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7. 中国の「根本大法」はいかに維持されているか
——憲政主義と憲法監督——＊

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第１章　憲政主義

第１節　概観

中国での「憲政」ないし「立憲」の概念は、「民権」「人権」等と並んで、清朝末期に明治時代の日本から移入されたものであるが、その後の過程において、中国では立憲政治の略称としての「憲政」が「立憲」よりも広く用いられるようになった。

憲政の理念と制度の国家体制内への導入には清朝保守派の根強い反発もあったが、支配層内での清朝崩壊の危機意識の高まりは、「外見的」であれ、憲政主義への途を整えることを余儀なくさせた。たとえば、1906 年の「預備立憲の詔」の発布、1908 年の「欽定憲法大綱」の発表および「9 年後の国会開設」の予告、1911 年の「重大信条十九条」(「十九信条」) のなどがそうであった。だが、この小手先の妥協ではもはや 1911 年の辛亥革命の勃発を食い止めることができなかった。

1912 年の中華民国の成立後、憲政主義は欧米の「先進思想」の１つとして積極的に論議されるようになり、かつ憲政主義の根幹である憲法的文書も次々と制定された[1]。しかし、中華民国成立後の中国の過酷な政治動態のなかで、これらの憲法的文書が内容と実践の面で深刻な問題を抱え込むことになったことは免れず、中国の憲政主義の「外見性」は継続した。もっとも、この時期は、実態はともかく、「憲政」そのものは国民党陣営と共産党陣営のいずれ

＊ 未発表論文

1　たとえば、中華民国臨時約法 (1912 年)、中華民国約法〔いわゆる「袁記約法」〕(1914 年)、中華民国憲法〔いわゆる「曹錕憲法」〕(1923 年)、中華民国訓政時期約法 (1931 年)、中華民国憲法 (1947 年) などである。

にとっても肯定的概念であった[2]。

しかし、1949年の中華人民共和国の成立後、特に1957年の「反右派闘争」後、憲政主義は否定的概念に転換した。憲政主義は人権などと共に、「ブルジョア的概念」として放逐されたのである。ところが、その後、反右派闘争から20余年後、憲政主義が復権してきた。つまり、1978年末以来の鄧小平の「改革・開放」路線下での市場経済化にともなう「ブルジョア的概念」の再検討ないし再評価とともに、憲政主義も肯定的に再登場し、特に1989年の天安門事件後の1990年代から今日まで、憲政主義は単なる概念容認のレベルにとどまらない新たな理論展開をみせるに至っている。

第2節　建国後の二つの転換

1989年、世界を震撼させた天安門事件が起きた。この事件は「反憲政主義」であったのか。憲政主義をきわめて素朴かつ形式的に「憲法に基づく政治」というようにとらえると、天安門事件は必ずしも反憲政主義ではなかった。

この事件では、学生・知識人達は、「民主と法制」「愛国護憲」などを旗印とし、言論の自由、集会・結社の自由、出版の自由、行進・示威の自由などの憲法上の権利規定を援用して行動した。これに対して、共産党・政府が「超憲法」的ないし「反憲法」的に応じたかというと、そうではなかった。共産党側も少なくとも形式的には憲法を根拠としていた。具体的には、事件当時の憲法に規定されていた「4つの基本原則(社会主義の道、人民民主独裁、共産党の統率的指導[3]、マルクス・レーニン主義と毛沢東思想の堅持)」(序言)、人民民主独裁と社会主義制度の擁護(第1条)、反革命活動禁止(第28条)などの規定である。共産党側にとって、学生達の行動は「公然と憲法に違反して、共産党の統率的指導と社会主義制度への反対を煽動した」[4]ということになる。

この「国家体制の維持」に関する憲法規定を援用する共産党・政府側と「権利」に関する

2　毛沢東も、1940年、延安の憲政促進会で行った演説のなかで、「欧米型の憲政」に対抗して「新民主主義の憲政」を打ち出していた(「新民主主義的憲政〔1940年2月20日〕」『毛沢東選集』〔人民出版社、1966年版〕第2巻、689頁以下)。なお、共産党陣営の憲法的文書として、中華ソビエト共和国憲法大綱（1931年、1934年）、晋察冀辺区施政綱領（1940年）、陝甘寧辺区施政綱領（1941年）、晋西北施政綱領（1942年）、陝甘寧辺区憲法原則（1946年）、東北各省市民主政府共同施政綱領（1946年）などがある。

3　「統率的指導」の原語は「領導」である。これは、日本では通常、「指導」と訳されているが、中国語には別に「指導」の用語はあり、また何よりも共産党は中国の「社会主義事業を領導する堅強な核心」で唯一の「執政党」であり、その「領導」の内容には「政治領導」、「思想領導」、「組織領導」が含まれており（中共中央党校理論部編『中国共産党建設全書』第6巻、山西人民出版社、1991年、3〜18頁参照)、実体的に「領導」は単なる「指導」よりむしろ、中国全体を統括・牽導する「統率的指導」と訳するほうが適切であるように考えられる。新中国建国後、とりわけ反右派闘争後の「領導」はそういえよう。もっとも、「統率的指導」の訳語は、中国での共産党の「領導」の重要な意味合いを示すためのものであり、このことを理解しておれば、訳語にさほど拘泥する必要はない。

憲法規定を援用する学生・知識人側の対立の構図は、実は天安門事件が初めてではなく、すでに 1954 年憲法下での 1957 年の反右派闘争において現出していた[5]。公式的には、反右派闘争は「社会主義事業の生死存亡に関係する闘争」であり[6]、天安門事件は「社会主義制度の擁護」のためであった[7]。いずれも「社会主義」の死守であり、憲法規定と密接不可分である。要するに、天安門事件にしろ反右派闘争にしろ、共産党・政府側は憲法を反撃の根拠にした、もしくは反撃の根拠にできたという意味で、そこには憲政主義の素朴な「かたち」はあった。こうした憲政主義を「形式的憲政主義」としておく[8]。この観点下では、反右派闘争と天安門事件は「反憲政主義」ではなかった。

ところが、天安門事件後から今日まで、中国において憲政主義についての新たな理論構築が進められるようになり、そして、この新憲政主義論の観点からすれば、反右派闘争と天安門事件を「反憲政主義」とみなすことも、少なくとも理論的には可能となってきた(もっとも、公式的には「反憲政主義」の認定はいまだない)。天安門事件直後はともかく、それから数年後、特に 1990 年代中頃からは、「形式的憲政主義」を改革する潮流が強くなり、さらには欧米的な立憲主義理論へ接近する傾向さえ出てきている。たとえば、こうした論の 1 つは、「憲政主義」の特徴を、人民主権を前提にしつつ、第 1 に、「権力の制限」、第 2 に、権力の制限の眼目は「人の権利・自由」を保障することにある、第 3 に、そのためには「憲政法治」の樹立が必須的に要求される、ととらえている[9]。この種の憲政主義を「実質的憲政主義」としておく。この実質的憲政主義の観点の下では、反右派闘争と天安門事件をいずれも「反憲政主義」とみなすことも可能である。

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4 『人民日報』1989 年 4 月 26 日。

5 この反右派闘争についての詳細な分析は、土屋英雄編著『現代中国の人権—研究と資料—』信山社、1996 年、第 1 部第 5 章を参照。

6 『人民日報』1957 年 8 月 16 日。

7 『人民日報』1989 年 4 月 26 日。

8 もっとも、反右派闘争後は、この「形式的憲政主義」でさえ消滅したことに注意する必要がある。つまり、反右派闘争の「完全な勝利」によって、その闘争を主導した毛沢東の社会主義建設戦略が全国的に確立されることになり、この建設戦略の方法的核たる共産党の統率的指導の絶対性、階級闘争の必須性、大衆運動の恒常性の 3 要素は、中国の 1954 年憲法体制を揺るがし、ひいてはその形式的枠組をも崩壊させることになったのである。

反右派闘争後、54 年憲法体制は崩壊への途をたどることになるが、もともと資本主義型の憲法の虚構性、形式性、欺瞞性に対する批判から出発した社会主義型の憲法としての 54 年憲法は、「人民の国家」を前提とすることによって、構造的に国家権力との対抗関係において人民の権利、自由を保障するという観点が希薄であった。そこには、国家権力に対する“性善説”ともいえる素朴な楽観主義が存在し、反右派闘争後は、この“性善説”が普遍化するようになった。このことを、筆者は早くに論じておいたが(土屋英雄「現代中国における『憲法政治流動化』の考察」『現代国家と憲法の原理』〔小林還暦記念〕有斐閣、1983 年、419 頁以下、また、土屋英雄『中国の人権と法—歴史、現在そして展望—』明石書店、1998 年、135 頁)、近年、中国内部でも、“性善論”が権力に対する拘束、抑制の観点を長期に軽視させてきたことが論じられるようになってきている(たとえば、郝鉄川「“性善論”対中国法治的若干消極影響」『法学評論』2001 年 2 期)。

第3節 天安門事件後の展開

「権力の制限」、「人の権利の保障」、「法治の樹立」を中核的内容とする実質的憲政主義は、1990年代以後、単に議論のレベルでなく、不十分ながらも部分的には現実政治のなかへ反映されつつある。この状況を次に個別的にみてみる。

(1)「権力の制限」との関連では、全国人民代表大会の権威の向上がみられる。具体的には、全国人民代表大会の会議の実質化、代表の地位の強化、国務院・最高人民法院・最高検察院に対する全国人民代表大会の監督の強化などである。憲法上、全国人民代表大会は最高国家権力機関であり、この権限の強化は「権力の制限」と矛盾するのではないかという疑問もありえようが、過去長期間、全国人民代表大会の会議は形骸化した「ゴム印」会議であり、その代表の地位も第一線を退いた幹部の「名誉職」的なものであった。これまで中国の国家統治の内実が「共産党独裁下の行政国家」という様相を呈していたことを考慮すれば、人民代表機関たる全国人民代表大会が共産党と行政機関から相対的に独立し、自己の権威を向上させることは中国の憲政主義の改善につながりうるし、「権力の制限」とも当面は矛盾するものではない[10]。

(2)「人の権利の保障」との関連では、天安門事件直後、中国指導部は主に欧米からの激しい批判にさらされることになったが、この批判に表面的には対抗しつつ、実質的には妥協して、人権に関する政策的手直しの検討を開始し、そうして、「人権」概念を中華人民共和国樹立後初めて体制的に公認した[11]。この公認は、国際社会向けの弁明的なものであったとはいえ、長期間のタブーを破ったことは確かであり、かつこれは現実の政治と社会および法制度、法理論に徐々に影響を及ぼしつつある。

(3)「法治の樹立」との関連では、1978年末に「改革・開放」路線へ転換したあとも長ら

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9 龔祥端主編『憲政的理想與現実』(中国人事出版社、1995年)所収の陳端洪論文参照。

10 特に近年は、代表による立法活動はかなり活発化してきている。たとえば、2003年3月開催の第10期全人代第1回会議における代表提出の議案は1050件(代表団提出の議案19件、30名以上の代表の連名提出の議案1031件)であり、このうち法律の制定または改正、法律制度の改善に関する議案が3分の2近くを占めていた。2006年3月開催の第10期全人代第3回会議における代表提出の議案は1006件(代表団提出の議案3件、30名以上の代表の連名提出の議案1003件)であり、法律案1003件のうち法律草案文を提出したものは541件(53.9%)である(『新華月報』2006年8期、71頁参照)。

また、2005年5月、中共中央が承認・通知した「全国人民代表の作用をさらに発揮させ、全人代常務委員会制度の建設を強化することに関する中共全人代常務委員会党組の若干の意見」(中共中央〔2005〕第9号文件)は、全人代制度の強化・充実に対して重要な意義を有している。この「意見」の精神に基づいて、同年6月、全人代常務委員会弁公庁は、「全人代代表活動を強化し規範化することに関する若干の意見」、「全人代代表議案処理弁法」、「全人代代表の建議、批判、意見の処理弁法」、「全人代常務委員会の機関の信訪活動の若干の規定」、「専門委員会の作用を十分に発揮させることに関する若干の意見」の5つの文書を発出した(『人民日報』2006年6月18日)。

11 1991年11月1日公表の「人権白書」(国務院新聞弁公室「中国的人権状況」)。この内容および分析は、土屋英雄編著『現代中国の人権—研究と資料—』(信山社、1996年)の第2部第1章と

く「法制」という概念を用いるのが中国では支配的であったが、1997年9月の共産党第15回全国代表大会での報告のなかで、江沢民は中国の指導者として初めて、「法制」とともに「法治」という概念を正式に用いた[12]。さらに、1999年3月、第9期全国人民代表大会第2回会議は憲法を改正し、「社会主義的法治国家」(第5条1項)という文言を入れた。

ここで注意すべきは、欧米的な立憲主義への中国の憲政主義の接近はあくまでも相対的な「接近」にとどまり、中国のいう「社会主義的」原理は維持されているということである。たとえば、「権力の制限」については、複数政党下の「権力の分立」という理念は体制的に容認されておらず、共産党の統率的指導という原理の下で「民主集中制」の原則が実行されている[13]。「人の権利の保障」については、人権の概念が1991年に公認されたにもかかわらず、憲法上は、その後も規定されていたのは「公民の権利の保障」であり、「人権の保障」が憲法規定化されるのは、2004年の憲法改正においてである。しかも、「人権」の体制的解釈は欧米とは異なる独自性を有している[14]。「法治」については、共産党第15回全国代表大会の江沢民報告における「法治」は「共産党の統率的指導の堅持」を前提としていた。北京大学教授の沈宗霊は、何よりもこの点が、中国の「社会主義的法治」と西側の「資本主義的法治」の原則的相違であるという[15]。

にもかかわらず、伝統的な「社会主義性」の濃度は薄らぎつつある。法実践的には、たとえば、1997年の全国人民代表大会の会議にて、刑法上の「反革命罪」が「国家安全危害罪」に修正され、その後、1999年の全国人民代表大会の会議にて、憲法上の「反革命活動」という文言が「国家の安全に危害を与える犯罪活動」に改められた。この改正で実態は変わらないという見解にも根拠はあるが、それまでの中国社会主義の象徴的概念の一つが憲法から消えたことのインパクトは弱くない。また、法理論的にも、「社会主義性」ははるか後景に移されつつあり、欧米的な(ないしそこの特定の思想潮流の)立憲主義的観点に基づく中国の「憲政」の改革が公然と主張されるようになってきている[16]。

資料を参照。

12　これより前、江沢民は小会議では、1996年2月の中共中央主催「法制講座」において「法治」に言及していた。なお、「法治」がそれまで用いられなかったのは、その概念が「ブルジョア的」であるという批判が党内でまだ有力に存在していたことによる。「法制」は制度・方法原則であり、法律と制度あるいは法律制度、および「法に依拠して事を処理する」という方法原則すなわち「依拠すべき法があること、法があれば必ず依拠すること、法の執行は必ず厳格であること、法に違反すれば必ず追及すること」(「有法可依、有法必依、執法必厳、違法必究」)という原則を含む。「法治」は制度・方法原則をも含むが、「人治」との対比で用いられ、かつ「民主」「人権」の価値原理と結合している。

13　脚注(10)の全人代制度の強化・充実の施策にしても、根本的には党の政策に基づいていることに注意する必要がある。

14　中国の人権論の詳細は、土屋英雄「中国の人権論の原理と矛盾的展開」『ジュリスト』2003年5月1日・15日合併号を参照。

15　沈宗霊「依法治国、建設社会主義法治国家」『中国法学』1999年1期、11頁。

16　たとえば、ある論者は、中国の「法律現代化」との関連で、「憲政建設は法律現代化の主要内容であると同時に、法律現代化の程度を測る基本的標尺であり、憲政がなければ法律現代化は語りようがない」と述べた上で、「憲政」には二つの要件、すなわち厳格に憲法に基づいて物事を

そして、何よりも中国の「社会主義的」原理に影響を及ぼしつつあるのは経済的土台の変容である。中国では、1978年憲法までは、個人経営経済、私営経済などの非公有制経済は公有制経済の対立面であるとする「対立」論が支配的見地であった。だが、その後、「改革・開放」路線下の1982年憲法で、「個人経営経済」は社会主義的公有制経済を補完するものであるとする第1段階の「補完」論が規定され、1988年の憲法改正で「私営経済」も社会主義的公有制を補完するものであるとする第2段階の「補完」論へと進められた。さらには、1999年の憲法改正で、単なる「補完」論でなく、個人経営経済、私営経済などの非公有制経済は社会主義的市場経済の重要な構成要素であるとする「重要構成要素」論が打ち出された。そうして、2004年の憲法改正で「私有財産権」が憲法規定化された。このように、中国のそれまでの「社会主義」を支えてきた経済的土台が確実にかつ大きく変移しつつある。中国の憲政主義の今後がこれと無関係ではありえない。

第2章 憲法監督の制度、理念、現実

第1節 憲法監督の制度

処理することと遵守される憲法は民主の憲法であることが必要であるが、この二要件に照らせば、中国は「憲政」からいまだ遠く隔たっていると批判する。当該論者は、批判の根拠を次のように論じている。①まず、現在の憲法の内容はいまだ不全である。具体的には、二つの問題がある。第一の問題は、公民の権利が多くないということである。「憲法は人権の保障書であり、これは憲法の質の規定性の一つである」。しかるに、現行憲法全138条のうち公民の権利・義務に関係するのはわずか24条(第33条～56条)である。中国はすでに国際人権規約に加入ないしそれを承認しているが、これらに規定されている権利の一部はまだ中国憲法には規定されていない。市場経済の条件下で必須の自由移動権、財産不可侵権、プライバシー権、無料初級教育権等は明確に規定されていない。また、現行の権利規定は抽象的すぎる。第二の問題は、権力の制約が不明確であるということである。これは重大な欠陥である。憲法は権力の制約があってこそ人民主権を確保できる。②次に憲法は飾りとして扱われ、刑法、民法等の法律は「硬法」で憲法は「軟法」と考えられ、「違憲だが違法でない」ともされており、違憲審査が声高に論じられているが、実践されていない(艾永明「中国法律
現代化的幾個問題」『社会科学』2005年11期、54頁以下)。

また、ある論者は、中国社会の法文化の全体を刑法文化、民法文化、法哲学文化、憲法文化の4つの段階に分類した上で、当面、中国社会は民法文化から法哲学文化への転化の時期にあり、法哲学文化の根本目標(公衆の権利価値観の確立)の達成が憲法文化の到来を準備すると論じる。この論者によれば、憲法文化は中国社会の憲政の成熟と発展を表示し、憲法文化の段階は中国の法治文明の理想の基本的実現の時期であるが、まだこの憲法文化は中国には到来していないとされる。ちなみに、憲法文化の標示は主に、①憲法の形式的意義の至上と実質的意義の至上の統一、すなわち憲法至上の制度宣言と社会公衆の普遍的な憲法至上価値観念の統一、②法学研究・教育活動において、憲法学研究・教育の重要性が単に口頭ないし文書上の宣言に留まるのでなく、憲法学研究・教育が法学活動の第1位の位置に置かれ、憲法学が法学体系のなかの“顕学”になること、③一切の国家機関と政府官僚の法的活動において、精神と行動上で憲法が最高基準となり、国家活動の最高の依拠がいかなる個人の意思ないし集団の意思ではなく憲法となること、である(桑保軍「中国法文化四階段分析」『甘粛政法学院学報』2005年6期、63頁以下)。

憲法監督とは、特定の国家機関が憲法の実施を保障するために、国家の根本的活動(主に立法活動)が合憲か否かを審査し、かつ違憲の行為を是正し必要な制裁を加える専門的活動を意味する。憲法監督は「憲法保障」とは異なる。中国での憲法保障は、憲法の実施を保障するために採用される各種の措置と制度を指し、それには、専門の憲法監督機関による憲法実施状況に対する監督が含まれるほかに、その他の国家機関、政党、社会団体、大衆団体及び公民による憲法実施の監督と保障が含まれる[17]。

また、憲法監督はいわゆる「人大監督」(「人民代表大会監督」)とも異なる。蔡定釗は両者の異同について、次のようにいう。①監督の主体が異なる。憲法監督は一般に統一的で、高度の権威を有する機構によって実施される。この機構は、人民代表大会の内部に設けることができるし、外部にも設けることができる。憲法監督は絶対多数の国家では一般に一つあるだけである。人大監督は、人民代表大会の性質と職権に基づいて創出され、中国の各級の人民代表大会はいずれも自身の監督権を有する。人大監督は上から下まで一つの系統をもつ。②監督の対象が異なる。憲法監督と人大監督の対象はいずれも、国家機関およびその勤務人員であるが、人大監督は主にそれが生み出した国家機関およびその工作人員に対する監督であり、憲法監督は政府、法院、検察院に対する監督を含むけれども、憲法監督の主旨は人民代表大会自身の立法に対して監督を行うことである。なおかつ、憲法監督の対象は主に中央一級の国家機関およびしの指導者に対する監督である。このほか、人大監督はそれが生み出した国家機関以外の政党と社会組織に対して監督を行うことはできないが、憲法監督は政党と社会組織の違憲行為に対する監督を含むことができる。③監督の内容が異なる。憲法監督は主に代表機関の立法が合憲か否かに対する監督である。人大監督は主に政府の法規、規章、行政措置、命令等が人民代表大会の法律に合致しているか否か、地方政府の規章が地方性法規に合致しているか否か、法院と検察院の活動と重大事項に対して行う監督である。④監督の方式と結果が異なる。憲法監督は違憲の法律、法規、規章、行政措置等に対して無効、取消しを宣布する方式を採用したり、あるいはその制定・発布機関に期限を切って、憲法と一致させるように命じる方式等をとって違憲問題を解決する。人大監督は主に活動報告の聴取、質疑・質問、特定調査の組織等の方式を通して、人民代表大会が生み出した国家機関およびその構成人員に対して批判、建議、意見を提示して圧力と影響を加え、それらに人民代表大会が代表するところの人民の意思に沿って事を処理するようにさせる[18]。

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17 蔡定釗『国家監督制度』(中国法制出版社、1991年)114～115頁参照。憲法監督についてのこの定義は比較的に整理されており、本稿においても特に断らないかぎり、これを用いることにする。

憲法監督と憲法保障の相違の他の説明については、楊泉明『憲法保障論』四川大学出版社、1990年、23頁、王広輝主編『通向憲政之路—憲法監督的理論和実践研究』法律出版社、2002年、11頁参照。また、憲法監督の意義を狭義と広義に分け、蔡定釗のいう「憲法監督」を狭義の憲法監督とし、「憲法保障」を広義の憲法監督とする説(陳雲生『民主憲政新潮』人民出版社、1988年、7頁)等がある。蔡定釗の「憲法監督」の意義については、「憲法監督を違憲審査制度と同等にし、専門機関以外の機関、組織、個人の憲法実施に対する監督と制約を無視していて全面的でない」という批判もあるが(李忠『憲法監督論』社会科学文献出版社、1999年、3頁)、つまるところ「定義」の問題である。

なお、憲法監督制度と違憲審査制度は幾分の差異があるとされているが(李春暉・辛智俊「違憲與違憲審査理論初探」『内蒙古師範大学学報〔哲学社会科学版〕』2004年6期、76頁)、両者は重要部分では重なる概念であり、中国でも、違憲審査の観点から憲法監督の問題を考察する論文は少なくない。この文献については、当面、張玉春「対我国違憲審査制度的幾点思考」『理論探索』2004年5期、鄭天鋒「完善我国違憲審査制度的思考」『人大研究』2004年5期、洪冬英「違憲審査與憲政」『法学論壇』2004年4期、趙晶・任進「也談我国違憲審査制度的模式選

第2節 憲法監督の制度と運用

現行憲法の1982年憲法は、全国人民代表大会(以下、全人代)は「憲法の実施の監督」(62条2号)の権限を、全人代常務委員会は「憲法の解釈、憲法の実施の監督」(67条1号)の権限を有すると規定している[19]。

このように、憲法監督を司る特定的な国家機関は、憲法上は、全人代とその常務委員会であるが、この憲法監督の制度上、つとに次のような問題が指摘されてきた。①制度が全体的に粗略である。例えば、憲法監督権をどのような手続で行使するのか、違憲事件をどのように処理するのか、違憲の法律、政治、行政の効果は何なのか、公民の基本的権利が侵害されて法律に救済措置規定がない場合に憲法的救済をどのように与えるのか等が不明である。②全人代及びその常務委員会は憲法監督の特定機関ではあるが専任機関でないので、監督活動に集中できない。③地方とりわけ省級の人民代表大会の憲法監督権に関する明確な規定がない[20]。現在もこれらの問題(①②が主要問題)は存続しており、このため違憲行為の多くが放置

澤」『国家行政学院学報』2003年5期、何紅喬「浅論違憲審査制度」『社科縦横』2004年4期、張暁傑「建立我国違憲審査制度的思考」『学術交流』2004年7期、肖霊「論公民啓動違憲審査程序」『嘉応学院学報(哲学社会科学)』2004年5期、張国安・張勇「違憲審査制度的法哲学思考」『平頂山師専学報』2004年4期等。

18 蔡定釗「我国憲法監督制度探討」『法学研究』1989年3期、30～31頁。蔡定釗のこの憲法監督と人大監督の区分は、狭義の憲法監督を前提にしているが、広義の憲法監督を前提にしつつ、それと立法監督、行政監督、司法監督との相違を論じているものとして、陳雲生『憲法監督司法化』北京大学出版社、2004年、32頁。これも、憲法監督の特質を理解する上で有益である。

19 この規定の仕方によって、全人代が憲法解釈権を有するか否かにつき説が分岐しているが、全人代制度の本質からして、否定する理由は薄弱である。立法法88条における、全人代は全人代常務委員会制定の不適当な法律と決定を改変し又は取消す権限を有し、全人代常務委員会が承認した憲法、法律に違背する自治条例と単行条例を取消す権限を有するという規定は、肯定説を前提にしていると考えられる。また、後述の「全国人民代表大会及び地方各級人民代表大会監督法」(以下「監督法」と略す)草案9条も同様の規定を置いている。

