JUSTITIA

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EDITORIAL BOARD

FOREWORD

My Foreword to *Justitia 1982-1984* was the first which I wrote as Dean of the Faculty of Law. The Foreword I now write is the first which I shall have written after the signing of the Anglo-Chinese Joint Agreement on the future of Hong Kong.

On July 1, 1997 China will resume the exercise of sovereignty over Hong Kong, thus ending some 156 years of British rule. During that time, Hong Kong has taken its place amongst those countries sharing in the great traditions of the common law, with the richness of its jurisprudence and the assurance of its freedoms and it is with a sense of satisfaction that I learned that those traditions are not to end with the ending in Hong Kong of British administration.

Hong Kong and its people have prospered materially and spiritually in an atmosphere of freedom, an atmosphere engendered by a benevolent and frequently far-seeing administration governing the territory under the rule of law. We all pray that this happy state of affairs will continue for many years.

But this will not happen without continued positive effort on the part of Hong Kong's citizens. Of those citizens, Hong Kong's lawyers must play a leading part in upholding the spirit and letter of that law which we wish to see maintained as the driving spirit of our community. Increasingly, this must mean that the graduates of our Faculty of Law, the only such Faculty in Hong Kong, must accept a greater mantle of responsibility as guardians and nurturers of our legal system and all it means to Hong Kong.

Included in this responsibility also will be the Faculty itself and our graduates must see it as *their* Faculty, to be cherished and developed for the common good and not pushed into the past as graduation photographs are consigned to a forgotten photo album.

I am sure that students of this Faculty, past, present and future, will accept this responsibility and thus play their part in ensuring the necessary orderly transition and development in the years ahead. The future of Hong Kong is in their hands and of their fellow citizens with whom they share a commitment to that future.

At this point, I always extend my good wishes to the Law Association, to the authors of the dissertations selected for publication in this issue and to all students in the Faculty of Law. I do so this year in a spirit of confidence that they will not be found wanting in that which is expected of them.

7 January 1986 *Dafydd Evans*

PREFACE

In the tradition of "Justitia", this issue is a presentation by students in the Faculty of Law: a collection of dissertations written in the course of our undergraduate studies and addressing in depth different topics of law which affect Hong Kong. Unlike previous issues however, we have ventured to transverse the domestic jurisdiction to a much greater extent by including also essays on aspects of the legal system of our close neighbour, the People's Republic of China.

At the same time we are also transversing the boundaries of the common law tradition which has been the cornerstone of law in Hong Kong. Hong Kong has a heritage of common law evolved and developed over many years, reflecting and embodying notions of right and wrong, and of fairness and unfairness. It has remained a living force, the support and prop of ordered life. As Hong Kong undergoes political transformation, the political and legal structure of the PRC demands increasing attention. We therefore hope that our "PRC" essays in this issue will serve to dispel the mystique of the PRC legal machinery.

We have also tried to include, as far as possible in terms of not only quality but also variety and utility to our reader population. The essays dealing with Hong Kong law thus cover aspects which are of continuing concern, though the dissertations in which these issues are examined were written two years ago.

Up till now we have placed our reliance on the unwritten judge-made law supplemented by statute to cope with the needs, aspirations and power structures of Hong Kong. We are following the metamorphosis of the formulation of a written charter of law. We are sure that dissertations in "Justitia" will comprise interesting reflections of the changing faces of Hong Kong law and the wealth of human spirit that is rising to the challenge.

EDITORIAL BOARD
Julianne Doe
Editor-in-chief

APPLICATION OF THE CHINESE LANGUAGE IN THE HONG KONG LEGISLATIVE AND JUDICIAL PROCESSES

by Danny Yu Ka Hing

INTRODUCTION

English has been the language of the law in Hong Kong since 1843[1]. Having regard to the political condition and limited resources obtainable during the early history of the colony, this was an expedient and inevitable arrangement.

During the past 140 years, Hong Kong has changed beyond recognition. The population has grown dramatically[2]. Trade and industry prospered[3]. With the continuous improvement in living standards and education, the citizens begin to share a sense of belonging and interest in government business. Nonetheless, the Chinese language is still playing a minimal role in the legislative and judicial processes of Hong Kong.

In 1971, the Legal Sub-Committee published its report on the use of the Chinese language in legal matters[4]. It ruled out the feasibility of giving the Chinese language equal status with English in the legal

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1 The British Colony of Hong Kong was constituted by the Royal Charter of 5th April 1843. A Legislative Council was established by the Letters Patent granted in 1843 (see App I L HK C1) The Governor, by and with the advice and consent of the Legislative Council, is empowered to make law 'for the peace, order and good government of Hong Kong'. (Article VIII of the Letters Patent)

2 The population, which stood at about 4,000 around 1841, has grown to over 5¼ millions by 1982, 98% of which are Chinese. Source: *Hong Kong in Figures,* 1983 Edition, Census & Statistic Dept. *Hong Kong 1983: A review of 1982 Annual Report,* Government Information Services.

3 In 1982, the value of domestic export was $83,032 millions, value of re-export was $ 44,353 millions and the per capita GDP was $30,060. Source: *Hong Kong In Figures*, 1983 Edition.
For a succinct overview of the economic growth of Hong Kong, refer to the speech delivered by Sir S Y Chung on the topic 'Hong Kong: A springboard into Asia', Papers of the 7th Commonwealth Law Conference at 463.

4 *Report of the Legal Sub-Committee to the Chinese Language Committee. Third Report of the Chinese Language Committee.* June 1971 Government Publications 86432-14K-6/71/

system. Most changes recommended by the Sub-Committee are procedural changes that can be implemented with relative ease. The Sub-Committee did recommend two important changes:[5] the translation of the Laws of Hong Kong and the use of Chinese in the lower courts. The progress made so far in both directions is negligible.

At the present rate of re-adjustment, the language barrier may take another century to fade away. For at least two reasons Hong Kong cannot afford to wait that long. First, the day-to-day operations of the legislative and judicial processes, hindered by the language barrier, are bound to be less effective. Second, if the general public cannot fully appreciate the value of their legal system, their determination to protect it from possible abuses will be undermined. Building up this determination is vital to the future of Hong Kong when the confidence of her inhabitants is increasingly being taxed by the 1997 issue.

I The Common Law System of Hong Kong & The Official Languages Ordinance

A. The Common Law System and the Use of the Chinese Language

Hong Kong, with its present legislative and judicial processes probably has attained a higher standard of justice and better protection of civil liberties than many countries which has a legal system working in the native language. This is attributable to the 'common law system' adopted in Hong Kong. The term 'common law system' is becoming a misnomer. With the modern tendency towards codification and law reform, legislation has replaced case-law as the dominant source of law in most common law countries[6]. In reality, the distinctive and most valuable features of the common law systems are the legal concepts entrenched in these systems[7]. To quote just a few: the Rule of Law; the concept of fair trial; the jury system and the use of prerogative writs to challenge the legality of executive actions.

However, it is questionable whether the legal system of Hong Kong, working through a language foreign to its inhabitants, is comparable to its counterparts in English-speaking countries as an efficient embodiment of these legal concepts. It is submitted that the language barrier substantially hampered the efficacy of our legislative and judicial processes.

The Hong Kong common law system faces a dilemma. It may maintain the status quo and satisfy itself with a less efficient interaction with its people than that of its counterparts in the English-speaking countries. As an alternative it must brace itself for the challenge and use the Chinese language more extensively in the legislative and judicial processes. This is no mean challenge. The difficulties involved are so formidable that most of the non-English-speaking countries which have a common law system retained English as the only authoritative language of their law. Singapore, the island republic which resembles Hong Kong in many significant aspects, has not even bothered to try[8]. On the other hand, Malaysia and Sri Lanka, motivated by nationalism, had pledged in their constitutions to put the authoritative text of their law in the native language

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5 *Report of the Legal Sub-Committee, loc cit,* Paras. 17-20 (Translation of Hong Kong Law into Chinese), Paras 21-25 (Wider use of Chinese in the Courts).

6 Refer to Walker & Walker, *The English Legal System* (5th Edn) at 56.

7 See Professor A L Goodhart, *'What is the Common Law'* (1960) 76 LQR 45.

8 Mandarin, the orthodox dialect of Chinese, is one of the four 'official languages' in Singapore. (see s7 Republic of Singapore Independence Act 1965) However, that proclaimation does not affect the dominance of English which continues to be authoritative language of legislation and judicial proceedings in Singapore.
Refer to R H Hickling, *'Language, Law and Singapore'* (1975) 17 Malaya Law Review 136. The Professor stressed Singapore's dependence on international trade, which is similar to Hong Kong, as the reason why Singapore does not bother to change the language of her law. Nonetheless, it is submitted that there are other political and social conditions obtainable in Singapore which discourage any change that tends to give the Chinese language a dominating role in the courts and the legislation. It is a small Island republic situated at the heart of ASEAN countries which have little sympathy for the Chinese culture. Moreover, Singapore, with big minorities of Malay and Indians in the population and having four official languages could not stop at having just a bi-lingual system. It faces more difficulties than Hong Kong in this aspect.

only[9]. So far the two countries have not succeeded in their endeavours.

Nonetheless, there are also legal systems which successfully retained the special qualities of the common law system and yet have managed to use the native language as an authoritative language of law. The three bilingual provinces of Canada: Quebec, Manitoba and New Brunswick are notable examples[10]. Another remarkable example is Israel which uses Hebrew as the only authoritative language in legislation and judicial proceedings[11]. These examples demonstrated that the difficulties confronted by a common law system in its endeavour to work through the native language is by no means insurmountable. However, it takes strong determination, careful planning and considerable cost to guarantee fruition.

The solution most suitable to Hong Kong may fall short of what has been accomplished in Israel or in the Canadian provinces. Exactly how far it may go depends on the strength of the justifications for the transition and Hong Kong's ability to minimize the disruptive effect of the transition. What is proposed in this paper is that the common law system of Hong Kong can be improved through the more extensive use of the Chinese language.

B. The Official Languages Ordinance (Cap 5) No 10 of 1974 & the Present Extent of Use of the Chinese Language.

The enactment of this Ordinance was a political gesture to improve the image of the government[12]. So far as the executive branch of government is concerned, this gesture has been quite successful. S3 states that English and Chinese are official languages of Hong Kong, and possess equal status 'for the purposes of communication'. Concrete measures were taken to render official communications in both languages[13].

Instead of urging the use of Chinese in legislation and judicial proceedings, the Ordinance clarifies the dominating position of English. S4(1) states that every Ordinance must be enacted in English. Thus, English is the only authoritative language of legislation. S4(2) provides that Chinese translations of Ordinances may be published. Despite the Legal Sub-Committee's recommendation that all Ordinances be translated into Chinese, only about a dozen were so translated and printed[14]. Similarly, Chinese translations of Bills are rare phenomena[15].

S5(2) states that the proceedings in any court not specified in the Schedule attached to this Ordinance must be conducted in English. The Schedule includes all the lower-ranking courts[16]. S5(1) gives these courts a discretion to conduct the proceedings in either Chinese or English. Since the great majority of cases heard in court were in the

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9 Article 152 of the Malaysian Constitution and the Malaysian National Act of 1963/67. Sections 9, 10 and 42 of the Sri Lankan Republican Constitution of 1972, also Section 23 of the Sri Lankan Constitution of 1978.
Refer also to Mark Cooray, *'Implications for the Legal Literature of Sri Lanka form the Change of the Language of the Law.'* Legal Literature in Small Jurisdictions at 137.

10 Section 133 of the British North America Act 1867, and the Official Languages Act 1969 of Canada in general.

11 Refer to Norman Bentwich, *'The Migration of the Common Law to Israel'* (1960) 76 LQR 64.
It is also interesting to note how the Israeli Legislature (the Knesset) ratified the Hebrew translations of the English Ordinances of the Mandate period and gave it sole authoritative status, refer to Yehoshua Freudenheim, *Government in Israel,* (1967 Oceana).

12 The Secretary for Home Affairs, Mr D C Bray, in moving the second reading of the Official Languages Bill said, 'This Bill is offered to the people of Hong Kong as an act of good faith, ... (to domonstrate) the government's intention that language itself be no longer used as a pretext for any difficulty of communication between the government and the people.' Legco meeting 30th Jan 1974 reported in *Legislative Council Proceedings Session Reports* 1974 at 414.

13 Remarkably, the Chinese Language Branch (now the Chinese Language Division) was set up for the purpose of facilitating the implementation of equal status. See Annual Departmental Reports 1971-74 Home Affairs Department.

14 Information supplied by the Chinese Language Division. Refer to Appendices.

15 See N J Miners, *The Government and Politics of Hong Kong,* (OUP 1981) at 134.

16 The Schedule presently includes: Magistrates' Courts, any inquiry by a coroner, any Juvenile Court, any Labour Tribunal, any Tenancy Tribunal (now superseded by the Land Tribunal), any Small Claims Tribunals and any Immigration Tribunal in Hong Kong.

Magistracies[17], if this subsection is used to its full potential, it can be a significant step in giving the Chinese language a more positive role in the judicial process. However, in practice, proceedings in the Magistracies are rarely conducted in Chinese. Most Magistrates are expatriates[18]. In most cases, even the Magistrates proficient in Chinese prefer to communicate through the medium of a court interpreter. S5(3) allows any party to, or witness in, court proceedings to use either Chinese or English. This merely states a necessity.

All in all, English remains the predominant language in legislation and judicial proceedings in a predominantly Chinese society.

II Justification for More Extensive Use of the Chinese Language in the Legislative and Judicial Processes in Hong Kong

A. Justification for the More Extensive Use of Chinese in the Legislative Process

Chinese should be used more extensively in the legislative process for at least three reasons. First and foremost, the legislative process can be made more effective if the language barrier is abridged to some extent by the more extensive use of Chinese. Second, it is also a political measure which reduces the 'colonial' image of the government and fosters the citizens' trust in their government. Third, the continuance of the present legal system beyond 1997 may depend on the extent to which the PRC government and the people of Hong Kong comprehend and appreciate its merits. The extensive use of Chinese facilitates this vital comprehension. These justifications will be elaborated in the following passages.

1. A More Effective Legislative Process

It is submitted that the efficacy of the legislative process in a free community is measured by two criteria: the extent to which it reflects the needs and aspirations of the community and the extent to which legislation achieves the result intended by the legislator. The legislative process comprises the preparation, enactment and publication of legislation. Efficacy according to the first criterion depends heavily on how well the responsible authority is informed of the public opinion during the preparation of new legislation. On the other hand, efficacy according to the second criterion depends heavily on how well the public is informed of the details of the legislation through the enactment and publication of new legislation. The proposition is that more extensive use of Chinese throughout the legislative process will enhance the flow of information in both directions and thus improve the general efficacy of the process.

During the preparatory stage of the process, responsible authorities gain information of public opinion through a process of consultation. Besides enabling the authorities to ascertain the needs and aspirations of the community, consultation also provides a greatly broadened outlook. As Mr Justice Kirby, Chairman of the Australian Law Reform Commission, observed, the process of consultation may turn up 'aspects of a problem which have simply not been considered by the Commissioners'.[19] However, the feedback of valuable opinion is possible only if the public is informed of the details of the draft of new legislation.

In Hong Kong, it is the practice of government to take a gauge of public opinion whenever a controversial issue is going to come up in the Legco agenda[20]. Nonetheless, even then only limited measures are taken to inform the public of the details of the draft-Bills. The Bills are not normally published with a Chinese translation. Thus, Hong

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17 According to the Annual Report, loc cit, in 1982, there were over one million 'defendants' in the Magistracies, that figure probably includes those charged with fixed-penalty offences. But in any event, the number of cases heard in the Magistracies far exceeds that of the other courts. In 1982, the Supreme Court dealt with 22,508 cases and the District Courts dealt with 73,922 cases.
It also appears that the workload in the Magistracies is increasing at a high rate. According to the Chief Justice, the total number of cases in the Magistracies increased by one-third of the 1981 figure and exceeded one million for the first time. Source: speech delivered by the Chief Justice at the opening of the legal year at 3rd Jan 1983, reported in the South China Morning Post 4th Jan 1983.

18 In the beginning of 1983, only 5 of the 45 Magistrates are Chinese.

19 Speech delivered in Sept 1979 at Warwick Univ quoted by Professor M Zander in *The Law-making Process*, (1980 Weidenfeld & Nicolson) at 301-4.

20 N.J. Miners, op cit, at 133-5.

Kong has a rather piecemeal mechanism of consultation, only the privileged few approached by government and those possessing sufficient knowledge of English to understand the draft are in a position to make concrete comments on it. This policy to single out a few interested groups for consultation purposes may result in an untrue representation of public opinion. It is possible that members of public other than those in the chosen groups will be affected by the new legislation.

The second criterion of efficacy is the extent to which legislation achieves the result intended by the legislator. That depends on how far the public abides by it. However, the law must be made accessible and comprehensive to the public before it can be followed. At present, virtually all Ordinances and subsidiary legislation are published in English only. Though many explanatory booklets had been published in Chinese, they only serve as brief introductions to the main points of the particular Ordinances. They cannot substitute the full text of the legislation. An average citizen who relies on the pamphlets in his search of the law may gain an incomplete and inaccurate understanding of his legal rights and obligations.

The legislative process will be more effective if publicity throughout the process is improved through the more extensive use of Chinese.

2. Trust of the Citizens in their Government

Despite the impact of successive refugee influxes in the post-war years, Hong Kong has become an international commercial and manufacturing centre. With growing affluence and sustained stability, the mentality of the middle aged group in Hong Kong has changed. For many of them, Hong Kong had ceased to be just a temporary haven sheltering them from the political turmoil in Mainland China or other parts of South East Asia.

An equally significant development is the emergence of a Hong Kong born generation which, as the Former Governor Lord Maclehose observed,[21] '. . . is used to the capitalist system of Hong Kong with its British law and high degree of social as well as economic freedom, insistent on the maintenance of these freedom and social standards and wishing to have a direct or indirect voice in the administration of their home.'

In general, the citizens of Hong Kong begin to share a sense of belonging. They also want a more accountable government. There is a lingering distrust in the works of government, including that of the legislature and the judiciary. This is understandable, the population is naturally sceptical of something which works in a language they cannot fully comprehend. The dominant position of the English language projects an unfavorable image. The legislature and judiciary are probably regarded by many people as docile extensions of their British counterparts.

If the legislative process is made more accessible and comprehensible through the extensive use of the Chinese language, the public will have much better tools to monitor and assess the running of government business. In due course, they will see it as 'their' government.

3. To Improve Hong Kong's Bargaining Position on the 1997 Issue

As the 1997 issue looms large, laymen and professionals alike become more concerned with the future of our legal system. The future of Hong Kong hinges on the confidence of foreign traders, investors and local inhabitants. In order to maintain the confidence, the present legal system must be retained. Nonetheless, those who contend for the retention of the present system will be in a weak bargaining position if not even a part of our law is written down in Chinese.

Hong Kong will have a better chance of retaining the existing legal system if it is an evolving bilingual system. It will be more acceptable to the PRC. Moreover, the PRC will have an opportunity to gain better understanding of our system, whether it will make good use of this opportunity is a matter for speculation. But in any event, if the citizens of Hong Kong are given a better opportunity to appreciate the way our legal system works, their support for its retention will be more purposeful and their protest to any abuse of it will be more

21 From a speech delivered on 3rd Dec 1982 in London. Reported in SCMP 7th Dec 1982 at p 2.

determined.

B. Justifications for the More Extensive Use of Chinese in the Judicial Process

Two basic justifications will be discussed in the remaining part of this chapter. First, the use of the Chinese language will improve the administration of justice in Hong Kong. Second, it will greatly enhance the extent to which justice is seen to be done.

1. In the Interest of Fair and Effective Administration of Justice

The primary concern of the judicial process is the administration of justice in individual cases. Whether the process is fair and effective depends not only on the existence of a responsible judiciary and competent legal profession, it also depends on how effective the litigants, witnesses and jurors fulfil their functions. Therefore, it is essential to an effective judicial process that these laymen have good comprehension of the court proceedings. In a jurisdiction like Hong Kong where the court speaks one language and the citizens speak another, the need to abridge the language barrier in court proceedings can hardly be exaggerated. It is submitted that the present arrangements to remove the barrier for the lay participants in the process are inadequate and can be improved by the more extensive use of the Chinese language.

(a) As Regards the Litigants, Especially the Defendants in Criminal Trials

A litigant is allowed to be present during the complete course of the proceedings. Nonetheless, his mere presence cannot add to the fairness of the proceedings if he does not understand the proceedings conducted in English. The possibility of prejudice cannot be disregarded even when this litigant is represented by the most competent advocate. If he can comprehend the courtroom conversation, he may discover or recall relevant facts that he had not previously discussed with his legal representatives. For this reason, accurate interpretation service should be provided for Chinese litigants throughout the proceedings.

At present, the quality of interpretation and the extent it is made available to the litigants leave much to be desired. S5(3) of the Official Languages Ordinance provides that the parties and witnesses to proceedings in any court may use either Chinese or English. In other words, if a litigant wants to communicate with the court in Chinese, interpretation must be provided. But what about the part of the proceedings in which the litigants remain silent? When a witness gives evidence in English no interpretation service is prescribed by any legislation for the benefit of the litigants.

In practice, some interpretation service is provided in such situations. In criminal proceedings, besides acting as a communication medium, the court interpreter also interprets the courtroom conversation for the defendant. However, such interpretation is not rendered before the court as in the case of interpretation for witnesses. The examination of a witness who speaks English is conducted at the usual pace without regard to the need to interpret for the defendant. Moreover, in order to avoid disrupting the English proceedings the interpreter is allowed to interpret in a soft voice, hardly audible to anyone except the defendant. Therefore, the interpretation for the defendant whilst he is not 'using' Chinese really amounts to this: the interpreter tries to follow all that is said in English between the witness and the advocates, summarizes it and gives the defendant a very brief account of the conversation every now and then. This sort of 'interpretation' is bound to be incomplete and inaccurate. It may be distorted by misconception or over-simplification. Even when the defendant is represented by an advocate proficient in Cantonese, the mistakes will go unnoticed since the interpretation is rendered in a soft voice and the advocate has to concentrate on the continuing proceedings.

In civil proceedings the extent to which interpretation is available is limited. The defendant will be provided with interpretation service if he does not have his own defence counsel. No interpretation service is provided for the plaintiff or a defendant who is legally represented. In any event, when interpretation service is available in civil proceedings, the quality is subject to the same criticisms levelled at interpretation service in criminal proceedings.

It is submitted that in order to guarantee fairness in criminal and civil proceedings, the comprehension of litigants should be improved through the extensive use of the Chinese language in two directions. First, the litigants should be provided with accurate interpretation service rendered before the court throughout the proceedings. Second, more

proceedings should be conducted in Chinese.

(b) As Regards the Witnesses

They are entitled to use Chinese in any court proceedings. Since the interpretation for this purpose is rendered before the court, mistakes are more readily detectable. However, there is an inherent inaccuracy in interpretation. When a complicated point is at issue, it is not unusual that an advocate has to put the same question in many different forms to extract the relevant information. The examination of witness will be more productive if it is conducted in the native language and record of what the witness said is kept in Chinese.

(c) As Regards the Jurors

It is submitted that the efficacy of the jury system is measured by the extent to which a jury is a cross-section of the community and the jurors' ability to comprehend the court proceedings. At present, the language barrier undermines the efficacy of our jury system in both of these aspects.

In Hong Kong, a potential member of jury must qualify under s4 of the Jury Ordinance.[22] He must have 'a knowledge of the English language sufficient to enable him to understand the evidence of witnesses, the address of counsel and the Judge's summing up'. This requirement substantially limited the number of potential jurors. In practice, Chinese jurors are chosen from those who have sat for the matriculation examination.[23] Our jury is less representative of the community than its counterparts in English-speaking countries. The requirement results in a high proportion of Europeans on juries, many of these are ignorant of local customs and circumstances. Moreover, the Chinese jurors chosen under this criterion are generally better educated and more successful than the average citizen.

The jury should be a cross-section of the community. A properly directed jury, composed of laymen of various temperament, age, sex, and viewpoints is in a better position then a single judge to solve uncertain issues of fact such as a defendant's intent. The aggregate life experiences and common sense of the jurors provides a more reliable basis of judgment. Besides that, the jury system is also a democratic measure which prevents popular distrust of the judicial process and cultivates a judicial habit in the community[24]. If only a restricted minority of the community is eligible as jurors, the outlook of these jurors will tend to be similar, bias will be compounded. Instead of preventing popular distrust, such a jury will intensify the feeling that the more successful members of public manipulate the judicial process.

One may argue that since the proceedings in the High Court is conducted in English, the s4 requirement is a necessary measure. Nonetheless, it is doubtful whether a Chinese juror deemed to have qualified under s4 can grasp all the subtle and intricate interaction of arguments and information in the courtroom.

The s4 requirement is not a sufficient guarantee of the jurors' comprehension unless it is very strictly applied. That will lead to an extremely restricted body of potential Chinese jurors. The requirement is also not necessary. There is a more preferable alternative. The way to ensure better comprehension is to let the Chinese jurors have interpretation service.

If the Chinese language is used more extensively in the judicial process, a much larger proportion of the Chinese population can be members of jury. Moreover, the Chinese jurors generally will have a better comprehension of the proceedings. In other words, Hong Kong will have a more effective jury system.

2. Let Justice be Seen to be Done

To many people in Hong Kong, the judicial process is an awe-inspiring but alien institution. The fact that most people in Hong Kong avoid litigation, instead of being explained away as an attribute of the confusian culture, may be largely due to the understandable human instinct to steer clear of something which they can neither comprehend nor predict. As noted in an editorial in the Hong Kong

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22 Cap 3 L HK.

23 Those who have sat for the matriculation examination are 'deemed' to be meeting the requirement. Information supplied by the Registrar, Supreme Court's office.

24 Refer to the merits of the jury system as stated by John Henry Wigmore, quoted by Professor Henry J Abraham in *The Judicial Process* (3rd Edn) at 132.

Law Journal[25], 'the use of English emphasises the alien character of the colony's law which the defendant in the Magistrate's court is expected to respect, and must indeed seem to him nothing less than a conspiratorial ritual to ensure his lack of comprehension.' This observation applies just as well to other courts of justice in Hong Kong.

The public galleries of courts in Hong Kong are usually sparcely occupied. Only a small number of people have seen justice being done in the court. Owing to the existence of a language barrier, perhaps even fewer left the courtroom feeling assured that justice had been and will be done. In order to improve the image of the judicial process, Chinese should be used more extensively in the process.

III Possible obstacles to the More Extensive Use of the Chinese Language in the Legislative and Judicial Processes

Before we make any proposal for the use of the Chinese language in the future, we have to consider the possible obstacles to the proposed changes. Naturally, the implementation of more profound changes will involve greater difficulties. There is an optimum point where the magnitude of these difficulties outweigh the justifications for change. It will be detrimental to our legal system to implement changes beyond that limit. Therefore, in order to construct a set of sound proposals we must first turn to assess the possible obstacles. They are: the possibility of causing uncertainty of law and failure of justice; the scarcity of manpower and financial resources; and the possibility of adverse effect on commerce and foreign investment.

Uncertainty of law and failure of justice is the most menacing of the potential obstacles. As the Legal Sub-Committee observed[26], 'the need for the law to be expressed with as near absolute precision and clarity as humanly possible is too obvious to require any explanation, for uncertainty and ambiguity in the law lead to injustice, confusion, and frivolous litigations.' A legal system which conducts its business in the native language, but only at the price of injustice and confusion is a real disaster. If Hong Kong has to choose between this and the status quo, the obvious choice is the latter. Fortunately, Hong Kong is not in such a constrained position.

Back in 1971, the Sub-Committee concluded that having regard to the 'practically insurmountable' difficulties involved in the accurate translation of the law, the Chinese language cannot be given equal status with English[27]. That may well be true as regards equal status in a strict sense, that is, in every aspect. The proposition here is that the Chinese language can be given equal status in at least 'some' aspects, for instance, in relation to criminal proceedings in the Magistracies. The accurate translation of statutory law alone, though by no means an easy task, can be accomplished. The case law can be gradually codified or otherwise put into statutes, which can be translated. In due course, the Chinese translation of the law can be ratified and given equal authoritative status with the English text after multiple scrutinies that remove possible discrepancies. By phases, Chinese can be given equal status with English in many aspects of law whilst uncertainty of law is avoided.

Although the cost of implementation will be considerable, it probably will not strain the government budget.[28] The question is where the proposals will rank vis-a-vis other projects. If the proposals are implemented by stages, the government will have better planning and control of the budget.

The scarcity of manpower is a real restraint on implementation of changes. However, it can be most effectively deployed and expanded in a phased transition. Translators, interpreters and draftsmen recruited in the first stage for relatively light tasks will be well-prepared to cope with the more demanding task in the later stages of transition. Similarly, judicial officials appointed to the lower courts in the first stage will gain experience and may be appointed to the higher courts in later stages.

As the former Attorney General, Mr John Griffiths QC commented,[29] 'Hong Kong's laws

25 (1972) 2 Hong Kong Law Journal 8.

26 Report of the Legal Sub-Committee, loc cit, para 13.

27 Report of the Legal Sub-Committee loc cit paras 13-16.

28 The total public revenue had been soaring throughout the last decades and is likely to continue to do so. In 1982, total public revenue stood at $38,321 millions, with a fiscal reserves of $ 22,571 millions.

29 Annual Report, loc cit, at 6.

gain from their adoption (of the law merchant of England) a strength, familiarity and acceptability they could not otherwise possess.' Traders are naturally concerned with the protection of their commercial interest under our law. It is reassuring to them to find it written down in familiar terms in an international language. If the proposals are implemented by stages, placing the changes as regards commercial law well back in the schedule, the success of the transition in other areas of law will convince these people that it is an effective process. In any event, English will remain as the more popular authoritative language of our commercial law for perhaps as long as Hong Kong exists.

It is submitted that the obstacles to future changes can be solved in a phased transition. It will be a painstaking and expensive project, but it will also be a rewarding one.

IV Proposals for Future Development

A phased transition involves less difficulties in its implementation. It is the basis of the set of proposals furnished in this paper. The proposals are divided into three stages. During the first stage, procedural changes will be introduced. These changes can be implemented without the passing of new legislation. The second stage includes more substantial changes, mainly concerning the legislative process. The third stage includes further substantial changes in the legislative and judicial processes.

A. Stage One Proposals

1. To Translate all existing Ordinances and Subsidiary Legislation into Chinese & to Publish all new Legislation Simultaneously in both Chinese and English
   (The English version prevails in case of discrepancy.)

   Back in 1971 the Legal Sub-Committee had recommended these changes. In 1972 the Executive Council decided to shelf the project and to review the position when sufficient progress has been made in using Chinese as an official language and in the training of expert translators. In 1981, the Home Affairs Branch conducted a sounding out of public opinion through the District Boards.[31] The response of the Boards and members of public has been generally favourable to the translation of the Laws of Hong Kong.[32] Nonetheless, after reconsidering the scale of the task, the government probably decided to wait indefinitely until the time comes for another review. So far only about a dozen Ordinances have been translated and printed in Chinese[33].

   In a recent Legco meeting, the acting Secretary for Home Affairs, Mr Akers-Jones in reply to questions put by Unofficials said that the government was satisfied with the progress[34]. The acting Secretary noted the limited resources and expertise available. He further claimed that the explanatory pamphlets were more important than the translation of the law. In response to a suggestion that the present policy be reviewed, he said it would be followed.

   In reality, are the technical difficulties and shortage of manpower that prohibiting? The translation is no doubt a mammoth task. The Chinese Language Division gave a rough estimate that it would take six senior Chinese Language Officers a decade to complete the task.[35] However, with more dedication and a boost in manpower, we may shorten the time needed considerably. As for the technical difficulties, the Attorney General, Mr Michael Thomas commented that accurate expression of legal concepts in Chinese is a difficult task but it can be done.[36] The Attorney General and the Chief Justice, Sir Denys Roberts on different occasions expressed opinion in favour of translating the law into Chinese despite the

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30 Report of the Legal Sub-Committee, loc cit, paras 17-18.

31 Source of information: Speech delivered by Mr C F Mak Asst Director of Home Affairs at a Rotary Club meeting 18th May 1981.

32 Information supplied by the Chinese Language Division.

33 Information supplied by the Chinese Language Division.

34 Legco meeting of 10th Aug 1983. Reported in SCMP 11th Aug 1983.

35 Information supplied by the Chinese Language Division.

36 The Attorney General expressed his opinion during a break at a Forum of Law. Reported in SCMP 22nd Sept 1983, *'Speedier Translations Appeal'*.

difficulties involved.[37] The Attorney General tritely stressed that without considering the implications of 1997, the law here should be available in Chinese to the people who live here.

The task of translation, once taken up with determination, may not be so absolutely prohibiting as it appears to some of us at present. The greatest problem seems to be the inertia against changes even if they are constructive. As one newspaper editorial commented,[38] 'our law should be accessible to all and we should not be dilly-dallying in translating them into Chinese.'

2. Extensive Use of Chinese in the Preparatory Stage of the Legislative Process

Consultation of informed public opinion is vital to an efficient legislative process. Although it is essential to keep the Exco proceedings confidential, the government should disclose the content of draft-Bills in Chinese news bulletins. Moreover, Chinese translations of all completed Bills should be published in the Gazatte simultaneously with the English version.

At present, it is more convenient to leave the task to the Chinese Language Division which is experienced in the translation of government announcements and had also translated some Ordinances. In due course, the task should be gradually transferred to the Law Drafting Division of the Legal Department in order to prepare the way for the drafting of Bills in Chinese at a later stage. Draftsmen proficient in both languages and having a good knowledge of our legal system will be recruited to shoulder this new task. These draftsmen will gain experience in the use of Chinese legal terms. They provide the core for further expansions of the Law Drafting Division when the time comes for legislation to be drafted and enacted in both Chinese and English.

3. To Improve the Interpretation Service for Defendants

Although it is impractical to require at this stage a word-to-word interpretation for the defendant throughout the proceedings, the interpreter should at least inform the defendants of the main points of the courtroom conversation. The ideal arrangement is to stop the conversation at short intervals. In this way the interpreter will be given more time to prepare his interpretation and advocates proficient in Cantonese can monitor and challenge the accuracy of the interpretation. Moreover, qualifying examinations for interpreters should be devised.

The implementation of this proposal will lengthen the proceedings considerably. Having regard to the shortage of manpower whilst the judiciary is being expanded to accommodate this change, perhaps at first this facility should be introduced only in selected types of trials involving serious criminal charges.

4. To Recruit More Bilingual Magistrates to Fulfil the Full Potential of s5(1) of the Official Languages Ordinance

The standard of justice in the Magistracies will be better guaranteed if s5(1) is used to its full potential so that a substantial number of cases are conducted in Chinese. At present, the standard of interpretation in the Magistracies is generally lower than that in courts of higher rank. As a news reporter observed,[39] 'many of these interpreters appear to take it upon themselves to cross-examine defendants, and afterwards present a censored account of what has been said.' Since most defendants appear in the Magistracies unrepresented[40], the possibility of

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37 The Attorney General in the above occasion.
The Chief Justice was speaking after the inauguration of the new Supreme Court building. Reported in SCMP 22nd Sept 1983 at 8.
There were also calls from lawyers in recent months for the translation of the Law of Hong Kong into Chinese. For instance, see SCMP 30th Aug 1983, *'Future Fear May Cause Legal Flight'*, 31st Aug 1983 *'Lawyers Plan to Voice Fears'*, and the Editorial of 3rd Sept 1983.

38 *'Making the Law Accessible to All'*, SCMP 3rd Sept 1983 at 2.

39 *'British Justice, the Hong Kong Way'*, Hong Kong Standard, 4th Nov 1981.

40 Despite the yearly expansion of the successful Duty Lawyer Scheme, only about nine thousands cases in the Magistracies were provided with free legal representation in 1982. Source: Annual Report, loc cit, at 267. Although the Legal Aid Department intends to extend its service to Proceedings in the Magistracies, it is unlikely that most of the defendants in the Magistracies will be provided with free legal representation in the near future.

failure of justice resulting from bad interpretation is quite high.

That may be partly alleviated by the presence of bilingual lay assessors who sit with expatriate magistrates. But basically they are just lay advisors on local customs and community feelings. In April 1982, a lay magistrates scheme was started to relieve the legally qualified magistrates of uncontested minor cases. Nonetheless, lay magistrates have their limitations. More bilingual and legally qualified magistrates should be appointed. Improved remuneration and better promotion prospect may attract more recruits.

5. To Revise the Glossary of Legal Terms

A Glossary of Applied Legal Terms containing over 18,000 entries in English and 27,000 entries in Chinese translation is in current publication.[41] The idea of a glossary of legal terms emaciated from the Legal Sub-Committee. The primary consideration governing the layout and content of the Glossary is to provide an effective reference for the convenience of the translators.[42] Explanations are not given in the entries. Thus, it is not very useful to laymen.

The glossary should be revised and expanded into a dictionary, the Chinese legal terms found in the glossary should be explained for the benefit of the laymen. The glossary should also be constantly updated and revised to include legal terms frequently used in court and in legal documents.

6. Law Reform Commission and Bilingual Commission

A special division of the Law Reform Commission should be set up to scrutinize the implementation of the proposals in Stage one. It will consider proposals for further changes, prepare detailed reports on the topics and direct the drafting of related Bills. It is essential that obstacles to future changes are anticipated at an early stage. In due course, this division should be detached from the Law Reform Commission and expanded to form an independent Bilingual Commission. This new Commission will continue to carry out its previous functions and should be given more extensive power to supervise and co-ordinate the implementation of various proposals. It should have legal practitioners, judges, draftsmen and translators amongst its members. Laymen may be invited to join its sub-committees.

At the same time, the Law Reform Commission should select some areas of case law and explore the feasibility of codification.

7. Legal Training in the Faculty of Law

All the courses still must be taught in English so long as English remains as an authoritative language of our law. Even in the distant future, it is unlikely that parts of our law such as commercial law will ever cease to have an authoritative English version. In any event, something should be done to familiarize the law students with Chinese legal terms and the presentation of legal arguments in Chinese. The aim of the courses in the Law School should be the training of competent bilingual lawyers. Some courses on the translation of legal documents and drafting of law in the Chinese language should be offered.

B. Stage Two Proposals

1. Codification of Selected Areas of Law

In proposal A6 it was suggested that the Law Reform Commission should select areas of law for future codification. By Stage Two, the Commission would have chosen the appropriate areas. The Commission should be augmented and entrusted with the preparation of the codifying legislation. The codifying legislation will be drafted and enacted in both Chinese and English according to proposal B2.

If the codification of selected areas of law proves successful, the Commission may proceed to codify other areas substantially covered by case law.

2. To Draft, Enact, and Publish Legislation in Both Chinese & English

S4 of the Official Languages Ordinance should

41 Glossary of Applied Legal Terms, compiled by the Chinese Univ Published by Govt Printer, 1974.
The idea emaciated from para 26(ii). Report of the Legal Sub-Committee, loc cit. It was qualified and endorsed by the Chinese Language Committee. Third Report of the Chinese Language Committee para 8(b).

42 Technical Notes at p viii The Glossary of Applied Legal Terms, loc cit.

be amended to this effect. Draftsmen should begin preparing Bills in both languages. Both texts of a Bill, expressing the same ideas, will be put before the Legco. Both texts will be enacted and given equal authoritative status. The effect will be similar to s8 of the Official Languages Act of Canada which provides that the English and French versions of legislation are equally authentic in the interpretation of the real meaning of the enactment.[43] There are formidable problems facing a legal system which has legislation written down in two authoritative versions. But these problems are by no means insurmountable.

