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Legality, discretion and informal practices in China's courts : a socio-legal investigation of private transactions in the course of litigation

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**Chapter 5 The delivery phase - Part I:
decision-making as a key to understand court operation**

5.1. Introduction

As mentioned in Chapter 3, this Chapter will probe into the contractual performance of judges, namely how they manage to deliver corrupt services in courts to bribers safely. This phase lies in the center of corrupt exchange in courts not only because the corrupt service is the main object of exchange but also because it is the phase, where the corruption participants have to extend their activities beyond the dyad of the briber and the bribed and hence to face possible challenge and scrutiny from the formal institution where the act is carried out. Execution of such act, no matter whether it is about an acquittal, a dismissal of a case, an award or the enforcement of an award, is necessarily subject to the rules regulating court decision-making. Therefore, in order to understand what has facilitated the delivery of corrupt services in courts, it is important to first understand how court decisions are made. More specifically, this chapter intends to answer the following questions: 1) who has the power to make which kind of decisions in courts and how is the decision-making process regulated; 2) what are the main features of the decision-making process; and 3) how do these features affect the contracting process of corrupt exchange in terms of the contractual performance of bribed judges?

This chapter mainly introduces the main court decision-making bodies and the features of the decision-making process. The next chapter will illustrate how these features affect the delivery of corrupt services in China's courts. This chapter is divided into two sections. The first section introduces the CCP's administration of the ranking system and the general principles regarding decision-making, which are followed by all public administrations, including courts. Then the second section introduces the main decision-making bodies concerning court affairs and the main features of court decision-making. Empirical data employed in this chapter include firstly the regulations of the Chinese Communist Party (CCP or the party) governing and affecting decision-making in courts; secondly, policies and directives issued by the Supreme People's Court (SPC), including opinions, instructions and guidelines; thirdly, internal regulations of individual courts investigated; and lastly commentaries, memo, essays and reports written by judges and other legal practitioners.

5.2. CCP rules on decision-making

In order to exert complete control over the state, the CCP implanted a ranking system and certain principles of decision-making in all public institutions. To understand decision-making in China's courts, it is necessary first to understand these basic elements of the CCP rules on decision-making in general.

5.2.1. The ranking system

The ranking system is a key factor in understanding public administration in China. In general, this ranking system refers to a “unified, pyramidal, rigidly stratified national bureaucratic system”.³²⁴ It very much resembles the *nomenklatura* of the former Soviet Union,³²⁵ which refers to “a list of positions, arranged in order of seniority, including a description of the duties of each office”.³²⁶ However, bureaucratic hierarchy has a much deeper historic root in China, a country with the largest and oldest bureaucracy in the world.³²⁷ Elaborate classification of officials’ ranks and close observation of the hierarchical order is the signature of Chinese bureaucracy throughout its history.³²⁸ Since the CCP took power, this ranking system had developed into a much more mature and complex system, which maps out all executive posts in all institutions over which the CCP exercises control.

All the posts enlisted in the *nonmenklatura* are ranked at six levels. Each level has two scales: chief (*zhengzhi*) and secondary (*fuzhi*). The rank of the cadre should correspond to the rank of the post.³²⁹ The CCP has the exclusive power to administer these posts and their appointments.³³⁰ Since the number of nominated candidates usually equals the

³²⁴ Huai Yan, *Organizational Hierarchy and the Cadre Management System*, ed. Carol Lee Hamrin, Suisheng Zhao, *Decision-Making in Deng's China - Perspectives from Insiders* (M.E. Sharpe, 1995), p.44.

³²⁵ M. Manion, "The Cadre Management System, Post-Mao China: The Appointment, Promotion, Transfer and Removal of Party and State Leaders," *China Quarterly* (1985). J.P. Burns, "Strengthening Central Ccp Control of Leadership Selection: The 1990 Nomenklatura," *The China Quarterly*, no. June (1994). Maria Edin, "State Capacity and Local Agent Control in China: Ccp Cadre Management from a Township Perspective," *China Quarterly* (2003).

³²⁶ Kjeld Erik Brødsgaard, "Institutional Reform and the Bianzhi System in China," *China Quarterly* 170 (2002). Fn.8.

³²⁷ As early as 1100-256 BC, Zhou Dynasty already boasted a number of 3,675 officials. A more mature bureaucratic management system (*junxianzhi*), characterized by a ranking system, was developed as early as Qin Dynasty (221-207BC), the first imperial dynasty in China. Qingyuan Wei, Bai Hua, *Zhongguo Guanzhishi [History of the Chinese Bureaucratic Institution]* (Shanghai: Oriental Publishing Centre, 2001), pp.10-4.

³²⁸ Ibid.

³²⁹ Occasionally, cadres of higher rank are assigned to a post of a lower rank in order to raise the profile of the post without changing the rank of the post. It is because the ranks of the posts of an institution are all hierarchically linked. To raise the rank of the executive post of an institution means all posts in the institution will be raised.

³³⁰ "Regulation Concerning the Recruitment and Promotion of Party and Governmental Cadres," (The CCP Central Committee, 2002). Art.2(1). For literature on the ranking system of China in the English language, see Melanie Manion, "The Cadre Management System, Post-Mao: The Appointment, Promotion, Transfer and Removal of Party and State Leaders," *The China Quarterly*, no. June (1985). Hon S. Chan, "Cadre Personnel Management in China: The Nomenklatura System, 1990-1998," *The China Quarterly* 179 (2004). Maria Edin, "State Capacity and Local Agent Control in China: Ccp Cadre Management from a Township Perspective," *The China Quarterly* 173 (2003). Lawrence R. Sullivan, "The Role of the Control Organs in the Chinese Communist Party: 1977-83," *Asia Survey* 24, no. 6 (1984). Burns, "Strengthening Central Ccp Control of Leadership Selection: The 1990 Nomenklatura." For more empirical research on the topic, see Carol Lee Hamrin, Suisheng Zhao, ed. *Decision-Making in Deng's China - Perspectives from Insiders* (M.E. Sharpe, 1995).

number of vacant posts, competition takes place mostly in the course of the nomination procedure, which is subject to few explicit rules. Competition intensifies when it concerns posts of higher ranks because of fewer vacancies of such posts. The selection and nomination is conducted by the superior party committee indicated in the job title list.³³¹ Since most candidates are similarly eligible according to the often broadly defined selection criteria, the selection is strongly influenced by the personal preferences of the individual leaders of selection bodies.³³² The pyramidal structure of the ranking system suggests that the majority of the ranked posts remain at the bottom with restrained discretion on a limited range of issues and a very few on the top with much less inhibited discretion on a much wider range of issues.

5.2.2. *General features of CCP decision-making*

Controlling the appointment and management of executive posts in public institutions helps top-level party leaders to exercise and retain complete control over the administrative machinery of the state. However, wielding this power alone would not ensure the party leaders sustained control once such appointments have been made. To solve this “defect”, the top-level party leaders developed two strategies. The first is to endow the top-level party leaders with the ultimate decision-making power regarding public affairs through a loosely regulated decision formulation process. The second is, in contrast, to discipline the relationship between the top-level party leaders as superiors and the leaders in all public institutions as subordinates, which requires the latter to unconditionally execute the decisions reached by the former. This superior-subordinate discipline is imposed upon all ranks in the ranking system. It ensures that the instruction from the very top leadership reaches the targeted posts at all levels in the chain of command and will be firmly executed.

5.2.2.1. *Formulation of decisions – the “democratic centralism”*

In this chapter, the term “formulation of decisions” refers to the process in which an opinion is formed, developed, discussed, finalized and transformed into an authoritative decree. The term is largely the same as “decision-making” but is used more so as to make contrast to “execution of decisions”, which is introduced in the next sub-section.