立法法上の法令審査体系は次のようになっている(88条)。①全人代は、その常務委員会が制定した不適当な法律を改変または取消す権限、全人代常務委員会が承認した憲法に違背する自治条例、単行条例および本法66条2項に規定された自治条例、単行条例を取消す権限を有する。②全人代常務委員会は、憲法、法律に抵触する行政法規を取消す権限、憲法、法律、行政法規に抵触する地方性法規を取消す権限、省、自治区、直轄市の人民代表大会常務委員会が承認した憲法に違背する自治条例、単行条例および本法66条2項に規定された自治条例、単行条例を取消す権限を有する。③国務院は不適当な部門規章、地方政府規章を改変または取消す権限を有する。④省、自治区、直轄市の人民代表大会は、その常務委員会が制定し承認した不適当な地方性法規を改変または取消す権限を有する。⑤地方人民代表大会常務委員会は、その級の人民政府が制定した不適当な規章を取消す権限を有する。⑥省、自治区の人民政府は、一級下の人民政府が制定した不適当な規章を改変または取消す権限を有する。⑦授権機関は、被授権機関が制定した授権範囲を超えるまたは授権目的に違背する法規を取消す権限を有し、必要なとき授権を取消すことができる。これから理解されるように、全人代そのものが制定した法律の審査については何ら規定されていない。のみならず、これを規定している他の法規は存在しない。ということは、全人代が制定した法律の審査は全人代自身が行うことになる。これは、中国では「憲法慣例」として確立されているとされる(胡建森、高春燕「法規的合憲性審査在中国」『法治論叢』2005年6期、66頁参照)。しかし、この憲法慣例に対しては、「自己監督は監督

されており[21]、とりわけ地方ではそうである[22]。

憲法監督に関係する活動が何も行われていないわけではない。しかし、全人代の会議へのその常務委員会の活動報告からみるに、常務委員会が違憲行為を是正する通常の措置ないし方法は、注意喚起、批判、要求、督促、促進、是正意見等にすぎない[23]。また、違憲行為の

がないに等しい」(呉家麟『呉家麟自選集』寧夏人民出版社、1996年、435頁)等、批判も強い。

なお、これまでの各憲法の憲法監督に関する規定の仕方はそれぞれ異なる。1954年憲法は、全国人民代表大会の職権として「憲法の実施の監督」(第27条3号)を、全人代常務委員会の職権として「法律の解釈」(第31条3号)を規定し、1975年憲法は、全人代常務委員会の職権として「法律の解釈」(第18条1項)を規定しているのみであり、1978年憲法は、全国人民代表大会の職権として「憲法と法律の実施の監督」(第22条3号)を規定し、全人代常務委員会の職権として「憲法と法律の解釈」(第25条3号)を規定している。しかし、いずれの職権も正式に行使されたことはない。

20 陳雲生『民主憲政新潮—憲法監督的理論與実践—』(人民出版社、1988年)221頁以下参照。なお、陳雲生は、その後の著書のなかで、以上の3点に加えて、「自己が自己を監督する」という現行の憲法監督システムは一般的監督ルールに反していること、憲法学術界の主流は現行の憲法監督システムの「改善」に関心を向け、そのシステムの根本的改革の必要性と可能性を意識していないことをあげている(前掲『憲法監督司法化』457頁以下)。現行の憲法監督制度の欠陥の分析については、他に、王広輝・前掲『通向憲政之路』385頁以下、李忠・前掲『憲法監督論』245頁以下参照。

21 蔡月萍「建立憲法保障機制的若干問題」『法学』1995年12期18頁参照。また、陳雲生は、この放置の理由について、次の諸点を指摘している(前掲『憲法監督司法化』509頁)。①全国人民代表大会は毎年1回開催されるだけで、会期も短く、憲法監督に十分な時間と精力をとることができない。②全国人民代表大会常務委員会は一般に2ヶ月に1回開催されるが、その職権は広範で、仕事は忙しすぎて、違憲審査に精力を集中して行うのに影響している。③各専門委員会は一つの工作機構にすぎず、自身の名義で単独で決定をなすことはできず、ただ自己の意見ないし建議を報告の形式でもって全国人民代表大会またはその常務委員会に提示し、それらに決定してもらうことができるだけである。④市場経済の条件下で、職権立法、授権立法、部門立法、地方立法が尽きることのなく、立法主体、立法形式の多元化はすでに不可避的な発展趨勢となっている。部門の利益、地方の利益、立法技術等の方面の要素の制約と作用により、この多層の立法体制が規範的文書の違法・違憲の可能性を大々的に増加させており、これらの立法に対する審査監督を強化する必要がある。⑤現行の憲法は改革・開放の初めに制定されたものであり、2回改正されたが、いまだ顕著な計画経済の痕跡があり、市場経済の発展の必要に適応することができない。このため、改革・開放の深化とともに、市場経済の要求に合っているが、しかし憲法規範に違反している大量の行為が良性違憲の形式で出現している。これらの行為は、経済発展を促進しているけれども、しかし憲法の権威を厳しく損なっており、多くの人に、“憲法はあっても、なくてもいい”という思想を生じさせているが、これは現代法治の精神と相容れず、必ず憲法監督制度を用いてこれらの行為の合憲性に対して審査しなければならない。

22 地方での法令違憲現象は、「改革・開放」政策への転換後の地方立法の数量の膨大化とともに制御不能になりつつある。このいわゆる「汎立法主義」的現象によって、「立法の質と法律の権威性の下降」が顕著になりつつある(崔卓蘭、孫波、駱孟炎「地方立法膨張趨向的実証分析」『吉林大学社会科学学報』2005年5期、106頁参照)。ちなみに、1979年～1998年末の期間、全国人民代表大会およびその常務委員会が制定した法律は351件であるが、地方立法機関が制定した地方性法規は6311件である。地方性法規の制定は、1979年～1994年の期間は年平均209件、1995年～1997年6月の期間は年平均662件、1997年7月～1998年末の期間は年平均877件であり、近年、地方立法が急激に増えてきている(同上・107頁参照)。地方立法機関でない地方行政機関が制定した規範性のある法文書に至っては、約200余万件あるとされる(胡建森、高春燕、前傾論文、67頁参照)。

23 法律上では、全人代の下の各専門委員会は、全人代常務委員会から付託された、憲法、法律と抵触するとみられる国務院の行政法規、地方性の法規等を審議して報告を提出することになっている(全国人民代表大会組織法37条3号)。この規定の運用によって、例えば、内務司法委員会

政治的、法的、行政的責任を追及する「違憲行為制裁システム」が欠如していることで、上のような措置・方法も無視される場合が少なくない。とりわけ問題なのは、憲法監督制度の中核たる、厳格な意義上の監督のための憲法解釈(「監督解釈」)ないし違憲審査解釈の権限が正式には発動されていないということである[24]。中国での憲法解釈学は時を追うごとに精緻化されてきているが、しかし解釈学が実効的な違憲審査制度と結合しないかぎり、解釈学が「空理空論」となることは避けられない[25]。

第3節 憲法監督をめぐる新しい動き

憲法監督制度に関する議論は、最近相当に煮つまってきているが[26]、こうした議論とは別に、憲法監督の問題が中国で改めて耳目を集める契機となった事件として、斉玉苓事件と孫志剛事件がある。斉玉苓事件との関係では、重要なのは事件そのものというより、その事件(教育を受ける権利の侵害事件)の裁判との関係で、2001年に出された最高人民法院の司法解釈(法釈〔2001〕25号)である。これによって、最高人民法院は、憲法規定を具体的事件において援用することを認めた(当該司法解釈の意義については後述)。

他方、孫志剛事件は、事件そのものが中国社会の強い関心対象となった。これは、広州で、「都市の乞食、浮浪者送還弁法」(1982年5月、国務院発布)にもとづき、「三無」(合法の証明書、正常な居所、正当な生活費出所が無い)を理由として収容された孫志剛(武漢出身で27歳の大卒者)が収容所のなかで、2003年3月、撲殺された事件である。5月14日、『北京青年報』はこの事件で13名の容疑者が逮捕されたことを報じた(最終的には17名が逮捕され、裁判で死刑を含む厳罰の判決が出された)。5月16日、3人の青年法学博士が、全人代常務委員会法制工作委員会に対して、「『都市の乞食、浮浪者送還弁法』を審査することに関する建議書」を提出し、1週間後、北京大学教授の賀衛方等の5人の学者も、全人代常務委員会に対して、孫志剛事

は「是正意見」「審査意見」「修正意見」等を提出している(『中国法律年鑑』1998年版～2001年版参照)。その他、全人代常務委員会弁公庁、全人代常務委員会法制工作委員会による特定の憲法規定についての説明的回答(「答復」)も存在し、これを「憲法解釈慣例」と称している論もある(周偉「憲法解釈慣例研究」『社会科学研究』2002年3期、80頁以下)。

24 全人代常務委員会によって現に行われている憲法解釈の方式として「立法」「決議」「決定」等をあげている書があるが(朱福惠主編『憲法学新編』法律出版社、1999年、132頁以下)、これらは基本的には立法活動の際の憲法解釈であり、これは憲法監督の一環としての専門的な監督解釈ないし違憲審査解釈とは性質を異にする。また、「香港特別行政区基本法は『中華人民共和国憲法』に基づいて、香港の具体的状況に照らして制定されており、憲法に符合する」と述べている全国人民代表大会「『中華人民共和国香港特別行政区基本法』に関する決定」(1990年4月4日採択)を全人代による憲法解釈の例とする書もあるが(莫紀宏『憲政新論』中国方正出版社、1997年、153頁)、「決定」は「基本法」と同じ日に両者一体的に全人代で採択されており、かつ「基本法」そのものに定めのない当該法の実施年月日(1997年7月1日)を特に規定していることからして、「決定」は監督解釈でなく、立法活動上の憲法解釈の範疇のものと考えられる。なお、法律解釈権は正式に行使されている(解釈手続は立法法42条～47条に規定)。例えば、第9期全人代(1998年～2003年)の下では、8件の法律解釈が採択されている。具体的には、香港居留権問題等との関連での1999年6月26日採択の全人代常務委員会「香港基本法第22条第4款及び第24条第2款第3項に関する解釈」、2002年4月28日採択の全人代常務委員会「刑法第294条第1款、第384条第1款に関する解釈」等がある。

25 夏澤祥、施嵩「何謂憲法解釈」『山東社会科学』2005年6期、17頁参照。

26 1982年憲法制定以後から20年余年間で、憲法監督に関する著書は10冊に近く、論文は320余篇の論文が発表されてきているとされる(鄭晾現、鄺少明「憲法監督制度研究述評」『求是学刊』2005年1期、88頁参照)。

件との関係で「特定問題調査委員会」を設置するように要求した。

憲法第37条は公民の人身の自由を保障し、「立法法」(2000年3月、全人代会議採択)は、法律制定事項の一部の制定を全人代および全人代常務委員会は国務院に授権できることを定めていると同時に、「人身の自由を制限する強制的措置と処罰」に関する事項等は授権できないと規定し(第9条)、「行政処罰法」(1996年3月、全人代会議採択)は、「人身の自由を制限する行政処罰は、法律によってのみ設定できる」(第9条)と規定している。上の学者の建議書等は、「都市の乞食、浮浪者送還弁法」はこれらに抵触する違憲、違法の行政法規ではないか、というものであった。憲法は、全人代常務委員会の職権として、「国務院が制定した行政法規、決定、命令のうちの、憲法、法律に抵触するものの取消」(第67条第7号)を定めている。しかし、この職権はこれまで一度も正式に行使されたことはなく、今回も、表面上は、国務院が自ら「都市の乞食、浮浪者送還弁法」の規定の問題を見出したかのように、6月18日、国務院常務会議は、中国の経済社会の発展と人口の流動状況の大きな変化にともなう新しい情勢に適応しなくなったとして、この弁法を廃棄し、6月20日、新たに「生活が定まらない都市の乞食、浮浪者救助管理弁法」を発布した(8月1日施行)。これは、全人代常務委員会と国務院が水面下で協議した結果であると考えられるが、このいわば「隠性」の解決方法に対する批判もある。また、確かに新しい弁法は旧弁法と比べて相当に改善されているにしても、新弁法(および「生活が定まらない都市の乞食、浮浪者救助管理弁法実施細則」民政部、2003年7月21日発布、8月1日施行)も、運用上、「救助」の名目で実質的に「収容」「送還」として機能する可能性もありえないことはない。

いずれにしても、斉玉苓事件と孫志剛事件が中国での違憲審査制度の問題を急浮上させる契機となったのは確かである[27]。

違憲審査制度との関係で、近年、新しい動きが出てきた。2004年5月、全人代常務委員会が、法制工作委員会の下部組織として、下位法と上位法(特に憲法)の間の衝突・抵触の問題を専門的に審査する任務を負う「法規審査記録室」を設立したのである。この機関は、独立性と権威性が弱く、違憲の法律・法規を取消す権限も有していないものの、将来的に違憲審査制度の一種へ発展する可能性を内包している試行的組織であり、今後の展開が注目される[28]。

第4節 最高人民法院と憲法適用

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[27] 2003年6月30日、上海において、「『孫志剛事件と違憲審査』学術研究・討論会」が開催されたが、この内容については、『中国法学』2003年4期、189頁以下、『法学』2003年7期、3頁以下。また、孫志剛事件で問題となった警察権力のあり方を考察した論文として、斉小力「憲政視野下的警察執法」『法学』2006年3期、137頁以下。なお、陳雲生は、「憲法監督司法化のきざし」の事件例として、斉玉苓事件のほかに、徐高民族差別事件、蒋韜身長差別事件をあげて分析している(前掲『憲法監督司法化』461頁以下)。この憲法監督司法化の問題は、次節の最高人民法院の憲法適用の問題とも関連している。

[28] 2005年3月9日、呉邦国は、第10期全人代第3回会議における「全人代常務委員会工作報告」のなかで、この新しい組織について次のように言及している。「法規の記録・審査を重視し、法制工作委員会に専門機構を増設し、力量を充実させ、行政法規・地方性法規・自治条例・単行条例の記録・審査の活動を強化した。法規の記録・審査の制度の絶えざる改善は、憲法と法律の権威を維持し、国家の法制の統一を保証するのに有利である」(『中華人民共和国全国人民代表大会常務委員会公報』2005年3号)。もっとも、この組織の制度上の欠陥がすでに指摘され、改革案も提示されている(王鍇「我国備案審査制度的若干缺陥及其完善」『政法論叢』2006年2期、39頁以下参照)。

現行憲法は、人民法院は独立して裁判権を行使する権限を有し、かつ最高裁判機関の最高人民法院は下級の人民法院の裁判活動を監督する権限を有することを規定しているが(126 条、127 条)、人民法院が憲法援用、憲法適用の権限を有するかについては規定がなく、むしろ過去、最高人民法院はそれらに否定的な意見を出していた。たとえば、最高人民法院は 1954 年憲法下の 1955 年 7 月 30 日、各級人民法院の判決のなかで罪刑の認定の根拠として憲法を援用することを控えることとする(新疆省〔現在は新疆ウイグル自治区〕高級人民法院への)「返信意見」(「復函」)を出し、1982 年憲法下でも、1986 年 10 月 28 日の(江蘇省高級人民法院への)「回答意見」(「批復」)において、各級の人民法院が引用することができる法的規範性文書のなかに憲法を掲出しなかった[29]。

しかし、2001 年に注目すべき新しい事態が出てきた。同年に出された最高人民法院の司法解釈である。具体的には、教育を受ける権利の侵害事件(斉玉苓事件)との関連で最高人民法院が発布した「姓名権を侵害する手段でもって、憲法が保護する公民の教育を受ける基本的権利を侵害することは、民事責任を負うべきか否かに関する回答意見(法釈〔2001〕25 号)」(7 月 24 日発布、8 月 13 日施行)[30]である。この回答意見は民事責任を肯定した。最高人民法院の責任者の説明によれば、姓名権を侵害する手段でもって、他人の教育を受ける機会を制限・妨

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29 ただし、これらに関して、1955 年の「返信意見」は刑事事件のみに対するものであり、民事事件と行政事件について憲法を援用すべきでないとは述べておらず、また 1986 年の「回答意見」も法院が直接援用できる法的規範性文書を明記しているのみで、憲法を援用する可能性を完全には排除していない、とする論(劉雲龍「也談建立中国憲法訴訟制度的必要性」『華中師範大学学報〔人文社科版〕』2002 年専輯 174 頁)、1955 年「返信意見」は、「刑事判決」についてのみ述べたものであり、しかも援用は「よろしくない」という援用の完全排除でない表現であり、かつその意見は 1954 年憲法に対するものである、1986 年「回答意見」は援用を肯定も否定もしていない「回避の態度」をとっているという論もある(王振民「有限政府與違憲審査」高鴻鈞等著『法治：理念與制度』中国政法大学出版社、2002 年、559 頁以下)。これらの論は援用に肯定的だが、実際には、たとえば、王家福、劉海年主編『中国人権百科全書』(中国大百科全書出版社、1998 年)は、「人権案例」として(「人権判例」という用語は別にある)、刑事事件、民事事件、行政事件を含む 53 件の案例を収めているが、これらを読む限り、いずれにおいても憲法援用はなされていない。しかし、1998 年、上海の第 2 審の法院は、人格権侵害事件で、憲法 38 条(人格の尊厳の不可侵)及び民法通則と民事訴訟法の関連規定に依拠して損害賠償を認めた(『1998－1999 虹口区人民法院年鑑』128 頁)。また、ある研究で、すでに『最高人民法院公報』(1999 年、2001 年)と『人民法院案例選』(1997 年、1998 年、2000 年)には、直接に憲法条文を引用し、かつそれと通常の法律と結びつけて判決を下した裁判例が収められていることが指摘されている(周偉「完善我国憲法監督制度研究」『社会科学』2004 年 5 期、54 頁)。

30 『法制日報』2001 年 8 月 13 日。なお、最高人民法院の司法解釈とは、裁判工作中における法律、法令の具体的適用の問題について、最高人民法院裁判委員会によってなされる解釈であり、法的効力を有する。司法解釈に関して規定したこれまでの決議等は、いずれも「憲法」の適用問題には触れていない(「法律解釈問題に関する全国人民代表大会常務委員会の決議」1955 年 6 月、「法律解釈工作を強化することに関する全国人民代表大会常務委員会の決議」1981 年 6 月、「司法解釈工作に関する最高人民法院の若干の規定」1996 年 10 月採択、翌年 6 月通知)。また、司法解釈には異なる形式と作用があり、それに応じて法的地位も異なることについては、曹士兵「最高人民法院裁判、司法解釈的法律地位」『中国法学』2006 年 3 期、175 頁以下参照。この筆者は最高人民法院高級裁判官。

害・剥奪するいかなる行為も、公民の教育を受ける権利に対する侵害であり、これによって損害を与えた者は相応の民事責任を負うべきであり、損害を受けた者は、人民法院に訴訟を提起し、物質的損失と精神的損失の賠償を請求することができる、というものである[31]。

この司法解釈によって、最高人民法院は、憲法規定を、具体的事件において援用すること、及び私人の間での訴訟において直接に適用することを認めた[32]。これは中国の法学界に強い反響を呼び起こし[33]、その意義等についての議論が深まりつつある[34]。この新動向は、中国での憲法的権利の「司法上」の保障との関係で注目されるが[35]、立法上の位置づけは現段階、

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31 『人民日報』2001年8月13日。この回答意見を受けた山東省高級人民法院は、同年8月23日、憲法46条(教育を受ける権利の規定)、教育法9条、81条、民法通則120条、134条及び当該回答意見を援用して、判決を下した(終審判決)。

32 付言すれば、当該司法解釈(「回答意見」)の内容がこの種の問題における、最高人民法院として「最初」の事例であるとは必ずしもいえない。例えば、最高人民法院は、「労災には一切責任を負わない」という雇用労働契約は有効か否かに関する回答意見(1988年10月14日公布)のなかで次のように述べていた。「勤労者に対して労働保護を実行するのは、わが国の憲法に明文の規定があり、これは勤労者が享有する権利である」。「労働者募集の登記において『労災には一切責任を負わない』と注記する行為」は、「憲法及び労働保護関係法規に違反していると同時に、社会主義的公徳にも厳重に違反しており、無効の民事行為に属する」(『中華人民共和国司法解釈全集』〔中国法律年鑑社出版、1997年〕第2巻、1406頁)。他に、「『公民は法律の前に一律に平等』の憲法原則」を援用した最高人民法院と司法部の「連合通知」(1999年4月12日)も出されている。なお、2001年の当該司法解釈が私人間で憲法を直接適用したかについては、一部に異なった解釈もあるが、一般的には直接適用したと解されている。

また、憲法の性質との関係で、全人代弁公庁秘書組副局長の蔡定劍が、憲法は私法的性質を有していると説明するのが、憲法の精神をよりよく認識し、現代社会生活における憲法の作用を理解し、憲法は政治的文書であるという中国の長年の誤った考えを是正し、憲法訴訟制度を建立するのに有利であるという見解を出しているのが注目される(「関於什麼是憲法」『中外法学』2002年1期99頁)。この蔡定劍の見地と類似するものとして、憲法は公法と私法の共通の基礎であり、憲法の私法化は同時に憲法の公法化の過程であるとする論がある(童之偉「憲法司法適用研究中的幾個問題」『中国律師』2001年12期、25頁)。他方、「憲法の司法適用」は必要だが、これと「憲法の私法化」とは区別すべきであり、中国の現状からして、私人の間では憲法の「直接適用」でなく「間接適用」が妥当であるとする論もある(方立新、徐鋼「論憲法在私法秩序内的意義」『浙江大学学報〔人文社会科学版〕』2004年6期)。

33 『法制日報』2001年12月30日参照。

34 この議論内容は、意義のほか、当該事件の解決は憲法の直接適用を必要としたか、「憲法司法化」の是非、司法機関は憲法を直接適用する権限をもつか、「憲法私法化」の問題等である。

また、これらの問題は別の角度からして、中国の法体系の議論とも関係している。たとえば、そのうちの一つの論は、憲法は公法ではなく、公法と私法の両方より高次にある根本法であり、市民法は私法(民法、商法等)であり、公民法は公法(刑法、行政法)、手続法(刑事訴訟法、民事訴訟法、行政訴訟法等)であるとする(呂世倫、任岳鵬「根本法、市民法、公民法和社会法」『求是学刊』2005年5期、65頁以下)。

なお、「憲法司法化」は、換言すれば「憲法訴訟」の可能性の問題でもあるが、憲法訴訟については、当面、以下を参照されたい。劉志剛『憲法訴訟的民主価値』中国人民公安大学出版社、2004年、王従烈「我国憲法訴訟的主要困惑」『河北法学』2005年1期、庄春英「建立憲法訴訟制度的構想」『中国律師』2004年5期、張景英「対建立憲法訴訟制度的思考」『洛陽師範学院学報』2004年4期、劉武俊「憲法司法化—通過訴訟激活憲法文本」『団結』2004年4期、劉志剛「憲法訴訟的司法性質」『法律科学(西北政法学院学報)』2004年6期。

35 当該司法解釈のその後の裁判への影響との関連では、斉玉苓事件の「河南版」とされる事件で、河南省新野県人民法院は、2002年6月26日、教育を受ける権利に関する憲法規定を援用した判決を出している(『法制日報』2002年8月22日)。

不明確である[36]。

第5節 司法権の独立性の問題

一 人民法院の独立の不全

かりに今後、人民法院が憲法援用、憲法適用の権限を行使する方向へ向かうとしても、人民法院がその権限を独立して行使できるのかという問題がある。

人民法院の独立裁判権の原則は、1954年憲法で初めて規定、57年の反右派闘争後に事実上廃止(憲法の改正はない)、75年憲法と78年憲法には無規定、82年憲法で復活(ただし、法律上は1979年7月制定の人民法院組織法で復活していた)、というように浮沈が激しかった。独立裁判権の原則が権力のありようと直結する問題であったからである。

現行の82年憲法は、「人民法院は、法律の定めるところにより、独立して裁判権を行使し、行政機関、社会団体および個人の干渉を受けない」(第126条)と規定している。ある論は、中国の法院の独立は西側(欧米)の司法の独立とは、概括的に次の諸点で異なるとする。1. 独立の理論的根拠。原則上、中国は国家権力の統一を基礎とする独立、西側は三権分立(ないし権力分立)を基礎とする独立。2. 独立の範囲。中国は裁判機構が行政機構から独立、西側は立法機構と行政機構から独立。3. 独立の主体。中国は法院の職権行使上の独立、西側は裁判官個人の独立。4. 独立の保障。中国は任期、人員、財政、物的施設などの面で独立が十分でないが、西側はこれらの面で比較的に独立が保障されている[37]。この説明は、いまだ基本的には妥当であるが、しかし、中国での法院の独立についての理論は、現在、変容の過程にあることにも注意する必要がある。

中国の法院の独立の現実態との関係では、とりわけ次の3方面の問題が重要である。

第一に、共産党の統率的指導である。1978年末の「改革・開放」政策へ転換後、共産党は、司法、法院の独立に一定程度配慮するようになった。たとえば、1979年9月9日に出された「刑法、刑事訴訟法の真剣な実施を断固として保証することに関する中共中央の指示」は、

なお、王徳志は、メディア関係の判例の分析に基づいて、司法での憲法適用について興味深い指摘をしている(「論憲法在我国民事案件中的適用」『法学論壇』2004年6期36頁以下)。当該論文は、メディア関係の事件を、①表現の自由と公民、法人の人格権の間の衝突の事件と②表現の自由と国家権力(行政権、司法権)の間の衝突の事件に分類し、①の分野は民事関係であり、憲法適用の空間は比較的小さいが、全く憲法と無関係ではなく、実際、法院が憲法規定(第35条の表現の自由、第41条の監督権、第47条の文化活動の自由など)を適用した事例があると言い、他方、②の分野は憲法事件であり、憲法の基準が適用されるべきであるが、逆に、法院は民法の原則を適用し、この結果、国家と公民の間の権力/権利関係が歪曲されている、と指摘している。

36 たとえば、この問題につき、「監督法」草案は何ら触れるところがない。ただ、草案12条は、法律解釈との関係で、「司法解釈」と「全国人民代表大会常務委員会の解釈」が一致しないときには、後者の解釈を基準とすると規定しているが、このことで司法解釈による憲法の援用ないし適用の可能性を否定しているとまではいえないであろう。