The first problem is for the Legal Department to acquire on its staff a team of skilful bilingual draftsmen. They must have profound knowledge in both languages and preferably, should also be experienced lawyers trained in our legal system. Those draftsmen recruited and trained during Stage One to participate in the translation of legislation will provide a core for this team. They will be experienced in the use of Chinese terms. The demanding task of the draftsmen in Stage Two is to put the precise idea down in both languages. The finished drafts must be scrutinized time and again to eliminate discrepancies.

Another problem is to devise a solution in cases of discrepancies. The court can scrutinize and compare both versions of the disputed provision to discover which one more accurately expresses the intention of the legislator.[44] There should not be much discrepancies, when the two versions receive the approval of the Legco, it must have been scrutinized down to each trivial detail many times by the draftsmen, the responsible government departments and the Legco. Having regard to the binding effect of precedents, the Legal Sub-Committee's prediction[45] that the discrepancies will cause 'endless' arguments is probably exaggerated. Though admittedly more judges are needed to settle the discrepancies.

3. Ratification of the Chinese Translations of Existing Ordinances

After these translations produced under proposal A1 had been published for reference purposes for several years, most discrepancies will be exposed by interested groups, legal practitioners and the Bilingual Commission. In Stage Two the translations and the English 'originals' will be further scrutinized and redrafted to eliminate any discrepancy. They will then be ratified and given equal status by the Legco.

4. To Provide Interpretation Service for Jurors

S4 of the Jury Ordinance should be amended to this effect. A Cantonese interpreter should be provided for the jurors in the relatively small number of jury trials.[46] The jurors must be provided with a complete interpretation instead of a summarized one suggested for the defendants in proposal A3.

Having regard to the complicated nature of interpretation, it is advisable to retain the s4 requirement in the beginning of Stage Two. As a first step, interpretation will be used as a supplementary measure to enhance the jurors' comprehension. When this is practised for some time, the interpreters will gain experience, technical details will be worked out. It will then be possible to lift the s4 requirement. The majority of the adult population in Hong Kong will become potential jurors.

5. To Give High Court and District Court Judges a Discretion to Conduct the Court Proceedings in Chinese or English

S5 of the Official Languages should be amended to this effect. If some of the Ordinances are written down in an authoritative Chinese text, they can be quoted in Chinese in all courts of justice. In some of the cases it may be practical and convenient to conduct the proceedings altogether in Chinese. The presiding judicial official should be empowered to do so at his own discretion. This is also a preparation for

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43 S8(1) of the Official Languages Act 1969 of Canada. Refer also to s2 (English and French declared to be official languages 'for all purposes') and also to s4 (All legislation must be published in both languages.)

44 That is the practice in the bilingual provinces of Canada. An alternative solution is to leave the task to an institution specialised in the interpretation of these bilingual statutes, such as the 'commentators' in Switzerland. (As a matter of fact, the legislation in this civil law country is trilingual, written in German, French and Italian.)

45 Report of the Legal Sub-Committee, loc cit, para 18.

46 There were 290 jury trials in the High Court in 1982. Information supplied by the Office of the Registrar, Supreme Court.

further changes, actual trials conducted in the District Court or High Court in Chinese may reveal problems and solutions which are not otherwise perceivable.

6. The Bilingual Commission will Publish the Second Set of Reports

C. Stage Three Proposals

1. To Continue the Codification of Selected Areas of Law
(Refer to proposals A6 & B1)
2. To Continue the Ratification of Chinese Translations of Ordinances
(Refer to proposal B3)
3. To Give Chinese Defendants in the Magistracies and Courts of Comparative Rank a Discretion to have the Proceedings Conducted in Chinese

S5 of the Official Languages Ordinance should be amended to this effect. By Stage Three, there should be a sufficient number of experienced bilingual judicial officials to conduct even the more complicated cases in the lower courts in Chinese. If the judicial officials available are still insufficient to implement this change, the discretion should at first be given only to defendants who are charged with certain types of offences and are not legally represented.

4. The Judge's Discretion to Conduct Proceedings in Chinese be Extended to the Court of Appeal

S5 of the Official Languages Ordinance should be further amended to this effect. By the end of Stage Three, the greater part of our law will be contained in bilingual Ordinances. Although the Court of Appeal deals with complicated questions of law and hears no evidence, the Justices of Appeal may need this additional flexibility.

5. The Bilingual Commission will Publish the Third Set of Reports

The Commission, having scrutinized the implementation of the proposed reforms all the way through, will suggest whether the transition can and should be carried further to give equal status to Chinese and English in every aspect of the legislative and judicial processes.

D. Conclusion

The set of proposals furnished in this paper is not aimed at the attainment of equal status for the Chinese and English languages in every aspect of application in the Hong Kong legislative and judicial processes. Instead, these changes are proposed because of the practical improvement each of them will bring upon the legal system of Hong Kong. At present, the attainment of equal status 'in every aspect' of application appears to be a grandiose but impractical goal. It may even be more practical to use Chinese as the only authoritative language of legislation and judicial proceedings than to have two languages of law equally authoritative in every aspect.

As a matter of fact, on accomplishment of the changes proposed in this paper Chinese will be given equal status with English in many significant aspects.[47] Legislation will be drafted and enacted in both languages. In due course, the existing legislation will also be put into two authoritative texts. Criminal cases in the lower courts will be conducted in Chinese at the defendants' discretion. Other cases can be conducted in Chinese at the judge's discretion.

It is submitted that at present these changes represent the maximum extent to which the legal system of Hong Kong may benefit from the extensive use of the Chinese language. Whether it is commendable to proceed further on accomplishment of these changes will depend on the future circumstances.

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47 As the Legal Sub-Committee tritely observed in 1971, equal status does not necessarily imply equal 'use' in every single instance, in some areas of law the Chinese version will be the one relied on by most litigants, for instance, criminal law. In the distant future, it may even be practical to further localise the law by making the Chinese version in these areas the only authoritative version. On the other hand, in other areas of law, such as commercial law, the English version will remain perhaps just as popular as it was before the transition.

APPENDICES

List of Ordinances Translated into Chinese

(Information supplied by the Chinese Language Branch, Home Affairs Department, Government Secretariat, in September 1983)

So far 13 Ordinances have been translated into Chinese and put in printed form:

1. Corrupt and Illegal Practices Ordinance, CAP 288
2. District Board Ordinance, CAP 366
3. Electoral Provisions Ordinance, CAP 367
4. Legal Aid Ordinance, CAP 91
5. Multi-storey Buildings (Owners Incorporation) Ordinance, CAP 344
6. Objectionable Publications Ordinance, CAP 150
7. Offences Against the Person Ordinance, CAP 212
8. Prevention of Bribery Ordinance, CAP 201
9. Police Force Ordinance, CAP 232
10. Public Order (Amendment) Ordinance, CAP 245
11. Small Claims Tribunal Ordinance, CAP 338
12. Summary Offences Ordinance, CAP 228
13. Trade Union Ordinance, CAP 332

Items 1, 2, 3, 13 are in currently publication and are on sale in the Government Publications Sales Centre.

CONSTITUTIONALISM AND THE 1982 CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA

by Louis Tong Po Sun

I INTRODUCTION

In the West, the term constitutionalism generally relates to the notion of limited government[1]. However, it bears different implications within the Chinese context. It points first to a situation where a proper division of powers and functions between the Communist Party and the State is maintained.

In analysing the new Constitution[2] of the People's Republic of China[3], many scholars are of the opinion that it would reintroduce the long-ignored concept of constitutionalism[4]. This paper is an attempt to examine whether their optimism is justified. It is submitted that although the new Constitution clearly shows tendency towards that end, certain basic obstacles remain which prevent the effective implementation of the concept of constitutionalism. The ultimate obstacle is the Party itself. And it seems that the Party is unwilling at the present stage to withdraw itself completely from direct participation in State affairs.

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1 The learned editor of Constitutional and Administrative Law stated that 'according to the principle of constitutionalism as it has developed in the western democratic tradition, one primary function assigned to a written constitution is that of controlling the organs of government. And Wheare was cited to have observed that 'Constitutions spring from a belief in limited government'.
See Bradley (ed.) Wade and Phillips *Constitutional and Administrative Law*, 9th edition 1978, pg 4.

2 Including the new 1982 Constitution, there are already four different Constitutions adopted in the PRC since 1949. There are the 1954, 1975, and the 1978 ones. The first Constitution is very close to the 1982 one. The 1975 one is usually understood as the Cultural Revolution document. And the 1978 constitution is a hybrid Constitution reflecting both 'leftists' and 'rightist elements'.

3 The short form would be adopted in this paper, ie, PRC.

4 Under the 1954 Constitution, there had been trends toward that end, but after the Anti-rightist which took place in 1957, the term Constitutionalism had properly become a taboo.

II THE ROLE OF PARTY LEADERSHIP UNDER THE NEW CONSTITUTION

One author has stated that the habitual penetration of the Party[5] into State affairs has been a major constitutional problem in the PRC, and this is acknowledged by the Chinese leaders themselves[6]. However, the same author has expressed optimism about the solution of the problem. He contends that 'the new Constitution reflects the leadership's concern to create a more predictable system on a clearer separation of roles and functions.'[7]

Another analyst of Chinese politics has made similar comments. While acknowledging that 'the relationship between Party and State represents a legal dilemma which defies any neat logical solution,'[8] he remarks that the new Constitution is an indication that 'the CPC[9] will henceforth operate behind the State line and will abide by the Constitution.'[10]

If we compare the new Constitution with the previous ones[11], we can see that there has been a major step taken by Chinese authorities to maintain the difference between the Party apparatus and the State machinery.

It was provided in 1975 Constitution that the Communist Party of China was the core of leadership of the whole Chinese people[12]. In addition, it was provided in the same document that all citizens must support the leadership of the Communist Party. In fact it was stated that it was their fundamental duty to do so[13]. These two provisions illustrated in a vivid manner the complete dominance of the Party over the State[14]. The basic demarcation between State and Party was virtually non-existent even at the theoretical level under this Constitution. The same provisions could be found in the 1978 Constitution despite the fact that it is generally described as less radical than the 1975 one.

However the situation is said to have been changed under the new Constitution. Such 'strange provisions'[15] are not to be found in it. It is pointed out that:

> The new State Constitution reflects the attempt to free the State from the grip of the Party. It reverts to the approach of the 1954 Constitution where the power of the Party was hidden in the Constitution. Thus reference to the Party as the "core of leadership" has been dropped as has the claim that it is the citizens' duty to support the Party' Now citizens are just said to have the duty to abide by the Constitution and the law[16].

It is submitted that such changes are indeed significant. They signify the trend toward constitutionalism. However, the exclusion of provisions concerning Party leadership is just a general manifestation of the development towards the separation of Party and the State. Specific areas must be studied to ascertain whether the new Constitution has fostered the growth of constitutionalism.

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5 Unless otherwise provided, Party in this paper refers to the Communist Party of China.

6 Tony Saich 'The Fourth Constitution of the People's Republic of China' (1983) 2 Review of Socialist Law 116.

7 Bryon Weng 'Draft Constitution of the People's Republic of China' (1982) China Quarterly 493.

8 Ibid 494.

9 CPC is the short form for the Communist Party of China.

10 Weng, op cit 494.

11 See note no. 2.

12 Article 2 of the 1975 Constitution.

13 Article 26 of the 1975 Constitution, in Chapter 3, on the Fundamental Rights and Duties of Citizens.

14 An underlying assumption in this paper that Party leadership shall only be exercised through legal channels. It should only propose; it should not participate directly in the management of the country. That would be the domain of the State machinery. This may sound too Western a standard. However the failure of the country to develop itself economically and technologically may be a consequence of direct party intermeddling with State life. It seems that the Soviet Union, also a Socialist State, has maintained a proper separation of Party and State, and there is no evidence that the Party status is being threatened by this. Should China not follow suit?

15 Weng, op cit 494. Where the author is discussing those provisions in the former constitutions such as that the CPC was the core of leadership of the whole Chinese people etc.

16 Saich, op cit 116. He provides further that 'Direct Party Control is weakened further by dropping the provisions that the Party and its Chairman lead and command the People's Liberation Army and dropping the stipulation that the Premier be appointed on the recommendation of the Party's Central Committee!' See similar comments by Byron Weng, op cit 494.

III CONSTITUTIONALISM AND THE INDEPENDENCE OF THE JUDICIARY

It is argued that Article 126 of the new Constitution serves as a major indication of the trend towards constitutionalism. The Article provides that 'the people's courts shall, in accordance with the law, exercise judicial power independently and are not subject to interference by administrative organs, public organizations or individuals'. An author exclaims that by including Article 126, the new Constitution 'has, in theory, re-established the principle of the independence of the judicial organs.'[17]

The present Article 126 is not unprecedented. In the 1954 Constitution, a similar but less vigorously worded provision was included[18]. However, there was no analogous provisions in both the 1975 and 1978 Constitutions. In the place of 'independent adjudication', the Maoist concept of 'mass line' was advocated and relied upon as part of the adjudication system[19].

Hence it seems that the new Constitution has made an important change with respect to the power of the courts. But does Article 126 of the new Constitution truly lay down the foundation of judicial independence, ie, no direct Party interference, and more specifically, no arbitrary, behind-the-scenes pressure on the presiding judge to decide a case in a certain way? To answer this question, the background of the Article must be examined.

In discussing the meaning of Article 78 of the 1954 Constitution which is basically the equivalent to Article 126 of the new Constitution, Chia Chien[20] argued that the Constitution (1954) had placed the judiciary in a special category. And that it was inappropriate for the Party to exercise direct leadership over the courts as it did over the other governmental agencies[21]. Moreover, he claimed that Party interference in the trying of specific cases was a violation of this particular constitutional provision[22].

According to Chia, the proper meaning to be assigned to Article 78 was this:

> The Party realizes its leadership over the work of the courts by enacting laws. Law is the will of the People, and also the will of the Party. When judges are subject to the law, this amounts to their being subject to the leadership of the Party. Therefore judges need only be subject to the law and must not receive any other leadership from the Party.[23]

This interpretation, if accepted by the leadership, would be the best indication of constitutionalism in the sense that judges are independent from the Party and are only obliged to apply the law. Party leadership would be restricted to the sphere of general political supervision.

In fact Chia Chien was not the only Chinese leader to hold such an opinion. The first President of the Supreme People's Court endorsed such a view. In a speech he made at a Party Congress[24] held in 1956, he implicitly admonished Party cadres against their intermeddling with the independent judicial process. He criticised those local Party cadres for failing to distinguish between the Party and the government.

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17 Ibid 120.

18 Article 78 of the 1954 Constitution provides that 'In administering justice the people's courts are independent, subject only to the law.'

19 Article 25 of the 1975 Constitution provides that '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.'
Article 41 of the 1978 Constitution provides that 'In accordance with law, the people's courts apply the system whereby representatives of the masses participate as assessors in administering justice. With regard to major counter-revolutionary or criminal cases, the masses should be drawn in for discussion and suggestions.'

20 The romanization would be Xia Xien. He was a noted figure in the Chinese legal field prior to the Anti-rightist movement in 1957.

21 J A Cohen, 'The Communist Party and "Judicial Independence 1949-59".' (1969) 82 Harvard Law Review 992.

22 Ibid 992.

23 Ibid 992.

24 The Eighth National Congress of the CPC which was held in September in Peking. It was the first one since 1945. A new Party Central Committee was elected and Mao Tse-tung was elected as chairman.
See Peter Cheng, *A Chronology of the People's Republic of China*, (Littlefield, Adams & Co, 1972) 64.

However, officially, Chinese authorities never really intended Article 78 to bear such a liberal meaning. Chia Chien and his supporters had overestimated the importance of an independent judiciary in the eyes of the Communist Party. Actually it is well known that the Party had always had direct control over the courts and indeed the whole legal system.

The official interpretation given to Article 78 was this:

> Article 78 made it clear that in China it was the courts, and not the individual judges, that were to conduct adjudication independently, in contrast to the situation under the Soviet Constitution.[25]

Thus a literal meaning was given to the provision, 'the people's courts are independent'. The courts' independence was differentiated from judges' independence. Actually, in addition to certain legal supervision[26], the judges have always been under the control of the Party committee at the corresponding level.

The nature and extent of the Party's control is explained in the following manner:

> Whether the facts of a case are clear, the evidence is convincing; the defendant should be subject to criminal sanction and what criminal punishment should be imposed on the defendant, should be sent to the secretary in charge of political – legal affairs of the local party committee at the same level for review and approval. This is called the system of deciding a case by the secretary.[27]

The same article goes on to point out that 'before a case is referred to the people's court for trial, the secretary must have previously decided the punishment to be imposed.'[28] And since the relationship between the secretary and the people's court at the same level is that between a superior and a subordinate, the courts has no choice but to accept the instructions of the secretary[29]. This has been the unquestioned system since the founding of the PRC[30].

If the fall of the 'Gang of four' signified some basic changes in the Chinese system, the reappointment of Deng Xiaoping to Party post[31] served as a catalyst of the transformation in both the political and economic areas. As Chinese leaders are now more concerned to establish a stable and comprehensive legal system, the question of judicial independence has been raised again. And there are clear indications that some leaders are not satisfied with the practice of Party secretary reviewing cases and making decisions for the judges[32]. In other words, they advocate that not only should the courts be independent but the judges should also be independent from the Party secretary.

At the first Academic Seminar organized by the Zhongqin City Law Association in late 1979, the participants took the following view:

> The leadership exercised by the various level party committees toward the cadres ..... of the court should primarily focus on strict supervision over their strict compliance with and impartial execution of the law.[33]

The criticism against Party interference in judges' function is not without grounds. Not only is such practice a violation of the basic concept of constitutionalism, ie, it tends to confuse the line between the Party and the State, it leads to many unjust results

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25 Cohen, op cit 993.

26 Apart from the question of Party control, judges are never said to be independent. There are supervision coming from the people's congresses, the procuracies, the next higher level courts and the masses. See 'The Independent Exercise of The Power of Adjudication is a Glorious Task Given By The New Constitution to the people's courts' *Essays on Constitutional law* (Chinese legal society 1983) 242. (Chinese in original, own translation).

27 Hungdah Chiu, 'Structural changes in the Organization and Operation of China's Criminal Justice System' (1981) 7 Rev Soc Law 53 at 59. Professor Hungdah Chiu was citing from a Chinese law journal. See note 43 of his article.

28 Ibid 59.

29 Ibid 59.

30 According to Professor Cohen, independence of the judges was a developing trend prior to 1957. But since the Anti-Rightist movement, such development was suffocated. See Professor Cohen's discussion of the changes in his article as cited in note no. 21.

31 Deng Xiaoping's re-emergence took place in late 1977. For a succinct discussion of Deng's rise and fall and his relationships with the Chinese pragmatic policies see J A Cohen, *China's Changing Constitution.*

32 Chiu, op cit, 60.

33 Ibid 60-61.

and causes hardship. Among problems such as delay and mistakes[34], the most serious defect concerning Party interference is that there is no mechanism for review of the Party secretary's decision.

Peng Zhen, who was then the head of a law commission under the Standing Committee of the National People's Congress, stated in October 1979 that Party committees should not concern themselves with actual cases which were matters for the court. And he agreed that Party leadership over the judges should be restricted to political leadership.[35]

Peng Zhen's statement seemed to have reflected a change of attitude on the part of the Party Central concerning the relationship between the judge and the secretary in charge of political and legal affairs.

Actually in the same year, a Party Central directive was released to order the abolition of the practice of deciding and reviewing of Court cases by the Party committee at the corresponding level[36]. The then President of the Supreme People's Court, Chiang Hua remarked that the directive introduced a major change in the system. It would change the conventional practice of the Party's domination of the judiciary. And that it was a guarantee at the leadership level of 'true' judicial independence[37].

In light of this directive, it is expected that there would be an unambiguous provision included in the new Constitution to prevent further Party control of the judges. However, the new provision is far from clear as a judicial independence statement. It is stated in Article 126 that 'the people's courts shall, in accordance with the law, exercise judicial power independently and are not subject to interference by administrative organs, public organizations or individuals.' Basically, the language is that of the 1954 Constitution (Article 78) and it is not certain

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34 Professor Hungdah Chiu stated in his article (note 27) that there are five major problems about such a system of Party Secretary reviewing cases.
1) The secretary has voluminous tasks to do and sometimes it is not possible for him to decide cases for several months, thus causing delay in the timely handling of cases.
2) The secretary's decision on cases usually takes the form of "surprise attack", ie, he decides several or even several dozen cases at one time. It is not possible for him carefully to study the facts, evidence, and the nature of each individual case.
3) If a court disagrees with the handling of a case by the Party Committee (ie, by the political-legal secretary), there is no rule prescribing that the court can request the party committee to reconsider the case. The rule is "whatever is approved (by the Party Committee) should be executed".
4) Since arrest and sentencing are all decided by the secretary on behalf of the Party Committee, in the course of trial by the people's court, the court has no choice but to sentence the accused in accordance with the decision of the Party Committee, even if the result is contrary to law.
5) When the secretary decides a case incorrectly, his attitude is "an official will never regret his decision"; the secretary consistently refuses to correct his mistakes. For example, in a city a homicide suspect had been detained for eighteen years despite the fact that the higher-level judicial organ had already decided that there was no evidence proving his guilt. He was held because the leadership insisted that in order "to maintain the decision of the city party committee" he should not be released.

35 Peng Zheng, 'Several Questions Concerning Socialist Legal System' (speech at Party School in September 1979) (1979) 11 Hongqi 3 (in Chinese; own translation).

36 The actual directive is not available. But the existence of such a directive and its content was reviewed by the former President of the Supreme Court. *People's Daily*, 25th Aug 1980.
See Albert Chen's article 'The Developing Legal System in China' (1983) 3 HKLJ 292, at 311 Note 90.

37 *People's Daily*, 25th Aug 1980.

whether public organizations[38] include the Communist Party and whether individuals[39] include the secretary in charge of political and legal affairs. So even at the theoretical level, it is doubtful whether the new Constitution has brought about judicial independence.

In any event, it seems that Party interference continues to exist in practice. In an article published in 1983, it was pointed out that the practice of Party committee controlling the State organs remained active even after the adoption of the new Constitution. And it was specifically stated that 'some leading Party cadres continue to interfere with the work of the judicial department by making telephone calls and writing notes to the judicial organs concerned.'[40] A vivid example of Party interference is discussed in the leading law journal in China. The Party secretary, who had forced the court to grant a divorce order and to sanction certain illegal arrests, was criticised as having disobeyed the Constitution and the law.[41]

In view of this, it is doubtful how much the Party Central directive and the vague Constitutional provision have assisted in achieving judicial independence. Interestingly, there are some Party leaders who are of the opinion that they really have not resolved the basic problem. It is stated that:

> The constitution provides that the people's court shall exercise its adjudication power independently ..... and not subject to (external) interference. But the interpretation of this provision varies. On one hand, there should be independence, on the other, adjudication work should be placed under the supervision of the Party. How to connect these two ideas? So far this question has not been resolved properly.[42]

And if in normal times, it remains unclear whether the Party should interfere in the judicial process, in the midst of a political campaign, the Party would definitely have the final say in the cases before the courts.

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38 The situation should be analysed chronologically. The 1954 Constitution carried the provision that 'in administering justice, the People's Courts are independent, subject only to the law'. There was no similar provision in both the 75 and 78 Constitutions.
In 1982, a draft of the revised Constitution was prepared by a special committee headed by Peng Zhen. Article 128 of the draft stipulated that 'the people's courts exercise their judical authority according to law and are independent of intervention by administrative organizations, organizations (團體), and individual.'
However, in the promulgated Constitution (ie, the new 1982 Constitution) 'organizations' was changed to 'social organizations' (社會團體).
The interesting point is that in both the official English editions of the Constitution, what in literal Chinese meant 'social organizations' was translated into 'public organizations'.
Although it is not always useful to concentrate too much on the literal meanings of certain terms especially where translation is involved, the subtle discrepancies seem to reflect the sensitiveness of the issue and the existence of disagreement. Clearly the terms 'organizations' and 'public organizations' are wide enough to include the Communist Party. But 'social organizations' apparently does not. And the problem is if the Party is included, its interference in the judicial process would be treated as a direct violation of the Constitution. (See also appendix on the amendment to the Organic Law of People's Courts. The term 'social organization' is used. Therefore there is a terminological ambiguity and inconsistency among the revelant provisions.)

39 So far the discussion of Article 126 is focused on the question whether 'organizations' include the Party. Perhaps there should be more analysis on the meaning of 'individuals' in the provision.
Officially, 'individuals' seems to refer to those ordinary citizens or cadres who have certain private interest in the case before the court and not the political-legal affairs secretary whose conventional task is to review judicial decisions. (See 'The People's Courts and People's Procuracies' in *Talks On the PRC Constitution*, (Laws Publication Society 1983) 98.
However, there are clear indications that certain more liberal-minded cadres argue that 'individuals' include the political-legal affairs secretary, and in fact all Party leaders. (See Jiang Hua's speech: *People's Daily*, 25th Aug 1980. See also (1983) 9 Jurisprudence 53. It is stated therein that Article 126 refers to a situation where Party leaders, no matter how high in rank, are forbidden to force the courts to follow their opinion rather than the law.)

40 Editorial 'To Put Right The Phenomenon Of Violation Of The Constitution And To Uphold The Dignity Of The Constitution' (1983) 5 Democracy and the Legal System 2. (In Chinese, own translation).

41 Editorial commentary 'Zhang Yauyu expresses, his opinion on the wrong case of Chu Souchun'. (1983) 9 Jurisprudence 53.

42 A statement made by Chen Pixien, secretary at the Secretariat of the Party Central, in an interview with reporters of the journal Democracy and the Legal System in Shanghai (1983) 3 Democracy and the Legal System 2. (In Chinese, own translation.)

The most outstanding example of the lack of independence on the part of the judges is the recent crackdown on crimes.[43] While the constitutional aspect of the crackdown is subject to doubt and shall be discussed later in this paper, suffice here to mention that in a political campaign, the true monitors are the Party cadres. All State organs, including the courts, are but tools of the Party to achieve the objects set by the Party.

First, there are indications that the courts are directed to analyse legal concepts in a particular manner in accordance with the latest Party policies. In a Fazhi Bao article[44], the commentator criticizes the view that to constitute the crime of hooligan activities, the gang must possess a clear criminal object, a detailed work plan, a tight organization and a stable division of work within the gang. It is stated that such as view is too restrictive under the current condition and is an obstacle in the struggle against crimes. The author suggests an alternative definition which has much expanded the scope of the crime.[45]

In another Fazhi Bao article, the commentator argues that the subjective element of the criminals' behaviour should be stressed rather than the actual consequences of the crime in determining the correct punishment to be given to the convicted persons. The author gives an example that a person should still be convicted of murder even if the victim is subsequently saved. This is so because of the malicious thought he has in perpetrating the crime.[46] In addition, the author goes further and states that the masses' opinion should be considered in meting out punishment to the criminals.[47] This amounts to forcing the court to take into extra-legal considerations in deciding on the question of punishment.

What's more alarming is a sweeping statement included in the People's Daily editorial entitled 'We must severely crack down on criminal activities'. It is expostulated that 'no attempts should made obstinately to interpret legal clauses and the range of penalty measures in favour of criminals and to the detriment of the people.'[48]

Both Fazhi Bao and People's Daily are official media subject to the control of the Party. Opinions expressed therein no doubt reflect current Party policies. These commentaries could well be part of the Party directives addressed to the judicial organs, particularly to the courts. It is difficult to envisage a situation where the judges would refuse to accept these policy instructions. Any attempt in this direction would be treated as undermining the Party leadership. The best evidence that judges have acted on these directives is the fact that they had begun cooperating with other judicial organs in dealing with the criminals in a quicker and harsher manner before the relevant codes were amended.[49]

How is this kind of interference justified? This turns on the meaning and nature of the Party's political leadership over the judiciary. Even when Jiang Hua was calling for independence of the judges, he was careful in adding that no Party interference did not mean that the courts need no longer be under the leadership of the Party. The latter, it was said, would continue to exercise such leadership through its ideological lines and policies.[50] Thus, it is apparent that the Party had a reserve power in terms of supervising the courts to ensure that certain basic Party policies are carried out and the reserve power would be used in promoting a political campaign.

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43 Officially began on 6th Aug 1983 where thousands of alleged criminals were arrested and later executed. The crackdown is an on-going process.

44 Zhongguo Fazhi Bao in Chinese means Chinese Legal System Newspaper. It is published by the Department of Justice. Its views are said to represent the official line. See Note 8 of Albert Chen's article, 'The Developing Legal System in China'.

45 'On How to Define Hooligan Gangs', *Fazhi Bao*, 16th Sept 1983.

46 'On the Question of Determining the Appropriate Amount of Punishment' *Fazhi Bao*, 16th July 1983.

47 Masses' opinions are not a factor to be considered either in deciding conviction or sentence under the criminal code. However the role of the masses has been emphasized again for the purpose of the crackdown as a political campaign against the criminals.

48 *People's Daily*, 4th Sept 1983.

49 Some criminals were executed where they should have been imprisoned before the relevant codes had been amended by the NPC standing committee. Detailed discussion of this aspect of the campaign is provided later in the paper.

50 *People's Daily*, 25th Sept 1980.

Judicial independence is a crucial concept in any legal system. No reliance and faith would be placed on a system of courts which is just the puppet of another organ which pulls the string behind the veil. The concept of 'justice must not only be done but must be seen to be done' is not the wisdom of a particular culture; it reflects the mechanism of basic human psychology.

To sum up, since the founding of the PRC, the Party has exercise different degrees of control over the judicial process at different stages. There is never the tradition of judicial independence. Chinese leaders have frequently asserted that 'judicial independence' refers to the independence of the courts as an institution. However, we see that even this narrower meaning is not followed in reality. The courts are subject to the control of the Party, more so during political campaign. Although recent developments indicate that there are possible changes, it remains to be seen whether such 'liberal' attitude can take root in theory and in practice.

In light of this background, the argument that Party intrusion into the sphere of judicial work is abolished by the new Constitution is not supported by the facts of Chinese political reality.

Perhaps it could be added here that even if judges are given independence, the problems involved in judicial work would still remain. A basic problem is the qualification of the judges. During an interview with certain judicial personnel which took place in 1974, a western scholar was informed that 'the majority of judicial workers came from worker; peasant or military backgrounds' and only a small minority were university graduates[51]. Since the Chinese leadership has just began to pay serious attention to the legal system in the recent years, the qualification of the judges would remain a problem. Unless better qualified judges are appointed[52], the quest for judicial independence would be an empty claim. Unqualified judges would be more ready to rely on the Party Secretary.

IV CONSTITUTIONALISM AND THE NPC SYSTEM

From the above discussion, we see that the new Constitution fails to guarantee constitutionalism in the area of judicial work. Party interference remains possible in theory and in practice. The question to be discussed now is whether a proper division of power between Party and the State is achieved in the area of legislative work. Here the main issues are the relative status of Party policies and State laws, and whether State laws could be directly replaced or changed by the Party.

It has been argued that Party intrusion into legislative work is necessary before the promulgation of the seven basic law codes. This is so because as there were little formal laws in existence, Party policies had to play the role of law in most circumstances[53].

The usual explanation for the lack of formal legal codes until 1979 is attributed to the institutional weakness of the National People's Congress[54] as a

51 Gerd Ruge, 'An Interview with Chinese Legal Officials' (1975) China Quarterly 121.

52 An additional paragraph is now attached to Article 34 of the Organic Laws of the People's Courts. Judges must now have professional legal knowledge. This is an encouraging development. See appendix.

53 Prior to the codification of basic laws in 1979, there were individual laws and regulations acting as the legal basis of the Judges' decisions. The draft of the criminal code had also been relied upon. Party policies, of course, played the leading role.
This situation is recognised in all Chinese legal materials. See generally.
Basic theories in Law, (Peking University Press, 1982) and *Four Hundred Legal Questions and Answers,* (Xueline Publication Society, 1982) (Both in Chinese).

54 The short form is NPC.

legislature[55]. It is pointed out that even Chinese lawyers have criticised the NPC as being too large in size, too infrequent in meetings and too short in meeting time, for it to carry out its legislative functions properly[56]. The proposed remedy is a basic organizational change in the NPC system to be brought about by the new Constitution. Where previously laws must be made by the NPC itself, now the legislative power is shared between the NPC and its Standing Committee[57].

However, it is submitted that to put the blame on the NPC for not being able to set up a comprehensive and rational network of legal codes for the country is putting the cart before the horse. The truth is that the Party or rather some Party leaders' attitude has been the main obstacle to the proper functioning of the work of the NPC.

It is implicitly stated by Peng Zhen that the cause for the delay in promulgating the legal codes is really a political one and has little to do with the efficiency of the NPC system[58]. He remarks that responsible leaders in the NPC have always been actively involved in the preparation of the various drafts of the codes. And the 33rd edition of the draft of the Criminal Code was completed in 1963[59]. However, it never got past the Party Central[60]. According to Peng Zhen, such intriguing situation is the result of the attitude, then prevailing among certain Party leaders, that so long as there are Party leadership and Party policies, positive laws are unnecessary[61]. In other words, there is a fear that the Party's supreme position might be hampered by the existence of a regular and formal legal system.

The mistrust for positive laws was heightened during the Cultural Revolution[62]. The 'leftist' Party leaders charged that the laws[63] were 'a shackle' and 'a straight jacket' holding back the mass movements[64], binding the hands and feet of the Party. Moreover, it was explicity stated in this turbulent period that law was inferior to Party policy. And it was asserted that a citizen who had violated Party policies would be punished accordingly as it would be so had it been a violation of law[65]. The line between

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55 The NPC is a representative assembly composed of some 3,000 delegates called deputies. They are elected by the people's congresses at various sub-national levels. At the national level, the deputies would select a group among themselves to constitute a standing committee which is the permanent body attached to the NPC. There are now about 200 standing committee members. Moreover, there are various special committee established under the standing committee to assist the NPC standing committee in its routine activities.
The NPC will meet once a year and the NPC as a whole is elected for a term of five years. The NPC meeting is convened by its standing committee.
However, a session of the NPC may be convened at any time the standing committee deems this necessary, or when more than one-fifth of the deputies to the NPC so propose.
The standing committee of the NPC is elected for the same term as the NPC; it exercises its functions and powers until a new standing committee is elected by the succeeding NPC. In addition, it is provided that the chairman and vice chairman of the standing committee shall serve no more than two consecutive terms. See the 1982 Constitution, Chapter three, section 1.
Thus it could be said that the NPC system is the 'matriarch' of all laws and government agencies. Only the NPC can create new organs and make new laws. No other State organs enjoy a higher status than the NPC.

56 Saich, op cit 116.

57 Article 58 of the 1982 Constitution. It proclaims that 'the National People's Congress and its Standing Committee exercise the legislative power of the State.' There are two points to be mentioned, however:
1) The change was not as drastic as it appeared to be. Ever since 1954, the Standing Committee had been delegated by the NPC authority to make laws.
2) The laws made by the Standing Committee is lower in status than the basic laws made by the NPC itself.

58 Peng Zheng, op cit, see note no 35 at 4.

59 Ibid 4.

60 Then headed by Mao Zedong. Peng Zheng said that the 33rd edition of the draft of the Criminal Code was checked by the Central Committee and Mao personally. He did not explicity say that Mao rejected the draft, but the implication was plain.

61 Peng Zheng, op cit at 4.

62 Took place in 1966. The 'official' duration of the Cultural Revolution is said to be 10 years.

63 As pointed out earlier, China had a few scattered laws, civil and criminal. It seemed that the 'leftist' Party leaders felt uncomfortable even with these few laws.

64 Chen, op cit 292.

65 See *Chinese Law and Government* 1969.

Party and State was destroyed. The consequence of such a development turned out to be a 'holocaust'[66].

Now China has a set of legal codes[67]. Does this mean that the Party can no longer 'legislate' by formulating policies? And under the ostensible trend toward constitutionalism, does the new Constitution solve the problem of the relative status of law and policy? It is contended that the new Constitution has achieved very little in this regard.

To give effect to the spirit of constitutionalism, the new Constitution should, ideally, include a provision stipulating that laws are above policies in terms of binding authority; and that although laws may originate from policies, once the policies have been transformed into laws according to prescribed procedures, no subsequent change is permitted unless there is a proper amendment. Such a statement would neatly dovetail with the development that ordinary citizens are no longer required by the constitution to give active support to the Communist Party, as discussed earlier.

Unfortunately the new Constitution is silent on this crucial issue. Furthermore, after the promulgation of the new Constitution, there remains the opinion that Party policies are higher than laws for the latter must be interpreted according to the former and where the law was unclear on a certain point, policy must be resorted to as direct authority[68]. If such an opinion represents the official attitude of the leadership it is argued that the new Constitution has in effect provided no channel for introducing constitutionalism in legislative work. The line that separates laws from policies continues to be blurred. The expansion of the power of the Standing Committee of the NPC can at best produce laws on a regular basis; it cannot solve the basic problem of the domination of party policies over laws.

V THE JOINT PARTY AND STATE COUNCIL RESOLUTION

Moreover, the new Constitution fails to define conclusively the legal procedure of law making and the exact categories of State laws. The loophole, perhaps intentionally created, allows the Party to interfere in the regular legislative process. This criticism is made with reference to the obviously still existing practice of the issuing of joint Party and State Council directives[69]. It is pointed out that in order to solve certain important questions, the Party Central and the State Council would issue a joint directive[70].

It is stated that such joint directive has a powerful effect. It could directly mobilize all Party members and all citizens to implement the decision contained in the directive. This way of legislating is described as 'a way by which the Party may exercise political leadership in a legal manner'[71].

The existence of the joint directive is against the trend toward constitutionalism. And this method of legislating also raises a question of constitutional importance. According to the new Constitution, the rank of Chinese law is as follows: the Constitution, the basic laws enacted by the NPC itself, the ordinary laws enacted by the Standing Committee of the NPC, and the administrative orders and regulations made by the State Council[72]. But where does a joint Party

66 Fox Butterfield, *China: Alive in the Bitter Sea* (London H&S 1982) 19.
Albert Chen in 'The Developing Legal System in China' described the Cultural Revolution in the following terms : "..... law and order completely broke down in China. Society was at war with itself. Millions were arbitrarily arrested, detained, tortured or murdered. The minimal protection of the inviolability of the body and personal property of the person, normally concomitant with civilization, was non-existent. It was one of these tragic moments in human history ....."

67 Formally put into effect in 1980 January 1.

68 Chen Shouyi, *Foundamental Legal Theories,* (Peking University Press, 1981) 231-234. In fact it is pointed out here that in some situations, laws are just legalized party policies that have been implemented for a period of time. This is intriguing because by that time, the codes were in effect already.

69 Ibid 344.

70 Ibid 344.

71 Ibid 344. A recent example of this type of joint resolution is the "Decision Concerning The Attack on Serious Criminal Offenders In The Economic Sphere." See generally Liu Yueqing, *Questions and Answers on the Open-Door Policy* (Law Publishing Society, 1983) 85 (in Chinese, own translation.)

72 See the various Chapters and sections in the 1982 Constitution.

and State Council order stand in this hierarchical system of laws?

The Constitution provides that the State Council administrative orders must be enacted in accordance with the Constitution and the various Statutes[73]. Does the direct involvement of the Party transform the nature and elevate the status of the administrative order?

