

Legal Institutions: The Political and Constitutional Setting

1 Introduction

Modern legal institutions have had a short but much troubled history in China since the Continental-style legal system was introduced at the turn of the twentieth century. As discussed in Chapter One, the adjudication system introduced to China during the Qing and Kuomintang (KMT) reforms, which was separate from and independent of the administrative hierarchy, was destroyed by the Communist Party of China (CPC) well before 1949. While efforts were made to rebuild a new legal system soon after 1949 (and ‘independent adjudication’ was promised to the courts by the 1954 Constitution), these efforts only lasted a few short years during the 1950s, with the lawyer and procuratorate systems having been abolished in 1957 and 1968 respectively.¹ Real progress in rebuilding the legal institutions did not occur until 1979, when two organic laws were promulgated on courts and procuratorates respectively, resulting in the systematic establishment of the courts and procuratorates. In 1980, the Provisional Regulations on Lawyers were issued that formally established the lawyer system in China.

Despite the strong different ideological orientations, Chinese legal institutions remain largely of a European Continental style. On paper, the Chinese Constitution lays down a straightforward structure for state and legal institutions that include the legislature, executive, judiciary and, most recently, supervision. However, this structure does not match the reality or reflect the actual operation of China as both a Party-State and a bureaucratic and hierarchical state. Behind and on top of the clear constitutional structure is the CPC, whose role in running the State continues to evolve and is yet to settle. It is the integration, through the *Nomenklatura* system, of the Party and State and the strict hierarchy that form the two most important features of the legal institutions in China today.

¹ Zhenjiang Zhao (ed.), *Forty Years of the Chinese Legal System (Zhongguo Fazhi Sishi Nian)*, (Beijing: Beijing University Press, 1990), at 116; and Chongdou Gan (ed.), *China Law Yearbook 1987 (Zhongguo Falü Nianjian)* (Beijing: Law Publishing House, 1988), at 8–30. For further discussions, see Alice E.-S. Tay, ‘Law in Communist China—Part I’, (1969) 6 *Sydney Law Review* 153; and Alice E.-S. Tay, ‘Law in Communist China—Part II’, (1971) 6 *Sydney Law Review* 335.

This chapter provides an overview of the Party-State setting in the PRC, with a focus on explaining the two features just mentioned above. It examines the interrelationships between the various institutions in the Chinese *Nomenklatura* and Party control systems. It also outlines the administrative responsibilities for justice and law. The judiciary and the legal profession will be analysed in the next two chapters.

2 Separation of Powers and the Integration of Party and State

The CPC undoubtedly has firm control over state affairs,² but the extent of such control has varied significantly throughout the history of the PRC. Suffice to say that by the time Deng Xiaoping came to power in 1978, there was no separation between the Party and the State and there was a large battle in post-Mao reform concerning the establishment of a clear demarcation between the Party and the State.

When Deng Xiaoping started his reforms, he made it clear that his reforms necessarily included political reforms, pointing out that '[i]f we only carry out economic reforms without political ones, our economic reforms will not succeed.'³ However, there was a fundamental flaw in Deng's idea—his political reforms were essentially to ensure that his economic reforms would succeed. To him, the major problems were the non-separation of the Party and the State, bureaucratisation, over-concentration of power, patriarchal methods, life tenure in leading posts and privileges of various kinds.⁴ His major concern was the efficiency of government and not government accountability, at least

2 As at the end of 2017, the total membership of the Party stood at 89.56 million, a tiny proportion of the Chinese population of more than 1.3 billion. However, the Party has established 4.5 million basic-level organisations throughout China, and its penetration into neighbourhood and township government is practically 100 per cent, 91 per cent into state-owned enterprises (SOEs) and close to 73 per cent into private enterprises. See 'Public Notice on Internal Statistics of the Communist Party of China in 2017', *Xinhua*, 30 June 2018, available at http://www.xinhuanet.com/politics/2018-06/30/c_1123059570.htm (last accessed 1/7/2018).

3 Quoted in Keping Yu, 'Deng Xiaoping and Political Progresses in China', available at <http://mp.weixin.qq.com/s/U0lkke7K9531HWN4GC1BMw> (last accessed 25/2/2018). See also Fang Gao, 'Retrospect and Prospect of Chinese Political Reforms Since "Reform and Opening Up"', (2010) 1 *Theoretical Discussion and Debate*, available at <http://www.hybsl.cn/beijingcankao/beijingfenxi/2018-06-05/67727.html> (last accessed 19/6/2018).

4 See Deng Xiaoping, 'On the Reform of the System of Party and State Leadership', in *Selected Works of Deng Xiaoping (1975–1982)* (Beijing: Foreign Languages Press, 1984), at 309. This article (in fact a speech delivered in 1980) is widely viewed as a programmatic document guiding the reform of the political system.