37 譚世貴「論司法独立」『政法論壇』1997年1期、31頁参照。

「司法工作に対する党の指導は、主に方針、政策の指導である。各級党委員会は、党でもって政に代える、言でもって法に代える、法律の規定によらずに事を処理する、司法行政事務を一手に引き受ける、というようなこれまでの習慣と仕方を断固として改変しなければならない」とし、1986年7月10日に出された「全党は社会主義法制を必ず断固として維持しなければならないことに関する中共中央の通知」は、さらに進めて、「司法工作に対する党の指導は、主に司法機関が厳格に憲法と法律にしたがい、職権を法に依って独立に行使するのを保証することである」とした。司法、法院の独立に対する党の配慮の動きは、1989年の天安門事件によって頓挫したが、1990年代の後半以降、党は改めて司法の独立への配慮の姿勢を示すようになった。この重要な現われの一つが、1997年9月12日の党第15回全国代表大会における党総書記(当時)の江沢民報告に出ている。そこで、江沢民は、「2010年までに中国的特色をもつ社会主義的法律体系を形成する」ことを明示し、かつ「司法改革を推進し、司法機関が法に依って独立・公正に裁判権と検察権を行使するのを制度上から保証する」ことを強調した。しかし、注意すべきは、司法、法院の独立へのこうした配慮は、いまだ主に理念的次元のものであり、現実態としては、司法、法院に対する党の指導は厳然と維持されているということである。

現在、党の指導は、具体的には次のような回路を通して行われている。県級以上の各級の共産党委員会は「政法委員会」を設置し、かつ多くの地方の政法委員会は公安庁(局)長を書記、法院院長と(または)検察長を副書記に任じている。あるいは、多くの省(市)は、1名の省(市)党委員会常務委員を副省長(副市長)兼政法委員会書記に任じて、政法活動を管理・統括させている。名目上、政法委員会は公安機関、検察院、法院の間の活動関係を「協調」させるのに責任を負っている機構にすぎないが、実際上は、公安機関、検察院、法院が紛議のある事件を処理する際、またはいわゆる重大事件、難事件および社会的影響が大きい事件を処理する際には、政法委員会に報告し、その検討と指示を待たねばならない。また、憲法上、地方各級の人民法院の幹部は同級の人民代表大会によって選出されるが、実際上は、「共産党が幹部を管理するという原則」に基づき、各級の法院の院長・副院長、廷長・副廷長、裁判委員会委員、裁判員について同級の共産党委員会があらかじめ討議で確定した後に、その名簿を同級の人民代表大会またはその常務委員会に回して選挙ないし任命させている。司法人員の昇任・降任・留任・転任の人事大権も共産党委員会に掌握されている。こうした現実下では、共産党からの法院の独立はきわめて限定的とならざるをえない[38]。

第二に、政府が財政を統一的に管理するという原則に基づき、各級の法院の業務経費、人員の給料について、同級の人民政府が予算を作成した後に、同級の人民代表大会が審議・採択している。この財政原則の下では、法院は政府の干渉を受けやすく、実際、干渉に抵抗して、経費を削減または経費支出を停止された事例、逆に「指示」を受け入れて、経費を増加

38 その他、事件に対する共産党委員会の書類取寄せ・閲読(「調閲」)、事件に対する共産党委員会書記の書面指示(「批示」)の問題などがある。

または経費支出を保証された事例がある。法院に対する政府の干渉は現在に至るまで改善されておらず、この弊害は特に行政訴訟において顕著に現れている。つまり、「法院は人、財、物の面において等しく行政機関の制約を受けていることによって、現実の行政裁判の活動においてしばしば行政機関の不法な干渉を受けており」、この「司法機関の独立性の不足が行政訴訟制度上の困難の第一の原因である」ことは学界の「一致した認識」であるといわれる[39]。

第三に、法院内の司法活動が行政化している。つまり、事件を処理する際、法院内の各段階で検査され、首長責任制および報告して指示を請う制度などの行政活動方式が実行されているのである。たとえば、法院での事件の審判の主なプロセスはこうである。

単独法廷(簡単な民事事件、軽微な刑事事件など)ないし合議法廷が審理を行って処理意見を提出した後、廷長に報告して審査され、その後、院長が審査・承認している。重大事件、複雑な事件または難事件は、院長を通して法院内の裁判委員会に回されて討論・決定される[40]。また、下級の法院が審判する事件のうち、重大・複雑・難事件はしばしば上級の法院に指示を請い、その後、下級の法院は上級の法院から出された「指示」の「精神」に照らして判決を出している[41]。これは、中国での2審終審制を形骸化させるものである。[42]

中国でも、これらの問題性は意識されており、裁判官の任免方法の改変、裁判官の身分の保障、司法経費の全国的統括制度、裁判官個人の独立等を含む多角的な改革策が議論されているが、共産党の「統率的指導」の位置づけ、国家機関相互の利害対立、裁判官の資質の低さなどの問題と密接にからんでおり、抜本的な改革は容易でない[43]。

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39 楊海坤、章志遠「修法要義在於理論之先行」『法学』2005年11期、4頁。

40 他の組織の「廷務会」によって討論・決定される場合もある。一部の法院は事件が重大・複雑・難であるか否かにかかわらず裁判委員会ないし廷務会の討論・決定によっている。

41 上級法院に指示を請う制度(「案件請示制度」)は、下級法院が事件審理の過程において、事件の実体処理または手続問題について口頭ないし書面の形式で、上級法院に指示を請い、上級法院が答復を与える制度を指す。これには歴史的起源と現実的必要性があり、中国の審判実践において重要かつ独特の機能を果たしてきたが、審判の独立、直接審理などの現代司法の基本理念に違背し、当事者の訴権を侵害し、訴訟効率を低下させているとして、将来的には廃止の方向にあるとされる。この問題を考察したある論文は、この制度の形成原因として、法律制度体系の不完全性、「解釈の共同体」の欠如、権威型国家管理モデル、法律解釈権力化の観念をあげている(万毅「歴史與現実交困中的案件請示制度」『法学』2005年2期、9頁以下)。

42 「合議法廷制度の建設を強化し、合議法廷の職能作用を強化するのが、当面の司法改革の一つの重要な内容である」として、この問題を考察した論文に、林勁松「我国合議廷評価制度反思」(『法学』2005年10期14頁以下)がある。当該論文は、合議法廷の裁判職能の全面的実現は「対外的独立、体内的民主」という語句に概括できるといい、そして合議法廷評価制度に含まれる民主原則として、「地位平等」、「共同参与」、「十分陳述」、「独立表決」、「多数決定」、「異議保留」があるが、しかし当面の中国には、「合議法廷の評価対象が明確でない」という問題と「合議法廷の表決規則があいまいである」という問題が突出していると指摘し、さらに、「合議法廷の改革の基本的方向」は「裁判委員会に対する合議法廷の依存を減少ないし離脱することである」と論じている。

なお、最高人民法院の院長の肖揚は、2001年3月2日、合議法廷の独立裁判権の確保を強調する演説を行い、この趣旨に沿って、2002年に、「人民法院の合議法廷の工作に関する最高人民法院の若干の規定」(同年7月30日、最高人民法院裁判委員会会議採択)が出された。

43 司法活動上の問題として、他に、例えば、法院の判決の「執行難」という深刻な問題があるが、これを解決するために、法院のなかに「執行廷」を設立したり、さらには執行廷の下に「執

二　司法機関に対する人民代表大会(およびその常務委員会)の監督

憲法上、中国の国家権力は人民に属し、かつこの国家権力は統一不可分であり、人民が国家権力を行使する機関は人民代表大会である。人民代表大会は国家権力を直接に行使するほかに、その他の国家機関に授権して分業的に行使させる。人民法院の創出母体は人民代表大会であり、法院の裁判権は人民代表大会からの授権に基づく。よって、法院の独立裁判権も人民代表大会の統一的な国家権力の下での相対的独立権限であり、人民代表大会の監督を受ける[44]。

問題は、この監督の内容と範囲であり、特に個別的事件の監督については、中国内の研究者のなかのみならず、司法機関のなかでも見解が厳しく対立している。1999年、全人代常務委員会の内務司法委員会が全人代常務委員会に提出した「裁判・検察機関の重大な違法事件の監督実施に関する決定(草案)」議案が、全人代常務委員会での2回の会議における激烈な論争の末、審議中止に追い込まれたのは、個別的事件の監督をめぐる対立の深さを示している[45]。この対立は、合憲か違憲かの対立に連動している。憲法解釈上の対立の内容を、張澤涛は以下のように整理している[46]。

合憲説の根拠は、次のようなものである。憲法126条は、「人民法院は、法律の定めるところにより、独立して裁判権を行使し、行政機関、社会団体および個人の干渉を受けない。」と規定しているが、この内容からして、憲法は決して、人民法院が独立して裁判権を行使するときに権力機関の干渉を受けないとは定めていない。これと相応して、「地方各級人民代表大会および地方各級人民政府組織法」44条は、地方各級人民代表大会常務委員会の職権の一つは、「その級の人民政府、人民法院および人民検察院の活動を監督し、その級の人民代表大会の代表と連携し、上述の機関と国家勤務員に対する大衆の申立と意見を受理する。」と規定している。よって、人民代表大会が法院に対して個別的事件の監督権を行使するのは、憲法と法律に根拠がある。

他方、違憲説の根拠は次のようなものである。国家機関の間の職権は必ず合理的な分業を

行隊」を設けたりしている場合もある。これに対しては、法理上、執行は一種の行政行為であり、「裁判と執行の不分離」の問題をつくり出しているという批判もある(信春鷹「中国需要什麼樣的司法権力」『環球法律評論』2002年春季号、67頁)。

なお、裁判官の人数自体はすでに充足しているとされる。現在、全国で、高級裁判官は3万人余、裁判官は18万人余、総数21万人余である(『人民法院報』2002年3月22日)。しかし、研究者の間では、この人数は、欧米・日本と比べて多すぎるとして、裁判官の職業化、精鋭化が主張されている（たとえば、章武生「法官職業化、精英化與司法権威」『政治與法律』2004年5期、4頁)。

44　最近においても、第10期全人代第4回会議での全人代常務委員会工作報告(2006年3月9日)において、委員長の呉邦国は、中国の人民代表大会制度は西側資本主義国家の「三権鼎立」とは本質的に異なり、裁判機関は人民代表大会の監督を受けることを強調している(『新華月報』2006年8期、64頁)。

45　張澤涛「個案監督亟須澄的三個誤識」『法商研究』2005年2期、95頁参照。

46　同上、97頁。

行わなければならず、マルクス主義者は立法、行政、司法の三権は不分と主張すると考えるのは、マルクス主義に対する重大な誤解であり、人民代表大会が個別的事件の監督権を行使するのを主張するのは、実質的に、立法権と司法権を人民代表大会の一身に集中させることである。次に、憲法はすでに論理的に、法院に対する人民代表大会の個別的事件の監督を否定している。というのも、憲法73条は、「全国人民代表大会は、全国人民代表大会の開会中、また全国人民代表大会常務委員会構成員は、常務委員会の開会中、法律の定める手続にしたがい、国務院または国務院各部、各委員会に対し、質問書を提出する権利を有する。質問を受けた機関は責任をもって回答しなければならない。」と規定している。この条文の立法原意からして、立法者は、裁判権、検察権と行政権の働きには本質的差異があるとすでに認識しており、人民法院と人民検察院が独立・自主的に裁判権と検察権を行使するのを保障するために、法院の裁判活動に対する人民代表大会の監督を弱化すべきであり、よって、人民代表大会は法院に対して質問権を行使すべきでない(この質問権は個別的事件の監督の一形式である)。さらに、憲法62条14号は、全国人民代表大会の職権として「戦争と平和の問題の決定」を規定し、同時に、憲法67条は、全国人民代表大会常務委員会に中央軍事委員会の活動を監督する職権を賦与しているが、しかし、全国人民代表大会およびその常務委員会は、これまで軍事委員会の具体的活動に対して監督を行ったことはない。この意味からして、人民代表大会およびその常務委員会は、法院の裁判活動に対しては、軍事委員会の活動に対するのと同様に、いわゆる個別的事件の監督を行ってはならない。

以上のように学説を整理した張澤涛自身は、合憲説の立場から、違憲説の論拠を次のように批判している。

第一に、違憲説の理由の一つは、82年憲法の本意は法院の裁判活動に対する人民代表大会の監督を弱化させようとした、ということである。しかし、事実は逆であり、82年憲法の制定者達の意図の一つは、法院の裁判活動に対する人民代表大会の監督を強化することを望んでいた。これを、法院の独立裁判権に対する82年憲法と54年憲法の規定の比較からみてみよう。82年憲法の126条は、「人民法院は、法律の定めるところにより、独立して裁判権を行使し、行政機関、社会団体および個人の干渉を受けない。」と規定し、54年憲法の78条は、「人民法院は独立して裁判を行い、法律にのみ服従する。」と規定している。つまり、82年憲法は、法院が裁判権を行使するときに、行政機関、社会団体および個人の干渉を受けないと規定しているだけで、人民代表大会およびその常務委員会を含んでいない。これに対して、54年憲法は、人民法院が裁判権を行使するときに、権力機関、行政機関、社会団体の干渉を受けないことを規定している。全人代常務委員会委員長(当時)の彭真も、82年憲法について、この改正は司法活動に対する党の指導と司法に対する人民代表大会の監督を強化するのに有利である、としている。

第二に、人民代表大会の個別的事件の監督と人民代表大会が裁判権を行使することは同一の概念ではない。国家機関の間の権力は合理的な分業が行われることは必要であり、人民代

表大会は法院に直接代替して裁判権を行使すべきでないが、しかし、これと個別的事件の監督権は同等のものではない。憲法学界の通説に基づけば、人民代表大会およびその常務委員会は国家の権力機関であり、それは国家の“一府両院”(政府と法院・検察院)を創造し、行政権、裁判権、検察権を政府(行政機関)、法院、検察院に委託し行使させ、人民代表大会およびその常務委員会は、権力の最終的掌握者として、行政活動、裁判活動、検察活動に対して監督を行う。よって、この種の監督は、権力を直接行使することとは異なる。

第三に、人民代表大会およびその常務委員会が中央軍事委員会の具体的活動に対して監督を行っていないことによって、人民代表大会は法院に対する個別事件の監督権を享有すべきでないとするのは、概念転換のきらいがある。とういうのも、中央軍事委員会の活動と法院の裁判活動には本質的区別があり、軍隊は必ず歩調を一致させなければならず、下級は無条件で上級に服従しなければならない。井岡山の土地革命の時期から、わが党は、党が銃を指揮するという観念を確固として樹立し、軍隊活動に対する党の絶対一元的指導を強調し、よって、人民代表大会および常務委員会は通常は軍事委員会の活動を監督していない。かつ、軍隊活動の多くは国家の軍事秘密に関係し、もし人民代表大会およびその常務委員会が軍事委員会の活動に対して監督を行うことができるとすれば、その前提条件は軍隊の活動は必ず透明でなければならないということになるが、これでは国家の軍事機密は漏出することになり得る。

第四に、憲法は、人民代表大会およびその常務委員会が法院に対して質問権を行使することができると明確に規定していないとしても、憲法公布後に全人代が制定した３つの法規(「地方各級人民代表大会および地方各級人民政府組織法」、「全国人民代表大会および地方各級人民代表大会代表法」、「全国人民代表大会常務委員会議事規則」)はこの職権を明定している。憲法は原則性の規定を置き、具体的には下位の法規で定められる。下位の法規が憲法の精神と一致するならば、その法規は憲法的根拠があることになる。上記の３つの法規の内容は憲法の精神に合致しており、質問権は人民代表大会の個別的事件の監督権の重要な表現形態であり、よって人民代表大会およびその常務委員会が法院に対して個別的事件の監督権を行使するのは憲法的根拠がある。

張澤涛のこの論は、第三の点を除いて(これは憲法外の論拠である)、82 年憲法の解釈として一定の説得力がある。法院に対する人民代表大会の監督の問題については、共産党と行政権による「外部」からの、および法院の「内部」での指導ないし干渉のなかでの活動を余儀なくされている現在の司法機関のありようからして、また裁判官の自治・自律の能力と物的条件の低さおよび司法の不公正・腐敗の広がりからして[47]、それまで「飾り物」的存在であっ

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[47] これについては、たとえば、方立新「司法改革的動因及其制度設計」『浙江大学学報〔人文社科版〕』2001 年 6 期、111 頁、劉夢蘭「我国司法独立現実体現及其局限」『湖南商学院学報』2002 年 2 期、86 頁等参照。その他、最高人民法院裁判官の劉会生が、司法の不公正・腐敗の根本原因を現行の法院管理制度に求め、そしてその制度の欠陥として、司法権の地方化、法院内部の管理の行政化、裁判官の非職業化をあげているのが注目される(「人民法院管理体制改革的幾点

た人民代表機関の権威と地位を向上させる方策の一環としての法院に対する人民代表機関の監督の強化は、中国の司法の独立へ向けての内在的発展段階の一里塚とも位置づけられ得るかもしれない[48]。だが、かりに個別の事件の監督が当面、容認されうるにしても、その実際の監督内容はやはり問題となり得る。

実際の監督に関して、人民代表大会制度が中国の根本的政治制度であるとされることから、個別の事件の監督をできるだけ広く認めようとする見地がある。これによれば、監督は、事前、事の進行中、事後のいずれ段階においても許され、その監督権行使の主たる方式は、1. 報告の聴取、2. 評議・評価、3. 質問書の提出、4. 法院の職権行使過程中の重大な違法行為に対する調査委員会による組織的調査、5. 違法性が確実な個別の事件に関する建議、決定または「法律監督書」(この書を受け取った機関、個人は一定の期限内に執行状況報告をその級の人民代表大会常務委員会に提出しなければならない)の発出、6. 公民・組織からの申立・告発の受理(このうち人民代表大会が自ら処理できる事件は調査を組織して決定を出す)等である[49]。また、地方の

思考」『法学研究』2002年3期、12頁以下)。

48　ただし、現段階では個別の事件の監督においても「党の統率的指導」が前提とされていることからすれば、この意義も限定的である。李伯鈞「関於個案監督的幾個問題」『法学雑誌』1999年4期、7頁参照。

49　王凡「浅議地方人大的個案監督」『現代法学』1998年1期、97頁以下参照。その他、王磊・前掲『憲法的司法化』(122頁以下)は10種の方式を掲出している。個別的事件の監督を合憲とする張澤涛もこの見地の範疇に属するが、いくらか限定的である。張は、個別的事件の監督についてのこれまでの学界での定義は妥当でないとして、自身は、「個別的事件の監督は、人民代表大会およびその常務委員会が、法院が訴訟手続に違反して事件を審理したこと、あるいは法院が下し効力の発生した判決に誤りがある客観的可能性があること、あるいは裁判員が私利のため法を曲げたり収賄したりしたことを見出した場合、監督権の行使を通して、法院がそれを是正し、かつ法定手続にしたがって関係者の責任を追及することを要求することを指す。」と定義している。そして、この定義に次の条件を付している。①人民代表大会およびその常務委員会が個別的事件の監督権を発動する理由は、効力の発生した判決に誤りが確実に存在すること、法院が訴訟手続に違反して事件を処理したこと、裁判員が私利のため法を曲げたり収賄したりしたことに限られる。②個別的事件の監督権はその行使の過程において、ただ各級の人民代表大会およびその常務委員会の集団的名義で行われることができるだけであり、個々の人民代表大会代表はこの権力を行使することはできない。しかし、現実には個々の代表がこの権力を行使している状況がみられるが、これは人民代表大会制度に悪影響を与えている。③人民代表大会およびその常務委員会は、個別的事件の監督権を行使するときに法院の独立裁判権に干渉することはできない。これには3点が含まれる。まず、もし人民代表大会およびその常務委員会が、法院の判決に誤りが存在すると考えても、判決無効を宣言することができないだけでなく、直接に判決を変えることもできない。できるのは、個別的事件の監督権の行使の名義でもって、法院が裁判監督手続に従って改めて審理と裁判を行うように要求することだけである。次に、法院が審理中の事件については、状況の相違に応じて区別しなければならない。人民代表大会およびその常務委員会がもし事件の実体問題に対する法院の判断が正確でないと考えても、自分たちの意図に従って審理と裁判を行うよう法院に要求することができないだけでなく、実体問題について自分たちの見解を発表することもできない。できるのは、判決が効力を発生した後に、法院が裁判監督手続に従って改めて審理を行うよう建議することだけである。法院が手続に違反して事件を審理したともし考えれば、人民代表大会およびその常務委員会は、個別的事件の監督権の行使の名義でもって法院がそれを是正し、かつ関係者の法的責任を追及するよう要求すべきである。さらに、もし人民代表大会およびその常務委員会が、裁判員が収賄とか故意に法を曲げて裁判したのを見出した場合、事件が審理中かすでに終結しているかにかかわらず、人民代表大会およびその常務委員会は立件調査することができる。もし証拠調査の結果、事実であれば、人民代表大会は法に依ってその裁判官を罷免

実践上においても、これらに近い方式が用いられている。

他方、できるだけ狭く限定しようとする次のような見地もある。人民代表大会が個別の事件に関する法院の報告の聴取・質疑・視察を行うことは許されるが、しかし、1. 調査委員会を組織して事件を直接に審査すること、2. 事件処理に関する具体的な建議または決定を出すこと、3. すでに効力を発している判決の一方の当事者を支持すること、4. 事件と利害関係のある代表が当該事件の監督活動に加わること、5. 法院の判決の取消ないし変更を行うこと、6. 地方の利益を保護するという観点から事件の審理を監督すること(いわゆる「地方保護主義」であり、中国では根強い。これは法院にもある〔「司法的地方保護主義」〕)、7. 行政機関が人民代表大会の監督活動を通して個別の事件に関与すること等は、防止し、あるいは避けなければならない[50]。これは、人民代表大会による法院活動の代替および監督権の乱用を抑止することに重点を置いた論であるが、当面はともかく(ただし 4〜7 は現在でも有効)、今後、司法改革が遂行され、かつその成果が定着した段階では説得力をもちはじめるであろう。

第 3 章 憲法監督の改革構想

憲法監督制度が有効に機能していないということは、憲法的権利の保障システムの根本的欠陥の一つを露呈するものである。中国でもこのことの重大性は認識されており[51]、これまで、少なからずの改革構想が出されてきたが、近年は議論が徐々に熟しつつある。このうち主要な構想は次のようなものである[52]。

1.全国人民代表大会の下に、全国人民代表大会常務委員会と並行に憲法委員会を設立する[53]。この構想は憲法改正を前提とする。

2.全国人民代表大会の下に、専門委員会の性質の憲法委員会を設立する（中国の憲法学界の

し、かつ検察機関に引渡し刑事責任を追及させるべきである(前掲論文・96 頁以下)。

50 王晨光「論法院依法独立審判和人大対法院個案監督的衝突及其調整機械制」『法学』1999 年 1 期、23 頁参照。

51 実はすでに、1982 年憲法草案の検討時に憲法委員会の設立の案は提示されていたが、人民代表大会制度の重視の観点から否定された（全国人大常委会弁公庁研究室政治組『中国憲法精釈』中国民主法制出版社、1996 年、96 頁、許崇徳『中華人民共和国憲法史』福建人民出版社、2003 年、886 頁参照)。

52 これらの構想の内容については、全国人大常委会弁公庁研究室文化研究室編『国家権力機関的監督制度和監督工作』(中国民主法制出版社、1999 年)所収の程湘清、李伯釣、汪鉄民の各論文、童之偉「切実推進違憲審査制度建設」『中国法学』2002 年 6 期 13 頁以下、陳雲生・前掲『憲法監督司法化』525 頁以下等を参照。

53 この説として、于浩成「一個極其重要的建議：関於憲法実施的保障問題」『法学雑誌』1982 年 4 期、姚登魁、鄭全成「試論健全保障憲法実施的機制」『当代法学』1988 年 3 期、劉景欣「論中国憲法監督体制」『内蒙古大学学報』（哲社版）1992 年 1 期、侯淑雯「論我国憲法監督機制的完善」『法学』1995 年 12 期、劉明勛「設置我国憲法監督専門機構的基本設想」『河南省政法管理幹部学院学報』1998 年 1 期、費善誠「試論我国違憲審査制度的模式選択」『政法論壇』1999 年 2 期。他方、この説を批判する論として、肖蔚雲『我国現行憲法的誕生』北京大学出版社、1986 年、64 頁、王叔文「論憲法実施的保障」『中国法学』1992 年 6 期。

多数説）[54]。この構想は、全人代は「必要な専門委員会を設置する」(憲法 70 条)ことができるので、憲法改正を経ることなく、実現可能である[55]。

3.全国人民代表大会常務委員会の下に、工作委員会の憲法監督委員会を設立する[56]。この構想は憲法改正を必要としない。

4.専門の憲法法院（憲法裁判所）を設立する[57]。この構想は憲法改正前提とする。

5.最高人民法院に違憲審査権を行使させる[58]。この構想は憲法改正を必要としない。

6.最高権力機関（全国人民代表大会とその常務委員会）と最高人民法院違憲審査廷の並行（双軌制）の違憲審査制を設立する[59]。この構想は憲法改正を必要としない。

7.現行の憲法監督制度の優越性を集約した複合的憲法監督制度（段階的発展の憲法監督制度）を確立する[60]。この構想は、内容によっては、憲法改正を必要とする。

その他、全人代のなかの既存の専門委員会たる「法律委員会」に違憲審査権を付与する論、全国レベルと省レベルの人民代表大会の下に憲法委員会を設置する論、 中級以上の人民法院に憲法訴訟管轄権を付与する論等がある。

現実の立法活動上では、近年、国内法の体系的秩序の維持上で重要な「監督法」[61]の起草

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54 この説として、何華輝「論憲法監督」『武漢大学学報』（社会科学版）1982 年 1 期、呉家麟「論設立憲法監督機構的必要性和可行性：為現行憲法頒布 8 周年而作」『法学評論』1991 年 2 期、董成美、胡錦光「我国違憲審査的組織機構初探」『中国人民大学学報』1987 年 1 期、胡錦光『中国憲法問題研究』新華出版社、1998 年、214 頁以下、王叔文「論憲法実施的保障」『中国法学』1992 年 6 期、程湘清「関於憲法監督的幾個有争議的問題」『法学研究』1992 年 4 期、程湘清「憲法監督立法三題」『法制日報』1997 年 12 月 11 日、張晶、載鴻映「関於憲法監督的比較與思考」『政法論壇』1995 年 5 期、甄樹清「憲法監督専門機構芻議」『河北大学学報』（哲社版）1996 年 4 期、李伯鈞「憲法実施的監督権属於全国人大及其常委会」『法学雑誌』1997 年 4 期、蔡定釗『中国人民代表大会制度』法律出版社、1998 年、416 頁以下、苗連営「関於設立憲法監督専責機構的設想」『法商研究』1998 年 4 期、王振民・前掲「有限政府與違憲審査」。