³³¹ "Regulation Concerning the Recruitment and Promotion of Party and Governmental Cadres." Ch.3-6. Before 1983, the Central Committee exercised directly control of the recruitment and promotion of cadres two levels down. Since the cadre management reform in 1984, the Central Committee decided to control only one rank down to increase incentives of subordinates as well as to ease the managerial burden. Also see Suisheng Zhao, *The Structure of Authority and Decision-Making: A Theoretical Framework*, ed. Carol Lee Hamrin, Suisheng Zhao, *Decision-Making in Deng's China - Perspectives from Insiders* (M.E. Sharpe, 1995). p.238.

³³² Yan, *Organizational Hierarchy and the Cadre Management System*. p.41. Zhao, *The Structure of Authority and Decision-Making: A Theoretical Framework*. p.236-7.

Formulation of decisions in the CCP follows the principle of “democratic centralism” (*minzhu jizhong zhi*).³³³ According to the CCP Charter (2002), “democratic centralism” can be summarized as a combination of two decision-making approaches. The first is the “democratic approach”, which means that decisions on critical issues shall be decided in a “collective decision-making process” through panel deliberation. The second is the “centralistic approach”, which means that regarding other “non-critical” issues individual leaders are competent to make decisions on their own according to the division of labor among the leaders.³³⁴

In practice, two features of the decision-formulation process are most noteworthy. Firstly, as the most important public institution in the country, the CCP’s exercise of power is not constrained by the Constitution. For example, the latest Constitution (2004) does not have any rules restraining the CCP’s exercise of power but only highlights its leadership in the preface. Similarly, the role of law is only mentioned in passing in the preface of the CCP Charter.³³⁵ The CCP is not regarded as an administrative organ. For that reason, its decisions and its procedure of decision-making are not subject to administrative review either. Instead, the superior party committee, which is responsible for composing the subordinate party committees, is the arbitrator of disputes rising among the subordinate party committees or their members. The internal party discipline inspection committee is mandated to inspect individual members’ abuse of power, such as corruption, but not institutional abuse of power of the party organization.

Secondly, the party rules regulating the decision-formulation process are few in number as well as vague, open-ended and lack sanctions. For decisions formulated through the “democratic approach”, the main explicit rule contained in the CCP Charter is that the majority rules. However, the Charter does not specify what constitutes a majority. Moreover, the Charter reserves an unspecified number of exceptions to the rule of majority. For example, according to the Charter, when controversy arises concerning decisions on critical issues, voting should be suspended except in emergent circumstances.³³⁶ However, what constitutes a “critical issue”, a “controversy”, or an “emergencies” is not specified.³³⁷ Since the collective decision-making process will be

³³³ Guoguang Wu, *“Documentary Politics”: Hypotheses, Process and Case Studies*, ed. Carol Lee Hamrin, Suisheng Zhao, *Decision-Making in Deng's China - Perspectives from Insiders* (M.E. Sharpe, 1995). p.26.

³³⁴ CCP Charter (2002). Art.10(5).

³³⁵ In its preface, the CCP Charter states that the Party shall operate within the Constitution and the law. However, no institution or procedure is designated to check the exercise of power of the CCP. CCP Charter (2002). Preface.

³³⁶ CCP Charter (2002). Art.16.

³³⁷ For example, according to the memoir of Zhao Ziyang, former Chief Secretary of the CCP, who had been forced to step down and kept under house arrest since 1989, on the decision of the announcement of the martial law in May 1989, two of the five members of the standing committee of the Politburo voted in

invoked only for “critical issues”, it means that in daily institutional operation, each leader can apply a narrow interpretation of the “critical issues” and make decisions on a wide range of affairs through the “centralistic approach” without the need to resort to the collective decision-making process.

For decisions formulated through the “centralistic approach”, which are made by individual leaders on their own, rules are even scarcer. The exercise of the “centralistic” decision-making power is constrained more by the individual leader’s competence, which is based on the division of labor. Among all leaders, the head of the decision-making body enjoys the widest competence. The head also has a particular advantage in the collective decision-making process due to the vagueness of the rules and due to his position as the chair person of the deliberation panel. This latter function comprises authority to initiate a collective decision-making process, to decide on attendance and to preside over the deliberations. By manipulating the deliberation process, the head has the advantage to incorporate and translate his individual preference into a collective decision to enhance the legitimacy of a decision that may not be representative of the collective opinion and also to shift the responsibility in case that the decision leads to negative consequence. The challenge to the head, though, lies in its cost and inefficiency due to the extra time and resources needed for politics maneuvering in the deliberation process.

Adding to the “free environment” of the decision-making in the CCP is the fact that the election of the members of the decision-making body lacks transparency and public involvement. As mentioned in Section 1.1, the nomination of candidates to key posts in all public institutions is all subject to top-down control.³³⁸ Public involvement only takes place to a limited extent at the grass-root level.³³⁹ At the top level, the nomination procedure and practices within *zhongnaihui* (CCP Headquarter) have been closely

favor of the announcement, two against, one abstained. The “discrepancy” was clear. According to the rules, the issue should be submitted to the full panel deliberation of the Politburo. However, Deng concluded the discussion by saying that he agreed with the “majority opinion”, namely, the announcement. In the preface of the memoir, Zhao’s then secretary Bao Tong commented that maybe Deng thought the affair was not “significant” enough for the full panel deliberation or maybe the concept of “rule” did not exist in Deng’s mind. Ziyang Zhao, *Gaige Licheng [Course of Reform]* (H.K.: New Century, 2009). Preface. p.10.

³³⁸ The superior party committee nominate and appointment leaders of party institutions. For leaders of non-party governmental institutions, the official appointment is completed by the people’s congress, which endorses the nomination of the party committee. For further reference about the importance of personal loyalty as a criterion for leader selection, see, for example, Xuezhi Guo, “Dimensions of Guanxi in Chinese Elite Politics,” *The China Journal* 46, no. Jul. (2001).

³³⁹ Direct election by the public is conducted at the village level and the urban neighborhood level. Organizational Law of Village Committee (1987). Organizational Law of Urban Neighborhood Residents’ Committee (1989).

guarded. It is the most privileged information, about which outsiders can only speculate.³⁴⁰

The afore-mentioned features of “democratic centralism” suggest that this principle is not designed to promote democracy in decision-making in its real sense. The question therefore arises as to what its real function is? From the perspective of the supreme central leadership, this “democratic centralism” greatly resembles an ancient Chinese governing strategy,³⁴¹ which aims to solve a managerial dilemma. This dilemma consists of squaring the need to shift workload by delegating power from the central leadership to regional and sectional leaders with the need for the means that would enable the center leadership to monitor and supervise the latter’s exercise of power. The major obstacle to effective supervision is the classic problem of information asymmetry, which the conventional wisdom has described as “The mountain is high and the emperor is far way”. As a response to overcome this obstacle, the central leadership reserves the power not only to appoint the chief leader of every administrative region and ministry, but also a number of deputy chiefs, who answer to the chief leader but cannot be removed, demoted or transferred even by the chief leader. This institutional arrangement effectively weakens the potential threat from the leaders dispatched to take charge of far-flung resource-rich regions and influential ministries. Holding the power to select the deputy leaders, who are more or less equally placed in the collective decision-making body with the chief regional or ministerial leader, manifests a sense of distrust among the regional or ministerial leadership. The reservation of the power to appoint deputy leaders, consequently, makes coalition-building against the central leadership more difficult. The same rationale and practices are copied, repeated and executed downwards from the regional or ministerial leaders to the leaders at the prefecture level and from the prefecture to the county levels.

5.2.2.2. Execution of decisions – the party discipline

In contrast to the “soft” and accommodating rules on the decision formulation process, the rules governing execution of these decisions are termed as “discipline (*jilü*)”, and appear vigorous and rigid. According to the CCP Charter, decisions of superior party

³⁴⁰ H. Lyman Miller, "Politics inside the Ring Road: On Sources and Comparisons," in *Decision-Making in Deng's China - Perspectives from Insiders*, ed. Carol Lee Hamrin, Suisheng Zhao (M.E. Sharpe, 1995). p.229.