The answer to this question has a direct bearing on the jurisdiction and efficacy of the NPC system. It is not entirely clear whether the Standing Committee of the NPC could quash such an order by relying on Article 67(7) of the new Constitution[74]. Apparently the Standing Committee of the NPC as a State organ does not have jurisdiction over the Party decisions. Nevertheless, it could be argued that by acting together with the State Council, the Party has in effect submitted itself to the jurisdiction of the Standing Committee in the particular instance. And therefore the Standing Committee can annul the decision if it appears to the Committee that such a decision has infringed a Constitutional or Statutory provision. These questions should not be disregarded as mere academic only. If the Chinese leaders' intention is to rebuild a functional legal system, each block has to be laid down properly in order to form a solid foundation. And hence these paradoxical problems of political power and State jurisdiction must be resolved.

In any event, even if it could be argued that the joint directive is, technically, not a violation of the Constitution since the latter does not explicity prohibit this[75], this 'irregularity' would better be abolished. Although the directive provides the short term benefit of efficient implementation of Party policies but this benefit is outweighed by the long term disadvantage of impeding the progress toward constitutionalism.

VI THE STATUS OF PARTY POLICY VIS-A-VIS THE FORMAL LEGAL CODES

Finally there is evidence that where there is a conflict between Party policy and existing laws, the former prevails. The recent nation-wide crackdown on crimes serves as a timely example that despite all constitutional appearances, the Party remains the ultimate holder of 'legislative' power. In fact, particular policies may be formulated with the specific aim of replacing existing laws.

According to a local journal which is generally reliable for its coverage of Chinese political developments[76], the crackdown campaign[77] officially began on August 6 1983. About 3,000 criminals had been arrested in Peking alone on this particular day. Sweeping arrests of criminals had since then taken place in different parts of the country[78].

The official justification for the crackdown is that criminal activities has reached an unbearable limit in the country and therefore harsh measures are necessary to restore social order and to protect the people[79]. Crimes are no longer viewed as a social problem. It is now a political question. Hence criminals are labelled as the enemies of the socialist system and that the crackdown is described as a class

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73 Article 89 of the Constitution. The State Council shall adopt administrative measures, enact administrative rules and regulations and issue decisions and orders in accordance with the Constitution and the Statutes.

74 Article 67(7) provides that the Standing Committee of the National People's Congress may annul those administrative rules and regulations, decisions or orders of the State Council that contravene the Constitution or the Statutes.

75 Such a kind of joint resolution is simply not mentioned in the Constitution.

76 Zheng Ming (in Chinese).

77 The official media never adopt this term 'campaign' to describe the attack on the criminals. But the circumstantial evidence, such as the rhetoric used, the participation of the masses, the existence of quota for execution, shows that it is really a campaign.

78 Zhou Huai Wai "Peking is undergoing a big clean up", (1983) 72 Zheng Ming 11.

79 According to Zheng Ming, same Party leaders have actually been attacked by some hooligan gangs while travelling. While the accuracy of this is not clear, generally speaking it is a trite point that serious crimes have increased since the open door policy pursued by the pragmatic leaders.
See generally (1983) 5 Politics and Law 132 (in Chinese).

struggle to attack these enemies[80].

The local journal Zheng Ming reported that the Party leaders were particularly alarmed at the increase in gangster activities which posed as a direct threat to social order[81]. To deal with this problem, Chinese authorities had come to the conclusion that new policies should be adopted to suppress the mounting criminal deeds. The leadership seemed also to have decided that this change of policy should be kept secret until the time was ripe for implementation. The attack was to be sudden[82]. The unpublished policy slogans formulated for the purpose of the crack down are 'to deal with the criminals in a swift, harsh and heavy manner'[83].

Once the crack down was in progress, the initial arrest of 3,000 in Peking was overshadowed by the mass rally organized on August 26[84]. The rally was held in a stadium in Peking. It seems to have been a mass trial where both questions of conviction and sentence were decided immediately by the court in the midst of a vociferous crowd[85]. During this particular trial, thirty alleged offenders, including murderers, gangsters, robbers, rapists and an attempted rapist, were given immediate capital punishment and the executions were carried out on the spot[86].

The anti-crime campaign is an on-going process, merging into the ideological purification campaign programmed by the Party[87]. Basically how a system deals with criminal activities is no doubt a matter of internal policy. And the sentencing of criminals is a question for the court to decide after considering the background of the convicted persons and the existing social conditions[88]. But it must nevertheless be done according to law.

China, has now a Criminal Code and a Code of Criminal Procedure to govern questions of criminal conduct and criminal trials. The guiding principle in the Criminal Law is clearly articulated in Article 1 of the Code. It is said that the Law adheres to the policy of 'combining punishment with leniency'. In addition, Article 57 states that 'When deciding the punishment of criminal elements, the sentence shall be imposed on the basis of the facts of the crime, the nature and circumstances of the crime and the degree of harm to society .....'. And it had been specifically pointed out that death penalty was to be used only on rare occasions[89].

On the other hand, the Criminal Procedure Law provides the accused with a number of procedural safeguards such as the time limits concerning the delivery of a copy of the indictment to him and for

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80 During the operation of the campaign, rhetoric became more political rather than legal in discussing the issue of crimes and social order. While previously Peng Zheng himself avoided using the political of dicotomy of enemies and people to analyse the status of criminals, this approach was dropped in the justification of the harsh measures taken in the campaign. The criminals are now described as new social dregs who are hostile to the socialist system and the leadership of the Party.

81 Zheng Ming, op cit 10. It was pointed that many of the hooligan gangs were armed and possessed explosives. Some were secret societies. But the official statement is that most of them are underground political organizations aiming at the overthrowing of the communist regime.

82 Lo Bing, 'The Robbing of Deng Xiaoping and the Massive Arrest', (1983) 72 Zheng Ming 9. It is pointed out that the planning of the campaign had really begun in February 1983 (in Chinese, own translation).

83 (從快，從重，從嚴) Hu Heng, 'The Massive arrest and the rule of Law', (1983) 72 Zheng Ming 15. See also, Editorial of Local newspaper, *Daily Express*, 25th Oct 1983.

84 Zheng Ming, op cit 7. This is the kind of mass trial used frequently in the Cultural Revolution.

85 Ibid 12.

86 Ibid 12.

87 Started in October 1983. A special committee was appointed by the Party Central to implement the policy of purging the Party of impure influences.

88 To look at the criminal as an individual and pass sentence accordingly is provided in the criminal code. And the Article, 'The principle of sentencing of over country' (1979) 9 Honqi 73 points out explicitly that under the existing codes, both questions of conviction and sentence must be considered objectively. The motive for the crime, the purpose of the act, and the actual consequences of the crime must be considered before passing sentence. But in the campaign, once a person is arrested for a certain crime, it seems that the elements discussed above would be presumed to his disadvantage and this is not the objective approach stipulated in the criminal code.

89 It is stated that 'China cannot abolish the death penalty yet, but it adheres to the principle of executing the least possible number of persons', (1980) 23 Beijing Review 21.

the delivery of subpoenas and notifications. This is something crucial for the accused in terms of preparing his defence[90].

In light of these statutory provisions, it seems that the execution of those criminals was illegal. There are legal limits to the proper punishment to be meted out to gangsters, murderers, rapists and robbers[91]. And the death penalty was permitted only in limited circumstances. Surprisingly the maximum penalty for hooligan activities was only 7 years' imprisonment[92]. In this regard, we can see that it was the Party policy and not the law, which served as a 'legal' basis for the crackdown. And the former may be formulated to contradict the laws because of political expediency.

VII PARTY POLICIES AND THE CONSTITUTION

It has been shown that State laws can be displaced by Party policies especially when a campaign is in motion. However, the development of the crackdown exposed a deeper question relating to the problem of constitutionalism. The problem was manifested in several resolutions made by the Standing Committee of the NPC. The resolutions were released on September 2, 1983. And there were three resolutions that concerned the present crackdown[93]. They are, first, the decision of the NPC Standing Committee on severely punishing criminals who gravely endanger public security. Secondly, the decision of the Standing Committee to amend the Criminal Procedure Code, which purports to shorten the time required for the delivery of the relevant documents to the accused. And thirdly, the decision to amend the Organic Law on People's Courts, which purports to allow provincial higher people's courts to approve death penalties in certain crimes, something which should have been done by the Supreme People's Court.

Nevertheless, it must be remembered that the mass trial had taken place on August 26, 1983. Thus the purported amendments are defective vis-a-vis the earlier executions. And such a defect is not cured by a 'retrospective' clause.

Moreover, as the Standing Committee is dealing with the basic laws which are made by the NPC itself, any amendments made thereto must proceed according to Article 67(3) of the new Constitution. It is provided that the Standing Committee may make partial supplements and amendments to statutes enacted by the NPC provided that they do not contravene the basic principles of these statutes.

Hence the amendments must be made within bounds. The power of the Standing Committee is not unfettered. It could be argued that the purported amendments, had been made ultra vires the Criminal Code and the Code on Criminal Procedure[93a]. The basic principles embodied therein could not be replaced under the pretext of making amendments.

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90 Article 110 and Article 131 of the Law on Criminal Procedure.

91 For the crime of murder, see Article 132; rapist, Article 139; robbery, Article 150.

92 Article 160: "whoever assembles a crowd to beat people, stir up fights and cause trouble, humiliate women or engage in other hooligan activities, undermining public order, when the circumstances are flagrant, shall be sentenced to not more than seven years of fixed term imprisonment, criminal detention, or control".

93 The NPC decision on Punishing Certain Criminals; Amendment to Law on Criminal Procedure; Amendments to Organic Law on People's Courts. See appendix.

93a A researcher at the Chinese Academy of Social Sciences suggests that six basic principles can be extracted from the Criminal Law. There are four that are relevant here. They are 'meting out punishment commensurate with the offence', 'protection of the rights of citizens' and 'revolutionary humanitarianism' and finally 'opposing the imputation of a crime solely to subjective factors or to the objective situation.' In addition, we may add 'combining punishment with leniency' as the basic principle (Article 1). It is argued that the amendments of the criminal codes are incompatible with them, particularly the basic principle.
On the other hand, the amendment to Article 110 of the law on Criminal Procedure contravenes Article 36 of that law as the former allows the determination of questions of evidence pre-trial and out of court. See appendix.
Chen Zhucheng, 'Brief Introduction to the Criminal Law', (1980) 23 Peking Review 17.
Similar arguments are advanced in an unpublished paper entitled 'Codification And Its Effect On the Pattern of Political Campaigns in the PRC' by the present author.

These changes could only be brought about by the NPC itself.

Apparently the amendments have been done under the auspices of the Party. The logical conclusion to be drawn is that where the Party finds it necessary, it could issue policy directives which may contravene the laws and even by-pass the Constitution. True that the Standing Committee is now armed with the power to supervise the implementation of the Constitution, but it is unclear whether any steps has been taken to exercise such power[94]. Perhaps there is some truth in saying that the NPC system is 'at best a legitimizing rubber stamp and a transmission belt' of the Party policies[95].

VIII THE STATUS OF THE PARTY AND CONSTITUTIONALISM

The above analysis shows that the general object of separating Party from the State has not been adhered to in the area of legislative work. Even after the promulgation of the basic laws and the new Constitution, the Party may directly encroach upon the legislative system. This conclusion inevitably leads to the question whether the Communist Party of China, being the Party in power, is bound by the Constitution at all.

Interestingly the new Constitution seems to suggest that the Communist Party is subject to the State Constitution. An explicit statement to this effect can be found in the Preamble of the new Constitution. It is stated that:

> This Constitution ..... is the fundamental law of the State and has supreme legal authority. The people of all nationalities, all State organs, the armed forces, all political parties and public organizations ..... on the country must take the Constitution as the basic norm of conduct, and they have the duty to uphold the dignity of the Constitution and ensure its implementation[96].

One author states that 'such a clear statement of constitutionalism is refreshing.'[97]

Although this is only a statement contained in the Preamble of the new Constitution, the significance of it should not be minimized. On the contrary, it is stated that the Preamble is that part of the Constitution which bears the highest authority. It actually contains the guiding spirit of the whole Constitution[98].

The statement contained in the Preamble is echoed in Article 5 of the Constitution, where it is provided that '..... All acts in violation of the Constitution must be looked into. No organization or individual may enjoy the privilege of being above the Constitution and the law.'

A more direct statement can be found in the new Party Constitution which is adopted on September 6, 1982[99]. In its Preamble, it is proclaimed that 'the Party must conduct its activities within the bounds set by the State Constitution and the laws. Furthermore Article 3 states specifically that Party members must conscientiously abide by the Party discipline and State Laws.'

In the Party journal Hongqi, a full discussion is devoted to the significance of the declaration that the Party must operate according to the State Constitution[100]. The author tries to justify that such a declaration should be implemented seriously. And three arguments are advanced in this regard.

First, to require the Party to function within the bounds of the Constitution and the law would

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94 In fact it is doubtful whether the supervising power does exist vis-a-vis the Party. It must be pointed out that Peng Zheng, who is chairman of the NPC, is only one of the Politburo members of the Communist Party. In a conflictual situation, the wish of the Party will apparently prevail over the claim of the NPC, which is, afterall a state organ under the leadership of the Party.

95 Weng, op cit 500.

96 *Constitution of the PRC* (Joint Publishing Co, 1982) 8.

97 Weng, op cit 493.

98 (1983) 4 Jurisprudence 12 (in Chinese, own translation). In this particular Article, the author is discussing the status of the Four Modernizations as mentioned in the Preamble; however, he says that the whole Preamble has a supreme status in the Constitution.

99 At the 12th Party Congress.

100 Zhang Hui, 'The Party must operate within the Scope of the Constitution and the Law' (1983) 4 Hongqi 36. See Albert Chen's Article. (note 32).

not hamper its leading role because the constitution and the law are actually legalized Party policies[101]. Secondly, the requirement would not bind the hands and feet of the Party as some had suggested[102]. And thirdly, the contention that the Party is bound by the Constitution is a logical extension of the fact that Party members are also ordinary citizens. And all citizens are under a duty to abide by the Constitution and the laws of the country[103]. This is closely linked with the concept of 'everyone is equal before the law.'[104]

These arguments are somewhat circular and paradoxical. And in light of the role played by the Party during the crackdown on crimes, it is doubtful how much of the budding principle of 'supremacy of the Constitution' is followed in practice.

A caveat should be made regarding the claim that Party members are to be treated as ordinary citizens under the new Constitution. It is common knowledge that Party members stand in a different position in society. Compared with this social norm, the recent recognition by the leaders that 'everyone is equal before the law' is a feeble assertion.

Party members are usually given leading positions in their respective units[105]. When a Party member has committed an act punishable by the law of the State, they are often dealt with according to Party discipline[106] which may often be a substitute for legal punishment[107]. There are numerous examples of this 'unconstitutional' practice[108]. There is no clear sign that it is declining. In fact until recently, it remains an unanswered question whether a Party member could be arrested before his Party membership is taken away[109]. Moreover, if the arrangement of 'segregated trials' according to social and political status'[110], as reported by Professor Hungdah Chiu, remains to be the standard pattern, the principle of 'everyone is equal before the law' would really be an empty slogan. The Party members are clearly above the law in practice.

Some tentative observations can be made concerning the constitutional requirement that the Party is bound by the Constitution and the related concept of 'everyone equal before the law'. First, these principles are mere projections of an ideal that remains to be achieved rather than a reflection of the reality. Secondly, it is possible to argue that these statements of principle do not intend to cover a political campaign situation where direct Party leadership is necessary. It is very likely that the Chinese leaders themselves are unable to reach an agreement on the problem of the relationship

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101 Ibid 38.
102 Ibid 38.
103 Ibid 36.
104 Article 5 of the 1982 Constitution. No individual is above the Constitution and the law (Para-phrase of the original Article).
105 This is naturally so as only social activists can become Party members. They are described as pioneers of the Chinese working class who possess socialist consciousness. (Article 2 of the Communist Party Constitution.)
106 See Chapter 7, (Article 38 – 42) on Party's discipline. See also Chapter 8 for the function and structure of the Party Disciplinary Committee, (the Communist Party Constitution.)
107 In reality the existence of the Party Disciplinary Committee poses a problem. The line between the Committee and the public security organ is rather unclear regarding the power to investigate.
Formally, the difference would be whether it is a case of violation of Party discipline or a case of violation of the criminal code. But as violation of law is also a violation of Party discipline, the difference would be blurred in reality.
108 For example, according to a report a Party Cadre who has violated both an administrative order issued by the State Council and the Criminal Code was only 'punished' by way of removal from his party position in the commune, *People's Daily*, 2nd Feb 1982.
See also *Reuter Dispatch*, 15th Dec reporting a case of violation of economic laws by a vice minister of the State Council. Obviously he was given an only warning by the Party. There was no report of prosecution. He merely made a public confession in the People's Daily. See also Hungdah Chiu's article, op cit 62.
109 *Questions and Answers About the Party's Organizational Work* (People Publication Society, 1983) Question 233, 270.
110 Hungdah Chiu states that: while the recently enacted criminal procedural law provides that everyone is equal before the law, it has been disclosed recently by a Vice-President of the Supreme People's Court that the jurisdiction of a people's court over an individual depends on the individual's status in the Chinese society: The basic people's courts shall exercise jurisdiction over common people; the intermediate people's courts over party cadres and "democratic elements" (ie, those persons who served as united front instruments of the PRC); and the higher people's court over senior party cadres in the minister ranks.

between the Party and the legal system. The leadership shall continue to find a proper balance between these two elements on a trial and error basis[111].

IX CONCLUSION

Constitutionalism has basically two aspects in the context of the Chinese system. It includes a proper separation of powers and functions between the Party and the State and the supremacy of the written Constitution. While the new Constitution recognises the importance of these two principles in a general manner, there are problem in their application to specific areas. The judges are still controlled by the Party Secretaries and Party policies still have a higher status than State laws. The crux of the problem for the development and growth of constitutionalism lies in the Party. It depends on how much the party is willing to concede in terms of direct control over the state organs. The new Constitution, although in many respects an improvement over its predecessors, fails to provide a final solution to this problem.

It is submitted that to say that the new Constitution has brought constitutionalism to the PRC and has uprooted the deep-seated mode of Party dominance is exaggerated optimism. Perhaps the commentators of the new Constitution have paid too much emphasis on the literal meaning of the provisions rather than analysing the provisions within the context of Chinese political reality. However it is hoped that a general recognition of the importance of constitutionalism by the new Constitution may gradually bring about the actual implementation of it. After all it is crucial to the national scheme of modernizations. The concept of constitutionalism is important to a more stable system of government and laws. Modernizations cannot be achieved if normal State function is constantly interfered by the ebb and flow of Party politics and power struggles.

111 The official statement is that China would develop a legal system that has unique and distinct Chinese features. Albert Chen is convinced that this could be done. But clearly, there is no consensus regarding what are distinct Chinese features. The trend seems to be that the political dimension would always be an integral part of the formal legal system.

APPENDIX

NPC Decision on Punishing Certain Criminals

Xinhua in Chinese 1517 gmt 2 Sep 83

Text, as transmitted, of "the decision of the NPC Standing Committee on severely punishing criminals who gravely endanger public security, approved at the second session of the sixth NPC Standing Committee on 2nd September 1983":

In order to safeguard public security, protect the people's lives and property and guarantee the progress of socialist construction, we deem it necessary to punish severely criminals who gravely endanger public security, and adopt the following decision:

(1) The following criminals who gravely endanger public security may be punished more heavily than the severest punishment currently stipulated under Criminals Law, and may be punishable by the death penalty:

(a) The ringleader of a criminal gang or anyone who engages in serious gangster activities with a lethal weapon or whose gangster activities are particularly dangerous;

(b) Anyone who commits intentional assault and battery and causes severe injury or death to another person in an absolutely vile way, or engages in violence and causes injury to policemen or citizens who report, expose and arrest criminals and stop criminal activities;

(c) The ringleader of a group engaging in abduction for purposes of trafficking in human beings or anyone who abducts in a particularly serious way;

(d) Anyone who illegally makes, or trades, transports or steals weapons, ammunition or explosives in a particularly serious way or with serious consequences;

(e) Anyone who organizes reactionary secret societies or sects and utilizes feudal superstitious beliefs to carry out counter-revolutionary activities and gravely endangers public security;

(f) Anyone who lures, houses or forces a female to engage in prostitution and whose case is particularly grave.

(2) Anyone who passes on methods of committing crimes and whose case is less serious will be sentenced to imprisonment for not more than five years. In a serious case, the offender will be sentenced to imprisonment for not less than five years, and in a particularly grave case, the offender will be sentenced to life imprisonment or death.

(3) After being made public, this decision applies to trials of aforesaid criminal cases.

Related articles and clauses of the criminal law (FE/6172/C/1)

Article 160

In vile cases, anyone who incites group fighting, creates disturbances, subjects women to indignities or carries out other gangster activities to disrupt public order will be sentenced to imprisonment for not more than seven years, detention or surveillance. The ringleader of a criminal gang will be sentenced to imprisonment for not less than seven years.

Article 134

Anyone who commits intentional assault and battery will be sentenced to detention or imprisonment for not more than three years. Whoever commits the aforesaid defence and causes severe injury to another person will be sentenced to imprisonment for not less than three years and no more than seven years; if he causes death to another person, he will be sentenced to life imprisonment or imprisonment for not less than seven years. Where separate provisions are laid down in the current law, such provisions will be followed.

Article 141

Anyone who engages in abduction for purposes of trafficking in human beings will be sentenced to imprisonment for not more than five years. In grave cases, the offender will be sentenced to imprisonment for not less than five years.

Article 112

The illegal making, trading and transporting of arms and ammunition or the theft in any form of guns and ammunition from state organs, police or militiamen will be punishable by fixed-term imprisonment of not more than seven years. In serious cases this will be punishable by fixed-term imprisonment of not less than seven years or life imprisonment.

Article 99

Those organizing and utilizing feudal superstitious believes, secret societies or sects to carry out counter-revolutionary activities will be sentenced to fixed-term imprisonment of not less than five years. In less serious cases they will be sentenced to fixed-term imprisonment, detention, surveillance or deprivation of political rights for not more than five years.

Article 140

Anyone who forces a female to engage in prostitution will be sentenced to imprisonment for not less than three years and no more than 10.

Article 169

Anyone who lures or houses a female and makes her engage in prostitution for the purpose of seeking profits will be sentenced to imprisonment for not more than five years, detention or surveillance. In grave cases the offender will be sentenced to imprisonment for not less than five years; concurrently a fine may be imposed or property confiscated.

Amendment to Law on Criminal Procedure

Xinhua in Chinese 1529 gmt 2 Sep 83

Text, as transmitted, of "decision of the NPC Standing Committee on the procedure to swiftly try criminals who seriously jeopardize public security adopted at the second session of the Standing Committee of the Sixth NPC on 2nd September 1983 (FE/6167/C/1):

In order swiftly and severely to punish criminals who seriously jeopardize public security and to safeguard the interests of the state and the people, it is decided that:

(1) Criminals involved in homicide, rape, robbery, explosions and other activities that seriously threaten public safety who warrant the death penalty should be tried swiftly if the major facts of the crime are clear, the evidence is conclusive and they have incurred great popular indignation. These cases shall not be restricted by the provisions in Article 110 of the Law on Criminal Procedure regarding time limits for the delivery of a copy of the indictment to the accused and for the delivery of subpoenas and notifications.

(2) The time limit for appeals by criminals listed in the foregoing section and for the requests for retrial by the people's procuratorates is changed to three days from 10 days as stipulated in Article 131 of the Law on Criminal Procedure.

Amendments to Organic Law on People's Courts

Xinhua in Chinese 1537 gmt 2 Sep 83

Text, as transmitted, of "the decision of the NPC Standing Committee on the revision of the 'Organic Law of the People's Courts of the PRC' approved on 2nd September 1983 (FE/6163/C/9):

The second session of the Sixth NPC Standing Committee has decided to make the following revisions to the "Organic Law of the People's Courts of the People's Republic of China":

(1) Article 2, clause 1, item 2 "special people's courts" shall be changed to "military courts and other special people's courts". Clause 3 – "The special courts include military courts, railway transport courts, water transport courts, forestry courts and other special courts" – shall be deleted.

(2) Article 4 – "The people's courts exercise their judicial authority independently and are subordinate only to the law," – shall be revised to read: "The people's courts exercise their judicial authority according to

law and are independent of intervention by administrative organizations, social bodies and individuals."

(3) Article 9 – "In handling initial trials, the people's courts shall apply the system whereby representatives of the masses participate as assessors in administering justice, except in simple civil cases or minor criminal cases or cases otherwise specified by law" – shall be deleted.

Article 10, clause 2 – "In handling initial trails, the people's courts shall form a collegiate bench of judges and assessors who are representatives of the masses, except in simple civil cases, minor criminal cases and cases otherwise specified by law," – shall be revised to: "In handling initial trials, the people's courts shall form a collegiate bench of judges or a collegiate bench of judges and assessors who are representatives of the masses; simple civil cases, minor criminal cases and cases otherwise specified by law may be tried by a judge alone."

(4) Article 13 – "cases involving the death penalty are to be handed down or approved by the Supreme People's Court. The procedure for reviewing cases involving the death penalty should be followed as prescribed in section III, chapter 4 of the Law on Criminal Procedure of the People's Republic of China" – shall be revised to: "Except for cases handed down by the Supreme People's Court, cases involving the death penalty shall be reported to the Supreme People's Court for approval. Whenever necessary, the Supreme People's Court may authorize the higher people's courts in provinces, autonomous regions and municipalities directly under central authority to exercise the power of approval in cases of murder, rape, robbery, use of explosives and other cases seriously endangering public security and social order which involve the death penalty."

(5) Article 17, clause 3 – "The judicial administration of the people's courts at various levels is to be administered by the judicial administrative organs" – shall be deleted.

(6) Article 19, clause 2 – "A basic-level people's court may set up a criminal court and civil court, with each to have a presiding judge and a deputy presiding judge" – shall be revised to: "Basic-level people's courts may set up criminal courts, civil courts or economic courts, with each to have a presiding judge and a deputy presiding judge."

(7) Article 22, clause 2 – "Render guidance to people's mediation committees and judicial assistants of people's communes" – shall be revised to: "render guidance to people's mediation committees". Clause 3 – "Administer justice within the limit of functions and powers authorized by higher judicial organs" – shall be deleted.

(8) Article 24, paragraph 2 – "An intermediate people's court shall set up a criminal court and a civil court and may also set up other courts as needed" – shall be revised to: "An intermediate people's court shall set up a criminal court, a civil court and an economic court and may also set up other courts as needed. Item 3 – "Intermediate people's courts of municipalities directly under the central government and such courts of provinces and autonomous regions shall establish economic courts" – shall be deleted.

(9) An additional paragraph will be added to Article 34 as item 2: "Judges of people's courts must have professional legal knowledge."

(10) Article 37, item 1 – "Local people's courts at various levels may be staffed with assistant judges according to the needs of their work, who shall be appointed or removed by judicial administration departments" – shall be revised to: "Local people's courts at various levels may be staffed with assistant judges according to the needs of their work, who shall be appointed or removed by the people's court at the same level."

(11) Article 42 – "The establishment, authorized size and structure of people's courts at various levels shall be separately stipulated by judicial administration organs" – shall be deleted.

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CRIME AND CRIMINAL PUNISHMENT IN THE PRC

by Amy Lo Sau Han

INTRODUCTION:

Legal developments in China have undergone very rapid and dramatic changes in recent years. Since the arrest of the Gang of Four in late 1976, there is a renewed interest among the leaders towards the question of legality and the glaring need for laws. For in a remarkable period of 30 years (1949–1979), China had lived in a legal vaccum in which major laws – apart from a few statutes on the crimes of counter-revolution and corruption[1] – were non-existent. At the nadir of these days, namely during the Cultural Revolution, the entire legal apparatus became the object of wanton attacks by the radicals while the people were subjected to arbitrary arrest, detention and political persecutions. However since 1978, China has embarked upon a series of steps, including the promulgation of major legislation[2] designed to revive and create a more orderly legal system in the country.

Among the laws passed in 1979 was the PRC's first comprehensive Criminal Code. (It was to take effect on January 1, 1980.) The adoption of the Code is a landmark in China's legal history as it defines for the first time punishable acts and the appropriate sanctions as well as the defences available to an accused. This paper will examine the reasons for the PRC's codifying the law and the aims and principles of her penal policy.

BACKGROUND TO THE CODE:

The Criminal Code was drawn up largely basing

1 These statutes include: the Act for Punishment of Counterrevolutionaries of 1951; the Act for Punishment of Corruption of 1952; the Arrest and Detention Act of 1954 and the Security Administration Punishment Act of 1957.

2 The NPC adopted in July 1979 six major legal codes: the Criminal Law; Law of Criminal Procedure; the Organic Law of Local People's Congresses and Local People's Courts; the Organic Law of People's Procuratorates; and the Law on Joint Ventures with Chinese and Foreign Investments.

on the lawmaking efforts of the 1950's.[3]

The promulgation of the PRC's first Constitution in 1954 inauguarated a new era in the country. There appeared a serious move toward the establishment of a formal legal system along Soviet lines. Efforts were made to draft criminal, civil and procedural codes that would provide proper and better guidance to the legal officials and the public.[4] The progress toward a stable legal order, however, ended abruptly with the Anti-Rightists Campaign (1957–58) which was launched as a counter-attack against strong criticisms of the Party during the Hundred Flowers Campaign. The full implementation of a legal system was denounced as it "would unduly curb the power of the Party and introduce bourgeois law and values".[5] The proposed penal and procedural laws were abandoned. The Cultural Revolution (now officially demarcated as 1966–1976) smothered whatever opportunities China had in positive legal developments. The entire legal apparatus (the police, procuracy and courts) came under heavy attack[6] while the purges of law enforcement officials were further intensified.[7] Indeed, those ten years were "the most regressive period of contemporary China's legal life".[8]

The single most important reason for the PRC's lack of codification in its 30-year history appeared to be Mao Zedong.[9] His anti-bureaucratic bias and preference for the mass line accounted much for the supremacy of the societal (informal) model of law over the jural (formal) model.[10] Mao considered law merely as a useful tool to political ends and it must be responsive to policy.[11] As a result, we find that a number of regulations had been promulgated by the PRC to aid the implementation of policy. For instance, the Land Reform Law and the Marriage Law were enacted in 1950 to change China's land and family system. Various measures and regulations were also adopted during the 1950's for modernization and industrialization.[12] But some of these rules were enforced at certain times while others were frequently altered, reflecting the changes in the Party policy.[13]

Mao also advocated that law enforcement was to aim at mobilizing mass support for the Party. His famous "mass line" theory consisted of the notion of "taking the ideas of the masses ..... (scattered and unsystematic ideas) and concentrating them ..... then going to the masses and propagating and explaining these ideas until the masses embrace them as their own, hold fast to them and translate them into action".[14a] When manifested in the area of law, the mass line policy led to the use of mediation in settling disputes, the practice of investigating and disposing of cases on the spot; the adjudication of criminals in mass meetings. By bringing the courts directly into contact with the people and by recruiting their direct participation in the administration of justice, the "mass line" not only served to strengthen the solidarity between the Party and the people but also

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3 Peng Chen, the then director of the Commission of Legal affairs of the NPC, (he is at present the chairman of the NPC Standing Committee), in his speech introducing the draft of the Criminal Law, said that there were more than 30 drafts before the Cultural Revolution and the present one was the 33rd draft of its kind.

4 For the judicial development of the PRC before the Cultural Revolution, see Jerome A. Cohen "The Criminal Process in the PRC, 1949-1963".

5 ibid at p 14

6 The procuracy which served as a significant check on the police powers was formally abolished by Art. 25 of the 1975 Constitution of the PRC.

7 eg. The President of the Supreme People's Court; the Chief Procurator and the First Deputy Minister of Public Security were all removed from their posts.

8 Leng Shao-Chuan, "Crime and Punishment in Post-Mao China", China Law Reporter (Spring 1982) pp 5-33 at p 5.

9 Leng Shao-Chuan, "The Role of Law in the People's Republic of China as reflecting Mao Tse-tung's influence" (1977) Journal of Criminal Law and Criminology Vol. 68 No. 3 pp 356-373.

10 ibid at p 357 According to Prof. Leng, the jural model stands for formal, elaborate and codified rules enforced by a centralized and institutionalized bureaucracy. The societal model, however, stresses socially approved norms and values, implemented by political socialization and enforced by social pressures. For a discussion of the two models of law in the PRC, see also Victor Li, "The Role of Law in Communist China", 44 China Quarterly pp 66-111.

11 ibid at p 357.

12 Leng supra note 9 at pp 366-367.

13 Cohen supra note 4 at p 49.

14a Lubman, "Form and Function in the Chinese Criminal Process", (1969) 69 Columbia Law Review pp 535-575 at p 537-8. The mass line is a fundamental Party principle of leadership. It originated in the Yenan days. According to Lubman, the policy accounted for much of the success of the Communists in their struggle for power and it also assisted the Party to carry out policies which it could not implement alone.

educated and indoctrinated the people in the desired objectives of the Party.[14b]

The prominence of the "mass line" approach to law produced significant effects.[15] To insure effectiveness in arousing the emotions of the people, formal rules of procedures[16] had to be simplified or at times even ignored. Secondly, the need for comprehensive substantive laws was dwarted, as "the public is not considered to require the guidance of legal standards to the same extent as those who administer the system".[17] They could receive the proper message through participation in political study sessions. Thirdly, written laws were thought to be undesirable because they would limit administrative flexibility. It was believed that "while laws were clearer and more precise after being written down, they also became more difficult to change".[18] This is particularly so in China where enormous political, economic and social changes were taking place continually. Therefore, as the mass line became entrenched in legal practice, the attempt toward the adoption of a formal legal system was rendered very difficult.

In fact, Mao himself was very skeptical about this. At the Eighth National Congress of the CCP held in September 1956, he warned of the evil of bureaucratism and the danger of becoming isolated from the masses.[19] The move had also met with the resistance of the cadres who held most of the positions in the public security and in the lower and middle-level judiciary.[20] They were untrained in law and had little commitment to legality. Nevertheless, they were appointed to legal work for their "ideological correctness".[21] As they controlled positions concerned with the day-to-day administration of justice, they exerted lasting impact on legal developments in the PRC.

Thus for 30 years, the PRC did not have a code of substantive or procedural law. The nation was ruled by the will of the Party which was liable to change from time to time. When determining whether a crime had been committed, there were no laws (apart from a few statutes on the crimes of counter-revolution and corruption) for the officials to follow. They had to seek guidance chiefly from Party resolutions and orders.[22] As for the people, they did not have a clear idea as to what acts were punishable and how they could defend themselves, for it was believed that customary notions of right and wrong combined with mass education in certain necessary cases sufficed.[23]

CODIFICATION: REASONS, AIMS AND OBJECTIVES:

The impetus to codification stemmed mainly from the Four Modernizations. The Post-Mao leadership had clearly recognized that the creation and strengthening of the legal system is absolutely essential to modernization. There was an urgent need to end past lawlessness. In an article published in Renmin Ribao, Han Yu Tung, deputy director of the Institute of Law of the Academy of Social Sciences, criticized the condition in the PRC as that "Badly needed laws were not drawn up; regulations in need of revision were not revised." She argued that the PRC had entered a new period of development in which it was necessary to strengthen the legal system. For that purpose, she urged that "a start must be made with wide-ranging legislative work ..... and criminal and civil laws must be enacted – and similarly for laws regulating economic activities".[24]

That the Criminal Law was one of the first laws to be adopted by the NPC in 1979 was no mere coincidence. The nation was demoralized by the

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14b ibid at p 357

15 Throughout the Maoist reign, the mass line approach to law was emphasized. Even in the mid-1950's when the PRC was beginning to make progress towards a more stable judicial system, the legal cadres were reminded of the need to apply the mass line to legal work and of the subservience of law to policy. On this point, see Lubman pp 545-546.

16 Formal rules of procedures here referred to those regulations made in 1954, see Cohen p 11.

17 Cohen supra note 4 at p 23.

18 Victor Li supra note 10 at p 89.

19 Leng supra note 9 at p 358.

20 Victor Li supra note 10 at p 83.

21 ibid.

22 "Official doctrine states that in the absence of express proscriptions, the 'relevant resolutions, decisions, orders, instructions and policies of the Party and the Government are ..... the basis for determining whether a crime has been committed". see Cohen supra note 4 at p 22.

23 ibid at p 23.

24 Renmin Ribao (RMRB) March 16, 1978 at p 3.

experience of the Anti-Rightists Movement, the Cultural Revolution and the days of the Gang of Four during which serious breaches of human rights occurred. For example, some 111,000 persons labelled as "rightists" had been detained since 1958 and they were only released in 1978.[25] There were also reports that many local cadres "arrest people at pleasure, tie them up or hang them up and torture them to extort confessions. Others are corrupt and accept bribes ..... There are some corners of the country where there is not a trace of legality".[26] In another article produced in the Renmin Ribao, the author wrote that, "As there is no unified criminal law, lawlessness has become universal ..... The concept of a legal system has become very shadowy indeed among both the cadres and the masses ..... We do not believe that law is almighty, but we do not adhere to a sort of nihilism".[27] A further cause of alarm was that a "crisis of faith" – marked by ideological confusion, loss of confidence and cynicism in the regime[28] – was emerging in the country. All these clearly militated against modernization.

There was a pressing need to develop a more rational and stable legal order. As Professor Cohen wrote, "The current leaders are seeking to meet this demand for greater personal security because they realize that it is essential to restore the morale, enthusiasm and productivity of the articulate segments of the nation if they are to fulfil their ambition to make China a modern, powerful industrial state. So long as fear of arbitrary action persists ..... one cannot expect officials to take bold initiatives, scientists to innovate ....."[29] Yen Chien-ying, the then Chairman of the Standing Committee of the NPC, stated that China must fully develop "socialist legality" in order to liberate the "socialist activism of all the people".[30]

Steps to end past injustices were first taken in the 1978 Constitution in which many individual rights, contained in the 1954 Constitution but omitted in the 1975 Constitution, were revived. For instance, under Article 41, an accused has the right to defence and to an open trial. By Article 43, the procuracy, which served as a significant check on the public security, was reinstituted. Article 47, in addition, states that before making an arrest, the police has to have the approval of the judiciary or the procuracy.

