazhi Bao* concluded that the appellate court had violated the prohibition against increasing a sentence on an appeal raised by the accused.<sup>208</sup>

204. MINZHU YU FAZHI (Democracy and Legality), No. 5, 1986, at 46.

205. *Zhongguo Fazhi Bao* (China Legal News), June 29, 1987, at 3.

206. 1979 Code, *supra* note 2, pt. III, ch. III, art. 142.

207. *Zhongguo Fazhi Bao* (China Legal News), Jan. 12, 1987, at 3.

208. The newspaper also concluded that the appellate court had acted improperly in remanding the case on the pretense that the facts were not clear. *Id.* See also *Zhongguo Fazhi Bao* (China Legal News), Aug. 4, 1987 (writer seeks vindication for her father and sister who were jailed after defending writer in a fight); *Zhongguo Fazhi Bao* (China Legal News), Feb. 23, 1987, at 3 (writer complaining of lower court's actions in forcing mediation); *Zhongguo Fazhi Bao* (China Legal News), Sept. 9, 1983, at 3 (writer questions validity of public trial by Yanzhou Lower People's Court in Gansu Province where only one member of public attended).

Interestingly, there have even been letters to legal periodicals from courts seeking advice on the proper interpretation of a point of law. In 1983, the Ningxia Lower People's Court wrote to *Zhongguo Fazhi Bao* for advice about a dispute within the court relating to when orders and judgments become effective.<sup>209</sup> One view was that if no party appeals the decision, it becomes effective immediately, while others argued that the order or judgment does not become effective until the appeals period has run, regardless of whether an appeal is made. *Zhongguo Fazhi Bao* advised that the latter view is correct because, although the parties may indicate initially that they do not plan to appeal, they may change their minds and decide to appeal during the appeals period.

It is as yet unclear what effect this informal route of "appeal" has had and will have on the formal appeals process. The advice columns of the legal periodicals may become so effective that they overshadow the formal appeals process or render it a mere formality. More likely, however, these legal advice columns perform an informal supervisory role over the legal system.<sup>210</sup> In this way, legal periodicals encourage individuals to return to the courts to seek a review of an adverse decision and thus foster the appeals process.

## VII. The Future of the Criminal Appeal in China

To assess the future of criminal appeals in the P.R.C., it is necessary to recall the policy goals which prompted the adoption of formal legal procedures in 1979.<sup>211</sup> While the desire to ensure vindication of individual rights creates a motive for legal formality, this concern for individual rights alone is not likely to drive a system that views law primarily as an instrument of the socialist state.<sup>212</sup> On the other hand, the purges of the Cultural Revolution have left many Chinese bitter and anxious to establish some guarantees of individual freedoms.<sup>213</sup> The central government, for its part, has recognized that the success of its modernization plans depends on its ability to win back the trust and confidence of the people,

209. *Zhongguo Fazhi Bao* (China Legal News), Oct. 31, 1983, at 3.

210. See Wang Xiaoqiang, *Legal Supervision Needs Close Cooperation of Supervision by Mass Media*, *Renmin Ribao* (People's Daily), Jan. 28, 1988, *trans. in* FBIS-CHI, *supra* note 2, Feb. 1, 1988, at 13. Wang, the Deputy Chief Procurator of the Supreme People's Procuratorate, praised *Renmin Ribao's* "Letters From Readers" column, saying it serves an important role in "improving all aspects of our work, enhancing people's understanding of the legal system, and cultivating good habits of abiding by the law and discipline." *Id.*

211. See discussion *supra* notes 52-53 and accompanying text.

212. Cf. SUN FEI, *supra* note 67, at 34-38.

213. See Chiu, *China's New System*, *supra* note 25, at 31; Meijer, *supra* note 45, at 127.

especially the intellectuals.<sup>214</sup> It has thus promulgated new legal codes which explicitly provide a process for individuals to reverse incorrect judgments.

A second force propelling the use of appeals in China is the recent emphasis on the use of law generally. In order to compete effectively in the world market, China has recognized the need to promulgate and enforce predictable laws for international transactions.<sup>215</sup> Moreover, to the extent that international trade requires a secure domestic order, China must further formulate definite domestic laws and procedures as it moves to join the world of complex, industrial states.