³⁴¹ The same as the ranking system, this practice also has a historical root. In order to prevent public administrators from outgrowing the royal power, Chinese emperors usually avoided to delegate important decision-making power to one post but, rather unnecessarily, to parallel posts (for example, having two prime ministers, or sending an eunuch to “assist” the prime minister). Such practices were devised to maintain a level of mutual constraint among these posts to the benefit of the emperor’s despotic control. Qian Lin, *Zhongguo Gudai Quanli Yu Falü [Power and Law in Ancient China]* (Beijing: CUP Press, 2004). pp.260-1. Such practices, termed as “imperial managing strategy”, had played a very important role for the despotic control over the state in ancient Chinese history. Wei, *Zhongguo Guanzhishi [History of the Chinese Bureaucratic Institution]*. p.82.

organizations must be strictly observed and “firmly executed” by subordinate party organizations.³⁴² In the earlier history of the CCP, all party members were granted the right to speak freely about party policies in meetings and publication.³⁴³ They were also entitled to criticize any member of the Party on any issue.³⁴⁴ However, since 1976 these clauses were gradually removed from the Charter.³⁴⁵ Only in the revised CCP Charter (2002), party members are “re-granted” the right to “attend” discussions of party affairs but “they shall voluntarily keep their thoughts in line with the party central committee and must not openly express any views or remarks in disagreement with the basic theory, lines, principles and experience of the Party”.³⁴⁶ The discipline is consolidated by the CCP Regulation on Punishment of Disciplinary Violation, which showed the least tolerance of conduct challenging the hegemonic position of the CCP and conduct that defies the “political disciplines” as well as the “organizational disciplines”.³⁴⁷

In practice, this party discipline results in very indirect and oblique communication between subordinates and superiors and an absence of direct argumentation in meetings, in deference to members of superior status, which hinders and discourages independent thinking and debates in the decision-making process.³⁴⁸ The discipline is further enhanced by the superior’s possession of loosely checked discretionary power in their managing of institutional affairs. Those who are reluctant to follow superiors’ instructions can be easily punished with discrimination at work and have their career development arrested. This is especially the case in the institutions where appointment to public posts is highly competitive³⁴⁹ and “following the superior(s)” is the dominating work ethos.³⁵⁰ The discipline is edified by the ritualization of the hierarchical order in daily events, in which officials are expected to attend rank rituals in every possible detail.

³⁴² For example, see CCP Charter (1945). Art.14. CCP Charter (2002). Art.15.

³⁴³ Charter (1945) (1956) Art.3(1). Party member has the right to have free and pertinent discussion on the execution of party policies in party meetings and publication. For a more detailed historical account of the development of the CCP democratic centralism, see Stephen C. Angle, "Decent Democratic Centralism," *Political theory* 33, no. 4 (2005). pp.524-7.

³⁴⁴ Charter (1945) (1956) Art.3(4).

³⁴⁵ The first revision of the CCP Charter (1977) after the Cultural Revolution, however, showed no toleration of opposition and disagreement, let alone protection of the democratic rights of party members. Instead, it was replaced with “party members shall have the courage to fight against any speech or conduct that is not in line with Party principles” and “party members shall be loyal to the Party ... and complete the tasks instructed by the Party enthusiastically”. See CCP Charter (1977). Art.2.

³⁴⁶ CCP Charter (2002) Art.7. Bill of Rights of CCP Members (2004). Art. 12.

³⁴⁷ CCP Regulation on Punishment of Disciplinary Violation (2003). Ch.6 and 7.

³⁴⁸ Carol Lee Hamrin, Suisheng Zhao, *Introduction: Core Issues in Understanding the Decision Process*, ed. Carol Lee Hamrin, Suisheng Zhao, *Decision-Making in Deng's China - Perspectives from Insiders* (M.E. Sharpe, 1995). xxxi

³⁴⁹ In the annual national civil servant recruitment examination, in average 78 candidates compete for one junior rank post. For posts in charge of valuable resources, the competition could be as intense as 4,584 candidates competing for one post. See <http://learning.sohu.com/20081026/n260248589.shtml>

³⁵⁰ Jiaqi Yan, *The Nature of Chinese Authoritarianism*, ed. Carol Lee Hamrin, Suisheng Zhao, *Decision-Making in Deng's China - Perspectives from Insiders* (M.E. Sharpe, 1995). p.7.

For example, when conferences convene, the order in which officials arrive, speak, and are seated is specifically arranged according to the rank order.³⁵¹ When the rank could not be further divided to manifest the power hierarchy, rules on the sequence of appearance of leaders of the same rank are specifically established and carefully observed.³⁵² Even at banquets, the seating plan follows certain rules, complying with the order of the power hierarchy.³⁵³

However, that this strict top-down control is compromised by a monitoring issue. This monitoring issue refers to the fact that, given the size and the complexity of the territory and its population, it is prohibitively costly for the top-leader to monitor the implementation of every decision that they have reached through a long chain of command at each subordinate level due to information asymmetry. Monitoring is particularly problematic when the interests of the central leadership are incompatible to that of the local. However, this does not mean that the central leadership has lost control over the state. It means, instead, that the center leadership has to prioritize objectives that are most crucial to their immediate interests and accordingly to mobilize and concentrate monitoring resources on the implementation of decisions that are made to achieve these objectives.³⁵⁴ Meanwhile, the central leadership has adopted a strategy, which is to divide the power and delegate it to a collective decision-making body, which is composed of one chief and several deputy leaders. In the decision-making body, the chief leader has superior status *vis a vis* the deputy leaders; however, the chief leader has no power to appoint, remove or transfer the deputy leaders. This strategy encourages distrust among the subordinate leaders and cancels out the individual strength of each member of the decision-making body. Hence it helps the superior leadership to constrain individual subordinate leaders from taking advantages of their direct access to resources and to prevent them from outgrowing the central power, which might lead to fragmentation and hence threaten the hegemonic position of the supreme central leadership.³⁵⁵

³⁵¹ Yan, *Organizational Hierarchy and the Cadre Management System*. p.44.

³⁵² For general remarks on this "informal politics" see <http://lateline.muzi.net/news/ll/chinese/1498633.shtml?cc=30805>, http://vip.book.sina.com.cn/book/chapter_100453_66515.html and <http://pk75329.bokee.com/viewdiary.30113366.html>

³⁵³ Apparently, the best seat is the one facing the door of the chamber, which is least disturbed by the traffic in the chamber but is provided with the direct view to oversee the traffic in the chamber. The worst are the ones closest to the door because their occupants are disturbed not only by the traffic of the guests, but also traffic of waiters, who enter and put dishes on the dining table over the shoulders of the persons who happen to sit there. Interview. L.035. During this research, the author also located a blog post illustrating this practice. See <http://wuyuhui1212.blog.163.com/blog/static/10539247420096282473886/>

³⁵⁴ Edin, "State Capacity and Local Agent Control in China: Ccp Cadre Management from a Township Perspective."

³⁵⁵ For more literature on the tension of the central-local relations and the potential threat and problem of fragmentation, see Susan Shirk, *The Political Logic of Economic Reform in China* (Berkeley: University of California Press, 1993). Kenneth G. Lieberthal, "Introduction: The "Fragmented Authoritarianism" Model and Its Limitations," in *Bureaucracy, Politics and Decision Making in Post-Mao China*, ed. K.G.

In summary, in order to retain control over the state, the CCP central leadership has developed a ranking system, which connects and subordinates the leaders of all public institutions to the supreme leadership of the CCP central decision-making body. To safeguard its monopolistic political position, the CCP central leadership also dispenses itself from any constitutional obligation by placing no constraint on its decision formulation process. To ensure that such uncontested decisions can reach down to and be fully executed at the ground level, the CCP central leadership also disciplines the hierarchical order of the ranking system, which requires subordinates to unconditionally comply with and execute instructions from their superiors. Meanwhile, a monitoring problem exists, which leaves room for non-compliance at the local levels. To solve the problem, policy/task prioritization is necessary and sharing of power among leaders is required. These conditions exist in all hierarchical relationships of public administration in the country, including the relationship between the central and local governments as well as the relationships between the CCP/government and courts and between superior and subordinate courts.

