Post-2013 Reforms of the Chinese Courts and Criminal Procedure
An Introduction

BJÖRN AHL

1.1 Introduction

The current development of Chinese law and groundbreaking reforms of legal institutions have coincided with the strengthening of the one-party dictatorship of the Communist Party of China (CPC) and the dominance of illiberal policies.\(^1\) From a liberal constitutional perspective, emphasising legality on the one hand and ‘absolute’ party leadership on the other appears contradictory. Advanced legality in the sense of the government following a comprehensive and sophisticated set of substantive legal rules and procedures presupposes a more rather than less autonomous legal system. However, post-2013 political and legal developments in China have seen the extension of the political realm into the legal, affording greater prominence to CPC ideology and strengthening party oversight of both the state and society.

The shift in the prevailing ideological discourse is reflected in the CPC Central Committee Decision of the 4th Plenum of the 18th Party Congress announced in October 2014.\(^2\) The decision emphasises consistency between party leadership and socialist rule of law, as well as party leadership of the entire process of governing the country in accordance with law. The concomitant organisational and institutional

---


\(^2\) CPC Central Committee Decision concerning Several Major Issues in Comprehensively Advancing Governing the Country According to Law (中共中央关于全面推进依法治国若干重大问题的决定) of 23 October 2014.
reorganisation, or recentralisation, has increasingly shifted power from state institutions to the CPC. The re-emphasis on party dominance over the law also affects the CPC’s conceptualisation of the law as less an autonomous self-referential system of objective norms than a reflection of the party’s will. Further, the law is perceived in such a way that its effectiveness hinges on permanent affirmation and supervision by the CPC, and ostensibly the people. In contrast to the previous rule-of-law rhetoric, which focused on institutionalising socialist rule of law through legislative reform, the emphasis now is on party leadership at all stages of implementation of the law. The ensuing deterioration of civil and political rights, increased repression of political dissent, including far-reaching restrictions on academic freedom, and mass internments in Xinjiang have contributed to the tangible regression of the rule of law. Therefore, legal developments in the Xi Jinping era are generally perceived outside China as subject to unrestricted authoritarian rule that has largely sidelined legal institutions, including the Chinese courts.

The widely discussed amendments to the Chinese Constitution in 2018 reflect these differing and contradictory development trends to a certain extent. For example, the renaming of the Law Committee of the National People’s Congress (NPC) as the Constitution and Law Committee of the NPC signalled the introduction of a constitutionality review mechanism. Although the scope and procedure of such review have yet to be clarified, the amendment implies that the review mechanism will be located within the NPC system. In addition to the review of draft bills, the aforementioned NPC committee will also be responsible for interpretations of the constitution. Another minor constitutional amendment pointing towards legality and institutionalisation is the replacement of ‘socialist legal system’ with ‘socialist rule of law’ in the constitution’s wording.

8 CPC Central Committee Publishes a ‘Plan for Reform of Party and State Organs’ (中共中央印发‘深化党和国家机构改革方案’) of 21 March 2018.
Other constitutional amendments are even more salient to reinforcing CPC dominance. For example, the revised Art. 1 incorporates the principle of party leadership, which had previously been enshrined only in the preamble, into the main body of the constitution, explicitly stating that CPC leadership is the most essential attribute of socialism with Chinese characteristics. Another amendment abolishes the term limits of the state president and establishes the National Supervision Commission (NSC) as a new state organ, a move that merges the anti-corruption agencies of the party and the state.\textsuperscript{10}

Despite these developments, and in contrast to the general perception of legal regression under Xi Jinping, this volume presents a more nuanced picture. It discusses in detail various attempts to strengthen China’s judicial institutions and promote criminal justice reform by drawing on legal doctrinal, political science and sociological investigations of some of the country’s most prominent, and contentious, institutional and criminal procedure law issues. In so doing, it seeks to fill the gaps in our knowledge by examining both the institutional and procedural law changes affecting criminal justice. The chapters herein explore a number of unprecedented attempts to strengthen the legality of criminal procedures within a political environment that has become hostile to the very idea of protecting the fundamental rights of the individual through mechanisms that effectively limit state power.