Perhaps the best reason to be optimistic about the continued development of formal criminal appeals in China, however, is that the legal uniformity which an appellate procedure maintains will continue to serve the interests of the government of the People's Republic. Appeals clarify and unify the law, making its application more predictable and evenhanded, which in turn promotes public confidence in the law.<sup>216</sup> For the Chinese government, then, appeals can be an effective mechanism to rally general support for the newly established legal system and for the government in general.

By providing an opportunity for systemic adjustments from above, appeals also centralize bureaucratic control of the law.<sup>217</sup> Appeals ensure the proper enforcement of central legal policies and funnel important controversies back to central governmental control.<sup>218</sup> This publicly reinforces the role of the national government as the proper authority for distinguishing "right" from "wrong," while providing regular opportunities for the government to reaffirm the legitimacy of the dominant ideology in the minds of the people.

This "centralizing" function of appeals (and indeed of all formal law) may be more important in the present era of "de-Maoization." Without the charismatic force of a personal leader evoking quasi-religious adherence, the central government may have to rely increasingly on the less emotional force of law for its legitimacy. Appeals reinforce the authority of the state and its policies.

214. Chiu, *China's New System*, *supra* note 25, at 31. The accomplishment of a full, effective right of appeal may hinge on the success of intellectuals to secure some protection from the discretion of the domineering party system, possibly in the form of an independent judiciary.

215. See, e.g., the list of economic laws cited in CHINA'S FOREIGN ECONOMIC LEGISLATION (Foreign Languages Press, Beijing).

216. Cf. SUN FEI, *supra* note 67, at 31-32.

217. Cf. *id.* at 31-34; M. SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS 49-56 (1981).

218. See SUN FEI, *supra* note 67, at 33-34.

Appeals in the criminal setting are particularly well-suited to legitimizing the central authority and its policies. Criminal appeals arise in a situation in which there has already been an allegation of divergence from central policy, and the need to curb that divergence is very great.<sup>219</sup> Significantly, the P.R.C. has given the government, through its procurator, an appeal as of right.<sup>220</sup> In addition, the P.R.C. has retained the possibility of reopening cases through adjudication supervision. The right of the procurator to appeal prevents the invalidation of central policies by one tribunal without a review by another. Although Party ideology is strong and may be sufficiently coercive to curb judicial divergence, there is always a danger, in a nation the size of China, that decentralized power will produce disparate outcomes. Thus, built-in safeguards in the form of a government right of appeal and the continuing availability of adjudication supervision will ensure an opportunity to redress deviations from central policies.<sup>221</sup>

Ultimately, the future of the appeal may depend on the success of China's campaign to train legal personnel. An appeal, even more than a trial, requires the technical knowledge of a trained legal expert. The growing professionalization of the judiciary and the Chinese bar should enhance the functioning of the appellate apparatus while fostering the acceptance and use of the legal system generally.

### Conclusion

The changes in the criminal appeals process from the Cultural Revolution to today have been significant. China has taken substantial steps in developing greater procedural protections for the criminal appellant, leading to a greater use of the formal appeals process. Undeniably, there remain residual influences that impede further development of the appellate system, so that whether these changes will be permanent remains unclear. Ultimately, the existence of the right to appeal will depend on China's continued commitment to a formal legal system.

The primary purpose of the criminal appeal in China will not necessarily be the protection of individual liberties. Rather, appeals may be used

219. Admittedly, some appeals are the result of simple error rather than of "deviations from policy." The proposition suggested here, however, is that the continued existence of a system of appeals may depend not on its ability to correct simple errors, but rather on its ability to correct systematic deviations from policies.

220. 1979 Code, *supra* note 2, pt. III, ch. III, art. 130.

221. The two cases discussed earlier, *Wang Li*, *supra* notes 129-30 and accompanying text, and *Sun Liqiang*, *supra* notes 134-36 and accompanying text, although flawed in providing individual justice, support the proposition that appeals can be used by the state as a powerful "centralizing" force.



principally to ensure uniformity and consistency within the system. In the absence of a charismatic leader, and during a period when established ideology is unstable, the strength of the central government will partly depend on and partly be expressed through the development of the rule of law. Effective and legitimizing appellate procedures will be one key to the success of this development.

The form of the appeal will fluctuate with social and economic forces. In light of the continuing aversion to rigorous formality, the criminal appeal will, most likely, remain an amalgam of the formal and the informal; in light of the continued dominance of a single-Party socialist state, the process also will necessarily reflect the tension between judicial independence and Party control. In short, it will be distinctly Chinese.