5.3. Decision-making bodies in courts

Decision-making in China's courts greatly resembles that in the CCP as introduced above. Before elaborating this resemblance, this section will firstly introduce who can make decisions on judicial affairs both inside and outside of a court.

Lieberthal, D.M. Lampton (Berkeley: University of California Press, 1992). Y. Huang, "Central-Local Relations in China During the Reform Era: The Economic and Institutional Dimensions," *World Development* 24, no. 4 (1996). Edin, "State Capacity and Local Agent Control in China: Ccp Cadre Management from a Township Perspective." Andrew C Mertha, "China's "Soft" Centralization: Shifting Tiao/Kuai Authority Relations Source," *The China Quarterly* 184, no. 1 (2005).

5.3.1. At the internal level

Chart 5.1 Internal power structure of China's courts

Following the “democratic centralism” principle, the decision-making bodies within courts all take the collegial form. These decision-making bodies are hierarchically placed, roughly classified at three levels. As shown in Chart I, the top level is the party-group, headed by the court president. According to the CCP Charter, a party-group is defined as a party organ in a non-party institution dispatched by the party committee, which share the same territorial jurisdiction (hereinafter the “territorial party committee”) as that of the court. The court president is necessarily a party member and the head of the party group.³⁵⁶ Other members of the party group include all court-level leaders (*yuanji lingdao*), mainly, a multiple number of vice-presidents, the head of office of the party discipline and inspection committee, and sometimes the director of the political department.³⁵⁷ Court-level leaders, who are not party members, are not members of the party-group but can attend party-group meetings with no right to vote.³⁵⁸ According to an internal directive of one county court, the mandate of the party-group includes “to inform and execute instructions from superior party organs; to discuss court annual agenda ... to discuss and administer activities concerning thought construction (*sixiang jianshe*), institutional construction (*zuzhi jianshe*) and attitude construction (*zuofeng jianshe*)...to decide issues concerning court recruitment, professional training, job assignment, promotion, appointment, award, resignation and lay-off; to deliberate judicial affairs and to pass court internal regulations concerning court administration, political work and human resource management; to discuss issues concerning court infrastructure construction and staff benefits and staff welfare; to discuss issues concerning applications and reports to be submitted to the superior governing bodies.”³⁵⁹

The decision-making body next under the party-group is the court adjudicative committee (*shenpan weiyuanhui*), which is also headed by the court-president. Other members are court-level leaders and division-level leaders.³⁶⁰ It means that all members of the

³⁵⁶ Infiltration of party members in non-party institutions started when the CCP was established in the 1920s. The infiltrating team was called *dangtuan* (party union) and later *dangzu* (party group). See The CCP Charter 1927, 1945 and 1956.

³⁵⁷ This research found no official documents on the constitution of the court party-group. The members indicated here are a summary based on the news reports on activities of party-group members of the SPC and the lower courts.

³⁵⁸ As a measure to promote “multi-party democracy”, non party-member judges are appointed to a limited number of deputy executive positions in some courts. According to a recent speech of vice-president of the SPC (who is not a party-member), there are a total number of 252 non party-members appointed to executive posts in courts all over the country. Among the 252, eight were appointed as vice-presidents in eight high courts. See http://www.humanrights.cn/cn/zt/qita/rqxz/wanexiang/4/t20090625_471768.htm. These court leaders can attend party-group meetings but possess no right to vote.

³⁵⁹ It is excerpted from the procedure of the party group of the Jiashan County Court of Zhejiang Province. The file can be accessed at http://www.jscourt.org/asp/news_show.asp?classid=3&nclassid=9&id=1029.

³⁶⁰ Practice varies from court to court in regard to whether a court leader, who does not perform judicial functions, shall be appointed as a member of the court adjudicative committee. In some courts, directors of political department or even logistic department are also appointed as members of the court adjudicative committee. See Ruihua Chen, “Zhenyi De Wuqu [the Holdup of Justice],” *Peking University Law*

party-group are members of the court adjudicative committee, with the occasional exclusion of non-judge members.³⁶¹ The party-group nominates the candidates for membership of the court adjudicative committee, who will be formally appointed by the people's congress upon the approval of the territorial party committee.³⁶² The main function of the adjudicative committee is to deliberate on individual cases, which are submitted by the court president and are considered "important" or "difficult".³⁶³

Next under the court adjudicative committee operates the collegial panel (*heyiting*), which is established in each court division that performs judicial functions. In lower and smaller courts, one court division only hosts one collegial panel; whereas in some higher and larger courts one division may host several panels. The collegial panel is usually composed of three members, including one head-judge, one "responsible judge", and the third member could be either a judge or a people's assessor.³⁶⁴ The constituency of the panel should be "relatively stable".³⁶⁵ Each collegial panel is chaired by the head-judge, who presides over the adjudicative procedure. Before a SPC reform launched in the late 1990s, the head-judge was nominated by the court president or the divisional director in a case-by-case manner. After the reform, head-judge becomes a permanent certified executive post, which is appointed by the court president through a qualification procedure.³⁶⁶ Once a case is assigned to a head-judge, the head-judge can nominate himself or one of the other two panelists (not the people's jury in any case) as the "responsible judge". The "responsible judge" is responsible for interacting with litigants. The responsible judge prepares and attends the court hearings, proposes a ruling and performs other tasks handed to him by the head-judge.³⁶⁷ In some courts, the responsible

Review 1, no. 2 (1998). p.384. Zheng Liu, "Lun Woguo Shenpan Weiyuanhui Zhidu De Xianshi Kunjing Ji Qi Gaijin Silu [the Significant Dilemma of the Adjudicative Committee and Considerations on Reform Measures]," *Xingshi sifa luntan [Criminal justice forum]* 1 (2008). pp.38-9.

³⁶¹ For example, in replying an inquiry from a regional people's congress, the National People's Congress instructed that a DIC representative should not be appointed as a member of the court adjudicative committee if the representative is not a judge. See

http://www.npc.gov.cn/npc/xinwen/lfgz/xwdf/2004-08/19/content_363189.htm. However, in practice, the practice may vary from court to court. For example, see Liu, "Lun Woguo Shenpan Weiyuanhui Zhidu De Xianshi Kunjing Ji Qi Gaijin Silu [the Significant Dilemma of the Adjudicative Committee and Considerations on Reform Measures]." p.39. ft.4.

³⁶² *Notification on Equipping Cadres in People's Courts and Procuratorates*.

³⁶³ Organizational Law of People's Courts. Art.11.

³⁶⁴ Organizational Law of People's Courts. Art.10. In most cases, the people's assessor has little involvement in the adjudicative process and plays a more decorative rather than substantial role in the judicial decision-making. For more information on this subject, see Liang, *The Changing Chinese Legal System, 1978-Present: Centralization of Power and Rationalization of the Legal System*. pp.146-7, 151-2, 197-9.

³⁶⁵ For example, see Working Procedure of the Collegial Panel of Wuhou District Court, Chengdu City, Sichuan Province. Art.6.

³⁶⁶ The SPC, "Measures of Appointment of Shenpanzhang in People's Courts," (2000).

³⁶⁷ For example, see the Working Procedure of the Collegial Panel of Wuhou District Court, Chengdu, Sichuan Province (available at <http://www.whfy.gov.cn/remark.asp?id=137>). Art. 8 listed sixteen obligations of the Head-judge, most of which are related with organizing meetings and decision-making.

judge can delegate some of his preparatory work to the court recorder (*shujiyuan*), if available.³⁶⁸ When a court president or divisional director sits in a collegial panel, he is automatically the head-judge.³⁶⁹

In basic courts, namely, local county courts (in rural areas) or district courts (in urban areas), cases, to which an expedited procedure (*jianyi anjian*) is applied, can be adjudicated by a single judge without a collegial panel. This expedited procedure is not typical in the cases represented here and hence not discussed in the rest of the chapter.