The enactment of the Criminal Code was expected to provide further protection to the people, because now there would be a law to govern what acts would attract criminal sanction, what the defences available to the accused are and what laws the legal officials have to apply in their work. How far this is achieved in practice will be examined later. But some provisions are obviously enacted to reassure the people of the regime's sincerity to prevent a recurrence of the political persecutions of the past. The Criminal Code, for example, narrows the definition of a counterrevolutionary by stating that such a person must have committed some action against the "dictatorship of the proletariat and the socialist system", not just the harbouring of damaging thoughts.[31] It also prohibits the extortion of confessions through torture and the gathering together of a crowd for "beating, smashing and looting"[32] (the term for red-guard abuses). There are also penalties covering false charges, framing up, perjury, unlawful incarceration and illegal searches or entries.[33]

That there is a concern to provide a more secure environment to the people is undoubted as their faith in the regime is indispensable to modernization. However, it would be unsafe to treat the codification as evidence of the PRC's commitment to the 'rule of law' similar to the Western types of liberalism. The attitude towards law remains distinctly Communist –

25 New York Times, June 6, 1978 at p 1.
26 China News Analysis, "Law and Party Discipline", No. 1144 Dec 22, 1978 at pp 4-5.
27 RMRB Aug. 8, 1978 at p 1.
28 For a discussion on the "Crisis of Faith" see Jan S. Prybyla, "The Hundred Flowers of Discontent", Current History Vol. 80, 1981 p 254.
29 Cohen, "China's Changing Constitution", China Quarterly Vol. 76 (Dec. 1978) pp 764-841 at p. 840. Prof. Hungdah Chiu also holds a similar view as Prof. Cohen, see "China's New Legal System", (1980) Current History Vol. 79 at p 29.
30 Cohen, "Will China Have a Formal Legal System", American Bar Association Journal Vol. 64 (Oct. 1978).
31 Art. 90 Criminal Code of the PRC (1980) c.f. Art. 2 Act of the PRC for Punishment of Counterrevolution (1951).
32 Art. 135-137 Criminal Code.
33 ibid Arts. 138, 143 and 144.

that is, law is a tool of the Government for disciplining the people and making them a "pliable instrument for attaining the objectives of the state".[34] In this case, law is conceived of as an important tool in "consolidating China's socialist system and safeguarding the progress of the Four Modernizations".[35]

THE DEFINITION OF CRIMINAL CONDUCT:

A major criticism about the lack of a Criminal Code is that it leaves ample room for arbitrary decisions. And even where legislation did exist[36], it was usually drafted in such vague and ambiguous terms that it amounted to no more than a "broad statement of purpose and direction" so that the officials were left free to do as they wished.[37] How far then does the 1980 Code adequately define criminal acts? Are the public given sufficient warning that certain acts are criminal? What restrictions are placed on the law-enforcement officials to decide whether a given act is criminal?[38]

Article 10 defines what constitutes criminal conduct. It states that, "All acts that endanger the sovereignty and territorial integrity of the state, endanger the system of the dictatorship of the proletariat, undermine the socialist revolution and socialist construction, undermine social order, violate property owned by the whole people or property collectively owned by the labouring masses, violate citizen's lawful privately-owned property, infringe upon citizen's rights of the person, democratic rights and other rights and other acts that endanger society, are crimes if according to law they should be criminally punished; but if the circumstances are clearly minor and the harm is not great, an act shall not be deemed a crime".[39]

As seen from Chinese jurists commentaries, an offence must have three basic characteristics.[40] First, it must be an act that endangers society. A criminal act is required for no one can be punished merely on his thoughts alone.[41] The social danger of an act is the "most essential characteristic of a crime". Second, it must be an act that violates the criminal law. Only an act that endangers society seriously enough constitutes an offence, for a socially dangerous act may only violate civil law or administrative regulation.[42] Third, a crime is an act that is punishable by law. A socially dangerous act shall not constitute an offence for it may be committed negligently or without intention.[43]

The specific provisions of the Code stipulate eight types of offences and their punishments. They are: (1) counterrevolution offences; (2) offences endangering public security; (3) offences against the socialist economic order; (4) offences infringing upon the personal and democratic rights of citizens; (5) offences of encroachment on property; (6) offences against public order; (7) offences against marriage and the family; and (8) malfeasance.[44]

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34 Cohen supra note 4 at p 69.

35 Chinese Law and Government – Lectures on the Criminal Law, Summer 1980/Vol. XIV No. 2 at p 5. Art. 2 of the Criminal Code also appears to confirm that the task of the law is to protect first of all, the socialist order and next, the people's personal rights. For the importance of law to the Four Modernizations, see also Faxue Yanjiu, "Criticizing Legal Nihilism and Stepping Up Research in Law" 1979 No. 2 p 28; "Democracy and Legal System – Important Guarantees for Realizing the Four Modernizations", 1979 No. 3 p 37.

36 Though the PRC had no comprehensive civil and criminal codes before 1980, there were a variety of laws passed, particularly in the 1950's. However, the only important criminal legislation was the Act for Punishment of Counterrevolution of 1951. The rest were mainly statutes concerning administrative sanctions eg. SAPA of 1957; the law on Rehabilitation Through Labor (1957).

37 Li supra note 10 at p 85.

38 These questions were in fact raised by Prof. Cohen in relation to the 1957 proposed draft of the Criminal Law. See Cohen supra note 4 at p 297.

39 Translation of the Criminal Law is taken from 73 Journal of Criminal Law and Criminology 138-237 (1982) by Cohen, Gelatt and Li.

40 See Lectures on the Criminal Law supra note 35 pp 22-25; Cao Zidang, "Questions and Answers on the Criminal Law", Beijing Review, June 9, 1980 pp19-20; Fan Fenglin, "On Fundamental Problems of the Characterization of Crimes", Faxue Yanjiu, No 4, 1979 pp 29-33, 41.

41 Considerable doubt was raised as to whether speech can amount to a criminal act under Art. 102(2): the offence of counterrevolutionary propaganda.

42 Beijing Review supra note 40 at p19.

43 ibid at p 20. Note that the Criminal Code adopts many Western concepts like forseeability, causation in the determination of guilt. (Arts. 11-13) A number of defences, for instance, insanity, infancy etc are also introduced. (Arts. 14-18)

44 Arts. 90-192, Chapters I-VIII, Part II.

Although the Criminal Law states the criteria for assessing criminality and makes more specific the types of acts subject to criminal sanctions, considerable problems and inadequacies exist. In the discussion that follows, it will be seen that the general definition of crime is equivocal and for certain offences specifically defined, particularly political offences, there are doubts as to their exact ambit. Moreover, for acts which are not considered criminal, they may be covered by other administrative provisions which are very wide and ambiguous.

THE CONCEPT OF 'SOCIAL DANGER' OF A GIVEN ACT:

One vital consideration affecting the decision as to whether a person's conduct deserves criminal punishment is the social danger of his act which is manifested in the nature of the act and the harm caused as a result. Article 10 stipulates that, "..... if the circumstances (of the case) are clearly minor and the harm is not great, an act shall not be deemed a crime." The definition is far from clear. How great a harm must be done to society before it is considered to be sufficiently serious as to warrant criminal punishment? In what terms is harm to be measured?[45] These are nowhere defined in the Criminal Code.

Another problem is that the concept is highly variable. Whether an offender will be pursued for criminal responsibility depends very much upon timing – that is, the prevailing Party policy.[46] This is understandable for the criminal process, being the regime's principal instrument for inducing compliance by the populace, has always faithfully reflected the leadership's changing attitudes towards social control and coercion.[47]

"Timing" is crucial as to whether given conduct will be treated as criminal.[48] This is especially obvious in counterrevolution crimes. During 1978–79, Beijing had seemed to be tolerating freer expressions of opinion and the agitation for democracy. As the movement was gaining momentum, the regime resumed the policy of repression. Many of the critics[49] were sent to rehabilitation camps while some like Wei Jingsheng[50] were convicted as counter-revolutionaries and sent to reform through labor.

"Timing" is also important in deciding the type of sanction and process – that is, criminal or administrative – to be used in relation to a given act.[51] For example, a cadre who accepted bribes might normally be demoted or expelled from office. However, if he were caught during the 1982 Campaign against Economic Crimes, he might be convicted of accepting bribes under Article 185 and sentenced to imprisonment or even to death for embezzlement (Article 155).

The heavy emphasis placed on the social danger of a given act and its highly variable character introduces an element of uncertainty to the application of China's penal laws. The call for adapting the law to the political situation of the country,[52] as in the recent law-and-order campaign,[53] simply reflects a continuation of the past practice of making Party policy paramount in the administration of justice.

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45 For an illustration of the difficulty in deciding whether a person's act is sufficiently serious as deserving criminal punishment, see Eliasoph and Grueneberg, "Law on Display in China", (1981) China Quarterly pp 669-685 at pp 674-677.

46 Cohen, "Reflections on the Criminal Process in China", Vol. 67 (1977) Journal of Criminal Law and Criminology pp 323-355 at p 331.

47 Idem.

48 Idem.

49 eg. Mr Liu Qing, an editor of the April 5 Forum (an underground journal) was arrested and sent to rehabilitation camp for publishing a tape-recorded transcript of Wei Jingsheng's trial and selling it at Democracy Wall.

50 Wei was the most prominent and vocal leader of the PRC's democratic movement. He urged the Chinese leaders to add a fifth modernisation, 'democracy', to the list of Four Modernisations. He was arrested in March 1979 and subsequently was charged under the Act for Punishment of Counterrevolution (1951) and convicted of supplying military secrets to an enemy and distributing reactionary materials inciting the overthrow of the leadership.

51 Cohen supra note 46 at p 331. See post pp 24-27.

52 Several writers in their communications to Minzhu Yu Fazhi agreed that to maintain the dignity of law, it should never again be dictated by the "requirements of circumstances" or be "blown in the direction of the wind", see Minzhu Yu Fazhi, No. 2, 1980 p 38 and No. 1, 1980 p 48. c.f. Wang Chuangsheng, "On the Application of Penalty and its Adapting to the Political Situation", Faxue Yanjiu, No. 6, 1981 p 1.

53 On the recent crackdown on crimes, see post pp 42-46.

COUNTERREVOLUTION CRIMES (Articles 90–104):

Political offences were drafted in very broad and ambiguous terms in the 1951 Act of the PRC for Punishment of Counterrevolution.[54] The scope of counterrevolution offences has been slightly narrowed under the Criminal Code but certain provisions still remain vague.

Article 90 stipulates that counterrevolution crimes must be committed with the intent of "overthrowing the political power of the dictatorship of the proletariat and the socialist system." It is pointed out that the term "counterrevolutionary" had been over-extended during the Cultural Revolution to cover other criminal acts as "counterrevolutionary rape", "counterrevolutionary theft".[55] However, under the Criminal Code, certain conduct such as the theft of public property can still be merged with the counterrevolution crime under Article 100 by inferring the requisite intent from the act.[56]

Article 90 also narrows the definition of a counterrevolutionary by stating that he must have committed some overt act; the harbouring of deviant thoughts is not a crime.[57] The trial of Wei Jingsheng led to queries as to the possible revival of "ideological offence" in the PRC. (Though Wei was charged under Article 10(3) of the 1951 Act, the case can be regarded as a pre-view of how counterrevolution crimes will be treated under the Code.) Wei was accused of having written "reactionary" articles inciting the overthrow of the dictatorship of the proletariat.[58] The case revealed the difficulty as to where the line should be drawn between counterrevolutionary propaganda and the permissible exercise of the freedom of speech conferred by Article 45 of the 1978 Constitution.[59] A further question is whether his writings or words by themselves can be regarded as a sufficient counterrevolutionary act for the purposes of Article 90. Or is some more concrete action necessary? Article 102 of the Criminal Code seems, in the light of Wei's trial, to continue the idea of ideological offences and thus opens a loophole for further persecutions of political deviants.

THE DOCTRINE OF ANALOGY (Article 79):

The Criminal Code does not provide an exhaustive definition of criminal conduct. Instead, it contains the traditional catch-all provision of analogy (Article 79).[60] Its retention adds more difficulty in defining the kinds of act that may be deemed criminal.

The preservation of the doctrine is based on the ground that the present law cannot possibly include all types of criminal acts which may appear or are appearing. As the country is in a new period of development and the situation keeps changing, it is very likely that an offence may occur about which there are no explicit stipulations in law, hence the doctrine is necessary.[61] But to prevent the miscarriage of justice, any conviction based on the use of analogy would require the approval of the Supreme People's Court.

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54 For an interesting comment on the poor drafting of pre-Code legislations of the PRC, see Prof. Li supra note 10 at pp 85-86.

55 Lectures on the Criminal Law supra note 35 at p 43.

56 Karl P. Herbst, Book Review of Political Imprisonment in the PRC, Amnesty International, Review of Socialist Law, Dec 1981 at p 461.

57 c.f. Art. 2 of the 1951 Act, it states that, "All counterrevolutionary criminals whose goal is to overthrow the people's democratic regime or to undermine the undertaking of the people's democracy shall be punished in accordance with this Act."

58 Fox Butterfield, "Leading Chinese Dissident Gets 15-Year Prison Term", New York Times, Oct 17, 1979 at A3; see also Hungdah Chiu, "Structural Changes in the Organization and Operation of China's Criminal Justice System", (1981) Review of Socialist Law pp 62-5. Translated excerpts of Wei's trial transcript is in New York Times, Nov 15, 1979 at A22.

59 Art. 45 of the 1978 Constitution provides that, "Citizens enjoy freedom of speech, correspondence, the press, assembly, association..... and have the right to 'speak out freely, air their views fully, hold great debates and write big-character posters' ". Note the "Sida" were deleted from Art. 45 in 1980.

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

61 The Chinese jurists differ in opinion as to whether the principle should ultimately be abolished. See, Li Youji, "On the Stipulation and Analogy of Offences and Penalties", Faxue Yanjiu No. 5, 1980 pp 19-25; Zhou Mi, "Should Offences and Penalties be Stipulated or Analogized", Faxue Yanjiu No. 5, 1980 pp 25-29.

The inherent weakness of the doctrine is that it can become a potential ground for manipulation and abuse, for the comparison of a given act to the provisions of the law always involves the danger of subjective and arbitrary judgment. In addition, there is the criticism that it is unfair to punish a person for certain acts for which the law does not expressly prohibit. The fact that the Soviet Union had abolished the doctrine in 1958 seems to add weight to these criticisms.[62] But, on the other hand, it can be said that the tighter control of the doctrine (ie. the requirement of approval of the Supreme People's Court) is an improvement over Article 16 of the 1951 Act for Punishment of Counterrevolution which permitted an unfettered admission of analogy.[63]

In the absence of any reported judgments, it is unclear how the principle is applied in practice. Perhaps, a fair comment of this doctrine is contained in this statement. "What (people may) too readily inclined to assume is ..... that the prohibition of analogy is itself capable of maintaining the safeguards of civil liberty ..... Even where statutes are prescribed, there is always the need of an interpretation, in such case, a considerable margin of uncertainty is and will always be inevitable ..... The fate of civil liberty depends on the men who have to administer criminal justice much more than on this or any other legal formula."[64] In view of the PRC's past legal developments and the recent law-and-order campaign, it seems that concern is justified on this score.

THE PROBLEM OF ADMINISTRATIVE-CRIMINAL DISTINCTION:

Despite the promulgation of a comprehensive Criminal Code, the PRC has retained a parallel set of non-criminal laws and sanctions. In the pre-Code days, these statutes empowered the public security to incarcerate many people without trials or judicial review, causing appalling breaches of human rights.[65]

On November 29, 1979 the Standing Committee of the NPC declared that all laws and decrees enacted since 1949 remain effective if they do not contravene the Constitution and the new laws adopted at the Fifth NPC.[66] Two important laws imposing administrative sanctions therefore remain effective. They are: the Security Administrative Punishment Act (SAPA) of 1957 and the Decision on Rehabilitation Through Labor of 1957. Article 32 of the Criminal Code was invoked to justify the continuance of these two pieces of legislation.[67]

SAPA authorizes the public security to issue warnings, impose a modest fine or up to 15 days of detention upon those whose misconduct disrupts public order and yet "does not warrant criminal sanctions."[68] Like the Criminal Code, this Act includes the doctrine of analogy, empowering the police to impose sanctions not specified in SAPA "by comparison with the most similar acts enumerated in the provisions of this Act" (Article 31). The decisions of the public security applying this Act are not subject to judicial review.

The education-through-labor management committee (notably comprising the public security, labor department and civil administrative organs) can send a variety of people to rehabilitation camps to work and to re-educate themselves.[69] This often means confinement in a labor camp in conditions that

62 Harold J. Berman, "The Dilemma of Soviet Law Reform", Vol. 76 (1963) Harvard Law Review pp 929-951 at p 936.

63 Art. 16 stated that, "Those who, with a counter-revolutionary purpose, commit crimes not covered by the provisions of this Act may be given punishments prescribed for crimes enumerated in this Act which are comparable to the crimes committed."

64 H. Mannheim, "Criminal Justice and Social Reconstruction", (London, 1946) at pp 210-211; 212-213. Excerpt is taken from Cohen supra note 4 at pp 340-341.

65 Political Imprisonment in the PRC (An Amnesty International Report) 1978. It contains a detailed analysis of the human rights violations in the PRC.

66 Beijing Review, Dec 7, 1979 p 3.

67 Art. 32 provides that, "Where the circumstances of a person's crime are minor and do not require sentencing to punishment, an exemption from criminal sanctions may be granted him, but he may, according to the different circumstances of each case.....be subjected to administrative sanctions by the competent department", see RMRB Nov 27, 1979 at p 1.

68 Arts. 2, 3 SAPA, see Cohen supra note 4 at p 205.

69 These people include, briefly, minor counter-revolutionaries and reactionaries; persons who do not engaged in proper employment; persons who did not obey work assignment or job transfers. For the exact categories, ref. Art. 1 of the Decision Concerning Rehabilitation Through Labor, see Cohen supra note 4 at p 249.

are virtually indistinguishable from that of criminal penalty of "reform through labor".[70] The term was originally unspecified and is now expressly limited to 3 years and may possibly be extended for another year.[71] This however, is not new. There were indications that the time limit was adopted in the early 1960's. But unfortunately, this was not always observed and the 1978 release of some 111,000 "rightists" who had been detained since 1958 amply supports this.[72] It remains to be seen whether the time limit will be honoured. But for those escapees from the rehabilitation camps, they will have to stay on indefinitely even though their terms have expired.[73] And again, the decisions of these administrative organs are not subject to judicial scrutiny, though they are said to be subject to the Procuracy's supervision, the extent of which remains unclear.[74]

The continuance of these legislation bears important implications on the position of an offender. They closely resemble the Criminal Code and govern conduct which, but for their "minor" degree of social danger, would have been dealt with by the formal criminal process. As the public security is normally the first to be called when a case arises, naturally, it will do the filtering job to decide whether the offender shall be dealt with by the administrative or criminal process. The Criminal Law has provided the guidelines to be followed when determining whether an act should be deemed a crime or not. But as discussed above, those stipulations are quite broad and in some cases imprecise (eg. counterrevolution crimes) so that they do little to limit decision-making. The affirmation of these laws empowering the public security to impose administrative sanctions hence enables it to continue to exercise a vast amount of discretion, for they are not only wide in scope, but also lack judicial review so that a person subject to these sanctions will be deprived of the procedural safeguards conferred by the Criminal Procedural Law. This could well mean the loss of the right to counsel, to trial or to appeal. This is very disturbing when one notes the serious punishments attached to these laws, especially with Rehabilitation Through Labor. A loophole for arbitrariness has clearly been retained. Indeed, it offers a very tempting method to the public security to dispose of political deviants without any trial and thus evade the embarrassment as that caused by Wei Jingsheng's trial. Reports have in fact indicated that the Chinese authorities have used these administrative measures to detain thousands of people, including dissidents, vagrants and those merely unemployed in labor camps.[75]

PRINCIPLES AND CRITERIA OF SENTENCING:

Article 57 of the Criminal Code provides that in passing sentence, the judge shall base his decision on due consideration of the facts of the crime, the nature and circumstances of the crime and the degree of harm to society, in accordance with the relevant provisions of the Law.

EFFECT OF "TIMING":

As pointed out earlier, those factors stipulated in Article 57 are subject to the overriding effect of "timing" so that for the same act, the accused may be punished differently with changes in Party policy.[76]

In the days immediately following the enactment of the Code, the PRC leaders had encouraged greater leniency toward the treatment of criminals. It was said that penal policy should aim at "punish(ing) the few and reform(ing) the majority."[77] Even for those guilty of "very heinous" crimes – counterrevolution, murder, rape, robbery, sabotage and large-scale embezzlement (Articles 103, 106, 111, 132, 139 and 150) – the sentence of death with a 2-years' reprieve was to be preferred.

But in face of the rising tide of violent crimes,

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70 Cohen supra note 46 at p 331.
71 Beijing Review, April 14, 1980 p 5.
72 China News Analysis, No. 1180 May 9, 1980 at p 3, see ante footnote 25.
73 RMRB June 11, 1981 at p 1.
74 Guangming Ribao Dec 9, 1979 at p 3.
75 Fox Butterfield, "Hundreds of Thousands Toil in Chinese Labor Camps", New York Times, January 3, 1981 pp 1,4. It was also reported by Jay Matthews that an editor of an underground magazine committed suicide by throwing himself under a train before he and other activists were about to be sent to a labor camp. See Leng, supra note 8 at p 28 and also footnote 109.
76 Cohen supra note 46 at p 331.
77 Cao Zidan, "Questions and Answers on China's Criminal Law," Beijing Review, June 9, 1980 pp 18-23.

the PRC reversed the entire trend of liberalization. The death penalty, for instance, was frequently meted out and was extended to cover a wide variety of crimes.[78] These drastic changes plainly reflect the dynamic nature of the PRC's legal policies. They also show that, even with the enactment of the Code, the fate of an accused largely depends upon the prevailing Party policy.

THE ACCUSED'S ATTITUDE:

An accused's attitude towards his conduct and the degree of his repentance are also relevant to sentencing. Unlike the West, the PRC attaches an unusually great emphasis on the maxim, "Leniency to those who confess and severity to those who resist." Though the principle is "not formally incorporated into the Criminal Law ..... its spirit appears to run through the entire Code."[79] For instance, a criminal who demonstrates "true repentance" may have his sentence reduced or may be granted parole (Articles 71 and 73). Another situation that can result in a reduced punishment is voluntary surrender (Article 63). In the case of a criminal sentenced to a suspended death penalty, he may have it commuted to life imprisonment if he truly repents during the 2 years period (Article 46). The policy was also invoked in the recent Campaign against Economic Crimes. Offenders were given a grace period to confess their crimes and it was also announced that those who failed to do so would be severely punished according to the amended provisions of the Criminal Code.[80]

Vehement emphasis on prompt confessions and repentance actually denies the defendant a meaningful opportunity to defend himself. It creates an environment that discourages an accused from challenging the evidence produced by the prosecution, for if he does not confess he will run the risk of suffering increased punishment as one who resists recognizing his guilt and beginning his self-reform.[81] Appeals against convictions are equally unthinkable as they give the impression that the defendants are not sincerely reflecting on their misdeeds. Hence, even today, most trials are mainly cases concerning mitigation of sentence rather than the challenging of conviction.

Sadly in the past, this policy had also led to the conviction of many people basing on their false confessions.[82] This is hardly surprising to a suspect who was afforded little pre-trial protections, for this might appear to be an easy way out from prolonged detention, interrogation and other psychological pressures. To counter the adverse effects of this policy, law enforcement officials are urged to act in strict accordance with the law and that stress should be placed on hard evidence.[83] They are also admonished to doubt the defendant's statement, even when he has confessed and should always verify his statement through investigation.[84] At the same time, extortions of confessions by torture and use of threat, enticement, deceit or any other illegal means are fobidden under Article 32 of the Criminal Procedure Law. Time limits have also been set for pre-trial detention for the purpose of investigation.[85] However, an accompanying note of caution is that "in practice, the shortage of trained personnel and the persistence of negative and erroneous views about the law have hampered the full implementation of the provisions of the Criminal Code."[86]

CLASS STATUS OF THE ACCUSED:

The requirement of taking law as the criterion in imposing sentence represents a sharp departure from the reprehensible policy of punishing a person on his class background. In the Maoist days, the class background of an accused used to be a decisive

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78 For a detail account of recent legal developments in the PRC, see Leng supra note 8 at pp 15-33. See also discussion post pp 42-46.

79 ibid at p 12.

80 RMRB March 10, 1982; March 24, 1982.

81 Cohen supra note 4 at p 50.

82 Cohen supra note 46 at p 341; see also footnote 101 therein.

83 Art. 4 Criminal Procedure Law provides that, "In conducting criminal procedure, the people's courts, the people's procuracies and the public security organs must rely on the masses and must take facts as their basis and law as their criterion."

84 Ming Shan, "On the Correct Handling of the Confession of the Accused", Faxue Yanjiu, 1982 No. 1 pp 19-26.

85 For a discussion of the procedural protections afforded to an accused, see Leng, "Criminal Justice in Post-Mao China: Some Preliminary Observations", China Quarterly, Sept 1981 pp 440-469 at pp 449-451.

86 ibid at p 450.

factor in the determination of guilt and the sanctions imposed. If an accused had a bad class origin[87] he was likely to receive a more severe punishment for a given offence than a person with a good social status. What is more objectionable is that this form of stigmatization is hereditary so that future generations are affected.[88] This kind of prejudicial treatment hardly accords with the universally acknowledged notion that everyone should be equal before the law.

The post-Mao leadership has attempted to end this unfair policy and the emphasis of acting in accordance with law is evidence of this change. In addition, Article 4 of the Criminal Procedure Law states that all citizens are equal before the law. In Hongqi, an author had stressed that the "criterion for measuring the penalty for a criminal ..... is not determined by whether his class element is good or bad, whether his years of revolutionary experience are long or short, or whether his work position is high or low."[89] The 1982 Constitution has also codified the concept of equality before the law.[90] The de-emphasis[91] of treating a person on his class background is truly a significant and praiseworthy advance in the administration of justice in the PRC.

Yet, regarding the Party members and cadres, it is less clear whether equality before the law has been fully realised. This group of people were not usually subject to normal judicial process and if they were, they usually received less severe or no punishment at all. Frequently, they were only subject to internal disciplinary sanctions ranging from warning to expulsion.

In an address delivered at the Fifth NPC, Yen Chien-ying had spoken of the problem of corrupt practices like "the pursuit of privilege, 'backdoor dealings', and suppression of democratic rights" He pointed out that nobody is above the law and "the Party and government must take resolute and effective measures to rectify them."[92] Despite his speech, articles appearing in the press indicated that favouritism was rampant and that many cadres guilty of crimes had gone unpunished and many ordinary Chinese had expressed cynicism about the special privileges enjoyed by the officials.[93]

In the recent law-and-order campaign, the Chinese authorities had set about to cope with this problem. For example, a director of the national fuel company of a northeastern city was reported to have been executed for embezzlement.[94] The recent execution of the grandson of Marshall Zhu De – the founder of China's Red Army – clearly shown the leadership's determination to put an end to favouritism.[95] These are very positive and encouraging signs of the PRC's attempt to achieve equality before the law. However, the continued reports of vengeance and retaliation by cadres toward expositions of their faults and errors should remind us that resentment remains strong against any interference with their privileges.

REFORM THROUGH LABOR WITH EDUCATION:

Penal policy of the PRC has always placed premium on the reform of offenders. The Criminal Code prescribes a hierarchy of sanctions which put the offenders through the reform process. For lesser offences, the criminals may be placed under "control" or "criminal detention" to perform labor under the supervision of the masses and the public

87 The five "bad" categories are landlords, rich peasants, counterrevolutionaries, bad elements and rightists. These categories could be changed or augmented in response to political changes.

88 Karl P. Herbst, "The Chinese Criminal Process: Revolutionary Ideology and Human Rights", (Book Review), Standford Law Review 1978 at pp 471-472.

89 Luo Ping, "The Principle of Measuring Penalties in China's Criminal Law", Hongqi 1979 p 75.

90 On the issue of "equality before the law" in relation to the 1982 Constitution of the PRC, see Herbst, "Criminal Justice Under China's Newest Constitution", The Asian Wall Street Journal, Jan 18, 1983.

91 The learned author of the above-mentioned article is wary as to the total elimination of class distinction in the PRC. He pointed out that, "Unlike the Soviet Union, which calls itself the 'socialist state of the whole people', China under the new Constitution, is labelled a 'socialist state under the people's democratic dictatorship'..... (Moreover) Peng Zheng stresses that despite the elimination of exploiting classes as such, class struggle continues against forces.....that are hostile to China's socialist system."

92 Leng supra note 85 at pp 462-463.

93 Minzhu Yu Fazhi, 1981 No.7 at p 47; 1982 No. 2 at p 5.

94 "Socialism fails to stamp out the swindlers", S.C.M. Post Aug 3, 1983.

95 "Warning to China's privileged children", S.C.M.Post Editorial, Oct 19, 1983.

security (Articles 34 and 38). For more serious crimes, offenders will be sent to prisons or camps to undergo reform through labor (Article 41). This will cover criminals sentenced to fixed-term imprisonment and life imprisonment as well as those sentenced to death with a 2-years' reprieve (Article 43).

(Note: the present discussion will be confined to the process of "reform through labor with education" as it raises interesting questions of human rights violations.)

Correction of criminals consists of two aspects: physical labor and ideological reform. In terms of time, the major activity of the inmates' daily routine is physical labor.[96] It is designed primarily to make the offenders see that "they should support themselves through honest labor"[97] and enables them to learn productive skills so that they can find suitable jobs on release. Besides compulsory labor, the inmates have to attend intensive thought reform sessions too.[98] Thought reform takes the form of self-criticism, lengthy written confessions and exposures and denunciations of others' wrongdoings. The prisoners are also indoctrinated about Marxism-Leninism-Mao Zedong Thoughts and Party policies. "In the end, each individual is evaluated on the basis of his work performance, sincerity in repentance, diligence in study, and responsiveness to reform."[99]

Despite claims by the PRC propaganda for the "humanitarian concern" towards the criminals, the reform process, particularly thought reform programmes, exerts a tremendous amount of pressure on the prisoners. As the avowed policy is "leniency to those who confess and severity to those who resist", questions of release, reduction of sentence, parole etc directly relate to the inmates' attitude.[100] For prisoners who are "backward" in their thinkings or do not labor actively, the reform through labor unit can impose a variety of sanctions such as warning, demerit, overtime work, loss of holidays or solitary confinement. These, moreover, will usually be accompanied by a more heightened form of criticism or even struggle in the thought reform sessions.[101] Thus a very coercive environment is created and the compulsion to conform one's behaviour – at least superficially – to the approved standards is very great.

These provisions stipulating rewards and sanctions to influence individual behaviour are, theoretically, not arbitrary in conception and "can be said to reflect rationality." Yet, they have unwittingly enabled the public security to wield a very broad discretion on decisions of modification of sentence and release. Under Article 72 of the 1954 Act of the PRC for Reform Through Labor, the court can on the recommendations of the public security extend the sentences of those who "do not labor actively but repeatedly violate prison rules and the facts prove that they still have not reformed and that there is a real possibility that they will continue to endanger the security of society after release." It appears that under this provision an offender does not need to commit a new crime before his sentence can be extended. In addition, though it is stated that the formal power to order reduction or extension of sentence lies with the court, it is the public security subdivision that administers the inmates' reform through labor which makes the recommendations for modification of sentence. And invariably, the court will usually accept the public security's recommendations.[102] The problem with this is that the inmate concerned enjoy very little safeguards in the procedure. The investigation is often conducted without giving him notice or an opportunity to be heard so that the formal sanctioning by the court is just a mere ritual.[103]

When the offenders have served their terms,

96 Art. 52 Act of the PRC for Reform Through Labor 1954 provides that "The time for actual labor for offenders generally shall be fixed at nine to ten hours each day....."

97 Beijing Review, "Reforming Criminals", Feb 23, 1981 pp 22-29.

98 Art. 25 of the 1954 Act states that, "In order to.... attain the goal of reforming offenders into new persons, reform through labor must be combined with political and ideological education."

99 Leng supra note 9 at p 369.

100 Art. 68 Act of the PRC for Reform Through Labor; Arts. 71 and 73 Criminal Code.

101 Art. 69 Act of the PRC for Reform Through Labor.

102 Cohen supra note 4 at p 44. Since Aug 1983, the actual administration of penal institutions are vested with the Ministry of Justice. But it is at this stage unclear as to whether it will involve any real or substantial changes.

103 ibid at p 45.

they can however be retained as "free workers" in the labor camps.[104] Ex-convicts who possess special skills that are needed by the camps have allegedly been pressured to "volunteer" to stay on.[105] The practice can also apply to those convicts who have no homes to return to and cannot find jobs as well as those who carried out their reform in sparsely inhabited areas and are needed there.[106] Under the relevant legislation, these ex-convicts can be retained even without their consent by the reform through labor units, the decisions of which only require the approval of the public security.[107] No judicial approval or review exists on the matter as it relates to employment rather than an extension of sentence. In such cases, these persons are not likely to have much choice as job allocations, ration coupons, household registrations etc are all state-controlled. As an academic wrote, "it is difficult not to regard involuntary retention in what is usually a remote place as a significant sanction."[108]

How successful, afterall, is the PRC in her efforts to reform the criminals? Can the Chinese authorities really expect the inmates who have spent a long day in hard labor to diligently study and criticize themselves for two or more hours? This becomes even more dubious as wide sections of the society are now being afflicted by the "crisis of faith". The status of Marxism-Leninism-Mao Zedong Thoughts and the image of the leadership have considerably declined with the drastic fluctuations in the leadership and even more so following the closing up of the Democracy Wall. It is doubtful whether extra doses of indoctrination will help to change a person's attitudes. Indeed, the NPC's 1981 resolution to provide heavy penalties for escapees from reform through labor or rehabilitation through labor camps reflected how far the PRC had accomplished in her efforts to reform the criminals.[109]

THE EXECUTION DRIVE (August 1983 – ?):

Not long after the promulgation of the Criminal Code, the PRC reverted to a policy of harsh and severe punishment of criminals. Death penalties, in particular, have vastly increased.[110] This change was obviously due to the leadership's disappointment with the growth in crimes.[111]

To curb the wave of crime, law enforcement officials were urged to mete out "heavy" and "swift" punishment according to law to those who seriously endanger society. This class of offenders include murderers, robbers, rapists, bomb throwers, arsonists, abettors and recidivists.[112] On June 10, 1981 the NPC Standing Committee passed two resolutions on the approval of death penalty and the handling of escapees and recidivists.[113] For the period of 1981-83, the right to approve death sentences on murderers, robbers, rapists, arsonists and saboteurs can also be exercised by the higher people's courts of the provinces, autonomous regions and municipalities directly under the central authorities.[114] For escapees (from reform through labor or rehabilitation through labor camps) and recidivists, they will have to be severely punished and have to stay on in the camps even though their terms have expired.[115]

Starting in August 1983, the regime has adopted some further ruthless measures – including sweeping arrests and executions – to deter the commission of crimes. In August, 105 persons accused to belong to

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104 It should be noted that some prisoners do agree to remain at the camps as civilian workers because they cannot find jobs or fear a hostile reception from the community.

105 Bao Ruo-wang, "Prisoner of Mao" at p 11. He wrote that "the prison experience is total and permanent. The men and women sentenced to reform through labor spend the remainder of their lives in the camps, as prisoners first and then as 'free workers' after their terms have expired." Excerpt is taken from Cohen supra note 46 at p 345.

106 Art. 62 Act of the PRC for Reform Through Labor 1954; Arts. 1 and 2 Provisional Measures of the PRC for Dealing with the Release of Reform Through Labor Criminals at the Expiration of Their Term of Imprisonment and For Placing Them and Getting Them Employment.

107 ibid Art. 3.

108 Cohen supra note 46 at p 345.

109 RMRB June 11, 1981 at p 1.

110 It is estimated that at least 198 persons had been executed and another 214 sentenced to death with 2 years' reprieve in the year ending June 30, 1980. see Leng supra note 8 footnote 45.

111 On the reasons for the growth in crimes in the PRC, see ibid at p 15.

112 ibid at p 17.

113 RMRB June 11, 1981 at p 1.

114 Originally, under Art. 43 of the Criminal Code, the death penalty would require the approval of the Supreme People's Court.

115 ante footnote 109.

six gangs were arrested in Hebei province.[116] Later that month, 30 murderers, rapists and a car thief were sentenced to death at a public rally of some 10,000 people in Shanghai and they were promptly executed after the meeting.[117] The drive continued in the months following[118] and it is estimated that 5,000 people have been executed since the crackdown began in August.[119]

Meanwhile, the purge has also affected many unemployed youths. Approximately 15,000 young people in the lower Yangse area alone were said to have been arrested and sent to Qinghai province for re-education under the 1957 Decision for the Rehabilitation Through Labor.[120]

To accomodate the switch in policy, the NPC at its meeting in September, 1983 decided that criminals guilty of certain offences may be punished more heavily than the severest punishment stipulated in the Criminal Code. They cover offences like hooligan gangs who use lethal weapons, assault and battery, abduction, the transport and trade of weapons, organising reactionary secret societies and utilising feudal superstitutious beliefs to carry out counterrevolutionary activities, forcing a female to engage in prostitution and passing on criminal methods to others.[121]

The Criminal Procedure Law was also drastically amended. Criminals accused of having been "involved in homicide, rape, robbery, explosion and other activities that seriously threaten public safety who warrant the death penalty should be tried swiftly if the major facts of the crimes are clear, the evidence is conclusive and they have incurred great popular indignation.[122] The time limit for appeals in such cases shall be reduced from 10 days to 3 days.[123] In addition, the power of the higher people's courts of the provinces, autonomous regions and municipalities to approve capital punishments in grave crimes is entrenched.[124]

The changes in criminal procedure are particularly alarming. They seriously undermine the accused's right to defence and to appeal. It really leaves one wondering whether justice can be properly administered if the law is to empower the judge to swiftly try a case where the evidence of the crime is said to be easily and quickly seen. Perhaps, in such cases, the verdict and sentence were decided before the trial! The practice of carrying out the death sentence immediately after its announcement at a mass trial also cast doubt on the availability and meaning of the right to appeal. The shortness of the time for lodging an appeal (3 days), in fact, renders this right nugatory.

The use of mass executions and the parading of criminals, no doubt, are tactics designed to demonstrate to the people that crime does not pay. But the current execution drive blantantly contradicts the regime's earlier policy of rehabilitating and reforming criminals. The move, however, is justified on the ground that "serious criminal offences should be regarded as a form of class struggle ..... Criminal offenders who have seriously harmed public security are ..... hostile elements ..... they are the targets of the people's democratic dictatorship."[125]

Surely, the seriousness of the crimes cannot be denied for the majority of executions are for offences of murder, rape, robbery and gang activities. But it is also important to note that the bulk of criminals are unemployed youths in their late teens and early 20's. The Execution Drive and the banishment of young people to Qinghai has only shelved, rather than solved, the basic problems of China's youth: their demands for jobs and greater freedom.[126]

CONCLUSION:

When the Criminal Code was promulgated in 1980, it had been generally applauded as a very

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116 FBIS, Aug 15, 1983 at K 14.
117 FBIS, Aug 23, 1983 at K 4.
118 eg. In late Sept, 20 people were executed in Urumqi. The same fate befell 30 criminals caught in Nanjing in the same month. See S.C.M. Post Sept 27, 1983 and Nov 14, 1983.
119 "Amnesty's execution plea rejected", S.C.M.Post Nov 3, 1983.
120 Ken Stevens, "Mass executions fail to correct deep problem", S.C.M.Post Nov 14, 1983.
121 FBIS, Sept 6, 1983 at K 2.
122 ibid at K 4.
123 Idem.
124 FBIS, Sept 6, 1983 at K 2.
125 FBIS, Sept 8, 1983 at K 18.
126 ante footnote 120.

positive and impressive step toward the establishment of a stable legal order in the PRC. When viewed in the light of the PRC's past history, it must be admitted that codification represents a significant improvement over past lawlessness. The introduction of the Criminal Code and the Criminal Procedure Law together with the reinstitution of the Procuracy laid the foundations for a rational legal order in the country. The question, of course, remains as to how far the PRC has gone in developing and strengthening the system on those foundations. Though they were said to proceed "according to law", the wave of executions and arrests are not in the least comforting. As Professor Berman wrote of a similar reversal in policy by the U.S.S.R in the 1960's, "..... the particular individual victims do not command our affection. They were, presumably, scoundrels. It is rather the abuse of integrity of the legal process that concern us, for one abuse suggests another."[127]

It has been mentioned in this paper that the Criminal Code was introduced largely with the aim of restoring faith and morality as well as encouraging initiative. Recent changes, however, would hardly enhance the people's confidence with "socialist legality".

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127 Berman supra note 62 at p 949.