## APPENDIX A

Selected Articles from the Criminal Procedure Law of the People's  
Republic of China\*

## Part III

## Chapter III

## Procedure of Second Instance

**Article 129** If a party or his legal representative refuses to accept a judgment or order of first instance of a local people's court at any level, he shall have the right to appeal in writing or orally to the people's court at the next higher level. Defenders or a defendant's near relatives may file appeals with the consent of the defendant.

A party to an incidental civil action or his legal representative may file an appeal against the portion of a judgment or order of first instance of the local people's courts that deals with the incidental civil action.

A defendant shall not be deprived on any pretext of his right to appeal.

**Article 130** If a local people's procuratorate considers that there is some definite error in a judgment or order of first instance of a people's court at the same level, it shall present a protest to the people's court at the next higher level.

**Article 131** The time limit for an appeal or a protest against a judgment shall be ten days and the time limit for an appeal or a protest against an order shall be five days; the time limit shall be counted from the day after the written judgment or order is received.

**Article 132** If a party files an appeal through the people's court which originally tried a case, the people's court shall within three days transfer the petition of appeal together with the case file and the evidence to the people's court at the next higher level; at the same time it shall deliver duplicates of the petition of appeal to the people's procuratorate at the same level and to the other parties.

If a party files an appeal directly to the people's court of second instance, that people's court shall within three days transfer the petition of appeal to the people's court which originally tried the case, for delivery to the people's procuratorate at the same level and to the other parties.

**Article 133** If a local people's procuratorate protests against a judgment or order of first instance of the people's court at the same level, it shall present a written protest through the people's court which origi-

\* As translated in THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA 1979-1982 120 (Foreign Languages Press, Beijing, 1987) (compiled by the Legislative Affairs Commission of the Standing Committee of the National People's Congress of the People's Republic of China).

nally tried the case and send a copy of the written protest to the people's procuratorate at the next higher level. The people's court which originally tried the case shall transfer the written protest together with the case file and evidence to the people's court at the next higher level and shall deliver duplicates of the written protest to the parties.

If the people's procuratorate at the next higher level considers the protest inappropriate, it may withdraw the protest from the people's court at the same level and notify the people's procuratorate at the next lower level.

**Article 134** A people's court of second instance shall conduct a complete review of the facts determined and the application of law in the judgment of first instance and shall not be limited by the scope of appeal or protest.

If an appeal is filed by only some of the defendants in a case of joint crime, the case shall still be reviewed and handled as a whole.

**Article 135** In cases where a people's procuratorate files a protest or a people's court of second instance requests personnel from a people's procuratorate to be in court, the people's procuratorate at the same level shall send personnel to the court. The people's court of second instance must notify the people's procuratorate ten days before the opening of a court session to examine the case files.

**Article 136** After hearing a case of appeal or protest against a judgment of first instance, the people's court of second instance shall handle it according to the conditions set forth below.

(1) If the original judgment was correct in the determination of facts and the application of law and appropriate in the meting out of punishment, the people's court shall order rejection of the appeal or protest and affirm the original judgment.

(2) If the original judgment contained no error in the determination of facts but the application of law was incorrect or the punishment was inappropriately decided, the people's court shall revise the judgment.

(3) If the facts in the original judgment are unclear or the evidence insufficient, the people's court may revise the judgment after ascertaining the facts, or it may rescind the original judgment and remand the case to the people's court which originally tried the case for retrial.

**Article 137** In the trial of a case appealed by a defendant, or his legal representative, defender of near relative, the people's court of second instance may not increase the criminal punishment on the defendant. The restriction laid down in the preceding paragraph shall not apply to cases protested by a people's procuratorate or cases appealed by private prosecutors.

**Article 138** If a people's court of second instance discovers that a people's court of first instance has violated the litigation procedures stipulated by law, and the correct rendering of judgment may have thus been affected, it shall rescind the original judgment and remand the case to the people's court which originally tried the case for retrial.

**Article 139** The people's court which originally tried a case shall conduct a retrial of the case remanded to it in accordance with the procedure of the first instance. The parties may appeal and the people's procuratorate at the same level may protest against the judgment rendered after the retrial.