Art. 9 listed ten obligations of the responsible judge, all concerning examination and investigation of the case through interacting with litigants. Art. 10 listed six obligations of other panel members, which require limited involvement in the adjudication process. Similar regulations are found, for example, in the following courts: Kunming Intermediate Court (Yunnan Province), Jincheng Intermediate Court (Shanxi Province), Zhuzhong Intermediate Court (Hunan Province), Jiyuan Intermediate Court (Henan Province).

³⁶⁸ For example, see the Working Procedure of the Collegial Panel of Wuhou District Court, Chengdu, Sichuan Province, Art.13.

³⁶⁹ Ibid. For more about the reform in practice, see the memo of a symposium on this subject organized by the National Judge's School on Yuqian Bi, ed. *Sifa Shenpan Dongtai Yu Yanjiu [Research on Judicial Development]*, vol. 1 (Beijing: Law Press,2002). pp.1-19.

5.3.2. *At the External level*

Chart 5.2 External power structure of China's courts

At the external level, courts are required to operate under the “leadership” of the party. This leadership is implemented in courts through the court party-group, which is directly subordinated to the territorial party committee. As a branch dispatched by the party, the court party-group is obliged to follow party rules, including “executing party guidelines, directives and policies; discussing and making decisions on significant issues about the institution concerned; managing cadres ... completing tasks assigned by the party and the state; and supervising the work of subordinate party organs.”³⁷⁰

Other than the “territorial party committee”, courts are also subject to supervision by their superior courts on judicial affairs, which constitutes the so-called “double administration”(shuangchong guanli).³⁷¹ Supervision from superior courts is sometimes also called “vertical administration” (*chuizhi guanli*) because, unlike the territorial party committee, which shares the same territorial jurisdiction of the court that it monitors, the superior court enjoys a higher level of jurisdiction. Between the “double administration” of the territorial party committee and the immediate superior court, the former takes the leading role. It is mainly because the territorial party committee has the decisive power in nominating court leaders (*renquan*), while the superior court is only assisting in the process.³⁷² The former also has the jurisdiction over court financial affairs (*caiquan*) since it provides the main part of court funding, in particular, judges’ salaries.³⁷³

Nevertheless, the superior court has the jurisdiction to monitor subordinate courts on daily court affairs (*shiquan*), for instance, issuing adjudicative guidance, policies, interpretations, ruling on appeals, launching campaigns, organizing training courses and performance evaluation. Meanwhile, as the political power of the judiciary grows, the SPC is becoming a strong competitor against regional and local powers in controlling lower courts. One of the most overt attempts of the SPC to assert power is the launching of a new judicial ranking system,³⁷⁴ which excludes territorial party committees and is solely regulated by the SPC. However, this new judicial ranking system has not shown much impact since it fails to gain support from the Treasury and is not able to link it to

³⁷⁰ CCP Charter (2002) Art.46.

³⁷¹ Courts, as well as a few other specialized public institutions, are subject to the so-called “double leaderships” (*shuangchong lingdao*) of the party committee of the same territory and of the court at the superior level. For details, see *Notification on Equipping Cadres in People’s Courts and Procuratorates*.

³⁷² *Regulations on Party Groups of People’s Courts Assisting Local Party Committee to Manage Court Cadres*, Fa zu zi [1984] No.3.

³⁷³ The local government is responsible for most of the operational costs of courts as well as judges’ salaries. Since 2003 the national treasury also provides a certain amount of funding annually to courts to subsidize especially the purchase of equipments and the maintenance of court buildings. See *Notification about Special Central Subsidy to Political and Legal Institutions*. Ministry of Finance [2003]. No.69. The document can be accessed at <http://www.fc110.gov.cn/zcfg/bwfg/200909/45878.html>.

³⁷⁴ *The Preliminary Regulation on Judges’ Ranks*.

judges' salary, benefits and other welfare items as much as the ranking system controlled by the territorial party committees does.³⁷⁵

Apart from the territorial party committee and the superior court, some other public institutions can also exert influence over court decision-making by sending instructions to court leaders. These institutions include, for example, the government, the people's congress and the police, as shown in Chart II. Among these institutions, only the people's congress has formal authority to monitor court affairs.³⁷⁶ Governmental institutions, instead, are prohibited from interfering in judicial affairs, according to the Constitution.³⁷⁷ However, when leaders of these governmental institutions send instructions to court leaders, their authority is not necessarily based upon their governmental offices, but on their positions in the territorial party committee. Under the current practice, the head of the government is necessarily a member of the leadership of the territorial party committee. So is the head of the police.³⁷⁸ When court leaders take instructions from these leaders, who hold two positions, one in the party and the another in the government, it is practically difficult as well as unnecessary to check or distinguish the source of the authority of the instructions concerned.

5.4. Features of decision-making in courts

The features which characterize CCP decision-making as introduced in Section 1 also characterize decision-making in China's courts. The decisions discussed here in this section include all decisions reached by judges on behalf of the courts in the entire course of litigation, including decisions related to case-registration, the adjudication and the enforcement of court awards in case of non-voluntary performance.

5.4.1. Formulation of decisions – the “democratic centralism”

Following the principle of “democratic centralism”, all court cases, except those adjudicated under the expedited procedure, are heard and deliberated by a collegial decision-making body, namely the collegial panel or the court adjudicative committee as

³⁷⁵ See the speech of vice-president of the SPC, Li Guoguang, at the National Conference on Implementing Regulation on Judges' Ranks.

³⁷⁶ For literature on this subject in the English language, see Randall Peerenboom, "Judicial Accountability and Judicial Independence: An Empirical Study of Individual Case Supervision," *SSRN eLibrary* (2008). For a collected volume on the same subject in the Chinese language, see Zhiping Liang, ed. *Ge'an Jiandu Yu Sifa Gongzheng [Individual Case Supervision and Judicial Fairness]*, vol. 2, Hongfan Pinglun [Hongfan Review] (2005).

³⁷⁷ Chinese Constitution (2009). Art.126.

³⁷⁸ Recent practices show that the head of the police is also often granted an executive position (*changwei*) in the party committee to take in charge of political-legal affairs. Zhu, ed. *Zhongguo Falü Fazhan Baogao (1979-2004) [China Legal Development Report (1979-2004)]*, p.180.

introduced in Section 5.3.³⁷⁹ Adjudication in these collective decision-making bodies represents the “democratic approach” of court decision-formulation. As mentioned above in Section 5.2.2, court rules regulating this process are lax, giving the court president, who normally also chairs the deliberation panel, a particular advantage in the formulation process. The court adjudicative committee decides by majority ruling. However, members of the court adjudicative committee have unequal voting power despite that the rules suggest otherwise. According to the SPC guidelines as well as the internal procedural rules of individual courts studied in this research, the court president can suspend the voting based on the magnitude of “controversy”.³⁸⁰ What constitutes “a high magnitude of controversy” is not specified. In addition, the court president, as the chair of the decision-making body, can decide when to commence a deliberation, who should attend the deliberation, how to summarize the deliberation and when to call for a vote.³⁸¹ Through manipulating these procedural rules, the court president can rather easily induce consent of committee members, who owe their appointments to the court president.

Similar rules apply in the deliberation of the collegial panel. The deliberation follows the rule of majority. However, if the head-judge finds himself in the minority, he has the opportunity to request the panel to re-deliberate and re-vote.³⁸² If the head-judge is still not satisfied with the result of the re-deliberation, he can present the case to his superior, the divisional director, for review. In practice, if a head-judge has a significant interest in a particular case, he has many ways to secure the majority’s support in a panel, which normally consists of only three members.³⁸³ For example, the head-judge can set the tone at the beginning of the deliberation, which makes any dissenting opinion appear as a

³⁷⁹ Article 10 of the Organizational Law of the People’s Courts states that cases will be adjudicated by courts in a collegial manner. According to the same law, the court adjudicative committee, as the higher decision-making body on adjudicative affairs, operates under the “democratic centralism” principle.