55 1993 年の憲法改正時に、全国人民代表大会常務委員会に提出された中共中央の憲法改正の建議の説明において、「第 70 条の規定に基づいて、全国人民代表大会は専門委員会の性質の憲法監督委員会を設立することができる」と述べられていたのは(姜士林等『世界憲法大全』青島出版社、1997 年、110 頁参照)、上記の趣旨を意味している。

56 この説として、柳嵐生「略論憲法監督」『社会科学』1981 年 3 期、兪静尭「試論全国人大常委会工作委員会建設」『法学評論』1993 年 5 期、陳雲生「走法治必由之路―論憲法和法律監督的制度化」『比較法研究』1997 年 1 期、陳雲生・前掲『民主憲政新潮』253 頁以下。

57 康大民「建議設立憲法法院」『法学雑誌』1981 年 2 期、王克穏「建立我国憲法法院制度的理論思考」『江海学刊』1989 年 2 期、正文「完善我国的違憲審査制度」『探索』1998 年 1 期、黄学賢「完善我国憲法監督機制的探討」中国法学会憲法学研究会編『憲法研究』第 1 巻、法律出版社、2002 年、342 頁以下。

58 王磊「中国的憲法解釈機構」許崇徳主編『憲法和民主政治』中国検察出版社、1994 年、98 頁以下、楊臨萍「法院改革的憲法思考」『法制日報』1999 年 1 月 14 日。

59 王才松「浅議違憲和対違憲的監督審査」『東北師範大学学報』（哲社版）1986 年 3 期、楊泉明「関於加強我国憲法監督的幾個問題」『政治学研究』1988 年 6 期、汪進元「司法審査模式論」『社会科学』1994 年 4 期、包万超「設立憲法委員会和最高法院違憲審査廷並行的複合審査制：完善我国違憲審査制度的別一種思路」『法学』1998 年 4 期、王士如、魏佩芬「関於設立双重違憲審査制度的思考」『晋陽学刊』1999 年 4 期。

60 李忠『憲法監督論』社会科学文献出版社、1999 年、242 頁以下。

61 「監督法」の起草作業は、2001 年から全人代常務委員会で始められ、2002 年 8 月の当該委員会会議で監督法草案の初歩的審議がなされた。この草案内容からみるに、 草案は全 7 章 73 条

作業が進められてきているが、しかしこれには憲法監督の改革構想はいまだ導入されていない。

こうした状況の中で、党総書記の胡錦涛は、2002年12月の「中華人民共和国憲法公布・施行20周年記念講演」において、中国の憲法監督システムとの関連で、「社会主義的市場経済の発展の新しい状勢下で、法律と体制の不健全及び執法者自身の素質の適応不全等の問題によって、法があっても依らず、法の執行が厳格でなく、違法があっても追及しない問題がいまだ少なくなく、一部の違憲現象が依然として存在している。憲法監督システムを研究・健全にし、憲法監督手続きをいっそう明確にして、一切の憲法違反の行為を適時に是正しなければならない。全人代及びその常務委員会は、国家と人民の根本的利益から出発して、立法過程において憲法が規定する公民の自由と権利を十分に保障し、憲法実施の監督の職責を真剣に担い、断固として違憲行為を是正しなければならない」[62]と述べた。

これは、党首脳としていささか異例の言及であったが、中国の憲法学界はこれに大いに活気付けられた。その後、2003年に入って、憲法改正活動の進行にあわせて、学界から憲法監督システム関係の憲法改正案が具体的に提示されてきた[63]。しかし、今回の憲法改正時、憲法監督システムに関する改正案はすべて採用されなかった。当面、国家指導部は現行の憲法監督システムの改革についてはいまだ慎重である。これは、憲法監督システムの改革がその内容によっては、党の統率的指導権を核とする中国の権力機構に変容をもたらす可能性があるからである。しかし、国家指導部は慎重でありながらも、憲法監督システムの改革に否定的でもない。改革が行われるにしても、それは「激進式」でなく「漸進式」で進められるであろうが[64]、究極的には改革が党の統率的指導権（最終的な憲法解釈権を含む）のありようにも関わるようにならねば、中国の憲法監督システムは、基本的には胡錦涛のいう「不健全」から脱却することはできない[65]。改革の「意

からなり、第2章「憲法と法律の実施の監督」(8条～21条)は、全人代及びその常務委員会の憲法と法律の実施の監督権限その他をより具体的に規定するにとどまり、憲法監督との関わりでの特別の制度上の改革はみられない。

62 『人民日報』2002年12月5日。

63 たとえば、童之偉「與時俱進、完善憲法」『法学』2003年1期、12頁、肖游「創設憲法委員会実現憲法可訴性」『政治與法律』2003年3期、10頁、胡錦光等「関於現行憲法第四次修正的建議」『法学家』2003年5期、29頁。

64 改革の関連的動きが出ていないわけではない。憲法改正後の2004年6月、全人代常務委員会は、法制工作委員会の下部組織として、下位法と上位法（特に憲法）の間の衝突・抵触の問題を専門的に審査する任務を負う「法規審査記録室」を設立した。この機関は、独立性と権威性が弱く、違憲の法律・法規を取消す権限も有していないものの、将来的に違憲審査制度の一種へ発展する可能性が絶無ではない試行的組織である。なお、近年、広い意味で中国の違憲審査制度の問題が全国的に耳目を集める契機となった事件として、斉玉苓事件と孫志剛事件がある。前者の事件については、土屋・前掲「中国の人権論の原理と矛盾的展開」210頁、後者の事件については、土屋英雄「中国の憲法改正」国立国会図書館発行『レファレンス』2004年9月号、77頁参照。

65 2002年に中国人民大学法学院と山東大学法学院を主体として実施された「中国公民憲法意識調査」によれば（胡錦光、韓大元主編『中国憲法発展研究報告』法律出版社、2004年1月、1257頁）、今後、憲法改正が最も必要なのは、人民代表大会制度、政党制度、経済制度、選挙制度、基層の大衆自治制度、基本的権利の保護、憲法監督制度、精神文明建設、司法制度、その他、のうち、憲法監督制度をあげた公民が最多で（47%）、以下、司法制度（42%）、選挙制度（39%）、

思」を有する胡錦涛政権による改革の「方向」が注目される。

第4章 憲政主義の根源的問題

第1節 中国共産党の統率的指導権

共産党の統率的指導の不可侵性は、中国の憲政主義上の最大かつ根源的な問題である。国家に対する共産党の指導権は、1954年憲法では明確な規定がなく、憲法「解釈」を通して堅持されていた。いわば「密教」的であったのである。ところが、共産党の指導権が具体的に公然と規定された憲法があった。「顕教」化である。文化大革命の時期に制定された1975年憲法である(1978年憲法も「顕教」性を残していた)。

1975年憲法は、序言でなく本文のなかで、国家に対する共産党の指導権を明記していた(第2条、15条、16条、17条、26条)[66]。「革命」的状況のもとで「顕教」化した共産党の指導権は、現行の1982年憲法下で再び後景へ移されることになった。つまり、この憲法は、中国の社会主義国家建設が共産党の指導下で遂行されること等を憲法序言で規定しているのみで、本文のなかでは何ら具体的に規定していない。この規定の仕方からすれば、中国も対外的には、共産党の指導は「主に思想・政治上のもの」と説明することができるし、そう説明している。だが、現実には、共産党の指導の「顕教」的内容はいまだ厳然と維持されている。

この現実の変革が全く志向されてこなかったわけではない。1978年末からの「改革・開放」路線下で、建国後30年にわたる国家に対する共産党の「一元的指導」から「分離式指導」への移行が模索されてきた。だが、これも89年の天安門事件によって頓挫した。近年でも、共産党の強力な指導下で、複数政党制へ向けての「中国民主党」の結成の動きに対する弾圧(1998年)、共産党指導者の居住地区「中南海」前で前代未聞の座り込みを強行した宗教的気功集団「法輪功」に対する厳しい取締り(1999年)等を行っている[67]。

基本的権利の保護（32%）、政党制度（31%）等であった（数字は改正必要順位の第一位から第三位の合計）。憲法監督制度と司法制度が一、二位を占めたのは、大多数の公民の憲法上の問題意識の所在を表している。

66 たとえば、第2条は「中国共産党は、全中国人民の指導的中核である。労働者階級は、自己の前衛である中国共産党を通して、国家に対する指導を実現する。」と、第15条は「中国人民解放軍と民兵は、中国共産党が指導する労働者・農民の子弟兵であり、各民族人民の武装力である。」と、第16条は「全国人民代表大会は、中国共産党の指導下の最高国家権力機関である。」と規定していた。

67 この「法輪功」取締りは現在まで継続しており、2002年3月の第9期全国人民代表大会第5回会議において、国務院総理の朱鎔基は、その「政府活動報告」のなかで、「『法輪功』等の邪教組織との闘争を引き続き展開する」ことを強調している。また、2003年3月の第10期全国人民代表大会第1回会議での朱鎔基「政府活動報告」も、「邪教組織の犯罪活動」の取締りと処罰に言及している。なお、中国での「法輪功」＝「邪教」論の詳細は、中国社会科学院「法輪功」現象綜合研究課題組『「法輪功」現象評析』社会科学文献出版社、2001年3月。

だが、西側のマス・メディアの注目を浴びやすいこうした事例とは別の営為も中国内で地道に進行中である。既述の憲政主義上の漸進的改革である。実は、この改革のいっそうの推進が、とりわけ経済的土台の変移によって迫られている。1999年の憲法改正で、非公有制経済が社会主義的市場経済の「重要構成要素」であると明記され[68]、また2004年の憲法改正で、私有財産権が規定された。市場経済化はこれまで中国の経済発展の駆動力であったが、しかし、今後、「安定・団結」を名目にこれまで先送りされてきた「政治体制」(中国語の「政治体制」はその基礎たる「政治制度」の具体的表現形態を含意、「経済体制」と「経済制度」の関係も同様)の改革を進めなければ、経済的土台における市場経済の拡大と政治体制における一党独裁との間の矛盾は極限にまで高まっていくことになる。「改革・開放」の継続を大前提とするかぎり、この矛盾の解消の主たる方向の一つは、理念的には、市場経済の成熟化に照応させて(もっとも、市場経済の成熟化は別種の矛盾を肥大化させ得るものであるが)、政治行為の主体を複数多元化した政治市場および思想の生産と伝播の平等な機会を保証する思想市場を形成することであろうし、中国内でもこうした類の議論はある[69]。また、中国は2001年12月10日に世界貿易機関(WTO)に正式に加盟したが、これは国内法体制の一定の体系的な変革を必須的に要求するものである[70]。

もっとも、一党独裁制から政権を争う複数政党制への転換は近い将来、予想され得ないし、この転換期に生じる「権力の空白」に政治的、経済的、社会的に堪え得る諸条件はいまだ中国で形成されていない。この破局的混乱を回避するために、中国は現在の国家体制を基本的に維持しながら、その体制内で憲政主義上の改革を漸進的に時間をかけて積み重ねていく可能性が高い[71]。

第2節　中国共産党と憲法制定・改正の建議権

中国では、1949年の中華人民共和国樹立後から今日まで、中国人民政治協商会議共同綱領(臨時憲法)を含めて5種の憲法が制定され、条文の部分的改正は、1978年憲法下で2回、現

68　市場化との関連では、1999年の憲法改正で、社会主義的市場経済の単なる「実行」ではなく、「発展」という文言が序言に規定されたことにも注意する必要がある。

69　たとえば、楊海坤「中国走向憲政之路」『安徽大学法律評論』2001年1巻、8頁以下。他に、計画経済から市場経済への移行にともなう、経済・政治・社会・文化の各領域での権利規範の改変についての興味深い考察として、常健『当代中国権利規範的転型』天津人民出版社、2000年、7章～9章。

70　このことを考察した論稿は少なくないが、まとまったものとして当面、李歩雲・江平主編『WTO與中国法制建設』中国方正出版社、2001年9月を参照。中国では、WTO加盟を評価する論が今のところ支配的であるが、しかしWTOと密接不可分であるいわゆる「グローバリズム」(中国語で「全球化」)は経済的、政治的、文化的に重い問題を内包しており、中国も早晩、先鋭化した矛盾に直面することになるのではないかと思われる。

71　この方策は、いわゆる「激進式改革」でなく「漸進式改革」である。このことと、中国が1999年の憲法改正で、社会主義の初級段階の「長期性」を序言に規定したことは無関係ではない。

行の 1982 年憲法下で 4 回行われてきた。そして、これらの制定と改正の建議はすべて中国共産党によってなされている。つまり、国家の「根本大法」たる憲法の制定と改正の建議権を中国共産党が掌握しているのである。この憲法制定・改正建議権は中国共産党の統率的指導権に含まれる最も重要な権限の一つである。ただし、当該権限の憲法上の明文規定は、過去も現在もなく、1954 年憲法の制定以来の「中国の憲法慣例」[72]であるとされている。

この憲法制定・改正の建議権の行使について、現行の 1982 年憲法の制定と最新の 2004 年の憲法改正のそれぞれの過程を素材として、具体的にみてみる。

(1) 1982 年憲法の制定過程

1978 年 12 月、中国共産党は第 11 期中央委員会第 3 回総会(11 期 3 中全会)を開催し、その会議で、それまでの「階級闘争をかなめとする」というスローガンの使用を停止して、活動の重点を社会主義的現代化の建設に移すことを決定した。1981 年 6 月、党は第 11 期中央委員会第 6 回総会で、建国以来の社会主義革命と社会主義建設の経験・教訓を、とりわけ「プロレタリア文化大革命」の経験・教訓を全面的に総括し、建国以来の多くの重大な歴史的問題に対して分析を行い、その結果を公表した[73]。そうして、1982 年 9 月の党の第 12 回全国代表大会は社会主義的現代化の建設の新局面を全面的に切り開くという戦略的政策を確定した。現行憲法はこの大変動の時期に制定された。

憲法改正の具体的な過程は次の通りである。

1978 年憲法の第二次部分的改正の直後の 1980 年 9 月、中共中央は、第 5 期全国人民代表大会第 3 回会議に対して「憲法改正および憲法改正委員会の設立に関する建議」を提出し、憲法改正の作業に責任を負う憲法改正委員会の設立を決定した。当該委員会は、党中央の各部門、国務院、最高人民法院、最高人民検察院、各民主党派、各人民団体、各省、自治区、直轄市および各方面の広汎な意見を聴取・研究したあと、1982 年 2 月、「中華人民共和国憲法改正草案(討論稿)」を提出した。この草案が党中央書記処の討議・修正と党中央政治局の原則的承認を経たあと、憲法改正委員会第 2 回会議はさらに草案に討議・修正を加えると同時に、全国人民代表大会常務委員会委員、全国政治協商会議委員、中央各部門、各省、自治区、直轄市が提出した修正意見を参考のうえ、憲法改正草案(改正稿)を作成した。これが党中央書記処の原則的承認を経たあと、憲法改正委員会第 3 回会議は、更なる討議・修正のあと、「中華人民共和国憲法改正草案」を採択した。同年 4 月、第 5 期全国人民代表大会常務委員会第 23 回会議は憲法改正草案を公布し、全国の討論に付した。4 ヶ月余の討論を経て、8 月に討論は終結した。そこで提示された各意見・建議について、憲法改正委員会は第 4 回会議、第 5 回会議を開催して討議・研究し、最終的に修正した「中華人民共和国憲法改正草案」を作

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72 韓大元編著『1954 年憲法與新中国憲政』湖南人民出版社、2004 年、502 頁。

73 1981 年 6 月 27 日「建国以来の党の若干の歴史的問題に関する決議」。この決議の内容と詳細な注釈は、中共中央文献研究室『関於建国以来党的若干歴史問題敵決議注釈本（修訂)』人民出版社、1985 年 9 月参照。

成し、これを第5期全国人民代表大会第5回会議の審議に提出することを決定した。1982年12月4日、第5期全国人民代表大会第5回会議は総会を開き、「中華人民共和国憲法」を表決・採択した。代表は合わせて3421人で、このうち出席投票者は3040人、賛成3037人、棄権3人であった。

(2) 2004年の憲法改正過程

2004年の改正過程は、1982年憲法に対するそれまで3回の改正過程と比較して、次のような特徴がある。第1に、これまでは、先ず改正案を作成し、その後で改正案に対する各方面の意見を求めたが、今回は、先ず広く意見を求め、その後で改正案を作成した。第2に、これまでの憲法改正建議は、中共中央政治局の討論後に全人代常務委員会に対して提出されていたが、今回の建議は、中共中央政治局の討論後、党中央委員会総会の審議を経て、全人代常務委員会に対して提出された。第3に、これまでの憲法改正は、中共中央が憲法改正建議を提出してから全人代が憲法改正案を採択するまで、文言は一字も改められなかったが（1999年の第3回の改正時に全人代会議上で代表連名による補充改正案が提出されたことはある)、今回の全人代会議の審議においては、重要部分でないにしても、代表たちが提出した意見にもとづいて、憲法改正案（草案）の文言の一部修正が行われた[74]。

これらは、憲法改正の手続きの面における「民主化」志向の一つの表われとして評価できるだろう。他方で、中共中央は、憲法改正案の内容がほぼ集約されてきた2003年9月、メディア、大学、研究所等が憲法改正問題について自由な報道、意見発表等を行うことを禁止する内部通達を出した。こうした硬軟の方策の同時遂行は、党指導部がいわゆる「漸進式改革」[75]を堅持していることを示している。

今回の憲法改正は、具体的には次のような過程で行われた。

2002年12月、中共中央政治局常務委員会は「2003年活動要点」のなかで、新しい情勢下での党と国家の事業の発展の要求にもとづいて、憲法改正活動に着手することを提示。

2003年3月初旬、党総書記の胡錦涛が、憲法改正活動を速やかに開始するように指示。

3月27日、中共中央政治局常務委員会の会議は、憲法改正活動の研究と配置を行い、憲法改正上の総原則を確定。これは、憲法改正の全過程において党の指導を真剣に強化し、民主を十分に発揚し、各方面の意見を広範に聴取し、厳格に法に依って処理することを強調すること、および

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74 ①憲法改正案（草案）：憲法序言第7段「中国的特色のある社会主義を建設する道に沿って」→「中国的特色のある社会主義の道に沿って」（「建設」の削除)。②憲法改正案（草案）：憲法第10条第3項「国家は公共の利益の必要のため、法律の定めるところにより、土地を徴収または徴用し、且つ補償を与えることができる。」→「国家は公共の利益の必要のため、法律の定めるところにより、土地を徴収または徴用し且つ補償を与えることができる。」（「且つ」の前の読点を削除)。③憲法改正案（草案）：憲法第13条「国家は、公共の利益の必要のため、法律の定めるところにより、公民の私有財産を徴収または徴用し、且つ補償を与えることができる。」→「国家は、公共の利益の必要のため、法律の定めるところにより、公民の私有財産を徴収または徴用し且つ補償を与えることができる。」（「且つ」の前の読点を削除)。

75 「漸進的改革」の趣旨は、前掲・土屋「中国の憲法事情」『諸外国の憲法事情』36-37頁参照。

全人代常務委員会委員長の呉邦国を組長とする「中央憲法改正小組」を成立させ、中共中央政治局常務委員会の指導下で活動を行うこと、である。

4 月初旬、中共中央は憲法改正に対する意見を広く求める通知を発し、各省、自治区、直轄市の人民代表大会常務委員会の党組織が調査・研究にもとづき、当該省、自治区、直轄市の党委員会の常務委員会の討論を経て中央へ報告することを求める。

5 月下旬から 6 月にかけて、中央憲法改正小組は、上海、成都、北京において 6 回の座談会を開催し、各省、自治区、直轄市の人民代表大会常務委員会の党組織の責任者、中央党組織の各部・委員会と国家機関の各部・委員会の責任者、一部の大型国有企業と私営企業の責任者、法学と経済学の専門家の意見を聴取し、また全国人民代表大会代表、全国政治協商会議委員および一部の理論活動担当者の憲法改正に対する意見を整理し、さらに世界の主要国の憲法の関連規定を調査・研究。これらを基礎にして、中央憲法改正小組は、憲法の一部の内容を改正することに関する建議を立案(「草案意見収集稿」)。この草案意見収集稿を、中共中央政治局常務委員会と中共中央政治局会議は、それぞれ 7 月 31 日、8 月 11 日に原則的に承認。

8 月 18 日、中共中央は、草案意見収集稿を各省、自治区、直轄市の党委員会、中央党組織の各部・委員会、国家機関各部・委員会の党組織、軍事委員会総政治部、各人民団体党組織に発出し、意見を求める。

8 月 28 日、胡錦涛は、各民主党派中央、全国工商連合会の責任者、無党派人士と座談会を主催し意見を求める。

9 月 12 日、中央憲法改正小組は、一部の理論活動担当者、法学専門家、経済学専門家と座談会を主催し、それぞれの意見を聴取。

中央憲法改正小組は、各地方、各部門、各方面の意見と建議にもとづいて逐条的に研究し、草案意見収集稿に対して修正と補充を加える。

9 月 18 日の中共中央政治局常務委員会会議、および 9 月 29 日の中共中央政治局会議における審議・同意を経て、「憲法の一部の内容を改正することに関する中共中央の建議（草案討論稿)」を作成。

10 月 11 日、党第 16 期中央委員会第 3 回総会が開催され、呉邦国が「憲法の一部の内容を改正することに関する中共中央の建議（草案討論稿)」について説明。同月 14 日、総会は「憲法の一部の内容を改正することに関する中共中央の建議」を採択。

12 月 12 日、党中央委員会は、全人代常務委員会が法の定める手続きにしたがって、憲法改正案議案を第 10 期全人代第 2 回会議の審議のために提出することを建議。

12 月 16 日、第 10 期全人代常務委員会第 10 回委員長会議が開催され、「憲法の一部の内容を改正することに関する中共中央の建議」を審議するため、それを第 10 期全人代常務委員会第 6 回会議に提出することを決定。

12 月 22 日、第 10 期全人代常務委員会第 6 回会議（12 月 22 日～27 日）の審議のために提出。全人代常務委員会副委員長の王兆国が憲法改正の建議に関して説明。

同会議は、憲法第64条が規定する憲法改正の手続きに照らし、「憲法の一部の内容を改正することに関する中共中央の建議」を基礎として、「憲法改正案（草案）」を作成。

12月27日、会議に出席した153名の常務委員会委員は満票で、憲法改正案（草案）を採択し、これを第10期全人代第2回会議での審議のために提出することを決定。

2004年3月5日～14日、第10期全人代第2回会議を開催。3月8日、王兆国が、同会議上で、「中華人民共和国憲法改正案（草案）」に関して説明。この審議において、憲法改正案（草案）の文言の一部を修正。3月14日、同会議は3分の2以上の多数で憲法改正案を採択。無記名投票の結果、配布2,903票、回収2,891票、有効2,890票、このうち賛成2,863票、反対10票、棄権17票。

以上から分かることは、実際は、中国共産党が掌握しているのは憲法制定・改正の建議権のみでなく、建議されたあとの制定・改正の過程においても、修正案の処理を含めて、中国共産党が一貫して指導しているということである。

さらに注意すべきは、中国共産党の政策・方針の新展開と憲法制定・改正との不可分性である。1982年憲法の制定は、1978年12月からの「改革・開放」政策への大転回および1981年6月の「建国以来の党の若干の歴史的問題に関する決議」と不可分であったし、またこの1982年憲法は、1988年4月、1993年3月、1999年3月、2004年3月に一部改正された。ほぼ5～6年ごとに改正されてきたといえる。これは、5年ごとに開催される中国共産党（以下、党と略称）の全国代表大会に対応している[76]。つまり、党の全国代表大会で決定された新しい政策、方針にもとづいて国家の根本大法が改正されているわけである。いわば、憲法上の手続きを通して、「党の意志」が「国家の意志」へ上昇[77]されているのである。

要するに、中国共産党が憲法そのものに対する最大・最上の「監督権」を掌握していることは否定され得ない。

第3節　中国共産党は憲法監督の対象となり得るか

中国共産党は憲法監督の対象となり得るか。つまり、憲法上では憲法監督権を有する全国人民代表大会およびそ常務委員会は、政治上の被指導者として、政治上の指導者たる中国共産党（その活動およびそれが制定する規範的文書）を監督できるか否か。これについては肯定説と否定説があるが、学界の多数説は前者である[78]。

76　1987年の党第13回全国代表大会→1988年の憲法改正、1992年の党第14回全国代表大会→1993年の憲法改正、1997年の党第15回全国代表大会→1999年の憲法改正、2002年の党第16回全国代表大会→2004年の憲法改正。

77　韓大元・前掲『1954年憲法與新中国憲政』502頁参照。

78　王広輝主編・前掲『通向憲政之路』413頁以下、陳雲生・前掲『憲法監督司法化』517頁以下参照。

(1) 肯定説[79]

①中国共産党と民主党派の間には政治上の指導と被指導の関係があるが、共産党は民主党派に対して「長期共存、相互監督」の方針をとっており、共産党は民主党派を監督すると同時に民主党派の監督を受ける。

②共産党は労働者階級の前衛隊であり、労働者階級と労働者階級を代表とする広大な人民の利益以外に自身の特殊な利益をもっていない。よって、共産党は全国人民代表大会およびその常務委員会が集中的に体現ないし代表する全国各民族人民の意思と利益を違背することはできないので、全国人民を代表して国家権力を行使する全国人民代表大会およびその常務委員会は共産党に対して監督を行うことができるものでなければならない。

③マルクス・レーニン主義を指導として全国人民の最大利益の実現の追求を出発点とする共産党は、人民が自身の国家権力機関を通して監督を行うという道理を決して恐れない。

④中華人民共和国の一切の権力は人民に属し、人民はその代表たる全国人民代表大会およびその常務委員会を通して権力を行使し、全国人民代表大会およびその常務委員会は人民に責任を負い、人民の監督を受ける。この関係上、人民代表大会のその他の国家機関に対する監督は実質上、国家機関に対する人民の監督である。よって、人民代表大会およびその常務委員会の共産党に対する監督は、実際上、人民の党組織に対する監督である。この憲法上の根拠は、憲法第5条、第62条2号、第67条1号である。