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JUDICIAL INDEPENDENCE IN THE PEOPLE'S REPUBLIC OF CHINA

by Betty Choi Man Yee

I Definition of Judicial Independence

Judicial independence is commonly understood to be independence of the judiciary from the executive branch of government. The doctrine, primarily of Western origin, is one of the most important constitutional principles in many countries of the world. It springs from and is complementary to the doctrine of the separation of powers, whereby government is divided into three distinct and non-interfering branches, namely, executive, legislative and judicial; the purpose of which is to limit the possibility of arbitrary use of government power by means of institutional arrangement. Both the doctrine of the separation of powers and the principle of judicial independence are but manifestations of the theory of the Rule of Law which advocates the absence of arbitrary government power and equality before the law.

Some writers have argued that the doctrine of judicial independence stems from a 'universal primal desire for justice' which involves as the core of the idea complete impartiality and the exclusion of arbitrariness[1]. In order that the judge can act with the utmost attainable degree of impartiality, the judiciary must necessarily be an institution free of any identification with or subordination to any organ of state or interest group within it. Not only must justice be done, it must also be seen to be done. It is for this reason that increasing importance has been attached to the principle of judicial independence over the years and indeed, the latter has now become a touchstone for determining the degree to which a nation's courts are deemed capable of impartially administering justice, not only between individuals but also between an individual and the government.

The more obvious impediments to impartiality have been conveniently summed up in the case of *Taafe* v. *Downes*[2] as 'the vexatious suits and attacks of irritated parties and the overbearing authority of

1 Barnes, *The Independence of the Judiciary in Hong Kong* (1976) 6 HKLJ 7.

2 (1812-13) 13 ER 15, 28.

the Crown'. However, most of the discussion about safeguards of independence tend to concentrate on the threat to impartiality posed by the overbearing authority of the executive with scant attention being paid to other impediments to objectivity. Yet, experience has shown that this is the soundest approach. If the judiciary is not safeguarded against interference by the executive, a guarantee of impartiality is lacking in an important area where the judge exercises his function, namely, in disputes involving citizen and state. If, however, that guarantee is provided, the judiciary itself can provide protection for the individual judge against 'the vexatious suits and attacks of irritated parties' in disputes involving citizen and citizen by creating a precedent that judges of different status are exempted from all civil liability whatsoever for anything done or said in their judicial capacity[3] and by developing traditions which guarantee that judges will be free from personal attack in the public forums of the press. Indeed, Jerome Cohen, in his article *The Party and the Courts,* has defined judicial independence to mean that 'political organs will not interfere with the application of legal sources to the facts of particular cases and that in principle, it should also mean that political organs will not inflict deprivations upon honest judges who make undesired decisions, nor reward those who make favoured decisions'[4]. Therefore, the discussion in this paper of the question of judicial independence in the People's Republic of China is mainly centered on the relationship between the people's courts and the executive government which is under the leadership of the Communist Party of China. In order to get an overall picture of the situation in China, it is necessary to begin the discussion with a description of the early days of the People's Republic.

II The period Prior to the 1954 Constitution

The pre-constitutional period (1949-1954) should be seen within the context of a time-honored tradition of imperial control of judicial decision-making and a general failure of recent twentieth century regimes[5] to respect judicial independence. Pre-1949 developments, which have been aptly described in Shao-chuan Leng's *Justice in Communist China*[6] and in Jerome Cohen's *The Party and the Courts*[7], showed no indication of a gradual understanding of the virtues of an independent judiciary. The following passage, extracted from Jerome Cohen's *The Party and the Courts,* summarizes the situation prior to the formation of a national government in 1949.

> "During the 'Red Terror' of the Chinese Soviet Republic (1931-1934), judges were subordinated to the executive committees that administered government at all levels. During the Yenan era (1935-1945), the courts in the Communist held 'Border Regions' continued to function under the control of political authorities as integral parts of the government at every level. The resumption of civil war with the Nationalists in 1946 led to a re-emphasis upon 'revolutionary justice' in 'liberated areas', with Party-manipulated, ad hoc 'people's tribunals' swiftly dispensing harsh sanctions against landlords, counter-revolutionaries and other enemies. As the Communists swept over China, steps were gradually taken to bring the terror under tighter control and to establish a hierarchy of 'people's courts'."[8]

In 1951, the People's Republic of China set up a three-level, two-trial (one appeal) system of the people's courts: County Court, Provincial Court and the Supreme People's Court. These courts were not independent of political authority but were organic parts of the people's government of the corresponding level[9]. A people's procuracy[10] was

3 *Sirros* v *Moore* [1975] 1 QB 118.
4 Jerome A Cohen, *The Party and the Courts,* China Quarterly, April-June 1969, no 38, at page 126.
5 'Recent twentieth century regimes' refer to the succession of regimes in China from after the collapse of the Manchu Dynasty in 1911 to the Communist take-over in 1949, ie from the Yuan Shih-kai government to the Nationalist government under the Kuomintang.
6 New York: Oceana Press, 1967, Chapter 1.
7 Cohen, *The Party and the Courts,* op cit, page 128.
8 idem.
9 Article 10 of the Provisional Organic Regulations of People's Courts in the People's Republic of China promulgated on September 4, 1951.
10 A prosecutorial institution with the power to investigate and protest against violations of law by government agencies.

also established on a level corresponding with each people's court, though it was at the same time a component part of the people's government at the same level[11]. As a result, both the courts and the procuracy were, in law and in fact, under the control of administrative organs and there was no separation of powers among them. For instance, the chairman of the county government frequently served concurrently as the head of the county court.[12]

The local courts which were gradually set up throughout the country were thus placed under dual rule. They received leadership and supervision from higher levels of the judiciary, with the Supreme People's Court serving under the supreme legislative body and its administrative arm, the Central People's Government Council. Since they were also made constituent parts of the people's government of the corresponding level, they received leadership and supervision from the local people's government council. Indeed, local people's courts were frequently instructed to follow orders or policies of the government or Party in cases not covered by existing law. Article 4 of the 1951 Provisional Organic Regulations of the People's Courts provided that:

> "The adjudication of cases by the People's Courts shall be based on the provisons of the Common Program of the Chinese People's Political Consultative Conference and the laws, decrees, decisions and orders promulgated by the People's Government. Where no specific provisions are applicable, the policy of the Central People's Government shall be followed."[13]

During this period, the judiciary was but an instrument of the party-government in carrying out revolutionary measures and in stifling political opposition. According to Shen Chun-ju, first president of the Supreme People's Court, judicial work 'must serve political ends actively and must be brought to bear on current central political tasks and mass movements'.[14] As a result, executive leadership of the courts was deemed to be of the utmost necessity. The principle of an independent judiciary, which ran counter to the political demands of the period, was doomed to oblivion.

Not only was the judiciary under the constant supervision of the executive government, judicial power during the pre-constitutional period was frequently usurped by ad hoc 'people's tribunals', military 'judges' and public security officials, dispensing major criminal sanctions in accordance with the wishes of the Party. Jerome Cohen, in his book *The Criminal Process in the People's Republic of China,* has described the operation of the criminal justice system during this period as follows:

> "During this period, the criminal process served as a blunt instrument of terror, as the Chinese Communist Party proceeded relentlessly to crush all sources of political opposition and to rid society of apolitical but anti-social elements who plagued public order . . . Although the Communist government created a judicial structure, much criminal punishment during these years was administered outside the regular court . . . During the regime-sponsored 'mass movement' or campaigns that swept the country, such as those instigated to carry out land reform, to suppress counter-revolution and to eradicate official corruption and related illegal activities in the business community . . . ad hoc 'people's tribunals', which were thinly veiled kangaroo courts, dispensed their own brand of justice."[15]

The main reason why the courts were not given exclusive power to dispense major sanctions, as suggested by Cohen, was the 'difficulty of organising and staffing a judicial system for a country of China's size and population'.[16] The Nationalist judicial cadres who remained were highly suspect in the eyes of the Party and hence could not be assigned greater powers. During the ensuing Judicial Reform

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11 Article 6 of the General Rules Governing the Office of the Local People's Procuratorates at Various Levels, promulgated on September 4, 1951.

12 Shao-chuan Leng, *Justice in Communist China,* op cit, page 22.

13 Translated in Shao-chuan Leng, *Justice in Communist China,* op cit, page 32.

14 Shen Chun-ju, *Strengthen the People's Judicial Construction; Consolidate the People's Democratic Dictatorship,* People's Daily, October 30, 1951, translated in Cohen, *The Party and the Courts,* op cit, page 129.

15 Jerome A Cohen, *The Criminal Process in the People's Republic of China,* 1949-1963, An Introduction, Cambridge, Mass 1968, note 6, 9-10.

16 Cohen, *The Party and the Courts,* op cit, page 130.

Movement, many Nationalist holdovers were screened out and bourgeois legal concepts and practices such as the belief that the law could be separated from considerations of politics and that the judiciary could be independent of political authority were denounced as 'the legacy of the Nationalists'.[17]

As a conclusion, the judiciary during the pre-constitutional era was an integral part of the government and an instrument of the Party in suppressing the hostile classes. There was virtually no judicial independence and the position of the judiciary was similar to that of the army and of the police, in that its primary function was to assist in consolidating the power of the Communist Party by eliminating political enemies.

III The 1954 Constitution

The 1954 Constitution[18] was not based upon the separation of powers, but upon the theory that the National People's Congress, which was endowed with supreme legislative power, was the highest organ of state power. Given the failure of the People's Republic of China to adopt the principle of the separation of powers in its constitutional framework, would the judiciary be able to assert any independence from other branches of government?

Article 78 of the constitution and Article 4 of the Law for the Organization of People's Courts[19] provided that 'people's courts shall conduct adjudication independently and shall be subject only to the law'. What could the Communist Party have meant by this provision in the light of the history of the Chinese Communist courts? Was it a genuine guarantee of independence or was it not worth the paper on which it was written?

The guarantee of independence embodied in Article 78 appeared to distinguish between independence of the individual judge and independence of the court. Specific reference was made to the independence of the people's courts, though the constitution was silent on the position of the individual judge. Before looking at the possibility of independence of the individual judge, let us now turn our attention to the position of the court vis-a-vis the legislature, the procuracy, the executive and most important of all, the Party.

Section 1 Independence of the Court

(i) Court vis-a-vis legislature

Under the 1954 Constitution, the courts were placed under the highest organ of state authority, the National People's Congress. Article 80 of the constitution provided that that 'the Supreme People's Court is responsible and accountable to the National People's Congress or, when the National People's Congress is not in session, to its Standing Committee'. Moreover, Article 31(5) provided that the Standing Committee of the National People's Congress was to 'supervise the work of the Supreme People's Court'. The lower courts, according to Article 80, were 'responsible and accountable to local people's congresses at the corresponding levels'. In other words, the courts were subordinated to the legislature and could not act independent of it. This was inevitable since the constitution was not based on the separation of powers, but upon the principle that the legislature was the supreme organ of state power. It could, therefore, be argued that judicial independence of whatever mode was impossible under such a constitutional framework and that Article 78 was totally devoid of meaning. However, this might not necessarily be the case. Although the courts were required to file reports with the legislative body of the corresponding level and to receive some scrutiny from it, the legislature did not intervene in the determination of specific cases. Moreover, the fact that the Standing Committee of the National People's Congress could overturn decisions of the Supreme People's Court could not be regarded as vitiating the effect of Article 78 since the decisions of the Standing Committee were legislative acts. Indeed, a Chinese law specialist has remarked that 'it was not the legislature's general controls over the judiciary that ran afoul of the principle of judicial independence but the Party's insistence on determining the outcome of specific cases',[20] a matter which will be examined in greater

17 idem.

18 An English translation can be found in *Documents of the First National People's Congress of the People's Republic of China* (Peking: Foreign Languages Press, 1955).

19 FKHP, I (1954-1955), page 123-132, hereafter referred to as the Organic Law of the Courts.

20 Jerome A Cohen, *China's Changing Constitution*, China Quarterly, December 1978, no 76, at page 819.

detail in subsequent paragraphs.

(ii) Court vis-a-vis procuracy

The courts were also placed under the supervision of the procuracy. Article 4(4) of the Law for the Organization of People's Procuracies[21] provided that the procuracy was required 'to see that the judicial process of people's courts conforms to the law'. Article 14 authorized procurators to attend all trials 'for the purpose of supervision'. In addition, the chief procurator at every level was empowered to participate without vote in the court's adjudication committee, which was to deliberate upon important or difficult cases.[22] The procuracy could lodge a protest and demand reconsideration if it considered any court judgment erroneous.[23] If the Chief Procurator of the country disagreed with the decision of the Adjudication Committee of the Supreme People's Court, he could refer the case to the Standing Committee of the National People's Congress which had the power to overturn the decision by legislation.[24] Again, there was no case-by-case intervention.

(iii) Court vis-a-vis executive

Under the pre-1954 arrangements, the people's courts were made constituent parts of the government at the corresponding level and had to follow instructions issued by the local people's government councils, the executive agents of the local people's congresses. Hence, the people's courts enjoyed no independent status and were integrated into the governmental structure. The 1954 Constitution released them from formal executive control and the decision of the Standing Committee of the National People's Congress passed at its twenty-sixth meeting on November 10, 1955 was such that 'presidents of local people's courts of the various levels . . . . . can in no case concurrently perform duties in people's councils of the various levels'.[25] Previous ties with the executive organs were thereby severed.

The above analysis of the position of the court vis-a-vis the legislature, the procuracy and the executive as prescribed by the 1954 Constitution reveals that judicial power was to lie exclusively in the hands of the courts. Although the procuracy and the legislative body at the corresponding level were given some degree of control over the judiciary, case-by-case intervention was definitely out of the question and the judiciary alone was responsible for individual exercises of judicial authority. Yet, the 1954 Constitution was silent on the relationship between the Party and the courts and Article 78, which stipulated that 'people's courts shall conduct adjudication independently and shall be subject only to the law', shed no light on the question. Indeed, independence of the courts from the executive would be worthless if the Communist Party could successfully manipulate judicial decision-making.

(iv) Court vis-a-vis Party

Article 17 of the constitution provided that 'all organs of state must rely on the masses of the people, constantly maintain close contact with them, heed their opinions and accept their supervision', which were all euphemisms for Party control. Being an organ of state, the courts had also to accept the leadership of the Party in the formulation of judicial policies and guidelines. Yet, it was not this general supervision and guidance that was so detrimental to an independent judiciary, but rather, it was the insistence of the Party on deciding the outcome of individual cases that struck at the very roots of the principle of judicial independence. The commentaries which appeared after the promulgation of the constitution did not deal specifically with this question. As Jerome Cohen has written in his article *The Party and the Courts,* 'it is difficult to know what to make of these early commentaries'.[26]

However, a group of liberal jurists did take a strong stand for the principle of judicial independence. In an article titled *The Superiority of the People's Judicial System of our Country* published in the People's Daily on October 16, 1954, the author argued against intervention in judicial decision-making on the ground that it would be impossible to develop uniform law throughout the country in the absence of an independent and impartial

21 FKHP, I (1954-1955), page 133-138, hereafter referred to as the Organic Law of the Procuracy.
22 Article 10, Organic Law of the Courts (1954-1955).
23 Articles 15, 16, Organic Law of the Procuracy (1954-1955).
24 Article 17, Organic Law of the Procuracy (1954-1955).
25 FKHP, II (1955), page 71, translated in Cohen, *The Party and the Courts,* op cit, page 131.
26 Cohen, *The Party and the Courts,* op cit, page 136.

judiciary.[27] In another article titled *Understanding 'People's Courts Shall Conduct Adjudication Independently and Shall Be Subject Only to the Law'* published in the Political-Legal Research,[28] the author also upheld the idea of autonomous judicial decision-making and argued that only the court had the power to decide a particular case. At the Eighth Party Congress in September 1956, Tung Pi-wu, President of the Supreme People's Court, lent support to the idea of an independent judiciary by admonishing Party cadres against interfering with individual cases and reminding them of the clear-cut distinction between Party organizations and government organs.[29] Chia Chien, Chief Justice of the Criminal Division of the Supreme People's Court, was also quoted as saying, 'The Party realizes its leadership in judicial work through its enactment of laws. Since the law represents the will of the people as well as that of the Party, a judge who obeys the law obeys in effect the leadership of the Party. Hence, all a judge needs to do is to obey the law; there is no need for any more guidance from the Party.' Moreover, he argued that 'the Party committees do not know the law or the circumstances of individual cases', and that 'their leadership, therefore, may not be correct'.[30]

Despite general support for judicial independence, criticisms published in the Hundred Flowers Period revealed that Party committees continued to interfere with judicial decision-making as they had in the pre-constitutional period. Yet, the first few years under the constitution witnessed a gradually evolving autonomy in judicial decision-making. Some Chinese law specialists have attributed this development to the growing complexity of the tasks of government and the need for specialization.[31] Jerome Cohen writes in his article *The Party and the Courts* that this gradual judicial erosion of Party control 'reflected an uneasy accommodation by the local Party and judicial organizations with their increasingly complex circumstances'.[32] Being a busy man, the secretary of the local Party committee could not afford to examine every individual case. On the other hand, the court president, though being a Party member himself, had much more judicial experience than the Party secretary and so held a low opinion of the latter's view on court matters. Indeed, consultation was often a mere matter of formality and disagreements between the court president and the Party secretary, which were infrequent, were resolved by compromise. It could, therefore, hardly be concluded that the courts were the Party's docile tool.[33]

The Party responded to this trend toward independent adjudication by initiating the Anti-Rightist Movement in 1957, during which the judiciary was purged of all cadres who showed rightist tendencies and non-judicial agencies were allowed to handle many types of cases. In some provinces, the Party went so far as to combine the law enforcement agencies, namely, the public security bureau, the procuracy and the courts into one organization, over which the Party exercised complete control.[34] The courts, therefore, became mere sections of this new integrated institution and had no separate identity. In this way, the law enforcement process beginning with the decision to arrest and ending in the final judgment could be successfully manipulated by the Party. However, it must be emphasized that this development took place in certain provinces of the country only.

For the first time since the promulgation of the constitution, the Party openly declared that Party control extended to the adjudication of individual cases. Wu Te-feng wrote in *Struggle in order to Defend the Socialist Legal System:*

> "The term 'conduct adjudication independently' means that a court conducts its adjudication independently and impartially. It means that a court 'uses facts as the basis and law as the standard' during adjudication work and is not

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27 Translated in Cohen, *The Party and the Courts,* op cit, page 134.

28 No. 1, 1955, pages 35, 37, translated in Cohen, *The Party and the Courts,* op cit, page 135.

29 Cohen, *The Party and the Courts,* op cit, page 136.

30 Jo Chuan and Ho Fang, *No Perversion of the Nature of the People's Courts Is Allowed,* People's Daily, December 24, 1957, translated in Shao-chuan Leng, *Justice in Communist China,* op cit, pages 61 and 62.

31 Cohen, *The Party and the Courts,* op cit, page 137.

32 Cohen, *The Party and the Courts,* op cit, page 139.

33 Cohen, *The Party and the Courts,* op cit, page 139.

34 Sometimes referred to as 'the joint work group' or 'the three chiefs', see Cohen, *The Party and the Courts,* op cit, pages 145-147.

affected by the parties' views. It means that during adjudication work the court may not be subjected to the unlawful interference of other state administrative organs, people's organizations and individuals. Nevertheless, people's courts in our country are created by the organs of state power and should be responsible to these organs. Therefore, they cannot act 'independently' of the organs of state power. The Communist Party is the leading nucleus of our state organs. People's courts are state organs. Naturally, courts cannot act 'independently' of the Party either."[35]

In *Censure the Bourgeois Principle of 'the Judge's Free Evaluation of the Evidence'*, Chang Tzu-pei argued that Party leadership should be manifested not only in the process of legislation but also in the administration of justice:

"The Party's leadership over people's courts is comprehensive and concrete and is not an abstract slogan. The Party's leadership is manifested not only in the Party's adoption of guidelines, policies and laws but also in its supervision of the concrete implementation of these policies, guidelines and laws by people's courts. Party leadership is manifested in political-ideological leadership and should be carried out in concrete adjudication work, including 'inquiry into specific cases'. Party leadership not only refers to leadership by the Central Party Committee but also to leadership by various local level Party committees over people's courts of the same level."[36]

As to the Party's competency for legal matters, an article in the Political-Legal Research had this to say:

"Our laws are the manifestation of the will of the people led by the working-class . . . They are enacted and enforced by the people under the leadership of the Party . . . How can one say, 'The Party Committees do not know law?' . . . Furthermore, the Party committees have a complete grasp of the political situation, know the political conditions as a whole, understand the relationship between the enemy and ourselves, and are well-acquainted with the feelings and demands of the people. Therefore, they are most qualified to weigh the pros and cons of a case in relation to the situation as a whole and to properly direct the work of all departments. It is only under the leadership of the Party that the people's courts can be assured of their correct administration of justice."[37]

Indeed, the Anti-Rightist Movement virtually ended all attempts to implement Article 78 of the constitution and examination of court cases by the Party secretary became the order of the day.

Section 2 Independence of the Individual Judge

As mentioned above, the independence referred to in Article 78 was that of the courts and not of the individual judge. The remaining part of this section is devoted to an analysis of the position of the individual judge in the People's Republic of China. The Anti-Rightist Movement confirmed the subordination of the courts to the Party, despite the guarantee of independence enshrined in Article 78. The individual judge, of whom nothing was said in the constitution, fared no better. As a matter of fact, the inferior position of the individual judge can be analysed under three different aspects: first, the lack of security of tenure; second, subjection to superiors within the court and third, subjection to the Party.

(i) No security of tenure

The National People's Congress was empowered under Articles 27(7) and 28(4) to elect and remove the President of the Supreme Court. The Standing Committee of the National People's Congress, on the other hand, was authorized under Article 30(9) to appoint and remove Vice Presidents, judges and members of the adjudication committee of the Supreme People's Court. In the provinces, people's

35 Political-Legal Research, No 1, 1958, pages 10, 16, translated in Cohen, *The Criminal Process in the People's Republic of China*, op cit, page 495.

36 (1958), page 47, translated in Cohen, *The Criminal Process in the People's Republic of China*, op cit, page 496.

37 Feng Jo-chuan, *Refute Chia Chien's Anti-Party Erroneous View of 'Judicial Independence'*, Political-Legal Research, No 1, 1958, page 21-22, translated in Shao-chuan Leng, *Justice in Communist China*, op cit, pages 62 and 63.

congresses were to enjoy similar power over the presidents of lower courts, and people's councils over other judges and the adjudication committees of lower courts.[38] Although Article 74 of the constitution prescribed that 'the term of office of the President of the Supreme People's Court and president of local people's courts is four years', no mention was made of the tenure of other judges or of the standard according to which political organs could decide whether to remove court presidents and their colleagues from office. The obvious inference was that all judges were to serve at the pleasure of the executive and legislative organs, and of the Party, which exercised absolute control over them. Indeed, it was not uncommon for judges to be removed in the midst of a trial.[39] As Chang Hui wrote in *These Are Not the Basic Principles of Our Country's Criminal Litigation:* 'A people's court cannot bind itself by using the hypocritical bourgeois rule that the officers of a court (judges and people's assessors) cannot be replaced while they are adjudicating a case.'[40]

(ii) Subjection to superiors within the court

Judges in the People's Republic of China could not decide cases independently but had to clear a proposed decision with the chief judge of the division, the court president and on certain occasions, with the adjudication committee. According to Chang Hui, " 'people's courts shall conduct adjudication independently and shall be subject only to the law' is not the same as 'judges are independent and subject only to the law'. The system of people's courts independently conducting adjudication differs in two respects from the independence of judges. First, people's courts establish adjudication committees. Adjudication committees discuss and decide important and difficult cases and cases of legally effective judgments in which the president of the court has discovered an error in the application of the law or in the determination of the facts. Second, the president of the court and the chief judge lead the collegial panels.[41] With the exception of relatively minor criminal cases, the judgment in all cases which the collegial panel adjudicates can only be pronounced after examination and approval by the president of the court and the chief judge."[42] Therefore, an ordinary judge who had been assigned to handle a case had to submit the proposed decision for approval by higher officials within the court. In practice, this requirement was strictly adhered to. Liu Tse-chun, one of the model judges, wrote of his judicial experience in *Realizations from my Adjudication Work:* 'When I presided in court I asked the leaders and my comrades to watch, and after adjudication I asked my comrades for their suggestions. I did not know how to write a judgment, so I watched how other comrades did it and copied various types of judgments. When I wrote a judgment myself, I let other comrades correct it, and then I gave it to the president of the court for his examination.'[43]

(iii) Subjection to the Party

As mentioned above, the constitution contained no provisions governing the tenure of ordinary judges or the removal of judges from their offices. Since the legislative and executive organs of government, in whom the power to appoint and remove judges was formally vested, were under the complete control of the Party, that power was actually exercised upon orders of the Party. Ever since the Anti-Rightist Movement, Party membership was essential for judicial service[44] and those members of the judiciary who exhibited rightist tendencies were screened out.[45] As a matter of fact, virtually all judges were subject to Party discipline, and there were Party committees within the courts themselves.

Section 3 Conclusion

In conclusion, the guarantee of independence enshrined in Article 78 of the 1954 Constitution was

38 Article 32, Organic Law of the Courts (1954-1955).
39 Cohen, *The Party and the Courts,* op cit, page 132.
40 (1958), page 78, translated in Cohen, *The Criminal Process in the People's Republic of China,* op cit, page 484.
41 For an explanation of the collegial system, see Shao-chuen Leng, *Justice in Communist China,* op cit, page 148.
42 Supra, note 40.
43 Political-Legal Research, No 1, 1958, page 48, translated in Cohen, *The Criminal Process in the People's Republic of China,* op cit, page 489.
44 People's Daily, May 21, 1957, page 2, translated in Cohen, *The Criminal Process in the People's Republic of China,* op cit, page 492.
45 People's Daily, December 12, 1957, page 4, translated in Cohen, *The Criminal Process in the People's Republic of China,* op cit, page 492.

a particular brand of judicial independence as distinct from the Western 'bourgeois' version. It pertained only to the courts and not to the individual judge and it will be this kind of independence that will be referred to in the rest of this paper. The individual judge, as we have seen, was by no means independent in performing the judicial function and was restrained both by officials within the court and by Party committees outside the court. Even then, the limited degree of independence bestowed on the people's courts was attacked and thoroughly destroyed during the Anti-Rightist Movement. It became clear that Article 78 was not to be taken seriously and that Party leadership of the judiciary went beyond the formulation of judicial policies and guidelines to the adjudication of individual cases. The practice whereby court cases had to be examined and approved of by the Party committee at the same level took the place of Article 78 and was strictly adhered to in most cases.

IV The 1975 Constitution

A brief look at the events during the period from 1958 to 1975 is essential to an understanding of the 1975 Constitution. As noted in the previous chapter, the Anti-Rightist Campaign which began in the summer of 1957 tolled the knell of an independent judiciary and events from 1958 to early 1966 witnessed increasing Party domination of the courts.[46] During this period, public security organs and other administrative organs were again given significant power in the administration of justice, at the expense of the procuracy and the courts. Notably, a decision of the State Council on August 3, 1957 authorized certain administrative organs to send several vaguely-described categories of persons to 'rehabilitation through labor', which in reality amounted to forced labor for an indefinite period without judicial review.[47] When the Cultural Revolution broke out in early 1966, the power of the judiciary was further undermined. Many high officials, including the President of the Supreme People's Court, were purged without resort to the judicial process. During the period from 1967 to the early 1970s when the Cultural Revolution reached its peak, a large proportion of the caseload was handled outside the judicial system and the function of the courts was seriously usurped by ad hoc agencies. With the intervention of the People's Liberation Army to restore order and the gradual subsidence of the Cultural Revolution in mid-1970, the courts slowly resumed their activities although they operated under the control of the Revolutionary Committee, the administrative organ which had replaced the 'people's governments' at provincial and lower levels. The judiciary and the executive once again blended into one, as they had in the pre-constitutional period. In short, the ten years prior to the promulgation of the Constitution on January 17, 1975 should be seen within the context of a gradual regression of the judiciary to its previous subordinate position in the pre-1954 days and a drastic tightening of Party leadership over the state.[48]

Bearing these developments in mind, it is not surprising to note that the 1975 Constitution omitted altogether the guarantee of independent adjudication enshrined in Article 78 of the 1954 Constitution. Under the 1975 Constitution, the courts were responsible and accountable to, not only 'the people's congresses' as before, but also to 'their permanent organs at the corresponding levels', i.e. the local people's governments. Thus, courts below the Supreme People's Court fell under the jurisdiction of the local legislature and the local revolutionary committees, which had replaced the local people's governments at the corresponding levels.[49] Furthermore, the 'permanent organs of the people's congresses', that is, the Standing Committee of the National People's Congress and the local revolutionary committees, were given the power previously enjoyed by their parent congresses to appoint and remove the presidents of the people's courts.[50] Thus, the new constitution officially confirmed the subordination of the judiciary to the administrative organs.

In order to ensure that the courts had no illusions about being able to exercise judicial

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46 See Chapter 3.

47 Hungdah Chiu, *Structural Changes in the Organization and Operation of China's Criminal Justice System*, Review of Socialist Law, March 1981, at page 55.

48 Hungdah Chiu, op cit, page 56.

49 Article 22, 1975 Constitution.

50 Article 25, 1975 Constitution.

authority independently, the constitution added to the emphasis upon the leadership of the Chinese Communist Party over the state by inserting the provision that 'the Communist Party of China is the core of leadership of the whole Chinese people' and that 'the working class exercises leadership over the state through its vanguard, the Communist Party of China'.[51] Moreover, the constitution went on to provide that 'the mass line' had to be applied in trying cases and that 'in major counter-revolutionary criminal cases the masses should be mobilized for discussion and criticism'.[52] Since the Chinese Communist Party was often referred to as 'the voice of the masses', the obvious inference was that Party control over judicial work would continue to be dominant and that proposed decisions had to be cleared with the secretary of the Party committee at the corresponding level before judgment could be pronounced. The procuracy, which had for a long time served as an independent watchdog of governmental legality, was officially abolished and its functions were transferred to the organs of public security at various levels.[53]

The situation took on an abrupt change with the beginning of 1976. The riot at the Gate of Heavenly Peace in April 1976 marked the height of the conflict between the pragmatists, who emphasized rapid industrialization and economic development, and the radicals, who stressed ideological purity and who were largely responsible for the radical instrument of the 1975 Constitution. The death of Chairman Mao in September 1976 led to the downfall and the subsequent arrest of the leaders of the radical group, later branded as the 'Gang of Four'. The smashing of the 'Gang of Four', according to Ye Jiang-ying, who was then Chairman of the Standing Committee of the National People's Congress, marked the end of the Cultural Revolution and the beginning of a new period of development that required a new fundamental law to meet its needs.[54] Another government constitution was indeed on the way.

V The 1978 Constitution

Within the context of Chinese politics, the 1978 Constitution could be regarded as a product of the victory of the pragmatists over the radicals.[55] Yet, like its predecessor, the 1978 Constitution failed to make any mention of the guarantee of independent adjudication of the 1954 calibre. On the other hand, it released the people's courts from stringent executive controls under which they were placed in 1975 and restored the 1954 arrangements. Article 42 of the 1978 Constitution provided that 'the Supreme People's Court is responsible and accountable to the National People's Congress and its Standing Committee' and that 'local people's courts at various levels are responsible and accountable to local people's congresses at the corresponding levels',[56] a provision which was identical to Article 80 in the 1954 Constitution. Consequently, the courts were once again placed under the general supervision of the legislature, the supreme organ of state power, while formal executive controls were abolished.

Experience under the 1954 Constitution had already revealed that such arrangements would not contribute towards the independence of the judiciary if the Party refused to relinquish its grip over the judiciary. It had also become clear after the Anti-Rightist Movement that Party leadership of the judiciary included inquiry into specific cases and the omission of the guarantee of independence in the 1975 Constitution was another indication of the determination of the Party to preserve its control over the courts. Had the 1978 Constitution achieved a breakthrough against such an unfavourable climate?

As usual, the Constitution was silent on the issue. Yet, the language of the Constitution itself implied that the Party was not prepared to accede to the demands of the courts for genuine independence. For instance, Article 2 of the 1975 Constitution which

51 Article 2, 1975 Constitution.
52 Article 25, 1975 Constitution.
53 idem.
54 Yeh Chien-ying, *Report on the Revision of the Constitution,* March 1, 1978, in *Documents of the First Session of the Fifth NPC,* pages 173, 176-177.
55 See Cohen, *China's Changing Constitution,* op cit, pages 804 and 805. Some Chinese law specialists, of whom Mr Karl Herbst is one, view it as a compromise rather than as a victory.
56 The Second Session of the Fifth National People's Congress held in June 1979 approved a resolution on the change of 'local revolutionary committees at all levels' into 'local people's governments at all levels'. FBIS-CHI-79-118, (June 18, 1979), Volume 1, No 118.
Article 42 of the 1978 Constitution released the courts from formal control by these executive organs, under which they were placed in 1975.

stipulated that 'the Communist Party of China is the core of leadership of the whole Chinese people' and that 'the working class exercises leadership over the state through its vanguard the Communist Party of China' was reproduced in the 1978 Constitution,[57] suggesting that the judiciary, being an organ of state, had to submit to Party leadership. Like other state organs, it was also required by the constitution to 'constantly maintain close contact with the masses',[58] 'to accept supervision by the masses'[59] and to 'practise democratic centralism',[60] all of which were metaphors for Party control. Indeed, the omission of the previous guarantee of judicial independence; the reproduction of Article 2 of the 1975 Constitution which laid great emphasis upon Party leadership over state organs and the retention of euphemisms for Party control all pointed to the fact that the Party was unlikely to abdicate from its previous dominant position vis-a-vis the judiciary.

Events since the promulgation of the constitution also lent support to the above proposition. At the Eighth National Conference on People's Judicial Work held in April and May 1978, Chi Teng-kuei, a vice-premier but identified only as a member of the Political Bureau of the Central Committee of the Chinese Communist Party, emphasized that 'strengthening Party leadership over judicial work and adhering to the mass line are the two fundamental points in our experience in judicial work. They are also the sure guarantee of our success.'[61] Jiang Hua, President of the Supreme People's Court, echoed Chi in his report to the conference by stating that judicial work and the application of the mass line must be placed 'under the direct leadership of Party Committees'.[62] The article that Jiang published in the People's Daily immediately after the conference laid great stress on improving judicial procedures and acting in strict accordance with the law, though he insisted that 'the mass line under Party Leadership be upheld'.[63] By 'acting in strict accordance with the law,' Jiang meant that there should be 'no violation of Party policy'.[64]

In a major editorial on the constitution and the legal system published in the People's Daily, Party committees at all levels were instructed to make appropriate changes in judicial personnel. They should 'promote those comrades to leadership posts who have been tested in the struggle between the two lines and who meet political requirements' and should 'remove from leading bodies or transfer out of judicial organs unrepentent elements who have committed serious mistakes and other political undesirables'. According to the editorial, the people's judicial organs were 'an important tool of the dictatorship of the proletariat' and had, therefore, to 'follow Party leadership' and to 'actively participate in the 'two blows' movement against the sabotage activities of the class enemies and the flagrant offensive of the capitalist forces'.[65]

The subordination of the judiciary to the Party was confirmed in subsequent provincial radio broadcasts which related how the Party and the police continued to dispense major criminal sanctions at the expense of the judiciary even after the promulgation of the constitution. In these reports, no mention was made of the courts. Indeed, despite the efforts of Peking propaganda organs to emphasize the renewed role of the courts and formal judicial trials, reports from the Heilungkiang Provincial Service and the Sian Shensi Provincial Service related how local Party committees stimulated public security bureaus to hold public trials at the expense of the courts.[66] The omission of the guarantee of independent adjudication, as seen in retrospect, was certainly not an oversight on the part of the Chinese Communist Party.

VI The System of Shuji Pian Discussed and Criticized

From the above lengthy discussion of the

57 Article 2, 1978 Constitution.
58 Article 15, 1978 Constitution.
59 Article 16, 1978 Constitution.
60 Article 3, 1978 Constitution.
61 *Reportage on National Judicial Conference held in Peking* Peking NCNA Domestic (May 27, 1978), in FBIS-CHI-78-105 (May 31, 1978) E1, E2.
62 Ibid, E3.
63 Supra, note 59.
64 idem.
65 *People's Daily Editorial Hails Judicial Work Conference,* Peking NCNA Domestic (May 28, 1978), in FBIS-CHI-78-106 (June 1, 1978), E1, E2.
66 FBIS-CHI-78-106 (June 1, 1978), L1; FBIS-CHI-78-106 (May 31, 1978), M1, M2, also cited in Cohen, *China's Changing Constitution,* op cit, page 820.

development of the concept of judicial independence since the 1954 Constitution, one hard fact emerges: the Chinese Communist Party was unwilling to relinquish control over the judiciary. Since the Anti-Rightist Movement in 1957, the practice gradually developed whereby court cases had to be examined and approved of by Party committees of the corresponding level. This system came to be known as shuji pian, meaning approving cases by the secretary, because the Party committee frequently delegated decision-making authority to its secretary in charge of political-legal affairs. A writer has described this system as follows:

> "Whether the facts of a case are clear, the evidence is convincing; the defendant should be subject to criminal sanction and what criminal punishment should be imposed on the defendant, should be sent to the secretary in charge of political-legal affairs of the local Party committee at the same level for review and approval. This is called the system of deciding a case by the secretary."[67]

According to the same writer, the political-legal secretary was usually in charge of the public security, the procuracy and the court of the area under the jurisdiction of the Party committee.[68] In short, the entire law enforcement process was under his control. Therefore, he could have previously approved of the investigation and of the prosecution of the accused and decided on the punishment to be imposed, before actually invoking the law enforcement process. The court had no other alternative but to accept the decision of the political-legal secretary. There was virtually no chance of independent adjudication.

The system of shuji pian had been the subject of a great deal of criticism since the death of Mao. These criticisms could be classified under three big categories.

Section 1 Uncertainty

Firstly, the system of shuji pian produced uncertainty about the manner in which a court case ought to be handled. Although the Anti-Rightist Movement had shown beyond doubt that Party leadership included inquiry into specific cases, it was conceded that there could not be any 'unnecessary intervention in and substitution for the concrete work of the professional departments' and that 'at no time will a Party committee organ itself arrest a person or adjudicate a case'.[69] The Party would not exercise such control over the judiciary as to lead to a complete take-over of judicial functions and render the courts obsolete. And indeed, it was physically impossible for the Party secretary, a man with voluminous tasks, to examine every single case. Consequently, some criteria had to be laid down for determining the type of cases that should be submitted for approval. The criterion suggested in the above quotation was that intervention had to be 'necessary'. Yet, the word 'necessary' is inherently uncertain and provides no concrete guidelines. Liu Tse-chun, a model judge, suggested that instructions from the Party committee ought to be solicited in cases which 'required arresting and sentencing', which 'had a relatively strong policy nature' or which 'involved village or cooperative cadres'.[70] On the other hand, a writer, Li Mu-an, argued that the system of shuji pian only applied to important cases such as 'cases during a mass movement, political cases and cases of an important policy nature and of far-reaching implications'.[71] These vague criteria propounded by various judges and writers only served to place judges in an extremely difficult position. On the one hand, they did not want to burden the Party secretary with too many cases and on the other hand, they feared that too much personal involvement in judicial work would land them in trouble. Even in cases in which the need for Party approval was obvious, judges were faced with other problems. In order to avoid loading

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67 Liao Junchang, *The Independence of Trial and the System of Deciding a Case by the Secretary*, Journal of the Southwest Political-Legal Institute, May 1979 No 1, 7, translated in Hungdah Chiu, op cit, page 59.