³⁸⁰ For example, see Art.24 of the working procedures of the court adjudicative committee of Jincheng Intermediate Court (Shanxi Province), Art.34 of the procedure of Naxi District Court of Lu Zhou City (Sichuan), Art.10 of Kunming Intermediate Court and Art.26 Wenshanzhou Intermediate Court.

³⁸¹ For example, see Art.13, 14, 17, 21, 24 of the Working Procedure of the Court Adjudicative Committee (2007) of Jincheng Intermediate Court, Shanxi Province; Art.30, 33, 34(4), 36(4), 37, 38, 39 of the Working Procedure of the Court Adjudicative Committee of Guangdong High Court (2008); Art. 2(1), (2), (7), (9), 3 (1), 4(2) of the Working Procedure of the Court Adjudicative Committee of Luohu District Court, Shenzhen City, Guangdong Province. Also see Chen, “Zhenyi De Wuqu [the Holdup of Justice].” p.403.

³⁸² For example, see the procedures on the court adjudicative committee in Jincheng Intermediate Court, Shanxi Province (Art.24), Guangdong High Court (Art.38), Naxi District Court of Luzhou, Sichuan Province (Art.9), Kunming Intermediate Court, Yunan Province (Art.34). Also see the procedures on the collegial panel in Wuhou District Court, Chengdu, Sichuan Province (Art.16,24), 2nd Civil Division of Yunan High Court (Art.47), Zhejiang High Court (Art.18), Kunming Intermediate Court, Yunan Province (Art.16).

³⁸³ By law, the collegial panel shall consist 3-7 judges (including people’s jury) in criminal cases and any odd number in civil cases. Criminal Procedural Law. Art.147, 202. Civil Procedural Law. Art.40. In practice, this research has not come across a single case, of which the collegial panel is consisted of more than 3 judges. It means as long as one judge concurs the opinion of the head-judge, that opinion will prevail as the majority opinion. The practice was also confirmed in an interview conducted by the author with a high court judge. Interview. Z.019.

challenge of the head-judge's authority. The head-judge can summarize the contested issues and the "majority opinion" in a manner which is close to his opinion, and adopt the decision accordingly. The head-judge can also replace a non-cooperative fellow judge with a "cooperative" people's assessor as a panelist.³⁸⁴ Some judges openly complain that such practices make "deliberation" akin to a ritual rather than a procedure to foster genuine debate and discussion.³⁸⁵ For this reason, the SPC stipulates that during the collegial panel deliberation the responsible judge shall speak first and the head-judge last in order to mitigate the "following" pressure.³⁸⁶ However, in practice, if the outcome of a case is vital to a head-judge, the head-judge can allocate himself to the role of responsible judge. In this way, the head-judge can deliver the first speech not as the head-judge but as the responsible judge.³⁸⁷ When dissenting opinions emerge, the head-judge has the authority to decide whether the disagreement is "serious" (*zhongda fenqi*) and consequently decide whether to submit the case to superior court leaders for examination and arbitration.³⁸⁸

The "centralistic approach" of decision-making is represented by the so-called "*pian zhidu*" (the approval system), which was not written down in the Organizational Law of the People's Court but has a far more significant influence upon court administration.³⁸⁹

³⁸⁴ Currently, there are few rules regulating the appointment of people's assessors as panelists in the collegial panels. In rural courts, the practices are so flexible and informal that sometimes judges, who were in a rush, would simply find whoever available around the court room to fill the bench. Interview. W020.

³⁸⁵ A judge Xuan Yi elaborated on the "collegial panel in reality" in his LLM dissertation. According to Xuan, only the responsible judge is involved in the court hearings. The other two panel members are more like "escorts". During the hearings, some of them read files of other cases which they are responsible of, or read books or newspapers. Sometimes, the "escort" judges excuse themselves immediately after the opening session of the court hearing. Yi Xuan, "Woguo Faguan Duli Shenpan Linian Xianzhuang Ji Duice Tanxi [on the Concept, Present Conditions and Countermeasures of the Judge's Independent Trial in Our County]" (East University of Political Science and Law, 2006). pp.22-3. Evidence of such practices can be easily found in the Chinese language sources. In English language literature, similar practices were also documented in Liang, *The Changing Chinese Legal System, 1978-Present: Centralization of Power and Rationalization of the Legal System*. pp.159-60. Evidence of similar practices can also be found in the following online posts from judges: Songping Tan, Xiaochun Li, "Several Issues About Collective Adjudication," <http://www.chinacourt.org/public/detail.php?id=161447>. Guofeng Zhang, "Shenpan Heyizhi Yunzuo De Jige Wentu [a Few Issues on the Operation of the Collegial Panel in the Process of Adjudication]," *zhongguo Fayuan Wang [People's Courts Network]* (2004). Chengxiang Wu, "Analysis of the Current Operation of the Adjudicative Panel," Chongqing 1st Intermediate Court, <http://www.cqcourt.gov.cn/Information/InformationDisplay.asp?newsid=44996>. For a rationalizing interpretation of this practice, see Suli, "The Adjudicative Function and Administrative Management of Courts," *Zhongwai Faxue*, no. 65 (1999). p.43.

³⁸⁶ The SPC, "Measures on the Working Procedure of the Collegial Panel in People's Courts," (2002). Art.10.

³⁸⁷ Tan, "Several Issues About Collective Adjudication." Zhang, "Shenpan Heyizhi Yunzuo De Jige Wentu [a Few Issues on the Operation of the Collegial Panel in the Process of Adjudication]."

³⁸⁸ SPC, "Measures on the Working Procedure of the Collegial Panel in People's Courts." Art. 12.

³⁸⁹ Weiping Zhang, "Improvement of the Operational System of People's Courts," *Research in Law and Commerce* 77 (2000). p.4. For a more comprehensive empirical study on this subject, see Shuping Luo, "Shenpan Weiyuanhui "Shenpi Anjian" Zhidu Ying Yu Quxiao [the Practice of Adjudication by Seeking

The *pi'an zhidu* refers to a series of rules regulating the issuance of official court documents, which grant individual court leaders the decision-making power on certain court affairs by examining and approving drafts of court documents before issuance.³⁹⁰ This “centralistic” *pi'an zhidu* encompasses the “democratic approach” of court decision-making. For example, when a rank and file judge intends to submit a case to the court adjudicative committee, it has to be approved by the head-judge, divisional director and the court president.³⁹¹ The “centralistic approach” covers virtually all court affairs. According to Article 105 of the Chinese Civil Procedural Law, interim court decisions on requests for disqualification, extension of the time constraint of legal proceedings, the issuance of court orders on fines, permission to summon a litigant to court by force, and on court orders imposing custody, are all to be signed by the court president. In some courts, court orders to freeze litigants’ bank account, court warrant, the waiver or reduction of litigation fees as well as “any other document that the court president sees necessary” are all subject to the approval and endorsement by the court president.³⁹² Vice-presidents are also entitled to examine and approve certain court documents, but within a comparatively narrower range.³⁹³ Such authority is granted to individual court leaders, not the court adjudicative committee. It means that by controlling the processing of court documents, individual court leaders can influence the decision-making without going through a group deliberation in the court adjudicative committee.

Similar prerogatives are reserved for divisional directors, who can frustrate a collegial panel’s decision from being translated into a court decision by refusing to endorse it.³⁹⁴ The same applies in relations between the head-judge and other panelists in the collegial panel. In practice, when unanimous decision is not reached, the head-judge will firstly decide whether the decision is “seriously controversial” and whether it should be

Approval from the Adjudicative Committee Should Be Abandoned],” *sifa gaige lunping [Judicial Reform Review]* 3 (2002).