⑤建国以来の経験・教訓は、共産党に対する有効な監督の樹立は国家の安定・団結を保証し、文化大革命の悲劇の再来を避ける重要な保証の一つであることを深刻に表している。

⑥共産党の規約も、党は必ず憲法と法律の範囲内で活動しなければならないと明確に規定している。

⑦共産党は実際上、中国の政治生活における決定的な力であり、それが違憲の行為をした場合、憲法の権威に対する破壊が生み出す影響は巨大であり、これは他の国家機関、社会組織の影響とは比べものにならない。

(2) 否定説[80]

①憲法の規定からみて、全国人民代表大会およびその常務委員会は、それらが選出ないし任命して創出した国家機関およびその人員に対して監督を行うことができるだけであり、党の組織は決して全国人民代表大会およびその常務委員会によって創出されたものでなく、よ

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79 肯定説の文献として、王景栄「論加強和完善的領導」『憲法論文集』(続編) 群衆出版社、1982年、46頁、曾恒、鐘明「論人大常委会対党組織的憲法監督」『法学季刊』1987年1期、蔡定釗「試論人大及其常委会監督的対象和内容」『論人大及其常委会的監督権』法律出版社、1988年、46頁以下、甄樹清「憲法監督専門機構芻議」『河北大学学報』(哲社版) 1996年4期、劉嗣元「憲法監督司法化若干問題的理論探討」『法商研究』2002年3期、湯嘯天「"治党従厳"與憲法訴訟」『江蘇行政学院学報』2002年2期、黄学賢「完善我国憲法監督機制的探討」中国法学会憲法学研究会編『憲法研究』第1巻、法律出版社、2002年、342頁以下。

80 呉文泰「関於人大及其常委会可不可以監督共産党組織的問題的初歩探討」『論人大及其常委会的監督権』法律出版社、1988年、116頁。

って全国人民代表大会およびその常務委員会は、憲法監督の対象に共産党を入れることはできない。

②憲法第5条の規定（憲法と法律に違背する一切の行為は必ず追及されなければならない）は、ただ一般的、原則的に規定しているにすぎず、このことから全国人民代表大会およびその常務委員会が共産党を監督できるという結論を得ることはできない。

③憲法第5条が規定しているのは「追及」であって「監督」ではない。

④全国人民代表大会およびその常務委員会が共産党を監督できることを承認することは、「以党代政」「党政不分」を認めることに等しい。党組織の文書、決議はたとえ誤り、さらに違憲の内容であっても、全国人民代表大会およびその常務委員会は、直接に取消したり、無効を宣布したりすることはできず、ただ批判・建議を提出し、党の組織自身によって訂正させることができるだけである。

以上の肯定説、否定説のうち、党の統率的指導の実質面に重点を置くと、肯定説が説得力を有しているが、憲法の構造と規定の形式面に重点を置くと、否定説が説得力を有している。いずれにしても、少なくとも「現行の憲法監督制度」を前提とするかぎり、党を憲法監督の対象とすることはできないものと考えられる。

もっとも、党が憲法監督の対象になり得るかどうかの問題は、単に憲法監督のシステムのみに関わるものでなく、根源的には国家体制そのものに関わるものである。つまり、党を憲法監督の対象とする可能性は、国家体制の改革の可能性と不可分である。その改革の一つの方向は、党を憲法の枠組み内の指導的国家機関と正式に位置づけたあとで、党を憲法監督の対象とするというそれである。

他方で、党を憲法監督の対象としない方向での改革もあり得る。すなわち、これまでの「一党独裁体制」（共産党と国家の癒着、国家に対する共産党の直接的指導という「権力的体制」）を、体制内の改革の積み重ねを通して、中期的に、「一党支配体制」（共産党と国家の組織的・人的分離、国家に対する間接的指導という「権威的体制」、この内容は天安門事件まで党内で模索されていた）へ移行させ、そしてこの体制下で、長期的には、執政党たる共産党の地位を維持しながらの複数政党の容認という「一党優位体制」へ変移、全国人民代表大会の名実共の「最高の国家権力機関」化、統一戦線組織たる中国人民政治協商会議の人民代表大会に次ぐ「第2院」化、という可能性である。こうした共産党と国家の分離が漸進的に具体化されていけば、党を憲法監督の対象にすることができるどうかを議論する必要性も減じていくであろう。

8. THE JUDICIAL REVIEW PROCEDURE IN THE PEOPLE'S REPUBLIC OF CHINA*

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In the present paper, we are concerned with the era of political and economic reform in the People's Republic of China, or the PRC, that commenced with the historic 3rd Plenum of the 11th Central Committee of the Communist Party of China, or the CPC, which was held in Beijing from 18 to 22 December 1978. The aspect of the reform era in the PRC on which we concentrate attention is to do with the endeavour of the leadership elites within the CPC and the state government to establish an effective rule of law, as a necessary institutional framework for social, political and economic organization. The form of the rule of law at issue here is that which is referred to in the PRC as the socialist legal order. The development of the socialist legal order has since 1978 been proclaimed by the Party-State leadership as something that is crucial for the full and proper realization of the presiding public policy programme in the PRC of socialist modernization, and, indeed, the socialist legal order has come to stand together with the socialist market economic order as being among the essential component parts of the project that the leadership has set for itself of bringing about an authentic socialism with Chinese characteristics.

As a reflection of this, the reform period that began in 1978 has witnessed a significant enlargement in the province of law and legislation in the PRC, and with there having taken place a continuous elaboration of legal forms and legal categories as under the heads of constitutional law, civil and commercial law, administrative law, economic law, social welfare law, criminal law and the law of litigation procedure. Of the different parts of law as thus specified, the body of administrative law has been prominent in the advancing of the agenda for political and economic reform in the PRC. It is the administrative law of the PRC, and more particularly the form of judicial review procedure foundational to it, that stands as the subject-matter of this paper. In the first part of the paper, we outline the

fundamental elements of the administrative law system in the PRC, and as these are to be found given in what are the relevant key statutes that pertain to administrative law. In the second part, we address directly the question of the judicial review procedure. Here, we explain the statutory bases for judicial review as embodied in the substantive law that belongs to the period of the 1980s. In doing this, we focus specifically on the provisions of the law on judicial review as concerning the administrative acts that are subject to judicial review, and as concerning the grounds that are accepted to be legitimate in the application for judicial review. After the discussion of judicial review as to its scope and grounds, we turn in the third part of the paper to the consideration of certain of what we take to be the imperfections of the judicial review procedure as in relation to what are stated in the law to be its declared purposes. [1]

i. The Administrative Law System in the PRC: Fundamental Elements

In its broadest sense, administrative law is the law that applies to the administrative authorities belonging to the institutional sphere of government within the state, and in this application it is the law which relates to the tasks and functions, and the structure, of the administrative authorities and which as such serves to regulate the exercise of the powers belonging to them. As to the first principles of administrative law, the principle that is crucial is that the acts of the administrative authorities, as involving the exercise of powers, are assumed to require some basis and justification in law. The corollary of this is that, from the standpoint of administrative law, the administrative authorities are to be thought of as being capable of acting, and of exercising their powers, contrary to law and hence in the absence of a lawful basis and justification. Thus it is that the administrative authorities are to be thought of as being subject to challenge in the name of law by ordinary citizens, and by such other parties, as may claim to be adversely affected, or aggrieved, by the allegedly unlawful acts of the particular administrative authorities in question. The possibility of legal challenges to the administrative authorities, as to their acts involving the exercise of powers, presupposes the availability of some official procedure for the presentation of such challenges, and for the providing of remedies in the event that the challenges to the administrative authorities are upheld through this procedure. In general terms, the form of procedure here that has proved to be characteristic of

administrative law systems, and that may be considered to embody the underlying foundation of administrative law as such, is a procedure of adjudication, and one where legal challenges to the acts of the administrative authorities are made and heard under the auspices of the organs belonging to the judicial branch of government. This is the procedure known as the judicial review of administrative action, and with this being the procedure that provides for the acts of the administrative authorities to be reviewed, and where necessary negated, through the ordinary courts or through such other special courts as are designated as being responsible for proceedings in administrative law.

The principles of administrative law, and those of judicial review, are closely bound up with the principles pertaining to the ideal of the rule of law and to the ideal of constitutional government. As to the rule of law, it is to be observed that administrative law is directed towards the control through law of the acts of the administrative authorities, and that, in this, administrative law gives effect to the defining principle of the rule of law that the powers exercised by government are to stand as non-arbitrary powers and hence as powers which are to remain subject to legal constraints and limitations. As to the matter of constitutional government, it is to be observed that administrative law is based in the principle of the separation of the legislative, executive and judicial powers of government which is held to be central to constitutionalism. Thus the procedure of judicial review involves the administrative authorities, as bearing the executive powers of government, being rendered subject to the scrutiny of independent courts, and with the courts, as in their judicial office, applying in regard to the administrative authorities the provisions of laws which, as to the institutional mode of their adoption and alteration, fall within the competence of the legislative power as a power separate from the judicial and executive powers. Beyond this, there is the consideration that administrative law, as through its relation to the rule of law and constitutional government, bears directly on the ideal of human rights. For the principles of administrative law presuppose that individuals possess lawful rights which are enforceable as against the institutions of state government, and that the powers of state government are to be exercised only where this is consistent with due respect for the material rights which are recognized in law to belong to ordinary citizens.

In the years since 1978, there has come to be established in the PRC what offers itself for attention as an operational system of administrative law. The advent of this administrative law system is significant in that it points to a forward

development in the PRC running in the direction of the acceptance of the principles of the rule of law and constitutional government, and even, as is now the case, the acceptance of the principles of individual human rights. This is so notwithstanding the continuing absence from the PRC of multi-party democratic politics, and the continuing domination of the social, political and economic order by the CPC as through its monopoly rulership powers. The general significance of the system of administrative law in the PRC is underlined by the pervasiveness of administrative law principles as throughout the whole body of standing substantive law. In the classification of the parts of law adopted in the PRC, the administrative law is presented and referred to as the law relating to the specific tasks and functions of public administration. Hence administrative law is taken to encompass the law relating to such matters as foreign affairs, public security, civil service personnel, education, public health, urban and rural planning, and protection of the environment. In the event, however, the administrative law system in the PRC is not to be understood so restrictively, as in terms of the designated administrative tasks and functions. For administrative law is the law applying to the administrative authorities and in regard to the exercise of their powers, and in the PRC the administrative authorities are everywhere engaged, as to the exercise of powers, in the regulation of all the many diverse aspects of the social, political and economic order. Thus it is that there is widespread recognition to be found given to the active engagement of the administrative authorities in the regulatory frameworks set in the legislation that pertains to the tasks and functions which come within the spheres of civil and commercial law, economic law and social welfare law.

In order to identify the essentials of administrative law in the PRC, it is necessary to turn away from the substantive law that is directed to the particular tasks and functions of public administration, and to fasten attention on the statutes that serve to describe the general powers of the administrative authorities, but without restriction as to tasks and functions, and that serve to describe the general procedures to which the administrative authorities are subject in the exercising of their powers. For it is with these basic framework statutes that the fundamental elements of administrative law are to be found present in an inclusive form and as comprising a unified system of law. The statutes at issue possess the normative force specific to law, since these are in all cases statutes that have the standing of laws which have been enacted by the National People's Congress, as the sovereign legislative power in the PRC, or which have been adopted by the Standing

Committee of the National People's Congress. To begin with, there is the law that is central to the concerns of this paper. This is the law stating the principles that relate to what is referred to as the administrative procedure and to what is, in effect, the procedure for the judicial review of administrative action: the Administrative Procedure Law of the People's Republic of China, which was adopted at the 2nd Session of the 7th National People's Congress on 4 April 1989. [2]

Passing beyond the matter of the law on judicial review, there is, as a second key statute, the law that sets out the principles relating to the liabilities of the administrative authorities for the payment of compensation in cases involving their violation of the lawful rights and interests of citizens and other parties: the State Compensation Law of the People's Republic of China, as adopted at the 7th Meeting of the Standing Committee of the 8th National People's Congress on 12 May 1994. [3] Third, there is the law that states the principles that govern the application of sanctions and penalties by the administrative authorities, as against citizens and other parties and in the context of their breaches of ordinary laws and administrative regulatory norms: the Administrative Penalties Law of the People's Republic of China, which was adopted at the 4th Session of the 8th National People's Congress on 17 March 1996. [4] Fourth, there is the law setting out the principles that relate to the activities of the administrative agencies of the state government that exercise supervisory powers over the administrative authorities and their official personnel: the Administrative Supervision Law of the People's Republic of China, as adopted at the 25th Meeting of the Standing Committee of the 8th National People's Congress on 9 May 1997. [5] Fifth, there is the law that sets out the principles relating to the procedure that is designated as administrative reconsideration, and with this being the procedure through which the administrative authorities are required to review, or to reconsider, their own acts or, as is more general, the acts of subordinate administrative authorities, as on the application of aggrieved parties: the Administrative Reconsideration Law of the People's Republic of China, as adopted at the 9th Meeting of the Standing Committee of the 9th National People's Congress on 29 April 1999. [6] Sixth, there is the law that sets out the principles relating to the powers of the administrative authorities in respect of the issuing of licences: the Administrative Licensing Law of the People's Republic of China, as adopted at the 4th Meeting of the Standing Committee of the 10th National People's Congress on 27 August 2003. [7]

The foundation of the system of administrative law in the PRC lies in the procedure for the judicial review of administrative action, as this is described in the Administrative Procedure Law. The main features of the judicial review procedure are straightforward to understand, and they may be summarized as follows. Thus it is provided that the administrative procedure - that is, the procedure for judicial review - is directed towards the so-called administrative cases. The latter cases arise when parties, whether citizens, legal person entities or other such like organizations, are aggrieved as on account of the concrete administrative acts of one or other of the administrative authorities, and being so aggrieved then proceed to make application to the ordinary courts for the judicial review of the administrative acts in question. The jurisdiction in administrative cases belongs to the system of the people's courts, as subject to the legal supervisory powers that are vested in what are known as the procuratorial authorities, and with this jurisdiction being exercised, as in accordance with the nature of the particular administrative cases, by the basic people's courts, the intermediate people's courts, the higher people's courts or by the Supreme People's Court. The Administrative Procedure Law includes detailed provisions that relate to what are the complex aspects of the judicial review procedure. Among these are the provisions concerning the substantive grounds for judicial review, the standing of parties to administrative proceedings, the rules of evidence, the submission of cases to the people's courts, the form and process of the adjudication involved and the remedies that are available to the people's courts in the decision of administrative cases. This notwithstanding, the essential principle of the judicial review procedure remains simple: that is, the principle to the effect that the procedure forms a judicial or adjudicative procedure, and where the applicant parties as plaintiffs and the administrative authorities as defendants stand subject to the jurisdiction of the people's courts as for the purposes of the resolution of disputes which are centred on the lawfulness of administrative action.

The foundational position of the judicial review procedure provided for in the Administrative Procedure Law, as in relation to the administrative law system in the PRC, is a status that belongs to it in the respect that the judicial control of administrative action is something which is presupposed in the terms of all the basic component parts of administrative law. So, for example, the powers of the administrative authorities, as with the powers relating to administrative sanctions and penalties and administrative licensing, remain subject to judicial review through the people's courts. The same is true with the rules on state compensation, given that

the judicial review of the acts of the administrative authorities, where this is successful as in favour of applicant parties, may itself be the occasion for submissions directed towards the securing of compensation awards. There is the further presupposing of judicial review under the terms of the procedure described in the law that provides for the administrative reconsideration of the acts of the administrative authorities. This, in its essentials, is a procedure that is internal to the institutional structure of the administration. For it is a procedure that is conducted by the administrative authorities, rather than one conducted through the people's courts as judicial bodies which stand independent of the organs of government and administration, and hence it is a procedure that is by definition non-judicial in character. However, the critical factor here is that while the procedure for administrative reconsideration is distinct from the judicial review procedure, it does not in and of itself place the administrative authorities to which it is applied beyond the reach of the procedure of judicial review as in relation to their acts. For the outcomes of administrative reconsideration are in general recognized as being themselves subject to judicial review, as in cases where affected parties are unable to accept unfavourable administrative reconsideration decisions and then resolve to challenge these through initiating administrative proceedings in the people's courts. In this way, there is preserved in the PRC, as in fidelity to the logic and inner coherence of the administrative law system, the full and complete accountability of the administrative authorities as subject to the control and jurisdiction of the people's courts as in accordance with the principles of the administrative procedure.

As a final matter, it is to be emphasized how the Administrative Procedure Law serves to establish the judicial review procedure, and the administrative law system that the procedure founds, as constituting a specific form of legal order applying to the administrative authorities, and one that is distinct from the legal orders comprising the rules and procedures which pertain to the criminal law and the civil law. For the judicial review procedure is not directed, as to its essential concern, towards the conditions of the participation of the administrative authorities in the various transactional relationships with non-state parties that form the subject-matter of the civil law, as say with contracts and with liabilities for civil damages arising from the violation by the administrative authorities of the rights and interests of citizens and other non-state parties. Nor is the judicial review procedure as such concerned with the investigation and prosecution of state officials who are guilty of acts of criminal wrong-doing, or with their punishment according to the

terms of the criminal law code, even though the application of the procedure may well occasion the exposure of corrupt practice and criminal misconduct on the part of state officials and so result in the bringing of criminal proceedings against the state officials involved.

In contrast to how it is with the civil procedure and the criminal procedure, the judicial review procedure is directed essentially towards the acts of the administrative authorities as involving the exercise of official powers, and towards the basis in law for the acts in question, but with this carrying no necessary implication of the presence of civil wrong or criminal misconduct. At the same time, the judicial review procedure proper provides in its essentials only for the remedies that are to do with the effecting of alterations to the form and substance of administrative action as which are specific to administrative law, and so, for example, judicial review does not as such constitute the procedural context in which the people's courts will move to impose criminal punishments. Thus it is that the judicial review procedure stands distinct as relative to the civil procedure and the criminal procedure, and thus it is that the Administrative Procedure Law is to be taken as standing independently and in its own right, as within the law of the PRC, alongside the landmark statutes which are foundational for the criminal law and the civil law divisions. For the criminal law, these are as follows: the Criminal Law of the People's Republic of China, as adopted at the 2nd Session of the 5th National People's Congress on 1 July 1979 and as subsequently adopted in revised form at the 5th Session of the 8th National People's Congress on 14 March 1997; [8] the Criminal Procedure Law of the People's Republic of China, as adopted at the 2nd Session of the 5th National People's Congress on 1 July 1979 and as subsequently adopted in revised form at the 4th Session of the 8th National People's Congress on 17 March 1996. [9] As for the civil law, the key statutes are the General Principles of the Civil Law of the People's Republic of China, as adopted at the 4th Session of the 6th National People's Congress on 12 April 1986, [10] and the Civil Procedure Law of the People's Republic of China, as adopted at the 4th Session of the 7th National People's Congress on 9 April 1991. [11]

ii. The Judicial Review Procedure

The Administrative Procedure Law was formally enacted by the National People's Congress on 4 April 1989, and it became effective in the PRC as from 1 October 1990. However, the procedure of judicial review that is described in the Administrative Procedure Law was already established in the PRC at the time of the enactment of the law, and, so far as the body of actual positive law is concerned, the procedure can be found referred to directly in the legal source materials dating from the years which follow the start of the reform period in 1978. To begin with, there is the State Constitution of the PRC as adopted at the 5th Session of the 5th National People's Congress as of 4 December 1982. [12] Here, it is to be noted that the State Constitution makes no explicit reference to judicial review as such, but that the principles of administrative law and judicial review, at least as to the accountability of the administrative authorities under law and in accordance with due legal procedure, are nevertheless to be found implicit in certain of its provisions. Thus Article 5 affirms, as a matter of general constitutional principle, that the state is to maintain the socialist legal order, and, in connection with this, it is provided that the public bodies associated with the state, as with the state organs and the armed forces, are to be subject to such constraints and limitations as are contained in the State Constitution and the laws. Then again, there is Article 41, which, in relation to the basic rights and duties of citizens, provides to the effect that ordinary citizens have the right to challenge state organs and their official personnel, and that state organs are required to answer the complaints and charges as brought against them by citizens in an open and responsible manner and may also be required to make payment of compensation. [13]

The problem with Articles 5 and 41 of the State Constitution, as in regard to administrative law and judicial review, is that while the articles do establish some basis in constitutional law for administrative law and judicial review, the terms of the articles are not such as to identify judicial review as a specific form of adjudicative procedure applying to state organs and state officials, and one that is distinct from the procedures belonging to the civil law and the criminal law. To have a sense of the distinctness of administrative law and judicial review as comprising a specific form of legal order applying to state organs and state officials, and as to the period prior to the Administrative Procedure Law of 1989, it is necessary to move from the constitutional law and to attend to the statutes and administrative

regulations where there is clear provision made for the procedure for judicial review as in relation to the acts of the administrative authorities. There is a large body of such legal source materials from the period up to 1989 to be reckoned with, and with these materials including, for example, the laws pertaining to such designated areas of administrative concern as follows: the safety of maritime traffic (1983), [14] the pharmaceutical industry (1984), [15] the administration of the grasslands (1985), [16] the regulation of metrology (1985), [17] the control of frontier health and quarantine (1986), [18] the postal services (1986), [19] the administration of water resources (1988), [20] the industrial state-owned enterprises (1988), [21] the regulation of standards (1988) [22] and the inspection of commodities for import and export (1989). [23]

With all these cases, the various laws concerned make explicit provision for the relevant administrative authorities to be considered subject to legal challenges as brought through the people's courts. The form of the judicial control of the administrative authorities as pointed to in the laws is that of the procedure for the judicial review of administrative action. Moreover, this is so in terms where the judicial review procedure is presented such that it stands as a procedure for the subjecting of the administrative authorities to the people's courts which is distinct, and formally separate, from the civil procedure and the criminal procedure. [24]

The legal source materials pre-dating the Administrative Procedure Law, as cited, mark a significant advance on the State Constitution as to the proper recognition of administrative law and judicial review, and of their particular characteristics, as embodying a specific form of legal order. However, the materials remain limited in their reference to judicial review, and they leave much unstated that is essential for completeness in the description of the judicial review procedure. Thus the terms of the laws referred to are such that they restrict the occasions for judicial review to the challenges made by affected parties to the application of administrative sanctions and penalties. As against this, there is the consideration that not all acts of the administrative authorities involve the application of sanctions and penalties, and that, as is in fact the case in the PRC, forms of administrative action other than the bare applying of administrative sanctions and penalties are accepted to be subject to judicial review as from the standpoint of administrative law. Going beyond this, there is nothing in the laws that indicates the precise grounds on which challenges are to be made by affected parties as to administrative action, or that indicates the precise grounds on which the people's courts are justified to intervene in administrative cases and to find against the administrative authorities. In addition

to the absence of the formal specification of the grounds for the application for judicial review, there is the absence also of any formal specification of the actual details of the principles of procedure, such as those to do with submissions, hearings and rules of evidence, which the people's courts are to follow for the purposes of the adjudication of administrative cases. Yet further, there is an absence from the laws cited of any reference to the matter of the remedies that are available to the people's courts in order to set right failures and improprieties in administrative action, and with this being as to the advantage of the affected parties. The principles relating to grounds, procedures and remedies constitute the core principles essential to the judicial review of administrative action as such, and it is these principles that are central to the authoritative elaboration of judicial review that comes in the Administrative Procedure Law of 1989.

The Administrative Procedure Law comprises 75 articles, and with these being organized in the form of eleven separate chapters. In Chapter 1 (Articles 1-10), there are set down the general principles that apply to the procedure for the judicial review of the acts of the administrative authorities. In Chapter 2 (Articles 11-12), there are identified the various administrative acts that are recognized to be eligible for judicial review as through the people's courts, in addition to the various administrative acts that are held to be beyond the control of the people's courts and hence that are to be considered as being not subject to the judicial review procedure. In Chapter 3 (Articles 13-23), there are elaborated the principles relating to the form of the jurisdiction that is to be exercised in administrative cases, as by the people's courts at the various levels within the hierarchic structure of the judicial system.

Moving on to Chapter 4 (Articles 24-30), there are set out the principles that relate to the position of the parties in administrative cases, while in Chapter 5 (Articles 31-36) there are set out the principles relating to the forms of evidence which are to be accepted by the people's courts for the purposes of the judicial review of administrative action. In Chapter 6 (Articles 37-42), there are stated the principles that relate to applications for judicial review and to the acceptance of such applications as by the people's courts. Chapter 7 (Articles 43-64) elaborates the principles that govern the hearing of administrative cases by the people's courts, and the decision of the same through the judgments that are to be issued by the people's courts in administrative cases. Chapter 8 (Articles 65-66) concerns the sanctions that are available to the people's courts for ensuring the execution of their judgments in administrative cases, and hence for ensuring the compliance with these on the part of

the applicant parties and the administrative authorities. In Chapter 9 (Articles 67-69), there are stated the principles that relate to the liabilities of the administrative authorities for the compensation of parties whose rights and interests have been unlawfully infringed upon through the acts of the administrative authorities in question. Chapter 10 (Articles 70-73) treats of the standing, and of the rights and duties, of foreign parties in respect of cases that come under administrative law. Finally, there are the two provisions stated in Chapter 11 as supplementary provisions. Thus Article 74 provides for the awarding of costs by the people's courts as against one or both of the parties in administrative cases and relative to the extent of their liabilities and responsibilities. As for Article 75, this provides that the Administrative Law was to become effective as of 1 October 1990.

The judicial review procedure described in the terms of the Administrative Procedure Law, as to the mechanics of the form of adjudication that it involves, is complex, and the particulars of it are not such as to permit its full and complete exposition in the context of the present paper. Suffice it to say, here, that the judicial review procedure is an adjudicative procedure as conducted by the people's courts at the various levels of their jurisdiction. As to the style of adjudication, this is one of adversarial presentation as on the part of the applicant parties as plaintiffs and on the part of the relevant administrative authorities as defendants. Concerning the form of jurisdiction exercised by the people's courts following the acceptance of administrative cases for their determination, this is a compulsory and inescapable jurisdiction as in regard to the administrative authorities. All this notwithstanding, there are two parts of the judicial review procedure that we shall treat of in some detail, in order to understand what is the very considerable extent of the control that the people's courts are held to exercise over the administrative authorities as in accordance with the procedure. First, there are the provisions regarding the administrative acts that are subject to judicial review and hence subject to judicial control, and with these provisions relating to the scope of judicial review. Second, there are the provisions to do with the remedies that are available to the people's courts as in administrative cases, and with these remedies being as relative to the accepted grounds for challenge to the administrative authorities as through the application by affected parties for the judicial review of their acts.