**Article 140** After a people's court of second instance has reviewed an appeal or protest against an order of first instance, it shall order rejection of the appeal or protest or quash or revise the original order respectively with reference to the provisions of Articles 136, 138, and 139 of this Law.

**Article 141** A people's court of second instance shall try cases of appeal or protest with reference to the procedure of first instance unless otherwise stipulated in this Chapter.

**Article 142** A people's court of second instance shall conclude the trial of a case of appeal or protest within one month or, one and a half months at the latest, after accepting it for trial.

**Article 143** All judgments and orders of second instance and all judgments and orders of the Supreme People's Court shall be final.

#### Chapter IV

##### Procedure for Review of Death Sentences

**Article 144** Death sentences shall be approved by the Supreme People's Court.

**Article 145** A case of first instance where an intermediate people's court has imposed a death sentence and the defendant does not appeal shall be reviewed by a higher people's court and reported to the Supreme People's Court for approval. If the higher people's court does not agree with the death sentence, it may bring the case up for trial or remand the case for retrial.

Cases of first instance where a higher people's court has imposed a death sentence and the defendant does not appeal, and cases of second instance where a death sentence has been imposed shall all be submitted to the Supreme People's Court for approval.

**Article 146** A case where an intermediate people's court has imposed a death sentence with a two-year suspension of execution, shall be approved by a higher people's court.

**Article 147** Reviews by the Supreme People's Court of cases involving death sentences and reviews by a higher people's court of cases involving death sentences with a suspension of execution shall be conducted by collegial panels composed of three judges.

## Chapter V

### Procedure for Trial Supervision

**Article 148** A party or a victim and his family or other citizens may present a petition to a people's court or people's procuratorate regarding a legally effective judgment or order, but the execution of the judgment or order cannot be suspended.

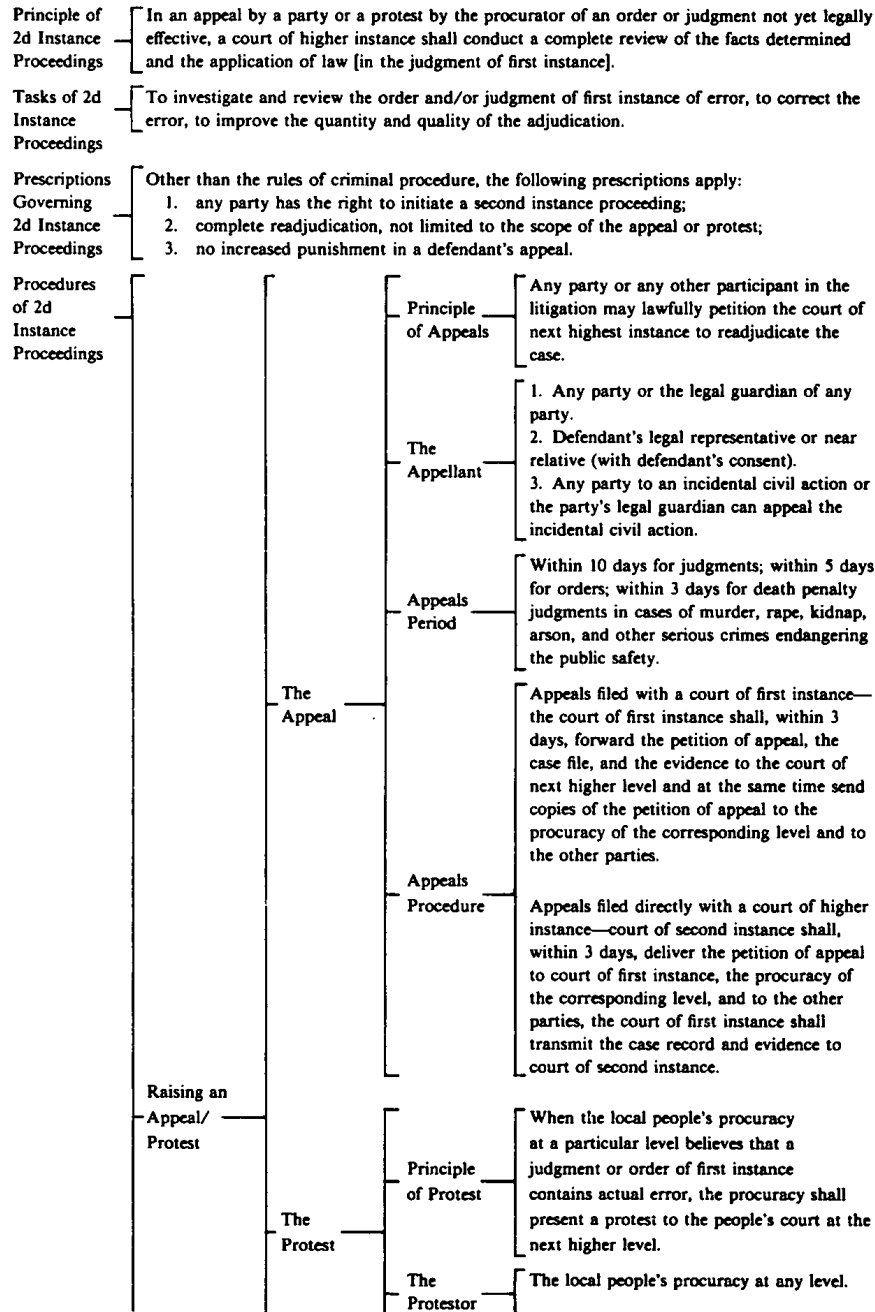
**Article 149** If the president of a people's court at any level finds some definite error in a legally effective judgment or order of his court as to the determination of facts or application of law, he shall refer the matter to the judicial committee for handling.