This volume combines a wide range of analytical perspectives and themes in order to investigate questions that link institutional changes within the court system and legal environment with developments in criminal procedure law. The first part of the book (Chapters 2–5) investigates topics that connect and contextualise institutional and procedural aspects of the law with a focus on various actors in the judiciary and other state and party organs. The judiciary includes not only the courts but also the public security organs and procuratorates. The new supervision commissions have a certain proximity to the judicial organs with regard to their powers of investigation in corruption cases but are not generally regarded as part of the judiciary. Although the thematic focus of the book is the courts, it takes into account the role of these and other proximate actors. Local governments and local people’s congresses also interact with the courts in a horizontal power relationship, and may thus

\textsuperscript{10} Arts. 45, 52 Amendment of the PRC Constitution (中华人民共和国宪法修正案) of 11 March 2018. The amendment also established supervision commissions at the local level under the auspices of the NSC.
influence the outcome of criminal trials. At the same time, higher-ranking courts interact with lower-ranking courts in a vertical power relationship that may also affect the latter’s adjudication. Moreover, within the court system, the relationship between trial judges on the one hand and division chiefs, court vice presidents and adjudication committees on the other has recently undergone changes that also have fundamental effects on criminal trials. All of these relationships have a bearing on the topics the authors of these chapters address.

In addition, the dynamics of institutional and procedural reform follow larger shifts in party policy that have induced changes in the power relationship between actors within the state judiciary and the party organs that supervise them. As Chapters 2 and 5 demonstrate, amongst the changes seen in the post-2013 era are recentralisation of court reform initiatives in the top party leadership and the transfer of investigative powers and resources from the procuratorates to the supervision commissions. Chapters 2 and 3 engage with the development of court reforms from a political science and doctrinal perspective. They contextualise the post-2013 reforms in terms of historical development, policy shifts, rule of law and a Chinese mode of judicialisation. Chapter 3 explains the interactions between civil procedure reforms and institutional changes during the early reform period. In addition to highlighting the development of the civil procedure system as an incubator of judicial reforms, it sets out the changes in the internal operating mechanism of the courts and the adjustment of their position within the overall political structure of the party-state.

The Supreme People’s Court (SPC) is the most important institutional actor linking court reform and criminal procedure reform, with the dynamics of both grounded in the administrative and legislative functions of the SPC. Those functions are distinct characteristics of China’s highest court that are not shared by the apex courts of other jurisdictions. Although the SPC has an important adjudicative function as an appeal court, its legislative function has elevated it to the role of a ‘third legislator’ that exercises informal legislative powers alongside the NPC and State Council. The SPC wields these powers through judicial interpretations that are often more relevant to adjudicative practice in procedural law than the laws passed by the NPC or its Standing Committee. At the same time, the SPC exercises administrative powers over the entire court system, including the design and implementation of court reforms in cooperation with the relevant party organs. How China’s apex court drafts judicial interpretations within the field of criminal procedure law is the theme of Chapter 4.
The second part of the book (Chapters 6–8) shifts the perspective to three controversial themes of criminal procedure reform: pretrial custody review, live witness testimony in court and criminal reconciliation. These themes are interlinked with such crucial institutional problems as the delineation of the supervisory power of the procuratorates and review power of the courts in criminal proceedings with regard to pretrial measures. The power relationship amongst the courts, procuratorates and police (the ‘iron triangle’) is an important underlying reason for the low number of witnesses who appear before the courts in person during criminal trials. Furthermore, the relative institutional weakness of the courts motivates judges to engage in lengthy negotiations with victims and defendants to achieve a deal by which economic compensation is exchanged for forgiveness. Such criminal reconciliation not only serves to pacify the parties concerned but also minimises the risk of petitions and appeals.

The final part of the book (Chapters 9 and 10) introduces two sets of contextual factors relevant to the adjudication of criminal cases. The first are factors situated within the administrative structure of the judiciary, including promotion incentives for judges and prosecutors, the informal rules guiding the daily routines of judicial staff and the management of judicial resources, all of which can have a direct impact on the outcome of criminal trials. The second – more remote – factors are media and public scrutiny and court efforts to regain control of the narrative, which play a significant role in high-profile cases. The courts draw intense scrutiny from the state-controlled media in cases that attract public attention but are increasingly asserting their own narratives of court cases by engaging directly with the public.

The remainder of this introductory chapter mirrors the volume’s overall structure. It begins with a review of the literature on post-2013 legal institutional reforms before turning to the context and content of procedural law changes and court reforms. The chapter then discusses the role of the SPC as an initiator of criminal procedure amendments and promoter of legal institutional reform. The most significant change in the judicial structure, that is caused by the introduction of the supervision commissions, is examined from the perspective of ongoing court reforms and the balance of power amongst the various actors within the judiciary. The chapter then turns to the criminal procedure law reforms enacted in 2012 and 2018, discussing the new mechanism of pretrial detention, the criminal justice reform goal of ‘trial-centredness’ and criminal reconciliation in public prosecution.
cases. As the contextual factors of criminal trials often have a decisive impact on the trial outcome, such factors as performance evaluations of courts and judges and media scrutiny of criminal cases are subsequently analysed. Finally, the chapter concludes with a summary of the key issues and findings of the volume as a whole.