The specification of the acts of the administrative authorities that are subject to judicial review comes in Chapter 2 of the Administrative Procedure Law. It

is to be noted at once that the relevant administrative acts as specified include acts other than those to do with the imposition of administrative sanctions and penalties that, as we have explained, stands out as the principal context for the judicial review of administrative action as referred to in the positive legal source materials as prior to 1989. For there are included also in Chapter 2 of the Administrative Procedure Law such acts as the so-called administrative compulsory measures and the issuing of licences and permits. Further, the various administrative acts that are confirmed to be eligible for judicial review are not only acts of commission, as with the application of administrative sanctions and penalties. In addition, there are acts of omission, as where the administrative authorities are alleged to have failed to fulfil duties that are in law required of them. However, the key consideration with all the administrative acts at issue is that these are acts that are claimed to involve some defect in law, and where it is their unlawfulness as acts that renders them, and the responsible administrative authorities, subject to challenge through the people's courts and hence subject to the terms of the judicial review procedure.

The acts of the administrative authorities giving proper occasion for applications by affected parties to the people's courts for judicial review are summarized in Article 11 of the Administrative Procedure Law as follows: (i) administrative sanctions and penalties, as with detention orders, fines, revocations of licences and permits, orders for the suspension of business operations and confiscations of assets and property; (ii) administrative compulsory measures, as with the placing of restrictions on the liberty of persons and the seizure or freezing of assets and property; (iii) acts where, as it is claimed, the administrative authorities violate the independent decision-making rights and powers of the industrial enterprises; (iv) acts involving the failure of the administrative authorities to issue licences or permits to applicants, as who claim to be qualified to receive them, or involving the failure of the administrative authorities to respond adequately to due and proper applications for the same; (v) acts involving the failure of the administrative authorities to discharge their statutory duties of extending due and proper protection for personal and property rights as when legitimately requested to do so, or involving the failure of the administrative authorities to respond adequately to legitimate requests for this; (vi) acts where the administrative authorities fail to grant pensions and benefits, as when this is required under law; (vii) acts where, as it is claimed, the administrative authorities impose unlawful demands on parties as to the performance of duties and obligations; (viii) acts that result in the violation by the

administrative authorities of the general personal and property rights of parties. Article 11 provides further that the people's courts are able to follow the administrative procedure in respect of other like acts of the administrative authorities, as where there are explicit stipulations to this effect as contained in the standing laws and regulations.

It is evident from this that the terms of the Administrative Procedure Law establish that the greater part of the activities of the administrative authorities are to be considered as amenable to judicial review and thus, in this respect, as falling under the control of the people's courts. Nevertheless, there are limits to the acts of administrative authorities that are confirmed to be subject to the people's courts, as for the purposes of the judicial review of administrative action. These limits are underlined with Article 12 of the Administrative Procedure Law, where there are listed the acts of the administrative authorities that allow for no legal challenges from the affected parties as to the people's courts and, hence, that are such that they in effect exclude the possibility of their being subject to the judicial review procedure and so to the form of control by the people's courts imposed through the procedure. Thus it is stated that the people's courts are not permitted to accept administrative cases in respect of the following matters: (i) acts of the administrative authorities that have the standing of acts of state, such as acts to do with national defence and the conducting of diplomatic relations and foreign policy; (ii) acts of the administrative authorities that involve the promulgation of administrative regulations, lower status regulations, and other decisions and orders such as possess a binding effect in law; (iii) acts of the administrative authorities that involve decisions relating to the appointment and dismissal of official personnel, and relating to the rewarding and punishment of the same; (iv) acts of the administrative authorities where stipulations contained in the relevant statutory legislation provide that the decisions of the administrative authorities as to the acts, as in question, are to be considered as final.

As to the matter of grounds and remedies as in regard to judicial review, there is to be considered the detailed specification given in Article 54 of the Administrative Procedure Law as to the different judgments that may be made by the people's courts in administrative cases, and as to the substantive remedies that may be provided by the people's courts for the applicants, as plaintiffs, as through the judicial review procedure. First, it is open to the people's courts to find in favour of the administrative authorities, as defendants, and so through this to uphold the

administrative acts which are the subject of applications for judicial review. This form of judgment is to be made in cases where the people's courts conclude that the evidence on which the acts of the administrative authorities at issue are based is adequate, that the administrative acts involve a correct application of the relevant laws and regulations, and that the performance of the administrative acts has been in conformity with the due legal procedures.

Second, it is open to the people's courts to find in favour of the plaintiff parties, and in doing this to order the administrative authorities that are the defendants to annul in whole or in part the administrative acts subject to judicial review and to order the administrative authorities to undertake new, and remedial, administrative acts. This form of judgment is to be made in cases where the administrative acts at issue are considered by the people's courts to fail, and in consequence of this failure to stand as invalid in law. The failure of administrative acts occurs where the acts are held to be lacking in the evidence essential for their support, where the acts are based in an erroneous application of the relevant laws and regulations, where the acts are performed in violation of due legal procedures, and where the performance of the acts involves the administrative authorities in actions which are ultra vires or tainted through the abuse of powers. The third form of judgment that the people's courts are able to make in administrative cases, as stated in Article 54, comes in cases where it is held not that the administrative authorities have performed acts that fail through the absence of proper evidentiary, legal and procedural foundations, but rather that the administrative authorities have failed to perform, or have delayed in performing, acts which they are required to perform as a matter of legal obligation. Here, the administrative authorities are to be ordered by the people's courts to perform the acts in fulfilment of their legal obligations within a specified time period. Finally, there is the fourth form of judgment referred to in Article 54, and with this figuring in administrative cases that relate to applications for judicial review as in respect of administrative sanctions and penalties. In this context, the people's courts are to order the administrative authorities to set aside or to modify the administrative sanctions and penalties that are made subject to judicial review, as when it is determined that the administrative sanctions and penalties are in some way unfair.

The remedial aspect of judgments in administrative cases, as directed towards the situation of plaintiffs, is essential to the logic of the judicial review of administrative action. So also is it essential to that logic that the provision of

remedies is to be contingent on the defectiveness of administrative acts as in relation to the accepted grounds for judicial review. These grounds, and to restate what is laid down in the Administrative Procedure Law, consist in the absence of sufficient evidence, the erroneous application of laws and regulations, the violation of due legal procedures, the presence of conduct that is ultra vires and involving the abuse of powers, the non-performance of duties and obligations, and the presence of unfairness in the application of administrative sanctions and penalties. To be sure, the hearing of administrative cases may result in the discovery of misconduct on the part of administrative officials, and with this misconduct going beyond the defects in administrative action that relate to the accepted grounds for judicial review and with it necessitating a response from the people's courts which goes beyond the providing of effective remedies for the plaintiffs. Thus it is laid down in Article 56 of the Administrative Procedure Law that where the people's courts find that the administrative authorities and their official personnel are in breach of the code on administrative discipline, then the materials relating to this are to be passed on for investigation to the administrative authorities in question, to the relevant administrative authorities at the next higher level, or to the administrative authorities which are responsible for supervision and personnel discipline matters. As to where the people's courts find that crimes have been committed by official personnel, then the materials concerned are to be passed on to the administrative authorities responsible for public security or to the relevant office of the people's procuratorial authorities. Nevertheless, it remains the case that the exposure and punishment of such misconduct by official personnel are incidental to the judicial review procedure, and as to such of its aspects as scope, grounds and remedies. For and to repeat what we have earlier emphasized, administrative law and the judicial review procedure comprise a form of legal order applying to administrative authorities and official personnel that is quite distinct from the legal orders constituted through the civil law and the criminal law and through their respective litigation procedures. [25]

iii. The Judicial Review Procedure Considered

The Administrative Procedure Law of 1989 marks the decisive step in the establishing of the system of administrative law in the PRC, and with this reflecting the full extent of the development of the socialist form of legal order as an integral

part of the agenda that has been followed in the PRC since 1978 for the effecting of political and economic reforms. The chief merit of the administrative law system in the PRC lies in the impetus that has come with the advent of administrative law for the promoting, and the longer term realization, of the ends of the rule of law and of the limited constitutional form of state government. Here and in particular, it is to be observed that the administrative law system in the PRC appears to promise that the administrative authorities are to remain subject to legal constraints and limitations, as to the exercise of their powers, and that, as to the specific modalities for this, the institutions of government and administration are to remain accountable for their acts as before the people's courts and as under the terms of the judicial review procedure. The promise of this notwithstanding, there still stands out one major area of doubt regarding administrative law in the PRC. This is to do with the question as to whether the judicial review procedure in the PRC does in fact establish a legal-institutional framework sufficient for the real and effective judicial control of the government and administration, and hence for the real and effective legal constraining and limitation of their powers. In order to address this question, it is of the first importance to keep in mind certain of the defining purposes of the Administrative Procedure Law, as these are referred to in the statement given in Chapter 1 of its general principles. The purposes that are in this connection of crucial relevance, as laid down in Article 1, are those relating to the office of the people's courts as follows: first, the proper protection of the rights and interests of citizens, legal person entities and other like organizations, as the parties affected by administrative action; second, the proper regulation of the administrative authorities in the exercise of their powers and the performance of their duties as in accordance with the laws.

One evident respect where the form of judicial review procedure described in the Administrative Procedure Law is to be found imperfect, as in relation to its defining purposes, is that the control that it assigns to the people's courts over the administrative authorities is not a complete form of control. For, as we have seen, there are certain administrative acts that are excluded from the scope of the judicial review procedure, and that in consequence of this are held to fall outside the control of the people's courts. To repeat, these are the administrative acts falling within the four categories as follows: first, acts of state; second, administrative regulations and subordinate administrative norms; third, decisions on administrative personnel; fourth, acts of the administrative authorities where it is stipulated in the

relevant legislation that the administrative authorities concerned are to have an ultimate decision-making power.

Of these various administrative acts, it is surely only the acts belonging to the third category where the absence of the jurisdiction of the people's courts as for judicial review is to be considered uncontroversial, as from the standpoint of the defining purposes of the Administrative Procedure Law. For it is hardly essential for the protection of the rights and interests of parties affected by administrative action, or essential for the regulation of the conduct of the administrative authorities, that the people's courts are to exercise judicial review powers in respect of the terms and conditions of the service of administrative personnel. However, it is another matter entirely with the administrative acts that belong to the first, second and fourth categories. To begin with, it is plain that acts of state may affect profoundly the situation of ordinary citizens, legal person entities and other like organizations, and that acts of state may therefore carry grave and detrimental consequences for the rights and interests of such parties. Hence the exclusion of acts of state from the scope of the judicial review procedure imposes a substantial restriction on the people's courts in the protection of the rights and interests of parties affected by administrative action, as it also substantially restricts the people's courts in the regulation of the administrative authorities as to their duties and powers as in relation to the laws.

There are similar considerations involved with administrative regulations and subordinate administrative norms and with the acts of the administrative authorities to do with the issuing of these. For administrative regulations and administrative norms set the general policy objectives and frameworks for the administrative authorities, and in doing so they impact directly on the rights and interests of affected parties: with the result that their exclusion from the scope of judicial review must inevitably militate against the fulfilment by the people's courts of the defining purposes of the Administrative Procedure Law. Most serious of all in terms of the wider implications, there are the acts of the administrative authorities where the administrative authorities concerned are by statute law specified to be the final arbiters, and so where, in effect, the control of the people's courts as for the ends of administrative law is set aside as through the acts of the legislative power of the state government. Here, the exclusion of the relevant administrative acts from the scope of the judicial review procedure is such that this serves not only to restrict the competences of the people's courts, and in seeming

frustration of the Administrative Procedure Law as to its defining purposes. At the same time, it serves to undermine the formal separation of governmental powers, and so goes against the principles of the rule of law and the principles of constitutional government that, as we have argued, are to be thought of as being closely associated with the principles of administrative law as such.

The excluding of administrative regulations and other administrative norms from the scope of judicial review points to what is a further limitation of the Administrative Procedure Law, considered as an instrument for the control of government and administration. This is that the judicial review procedure involves no powers belonging to the people's courts to review the general policy intentions and directives of the administrative authorities. On the contrary, the judicial review procedure involves for the people's courts only the power to adjudicate cases arising from the substantive acts of particular and ascertainable administrative authorities, and with these as affecting the rights and interests of particular and ascertainable parties. Thus Article 41 of the Administrative Procedure Law provides that the adjudication of administrative cases by the people's courts requires that the following conditions are to be met: first, the presence of specific parties standing as plaintiffs and with lawful rights and interests violated by the acts of administrative authorities; second, the presence of specific administrative authorities to have standing as defendants; third, the presence of specific claims regarding the administrative acts that are to be reviewed, and with some factual basis existing for these; fourth, the presence of proper jurisdiction as exercised through the people's courts. No doubt, the conditions here for administrative cases are consistent with the ends of judicial review as a procedure directed towards the protection of the rights and interests of the parties as adversely affected by administrative action. However, these are conditions that render the judicial review procedure dependent, as to its operationalization, on the context set by the existence of plaintiffs, the infringement of plaintiff rights and interests, the performance of administrative acts and the agency of administrative authorities. In consequence of this, the judicial review procedure holds out the real prospect of remedies for parties aggrieved through administrative action, but with the form for the overall control of government and administration provided through the procedure being limited to the degree that it is context-determined in the respects to do with plaintiffs, plaintiff rights and interests, administrative acts and administrative authorities as referred to.

The final matter where the Administrative Procedure Law stands as imperfect, as to its defining purposes, relates to the judicial review procedure as a procedure where the people's courts are concerned with the lawfulness of the acts of the administrative authorities. This concern is fundamental for the people's courts, in the respect that deliberation as to the lawfulness, or the unlawfulness, of administrative acts is the critical determining factor, as for the people's courts, in their intervention to protect the rights and interests of the parties affected by administrative action and to regulate the activities of the government and administration. That the people's courts are to concern themselves with the lawfulness of administrative action is underlined with the statement contained in Article 54 of the Administrative Procedure Law as to the grounds for the application for judicial review, and as to the grounds for the decision of administrative cases as for or against the providing of remedies for applicant parties. Thus and to repeat, it is provided that the people's courts are to uphold the acts of administrative authorities where the acts are based in sufficient evidentiary materials, and based in the correct application of the relevant laws and regulations and in the correct application of the relevant due legal procedures. At the same time, it is provided that the people's courts are to set aside the acts of the administrative authorities where the acts at issue lack a sufficient evidentiary basis, where the acts involve an erroneous application of the relevant laws and regulations or a violation of the relevant due legal procedures, or where the administrative authorities exercise their powers ultra vires or otherwise abuse their powers. In addition, the people's courts are empowered to order the administrative authorities to fulfil their legal duties where there is failure of performance, and to order the setting aside of administrative sanctions and penalties where these are adjudged to be unfair.

The grounds for judicial review stated in Article 54 of the Administrative Procedure Law are such that, with the exceptions of the evidentiary basis for administrative acts and the unfairness of administrative sanctions and penalties, these are all grounds where the essential consideration for the people's courts is the degree of the fidelity of the administrative authorities to the established laws and regulations and to the established due legal procedures. It is clear that the law-focused form of the adjudication of administrative cases accords with the functions of judicial review understood as the proper protection of the rights and interests of parties affected by administrative action, and as the proper regulation of the administrative authorities in the exercise of their powers and the performance of

their duties. Even so, there remain inherent limitations to this. As to the regulation of the administrative authorities, the judicial review procedure is directed towards the matter of the consistency between administrative action and the established laws and regulations and established due legal procedures, but without this permitting the people's courts to pass as such on the form and substance of the legal norms and procedures by which the administrative authorities are to go in the performing of their official acts. As to the protection of the rights and interests of the parties affected by administrative action, the judicial review procedure is directed towards this, but with it being so only where the rights and interests of the parties possess some basis in conventional law or where these are implicit in the procedural law that applies to the administrative authorities. There is not, however, any recognition contained in the Administrative Procedure Law as to the legal relevance of independent normative standards of justice and political morality for the determination by the people's courts of the legitimate rights and interests of the non-state parties in administrative cases. The absence of this recognition is a significant feature of the administrative law system in the PRC, as this is founded in the Administrative Procedure Law, and, as we may observe, it is something that will come to weigh increasingly with the jurists and legal commentators given what is now the explicit commitment of the PRC, at the level of constitutional law, to the principles of human rights. [26]

There should be no overstating of the above considerations in regard to the grounds for the judicial review of administrative action, and as relating to the matter of human rights, in the proper assessment of the administrative law system in the PRC and as to its particularities and its imperfections. For the limitations on the grounds for judicial review that we have noticed are not in fact exclusive to the administrative law system in the PRC. Indeed, the grounds for judicial review accepted in the PRC have significant parallels with those that are accepted in other jurisdictions, and with the latter extending to the administrative law systems established in the Anglo-Saxon legal community where, as in the PRC, the judicial review procedure is applied as through the ordinary courts. This is true, for example, of judicial review in the United States, and true also of judicial review in the United Kingdom.

In connection with the grounds for the judicial review of administrative action accepted in the United States, there is the specification of the grounds on which the courts are able to review and negate the acts of the

administrative authorities as stated in Section 10(e) of the United States Administrative Procedure Act of 1946 and as restated in the subsequent amended forms of the Act. Here, it is provided, first, that the reviewing courts are to compel the administrative authorities to perform such acts as are held to be unlawfully withheld or unreasonably delayed. Second, it is provided that the acts, findings and conclusions of the administrative authorities are to be held to be unlawful, and to be set aside, by the reviewing courts in circumstances where these are adjudged to be: (i) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (ii) contrary to constitutional right, power, privilege, or immunity; (iii) in excess of statutory jurisdiction, authority or limitations, or lacking in statutory right; (iv) in violation of the required legal procedures; (v) unsupported by substantial evidence as in cases that are subject to the procedures on administrative hearings; (vi) unwarranted by the relevant facts as in cases where the facts concerned are subject to adjudication de novo as by the reviewing courts. As it is obvious, the specification of the grounds for the judicial review of administrative action, as set out in the US Administrative Procedure Law, contains within itself all the various grounds for judicial review that we have found to be referred to in Article 54 of the Administrative Procedure Law of the PRC. This is so, most particularly, with the grounds for judicial review as concerning the absence of proper evidence, the misapplication of or departure from laws and regulations, the disregarding of due legal procedures, the presence of ultra vires or abuse of powers, and the failure or delay in the performance of the acts that are in law required of the administrative authorities. [27]

As for the position in the United Kingdom, the standard point of reference as for the grounds for the judicial review of administrative action is the statement of the principles of judicial review given by Lord Diplock in the judgment of the House of Lords in the celebrated case Council of Civil Service Unions v. Minister for the Civil Service (1985). The three main grounds for judicial review identified by Lord Diplock are illegality, irrationality and procedural impropriety. The ground of illegality, as it is explained, is a ground that relates to cases involving a failure by the administrative authorities to understand correctly, or to give effect to, the law which regulates their powers. As to irrationality, this is a ground that is explained as relating to cases where the administrative authorities act in defiance of logic, or of accepted moral standards, and in this as contrary to the standpoint of sensible persons exercising their minds as to the matters at issue. With procedural

impropriety, this, for Lord Diplock, relates not only to cases where the administrative authorities fail to act with procedural fairness or fail to observe the basic principles of natural justice, but also to cases where the administrative authorities fail to observe the rules of procedure set down in the relevant legislative instruments. It is plain that the stated grounds of illegality, irrationality and procedural impropriety match closely the grounds for judicial review as stipulated in Article 54 of the Administrative Procedure Law of the PRC. The ground of illegality corresponds to what is said in Article 54 as regarding the erroneous application of laws and regulations, and also as regarding ultra vires and abuse of powers. The ground of irrationality corresponds, in its essential meaning, to the considerations in Article 54 to do with the proper factual evidentiary bases for administrative acts and with the idea of unfairness in the application of administrative sanctions and penalties. The ground of procedural impropriety is to be matched with what is provided for in Article 54 as to the violation of due legal procedures as a ground for judicial review, albeit that this in the terms of the Administrative Procedure Law appears to be rather narrowly a matter of the disregarding by the administrative authorities of the procedures that are laid down in the statute law. [28]

If there are parallels between the administrative law system of the PRC and administrative law in the United States and the United Kingdom, as to the grounds for the judicial review of administrative action, it remains the case that there stand out major differences as to the essential form of legal order in the PRC and the essential form of legal order obtaining in the United States and the United Kingdom. The most notable of these differences is the presence in the United States and the United Kingdom, and the absence from the PRC, of a strongly entrenched jurisprudence of individual rights that involves the appeal to fundamental liberal conceptions of justice and political morality which are rights-based in character. Thus it is that the Constitution of the United States famously includes as its first ten amendments the articles of the Bill of Rights, and with the practice of constitutional adjudication as conducted by the courts being very much directed towards deliberation about the meaning and application of principles to do with the rights of individual citizens. In contrast to the position in the United States, there is no written constitution in the United Kingdom. This notwithstanding, the rights and liberties of individuals have been central within the English common law tradition and, accordingly, have been given effect to by the United Kingdom courts, and in addition

to which the European Convention on Human Rights has since 1998 been incorporated as part of United Kingdom law. [29]

As to the matter of the jurisprudence of individual rights as in relation to the form of legal order in the PRC, the crucial consideration is that the dominant ideology in the PRC is not that of liberalism but stands rather as a socialist ideology, and where socialism is presented as something that is to be taken as necessary for the realization of what is referred to within that ideology as the highest ideal and ultimate goal of a society founded in communism. To understand this, it is to be emphasized that the official public doctrine in the PRC is that prescribed by the CPC as the power exercising rulership within the state and society, and with the core of this official public doctrine consisting in the so-called four cardinal principles. These provide in specific terms for the maintenance of the socialist road, the democratic dictatorship of the people, the leadership of the CPC, and the ideological primacy of Marxism-Leninism and Mao Zedong Thought. As such, the four cardinal principles underline the public commitment in the PRC to the building of the true socialist society, as the precondition for the final achievement of communism, and in doing this the four cardinal principles serve to set the controlling normative standard that is to be adhered to throughout the course of the implementation of the presiding public policy programme of socialist modernization.

In what is the current and authoritative version of the official public doctrine of the PRC, as set forth in the Constitution of the CPC as amended at the 16th National Congress of the CPC held during November 2002, it is affirmed that the PRC is now in the primary stage of socialism and that this stage of socialism is to continue to hold for a long period of time. As for the tasks specific to the primary stage of socialism, these in their fundamentals are stated to concern the development of the productive forces, adequate to meet the material and cultural needs of the people, as through the reform of the existing production relations and the existing legal-political superstructure. In line with this, the reforms effected in the PRC since 1978 stand out as reforms that, as from the standpoint of the official public doctrine, are to be understood as reforms that are essential for, but also as particular to, this the primary stage of socialism and its own defining conditions. This is to be taken as true, as per the official public doctrine, for the reforms directed towards the market economic order and the legal order in their socialist forms, and as directed towards the consequent concessions of rights to individuals within the economic and legal spheres and as here including the rights of individuals that are intended to be

secured by the people's courts as through the application of the judicial review procedure. In the context of the primary stage of socialism and in the light of its official public doctrinal explanation, however, the status of the rights of individuals as within the PRC is not one of absolutism, as it is with the Anglo-American liberal conceptions of justice and political morality. It is rather a conditional status, as where the normative force of the rights of individuals is left contingent on, and relative to, the desiderata of socialism and the advancement of the final end state of the perfectly realized communist society. To the extent that the current official public doctrine on individual rights is maintained, then it is to be expected that the prospects in the PRC for a law and jurisprudence based in the rights of individuals will continue to be limited, as it is to be expected also that there will remain in place major institutional and jurisprudential impediments to the incorporation of effective human rights standards as within the procedure for the judicial review of administrative action. [30]

Notes and References

*First published: Historia Juris, 14 (March 2006), pp. i-xxxiii.

1. The method adopted here in the discussion of administrative law and the judicial review procedure in the PRC is based in the critical exposition of legal source materials. The full Chinese-language texts of the legal source materials to which reference is made are to be found either in Zhonghua Renmin Gongheguo Fagui Huibian or in Zhonghua Renmin Gongheguo Guowuyuan Gongbao. The first named of these official publications is translated as The Compilation of the Statutes of the People's Republic of China and cited hereafter as Compilation, while the second named is translated as The Gazette of the State Council of the People's Republic of China and cited hereafter as GSC. The formal titles of the legal source materials are given first in English and then in Chinese phonetics, and with both the English translations and the Chinese phonetics versions being the authors' own. For a standard and authoritative account of administrative law and judicial review in the PRC, see: Lin Feng, Administrative Law Procedures and Remedies in China (Hong Kong and London: Sweet and Maxwell, 1996). For detailed treatment by the present authors of the subject, and as where the method of the critical exposition of legal source materials is followed, see: Charles Covell and Shahzadi Covell: 'The State Council and Administrative Law in the People's Republic of China', Jurisprudentia, 6

(March 1999), pp. 1-49; 'Judicial Review in the People's Republic of China: Selected Legal Source Materials from 1982 to 1989 (in two parts: Part 1)', Tsukuba University Journal of Law and Political Science, 37 (September 2004), pp. 1-69; 'Judicial Review in the People's Republic of China: Selected Legal Source Materials from 1982 to 1989 (in two parts: Part 2)', Tsukuba University Journal of Law and Political Science, 38 (March 2005), pp. 1-52.

2. Decree No. 16 of the President of the People's Republic of China.
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7. Decree No. 7 of the President of the People's Republic of China.
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8. For the Criminal Law of the PRC as in its revised version as of 1997, see:
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9. For the Criminal Procedure Law of the PRC as in its revised version as of 1996, see:
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11. Decree No. 44 of the President of the People's Republic of China.
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12. Constitution of the People's Republic of China.

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13. In specific terms, Article 5 of the State Constitution of the PRC provides that the state organs, the armed forces, the political parties, the state industrial enterprises and the other like public bodies are to act in conformity with the State Constitution and the laws, that the acts of such public bodies that contravene the terms of the State Constitution and the laws are to be investigated, and that the public bodies are to be denied any privileges which serve to place them beyond the scope of the State Constitution and the laws. As for Article 41, this provides specifically that citizens have the right to criticize state organs and their official personnel and to make suggestions to them, and that citizens have the right to bring complaints and charges against, and to expose, state organs and official personnel where these have violated the laws or have been in dereliction of their duties. It is provided further that state organs are required to answer the complaints and charges brought against them by citizens in an open and responsible manner, and that there is to be no suppression of such complaints and charges and no retaliation against the citizens bringing them. Finally, Article 41 provides that where citizens suffer losses in consequence of the infringement of their civil rights by state organs and official personnel, then the citizens concerned are to have the right to seek proper compensation as allowed for in law.