68 Ibid.

69 Wu Te-feng, *Struggle in order to Defend the Socialist Legal System*, Political-Legal Research, No 1, 1958, pages 10, 16, translated in Cohen, *The Criminal Process in the People's Republic of China*, op cit, page 498.

70 Liu Tse-chun, *Realizations from my Adjudication Work*, Political-Legal Research, No 1, 1958, page 48, translated in Cohen, *The Party and the Courts*, op cit, page 149.

71 *Censure Independent Adjudication that Proceeds from Concepts of the Old Law*, Political-Legal Research, No 1, 1958, pages 24, 26, translated in Cohen, *The Party and the Courts*, op cit, page 149.

the Party secretary with too much work and to prevent 'a substitution of the Party for the concrete work of professional departments',[72] judges were frequently advised, when submitting a case to the Party secretary, to prepare an analysis of the case and a recommendation of how to dispose of it. Yet, most judges feared that too much initiative on their part would expose them to the risk of committing mistakes.[73] In addition, there was the uncertainty about which Party committee ought to be approached. The model judge, Liu Tse-chun, described in his article how in one case he asked for instructions from 'the Party committee of the administrative village and the county people's court' and also from 'the village Party branch'.[74] Indeed, it was a matter of great difficulty to decide whether a case was sufficiently important to warrant consultation with more than one Party committee. To summarize, the system of shuji pian was bedevilled with uncertainties, reflecting the difficulty of striking a balance between Party control of the judiciary on the one hand and separation of Party organs from government agencies on the other.

Section 2 Inefficiency and Arbitrariness

Secondly, this system often led to delay and in some cases, to legally unsound judgments. Being a busy man burdened with many other administrative duties, the political-legal secretary obviously could not spend too much time in reviewing cases, as professional judges could have done. In an article titled *The Independence of Trial and the System of Deciding a Case by the Secretary* the author, Liao Chun-chang, pointed out that the Party secretary could afford to do so only once every one or two months.[75] As a result, there was considerable delay in the handling of cases. And even when the secretary did examine cases, he often went about his task in an expeditious and careless manner, without actually going into the facts and the evidence of each individual case. Thus, erroneous decisions were by no means uncommon. Furthermore, it was not possible for the court to lodge an appeal with the Party committee if a decision was considered to be legally unsound. There was no other choice but to adopt the decision of the Party secretary, even though the result was contrary to law. Hence, the administration of justice was often rendered inefficient and arbitrary by this system of shuji pian.[76]

Section 3 Loss of Confidence in the Legal System

Thirdly, the usurpation of judicial power by Party committees tended to destroy the morale of judges and dampen their enthusiasm in judicial work. Instead of being an independent and respectable institution with its own rules and traditions, the judiciary had degenerated into a mere puppet of the Communist Party which commanded very little respect. Judges were deprived of the esteem enjoyed by their Western counterparts because they could never exercise their own judgment in the adjudication of cases. Hence, it is not surprising to find that under the system of shuji pian, the working spirit of judicial personnel was at its lowest.

Perhaps it could be argued that the adverse effect of the system of shuji pian on the morale of judges was illusory in the days when judges had little or no legal education and as a matter of necessity, had to be told what to do in the adjudication of individual cases. Indeed, information obtained from an interview with five leading members of the Kwantung Institute of Law and Political Science on May 13, 1974 showed that very few judges had received formal legal training. As one of the interviewees said:

> "The majority of judicial workers come from worker, peasant or military backgrounds. They are trained through daily revolutionary work, participation in struggle and practice. A small minority are university graduates from faculties of law or from the institutes of political science and law. From the president of a court to any judicial worker in a given court – they are all appointed by the governmental Revolutionary Committee of the same level."[77]

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72 Wu Te-feng, loc cit.

73 Cohen, *The Party and the Courts*, op cit, page 150.

74 Liu Tse-chun, loc cit.

75 Liao Jun-chang, op cit, No 9, translated in Hungdah Chiu, op cit, page 60.

76 See Hungdah Chiu, op cit, pages 59 and 60.

77 Gerd Ruge, *An Interview with Chinese Legal Officials*, China Quarterly, March 1975, no 61, at page 121.

However, with the re-establishment and the gradual expansion of legal education in recent years,[78] it is certainly not surprising to find increasing tension between the judiciary and the Party; and more persistent demands for autonomy in judicial decision-making.

Other than such detrimental effects on the outlook of the judiciary itself, the system of shuji pian also brought about a general loss of confidence in the legal system as a whole, the reason being that the predetermination of the outcome of cases by the political-legal secretary had stripped court trials of all meaning and rendered them a mere formality. Furthermore, doubts about the value of the legal system would inevitably undermine confidence in the viability of the Rule of Law, thus destroying one of the most important bases of modern government. Looked at in this respect, the system of shuji pian did have important consequences of far-reaching legal and political implications.[79]

VII Recent Developments and the 1982 Constitution

Events during the period from November 1978 to late 1980 seemed to suggest that the Communist Party had released its control over the judiciary in view of the criticisms directed at the system of shuji pian. Some of these events will now be analyzed in chronological order.

In an interview with Xinhua correspondents in February 1979, shortly after the third plenum of the Eleventh Party Central Committee in December 1978, General Ye Jiang-ying, chairman of the Standing Committee of the National People's Congress and a Politbureau member, said that 'the procuratorial organizations and the courts must faithfully serve the people's interests, abide by the laws, rules and regulations, keep to facts and maintain their independence as is appropriate' and that 'there must be fearless procurators and judges who are ready to sacrifice their lives to uphold the dignity of the legal system'.[80] This was the first time in the history of the People's Republic of China that a member of the Communist Party officially endorsed the principle of judicial independence, though he did so with an important reservation. The people's courts should maintain their independence only when it was 'appropriate' to do so. What did Ye mean by the word 'appropriate'? Experience under the previous three constitutions showed that it meant no independence whatsoever. Therefore, at its very best, what Ye Jiang-ying said in the interview could only amount to this: the courts could exercise independent judgment in the adjudication of cases, though the Party reserved the right to be consulted in some occasions. Exactly what these occasions were Ye did not specify. The position was left in doubt though it was probably safe to conclude that the speech of Ye Jiang-ying reflected the beginning of official support for the concept of judicial independence but uncertainty as to the extent to which courts could maintain their independence.

The 1979 Organic Law of the Courts, adopted at the second session of the Fifth National People's Congress on July 1, 1979, reinserted the 1954 provision of independent adjudication which was explicitly repudiated since the Anti-Rightist Movement and henceforth omitted in the 1975 and 1978 Constitutions. Article 4 of the 1979 Organic Law of the Courts provided that 'the people's courts exercise their judicial authority independently and are only subordinated to the law',[81] thus lending further support to the proposition that the judiciary was beginning to gain genuine independence from Party committees.

September 1979 witnessed another important official pronouncement which created high hopes for an independent judiciary. In an instruction issued by the Central Committee of the Chinese Communist Party, the practice of having cases examined and

78 It is beyond the scope of this paper to discuss the question of the expansion of legal education in the People's Republic of China. Suffice it to say that whereas the department of law was the smallest in the Beijing University in 1965, it is at present the largest and has over nine hundred law students.

79 Special Group Assisting the Handling of Cases from the Southwest Political-Legal Institute, *'Looking at Some Problems Relating to Judicial Works from the Practice of Handling Cases'*, Journal of the Southwest Political-Legal Institute, op cit, note 43, 26-27, translated in Hungdah Chiu, op cit, page 60.

80 *Speeding the Work of Law-making*, 22 Beijing Review, March 2, 1979, No 9, 3.

81 OWO70419 Beijing XINHUA Domestic Service in Chinese 0254 GMT 5 July 79 OW.

approved by Party committees was explicitly abolished and Party cadres were advised not to interfere with the judicial authority of the courts.[82]

At the First Academic Seminar organized by the Chungking City Law Association on 22 and 23 October 1979, the participants welcomed the September directive and after a sharp debate over the merits and the demerits of the shuji pian system, came to the conclusion that 'the procuracy and the court should independently exercise their function, that is, in handling cases, they should insist to rely on facts and laws and should not allow any organs, groups and individuals outside the judicial organs, through open or secret methods, to interfere' and that 'the leadership exercised by the various level Party committees toward the cadres of the procuracy and the court should primarily focus on strict supervision over their executing guidelines and policy and their strict compliance with and impartial execution of the law'.[83] According to the majority view, the system of shuji pian was only necessary during the early years of the Republic when the political situation called for close cooperation between the Party and the judiciary. However, with the promulgation of the constitution and the organic laws for the procuracy and the court, the continuance of the system would hamper the development of a healthy legal system on which all nations rely for their stability and prosperity. Therefore, 'it is entirely correct . . . to change the system of Party committee's approval of cases'.[84]

Many legal writings that appeared in late 1979 and early 1980 also tried to reconcile the principle of judicial independence with the principle of Party leadership. Liu Guang-ming, in his article *The People's Courts Administer Justice Independently* argued that although the socialist principle of independent adjudication could not be equated with its bourgeois counterpart, it would be equally inaccurate to interpret Party leadership to mean the substitution of the Party for the courts in the details of judicial operation. As a former president of the Supreme People's Court once said, 'at no time will a Party committee organ itself arrest a person or adjudicate a case'.[85] Hence, the independent administration of justice by the people's courts in no way conflicted with the principle of Party leadership.[86] Chang Gong, in his article *A Fine Statute on the People's Judicature,* echoed Liu by asserting that independence in judicial decision-making was entirely consistent with the principle of strengthening Party leadership in legal work. According to him, the laws of the country were enacted by the National People's Congress under the leadership of the Party. They, therefore, represented both the will of the people and the policy of the Party. If a judge adhered strictly to the law in the adjudication of cases, he was in effect implementing the policy of the Party. Hence, Chang concluded, 'independent adjudication by the courts according to the law really stands for accepting Party leadership and not seeking independence from the Party'.[87] Indeed, Peng Zhen wrote in his article *Several Questions on the Socialist Legal System* that by refraining from examining individual cases and by concentrating on the formulation of general policies and guidelines, the Party would be able to assert more effective leadership in the legal field.[88]

Events in the year 1980 also revealed growing support for an independent judiciary. In a newspaper article published in the People's Daily on January 11, 1980, it was reported that Jiang Hua, who was President of the Supreme People's Court at the time, maintained that Party leadership over judicial work should be limited primarily to the guidelines and policies of the judiciary and should thoroughly guarantee that the courts may conduct trials independently.[89] In a criminal trials conference in August 1980, Jiang Hua also urged Party cadres to observe the September 1979 directive of the Central Committee of the Chinese Communist Party,

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82 Yu Hao-cheng, *Party committees Should Not Continue Examining and Approving Cases,* Beijing Daily, January 23, 1981, page 3, translated in Shao-chuan Leng, *Criminal Justice in Post Mao China,* China Quarterly, September 1981, no 87, at page 458.

83 Li Jin-rong, *Chungking City Law Association Held an Academic Seminar,* Journal of the Southwest Political-Legal Institute, October 1979 No 2, 59, translated in Hungdah Chiu, op cit, page 61.

84 idem.

85 Wu Te-feng, loc cit.

86 Faxue Yanjiu, No 3, 1979, pages 31-32.

87 Ibid, No 4, 1979, pages 35-36.

88 Hongqi, No 11, 1979, page 7.

89 Translated in Hungdah Chiu, op cit, page 68.

abolishing the practice of having cases examined and approved by Party committees. In his view, this instruction of the Central Committee was a major step towards ensuring 'independent court trials according to the law' and 'proper Party leadership over judicial organs in principles and policy lines and not in concrete and routine matters'.[90]

In spite of all this, evidence showed that Party cadres continued to interfere in the handling of specific cases, although such interference was generally viewed as improper. At a panel discussion held by delegates of the National People's Congress in September 1980, a representative from Jiangjiu said that some Party officials adopted an attitude of 'passive resistance' towards the guarantee of independent adjudication. They continued to interfere with judicial decision-making and those judges who had firmly opposed them were replaced. This situation, according to him, had to be 'resolutely rectified'.[91] In an informal discussion session sponsored by the Enlightenment Daily in October 1980, attention was also drawn to the continuing usurpation of judicial power by Party committees which manifested itself in principally two areas: first, in the handling of specific cases and second, in the appointment and removal of judges.[92] In an article *Party Committees Should Not Continue Examining and Approving Cases* published in the Beijing Daily on January 23, 1981, the author, Yu Hao-cheng, put forward a similar problem and cited several instances of how Party cadres actually interfered with judicial work.

Indeed, the September 1979 directive had not put an end to Party interference in the handling of specific cases and in cases of important political implications, the Party role became even more dominant. The trial of the dissident Wei Jing-sheng (October 1979 to November 1979) was a good example. According to an article in the Dadi (Great Earth) published on November 4, 1979, both the Beijing City Revolutionary Committee, i.e. the municipal government, and the Beijing Party Committee exercised major influence over the arrest and sentencing of Wei.[93] The trial of the Gang of Four (November 1980 – January 1981) provided another illustration. Although it was reported in an article published in the People's Daily on December 22, 1980 that 'the principle of independence of judicial work was implemented throughout the trial',[94] it was clear from the outset that the Party was directly responsible for initiating the entire law enforcement process which culminated in the sentencing of the Gang of Four.

Events since 1981 were even more suggestive of a retrogression of the judiciary to its pre-1978 position. Significantly, the law and order campaign which began in early 1981 had the effect of severely limiting the independence of the judiciary since it advocated swift justice and harsh sanctions.[95] Moreover, the post of 'political-legal secretary' in local party committees had apparently been reinstated, indicating a possible revival of the shuji pian system.[96]

During the third national meeting on the trial of criminal cases in November 1981, Jiang Hua, who was president of the Supreme People's Court at the time, called for 'efforts to strengthen supervision over trials at people's courts at all levels', though he was a little vague on the question as to who should exercise this supervision.[97] In his report to the Fourth Session of the Fifth National People's Congress in December 1981, Jiang Hua said that 'the Supreme People's Court and the people's courts at various levels have exercised judicial authority independently' but 'in accordance with the principles and policies of the Party and the state' and that in

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90 People's Daily, August 25, 1980, page 1.
91 Xinhua, September 15, 1980, translated in Shao-chuan Leng, *Criminal Justice in Post Mao China*, op cit, page 460.
92 Enlightenment Daily, October 10, 1980, page 2, translated in Shao-chuan Leng, *Criminal Justice in Post Mao China*, op cit, page 458.
93 See Hungdah Chiu, op cit, pages 64 and 65.
94 See *A Great Trial in Chinese History:* Beijing New World Press, 1981.
95 Karl P Herbst, *Criminal Procedure Under China's Newest Constitution*, Asian Wall Street Journal, Wednesday, January 19, 1983.
96 idem.
97 FBIS-CHI-81-225 (November 23, 1981), volume 1, no 225.

public trials, they had been able to 'apply the law correctly under the supervision of the masses'.[98] Although the language that Jiang used was a great deal milder than that employed by the supporters of the Anti-Rightist Movement who explicitly asserted that Party leadership extended to inquiry into specific cases, nevertheless, what Jiang said on these two occasions was a noticeable retraction from the firm position he held in 1980.[1] Similarly, the meeting on the work of political science and law sponsored by the Political Science and Law Commission under the Central Committee of the Chinese Communist Party in July 1982 called on the political and judicial departments, which were described as 'the tools of the people's democratic dictatorship', to work hard 'with a revolutionary drive under the leadership of the Party'. [2]

It was against this background of gradual tightening of Party control over the judiciary that a new constitution was promulgated in December 1982. The draft of the constitution, published in April 1982, stipulated that 'People's courts shall exercise judicial authority independently according to provisions of the law and are not subject to interference by administrative organs, organizations or individuals', leaving the reader to decide for himself whether this included the Party.[3] In the final form of the constitution, the same formula was adopted though the word 'organization' was now qualified by the word 'public'.[4] Karl Herbst, in his article *Criminal Procedure Under China's Newest Constitution,* suggested that 'public organizations' should have been translated as 'social organizations' and in his view, 'it is most uncertain whether that term would encompasss the Communist Party'. Furthermore, he went on to say that 'if the language does not encompass the Communist Party and if interference indicates more than general leadership, then the 1982 constitution would have severely limited the independence, which at least in theory, the courts were given in 1979'.[5] Whether or not this is going to be the case, as Mr. Herbst rightly pointed out, 'cannot be adequately determined at this time', though a couple of events since the promulgation of the constitution in December 1982 may shed some light on the direction the judiciary is heading.

In his report to the Sixth National People's Congress in June 1983, Premier Zhao Ziyang said that the public security, the procuratorial and judicial organs at all levels must 'rely on the masses'[6] in carrying out their work. One cannot help but relate the word 'masses' to the Party, which is often referred to as the voice of the masses, and infer from this speech that heavy reliance has once again to be placed on Party leadership in judicial work.

The report of Jiang Hua to the Sixth National People's Congress on the work of the Supreme People's Court at about the same time bears similar implications. According to him, the people's courts through trial of criminal offences had exercised their functions effectively as 'an organ of dictatorship over the enemy' and the achievements made by the people's court in the past five years were a result of 'implementing the Party's line, principles and policies' laid down in the third plenary session of the Eleventh Party Central Committee. Although Jiang said in his speech that 'judges must enforce the provision of the constitution that the people's courts, in accordance with the law, exercise judicial power independently' and that 'they must act with a firm faith, uphold principle and dare to struggle against unconstitutional acts of illegally interfering with judicial work', he went on to stress at great length that:

> "It is necessary to implement the mass line and to combine special organs with the masses. In trying a criminal case, it is essential to collect information from among members of the masses who know the facts concerning the case . . . In handling a civil case, it is necessary to go among the masses to investigate the details behind the case in order to understand the crux of the dispute among the parties concerned. Moreover, the masses and basic-level organizations should

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98 FBIS-CHI-81-244 (December 21, 1981), volume 1, no 244.

99 See footnotes 35, 36 and 37.

1 See footnote 90.

2 FBIS-CHI-82-143 (July 26, 1982), volume 1, no 143.

3 This formula had frequently been used to explain Article 78 of the 1954 Constitution before the Anti-Rightist Movement.

4 Article 126, 1982 Constitution.

5 Asian Wall Street Journal, Wednesday, January 19, 1983.

6 FBIS-CHI-83-109, (June 6, 1983), volume 1, no 109.

be relied on to help the parties in the dispute to see what is right or reasonable and to do a good job in mediating their dispute. Trying civil cases is a kind of mass work as well as political and ideological work. If the mass work and the political and ideological work are done thoroughly, the dispute is handled properly; then the parties in the dispute are sincerely convinced, the masses are educated and a good social effect is produced. *In a word, the people's courts should be good at following the mass line, they should listen attentively to the view of the various quarters through investigation and study, and at the same time, be good at thinking things out for themselves and handling cases independently and responsibly.'* [7]

Despite the note of ambiguity that prevails throughout Jiang's report, the overwhelming impression that one gets after reading it is that the Party is still reluctant to relinquish its grip over the judiciary.

The frequent holding of mass sentencing meetings since September 1979 is perhaps another strong indication that the judiciary will not go far in its struggle for independence. Although the purpose of these meetings is avowedly to deter people from committing counterrevolutionary or criminal offences, the whole process, nevertheless, seriously impairs the independence of the courts since the immediate execution of death sentences[8] renders appeals impossible. Indeed, any subsequent alteration of publicly announced sentence would result in a serious loss of face for the government.

Recently, the Organic Law of the Courts has been revised so that Article 4, which allows the judiciary independence in general terms, is now identical to Article 126 of the 1982 constitution, which lists the entities that are not to interfere with the courts. The latter, as Mr. Herbst pointed out, may or may not include the Communist Party. If, as the events since the promulgation of the constitution indicate, the Communist Party is not included in the list and Party interference goes beyond overall leadership, the prospects for an independent judiciary are certainly rather dim.

VIII Conclusion

The above analysis of the development of the concept of judicial independence reveals a problem of fundamental importance in the legal system of the People's Republic of China, and that is, the absence of any meaningful judicial independence and the insistence of the Party on determining the outcome of individual cases. Although events during the period from late 1978 to late 1980 show promises of an independent judiciary, subsequent developments are much less promising and indeed, they point to the possibility that the People's Republic of China is rapidly regressing in so far as the concept of judicial independence is concerned.

Since the People's Republic of China is a one-party state, it is inevitable that the Party will play a dominant role in the formulation of judicial policies and in the adjudication of major political cases such as the trial of the Gang of Four. Yet, does this mean that the concept of judicial independence is so much at variance with the state structure that it cannot be allowed to exist altogether?

Different writers have come to different conclusions. According to Jerome Cohen, the exclusion of the concept of judicial independence was necessary during the early years of the Republic when the Chinese Communist Party was striving to consolidate its power and a Party-manipulated judiciary could serve as a valuable instrument for coercing opponents of the new regime and for inculcating new values. However, experience drawn from other Asian and African states convinces him that there will come a time in the development of the one-party state at which the concept of judicial independence will no longer be repugnant. And it is his argument that:

". . . political mobilization techniques for articulating and reinforcing new popular aspirations

7 FBIS-CHI-83-124, (June 27, 1983), volume 1, no 124.

8 Often after a cursory appeal.

> and values are indispensable but insufficient tools for nation-building and that popular politics must at some point be balanced by orderly legal institutions and competent administrative structures if the development of a modern polity is not to be crippled or even prevented altogether."[9]

Admittedly, there is a great deal of persuasiveness in Cohen's argument. However, one must bear in mind that the above proposition was based on experience in the fifties and it is doubtful whether he would have come to the same conclusion in the light of recent developments. Perhaps the general words of wisdom are to be found in Mr. Herbst's article *Criminal Procedure Under China's Newest Constitution:*

> "the problem of judicial independence cannot be adequately determined at this time and remains a crucial issue regarding the administration of justice in China."[10]

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9 Cohen, *The Party and the Courts,* op cit, page 157.
10 See footnote 104.

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MENS REA IN RAPE

by May Lau May Yin

I. INTRODUCTION

The rule actus non facit reum, nisi mens sit rea (the act itself does not constitute guilt unless done with a guilty intent) is familiar to every law student. It is a fundamental principle in English criminal law that, to convict an accused person, the prosecution must show that person has both the actus reus and the required mens rea.

Rape in Hong Kong, as in England, is a statutory offence, with both the actus reus and the mens rea spelt out. By sl(1) of the *Sexual Offences (Amendment) Act 1976*[1]:

'A man commits rape if –

(a) he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it; and

(b) at the time he knows that she does not consent to the intercourse or he is reckless as to whether she consents to it.'

This dissertation is concerned only with the mens rea. It must first be pointed out that this statutory definition of rape only came into existence in 1976. Prior to the Act, the definition of rape was a matter for the common law and the leading case of *DPP* v *Morgan*[2] was decided at common law.

The first two sections of the main body of this dissertation are devoted to a thorough examination of the two leading cases on mens rea in rape, *DPP* v *Morgan*[3] and *R* v *Pigg*[4]. The approach adopted is one of strictly legal analysis. Opinions of leading commentators will be appraised. Following those will be a section examining the policy considerations of the law relating to rape. Attention will in particular be focussed on the suggestion by an academic who

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1 The equilvalent in Hong Kong is s118 (3) of the *Crimes Ordinance 1978.*

2 [1976] AC 182.

3 supra.

4 [1982] 2 All ER 591.

maintained that we need a different notion of culpability[5]. Why that approach has received no legal backing will be explained in the next section. In the concluding section, suggestions for reform will be put forward together with the accompanying difficulties.

For a long time, the law in this area has been a fertile ground for vehement argument between "subjectivists" and "objectivists". *DPP* v *Morgan*[6] represents the triumph for subjectivists; *R* v *Pigg*[7] is generally seen as a return to a more objective approach; while *R* v *Mohammed Bashir*[8] ostensibly offers a subjective gloss on *R* v *Pigg*. Yet the law has not become satisfactory. Though described as 'part of a logical and rational development of fundamental legal principles' by the Heilbron Report, *DPP* v *Morgan* is not without its criticisms. However correct it is technically, there is obviously much unease with the decision. This dissertation therefore endeavours to break out of the narrow confines of unqualified legal reasoning, and place the whole issue of rape against the appropriate social background of reality. This is done in Chapter V.

Source materials consulted include cases, commentaries and articles by leading academics. Two very useful books, one by Barbara Toner[9] and the other by Tony Honoré[10], have also given the present author much inspiration.

II. THE 'DEFENCE' OF UNREASONABLE MISTAKE: *DPP* v *MORGAN*

Few decisions have evoked such mixed reactions. Those who welcomed it extolled its logic: Glanville Williams hailed it as 'the wonderful case in which the House of Lords first saw the light on the subject of mens rea'[11]. Those who disagreed with it denounced it as a 'Charter for Rapists'. The violent condemnation by the public forced the government in England to form the Heilbron Committee hurriedly, to inquire into the law of rape and see if changes are advisable. Yet the recommendations of the Committee, later put into statutory form as the *Sexual Offences (Amendment) Act 1976,* was an overwhelming affirmation of the maligned decision. Moreover, *DPP* v *Morgan* is a case which made its impact felt, not only in the law of rape, but in the whole realm of criminal law.

1. Facts And Decision

The defendants, Morgan and three of his colleagues, spent the night drinking together. After that, Morgan made the astonishing suggestion to the others that they should come to his home to have sexual intercourse with his wife. He told them that she would struggle a bit but that this would 'turn her on'. So Mrs Morgan was aroused from sleep and pulled out of bed. She struggled and resisted vigorously, and shouted to her sons to get the police – all to no avail. The defendants succeeded in dragging her into another room and had intercourse with her.

The defendants' initial statements to the police largely corroborated the victim's evidence. However, at the trial, the defendants renunciated those earlier statements, averring instead that Mrs Morgan not only agreed but actively cooperated and enjoyed the intercourse. Their defence was based, firstly, on the allegation that Mrs Morgan actually consented to the intercourse; alternatively, if she did not, the defendants claimed to have a genuine belief in her consent. The jury was therefore faced with two sets of evidence – 'the one of a violent and unmistakeable rape of a singularly unpleasant kind, and the other of active cooperation in a sexual orgy'[12]. The jury eventually rejected the defendants' story and convicted.

An appeal was lodged to the Court of Appeal on the ground that there was a misdirection by the trial judge who instructed the jury that they were only entitled to acquit if they were satisfied that they honestly believed that the victim consented to intercourse AND the belief was based on reasonable

5 Toni Pickard, *Culpable Mistakes and Rape,* [1980] 30 University of Toronto Law Journal 75.
6 [1976] AC 182.
7 [1982] 2 All ER 591.
8 [1982] Crim LR 687.
9 Barbara Toner, *The Facts of Rape,* (Arrow 1977).
10 Tony Honoré, *Sex Law,* (Duckworth 1978).
11 Glanville Williams, *Divergent Interpretations of Recklessness,* [1982] NLJ 336.
12 Per Lord Hailsham in *DDP* v *Morgan* [1976] AC 182 at 207.

grounds. The appeal was dismissed but leave was given to appeal to the House of Lords. A point of law of general public importance was certified:

> 'Whether, in rape, the defendant can properly be convicted notwithstanding that he, in fact, believed that the woman consented, if such belief was not based on reasonable grounds.'

In the House of Lords, a majority of the Law Lords, comprising Lord Cross of Chelsea, Lord Hailsham of Maryleborne and Lord Fraser of Tullybelton, gave a negative answer to the question. Lord Edmund-Davies held otherwise, but only because he believed that the court was bound by *R* v *Tolson*[13], a bigamy case. Only Lord Simon held a diametrically opposite view.[14] Ultimately, though, the court held that no reasonable jury could have failed to convict the defendants even if it had been properly directed, so that, in the result, there was no miscarriage of justice. Accordingly, s.2(1) of the *Criminal Justice Act* 1968 was applied and the appeal was dismissed.

The ratio decidendi that emerged was that a man should not be convicted of rape unless it can be proved that he intended to have intercourse with a woman who did not consent or he was reckless as to whether he had her consent or not. It followed that a genuinely mistaken belief will exclude him from liability. The reasonableness or otherwise of the belief will only be one of the factors to be taken into consideration in ascertaining the authenticity of the belief.

2. Impact Of *DPP* v *Morgan*

The outcry that followed *Morgan* might make one think that the decision has wrought a tremendous change in the law. Indeed, the public was appalled by the notion that a mistaken belief in consent, however ridiculously based, should lead in theory to an acquittal of the accused. The truth is, however, as Glanville Williams observed, that

> 'The controversy over *Morgan* was a storm in a teacup, because that decision concerned only the sacred words that the judge must utter to the jury, not the realities of the situation. A judge is perfectly entitled to tell a jury that the unreasonableness of an alleged belief is evidence that it was not held – they may refuse to credit that anyone could have held the absurd belief that the defendant puts forward'.[15]

In short, unreasonableness of the belief in general casts doubt upon the authenticity of it.

The rationale of the decision was the general principle that the prosecution must prove its case, including mens rea of the accused. 'The so-called "defence" is simply a denial that the prosecution has proved its case'.[16] Thus, despite the length of the Lordships' judgments, the argument can be effectively reduced to a few propositions:

> 'Rape is a crime requiring mens rea.
> Mens rea means intention or recklessness.
> If the accused believes that the victim is consenting, he does not intend to rape, and is not reckless.
> Therefore, even an unreasonable belief negatives liability.'[17]

The short point of this is that, the mistaken belief per se is not so significant. Rather, it is the fact that the existence of the belief means that the prosecution has not discharged the onus of proving

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13 [1889] 23 QBD 168.

14 Lord Simon's view will be discussed in 3 of this section.

15 Glanville Williams, *Textbook of Criminal Law*, (Stevens 1978) p 101.

16 Smith and Hogan, *Criminal Law*, 4th Ed (Butterworths 1978) p 182.

17 Glanville Williams, op cit, p 100.

its case that is the gist of the matter. Thus, *Morgan* is actually a decision that is based on the principle established in *Woolmington* v *DPP*[18].

3. Lord Simon's Dissenting Opinion

Lord Simon's argument was based on an interplay between basic and specific intent, and that between the probative and evidential burden of proof. His argument goes like this:

> In criminal law, a crime of basic intent denotes that its mens rea need not go beyond its actus reus. (Proposition 1)
>
> The probative burden of proving every issue rests on the prosecution, but the prosecution may adduce sufficient evidence to call for some explanation from the accused, thereby shifting the evidential burden, but not the probative burden which always remains with the prosecution. (Proposition 2)
>
> Applying (1) and (2), where the crime is one of basic intent, proof of actus reus will be sufficient prima facie proof of mens rea to shift the evidential burden of proof. (Proposition 3)
>
> Since rape is a crime of basic intent, its mens rea (ie knowledge or recklessness as to the woman's consent) does not go beyond its actus reus (ie sexual intercourse with a woman who in fact does not consent). (Proposition 4)
>
> Applying (3) and (4), proof of actus reus in rape will shift the evidential burden to the accused, who must then, inter alia, negative the inference as to mens rea by showing his genuine belief that the woman consented.
>
> Both authority[19] and policy requires that belief to be based on reasonable grounds.

This argument sounds rather methodical. Nevertheless, there is an apparent spuriousness in it once one is able to grasp the distinction between

a. Evidence of reasonable belief; and
b. Reasonable evidence of belief.

The jury can only convict an accused if it is satisfied that he did not hold a mistaken belief in consent, since such a belief would negative any intention to have sexual intercourse with a non-consenting woman. This is the case if it can find no reasonable ground on which he could have held the belief, or in other words, there is no reasonable evidence that points to the accused holding any honest belief at all. There is a world of difference between this situation and the situation where the jury finds the accused holds an unreasonable belief. An unreasonable belief, albeit unreasonable, is a belief nonetheless; and if there is an honest belief, there can be no intention to do the actus reus.

Failure to perceive this fine but vital distinction is probably what accounted for the violent outburst of discontent among the public after the *Morgan* ruling. People failed to realize that the certified question was

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18 [1935] AC 462 per Viscount Sankey LC at p 483, 'Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to..... the defence of insanity and subject to any statutory exception..... No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained'. As rape was not, in 1975, defined in the *Sexual Offences Act* – it was only provided that it was an offence for a man to rape a woman – the definition was a matter for the common law. The Law Lords in *Morgan* accepted the definition in *Archbold* that 'rape consists in having unlawful sexual intercourse with a woman without her consent by force, fear or fraud'. Though there is no explicit reference to a mental element, it was thought repugnant to hold that a crime of this gravity lacks a mental element. Also, *Sweet* v *Parsley* [1970] AC 132 held that both statutory and common law offences habitually employ in their definitions words which impliedly import into the definition of the crime an implication of an intent or state of mind in the accused. The prosecution attempted to base its case on *R* v *Tolson*, a bigamy case. The House refused to regard itself as bound by that case. Lord Hailsham pointed out that bigamy, which was a statutory offence, was on its face an absolute offence, followed by a proviso containing a defence to the charge. In such circumstances, clearly it was for the defence to adduce evidence as to the defence. Not so in the case of rape. The actus reus being unlawful sexual intercourse with a non-consenting woman, the mens rea would be knowledge of her lack of consent. All these have to be proved by the prosecution. Unlike in bigamy, the defendants' allegation of a mistaken belief in consent was therefore not a 'defence' as such but rather an allegation that the prosecution has failed to prove one of the essential elements of the offence.

19 Lord Simon believed that *R* v *Tolson*, supra, bound the court.

> 'wholly unreal, because if there was reasonable doubt about belief, the same material must have given rise to reasonable doubt about consent, and vice versa.'[20]

Hence the Heilbron Report commented that 'certain misconceptions and misunderstandings have arisen, possibly from the undue emphasis that has been put, out of context, on certain phrases stemming from the wording of the question certified for their Lordships' consideration.'[21]

It was to dispel any further misapprehension that this paragraph was added to s1 of the *Sexual Offences (Amendment) Act 1976*[22]:

> 'It is hereby declared that if at a trial for a rape offence, the jury has to consider whether a man believed that a woman was consenting to sexual intercourse, the presence or absence of reasonable grounds for such a belief is a matter to which the jury is to have regard, in conjunction with any other relevant matters, in considering whether he so believed'.

4. Evaluating *DPP* v *Morgan*

The previous sections have already demonstrated the impeccable logic of the decision of *Morgan.* In a strictly legal sense, it is undeniably correct. Even those who criticized the decision did not impugn its legal reasoning. A more important ground of criticism is the question of justice to the victim. Thus, Lord Simon said in the very case,

> 'A respectable woman who has been ravished would hardly feel that she was vindicated by being told that the assailant must go unpunished because he believed, quite unreasonably, that she was consenting to sexual intercourse.'[23]

Reasonableness of the belief was therefore regarded as a necessary requirement to protect victims from the carelessness or negligence of men in ascertaining their wishes. 'Bodies', wrote Honoré[24], 'deserve better protection than goods', so if the conduct of the accused fell short of the reasonable man standard, he should be found guilty of rape.

Thomas Lewis objected to this suggestion[25]. He agreed that women must be protected from rape, which is a serious violation of her rights – 'violation not only of the body, but also of her very sense of self' – yet if the accused were to be convicted of a serious violation of this sort without scrupulous attention being paid to the question of whether he did in fact choose to do what was forbidden, it would be an equally serious violation of his rights. He concluded that an accused should not be held legally culpable except for something he actually chose to do.

The same feeling was expressed by the Heilbron Committee, which realized that

> 'It is said to be unfair to the woman that there should be a situation in which she has been subjected to sexual intercourse without her consent, and yet the man may be found not guilty of raping her. She has suffered a gross harm; the perpetrator of that harm, so critics say, should be liable to conviction for inflicting it.'[26]

The Committee's answer is that

> 'To this criticism there is, we feel, a real objection. If carried to its logical conclusion the argument would lead to the abandonment of any requirement of a guilty mind, for the harm suffered by the victim is the same whatever the man's intention may be. We are concerned not only with harm, but with culpability.'[27]

Notably, the Committee also suggests that recklessness will also suffice as mens rea because there is 'no significant moral difference'[28] between the intentional and the reckless rapist. The emphasis, then, is on culpability or guilty mind, a theme which will again be taken up in IV.

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20 Per Lord Hailsham in *DPP* v *Morgan,* supra, at p 207.
21 Para 65 Heilbron Committee Report [1975] Cmnd 6352.
22 The equivalent in Hong Kong is s118 (4) *Crimes Ordinance.*
23 *DPP* v *Morgan* [1976] AC 182 at p 221.
24 Tony Honoré, *Sex Law,* (Duckworth 1978) p 78.
25 Thomas Lewis, *Recent Proposals in the Criminal Law of Rape,* 17 Osgoode Hall LJ 445.
26 Para 74, Heilbron Committee Report, op cit.
27 Para 74, ibid.
28 Para 76, ibid.

We now turn to *R* v *Pigg*, on reckless rape.

III. THE PROBLEM WITH RECKLESS RAPE: *R* v *PIGG*

One important aspect of the decision in *DPP* v *Morgan* is the specific reference by their Lordships to recklessness as mens rea in the law of rape. This was subsequently incorporated into the statutory definition of rape.

The concept of recklessness in the criminal law has brought some intriguing problems, especially in the context of rape, as revealed by the case of *Pigg*[29].

1. Recklessness Prior To *R* v *Caldwell*[30]

There were no general authoritative pronouncement as to the meaning of recklessness prior to the case of *R* v *Caldwell.* Textbook writers however have produced their versions:

Glanville Williams treated recklessness as

'The *conscious disregard of risk*[31] – the state of mind of one who knows that a consequence is likely to follow from his conduct but pursues his course notwithstanding.'

Smith and Hogan defined recklessness as

'The *deliberate*[32] taking of an unjustifiable risk. A man is reckless with regard to circumstances if *he realizes that the circumstances may exist*[33] without either knowing or hoping that they do ..... It is essential that [he] should have known of the risk or *deliberately*[34] closed his mind to its existence when he acted'.

The American Law Institute's Model Penal Code s202(2) states that

'A person acts recklessly with regard to a material element of an offence when he *consciously*[35] disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct'.

The Law Commission recommended in Working Paper No31 Report on the Mental Element of Crime (1978), that

'A person is reckless if

(a) *knowing*[36] that there is a risk that an event may result from his conduct or that a circumstance may exist, he takes that risk, and

(b) it is unreasonable for him to take it, having regard to the degree and nature of the risk which he knows to be present .

It is apparent from the above examples that the general consensus of opinion is that there is an element of deliberation. Recklessness is distinguishable from gross negligence in that, in the former, the issue is whether the facts speak so loudly that the jury can profess themselves satisfied beyond reasonable doubt that the defendant must have foreseen – that they cannot imagine that he did not foresee – the possibility of the consequence, whereas in the latter, the issue is whether the defendant has acted in a way that falls significantly below the standard of a reasonable man. In recklessness we probe the mind of the accused, but in negligence what the accused thinks subjectively is no longer relevant.

2. Effect Of *R* v *Caldwell* On The Concept Of Recklessness

This is a case of criminal damage. The facts will not be cited. What concerns us is a model direction formulated by Lord Diplock[37]:

'"Reckless" as used in the new statutory definition of the mens rea of these offences is an ordinary English word. It had not by 1971

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29 supra.
30 [1982] AC 341.
31 Emphasis added.
32 Emphasis added.
33 Emphasis added.
34 Emphasis added.
35 Emphasis added.
36 Emphasis added.
37 *R* v *Caldwell* [1982] AC 341 at p 353-4.

become a term of legal art with some more limited esoteric meaning than that which it bore in ordinary speech[38], a meaning which surely includes not only deciding to ignore a risk of harmful consequences resulting from one's act that one has recognized as existing, but also *failing to give any thought to whether or not there is any such risk in circumstances where, if any such thought were given to the matter it would be obvious that there was*[39].'