³⁹⁰ The SPC, Procedures on the Issuance of Official Documents in People’s Courts (1996). Ch. 6. For more literature on this topic, see Zhang, “Improvement of the Operational System of People’s Courts.” p.6. Luo, “Shenpan Weiyuanhui “Shenpi Anjian” Zhidu Ying Yu Quxiao [the Practice of Adjudication by Seeking Approval from the Adjudicative Committee Should Be Abandoned].”

³⁹¹ The Criminal Procedural Law as well as internal procedural rules in all the courts investigated in this research all includes a reservation clause, which grant the court president and/or the deputy vice-president the authority to instruct lower decision-making bodies to submit a particular case to the court adjudicative committee for deliberation as long as he considers necessary. For example, see the Procedures of Adjudicative Committee of Helan County Court, Ningxia Hui Autonomous Region. Art.6. The document is available at <http://www.nxhlfy.gov.cn/23/2008-12-8/7843001@369.htm>. Procedures of Adjudicative Committee of Luohu District Court, Shenzhen, Guangdong Province. Art.1(3)4. Procedures of Adjudicative Committee of Kunming Intermediate Court, Yunnan Province. Art.14(9), 15(5), 16(4), 17(6), 18(4). For similar discussions, see also Chen, “Zhenyi De Wuqu [the Holdup of Justice].” pp.385-6.

³⁹² See the Preliminary Regulation on the Issuance of Court Documents of Jiashan County Court (2007). Art. 1. Available at http://www.jscourt.org/asp/news_show.asp?id=2027

³⁹³ Ibid.

³⁹⁴ Zhang, “Shenpan Heyizhi Yunzuo De Jige Wenti [a Few Issues on the Operation of the Collegial Panel in the Process of Adjudication].”

presented to the divisional director. The divisional director will then examine the decision and decide whether the case shall be presented to the court president or vice-president in charge, who will then decide whether or not the case should be submitted to the court adjudicative committee for deliberation.³⁹⁵ Compared to the collective decision-making, the exercise of this “centralistic” decision-making power is even more difficult to check. For example, when a court president silently disapproves a collegial panel’s decision simply by inaction, namely by either not endorsing it or not submitting it to the court adjudicative committee for deliberation, the court internal regulations provide no formal solution for the collegial panel to solve the impasse.³⁹⁶ To guarantee decisions that are reached through such a non-democratic approach will be fully implemented at the lower levels, a strict “following discipline” is imposed to regulate the superior-subordinate relationship to ensure full execution of decisions that are reached in the top. This “following discipline” features both the relation between court leaders and their party superiors and the relation between court leaders and their court subordinates.

5.4.2. Execution of decisions – the “following discipline”

First of all, the absolute majority of members of the court party-group, the top court decision-making body, are party members.³⁹⁷ They are automatically subject to the CCP disciplinary rules, including following superiors’ instructions. The most “superior” superior of the judiciary is the CCP central leadership. In a recent speech in the National Political and Legal Conference, the serving PRC President Hu Jintao said, “Political and legal work has to ... serve the party and state agenda. To maintain the party as the ruling party ... is the primary political task of the political and legal institutions.”³⁹⁸ In that speech, Hu also required judges to uphold firstly the “supremacy of the party’s mandate”, secondly the “supremacy of the people’s interests” and lastly the “supremacy of the constitution and laws”.³⁹⁹ Soon after the speech, a political campaign labeled “the three supremacies” (*sange zhishang*) was launched by the SPC and carried out in all courts through out the country. In a national political study course for judges above the rank of

³⁹⁵ For example, Art. 3(2) of the Working Procedure of the Court Adjudicative Committee of Luohu District Court, Shenzhen, Guangdong Province states that before a case can be submitted to the court adjudicative committee, the responsible judge shall fill a form and have it examined and approved by each court leader till the court president or the vice-president in charge. For more description of the practice, see Luo, “Shenpan Weiyuanhui “Shenpi Anjian” Zhidu Ying Yu Quxiao [the Practice of Adjudication by Seeking Approval from the Adjudicative Committee Should Be Abandoned].” p.57. Guohong Lan, “Reconstructing Internal Court Management System [Fayuan Neibu Guanli Tizhi Zhi Chonggou],” *Fengtai Court Net* (2009).

³⁹⁶ The SPC guideline only indicates that dissenting judges in the collegial panel can apply for a review once regarding the decisions of the court adjudicative panel but not to the individual acts of the court president.

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³⁹⁸ See http://www.rmzxb.com.cn/szyw/t20071226_171754.htm.

³⁹⁹ Ibid.

president of high court, the SPC president Wang Shengjun reiterated that “courts must submit to the party’s leadership... The party’s leadership can only be strengthened and can not be doubted, loosened, weakened and especially can not be taken simply as a figurehead.”⁴⁰⁰

In fact, the “three supremacies” campaign directly attacks the growing demand for judicial independence from reform-minded judges and academic lawyers. In pledging to follow the “three supremacies”, Tang Jianfu, president of Junxian County Court (Henan Province), wrote that the demand for judicial independence had led to some troublesome judicial practices, for example, emphasizing judges’ passive and impartial role in the adjudicative process. Tang condemned such practices since he considered that regarding “law as the only supremacy” had tainted the “dignity of the rule of law” and destroyed “the good image of people’s courts and judges”.⁴⁰¹

Political campaigns such as that of the “three supremacies” are by no means new in the courts of contemporary China. Just before President Hu took office, a series of political campaigns initiated by the former PRC President Jiang Zemin entitled respectively “three- representative” (*sange daibiao*) and “three-emphasis education” (*sanjiang jiaoyu*) had dominated the political activities in courts for several years.⁴⁰² Contrary to the apparently hollow ideology-filled political slogans, discourses and study meetings that feature in these campaigns, a rather concrete objective is pursued by the campaign initiators. This objective is to raise the general awareness of the ultimate power of the party leaders and to strengthen the discipline of unconditional compliance in superior-subordinate relationships.⁴⁰³ It means that the following discipline applies not only to the hierarchy between court top leaders and their party superiors but also to the hierarchy within courts from court top leaders down to the rank-and-file judges. After having achieved that objective, instructions from the central leadership of the CCP can

⁴⁰⁰ See an excerpt of Wang Shengjun’s speech posted on the website of Tai’an Intermediate Court at <http://www.tacourt.gov.cn/html/dtljh/2009-6/dtljh18599694.shtml>.

⁴⁰¹ See <http://hnfy.chinacourt.org/public/detail.php?id=74056>.

⁴⁰² Information about these political campaigns can be easily accessed on the internet by searching the keywords “*sanjiang jiaoyu*” or “*sange daibiao*”.

⁴⁰³ This “hidden” objective is well understood by people who had been exposed to Chinese political campaigns. In the bulletin board of the chinacourt.org website, a bulletin visitor posted a question, “Now judges are required to emphasize politics. Forgive me if I am slow on this, is strictly complying with law not to emphasize politics? What is to emphasize politics?”. More than ten visitors answered to the post. One said, “[to emphasize politics] means to rule the case according to how you are instructed to rule by your superiors”. Another said, “... to be explicit, to emphasize politics means to follow your superior. Do what your superior has said.” Other visitors provided similar comments. For details, see <http://bbs.chinacourt.org/index.php?showtopic=294090>. Similar remarks can also be found, for example, in the following blog posts http://blog.sina.com.cn/s/blog_5a3baaa00100alg5.html and http://blog.sina.com.cn/s/blog_48b8489b0100021x.html.

reach courts at all levels with a minimum of friction or resistance through the chain of command mapped out by the power hierarchy inherent in the ranking system.