14. Decree No. 7 of the President of the People's Republic of China.
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Zhonghua Renmin Gongheguo Zhuxi Ling (di 61 hao).
Zhonghua Renmin Gongheguo Shui Fa.
Compilation, January-December 1988, pp. 583-95.

21. Decree No. 3 of the President of the People's Republic of China.
Law of the People's Republic of China on the Industrial State-Owned Enterprises.
Zhonghua Renmin Gongheguo Zhuxi Ling (di 3 hao).
Zhonghua Renmin Gongheguo Quanmin Suoyouzhi Gongye Qiye Fa.
Compilation, January-December 1988, pp. 721-34.

22. Decree No. 11 of the President of the People's Republic of China.
Standardization Law of the People's Republic of China.
Zhonghua Renmin Gongheguo Zhuxi Ling (di 11 hao).
Zhonghua Renmin Gongheguo Biaozhunhua Fa.
Compilation, January-December 1988, pp. 1109-14.

23. Decree No. 14 of the President of the People's Republic of China.
Law of the People's Republic of China on Import and Export Commodity Inspection.
Zhonghua Renmin Gongheguo Zhuxi Ling (di 14 hao).
Zhonghua Renmin Gongheguo Jinchukou Shangpin Jianyuan Fa.
Compilation, January-December 1989, pp. 275-81.

24. For the relevant provisions of these various laws where there is reference made to the judicial review of administrative action, see: Article 45 of the Maritime Traffic Safety Law; Article 55 of the Pharmaceutical Administration Law; Article 21 of the Grassland Law; Article 32 of the Metrology Law; Article 21 of the Law on Frontier Health and Quarantine; Article 40 of the Postal Law; Article 48 of the Water Law; Article 59 of the Law on the Industrial State-Owned Enterprises; Article 23 of the Standardization Law; Article 28 of the Law on Import and Export Commodity Inspection.

25. To bring out the distinctness of the judicial review procedure as in relation to the adjudicative procedures specific to the civil law and the criminal law, it may be noticed here in passing that the defects in administrative action that, for the purposes of the Administrative Procedure Law, are accepted to give grounds for judicial review and to occasion remedies in administrative law are, of course, to be distinguished from the sort of misconduct offences of state officials which, for the purposes of the Criminal Law, are recognized to constitute crimes and to involve criminal responsibility. Among the latter are the criminal offences falling within the category of bribery and embezzlement, as elaborated in Chapter 8 of the Criminal Law, and that are there referred to in connection with the following forms of the misconduct of state officials: embezzlement of public funds (Articles 382-383); misappropriation of public funds (Article 384); extortion and acceptance of bribes (Articles 385-389); retention of gifts accepted in the public service (Article 394). There are also the various crimes elaborated in Chapter 9 of the Criminal Law that are to do

with dereliction of duty on the part of state officials. These are presented as involving the causing of substantial losses to the state through negligence and through malpractice for personal gain and enrichment (Article 397), and with this as arising in such specified administrative contexts as the judicial office and law enforcement (Articles 399-402), the regulation of corporations and corporation shares (Article 403), the taxation system (Articles 404-405), the customs (Article 411) and the control of border crossings (Article 415).

26. The commitment to respect for human rights within the PRC is now enshrined in the State Constitution of the PRC, as through the constitutional amendments which were adopted at the 2nd Session of the 10th National People's Congress as of 14 March 2004. Thus it is that under the terms of the constitutional amendments, Article 33 of the State Constitution stands revised such that there is added to it a new paragraph affirming that the state is to respect and guarantee human rights. The provision on human rights supplements the existing provisions, as contained in the article, where it is affirmed that the nationals of the PRC are its citizens, that the citizens of the PRC are equal under the law, and that all citizens are entitled to the rights and subject to the duties set forth in the State Constitution and in the laws. The reference details for the March 2004 amendments to the State Constitution are as follows:
Amendments to the Constitution of the People's Republic of China.
Constitution of the People's Republic of China.
Zhonghua Renmin Gongheguo Xianfa Xiu Zheng An.
Zhonghua Renmin Gongheguo Xianfa.
GSC, 10 May 2004, Issue No. 13, Serial No. 1120, pp. 4-17.

27. For the text of the United States Administrative Procedure Act as in its original 1946 form, see: Bernard Schwartz and H.W.R. Wade, Legal Control of Government: Administrative Law in Britain and the United States (Oxford: Clarendon Press, 1972), Appendix I.

28. The principles of natural justice to which Lord Diplock makes reference are the principle that the parties to disputes are to be heard in their own cause (audi alteram partem), and the principle that the parties to disputes are not to be judge in their own cause (nemo judex in causa sua). It is to be observed that there is little or none of the

sense in the Administrative Procedure Law of the PRC of the breach of the principles of natural justice, as a ground for the judicial review of administrative action, as this is familiar from English law. For the text of the statement by Lord Diplock on the principles of judicial review in Council of Civil Service Unions v. Minister for the Civil Service (1985), see: Sir William Wade and C.F. Forsyth, Administrative Law, 9th edition (Oxford: Oxford University Press, 2004), Appendix 1.

29. For an excellent account of constitutional adjudication in the United States where its rights-based focus is brought out, see: Ronald Dworkin, Law's Empire (Cambridge, Massachusetts: Harvard University Press, 1986), Chapter 10. For discussion of human rights law in the United Kingdom and the impact of the 1998 Human Rights Act, see: A.W. Bradley and K.D. Ewing, Constitutional and Administrative Law, 13th edition (Harlow, England: Pearson-Longman, 2003), Chapter 19.

30. For the reference details for the Constitution of the CPC in its amended version as adopted at the 16th National Congress of the CPC as held in Beijing from 8 to 14 November 2002, see:
Constitution of the Communist Party of China (Zhongguo Gongchandang Zhangcheng), as amended and adopted at the 16th National Congress of the Communist Party of China on 14 November 2002. For the full Chinese text of this with an English translation in two parts, see: Beijing Review: 45 (19 December 2002), Supplement; 45 (26 December 2002), Supplement.

9. JUDICIAL REVIEW AND THE CIVIL SOCIETY QUESTION IN THE PEOPLE'S REPUBLIC OF CHINA*

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In the present paper, we are concerned with the era of political and economic reform in the People's Republic of China, or the PRC, that began with the historic 3rd Plenum of the 11th Central Committee of the Communist Party of China, or the CPC, which was held in Beijing from 18 to 22 December 1978. The aspect of the reform era in the PRC on which we focus attention is the endeavour of the leadership elites within the CPC and the state government to establish an effective rule of law, as the framework for social, political and economic organization. The form of the rule of law at issue here is that which is referred to in the PRC as the socialist legal order. The development of the socialist legal order has since 1978 been pointed to by the Party-State leadership as being crucial to the realization of the presiding public policy programme of socialist modernization, and, indeed, the socialist legal order has come to stand with the socialist market economic order as one of the essential component parts of the project that the leadership has set for itself of bringing about an authentic socialism with Chinese characteristics. As a reflection of this, the period since 1978 has seen a significant enlargement in the province of law and legislation in the PRC, and with there having taken place a continuous elaboration of legal forms and legal categories, as under the heads of constitutional law, civil and commercial law, administrative law, economic law, social welfare law, criminal law and the law of litigation procedure. Of the different parts of the law as thus specified, the body of administrative law has been prominent in the advancing of the agenda for political and economic reform in the PRC. It is the administrative law of the PRC, and more particularly the form of judicial review procedure that is foundational to it, that we discuss in the first two sections of this paper. After this discussion, we turn to consider in the third section of the paper the judicial review procedure in its relation to the question of the emergence in the PRC of what is recognizable as a condition of

civil society, and, in this context, we point to certain of what we take to be the imperfections of the judicial review procedure. [1]

i. The Basic Elements of Administrative Law in the PRC

In its broadest sense, administrative law is the law that applies to the administrative authorities belonging to the institutional sphere of government within the state, and in this application it is the law which relates to the tasks and functions, and the structure, of the administrative authorities and which as such serves to regulate the exercise of their powers. As to the first principles of administrative law, the principle that is fundamental is that the acts of the administrative authorities, as involving the exercise of powers, are assumed to require some basis and justification in law. The corollary of this is that, from the standpoint of administrative law, the administrative authorities are to be thought of as being capable of acting, and of exercising their powers, contrary to law and hence in the absence of a lawful basis and justification. Thus it is that the administrative authorities are to be thought of as being subject to challenge in the name of law by ordinary citizens, and by such other parties, as may claim to be adversely affected, or aggrieved, by the allegedly unlawful acts of the particular administrative authorities in question. The possibility of legal challenges to the administrative authorities, as to their acts involving the exercise of powers, presupposes the availability of some official procedure for the presentation of such challenges, and for the providing of remedies in the event that the challenges to the administrative authorities are upheld through this procedure. In general terms, the form of procedure here that has proved to be characteristic of administrative law systems, and that has come to embody the core element of administrative law as such, is a procedure of adjudication, and one where legal challenges to the acts of the administrative authorities are made and heard under the auspices of the organs pertaining to the judicial branch of government. This is the procedure known as the judicial review of administrative action, and with this being the procedure that provides for the acts of the administrative authorities to be reviewed, and where necessary negated, through the ordinary courts or through such other special courts as are designated as being responsible for proceedings in administrative law.

The principles of administrative law, and those of judicial review, are closely bound up with the principles pertaining to the ideal of the rule of law and with those pertaining to the ideal of constitutional government. As to the rule of law, it is to be observed that administrative law is directed towards the control through law of the acts of the administrative authorities, and that, in this, administrative law gives effect to the defining principle of the rule of law that the powers exercised by government are to stand as non-arbitrary powers and hence as powers which are to remain subject to legal constraints and limitations. As to the matter of constitutional government, it is to be observed that administrative law is based in the principle of the separation of the legislative, executive and judicial powers of government that is held to be central to constitutionalism. Thus the procedure of judicial review involves the administrative authorities, as bearing the executive powers of government, being rendered subject to the scrutiny of independent courts, and with the courts, as in their judicial office, applying in regard to the administrative authorities the provisions of laws which, as to the institutional mode of their adoption and alteration, fall within the competence of the legislative power as a power separate from the judicial and executive powers. Beyond this, there is the consideration that administrative law, as through its relation to the rule of law and constitutional government, bears directly on the ideal of human rights. For the principles of administrative law presuppose that individuals possess rights which are enforceable as against the institutions of state government, and that the powers of state government are to be exercised only where this is consistent with a due respect for the rights which are recognized to belong to ordinary citizens.

In the years since 1978, there has come to be established in the PRC what offers itself for attention as an operational system of administrative law. The advent of this administrative law system is significant in that it points to a forward development in the PRC running in the direction of the acceptance of the principles of the rule of law and constitutional government, and even, as is now the case, the acceptance of the principles of individual human rights. This is so notwithstanding the continuing absence from the PRC of multi-party democratic politics, and the continuing domination of the social, political and economic order by the CPC as through the maintenance of its monopoly rulership powers. The general significance of the system of administrative law in the PRC is underlined by the pervasiveness of administrative law principles as throughout the whole body of substantive law. In the classification of the parts of law adopted in the PRC, the administrative law is

presented and referred to as the law relating to the specific tasks and functions of public administration. Hence administrative law is taken to encompass the law relating to such matters as foreign affairs, public security, civil service personnel, education, public health, urban and rural planning, and protection of the environment. In the event, however, the administrative law system in the PRC is not to be understood so restrictively, as in terms of the designated administrative tasks and functions. For administrative law is the law applying to the administrative authorities and in regard to the exercise of their powers, and in the PRC the administrative authorities are everywhere engaged, as to the exercise of their powers, in the regulation of all the diverse aspects of the social, political and economic order. Thus it is that there is widespread recognition to be found given to the active engagement of the administrative authorities in the various regulatory frameworks that are provided for in the legislation pertaining to the administrative tasks and functions which come within the spheres of civil and commercial law, economic law and social welfare law.

In order to identify the fundamentals of administrative law in the PRC, it is essential to turn away from the substantive law that is directed to the particular tasks and functions of public administration, and to fasten attention on the statutes that serve to describe the general powers of the administrative authorities, but without restriction as to tasks and functions, and that serve to describe the general procedures to which the administrative authorities are subject in the exercising of their powers. For it is with these statutes that the component parts of administrative law are to be found present in an inclusive form and as comprising a unified system of law. The statutes at issue possess the normative force specific to law, since these are in all cases statutes that have the standing of laws which have been enacted by the National People's Congress, as the sovereign legislative power in the PRC, or which have been adopted by the Standing Committee of the National People's Congress. Among the relevant statutes, the most important are the law from 1994 concerning the liability of the administrative authorities for the payment of compensation, [2] the law from 1996 concerning the application of sanctions and penalties by the administrative authorities, [3] the law from 1997 concerning the supervision by the state government of the administrative authorities and their personnel, [4] the law from 1999 concerning the procedures for the reconsideration of the acts of the administrative authorities, [5] and the law from 2003 concerning the issuing of licences by the administrative authorities. [6] There is also the law that is

central for the purposes of this paper. This is the law stating the principles that relate to what is referred to as the administrative procedure, and to what is, in effect, the procedure for the judicial review of administrative action: the Administrative Procedure Law of the PRC, which was adopted at the 2nd Session of the 7th National People's Congress on 4 April 1989. [7]

The foundation of the system of administrative law in the PRC lies in the procedure for the judicial review of administrative action, as this is described in the Administrative Procedure Law. The main features of this judicial review procedure are straightforward to understand, and they may be summarized as follows. Thus it is provided that the administrative procedure - that is, the procedure for judicial review - is directed towards the so-called administrative cases. The latter cases arise when parties, whether citizens, legal person entities or other such like organizations, are aggrieved as on account of the concrete administrative acts of one or other of the administrative authorities, and being so aggrieved then proceed to make application to the ordinary courts for the judicial review of the administrative acts in question. The jurisdiction in administrative cases belongs to the system of the people's courts, as subject to the legal supervisory powers that are vested in what are known as the procuratorial authorities, and with this jurisdiction being exercised, as in accordance with the nature of particular administrative cases, by the basic people's courts, the intermediate people's courts, the higher people's courts or by the Supreme People's Court. The Administrative Procedure Law includes detailed provisions that relate to what are the complex aspects of the judicial review procedure, as with the provisions concerning the legitimate grounds for judicial review, the standing of the parties to administrative proceedings, the submission of cases to the people's courts, the form of adjudication involved and the substantive remedies available in administrative cases. This notwithstanding, the essential principle of the judicial review procedure remains simple: that is, the principle to the effect that the procedure forms a judicial or adjudicative procedure, and where the applicant parties as plaintiffs and the administrative authorities as defendants stand subject to the jurisdiction of the people's courts as for the purposes of the resolution of disputes which are centred on the lawfulness of administrative action.

ii. The Judicial Review Procedure in the PRC

The Administrative Procedure Law was enacted by the National People's Congress on 4 April 1989, and it became effective in the PRC as from 1 October 1990. However, the procedure of judicial review that is described in the Administrative Procedure Law was already established in the PRC at the time of the enactment of the law, and, so far as the body of actual positive law is concerned, the procedure can be found appealed to in legal source materials from the years following the start of the reform period in 1978. To begin with, there is the State Constitution of the PRC as adopted at the 5th Session of the 5th National People's Congress as of 4 December 1982. [8] Here, it is to be noted that the State Constitution makes no explicit reference to judicial review as such, but that the principles of administrative law and judicial review, at least as to the accountability of the administrative authorities under law and in accordance with due legal procedure, are nevertheless to be found implicit in certain of its provisions. Thus Article 5 provides to the effect that the public bodies associated with the state, as with the state organs and the armed forces, are to be subject to such constraints and limitations as are contained in the State Constitution and the laws. Then again, Article 41 provides to the effect that ordinary citizens have the right to challenge the state organs and their official personnel, and that the state organs are required to answer the complaints and charges brought against them by citizens in an open and responsible manner and may in addition be required to make payment of compensation. [9]

The problem with Articles 5 and 41 of the State Constitution, as in regard to administrative law and judicial review, is that while the articles do offer some basis in constitutional law for administrative law and judicial review, the terms of the articles are not such as to establish judicial review as a specific form of adjudicative procedure applying to state organs and state officials, and one that is distinct from the procedures belonging to the civil law and to the criminal law. To have a sense of the distinctness of administrative law and judicial review as comprising a specific form of legal order applying to state organs and state officials, and as to the period prior to the Administrative Procedure Law of 1989, it is necessary to move from the constitutional law and towards the statutes and administrative regulations where there is clear provision made for the judicial review procedure as in relation to the acts of the administrative authorities. There is a large

body of such legal source materials to be reckoned with, and with these including, for example, the laws pertaining to such matters as the safety of maritime traffic (1983), [10] the pharmaceutical industry (1984), [11] the regulation of metrology (1985), [12] the postal services (1986), [13] the industrial state-owned enterprises (1988) [14] and the maintenance of standards (1988). [15]

With all these cases, the various laws concerned make explicit provision for the relevant administrative authorities to be considered subject to legal challenges as brought through the people's courts. The form of the judicial control of the administrative authorities as pointed to in the laws is that of the procedure for the judicial review of administrative action. Moreover, this is so in terms where the judicial review procedure is presented such that it stands as a procedure for the subjecting of the administrative authorities to the people's courts which is distinct, and formally separate, from the civil procedure and the criminal procedure. [16]

The legal source materials pre-dating the Administrative Procedure Law, as cited, mark a significant advance on the State Constitution, as to the proper recognition of administrative law and judicial review, and of their particular characteristics, as embodying a specific form of legal order. However, the materials remain limited in their reference to judicial review, and they leave much unstated that is essential for completeness in the description of the judicial review procedure. Thus the terms of the laws referred to are such that they restrict the occasions for judicial review to the challenges made by affected parties to the application of administrative sanctions and penalties. As against this, there is the consideration that not all acts of the administrative authorities involve the application of sanctions and penalties, and that, as is in fact the case in the PRC, forms of administrative action other than the bare applying of sanctions and penalties are accepted to be subject to judicial review as from the standpoint of administrative law. Going beyond this, there is nothing in the laws that indicates the precise grounds on which challenges are to be made by affected parties as to administrative action, or that indicates the precise grounds on which the people's courts are justified to intervene in administrative cases and to find against the administrative authorities. In addition to the absence of the formal specification of the grounds for the application for judicial review, there is the absence also of any formal specification of the actual details of the principles of procedure, such as those to do with submissions, hearings and rules of evidence, which the people's courts are to follow for the purposes of the adjudication of administrative cases. Yet further, there is an absence from the laws cited of any

reference to the matter of the remedies that are available to the people's courts in order to set right failures and improprieties in administrative action, and with this being as to the advantage of the affected parties. The principles relating to grounds, procedures and remedies constitute the core principles essential to the judicial review of administrative action as such, and it is these principles that are central to the authoritative elaboration of judicial review that comes in the Administrative Procedure Law of 1989.

The Administrative Procedure Law comprises 75 articles, and with these being organized in the form of eleven separate chapters. In Chapter 1 (Articles 1-10), there are set down the general principles that apply to the procedure for the judicial review of the acts of the administrative authorities. In Chapter 2 (Articles 11-12), there are identified the various administrative acts that are recognized to be eligible for judicial review as through the people's courts, in addition to the various administrative acts that are held to be beyond the control of the people's courts and hence that are to be considered as being not subject to the judicial review procedure. In Chapter 3 (Articles 13-23), there are elaborated the principles relating to the form of the jurisdiction that is to be exercised in administrative cases, as by the people's courts at the various levels within the hierarchic structure of the judicial system.

Moving on to Chapter 4 (Articles 24-30), there are set out the principles that relate to the position of the parties in administrative cases, while in Chapter 5 (Articles 31-36) there are set out the principles relating to the forms of evidence which are to be accepted by the people's courts for the purposes of the judicial review of the acts of the administrative authorities. In Chapter 6 (Articles 37-42), there are stated the principles that relate to applications for judicial review and to the acceptance of applications by the people's courts. Chapter 7 (Articles 43-64) elaborates the principles that govern the hearing of administrative cases by the people's courts and the decision of the same through the judgments that are to be issued by the people's courts in administrative cases. Chapter 8 (Articles 65-66) concerns the sanctions that are available to the people's courts for ensuring the execution of their judgments in administrative cases, and hence for ensuring the compliance with these on the part of the applicant parties and the administrative authorities. In Chapter 9 (Articles 67-69), there are stated the principles relating to the liabilities of the administrative authorities for the compensation of parties whose rights and interests have been unlawfully infringed upon through the acts of the administrative authorities in question. Chapter 10 (Articles 70-73) treats of the

standing, and the rights and duties, of foreign parties in respect of cases that come under administrative law. Finally, there are the two provisions stated in Chapter 11 as supplementary provisions. Thus Article 74 provides for the awarding of costs by the people's courts as against one or both of the parties in administrative cases and relative to the extent of their liabilities and responsibilities. As for Article 75, this provides that the Administrative Law was to become effective as of 1 October 1990.

The judicial review procedure described in the terms of the Administrative Procedure Law, as to the mechanics of the form of adjudication that it involves, is complex, and the particulars of it are not such as to permit its full and complete exposition in the context of the present paper. Suffice it to say, here, that the judicial review procedure is an adjudicative procedure as conducted by the people's courts at the various levels of their jurisdiction, that the style of adjudication is that of adversarial presentation as on the part of the applicant parties as plaintiffs and on that of the relevant administrative authorities as defendants, and that the form of jurisdiction exercised by the people's courts following the acceptance of administrative cases for their determination is compulsory and inescapable as in regard to the administrative authorities. There are two parts of the judicial review procedure that we shall treat of in detail, in order to understand what is the very considerable extent of the control that the people's courts are held to exercise over the administrative authorities: first, there are the provisions concerning the administrative acts that are subject to judicial review, and hence subject to judicial control; second, there are the provisions concerning the remedies that are available to the people's courts as in administrative cases, and with these as relative to the accepted grounds for challenge to the administrative authorities as through the application for the judicial review of their acts.

The specification of the acts of the administrative authorities that are subject to judicial review comes in Chapter 2 of the Administrative Procedure Law. It is to be noted at once that the relevant administrative acts as specified include acts other than those to do with the applying of administrative sanctions and penalties that, as we have explained, stands out as the principal context for the judicial review of administrative action as referred to in the positive legal source materials as prior to 1989. For there are included also in Chapter 2 of the Administrative Procedure Law such acts as the so-called administrative compulsory measures and the issuing of licences and permits. Further, the administrative acts that are confirmed to be eligible for judicial review are not only acts of commission, as with the application of

administrative sanctions and penalties. In addition, there are acts of omission, as where the administrative authorities are alleged to have failed to fulfil duties that are in law required of them. However, the key consideration with all the different administrative acts at issue is that these are acts that are claimed to involve some defect in law, and where it is their unlawfulness as acts that renders them, and the responsible administrative authorities, subject to challenge through the people's courts and hence subject to the terms of the judicial review procedure.

The acts of the administrative authorities giving proper occasion for applications by affected parties to the people's courts for judicial review are summarized in Article 11 of the Administrative Procedure Law as follows: (i) administrative sanctions and penalties, as with detention orders, fines, revocations of licences and permits, orders for the suspension of business operations and confiscations of assets and property; (ii) administrative compulsory measures, as with the placing of restrictions on the liberty of persons and the seizure or freezing of assets and property; (iii) acts where, as it is claimed, the administrative authorities violate the independent decision-making rights and powers of the industrial enterprises; (iv) acts involving the failure of the administrative authorities to issue licences or permits to applicants, as who claim to be qualified to receive them, or involving the failure of the administrative authorities to respond adequately to due and proper applications for the same; (v) acts involving the failure of the administrative authorities to discharge their statutory duties of extending due and proper protection for personal and property rights as when legitimately requested to do so, or involving the failure of the administrative authorities to respond adequately to legitimate requests for this; (vi) acts where the administrative authorities fail to grant pensions and benefits, as when this is required under law; (vii) acts where, as it is claimed, the administrative authorities impose unlawful demands on parties as to the performance of duties and obligations; (viii) acts that result in the violation by the administrative authorities of the general personal and property rights of parties. Article 11 provides further that the people's courts are able to follow the administrative procedure in respect of other like acts of the administrative authorities, as where there are explicit stipulations to this effect as contained in standing laws and regulations.

It is evident from this that the terms of the Administrative Procedure Law establish that the greater part of the activities of the administrative authorities are to be considered as amenable to judicial review, and thus in this respect as falling

under the control of the people's courts. Nevertheless, there are limits to the acts of the administrative authorities that are confirmed to be subject to the people's courts, as for the purposes of the judicial review of administrative action. These limits are underlined with Article 12 of the Administrative Procedure Law, where there are listed the acts of the administrative authorities that do not admit of challenges from the affected parties as to the people's courts and, hence, that are such that they in effect exclude the possibility of their being subject to judicial review as through the administrative procedure. Thus it is stated that the people's courts are not permitted to accept administrative cases in respect of the following matters: (i) acts of the administrative authorities that have the standing of acts of state, such as acts to do with national defence and the conducting of diplomatic relations and foreign policy; (ii) acts of the administrative authorities that involve the promulgation of administrative regulations, lower status regulations, and other decisions and orders such as possess a binding effect in law; (iii) acts of the administrative authorities that involve decisions relating to the appointment and dismissal of official personnel, and relating to the rewarding and punishment of the same; (iv) acts of the administrative authorities where stipulations as contained in the relevant statutory legislation provide that the decisions of the administrative authorities as to the acts, as in question, are to be considered as final.

As to the question of grounds and remedies as in regard to judicial review, there is to be considered the detailed specification given in Article 54 of the Administrative Procedure Law as to the different judgments that may be made by the people's courts in administrative cases, and as to the substantive remedies that may be provided by the people's courts for the applicants, as plaintiffs, as through the judicial review procedure. First, it is open to the people's courts to find in favour of the administrative authorities, as defendants, and so through this to uphold the administrative acts that are the subject of applications for judicial review. This form of judgment is to be made in cases where the people's courts conclude that the evidence on which the acts of the administrative authorities at issue are based is adequate, that the administrative acts involve a correct application of the relevant laws and regulations, and that the performance of the administrative acts has been in conformity with the due legal procedures.