1.2 Assessment of Post-2013 Chinese Court Reforms

The Chinese courts have long been regarded as pawns of the party-state: passive, plagued by corruption, lacking in legal expertise and authority, and dependent on local governments and local party committees. Research in comparative judicial politics has investigated how authoritarian regimes use the law and courts as instruments of governance, why authoritarian rulers grant the courts a certain amount of decision-making autonomy, what strategies judges apply to extend their influence and increase the autonomy of the judiciary, and how activists challenge such regimes through court litigation. Further, many studies have identified cases of the judicialisation of authoritarian politics.

Given that the Chinese courts are political institutions subject to the monitoring and control of relevant CPC organs, there appears to be little space for their empowerment. However, the law has become increasingly important as a form of guidance and a benchmark of administrative behaviour, and the 1989 Administrative Litigation Law afforded the courts the authority to determine the legality of administrative acts. The law’s 2014 revision extended the courts’ review power to certain administrative acts and to abstract ‘normative documents’. Scholarship on court politics has also identified the intrinsically local dynamics of judicialisation in the Chinese courts. The courts have gained authority and expanded their jurisdiction on the basis of official rule-of-law ideology, their indispensable role in resolving the rapidly increasing number of legal disputes, the maintenance of social order


14 Arts. 12, 53 PRC Administrative Litigation Law (中华人民共和国行政诉讼法) of 1 November 2014.
and the strategic use of bargaining power.\textsuperscript{15} The empowerment of local courts in the administrative litigation arena relies on innovative tactics that build on party support and active engagement of administrative agencies. However, court empowerment serves primarily as a party-state instrument to maintain social stability, which suggests that the process of judicialisation is limited and reversible.\textsuperscript{16}

Whilst the liberal perspective associates court empowerment with stronger protection for individual liberties, greater court autonomy in authoritarian systems has been used to sideline the opposition, maintain the political dominance of the regime, and subvert representative democracy and liberal rights.\textsuperscript{17} The courts become important instruments of social control when they implement criminal law. In addition, to distance themselves from contentious political decisions, the executive and legislative organs of the state often delegate the implementation of those decisions to the courts.\textsuperscript{18} The consequence is that the courts are transformed into ‘balancing institutions’. They are left to deal with disgruntled citizens whose grievances will not be addressed by other party-state institutions. Granting access to the courts can thus be a means of relieving political pressure without undertaking political reforms. The courts can also maintain the legitimacy of authoritarian leaders, as they convey an image of constraints on arbitrary rule. However, relatively autonomous courts and expanded rule-of-law rhetoric can function effectively as a legitimising ideology only if the courts enjoy genuine autonomy and do not always side with the regime. According to what Martin Shapiro describes as the ‘legitimacy dilemma’, the empowerment of authoritarian courts has limitations, as genuinely independent courts will be perceived as a threat to the political stability of the regime, which will in turn impose stricter controls on the courts, thereby undermining their


\textsuperscript{16} Xin He, ‘Judicial Innovation and Local Politics: Judicialization of Administrative Governance in East China’ (2013) \textit{China Journal}, 20–42.


autonomy.\textsuperscript{19} How the dynamics of this dilemma play out in the context of the readjustment of the relationship between the CPC and the state under the Xi administration is one of the questions this volume addresses.

The concentration of personal power in the hands of CPC General Secretary Xi Jinping in the post-2013 period is generally regarded as a return to unchecked authoritarianism that has undermined both the law and legal institutions.\textsuperscript{20} The crackdown on human rights lawyers that began in July 2015 is seen as an expression of disregard for the law and an attempt to eliminate a small but politically important cohort of the legal profession.\textsuperscript{21} Against the backdrop of party-state centralisation, reinforced party dominance and increasingly illiberal policies, the current Chinese leadership has nonetheless advanced significant reforms of the judicial system. The somewhat counterintuitive result is that the Chinese courts currently enjoy a level of autonomy unprecedented in PRC history.\textsuperscript{22} The post-2013 judicial reforms and introduction of supervision commissions have far-reaching implications for the constitutional status of the courts and the division of powers amongst the judiciary and other organs of the party-state.