Under the principle of the “three supremacies”, problems will not arise when the interests of the party or court leaders are aligned with public interests and the outcome of the application of law. However, when the interests of the party collide with law and public interests, asserting the “party’s supremacy” will contradict certain constitutional principles, which are formally supported by the party.⁴⁰⁴ This contradiction is most conspicuous in the so-called “political” and “sensitive” cases, involving the vindication of citizens’ constitutional rights and thereby confrontation with the arbitrary use of power. In order to cover this contradiction and to avoid such confrontation in litigation, courts have no choice but to disregard the law, mainly by violating procedural rules and/or rendering arbitrary court decisions devoid of rational legal argument since rational legal thinking would inevitably impede the realization and consolidation of the political interests of the party. Inevitably, such an approach hinders the development of rational legal thinking and weakens its role in the judicial decision-making process. As will be elaborated later in the next chapter, it is this institutional design on decision-making in courts that greatly affects the delivery of corrupt services in the adjudicative process despite the fact that the CCP’s political interests are involved in only a minor fraction of all court cases.

Instructions made in an arbitrary fashion are replicated in the court decision-making process. When a court president, vice-president or divisional director makes a decision on a case either through the collective decision-making process or the “centralistic” *pi’an zhidu*, the decision is made through simple instructions without reasoning.⁴⁰⁵ The instruction has to be faithfully executed by the responsible judge in the adjudication and the court ruling. The leaders, who made the instruction, do not write the legal opinion nor do their names appear on the court ruling.⁴⁰⁶ If the subordinate judge fails to observe the

⁴⁰⁴ What happened in a recent interview between a journalist and the director of the Zhengzhou Municipality Zoning and Construction Bureau is an example, in which the party’s self-purported claim as the embodiment and the “representative” of “the people’s interests” was debunked. In the interview, the journalist questioned the bureau director why the bureau permitted some real estate developer to turn a piece of land, which was allocated to develop residential complex for low-income citizens, into the construction of up-market luxury residences. The bureau director responded with a question to the journalist, “Do you speak for the party or for the people?” The question implies and consequently exposes an informally shared understanding of the dichotomy between the party’s interests to the people’s interests. The story has raised great attention from and discussion among citizens on the internet. For detailed report of the story, see Zhengzhou zoning bureau <http://news.163.com/09/0617/09/5C0HSV0S0001124J.html>.

Another dialogue between a journalist and an official of the Pet Management Office of Zhengzhou City had generated similar effect. For details see <http://news.sina.com.cn/c/2009-11-06/153418991902.shtml>

⁴⁰⁵ Suli, “The Adjudicative Function and Administrative Management of Courts.” p.41.

⁴⁰⁶ “The Reply on the Issue Concerning the Signature of Court President on Court Judgment,” ed. SPC (1969). Haiying Huang, “Jitifuzezhi Shibi Zouyi [Remarks on The “Collective Responsibility”],” *Renmin sifa [People’s Adjudication]*, no. 2 (1988). p.68.

law and/or the rational legal reasoning in order to execute the instruction, he will be normally exonerated, since he is not the judge who made the decision.⁴⁰⁷

For a court leader, the decision whether to exert influence through direct instruction or through a consent-seeking process in the collegial decision-making body is based on a trade-off. The advantage of influencing a court decision through direct instruction stems from its efficiency while the disadvantage is that it exposes the court leader and makes it difficult for the court leader to avoid responsibility for the act if it is called for. As to the approach of influencing a court decision through a consent-seeking process, its disadvantage is its inefficiency because it demands time and other resources to mobilize and maneuver so as to induce consent. Its advantage is that it helps the court leader to avoid responsibility. As mentioned in the previous sub-section, a subordinate will not be held responsible for executing a wrong decision. At the same time, if the wrong decision is reached through a collective decision-making process, the responsibility will fall on the collective decision-making body, which means that in practice no individual will be held accountable.⁴⁰⁸ For example, according to an internal regulation of the Zhejiang High Court, if a case is considered a “wrong case” and the ruling is based on the instruction of the court adjudicative committee, the judges of the collegial panel, who made the ruling, will not be held responsible, unless the collegial panel has misrepresented the facts and accordingly misled the court adjudicative committee. The regulation is silent on the issues of responsibility and sanctions for misconduct in such circumstances.⁴⁰⁹ The same is found in the regulation of the Changsha Intermediate Court.⁴¹⁰ Such decision-making environment has substantially hindered the development of the rational legal thinking and the establishment of the rule of law. It has also inevitably reduced the predictability and stability of law and weakens the public trust placed in the legal system in general.

In open court regulations, the “following discipline” is not manifested in a manner as straightforward as it is in party organizations. In courts, only regulations on the decision-making process of the court adjudicative committees have laid down explicitly that decisions reached by the adjudicative committee must be implemented by the collegial panel.⁴¹¹ However, the “following” pressure is imposed upon rank and file judges through other indirect means. For example, in recent years, courts have introduced

⁴⁰⁷ For example, see the Regulation on Evaluation of Adjudicative Performances of Zhejiang High Court, Art.14. also the Regulation on Evaluation of Adjudicative Performances of Changsha Intermediate Court (Hunan Province), Art.25.

⁴⁰⁸ The following literature was all written by judges based on their working experience. Luo, "Shenpan Weiyuanhui "Shenpi Anjian" Zhidu Ying Yu Quxiao [the Practice of Adjudication by Seeking Approval from the Adjudicative Committee Should Be Abandoned]." Huang, "Jitifuzezhi Shibi Zouyi [Remarks on The "Collective Responsibility"]." Wu, "Analysis of the Current Operation of the Adjudicative Panel."

⁴⁰⁹ Rules on Case Evaluation and Examination, Zhejiang High Court [2008]. Art.14.

⁴¹⁰ Rules on Case Evaluation and Examination, Changsha Intermediate Court [2005]. No. 51. Art.25

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a series of measures to allow court leaders to supervise and evaluate the work performance of subordinate judges.⁴¹² Such evaluation is then treated as the basis for promotion, demotion, award and punishment. With their career and even livelihood held in the hands of their superiors,⁴¹³ the rank and file judges do not only follow but also are encouraged to apply law “creatively” to please their superiors.⁴¹⁴ Understandably, in such an environment, rational legal thinking, which is essential to the rule of law, is difficult to take root.

5.5. Conclusion

This chapter has demonstrated that under the guidance of an instrumental view of law and courts, courts are incorporated in a party-state bureaucratic structure, which is designed to serve, channel and execute the political agendas of the party through court affairs by activating a chain of command disciplined to follow instructions. Simultaneously, courts have also inherited two of the most significant features of decision-making from the CCP, namely a loosely supervised procedure about the formulation of decisions and a strictly disciplined procedure of the execution of such decisions. This political arrangement is detrimental to law and justice not because how it places the party’s interests before law but because how court decision-making has been designed and institutionally regulated to achieve that end. Such an institutional design of court decision-making is damaging since once it is established, it can be abused not only for the political interests of the party but also for the corrupt interests of individuals, who are entrusted with decision-making power at any level of the hierarchy. This will be elaborated in the next chapter.

⁴¹² In some court, the collegial panel will not only have to follow the decision of the court adjudicative committee, the panel and the panel members will also be appraised of their performance by the court adjudicative committee in each case that is submitted to the court adjudicative committee. For example, see Chapter 5 of the Working Procedure of the Court Adjudicative Committee (2007) issued by Jincheng Intermediate Court, Shanxi Province. Available at <http://jcfy.jconline.cn/3/2007-9-5/10001@19.htm>

⁴¹³ An example can be found in the case of Mai Chongkai, former president of Guangdong High Court. Mai had reportedly arrested the career advancement of a court official simply because the court-subsidized flat allocated to Mai by the official’s department was not to Mai’s full content. Renzhou Liu, "Jujiao Mai Chongkai Chenglun De Guiji [Zooming in the Falling Trajectory of Mai Chongkai]," *Jiancha fengyun [Procuratorial Review]*, no. 3 (2004). Also Available at http://www.uibe.edu.cn/upload/up_jcsjc/alfx/alfx_07032002.html.

⁴¹⁴ Interview C011.