If the Supreme People's Court finds some definite error in a legally effective judgment or order of a people's court at any lower level, or if a people's court at a higher level finds some definite error in a legally effective judgment or order of a people's court at a lower level, it shall have the power to bring the case up for trial itself or may direct a people's court at a lower level to conduct a retrial.

If the Supreme People's Procuratorate finds some definite error in a legally effective judgment or order of a people's court at any level, or if a people's procuratorate at a higher level finds some definite error in a legally effective judgment or order of a people's court at a lower level, it shall have the power to protest against the judgment or order in accordance with the procedure for trial supervision.

**Article 150** A new collegial panel shall be formed for the retrial of a case by a people's court in accordance with the procedure for trial supervision. If the case was originally one of first instance, it shall be tried in accordance with the procedure of first instance and the new judgment or order may be appealed or protested. If the case was originally one of second instance or was brought up for trial by a people's court at a higher level, it shall be tried in accordance with the procedure of second instance and the judgment or order rendered shall be final.

APPENDIX B  
Proceedings of Second Instance



		<p>Protest Period</p> <p>Within 10 days for judgments, within 5 days for orders; within 3 days for death penalty judgments in cases of murder, rape, kidnap, arson, and other serious crimes endangering the public safety.</p>
		<p>Protest Procedure</p> <p>People's procuracy presents a protest to the court that originally adjudicated the case, provided the procuracy is of the same level as the case, and sends a copy of the protest document to the procuracy at the next higher level.</p> <p>The people's court that originally adjudicated the case sends the protest document and the case file and evidence to the court of next higher level and to the parties.</p> <p>If the procuracy at the higher level considers the protest inappropriate, it may withdraw the protest and notify the procuracy at the lower level.</p>
Adjudication Procedure of Court of 2d Instance		<p>Upon receiving the appeal or protest document, the court of second instance must form a collegiate panel of 3 to 5 judges, and must conduct a complete review of the case.</p> <p>If the court demands the in-court appearance of procuracy personnel, the court of second instance must, 10 days before opening the court session, notify the people's procuratorate to examine the case file.</p> <p>The adjudication shall follow procedures of first instance proceedings.</p>
Decision of Court of 2d Instance		<p>Reject the appeal or protest and affirm the original judgment—if the determination of facts and application of law in the original judgment are correct and the punishment appropriately decided.</p> <p>Modify the judgment—if the facts are unclear or if the determination of facts in the original judgment contains no error, but there is error in the application of law or the punishment is inappropriately decided.</p> <p>Quash the original judgment and remand the case for a new adjudication—if the facts in the original judgment are unclear or the evidence insufficient.</p>
Legal Effect of Judgment or Order of 2d Instance		<p>Judgments and orders of second instance are final and may not be appealed again; judgments and orders rendered after remand for new trial may again be appealed or protested.</p>

Translated by the author from 1 *Faxue Zhishi Tujie* (Charts of Legal Proceedings) 162-63 (1984).





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