Thus far, only a few scholars have discussed the empowerment of legal institutions and changes in the role of law in the post-2013 period. A relatively critical account is offered by Ling Li, who analyses the integration of politics and law into the institutional architecture of the courts. She argues that the CPC retains supreme authority over the interpretation, application and enforcement of law through its institutional control of the courts. As the party can potentially exercise its decision-making power in any court case, the courts do not possess genuine judicial autonomy because the very existence of the non-political space in which they enjoy wide discretion is conditioned on their lack of capacity to behave autonomously in relation to the party.\textsuperscript{23} Hualing Fu offers a more differentiated

\textsuperscript{19} Shapiro, ‘Courts in Authoritarian Regimes’.
view of the post-2013 changes in legal institutions. He draws on Fraenkel’s dual-state theory, according to which authoritarian leaders rule in line with political expediency, leaving conventional matters to regular legal rules. Fu argues that the CPC has expanded and consolidated its prerogative to resolve politically sensitive issues through extra-legal methods. According to Fu, matters relating to the media, religion and ethnic affairs are in principle no longer governed by state law or state institutions. Instead, they have become effectively controlled by the prerogative of the extra-legal party-state. The dual-state logic implies that a legal system can continue to grow in institutionalisation and sophistication but still remain a semi-autonomous legal system within the parameters set by the party. The law is essentially used to empower the party-state and legitimise party rule. It is for this reason that previously extra-legal repressive measures have been formally and publicly legalised.

Taisu Zhang and Tom Ginsburg interpret both the 2018 constitutional amendment and court reforms since 2013 as a turn towards legality. They argue that judicial reforms have empowered the courts vis-à-vis other party-state actors and subjected party power to legal authorisation. According to these authors, China’s political system has become increasingly illiberal and centralised not by ignoring formal legal regulations but by making use of the organisational and legitimising capacity of the law. In their view, the new centralised, top-down mode of governance and growing popular demands for legality have prompted the party leadership to embrace legality, adhere to legal procedures and strengthen legal institutions.

Xiaohong Yu describes the courts as underestimated self-interested bureaucratic institutions. She argues that the local courts have strategically expanded their jurisdiction in handling administrative law cases and that such judicialisation will remain entrenched as long as the party-state maintains and benefits from a high degree of fragmentation within the system. The courts make strategic use of the discrepancy between the local party-state and higher-level courts. Yu further argues that fragmentation of the judiciary benefits CPC rule, as it induces political deadlocks that only the party can effectively resolve. This dynamic implies that fragmentation facilitates both the expansion of judicial power and de-judicialisation of the party apparatus in the political–legal system.

26 Yu, ‘Rule of Law under (Fragmented) Authoritarianism’.
The variety of scholarly views on China’s court reforms range from the denial of judicial decision-making autonomy owing to potential political interference in any given court case to the expansion of court competence through the courts’ active self-empowerment. The arguments that occupy a middle ground either see a shrinking sphere governed by an increasingly differentiated legal system combined with an expanding extra-legal realm or emphasise an overall institutionalisation that encompasses both the state and an increasingly dominant and visible party.

1.3 Context and Content of Post-2013 Court Reforms

From the beginning of the reform and opening period in 1978 until 2003, judicial reforms were initiated and implemented primarily by the judicial organs themselves, the SPC and Supreme People’s Procuratorate (SPP) in particular. These pre-2003 reforms were oriented towards the rule-of-law courts of liberal democracies but remained departmental, and in the course of their implementation led to institutional conflicts. Amongst the reforms were the refinement of trial procedures and establishment of administrative litigation and administrative law divisions in the courts. Further, the Judges Law and Law on Procurators introduced new professional standards for judges and procurators, respectively.

Although the courts remained subject to interference by a wide range of actors, who could often successfully challenge court decisions, they gradually expanded their sphere of influence. They gained strength in relation to local administrative agencies by applying such tactics as seeking support from a court adjudication committee, the highest collective decision-making organ of a court, or from a higher court. The courts also benefited from the lack of legal expertise and passivity of the people’s congresses at various levels. The courts even developed de facto review power by adopting the SPC-backed practice of refraining from applying local legislation they held to be in violation of national law.

In addition, the widespread view that the judiciary played a significant role in

27 Susan Trevaskes, ‘Political Ideology, the Party, and Politicking: Justice System Reform in China’ (2011) 37 Modern China, 315–344.
28 PRC Judges Law (中华人民共和国法官法) and PRC Public Procurators Law (中华人民共和国检察官法), both adopted at the 12th session of the 8th National People’s Congress on 28 February 1995, revised in 2001 and 2017.