The addition of the second limb into the ambit of recklessness has the effect that there is now a very real danger of confusion between recklessness and negligence. This danger has been perceived by Lord Edmund-Davies, who dissented in *R* v *Caldwell*[40]:

'Unlike negligence which has to be judged objectively, recklessness involves foresight of consequence, combined with an objective judgement of the reasonableness of the risk taken ..... recklessness in vacuo is an incomprehensible notion. It must relate to foresight of risk of the particular kind relevant to the charge preferred ..... So, if the defendant says of a particular risk, "It never crossed my mind", a jury could not on the words alone properly convict him of recklessness simply because they considered that the risk ought to have crossed his mind ..... a person cannot, in any intelligent meaning of the words, close his mind to a risk unless he first realize that there is a risk'.

Unfortunately, the confusion that has arisen has now been brought into the law of rape by the adoption in *Pigg* of the *Caldwell* principle.

3. *R* v *Pigg*: Enlarging The Scope Of Reckless Rape

The facts of this case are not directly relevant to the question in point. What is the main concern here is a declaration by the Court of Appeal that

'So far as rape is concerned, a man is reckless if either he was indifferent and gave no thought to the possibility that the woman might not be consenting in circumstances where if any thought had been given to the matter it would have been obvious that there was a risk that she was not, or, that, he was aware of the possibility that she might not be consenting but nevertheless persisted regardless of whether she consented or not.'[41]

The novelty lies in the first limb of this direction, as a result of which it is now possible to convict a person even though the possibility that the victim is not consenting has never even crossed his mind – what Lord Edmund-Davies referred to as 'recklessness in vacuo'.

4. Divergent Interpretations Of *R* v *Pigg*

The direction, quoted in 3, from Lord Lane's judgment, is notorious now for its lack of clarity. In particular, he gave no clue as to the subject of 'if any thought had been given' and 'it would have been obvious'. There is no hint at all as to thought given by whom or obvious to whom. As such, a lot of discussion has centred on the interpretation of this case. Commentators can be divided into those who believe the *Morgan* principle has been unaffected and those who believe that there have been changes so as to affect the status of *Morgan.*

(a) Morgan Unaffected: A positive belief in consent always negatives liability

(i) Professor JC Smith

Professor Smith's initial reaction is contained in a commentary in the Criminal Law Review[42]. His view is that *R* v *Caldwell*[43] should never have been applied to the law of rape at all, because that case concerned recklessness as to consequences, whereas in rape, the issue is recklessness as to circumstances.

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38 In *R* v *Lawrence* [1982] AC 510, Lord Diplock again emphasized that 'reckless' is a word that has been in the English language in general use for over a thousand years, and that, at p 525, it 'had not acquired a special meaning as a term of legal art, but bore its popular or dictionary meaning of careless, regardless, or heedless of the possible harmful consequences of one's acts'.

39 Emphasis added.

40 [1982] AC 341 at 358.

41 [1982] 2 All ER 591 at 599.

42 [1982] Crim LR 446.

43 supra.

Moreover, he finds it totally unthinkable that a man does not consider the possibility that a woman may not be consenting to the intercourse and at the same time does not believe that she is consenting, because, in his view, 'his failure to consider the possibility amounts to an assumption that is no less indistinguishable from a belief'.

So, to Professor Smith, what Lord Lane depicts as 'the theoretically possible case'[44] that a man never addressed his mind to the possibility that a woman was not consenting though there was a real risk that she might not be, 'seems unlikely to be a practical problem and it is perhaps arguable that the case does not exist even in theory'[45]. The discussion of such a 'non-existent problem'[46], he contends, only breeds confusion.

Professor Smith also challenged the correctness of the sentence 'indifferent and gave no thought to the possibility .....'. It is, he said, a non-existent situation, for 'how can a person be indifferent to the possibility of something the possibility of which he has not envisaged?'[47] Indifference presupposes consciousness of a risk and is apparently the same as pre-*Caldwell* recklessness.

(ii) Glanville Williams[48]

It is also Professor Williams' opinion that *R* v *Pigg* is an unnecessary decision.

He took the approach that, even accepting a subjective approach of recklessness, it usually includes the case where, though a thing is not at the moment present in the mind, it can be recalled instantly – 'what is required is not present awareness but general knowledge given the will and ability to recall the knowledge.' Insofar as *R* v *Pigg* represents an attempt to catch such a criminal, it is therefore redundant.

On the other hand, if the Court of Appeal in *Pigg* meant to extend the definition of recklessness even further, Williams is totally adamant on upholding the *Morgan* principle. To him, 'the limit is this: that no departure should be made if the defendant positively believed [in consent]'.

(iii) George Syrota[49]

A very elaborate and complicated argument was formulated by Mr Syrota in order to limit the effect of *R* v *Pigg*. He developed a so-called 'double-barrelled test'[50], whereby the jury must, before convicting, satisfy itself that

a. The defendant, though he is not aware of the risk, does know all the material facts and possesses knowledge of the risk stored at the back of his mind which he could have brought to the forefront of it if he had chosen to do so; and
b. The defendant would not have acted differently even if he had been aware of the risk.

Syrota's approach was therefore to emphasize the aspect of indifference.

Jennifer Tempkin[51] cited several objections to this analysis of *Pigg*. Not only is it unsupported by any part of the judgment itself, but it is also unworkable and clumsy in practice. It only strained the meaning of recklessness as described in *R* v *Caldwell*[52], *R* v *Lawrence*[53] and *R* v *Pigg* itself.

(b) 'Retreat from Morgan'

This view is expressed by Jennifer Tempkin[54]. Her interpretation of *Pigg* is that it is designed to catch an accused who has special knowledge and should have known better.

Tempkin suggested that we must read the ambiguous passage in *Pigg* on the assumption that Lord Lane is not referring to the reasonable man but to the accused himself. The test is objective in that there is the 'gave no thought' phrase, but she thought that a subjective gloss should be painted onto it. The

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44 [1982] 2 All ER 591 at 597.
45 [1982] Crim LR 446 at 448.
46 [1982] Crim LR 446 at 448.
47 [1982] Crim LR 446 at 448-9.
48 G Williams, *Divergent Interpretations of Recklessness*, [1982] NLJ 289.
49 G Syrota, *A Radical Change in the Law of Recklessness?* [1982] Crim LR 91.
50 Jennifer Tempkin, *The Limits of Reckless Rape*, [1983] Crim LR 5 at 9.
51 J Tempkin, op cit.
52 supra.
53 supra.
54 J Tempkin, op cit.

correct way to read the passage then, is to imply the part in parenthesis into it:

> 'So far as rape is concerned, a man is reckless if either he was indifferent and gave no thought to the possibility that the woman might not be consenting in circumstances where if any thought had been given to the matter (by him) it would have been obvious (to him) that there was a risk that she was not .....'

The effect is that, an accused who has given no thought to the possibility of non-consent but believes the woman is consenting, will be reckless provided that if he had stopped and think, he would have realized that there was a risk.

So, whereas *Morgan* decided that a positive belief in consent would invariably save the accused from liability, we must now, in the light of *Pigg*, differentiate between

a. A defendant who believes the woman is consenting. It does not occur to him that she might not be; and
b. A defendant who, having realized that the woman might not be consenting, wrongly and quite unreasonably concludes that she is.

The difference lies in taking the trouble to give the matter some consideration. The defendant in situation (a) fails to advert at all; in (b), an attempt is made to evaluate the circumstances but a wrong conclusion is reached.

It is Tempkin's theory that the defendant in (a) will be liable but not that in (b), for 'Culpability lies in not troubling to think'[55]. She submits, therefore, that

> 'a defendant who fails to advert to the risk that the woman is not consenting to sexual intercourse will be liable for rape provided that he neither lacked the capacity to advert nor was in a state such as shock, fatigue or stress at the time.'[56]

5. After *Pigg*: What Is The Status Of *Morgan*?

Tempkin's view has now been given credence by a Court of Appeal decision *R* v *Mohammed Bashir*[57] which held, inter alia, that with regard to the meaning of recklessness, the trial judge's introduction of the concept of the reasonable man was a 'serious misdirection', and that the proper test was whether the actual defendant acted recklessly, not whether the reasonable man would have acted in the same way. 'Obvious risk' refers to a risk that would have been obvious to the defendant had he stopped to think.

J C Smith, however, argued that the misdirection cannot be regarded as such a serious one in fact[58],

> 'The defendant may on this occasion have diverged from the standard of the reasonable man in not stopping to think, but *the approved test requires us to consider what he would have thought if he had stopped to think*[59]. If ..... any ordinary and reasonable man would have appreciated that there was a substantial risk that the girl was not consenting, the defendant also, *if he had stopped to think*[60], must have appreciated this, unless he was sub-normal. *The very fact that we are required to assume that the defendant had thought about the matter removes any distinction between him and the reasonable man*[61].'

At this juncture we may take the law as temporarily settled. What, then, is the effect of this new recklessness on the decision on *Morgan*? Has this surreptitious re-introduction of the reasonable man led to the ousting of the *Morgan* principle, as David Cowley[62] pessimistically observed?

It has already been pointed out that, insofar as the defendant has taken the trouble to give the matter some consideration, but through his own stupidity comes to an utterly erroneous and unreasonable conclusion, he is not to be convicted. To this extent,

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55 J Tempkin, op cit, at p 11.
56 J Tempkin, op cit, at p 14.
57 [1982] Crim LR 687.
58 [1982] Crim LR 687 at 688-9.
59 Emphasis added.
60 Original author's emphasis.
61 Emphasis added.
62 David Cowley, *The Retreat From Morgan*, [1982] Crim LR 198.

the *Morgan* principle remains unscathed and the positive belief, however unreasonably formed, still saves the defendant from liability.

Nevertheless, it is submitted that there has been some fundamental change in the thinking behind the law of mistake. In *Morgan*, it has been repeatedly stressed that the existence of a mistaken belief is not so much a 'defence' as a denial that the prosecution has proved its case. This accounts for Lord Hailsham's oft-quoted passage:

> 'Once one has accepted, what seems to me to be abundantly clear, that the prohibited act in rape is non-consensual sexual intercourse, and that the guilty state of mind is an intention to commit it, it seems to me to follow as a matter of inexorable logic that there is no room for either a 'defence' of honest belief or mistake, or of a defence of honest and reasonable belief or mistake. Either the prosecution proves that the accused had the requisite intent, or it does not. In the former case it succeeds, and in the latter it fails ..... honest belief clearly negatives intent .....'[63]

In *R* v *Pigg*, however, the Court of Appeal treated mistake in the nature of a true defence – an excuse: if the defendant has not taken the trouble to give the matter some thought, all he has is a 'bad excuse' and it should not salvage him from liability.

IV. SHOULD LIABILITY FOR RAPE CONTINUE TO REST ON INTENTION AND RECKLESSNESS ALONE – OR SHOULD A DIFFERENT NOTION OF CULPABILITY BE RECOGNISED?

It has already been demonstrated that, to some extent, *R* v *Pigg* represents a departure from the 'inexorable logic' in *Morgan*. On the other hand, it is obvious that the practical impact of this is probably quite limited. An accused who, having appreciated that a risk of non-consent exists, forms an erroneous and unreasonable belief that it is, will still be able to escape liability. It has been suggested by several academics that an alternative notion of culpability is required in the law of rape; and this section will be devoted to an analysis of their arguments. In particular, the idea expounded by Toni Pickard[64] will be examined in detail.

The starting point of this is to embark on a re-analysis of *DPP* v *Morgan* whose legal argument has not been at fault and which is not technically challengeable. It has been mentioned that Glanville Williams has neatly summarized the logic of that decision in four sentences:

> 'Rape is a crime requiring mens rea. (a)
> Mens rea means intention or recklessness. (b)
> If the accused believes that the victim is consenting, he does not intend to rape, and is not reckless. (c)
> Therefore, even an unreasonable belief negatives liability. (d)'

(a) is of course a fundamental principle of English criminal law, (c) and (d) logically follows if we accept (b). The argument now is that we should not accept (b) on its face.

It seems to have become a widely held notion that mens rea should be equated with intention or recklessness. Mens rea is often described as a 'guilty mind', and in most cases, the law has adopted a subjective approach, convicting only an accused who has done a forbidden act deliberately. The raison d'être is obviously the need to strike a balance between the competing interests of society and freedom of the individual. Justice seems to dictate that the accused should not be lightly deprived of his freedom.

But such an approach, as John Sellers pointed out[65] is highly 'defendant-oriented', since

> 'attention is focussed less on the fact that the prohibited harm has occurred than on the subjective mental state of the defendant at the time he caused it'[66]

So justice is adequately done to the defendant, but what about justice for the innocent victim?

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63 [1976] AC 182 at 214.

64 Toni Pickard, *Culpable Mistakes and Rape: Relatings Mens Rea to the Crime*, [1980] 30 U of Toronto LJ 75.

65 John Sellers, *Mens Rea, Judicial Approach to Bad Excuses*, 41 Modern LR 245.

66 Ibid, at p 247.

Toni Pickard[67] boldly argued in her article[68] that, in rape, there is little doubt that the cost of taking reasonable care is insignificant compared with the harm which can be avoided through its exercise. This is because the defendant can avoid the mistake by simply asking the woman whether she consents or not. The only cost, perhaps, is what Tony Honoré suggested: 'greater explicitness in sexual contexts'.

Indeed, Pickard's essay is not confined to the topic of rape. In her own words, the essay is,

> 'first, to develop a detailed argument in support of the position that a mistake about consent should be accepted as a good answer to a rape charge only if the mistake was reasonable;
> second, to provide, by way of this argument, an illustration for a more general thesis, that we cannot adequately explicate the concept of mens rea with respect to a particular offence without analysing the nature of the conduct involved in that offence'[69]

The fact that an element of deliberation is required in most other crimes to ground a conviction does not necessarily mean the same idea can be applied to rape. ATH Smith[70] pointed out that the division of crime into its constituent parts of actus reus and mens rea is merely an exercise of analytical convenience. These concepts are useful tools in the exposition of criminal law, but it is easy to fall into the danger of allowing questions of policy to be determined by reference to definitions and terminology, thereby converting these descriptive tools into normative rules. John Sellers[71], too, reminded that

> 'Definitions, by their nature, deal with the paradigim case, and not with all the penumbral situations which must be resolved'[72]

If, therefore, it is recognized that the 'equation' mens rea means intention or recklessness is not well-equipped to cope with the particular crime of rape, a 'wider fault element' should be recognized. Indeed, this has happened in the intoxication cases. In *DPP* v *Majewski*[73], judicial common sense has 'illogically' struggled to reach the just result. Lord Simon, in that case, recognized that

> 'a mind rendered self-inducedly insensible through drink or drugs to the nature of a prohibited act or its probable consequences is *as wrongful as*[74] one which contemplates the prohibited act and foresees its probable consequences (or is reckless as to whether they ensue)'.

Unlike his colleagues[75] who tried to treat the drunkenness as an act of recklessness, Lord Simon is bold enough to jettison the attempt to squeeze the intoxicated defendant into the same category as the deliberate wrongdoer. Instead, he recognized that there is a different kind of fault element, beyond subjective mens rea, as a sufficient basis for liability, bearing in mind that 'the lifeblood of the law is not logic but common sense'[76].

In the same way, Pickard argues,

> 'mens rea is not a task of definition but one of discerning just bases for the attribution of criminal liability. Thus, it does not refer to a specific subjective state but to the actor's moral culpability in acting as he does'[77]

In rape, since the defendant's failure to inquire into consent constitutes such a minimal concern for the bodily integrity of others, it is good criminal policy to ground liability on it.

This attitude echoes that of Mewett[78],

> 'A failure to direct one's mind to whether consent was present or not may also, in some circumstances, amount to a state of mind that itself may be sufficient to provide the requisite mens rea ..... All that is required is the acceptance of the principle that certain surrounding circumstances may exist and that to carry on

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67 T Pickard, op cit.
68 It must be pointed out that this article came out before even *R* v *Caldwell,* supra.
69 T Pickard, op cit, at p 75.
70 ATH Smith, *On Actus Reus & Mens Rea* in *Reshaping the Criminal Law,* (Glazebrook ed).
71 John Sellers, op cit.
72 At p 264.
73 [1976] 2 WLR 623.
74 Emphasis added.
75 Lord Elwyn – Jones and Lord Edmund Davies.
76 A quotation of Lord Reid in *Haughton* v *Smith* [1975] AC 476 at 500.
77 Pickard, op cit, at p 97 fn 72.
78 Mewett, *The Reckless Rape,* [1975-6] 18 Crim LQ 418.

these activities without taking reasonable steps to ensure that those surrounding circumstances do not exist necessarily means that in choosing to act, the actor chooses the risk'

After all, says Celia Wells[79],

'The pursuit of sexual enjoyment can be abandoned without loss to anything other than the satisfaction of hedonistic pleasure'

Pickard's opinion has been endorsed by Jennifer Tempkin[80], who maintained that 'the guiding principle in the law of rape should be the protection of sexual choice for woman ..... no law can claim to protect sexual choice for woman if it permits as a defence a belief in consent based on what another person (usually the complainant's husband) has told the accused'. It must be recognized that such an argument has great force.

V. A STUDY OF THE SOCIAL BACKGROUND TO RAPE

It has been mentioned in the foregoing section how the *Morgan* decision may be challenged – not on its logic, but on the jurisprudential plane of culpability and justice. Although *R* v *Pigg,* which, purporting to follow *Morgan,* has in fact eroded the Morgan principle; it is clear that there is still much dissatisfaction with the law relating to mens rea of rape. The notion that only intention and recklessness form the requisite mens rea in rape is still firmly entrenched in the statutes. By giving the word 'recklessness' a twisted meaning, *R* v *Pigg* has only resulted in more confusion and done more violence to this already much abused term.

It remains a most unsatisfactory feature of the law of rape that, there are times when a woman considers herself raped but the man does not consider himself a rapist. This probably arises because, as the Heilbron Committee pointed out[81],

'It involves an act – sexual intercourse – which is not itself either criminal or unlawful, and can, indeed, be both desirable and pleasurable. Whether it is criminal depends on complex considerations, since the mental state of both parties and the influence of each upon the other as well as their physical interaction have to be considered and are sometimes difficult to interpret – all the more so since normally the act takes place in private.'

The difficulty in interpreting a situation is further elaborated and explained in *The Facts of Rape* by Barbara Toner[82]. She started off by explaining that

'There is a glorious rape fantasy epitomized by the handsome knight on a white charger who is so overcome by desire for a beautiful woman that he sweeps her on to his horse and carries her away to his castle where she delicately submits and loves him ever more. It imbues in all but the very bad rapes a quality of excitment and romance. The difficulty is in sorting out the fantasy from reality.'

This fantasy, she continues, stems from the traditional notions of masculinity and femininity. Men have always been expected to be aggressive, competitive and dominant, women always expected to be sub-ordinate and passive. Men should desire and conquer, women should be desirable and chaste and yet conquerable. Deeply entrenched in the society is 'sexual schizophrenia' or 'sexual apartheid' which makes it difficult to distinguish rape from seduction, which is not against the law. Indeed, seduction is a characteristic of courtship – men being responsible for extending the invitations and footing the bills; women being acceptors of hospitality.

This view is echoed by Honoré[83]:

'Because he is usually more daring a man is apt to think that a woman will allow him to go further than she really intends. A woman, being more cautious, is apt not to realize how far a man wants and intends to go. Each misreads the other's mind ..... There is often no definite stage at which it can be said that the two have agreed to sexual intercourse.'

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79 Celia Wells, *Swatting the Subjectivist Bug,* [1982] Crim LR 209 at 214.

80 J Tempkin, op cit, at p 15.

81 Heilbron Committee Report, op cit, para 9-10.

82 B Toner, *The Facts of Rape,* (Arrow 1977).

83 T Honoré, op cit, at p 77.

As a result of this similarity with seduction, it has been a historical phenomenon to attribute only the most heinous misconduct to rape, in order to avoid confusion; so in *East and Hale,* it was said that

> 'Rape consists in having unlawful sexual intercourse with a woman without her consent by force, fear or fraud'

and

> 'It is true rape is a most detestable crime, and therefore ought to be punished by death; but it must be remembered that it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, though never so innocent.'[84]

It thus became a general notion that if a rapist cannot be labelled 'fiend' or 'monster' or 'maniac', then he is probably not a rapist at all. Rape has acquired such a bad connotation in people's minds that courts often hesitate to pronounce a man a rapist unless very sure of his guilt – and his guilt is determined by a very subjective approach. An illustration of this attitude is Lord Cross in *DPP* v *Morgan*[85]. Lord Cross hypothesized the situation where an ordinary person is asked whether a man who has intercourse with a woman, believing that she consents, though she does not, is committing rape. His answer is 'No, if he was grossly careless then he may deserve to be punished, but not for rape'.

What is interesting is that Lord Cross does not think it will be unjust to demand a reasonable belief:

> 'To have sexual intercourse with a woman who is not your wife is, even today, not generally considered to be a course of conduct which the law ought positively to encourage and it can be argued with force that it is only fair to the woman and not in the least unfair to the man that he should under a duty to take reasonable care to ascertain that she is consenting to the intercourse and to be at the risk of a prosecution if he fails to take such care.'

Although, in other words, a man who is so grossly careless seems to be blameworthy, branding him a rapist seems to be too severe a penalty. Indeed, the penalty for rape is very harsh, for it can result in life imprisonment. Thus, to the burden of proof, it adds the burden of responsibility for the fate of the accused, both of which placed squarely on the shoulders of the unhappy accuser.

VI. CONCLUSION

It is apparent from the foregoing sections that, despite improvements and clarifications in the law relating to rape, there exists some very unsatisfactory features. In the realm of mens rea in rape, there is an obvious gap in the law: if a man deliberately commits unlawful sexual intercourse with a woman without her consent, he is liable and can face very severe punishment – and this includes the situation where he does not care to think about the question of consent; where he has been negligent in the sense that he positively believes in consent where a reasonable man would have thought otherwise, the crime of rape cannot catch him. There is no offence into which his behaviour can fall into.

What, then, can be done?

One possibility is to re-draft the statutory definition of rape so as to include within the definition of mens rea of rape the negligent 'rapist' as well. The problem with such an idea is the fact that rape has the long-standing image of being a heinous crime so that it seems rather unfair to treat such a person as within the same moral category as the deliberate rapist, at least in the public opinion. Undoubtedly, *R* v *Pigg* represents one step in the direction of recognizing new heads of liability in rape since the stringent logicality of *DPP* v *Morgan.* Yet it may be that, given our social background and the very bad connotation of rape, such a suggestion will be unacceptable. The law is notoriously slow to change.

Another suggestion is to recognize a lesser offence to cover the negligent sexual offender. Honoré suggested that there may be created an offence termed 'unlawful sexual intercourse' and there might be a rule that on a rape charge, the jury can find the accused guilty of having unlawful sexual intercourse if they think the man believed, though without good reason, that the woman consented.[86]

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84 1 Hale PC 635.
85 supra, at p 202-3.
86 T Honoré, op cit, p 78-9.

In fact, such a proposal has already been considered by the Heilbron Committee back in 1975. Such an offence, they realize, will cover an accused who 'in effect, ... is the man whom many critics of *Morgan* wish to catch'.[87] However, the Committee found three reasons against this suggestion. First, the introduction of such an offence would greatly complicate the task of the trial judge when he gives the jury directions. Secondly, it was gravely doubted whether, in view of the particularly subtle nature of sexual relations, any satisfactory account of the behavior of the reasonable man could be formulated. Lastly, there was a fear that juries would be tempted to convict of the lesser offence as a compromise solution, with the result that convictions for rape would become more difficult to acquire and in effect the law would be weakened and not strengthened.

There is much to be said about these practical difficulties in re-formulating the law of rape. Yet it is equally obvious that the law now is far from satisfactory. So long, however, as the law remains as it is, *R* v *Pigg* must be criticized for its unduly wide interpretation of recklessness[88] while at the same time not changing the law sufficiently. It may be time for the legislature to re-examine the law of rape in the light of our actual social background and recommend modifications – hopefully in the near future.

87 para 79 Heilbron Committee Report, op cit.

88 Strictly speaking, Lord Lane's test of recklessness which has caused such confusion is obiter, since the trial judge's direction was even more favourable to the defendant.

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THE LAW RELATING TO COMPENSATION FOR OCCUPATIONAL DISEASES IN HONG KONG

by Erik Shum Sze Man

INTRODUCTION

In a modern industrial society most of the population takes part in the commercial or industrial activities. Among the five million citizens in Hong Kong two and a half million people are engaged in the labour force.[1] Though the number of reported cases of occupational diseases is small[2] it is not difficult to appreciate the importance of protection of this large section of the general population against work-related diseases. This can be achieved primarily by preventive measures[3] to reduce the occurrence of occupational diseases. The compensation for victims of occupational diseases, however, cannot be ignored because, firstly, like industrial accidents some occupational diseases are caused without the fault of anybody and can hardly be prevented;[4] and secondly the preventive measures can never catch up with the ever-developing technology in industrial processes.

Dr Berrardino Ramazzimi, father of occupational medicine, said 300 years ago, 'Tis [sic] a sordid profit that's accompanied by the destruction

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1 According to the year book of Hong Kong at the end of 1982 the total population is 5,287,800 in which 2,405,000 were engaged in the workforce.

2 The statistics of occupational diseases reported under the *Employees' Compensation Ordinance* Cap 282 are tabled in Chapter 2.

3 For details of the law relating to these preventive measures refer to *Factories and Industrial Undertakings Regulations* Cap 59, *Dangerous Goods Ordinance* Cap 295 ..... etc.

4 The description of industrial accidents by John Miller in 'Accident Compensation in Hong Kong', (1979) 9 HKLJ 4, is applicable, 'These huge accident tolls are the inevitable consequence of activities pursued in a modern industrial society. They bring misery and financial hardship to hundreds of thousands of Hong Kong citizens every year while we as a society tolerate this as the inevitable price of progress. As we are not prepared to curtail the activities which produce these accidents we should at least provide a modern system of compensating and rehabilitating the victims.'

of health [of the workers]'.[5] The basic assumption of this paper is that the wilful sacrifice of a worker's health in favour of his employer's profit is not acceptable in modern industrial societies. It is the purpose of the author to review the law relating to compensation for occupational diseases in Hong Kong, with reference to the situations and problems faced by the corresponding systems in some foreign countries.

Notwithstanding the fact that it is impossible to avoid discussing industrial accident compensation in general the paper will concentrate on the aspect of disease compensation. There are two reasons for the choice. Firstly, occupational diseases seem to be a gap ignored by academic lawyers among the volume of critics on industrial accident compensation. Secondly, and more important, the problems with respect to compensation for occupational diseases are unique in themselves[6] and therefore deserve special attention.

The topic being a social issue as well as a legal one, apart from library research which was the main way of collecting information, resort has been made to interviews, past newspaper extracts and visits to various government departments and labour organisations.

I WAYS OF CLAIMING COMPENSATION FOR OCCUPATIONAL DISEASES IN HONG KONG

Section 1: THE EMPLOYEES' COMPENSATION ORDINANCE[7]

The statutory right to claim compensation for occupational diseases is provided in s32(1) of the *Employees' Compensation Ordinance.* The section provides that an employee who has contracted an occupational disease which is due to the nature of his employment in which the employee was employed at any time within the prescribed period immediately preceding his incapacity or death is to be compensated as if in a case of injury by industrial accident arising out of and in the course of employment[8] subject to some modifications.[9] To be qualified for compensation a worker has to establish basically the following:

1. that he is within the definition of 'employee' provided by s2 of the Ordinance;[10]
2. that he has contracted an occupational disease as a result of which he suffers total or partial incapacity (whether of a permanent or temporary nature) or death;
3. that the disease was due to the nature of his employment (present or previous);
4. that the type and the time of that employment are within the limitations provided by the second schedule of the Ordinance.[11]

The first requirement, which is a typical problem to all employees' compensation cases, deserves special attention. The essence of the problem is the distinction between a contract of service and a contract for service, the former being a necessary condition for a claimant to be protected under the Ordinance. The traditional test for the distinction, the control test,[12] was considered as obsolete

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5 Quotation taken from a commentary in the *Hong Kong Standard* published on 3rd May, 1983.

6 For explanation of the proposition refer to Chapter 3, s2.

7 Cap 282.

8 The principal section for injury by accident is s5.

9 The modifications relate to the determination of the time of accident s32(1)(a), the disqualification from compensation for deceit s32(1)(b), liability of last employer within prescribed period s32(1)(c), amount of compensation s32(1)(d) and notice to the last employer concerned s32(1)(e).

10 'Employees', by s2(1), means 'any person who has, either before or after the commencement of this Ordinance, entered into or works under a contract of service or apprenticeship with an employer in any employment, whether by way of manual labour, clerical work, or otherwise, and whether the contract is expressed or implied, is oral or in writing.' But the section excludes those who are employed in a casual nature, or 'not for the purposes of the employer's trade or business,' or 'being a person employed for the purposes of any game or recreation and engaged or paid through a club,' [s2(1)(b)]. The definition also excludes outworkers [s2(1)(c)], a member of the employer's family who resides with the employer [s2(1)(d)] and employees employed under an illegal contract [s2(2)].

11 Other minor qualifications in s33(2) are left out from the discussion.

12 The test was summarised by Bramwell LJ in *Yewens* v *Noakes* [1880] 6 QBD 530 as '(whether the worker was) subject to the command of the master as to the manner in which he shall do his work.'

because the postulation of a 'combination of managerial and technical functions in the person of the employer,[13] had been nullified by economic developments of modern industrial societies. From the late forties of the twentieth century, in view of the fine division of labour and highly skilful and technical character of some work, Judges took into account many other considerations when they distinguished between the two kinds of contracts. These included, inter alia whether there were other managerial control as to the time and place of work,[14] whether a lawful authority rested on the master to order the worker to work,[15] method of payment of wages and power of dismissal.[16] In the more recent cases of *Ready Mix Concrete* v *Minister of Pensions*[17] and *Market Investigations Ltd.* v *Minister of Social Security*[18] the courts took a pragmetic approach towards the issue. A set of criteria was pointed out in each case and decision was made after considering each factor. It can well be concluded, for our present purpose, that in distinguishing the two kinds of contract, 'no magic formula can be propounded for determining which factors should in any given case be treated as the determining ones. The plain fact is that in a large number of cases the court can only perform a balancing operation, weighing up the factors which point in one direction and balancing them against those pointing in the opposite direction.'[19]

The rest of the requirements relates to the meaning of occupational diseases and causation problem. They are dealt with by a prescribed schedule in the ordinance. The main characteristic of compensation under this piece of legislation is that occupational diseases are defined as those diseases 'specified in the second column of the Second Schedule and any recurrence or sequelae thereof.'[20] It means that only those diseases prescribed in the Second Schedule are to be regarded as 'occupational diseases' and thus are to be treated as cases of industrial injury by accident 'out of and in the course of employment.'[21]

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13 O Kahn-Freund, 'Servants and Independent contractors' (1951) 14 MLR 504 at 505-506. For transformation of the control test, see *Mersey Docks and Habour Board* v *Coggins and Griffiths* [1947] AC 1.

14 *Zuijis* v *Wirth Brothers* (1955) 93 CLR 561.

15 ibid.

16 *Morren* v *Swintor and Pendelbury Council* [1965] 2 All ER 349.

17 [1968] 2 QB 497.

18 [1969] 2 QB 173.

19 Atiyah, 'Vicarious Liability'.

20 s3, Cap 282.

21 For compensation for industrial accidents refer to s5 to s31 of Cap 282.

Part of the Second Schedule is reproduced below:[22]

Item	*Description of occupational disease*	*Nature of trade, industry or process*	*Prescribed period for purposes of section 32*
1.	Poisoning by lead	Any occupation involving the use or handling of, or exposure to the fumes, dust or vapour of, lead or a compound of lead, or a substance containing lead.	2 years. In the case of nephritis – 4 years.
2.	Poisoning by manganese	Any occupation involving the use or handling of, or exposure to the fumes, dust or vapour of, manganese or a compound of manganese, or a substance containing manganese.	2 years.
3.	Poisoning by phosphorus	Any occupation involving the use or handling of, or exposure to the fumes, dust or vapour of, phosphorus or a compound of phosphorus, or a substance containing phosphorus.	3 years.

It can be seen from the above Schedule that a victim of the prescribed occupational diseases can only recover compensation by virtue of s32 if he can satisfy the third and fourth columns of the Schedule, namely the nature of the trade or process where the occupational disease was contracted and the period immediately preceding the incapacity or death within which the disease was contracted.

It is the purpose of s32 and the Second Schedule to relieve the disabled employees from the legal complications of having to prove that a certain disease was of occupational origin and thereby, facilitate the compensation process.[23] It is provided in s34 that if an employee satisfies the requirements of the Second Schedule it is presumed that the disease he suffers from was due to the nature of his employment. The burden to disprove the causation thus falls on to the employer.

The procedure of claiming compensation under this heading is simple. When the employee discovers that his incapacity (or the employee's dependants discover that the employee's death) was due to a prescribed occupational disease and he is qualified to claim compensation he should notify[24] the employer from whom compensation is sought. That employer is then under a legal duty to report the case to the Labour Department within seven days.[25] After investigation by the Commissioner for Labour, if there is no dispute, compensation will be paid by the employer or his insurance company under an order of the District Court with reference to the earnings of the employee under that employer.[26] Appeal can be lodged to the Court of Appeal.[27]

If a victim of an occupational disease fails to comply with any of the requirements in the Second Schedule an alternative way is still available to him

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22 The Schedule is at present under review by the Legislative Council. For details of the proposed amendment, refer to Chapter 2.

23 Extract from a confidential memorandum of the Labour Department.

24 s14, Cap 282: the employee should notify his employer within 24 months from the occurrence of the incapacity or death.

25 s15, Cap 282.

26 s32(1)(d), Cap 282: the calculation is the same as in an accident case.

27 s23, Cap 282.

by virtue of s36(1). The section provides that if the disease is personal injury by accident within the meaning of s5 then the law relating to compensation for injury by accident out of and in the course of employment is still applicable. In this way the presumption of causation provided in s34 will not help the claimant who then has to prove, as in an ordinary accident injury case, the following:

1. that the disease was due to 'an accident';
2. that he was injured out of and in the course of his employment.

The difference between a disease developed by process and a disease contracted due to an accident becomes significant. In *Brintons, Limited* v *Turvey*[28] the claimant's husband contracted and died from anthrax which was caught at a particular event when a particle from some wool settled in his eye. It was held that it was an accident and the claimant was entitled to be compensated under the *Workmen's Compensation Act* 1896. But in that case as was explained later[29] by the English Court of Appeal there was no attempt to 'say that a mere disease without accident, not attributed to something which may properly be called an accident, entitles a workman to compensation.....'[30]

Though the courts often found it difficult to distinguish between the two cases the guideline for the distinction is that whether one can 'indicate the time, the day, the circumstance and the place in which the accident has occurred by means of some definite event'[31] where the employee contracts the disease. The authorities are applicable in Hong Kong in drawing the distinction between an injury by accident and a disease by process.

A last point should be noted that after the *Pneumoconiosis (Compensation) Ordinance*[32] was passed Pneumoconiosis diseases such as silicosis and asbestosis are to be compensated by a special statutory fund.[33] Therefore this very limited type of occupational diseases has its own way of compensation outside the scope of the *Employees' Compensation Ordinance.*[34]

Section 2: COMMON LAW REMEDIES

Victims of occupational diseases can seek compensation by civil actions. This is true whether the claimant has already succeeded in obtaining compensation under s32 or s36(1) of the *Employees' Compensation Ordinance*[35] or not. But in any case the compensation obtained under the *Employees' Compensation Ordinance* will be deducted from his damages, if he succeeds in his action.[36]

The commonest types of civil actions for damages relating to occupational diseases are negligence and breach of statutory duty. They will be discussed separately in the following paragraphs.

(i) negligence

In an action of negligence the plaintiff has to prove the following: firstly, the employer owes him a duty of care; secondly, the employer has breached this duty; thirdly, the breach of his duty has caused the disease from which the plaintiff suffers; and fourthly the injury the plaintiff suffers is not too remote.

The first requirement concerning the duty of care needs little explanation. Since the employer is the controller of the work of the employee, no doubt he is 'bound to provide for the safety of his servant'.[37] This was recognised as far as in the early nineteenth century. Therefore an employee, as a plaintiff, seldom finds any difficulty on this point.

The second requirement relates to the standard of the duty of the employer and whether there is a breach of that duty. Generally, as in other cases of torts, the standard applied to any employer is an objective one. 'The law finds "legal fault" in a failure

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28 [1905] AC 230.

29 *Eke* v *Hart-Dyke* [1910] 2 KB 677 and *Roberts* v *Lord Parrhyn* [1949] 1 All ER 891 where both cases were decided in favour of the employers on the ground that there was no accident causing the injury.

30 *Eke* v *Hart-Dyke,* ibid p 681 per Cozens – Hardy MR.

31 *Eke* v *Hart-Dyke,* ibid p 684 per Cozens – Hardy MR.

32 Cap 360.

33 The fund is financed by levy imposed on the construction and quarry industries.

34 s36(2), Cap 282.

35 Cap 282, for details of the sections and their application, refer to Chapter 1 section 1.

36 s26, Cap 282.

37 *Priestley* v *Fowler,* Court of Exchequer [1835-42] All ER 449 per Lord Abinger CB.

to live up to an ideal standard of conduct which may be beyond the knowledge or capacity of the individual'.[38]

The duty of an employer was said to be threefold, 'the provision of a competent staff of man, adequate material, and a proper system and effective supervision'.[39] These duties were summarised by Payne J[40] to be a 'duty to take reasonable steps to avoid exposing servants to a reasonably foreseeable risk of injury.' Though the duty is set by an objective standard, it is never a strict one, but depends on the circumstances of the particular case.[41]

Those circumstances include the knowledge of a reasonable employer,[42] the recognised practice at the material time,[43] and whether the employer has fulfilled his duty by ordering machines from a reputable supplier.[44]

The third requirement is causation, i.e., the breach of duty must have in fact caused the disease suffered by the plaintiff. The same problem appears in an action of breach of statutory duty. As in other cases of negligence the 'but for' test[45] applies here. The test, however, is incapable of dealing with every case of factual causation,[46] especially when there are multiple or concurrent causes or satisfactory proof of the cause of the damage is beyond the knowledge of mankind. In cases where the plaintiffs' diseases develop over a long period the test seems to be artificial because there may be other minor causes contributory to the injury. The English courts have taken a common sense approach to this problem. Lord Reid was of the opinion that 'the employee must, in all cases, prove his case by the ordinary standards of proof in civil actions: he must make it appear at least that, on a balance of probabilities, the breach of duty caused, or materially contributed to, his injury'.[47] The dictum was widely applied in the cases that followed.[48]

The fourth requirement, i.e., the remoteness of damage, is best illustrated by the case, *Tremain* v *Pike and another.*[49] In that case an agricultural worker contracted Weil's disease, a rare kind of disease carried by rats, in the course of his work. It was held that the defendant was immune from liability on the ground that Weil's disease was at least a remote possibility which they would not reasonably foresee, and that the damage suffered by the plaintiff was, therefore, unforeseeable and too remote to be recoverable. The burden is thus on the plaintiff to show that the type of disease he contracts is foreseeable in relation to his work.

(ii) breach of statutory duty

An alternative civil action which may be brought by an injured employee is an action for breach of statutory duty. In this action all he has to show is that:

(i) the duty is owed to him;
(ii) the disease he suffers from is intended by

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38 Prosses, *Torts*, p 18. For cases to illustrate this proposition, see *Workington Harbour and Dock Board* v *SS Towerfield (owners)* [1951] AC 112, 160; *Gollins* v *Gollins* [1964] AC 644, 664.

39 *Wilson and Clyde Coal Co Ltd* v *English* [1937] 3 All ER 628 per Lord Wright.

40 *Tremain* v *Pike and another* [1969] 3 All ER 1303.

41 For similar proposition, see *Ho Mui* v *Gammon (Hong Kong) Limited and another* HKLR [1975] 195.

42 *Ebbs* v *James Whitson & Co Ltd.* [1962] 2 All ER 192, (an employee suffered from dermatitis was denied damages because, as it was held, on the state of knowledge then existing of the danger of exposure to monsonia wood dust, there was no such probability that exposure would result in injury as to lead a reasonable man placed in the defendant's position to anticipate it).

43 *Stokes* v *Guest Keen and Nettlefield (Bolts and Nuts) Ltd.* [1968] 1 WLR 1776 (it was held that an employer did not fall below the standard to be properly expected of a reasonable and prudent employer if he followed a recognised practice, unless it was clearly bad).

44 *Davie* v *New Merton Board Mills Ltd and another* [1959] AC 604 (it was held that the employer, being under a duty to take reasonable care to provide a reasonably safe tool, had discharged that duty by buying from a reputable source a tool whose latent defect they had no means to discover).

45 The defendant's negligence is a cause of the damage if that damage would not have occurred but for it.

46 Thorough discussion on this point can be found in 'The Scope and Application of the "But-For" Causal Test' DMA Strachau (1970) 33 MLR 386 at 391.

47 *Bonnington Castings Ltd* v *Wardlow* [1956] All ER 615 at 618.

48 *Nicholson and others* v *Atlas Steel Foundry and Engineering Co Ltd* [1957] 1 All ER 776, *Gardiner* v *Motherwell Machinery and Scrap Co Ltd* [1961] 3 All ER 831.

49 [1969] 3 All ER 1303.

the statute to prevent;

(iii) the employer has not complied with the provisions of a statute, and

(iv) such lack of compliance has resulted in the employee catching a disease.[50]

But before establishing the breach of statutory duty and causation, the employee has to show that duties imposed by the legislation are intended to give rise to civil actions.

Whether a statutory duty on the employer gives the employee a private right in law is a question which attracts a great deal of judicial attention. 'The only rule which in all circumstances is valid is that the answer must depend on a consideration of the whole Act and the circumstances, including the pre-existing law, in which it was enacted'.[51]

In construing the intention of the legislature a few criteria were often applied. They are: whether the statutes are for the benefit of a class,[52] whether there is already severe penalty on the employer,[53] and whether the existing common law remedies are adequate.[54] Though all the tests are vague and difficult to apply they continue to be the solution of the dilemma in the absence of clear provision in the statutes. In the area of industrial health, nevertheless, judicial attitude seems to be in favour of the employees. In the Australian case of *O'Connon* v *S.P. Bray Ltd.*[55] Dixon J said,

> 'In the absence of contrary legislative intention, a duty imposed by statute to take measures for the safety of others seems to be regarded as involving a correlative private right, although the sanction is penal, because it protects an interest recognised by the general principles of the common law..... The effect of such provision is to define specifically what must be done in furtherance of the general duty to protect the safety of those affected by the operation carried on'.[56]

In Hong Kong the obligations of employers are incorporated in various ordinances. These include the *Factories and Industrial Undertakings Ordinance and regulations,*[57] *Dangerous Goods Ordinance,*[58] *Public Health and Urban Services Ordinance,*[59] etc. Though there is little local authority on the issue there is no reason why different criteria should apply.

Not only does the employee have to show that his action can rely on the employer's statutory duty, he needs to prove that such duty is owed to him or a class to which he belongs. The reason is clear from the above-mentioned nature of the action. Since the action is primarily based on the fact that the statutory duty gives rise to a private right it is self-evident that such right must be intended to be owned by a plaintiff before he can enforce it. Therefore safety provisions are of no avail to a person who is outside the class which is intended by the legislature to protect.

Another element of the action is that the disease an employee suffers has to be within the intention of the statute to prevent. The same reasoning as the foregoing requirement applies here. For instance a statute, which provides that the machines should be properly fenced, cannot be relied on by an employee who suffers from occupational deafness though in fact they may be causally linked in some ways.

The fundamental element of this action is the breach of the statutory duty. Different from the case of negligence, liability under this action is strict. All depends on the interpretation of the statute concerned. Though the standard of duty required by a statute is not easily discerned and resort may be made to the pre-existing common law or recognised practice, once the standard is interpreted by the court the employer has to abide by that standard the breach of which is sufficient to fix him with liability (provided that other elements of the action are present).

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50 For general discussion, see 'Accident Compensation in Hong Kong' John Miller (1979) 9 HKLJ 4.

51 *Cutler* v *Wandsworth Stadium Ltd* [1949] AC 398, 497, per Lord Simonds.

52 *Phillips* v *Britannia Hygienic Laundry* [1923] All ER 127 per Bankes LJ.

53 *Groves* v *Wimbarne* [1898] 2 QB 402.

54 *Square* v *Model Farm Dairies Ltd* [1939] 2 KB.

55 [1937] 56 CLR 464.

56 ibid per Dixon J at 478. Similar suggestion was given by AL Smith LJ in *Groves* v *Lord Wimbarne* [1898] 2 QB 407.

57 Cap 59.

58 Cap 295.

59 Cap 132.

The last requirement concerning causation is similar to that in negligence. The breach of the statutory duty must have caused the disease of the plaintiff. This has been discussed in relation to the action of negligence.

Section 3: OTHER ASSISTANCE

(i) sickness allowance

A more general benefit which is available to workers is sickness allowance. This is provided in s33(1) of the *Employment Ordinance.*[60] However that Ordinance[61] excludes the allowance for occupational diseases in respect of which compensation is payable under the *Employees' Compensation Ordinance.*[62] Therefore it is only when an employee fails to be compensated under the *Employees' Compensation Ordinance* will he be paid sickness allowance.

There are still a few basic conditions to be satisfied before the allowance is paid by an employer. Firstly an employee has to be employed under a continuous contract for a period of one month or more.[63] Secondly sickness allowance is only payable if an employee takes at least four consecutive days as sickness days.[64] Thirdly the employees' allowance is limited to the number of paid sickness days accumulated by him,[65] the accumulation being calculated at the rate of one paid sickness day for each completed month of employment.[66] Fourthly the sickness must be certified by a recognised medical practitioner.[67]

The daily rate of sickness allowance is a sum equivalent to two thirds of the wages which the employee would have earned had he worked on the sickness day.[68]

(ii) social welfare

Other forms of assistance an employee who suffers from occupational disease can get are public assistance and special needs allowance. Both schemes are administered by the Department of Social Welfare. 'The objective of the schemes is to meet the basic and particular needs of recognised vulnerable groups in the community'.[69]

The Public Assistance Scheme is intended to bring the income of needy individuals and families up to a prescribed level.[70] An injured employee who obtains no compensation whatsoever can turn to this last resort. There are three basic conditions governing eligibility. They are level of income and savings, length of residence in Hong Kong and age.[71] After the last revision of rate of assistance on 1st July, 1981, the rate for a single person per month is $350.[72] Additional Special supplements such as old age supplement and disability supplement, and rent allowance are also available to the needy.

An injured employee can also apply for special needs allowance. The scheme is designed to provide non-means tested, non-contributory allowances to the severely disabled and elderly persons. The rate revised on 1st July, 1981 was $350 per month for the severely disabled.

(iii) conclusion

The various ways of compensation for occupational diseases by no means represent the whole picture in this field. They are the commonest types of relief an injured employee can seek and are available to them in general. There are of course the private schemes of compensation operated by different corporations and companies and various charitable funds such as the Brewin Trust Fund.[73] They are, however, of minimal significance and are left out from the discussion.

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60 Cap 57.
61 s33(5)(e), Cap 57.
62 Cap 282.
63 s33(1), Cap 57. The meaning of a continuous contract is provided in s3(1) of Cap 57: an employee has to be working under the same employer continuously for four or more weeks each of which contains three or more working days and six hours per day is the minimal condition of a working day.
64 s33(3), Cap 57.
65 s33(4), Cap 57.
66 s33(2), Cap 57; this provision is to be amended soon.
67 s33(5)(a), Cap 57.
68 s35(1), Cap 57.
69 *Annual Departmental Report of the Director of Social Welfare* 1982 para 17.
70 ibid para 18.
71 The levels of these conditions are constantly under review.
72 The information concerning the rates of assistance in this section is taken from the *1982 Report of the Director of Social Welfare.*
73 Administered by the Home Affairs Department since it was established in 1955.

II LIMITATIONS AND DEFECTS OF THE PRESENT SYSTEM

Section 1: PRESENT OPERATION OF THE SYSTEMS

Among the different ways of compensating an employee suffering from an occupational disease, sickness allowance and social welfare, strictly speaking, are not typical schemes to cater for occupational disease victims. They aim at providing assistance to natural disease victims and the needy of the public at large. Therefore they are in no way exclusive to occupational disease sufferers, and as a result no clear and comprehensive picture concerning the situation of occupational disease victims being compensated in these ways can be drawn from these schemes. They will not be discussed in this chapter.

The two typical systems of compensation for occupational diseases with the main characteristic of such diseases, namely their being work-related, are the *Employees' Compensation Ordinance*[74] and the common law remedies.

(i) compensation under the *Employees' Compensation Ordinance*

Since the Second Schedule was first introduced in 1966 the number of cases of occupational diseases confirmed and compiled by the Occupational Health Division of the Labour Department has increased gradually. The following table illustrates the occupational diseases reported in Hong Kong from 1979-1981.[75]

Type of notifiable occupational diseases	*No. of cases*		
	1979	*1980*	*1981*
Decompression sickness	426	328	210
Silicosis	227	205	446
Contact Dermatitis	3	13	15
Poisoning by lead	2	7	3
Poisoning by manganese			1
Poisoning by organic chemicals			1
Gas poisoning (chlorine)	1	4	
Are eye	1	3	
Toluene Dissocyanate Induced Asthma		1	
Resin induced pharyngitis		1	
	660	562	676

It can be observed from the above table that the commonest occupational diseases in Hong Kong are decompression sickness, silicosis and contact dermatitis. The total number of occupational diseases each year is small when compared with the huge labour population in Hong Kong. But this small number has been said to be due to under-reporting rather than a reflection of effective control in the industries.[76]

The under-reporting may be due to a few reasons. Firstly workers lack the legal knowledge of compensation of occupational diseases. Though the Labour Department publishes booklets explaining the law under the *Employees' Compensation Ordinance* and diagnosis of occupational diseases, the circulation of these booklets is limited and the booklets are not comprehensive to common workers.[77] Moreover classes of industrial health organised by the Labour Department which may help workers to recognise their rights were often attended by groups of employees from well organised companies. But since most of the Hong Kong factories are small establishments (e.g. over 81% of

74 Cap 282.
75 Information obtained from the Labour Department.
76 Observation made by a doctor in a seminar.
77 Extract from proposal by fourteen labour organisations to the Labour Department dated 21st April, 1983.

all manufacturing establishments were small factories with less than twenty workers each[78]) a large part of the labour population thus has not received education from these classes. And for the same reason that most factories are small there is inadequate legal knowledge introduced by the employers as well. The proposition of under-reporting is not without support. Contract dermatitis, for example, is a very common entity in Hong Kong. 638 cases were reported by the government skin clinic in 1980. However the figure of that disease reported under the *Employees' Compensation Ordinance* was only 13. It is out of proportion even if we take other causes of the disease into account. This may be at least partly attributed to the lack of knowledge of the workers of their right to be compensated.

Secondly there is the discovery problem. Despite the fact that medical practitioners are required to report cases of occupational diseases they may fail to do so for two reasons.[79] Firstly some doctors may not be minded to ask their patients questions concerning their working conditions and thus miss the discovery of occupational diseases, e.g., occupational asthma, which are difficult to distinguish from common daily diseases. A doctor may not discover that the disease of a worker is work-related even if he exercises due care.

The last reason to suggest that the statistics of reported notifiable occupational diseases does not reveal the true picture of industrial health is that the scope of the Second Schedule is too narrow. A substantial proportion of the reported cases being decompression sickness and silicosis the range of the reported cases is in fact very limited. This may mean that other diseases in the schedule are not common. But more possible is that many potential claimants find their diseases outside the Second Schedule.

(ii) compensation through common law remedies

The situation concerning civil actions brought by employees against their employers for damages for occupational diseases is less clear than in the case of claims under the *Employees' Compensation Ordinance.* A search of the Supreme Court files in 1982 showed that there was not an action by an employee against his employer for occupational disease claim. Even actions by employees for personal injury in industrial accident were few.[80] There was no reason to suggest that civil actions for damages for occupational diseases should have risen in these years.

The reasons for the small number of actions are manifold. It was suggested that 'Chinese people abhor the suggestion of court proceedings;[81] that 'the workers are unfamiliar with the enforcement of legal rights by court actions';[82] and that 'the legal system is outside the financial resources of most of the working community'.[83] These form the basic reasons why few actions were brought against the employers. Nonetheless the employees' reluctance to sue may be due to the nature of the action itself. This will be discussed in the next section.

Section 2: DEFECTS OF THE VARIOUS SYSTEMS OF COMPENSATION

(i) the *Employees' Compensation Ordinance*

The *Employees' Compensation Ordinance* was modelled in the shape of the pre-1946 English Workmen's Compensation Acts. Notwithstanding the famous criticisms by Beveridge[84] Hong Kong kept this system in which no-fault liability[85] for employees' personal injury was put on to individual employers instead of the industries or the state. Seven years before Hong Kong adopted this system in 1953 Beveridge wrote, 'It allows claims to be settled by bargaining between unequal parties,

78 1981 *Annual Report of the Labour Department,* op cit.

79 The proposition was suggested by an expert in occupational diseases in the *Hong Kong Standard,* 17th May, 1983.

80 Past research by John Miller revealed that from 1975 to 1977, there was only one action brought by an employee for damages for personal injury. The case was *Wong Tak – Ling* v *Tai Sang Industrial Co Ltd* [1975] OJA No. 1489 of 1973. See 'Accident Compensation in Hong Kong' (1979) 9 HKLJ 4 at p 6. Recent research showed that from 1978 – 1982 there were 12 such cases among 224 personal injury files in the Supreme Court.

81 'Accident Compensation in Hong Kong,' loc cit.

82 *'Chinese Labour under British Rule'* England and Rear (Hong Kong: Oxford UP 1975) 194-5.

83 England and Rear, loc cit.

84 Sir William Beveridge, Social Insurance and Allied Services (1942, CMND 6404).

85 For detailed discussion refer to JA Jolowicz, 'Compensation for Personal Injury and Fault' in *'Accident Compensation After Pearson',* DK Allen and others.

permits payment of socially wasteful lump sum instead of pensions in cases of serious incapacity..... and over part of the field, large in the numbers covered, though not in the proportion of total compensation paid, it relies on expensive private insurance'.[86]

The criticisms were not ill-founded. The present Hong Kong system in fact suffers from the basic principles of the scheme which, according to Beveridge, were 'wrong and dominated by a wrong outlook'.[87]

One of the fundamental defects of the system is that it rests in the last resort on the threat or reality of litigation.[88] This is true even after the implementation of compulsory insurance by the *Employees' Compensation (1982 Amendment) Ordinance.* It is costly and may be manipulated unfairly because of the uneven bargaining powers and potentials of the parties.

The second general defect is that the cost of administration in private insurance is very high.[89] It has been argued that if there is national insurance not only the level of compensation may be raised but the qualification for compensation in both accident and occupational disease cases can be extended and thus compensation can be paid according to needs.[90]

Apart from the two criticisms concerning the basis of the Ordinance which apply equally well to accident cases there are three major defects in the system governing occupational diseases. Firstly occupational diseases are defined as those diseases prescribed in the Second Schedule. They are to be compensated automatically if the requirements of the Schedule are satisfied. Similar Schedules are present in other jurisdictions such as England, China and New Zealand. In view of the advancement and varieties of Hong Kong industries the scope of the Second Schedule is narrow as compared with those countries. Even after the inclusion of the new proposed addition of sixteen diseases[91] to the existing Schedule there are many common diseases in the Hong Kong industries which are outside the Schedule. Typical examples are byssinosis and occupational deafness.[92] The English Schedule[93] contains fifty occupational diseases and is under constant review by the Industrial Injuries Advisory Council. The Hong Kong Schedule, however, does not respond sensitively to the steps of the industrial development.[94]

The second defect relates to the prescribed periods in the Schedule. The prescribed period is important to the claimant because the presumption of causation will not help the one whose disease was due to an employment outside the prescribed period. The periods, nonetheless, was arbitrarily fixed and its only purpose was to limit the range of liable employers. But it was observed that some diseases may not be diagnosed or its cause may not be discovered within the prescribed period.[95] It is an irony that an injured employees' compensation may entirely depend on the time when he discovers the occupational disease.

The last major defect of the system, but in no way the least, is the failure to compensate a victim of occupational disease when that disease is outside the Schedule. Very often such diseases are contracted by process and therefore it could not be proved to be due to an accident. The claimant would then be deprived of any compensation under the scheme.

(ii) common law remedies

The essence of liability for negligence is the legal fault of the tort-feasor. A plaintiff's first hurdle would be to prove that the defendant was negligent

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86 Beveridge Report, op cit.
87 Beveridge Report, op cit.
88 England and Rear *'Industrial Relations and Law in Hong Kong'* p 289.
89 England and Rear, op cit.
90 Opinion of Dr Lo, Occupational Health Division, Labour Department, in an interview.
91 The new proposal will soon be put to the Executive Council for consideration before the end of 1983.
92 According to a publication of the Promotion of Labour Relations Association (Issue 46) there are 40,000 to 50,000 workers suffering from noisy working environment and more than 4,000 workers have early symptons of byssinosis.
93 Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1975, SI 1875 no. 1537 and SI 1975 no. 2241.
94 The new proposal is the first major review of the Schedule since 1964.
95 A quotation from Dr Lo, op cit.

in failing to take adequate steps to protect the plaintiff. In an action for breach of statutory duty the same basic principle of the need to establish fault judged by prescribed standard is applied. But if it is accepted that occupational diseases are the price of development of society and are often not caused by fault of anyone[96] the common law remedies seem to put an undue, or seemingly insurmountable burden on the victims of occupational diseases: the Pearson Commission estimated that only 10.5 per cent of those injured at work received tort compensation, and the corresponding percentage for occupational diseases may well be considerably lower than this.[97] No doubt this is attributed to the inherent defect in the tort system as a remedy to the injured employees.

An even heavier burden on a plaintiff is the need to prove that the ill-health is caused by conditions for which the defendant is liable. The difficulty lies in the fact that medical knowledge may not be sufficient to provide a satisfactory proof of the causes of the diseases. Added to this is that idiopathic diseases may have developed for a long period before they are diagnosed. As a result the history of each disease will not easily be discovered. Moreover the problem faced by the courts is complicated by the pre-existing conditions of an employee before his employment. In cases of this kind 'medical evidence assumes crucial importance upon which a claim stands or falls'.[98] But if the cause of the disease is beyond the knowledge of the medical field the misfortune falls on the plaintiff who is then deemed to fail.

A third inherent defect is that all damages to the actions are awarded on an once and for all basis. As in other personal injury by accidents cases there is no further review of the amount of damages awarded and in applying the multiplicands and multipliers judges are required to make unwarranted predictions.[99] Compensation in this way simply takes a simplified view of the problem of the victims and the purposes of 'promoting the rehabilition and restoring the former capabilities of the injured people' are defeated.[1]

Apart from the inherent defects of the tortious actions the system of implementation has shown to be a hindrance to the plaintiffs. The worst of the defects are the delay of the actions and the cost of administering the system. The former was examined by John Miller a few years ago.[2] It was revealed by his research that the majority (47%) of the personal injuries actions filed in the Supreme Court from 1975-1977 took two to four years before judgements were given. In one fifth of the cases a further delay of a few months emerged before damages were assessed.[3] This delay added to the hardship of the plaintiff.

The cost of administering the system has proved to be unduly high. It was observed by the Pearson Commission that about 45 per cent of the total amount paid into the system went to the operating costs.[4] In Hong Kong similar percentage (50%) was paid to administer the negligence system.[5] With this high cost of administration the negligence system seems to be a defective way to compensate at least for minor occupational diseases victims whose claim would not justify a law suit.

III THE WAY TO A BETTER SYSTEM OF COMPENSATION

Section 1: PURPOSES OF COMPENSATING VICTIMS OF OCCUPATIONAL DISEASES

From the analysis of the present systems of compensation in Hong Kong in the last chapter it can be seen that they are far from being satisfactory. But before going to the fundamental problems of constructing a better system it will not do without sorting out the objectives of such a system.

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96 Refer to Introduction footnote 4.

97 'Employer's Liability for Work related I11 – Health', Brenda Barrett *ILJ* (81) 10 p 104.

98 'Occupational Disease – The problems of comprehensive system of coverage' SR Wilson.

99 *'Accident Compensation in Hong Kong'*, op cit p 13.

1 'Pearson: Implications for victims of Industrial Accidents' Tess Gill, *'Accident Compensation After Pearson'* DK Allen and others. For elaboration of the proposition see Australian Report para 139.

2 'Accident Compensation in Hong Kong', op cit.

3 ibid p 11.

4 Pearson Report Vol 1, para 83.

5 'Accident Compensation in Hong Kong', op cit.

The purposes of compensation for injury in employment, which applies equally well to occupational diseases, have been summarised as follows:[6]

(i) 'to replace in full the loss of earnings of injured work people whose earning capacity has been lost or reduced';
(ii) 'to make up for, as far as this is possible in monetary terms, the physical and mental impairment caused by an injury or disease, and for the adverse consequences on the activities of the victim other than work';
(iii) 'to provide financial support to dependants of a worker who has been killed, and to make up for, as far as this is possible in monetary terms, the loss of the life of a relative';
(iv) 'to provide an additional incentive against the prevention of death, injuries and diseases in the course of employment';
(v) 'to promote the rehabilitation and restoration of former capabilities of injured work people'.

There are three main reasons why the present system fails the objectives as stated. Firstly, many workers suffering from occupational diseases are outside the scope of protection of the *Employees' Compensation Ordinance* and are therefore denied compensation completely. They may be prevented from pursuing damages in the tort system due to the reasons mentioned in the last chapter. Then they are left with minimal assistance in the other schemes. The rest of the chapter concentrates on this fundamental defect of the system of compensation.

The objectives may fail because the level of compensation offered by the *Employees' Compensation Ordinance* is inadequate to meet the needs or even the loss of the workers. Taking an accident case[7] for example, after the employee had sought compensation under the *Workmen's Compensation Ordinance,* which amounted to $7,071.35, he sued his employer for damages in negligence. The court awarded him altogether $39,500 as damages. The difference between the compensation is due to the different ways of assessment of the two systems. The tort system seeks to give full compensation to the plaintiffs while the statutory scheme, being concerned with income maintenance, is inflexible and conservative.[8] Further discussion on this defect relates to the workmen's compensation scheme in general and is beyond the scope of the paper.

The third failure of the present systems is the vague relation between the roles of the workmen's compensation scheme and the tort system. This question leads to the consideration whether the tort system concerning occupational diseases should be abolished. This will be discussed later.

Section 2: UNIQUENESS OF OCCUPATIONAL DISEASE COMPENSATION

Before attempting to find a better way to compensate victims of occupational diseases the characteristics of the problems involved must first be identified. Justice Frank stated thirty years ago, '[l]egislation is needed which will effectively meet the social obligations which underlie the incidence of occupational disease'.[9] In reality one basic mistake of the Hong Kong systems is that little attention is paid to the difference between the case of occupational disease and a case of accident. There are 3 features in the course of determining an occupational disease compensation case that produce problems.

The first feature is the diagnostic problem. The ill-health of an employee may not easily be identified as a particular disease. The problem is important in the present compensation scheme under the *Employees' Compensation Ordinance* in relation to whether the disease is within the Second Schedule. Medical evidence is essential, though not conclusive, in this aspect.

The second problem is causation. Occupational diseases developed by process is particularly difficult

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6 'Pearson: Implications for victims of Industrial Accidents' Test Gill in *'Accident Compensation After Pearson'* p 149.

7 *Fung Lai Yin* v *Lai Kam-Chiu* [1978] 8 *HKLJ* 254.

8 For example, there is no compensation for pain and suffering and loss of amenites, see Brenda Barrett, 'Employer's Liability for Work Related Ill-health' *ILJ* (81) 10, 104.

9 *Urie* v *Thompson* 337 US 163, 197 (1949).

to prove to be work-related. Some diseases, e.g. cancer, are of unknown aetiology and cannot be conclusively traced to the employment environment. Moreover the notion that many diseases have multiple causes is recognised by modern medical science.[10] This, in fact, is the biggest problem that a claimant faces because without satisfactory proof of causation there is no ground for him to be compensated by his employer.

The third problem is related to the pre-existing condition. The problem is an extension from the causation problem. The question to be determined is whether the occupational factor only accelerates or exacerbates the condition of an already existing disease or it causes a weak worker to contract a disease. A decision has then to be made whether to include the former case within the definition of occupational disease[11] and, if the answer is positive, to what extent will that definition be designed to include pre-existing condition of an employee. In the context of the employees' compensation scheme in Hong Kong the limited definition of occupational disease will exclude these cases.

Section 3: LOOKING FOR A BETTER SYSTEM

(i) definition of occupational disease

Owing to the particularity of occupational disease compensation many jurisdictions struggled painfully for a satisfactory system. The British workmen's compensation scheme was first introduced in 1896. The scheme was incorporated into the Social Security Scheme[12] after the Beveridge Report and certain benefits[13] can be claimed if the claimant satisfies the conditions.[14] Besically the conditions relate to a prescribed list of occupational diseases. Therefore apart from the operation of the scheme as part of the social security the principle governing qualifications of a claimant is similar to the Hong Kong statutory system.

A more complicated picture, however, is presented in the United States. Though the earliest compensation acts in the United States were patterned after the English Compensation Act of 1897,[15] the occupational disease compensation law has developed far more than that in England. While the schedule method was once widely copied, the trend has been toward expansion into wide coverage by a general difinition of compensable occupational diseases. Some states, such as New York and Nevada, after introducing the general definition, retained the prescribed schedule because there was a 'strong presumption that the contraction of that disease by one engaged in that process was attributable to the employment'.[16] Other states abandoned the schedule altogether.[17]

Amongst the general difinitions of occupational disease in different states there are some striking similarities. They are listed as follows:

1. The disease has to be arisen out of and in the course of employment.
2. The disease is due to conditions or risks peculiar to a particular trade or occupation.
3. There is an exclusion of ordinary diseases of life which the general public is exposed.

The states adopt at least some or all of the above criteria.

The conservative approach of the English legislation of limiting definition of occupational disease to the prescribed schedule has been widely criticised on the ground that even under the most inclusive schedules, they are falling short of current industrial

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10 'The Dark Side of Workers' Compensation Burdens and Benefits in Occupational Disease Coverage', R Robblee (1978) 2 *Industrial Relations Law Journal* 596.

11 *Rockford Transit Corporation* v *Industrial Commission* 38. ILL 2d 111, 230 NE 2d 264 (1967) (a pre-existing disease of an employee aggravated by smoke and fumes was held not to be an occupational disease unless it was followed as incidents of an occupational disease as defined in the statute.)

12 The present legislation is the *Social Security Act* 1975.

13 The benefits are such as injury benefit, disablement benefit and industrial death benefit.

14 s76(1) of *Social Security Act* 1975.

15 Thomas C Angerstein, 'Logal Aspects of Occupational Disease' (1946) 18 *Rocky Mountain Law Review* 240, 241 and *Ives* v *South Buffalo Ry Co*, 201 NY 271, 94 NE 431, at 436 (1911).

16 Arthur Larson, Occupational Diseases under Workmen's Compensation Laws (1974) 9 *University of Richmond Law Review* 87, 89.

17 Examples are California, Florida, Indiana and Michigan.

diseases.[18] In view of the successful experience of the American states which have a dual coverage by prescribed schedule and general definition it is time Hong Kong legislature considered that approach.

(ii) individual proof system

Having considered the American experience the Pearson Report[19] suggested an individual proof system[20] into the definition of occupational disease. The system is to award compensation to a claimant even if his disease is outside the prescribed list provided that he can prove that it was caused by his occupation and that it was a particular risk of his occupation. The claimant, according to the recommendation, needs not only to establish factual causation but also to prove that the chance of contracting his illness is 'substantially greater for those in that occupation than for the public'.[21]

The reason for the additional burden of proof of particular risk is the fear of excessive claims concerning diseases not related to employment. Therefore the concept of occupational disease is suggested to be widened with such limitation. This conservative approach, however, was criticised by Tess Gill[22] who said that 'if the disease was work-induced in the individual instance he or she should be entitled to benefit. It should be the same kind of test as for an accident'.

From a theoretical point of view the particular risk test, together with the factual causation test, is self contradictory when they form a compound criteria for compensation. It is because if a claimant can prove satisfactorily that his disease is actually caused by his employment then there is no reason why the risk of contracting that disease in other sectors of the public should be relevant to his claim. The insertion of the particular risk test would do unjust result to some injured employees in this way.

The test also presents a practical problem: what should the risk of contracting the disease in that employment be compared with? Pearson's report stated the test as 'whether the risk is substantially greater for those in that occupation than for the public'. But the public's risk differs as to locality and activities. A judge may be faced with an abstract question the answer of which is unfounded. In reality the courts adopted an ad hoc attitude to each case and the decisions were arbitrary.[23] Most probably the judge will strictly construe the relationship between the risk of a disease and an occupation according to precedents. The new way of individual proof will then be of little help to the claimants.

This defect was in fact experienced in Illinois before 1975. The definition of occupational disease in the then *Illinois Occupational Disease Act*[24] excluded those ordinary diseases of life to which the general public is exposed outside of the employment. From the experience of case law[25] victims were denied compensation by the highly restrictive construction of the exclusion. The amendments in 1975 eliminated the 'ordinary disease of life' exclusion and this has proved to be a clearing of obstacle for the claimants.[26]

The only objective of the particular risk test is seemingly to prevent floods of claims. In order to achieve the same ends the Industrial Injuries Advisory Council (IIAC) in England rejected the particular risk test and in its place proposed a list to specify the diseases to which the individual proof system did not apply.[27] The new proposal will serve as an

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18 Ashley St Clair, 'Proceedings of the 35th Annual Convention of the International Association of Industrial Accident Boards and Commissions, US Department of Labour, Bureau of Labour Standards Bill, no. 119 p 70 (1949).

19 Cmnd 7054 Vol I, II, III (1978).

20 ibid Vol 1 para 880.

21 ibid para 884 and 885.

22 *'Accident Compensation After Pearson'* p 156, op cit.

23 Contrast *Carter* v *International Detrola Corp* 328 Mich 367, 43 NW 2d 890 (1950) where the excessive muscular movement was held not peculiar to that employment with *Underwood* v *National Motor Castings Division*, 329 Mich 273, 45 NW 2d 286 (1951) where bending and lifting movement was held to be peculiar to the business.

24 I11 Rev Stat ch 48 172.36(d) (1973).

25 *Visioni* v *Industrial Commission* 379 I11 608, 42 NE 2d 64 (1942) and *Stewart Warner* v *Industrial Commission* 376 I11 141, 33 NE 2d.

26 John T Williams 'The Worker's Occupational Diseases Act and the 1975 Amendments.....' Feb 1979 *Illinois Bar Journal* 371.

27 See DHSS 'Industrial Injuries Compensation Discussion Document' paras 6.51-6.53 (1980).

alternative way to clear an obstacle for a claimant. The main purpose of the exclusion list is to avoid claims that are difficult or impossible to diagnose as being work-related. From an administrative point of view this is essential to save costs. But its validity will depend on how wide that exclusion list is drafted. Experience in America concerning similar exclusion of 'ordinary disease of life'[28] list showed that the percentage of successful claims was not affected by the addition of the list[29] because the major problem in an individual proof system was causation.

(iii) causation

The Pearson Report did not touch on the practical problem of causation which will certainly be faced by a claimant if an individual proof system is introduced. The Report only recognised that 'the number of successful cases under this provision [in relation to similar German scheme] has been small because of the difficulty of proof'.[30] The IIAC again did not give adequate consideration on this point. A doctor of the Occupational Health Division in Hong Kong opined that 'in such individual proof system the claimant is faced with a very heavy burden in proving causation in a great number of diseases'.[31]

In Hong Kong, before a complete social security scheme is introduced the employees' compensation scheme in relation to occupational diseases will certainly have to restrict itself to 'work-related' injuries. As a result the causation problem is inherent and inevitable. If an individual proof system is implemented it is for the adjudicating machinery to decide, on a balance of probability, the question of causation. In view of the injustice that the failure of medical proof on certainty of etiology acted against the victims the American courts, though reluctantly refused compensation, expressly invited reform from the legislature on this aspect.[32] As a result the Illinois legislature reacted in 1975 to eliminate the disqualifying phrase 'a direct causal connection between the conditions under which the work is performed and the occupational disease' in the original *Worker's Occupational Disease Act.*[33] In order to protect the unfortunate employees whose injuries are the costs of modern social development the only way is to take a relaxed standard of proof such as 'a reasonable medical certainty or a high probability'.[34] In fact in the more flexible common law system judges adopted a fairly favourable approach for the employees.[35] The same approach could be adopted in the statutory scheme. For example legal standards may permit a claimant to be compensated if the workplace constituted a 'substantial factor' in causing the worker's disease.

The problem of the effects of pre-existing conditions on occupational diseases causation invites similar solution. The definition of occupational disease in the individual proof system could be so drafted as to award compensation to a claimant who can prove that his condition was 'aggravated and rendered disabling as a result of the exposure of the employment'.[36]

However the widening of the definition and the revision of the standard of proof of causation, instead of improving the system, may give rise to more contested cases if the compensation is to be paid by an individual employer in each case. In a similar system in America it was found that occupational diseases claims were six times more likely to be contested than accident cases.[37] The difference was attributed to the advantage an employer had in an occupational disease claim where the inadequacy of medical knowledge worked against the employee. In order to save the cost of such contests and to

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28 See, eg GA CODE 114-803 (1978); OR REV STAT 656.802 (a) (1977); VA CODE 65.1-56 (1973).

29 Williams, 'The Workers Occupational Disease Act and the 1975 Amendments.....' February 1979, *Illinois Bar Journal* 371.

30 Supra note 4, Vol III, para 473.

31 Dr Lo in an interview.

32 *Rockford Transit Corp* v *Indus Commission* 38 I11 2d 113, 230 NE 2d, 265 (1967).
International Harvester v *Indus Commission* 56 I11 2d at 94, 305 NE 2d at 535.

33 I11 Rev Stat ch 48 172 36(d) (1973).

34 Policy Group, Interdepartmental Workers' Compensation Task Force, Workers' compensation 11 (1977).

35 The trend can be seen from *Gardiner* v *Motherwell Machinery and Scrap Co Ltd* [1961] 3 All ER 831; *Bonnington Castings Ltd* v *Wardlow* [1951] 3 All ER 615; *McGhee* v *National Coal Board* [1972] 2 All ER 1008.

36 The phrase was copied from the Amendment of 1975 and the *Workmen's Occupational Disease Act* 1973 in Illinois.

37 Task Force, Workers' Compensation 11 [1977] loc cit.

establish a consistent standard of awarding compensation an industrial insurance scheme is most suitable. The operation of the scheme may copy from the statutory fund prescribed in the *Pneumoconiosis Ordinance.*[38] Though the scheme would be of a much larger scale and its administration would be complicated it seems to be the best way to cope with the unjust result of the unique problems of compensation concerning occupational diseases.

(iv) relation between tort and statutory scheme

The Pearson Commission recommended that the common law action for damages should be retained in respect of industrial injuries. The inadequacies of the industrial injuries scheme in respect of work related illness suggests that this is an area in which the tort system might play a valuable complementary role.[39]

One important role of the tort system is that it provides the employee with full compensation. The lower compensation level of the statutory scheme theoretically represents 'a concession by the employee made in exchange for the employer's extended liability and the greater assurance of recovery for the employee'.[40] Therefore in more serious injury or death cases an occupational disease victim may not receive adequate compensation under the statutory scheme and resort should be allowed to be made to the tort system.

Another reason for retaining the tort system is that tortious actions may reveal some of the drawbacks of the statutory scheme, e.g., the level of compensation or its coverage, and thus exert pressure on the legislature to keep the statutory system up-to-date.

Thirdly, the tortious actions which base on fault principle may be a safeguard to keep employers aware of potential hazards which may cost him a fortune in a civil litigation. The Mabuchi gassing accident[41] which injured 192 workers was a good illustration of the kind of incident when liability under the tort system may give some incentive to employers to prevent hazards.

As a conclusion, before a complete social security like the one in New Zealand is introduced there is always a place for tort to play. The retention of tort system has been suggested to provide 'an independent assessment of individual needs for compensation against which to judge the adequacy of state provision, and that, irrespective of the effects of liability insurance, tort reinforces the principle of the legal and moral responsibility of an individual for his own actions'.[42]

Section 4: CONCLUSION

Since the labour class consists of a large sector of the population, compensation for occupational diseases is important to protect this large class of workers. Both the statutory employees' compensation scheme and the tort system are defective in many ways. In order to adequately provide compensation for the innocent injured workers a no-fault employees' compensation scheme should be the primary means of compensation. The tort system, nonetheless, has its complementary role to play and thus is recommended to be retained.

Being the major scheme of compensation the present employees' compensation scheme for occupational diseases needs much improvement. Firstly employers should be required to contribute to a compulsory national industrial instead of private liability insurance. This may save the cost of administration and thus uplift the level of compensation. Besides, the number of contested cases will be controlled and the scheme can then be operated without the ultimate threat of litigation.

Secondly the individual proof system may be introduced to let a claimant prove the factual causation between his disease and his occupation when his case is outside the prescribed schedule. The individual proof system will remedy the defects of the prescribed Schedule by providing a secondary

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38 Cap 360.

39 Brenda Barrett, op cit note 3.

40 W Prosser, *Handbook of the Law of Torts* 80, at 531 (4th ed 1971).

41 In January, 1983. The accident was caused by leak of gas from a new printing maching operation where there was no appropriate safety measures.

42 *'Accident Compensation After Pearson'* CJ Bourn p 30.

means to get into the compensation scheme. Since the burden of proof of factual causation is already heavy the significance of an exclusion list is doubtful. The only justification for its existence may be to save administrative costs in some obviously difficult or impossible cases. Another point to note is that the individual proof system will be of little use unless the inadequacies of medical knowledge in proving causation is balanced by a relaxed legal standard of proof. By these changes in the system it is hoped that the objectives of compensating victims of occupational diseases could be better accomplished.

After all 'the ultimate solution to the problem of providing for those who suffer a disabling deterioration in health might well be a social security system able to cover adequately all forms of disability howsoever caused'.[43] But the attitude of the government[44] seems to suggest that such system is still far from appropriate in the Hong Kong society. But the need to protect the workers is so urgent that the revised system abovementioned may be considered. It may even help to prove that general national insurance is possible in Hong Kong and thereby act as a bridge to the way of social security scheme.

43 Brenda Barrett, 'Employer's Liability for Work Related Ill-Health' *ILJ* (81) 10 p.112.

44 See *SCMP* 14/3/83 where the reasons why government did not consider social security scheme were explained.

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