Second, it is open to the people's courts to find in favour of the plaintiff parties, and in doing this to order the administrative authorities that are the defendants to annul in whole or in part the administrative acts subject to judicial

review and to order the administrative authorities to undertake new, and remedial, administrative acts. This form of judgment is to be made in cases where the administrative acts at issue are considered by the people's courts to fail, and in consequence of this failure to stand as invalid in law. The failure of administrative acts occurs where the acts are held to be lacking in the evidence essential to their support, where the acts are based in an erroneous application of the relevant laws and regulations, where the acts are performed in violation of due legal procedures, and where the performance of the acts involves the administrative authorities in actions which are ultra vires or tainted through the abuse of powers. The third form of judgment that the people's courts are able to make in administrative cases, as stated in Article 54, results in cases where it is held not that the administrative authorities have performed acts that fail through the absence of proper evidentiary, legal and procedural foundations, but rather that the administrative authorities have failed to perform, or have delayed in performing, acts which they are required to perform as a matter of legal obligation. Here, the administrative authorities are to be ordered by the people's courts to perform the acts in fulfilment of their legal obligations within a specified time period. Finally, there is the fourth form of judgment referred to in Article 54, and with this figuring in administrative cases that relate to applications for judicial review as in respect of administrative sanctions and penalties. In this matter, the people's courts are to order the administrative authorities to set aside or to modify the administrative sanctions and penalties that are made subject to judicial review, as when it is determined that the administrative sanctions and penalties are in some way unfair.

The remedial aspect of judgments in administrative cases, as directed towards the situation of plaintiffs, is essential to the logic of the judicial review of administrative action. So also is it essential to that logic that the provision of remedies is to be contingent on the defectiveness of administrative acts as in relation to the accepted grounds for judicial review. These grounds, and to restate what is laid down in the Administrative Procedure Law, consist in the absence of sufficient evidence, the erroneous application of laws and regulations, the violation of due legal procedures, the presence of conduct that is ultra vires and involving the abuse of powers, the non-performance of duties and obligations, and the existence of unfairness in the application of administrative sanctions and penalties. However, the hearing of administrative cases may also result in the discovery of misconduct on the part of administrative officials, and with this misconduct going beyond the defects in

administrative action that relate to the accepted grounds for judicial review and with it necessitating a response from the people's courts which goes beyond the providing of effective remedies for the plaintiffs. Thus it is laid down in Article 56 of the Administrative Procedure Law that where the people's courts find that the administrative authorities and their official personnel are in breach of the code on administrative discipline, then the materials relating to this are to be passed on for investigation to the administrative authorities in question, to the relevant administrative authorities at the next higher level, or to the administrative authorities which are responsible for supervision and personnel discipline matters. As to where the people's courts find that crimes have been committed by official personnel, then the materials concerned are to be passed on to the administrative authorities responsible for public security or to the relevant office of the people's procuratorial authorities.

In this connection, it is to be emphasized how the Administrative Procedure Law serves to establish the administrative law as a specific form of legal order applying to the administrative authorities, and thus as something distinct from the legal orders comprising the rules and procedures that pertain to the criminal law and the civil law. To be sure, the civil law provides that the administrative authorities, and the official personnel, are accountable before the people's courts under the civil procedure and in respect of the regime of rights and obligations specific to civil law, as with contracts and with liabilities for civil damages arising from the violation of the rights and interests of citizens and other non-state parties. Likewise, the criminal law provides that the administrative authorities, and the official personnel, are accountable before the people's courts under the criminal procedure, as with the criminal misconduct of state officials involving bribery and embezzlement, negligent loss of public monies and malpractice for personal gain and profit. As against the civil procedure and the criminal procedure, however, there offers itself for attention in its full distinctness the judicial review procedure. For the concern of this procedure lies neither with the administrative authorities in their involvement in the various transactions and relationships with non-state parties that form the subject-matter of the civil law, nor with the investigation and prosecution of state officials who are guilty of acts of criminal wrong-doing and with their punishment according to the terms of the criminal law code. To the contrary, the judicial review procedure is directed essentially towards the acts of the administrative authorities as involving the exercise of official powers, and towards

the examining of the basis and justification in law for the acts in question (but with this carrying no necessary implication of civil wrong or criminal misconduct in the event that no proper legal basis and justification are found to exist). Moreover, the judicial review procedure provides, in its essentials, only for the remedies to do with the effecting of alterations to the form and substance of administrative acts that are specific to administrative law (but with this being quite separate from such outcomes as the awarding of civil damages or the imposing of criminal punishments). Thus it is that the Administrative Procedure Law stands independently and in its own right, as within the law of the PRC, alongside the landmark statutes that are foundational for the criminal law and civil law divisions: the Criminal Law of the PRC (1979), [17] the Criminal Procedure Law of the PRC (1979), [18] the General Principles of the Civil Law of the PRC (1986) [19] and the Civil Procedure Law of the PRC (1991). [20]

iii. The Judicial Review Procedure Considered and the Civil Society Question

The Administrative Procedure Law of 1989 marks the decisive step in the creation and establishment of the system of administrative law in the PRC. The establishing of the administrative law system reflects the full extent of the adoption, and development, of the socialist form of the rule of law as an integral part of the agenda that has been followed in the PRC since 1978 for the bringing about of fundamental political and economic reforms. The administrative law system is also bound up with what is now acknowledged to be a most notable outcome of the reform period. This is the emergence in the PRC of what stands, and flourishes, as a substantial civil society. As for the characteristics of the civil society that has come to form itself in the contemporary PRC, these are to be taken as being in agreement with the conceptualization of civil society which is now more or less conventional. This is the conceptualization where civil society is presented as forming a sphere of social order that gives effect to the principles of the economic market, and that, in consequence of this, gives effect to the regime of voluntary contract and the institution of private property which are essential for economic markets. It is also the conceptualization where civil society is presented as a sphere of social order that comprehends a plurality of free and independent associations, and that remains subject to an effective rule of law sufficient for the enforcement of all personal rights pertaining to

individuals, including all rights in property and by contract, and sufficient for the adequate regulation of all the various subordinate associations within society in their status as free and independent entities.

The sphere of social order, so characterized as civil society, is conceptualized further such that it is understood to be distinct from the state, and to possess a relative autonomy in respect of the state and the institutions of government through which the state organizes itself and acts in the exercise of its powers. In this, the condition of civil society, as relatively autonomous, is considered to involve the establishing of material impediments as to the arbitrary or unrestricted application of powers on the part of state and government, and with these impediments being explained as originating from within the autonomous structures and processes of civil society as these are determined through such factors as personal and property rights, freedom of contract and associational pluralism. The opposition as embodied within civil society to arbitrariness and the absence of restriction in the powers of state and government is of course something that is closely bound up with, and that is typically accounted for in reference to, the general normative principles concerning the rule of law and constitutional government which provide for the institutions of state and government to be maintained as subject to proper legal constraints and limitations. Included among these general normative principles are the principles to do with the basic rights of individuals. Thus it is that the condition of civil society is now linked together with the cause of human rights as inseparably as it is linked together with the ideal of the rule of law and the ideal of the constitutional form of statehood. The conceptualization of civil society here elaborated is the one that is encountered in the work of the recent commentators on the subject, and it is the one that is to be associated with the classic specification of civil society in its relation to the family and the state as provided by the German political philosopher G.W.F. Hegel (1770-1831) in his Philosophy of Right (1821). [21]

There is an important qualification that it is necessary to enter as in regard to the above conceptualization of civil society. This is that, in much of the current literature on the subject of civil society, it would appear to stand as controversial as to whether civil society is to be thought of as something distinct from the economic market, or whether civil society is to be thought of as comprehending the economic market and hence as comprehending the modes of economic enterprise and relationship which are aimed at the securing of profit and the generation of wealth. In the case of the PRC, however, there can be no doubt about the matter. For

civil society in the contemporary PRC has emerged and developed as the result of a reform programme where economic reform with a market-directed orientation has been a central, and indeed indispensable, component part. The main institutional context for the application of market principles in the economic sphere in the PRC has been with the reform of the industrial enterprises falling within the state sector. Essential to the process of state industrial sector reform has been the transition from a political command economic order, where the state held all rights of ownership and management control in the means of industrial production as on a sole and exclusive basis, and towards what is most appropriately described as a mixed economic order. As to the latter, this stands as a form of economic order where the state has maintained its overall ownership and management control of the so-called strategic industrial sectors, but where there has also been effected a qualification of unrestricted state ownership and management control of the means of industrial production as through the progressive extending of ownership rights and management control rights to non-state parties. [22]

The socialist market economic order that is hailed in the PRC as the outcome of the transition process, as from the political command economic order to the mixed economic order, has been such as to render the social and economic spheres autonomous in relative terms as from the state and the institutions of state government. As a manifestation of this, there has been witnessed from the 1980s onwards a great enlargement in the scope and extent of the private economic rights and interests of the sort which are conventionally pointed to as being among the fundamental prerequisites for a functioning civil society. This the condition of emergent civil society in the PRC is at present nowhere more clearly in evidence than with the proliferation of private enterprises, established either as the privatized successors to state-owned industrial enterprises or as enterprises created entirely through the initiative and capital investment of the private parties owning them, and with the consequent formation through all this of what is a burgeoning private enterprise sector. [23] The impact of the private enterprise sector on state and society in the PRC has been profound, and, in consideration of it, the private enterprise owners were to acquire the mandate of legitimacy as through their formal recognition by the Party-State leadership at the 16th National Congress of the CPC in November 2002. Thus the private entrepreneurs were there recognized to belong among the new dynamic social strata in the PRC that are now to be regarded as contributing positively to the development of the productive forces and that, in

consequence of this, are to be accommodated within the structure of the Party-State establishment, as in line with the terms of the Thought of the Three Represents which, as of November 2002, came to be accepted as an essential part of the official public doctrine of the CPC as this is embodied in its Constitution. [24] To underline further the newly legitimated position of the private entrepreneurs, the Thought of the Three Represents and the inviolability in law of private property rights were to be enshrined in the State Constitution of the PRC, as through the constitutional amendments which were adopted at the 2nd Session of the 10th National People's Congress as of 14 March 2004. [25]

If the state in the PRC has withdrawn its political command control of the social and economic spheres in favour of private rights and interests sufficient to allow for the emergence of a relatively autonomous civil society, it remains the case that the condition of civil society in the PRC is one where civil society has been to a large extent dependent on state action and where a strong state-civil society relationship has persisted, and most particularly so in the economic sphere. To some extent, this has followed from the maintenance by the state of its overall ownership and management control rights in the strategic industrial sectors. Of greater account is the fact that, in the PRC, it is the state, acting in furtherance of the policy projections of the Party-State leadership, that has initiated and overseen the development of the socialist market economic order, as through the deliberate modification of the prior existing political command economic order. So also is it of great account that the state has exercised overall direction of the socialist market economic order as through the subjecting of it, and up to and including the parts of it based in private ownership and management control rights, to a comprehensive regime of public administrative regulation. With this regulatory regime, the administrative law system has been a vital component. For it is the administrative law that in the PRC presents itself as the legal-institutional framework by means of which the state has acted to effect the transitions in the economic order essential to the general reform agenda, and then to maintain the consistent regulation of the activities of the individuals and organizations involved within, and constitutive of, the emerging civil society. Thus and in concrete terms, the administrative authorities pertaining to state and government regulate the social and economic spheres through the performing of official acts which are to have due legal status as to their form and substance, and which are to conform with, and to be subject to, the principles of due

legal procedure applying to them and in this including the procedure for the judicial review of administrative action.

Here, of course, the administrative law system has promoted the condition of civil society in the PRC, and this in conjunction with its promoting of the principles of the rule of law and constitutional government and those to do with the rights of individuals which, as we have indicated, are thought of as being contained within the concept of civil society. Thus it is that the administrative law system appears to promise that the administrative authorities are to remain subject to legal constraints and limitations as to the exercise of their powers. It promises further, as to the specific modalities for this, that the institutions of government and administration are to remain accountable for their acts as before the people's courts and, as under the terms of the judicial review procedure, accountable in such a way as to protect the lawful rights of individual citizens and non-state parties as relative to the administrative authorities. The promise of all this notwithstanding, there still stands out one major area of doubt regarding administrative law in the PRC. This is to do with the question as to whether the judicial review procedure in the PRC does in fact establish a legal-institutional framework sufficient for the real and effective judicial control of the government and the administration, and hence also for the real and effective legal constraining and limitation of their powers as in relation to the position of non-state parties and as consistent with the terms of the general civil society conceptualization. In order to address this question, it is of the first importance to keep in mind certain of the defining purposes of the Administrative Procedure Law, as these are made explicit in the statement given in Chapter 1 of its general principles. The purposes that are in this connection of crucial relevance, as laid down in Article 1, are those relating to the office of the people's courts as follows: first, the proper protection of the rights and interests of citizens, legal person entities and other like organizations, as the parties affected by administrative action; second, the proper regulation of the administrative authorities in the exercise of their powers and the performance of their duties as in accordance with the laws.

One evident respect where the form of judicial review procedure described in the Administrative Procedure Law is to be found imperfect, as in relation to its defining purposes, is that the control that it assigns to the people's courts over the administrative authorities is not a complete form of control. For, as we have seen, there are certain administrative acts that are excluded from the scope of the judicial review procedure, and that in consequence of this are held to fall

outside the control of the people's courts. To repeat, these are the administrative acts falling within the four categories as follows: first, acts of state; second, administrative regulations and subordinate administrative norms; third, decisions on administrative personnel; fourth, acts of the administrative authorities where it is stipulated in the relevant legislation that the administrative authorities concerned are to have an ultimate decision-making power.

Of these various administrative acts, it is surely only the acts belonging to the third category where the absence of the jurisdiction of the people's courts as for judicial review is to be considered uncontroversial, as from the standpoint of the defining purposes of the Administrative Procedure Law. For it is hardly essential for the protection of the rights and interests of parties affected by administrative action, or essential for the regulation of the conduct of the administrative authorities, that the people's courts are to exercise judicial review powers in respect of the terms and conditions of the service of administrative personnel. However, it is another matter entirely with the administrative acts that belong to the first, second and fourth categories. To begin with, it is plain that acts of state may affect profoundly the situation of ordinary citizens, legal person entities and other like organizations, and that acts of state may therefore carry grave and detrimental consequences for the rights and interests of such parties. Hence the exclusion of acts of state from the scope of the judicial review procedure imposes a substantial restriction on the people's courts in the protection of the rights and interests of parties affected by administrative action, as it also substantially restricts the people's courts in the regulation of the administrative authorities as to their duties and powers as in relation to the laws.

There are similar considerations involved with administrative regulations and subordinate administrative norms and with the acts of the administrative authorities to do with the issuing of these. For administrative regulations and administrative norms set the general policy objectives and frameworks for the administrative authorities, and in doing so they impact directly on the rights and interests of affected parties: with the result that their exclusion from the scope of judicial review must inevitably militate against the fulfilment by the people's courts of the defining purposes of the Administrative Procedure Law. Most serious of all in terms of the wider implications, there are the acts of the administrative authorities where the administrative authorities concerned are by statute law specified to be the final arbiters, and so where, in effect, the control of the

people's courts as for the ends of administrative law is set aside as through the acts of the legislative power of the state government. Here, the exclusion of the relevant administrative acts from the scope of the judicial review procedure is such that this serves not only to restrict the competences of the people's courts, and in seeming frustration of the Administrative Procedure Law as to its defining purposes. At the same time, it serves to undermine the formal separation of governmental powers, and so goes against the principles of the rule of law and the principles of constitutional government that, as we have argued, are to be thought of as being closely associated with the principles of administrative law as such.

The excluding of administrative regulations and other administrative norms from the scope of judicial review points to what is a further limitation of the Administrative Procedure Law, considered as an instrument for the control of government and administration. This is that the judicial review procedure involves no powers belonging to the people's courts to review the general policy intentions and directives of the administrative authorities. On the contrary, the judicial review procedure involves for the people's courts only the power to adjudicate cases arising from the substantive acts of particular and ascertainable administrative authorities, and with these as affecting the rights and interests of particular and ascertainable parties. Thus Article 41 of the Administrative Procedure Law provides that the adjudication of administrative cases by the people's courts requires that the following conditions are to be met: first, the presence of specific parties standing as plaintiffs and with lawful rights and interests violated by the acts of administrative authorities; second, the presence of specific administrative authorities to have standing as defendants; third, the presence of specific claims regarding the administrative acts that are to be reviewed, and with some factual basis existing for these; fourth, the presence of proper jurisdiction as exercised through the people's courts. No doubt, the conditions here for administrative cases are consistent with the ends of judicial review as a procedure directed towards the protection of the rights and interests of the parties as adversely affected by administrative action. However, these are conditions that render the judicial review procedure dependent, as to its operationalization, on the context set by the existence of plaintiffs, the infringement of plaintiff rights and interests, the performance of administrative acts and the agency of administrative authorities. In consequence of this, the judicial review procedure holds out the real prospect of remedies for parties aggrieved through administrative action, but with the form for the overall control of government and

administration provided through the procedure being limited to the degree that it is context-determined in the respects to do with plaintiffs, plaintiff rights and interests, administrative acts and administrative authorities as referred to.

The final matter where the Administrative Procedure Law stands as imperfect, as to its defining purposes, relates to the judicial review procedure as a procedure where the people's courts are concerned with the lawfulness of the acts of the administrative authorities. This concern is fundamental for the people's courts, in the respect that deliberation as to the lawfulness, or the unlawfulness, of administrative acts is the critical determining factor, as for the people's courts, in their intervention to protect the rights and interests of the parties affected by administrative action and to regulate the activities of the government and administration. That the people's courts are to concern themselves with the lawfulness of administrative action is underlined with the statement contained in Article 54 of the Administrative Procedure Law as to the grounds for the application for judicial review, and as to the grounds for the decision of administrative cases as for or against the providing of remedies for applicant parties. Thus and to repeat, it is provided that the people's courts are to uphold the acts of administrative authorities where the acts are based in sufficient evidentiary materials, and based in the correct application of the relevant laws and regulations and in the correct application of the relevant due legal procedures. At the same time, it is provided that the people's courts are to set aside the acts of the administrative authorities where the acts at issue lack a sufficient evidentiary basis, where the acts involve an erroneous application of the relevant laws and regulations or a violation of the relevant due legal procedures, or where the administrative authorities exercise their powers ultra vires or otherwise abuse their powers. In addition, the people's courts are empowered to order the administrative authorities to fulfil their legal duties where there is failure of performance, and to order the setting aside of administrative sanctions and penalties where these are adjudged to be unfair.

The grounds for judicial review stated in Article 54 of the Administrative Procedure Law are such that, with the exceptions of the evidentiary basis for administrative acts and the unfairness of administrative sanctions and penalties, these are all grounds where the essential consideration for the people's courts is the degree of the fidelity of the administrative authorities to the established laws and regulations and to the established due legal procedures. It is clear that the law-focused form of the adjudication of administrative cases accords with the

functions of judicial review understood as the proper protection of the rights and interests of parties affected by administrative action, and as the proper regulation of the administrative authorities in the exercise of their powers and the performance of their duties. Even so, there remain inherent limitations to this. As to the regulation of the administrative authorities, the judicial review procedure is directed towards the matter of the consistency between administrative action and the established laws and regulations and established due legal procedures, but without this permitting the people's courts to pass as such on the form and substance of the legal norms and procedures by which the administrative authorities are to go in the performing of their official acts. As to the protection of the rights and interests of the parties affected by administrative action, the judicial review procedure is directed towards this, but with it being so only where the rights and interests of the parties possess some basis in conventional law or where these are implicit in the procedural law that applies to the administrative authorities. There is not, however, any recognition contained in the Administrative Procedure Law as to the legal relevance of independent normative standards of justice and political morality for the determination by the people's courts of the legitimate rights and interests of the non-state parties in administrative cases. The absence of this recognition is a significant feature of the administrative law system in the PRC, as this is founded in the Administrative Procedure Law, and, as we may observe, it is something that will come to weigh increasingly with the jurists and legal commentators given what is now the explicit commitment of the PRC, at the level of constitutional law, to the principles of human rights. [26]

It is as well to avoid overstating the above considerations regarding the grounds for judicial review, and the matter of human rights, in the assessment of the administrative law system in the PRC and as to its particularities and its imperfections. For the limitations on the grounds for judicial review that we have noticed are not in fact exclusive to the administrative law system in the PRC. Indeed, the grounds for judicial review accepted in the PRC have close parallels with those accepted in other jurisdictions. This is true, for example, for the United States and the United Kingdom, in both of which jurisdictions the judicial review procedure is applied, as it is in the PRC, through the ordinary courts. Even so, it is still the case, as in respect of the examples cited, that there remain major differences as to the form of legal order in the PRC and that as obtaining in the United States and the United Kingdom. The most notable of these differences is the presence in the United States

and the United Kingdom, and the absence from the PRC, of a strongly entrenched jurisprudence of individual rights that involves appeal to fundamental liberal conceptions of justice and political morality which are rights-based in character. Here, the crucial factor is that the ruling ideology in the PRC stands as a socialist ideology, and where socialism is presented as something essential for the realization of what is endorsed within that ideology as the highest ideal and ultimate goal of a society founded in communism. It is this the official public doctrine of socialism that is to be taken as setting the final containing ideological framework in the PRC for the market economic order and for the legal order in their socialist form, and including the practice of the people's courts with the judicial review procedure. This, however, is a doctrine where the rights of individuals are, as it were, not absolute in their normative force, but are rather conditional as relative to the socialist desiderata. To the extent that this doctrinal position on individual rights is maintained in the PRC, then, it is to be concluded, the prospects for the full incorporation of human rights standards within the procedure for the judicial review of administrative action will remain limited, as will remain limited too the more general prospects within the PRC for the full flourishing of an active and substantial civil society. [27]

Notes and References

*First published: Tsukuba University Journal of Law and Political Science, 39 (September 2005), pp. 25-60.

1. The method adopted here in the discussion of administrative law and the judicial review procedure in the PRC is based in the critical exposition of legal source materials. The full Chinese-language texts of the legal source materials to which reference is made are to be found either in Zhonghua Renmin Gongheguo Fagui Huibian or in Zhonghua Renmin Gongheguo Guowuyuan Gongbao. The first named of these official publications is translated as The Compilation of the Statutes of the People's Republic of China and cited hereafter as Compilation, while the second named is translated as The Gazette of the State Council of the People's Republic of China and cited hereafter as GSC. The formal titles of the legal source materials are given first in English and then in Chinese phonetics, and with both the English translations and the Chinese phonetics versions being the authors' own. For a standard and authoritative account of administrative law and judicial review in the

PRC, see: Lin Feng, Administrative Law Procedures and Remedies in China (Hong Kong and London: Sweet and Maxwell, 1996). For detailed treatment by the present authors of the subject, and as where the method of the critical exposition of legal source materials is followed, see: Charles Covell and Shahzadi Covell: 'The State Council and Administrative Law in the People's Republic of China', Jurisprudentia, 6 (March 1999), pp. 1-49; 'Judicial Review in the People's Republic of China: Selected Legal Source Materials from 1982 to 1989 (in two parts: Part 1)', Tsukuba University Journal of Law and Political Science, 37 (September 2004), pp. 1-69; 'Judicial Review in the People's Republic of China: Selected Legal Source Materials from 1982 to 1989 (in two parts: Part 2)', Tsukuba University Journal of Law and Political Science, 38 (March 2005), pp. 1-52.

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7. Decree No. 16 of the President of the People's Republic of China.
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Zhonghua Renmin Gongheguo Xingzheng Susong Fa.
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8. Constitution of the People's Republic of China.
Zhonghua Renmin Gongheguo Xianfa.
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9. In specific terms, Article 5 of the State Constitution of the PRC provides that the state organs, the armed forces, the political parties, the state industrial enterprises and the other like public bodies are to act in conformity with the State Constitution and the laws, that the acts of such public bodies that involve contravention of the State Constitution and the laws are to be investigated, and that the public bodies are to be denied any privileges which serve to place them beyond the scope of the State Constitution and the laws. As for Article 41, this provides specifically that citizens have the right to criticize state organs and their official personnel and to make suggestions to them, and that citizens have the right to bring complaints and charges against, and to expose, state organs and official personnel where these have violated the laws or have been in dereliction of their duties. It is provided further in Article 41 that state organs are required to answer the complaints and charges brought against them by citizens in an open and responsible manner, and that where citizens suffer losses in consequence of the infringement of their civil rights by state organs and official personnel, then the citizens concerned are to have the right to seek proper compensation as allowed for in law.

10. Decree No. 7 of the President of the People's Republic of China.

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16. For the relevant provisions of the various laws as cited where there is reference made to the judicial review of administrative action, see: Article 45 of the Maritime Traffic Safety Law; Article 55 of the Pharmaceutical Administration Law; Article 32 of the Metrology Law; Article 40 of the Postal Law; Article 59 of the Law on the Industrial State-Owned Enterprises; Article 23 of the Standardization Law.

17. For the Criminal Law of the PRC as in its revised version as of 1997, see:
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thrust and direction of the recent thinking about civil society, see for example: Civil Society: Theory, History, Comparison, ed. John A. Hall (Cambridge: Polity Press, 1995); The State of Civil Society in Japan, ed. Frank J. Schwartz and Susan J. Pharr (Cambridge: Cambridge University Press, 2003).

22. For wide-ranging discussion of the economic reform programme in the PRC, as this has been centred on the reform of the state industrial sector, see: Shahzadi Covell: The Reform of the Industrial State-Owned Enterprises and its Impact on the Political-Administrative System in the People's Republic of China since 1978, PhD Dissertation in International Political Economy (Tsukuba, Japan: Graduate School of International Political Economy, University of Tsukuba, March 2001); The Corporation System in the People's Republic of China in its Practice and Operation: The Parent-Subsidiary Corporate Organizational Structure and the Framework for State Industrial Sector Reform, IPE Monograph No. 1, Monograph Series in International Political Economy: The Doctoral Program in International Political Economy, University of Tsukuba (Tsukuba Science City, Japan: January 2002).

23. In connection with the rise of the private enterprises in the PRC during the reform era, see: Charles Covell and Shahzadi Covell, 'The Law of the Individual-Exclusive Funded Enterprises and the Private Enterprise Sector in the People's Republic of China', Tsukuba University Journal of Law and Political Science, 34 (March 2003), pp. 1-95.

24. For the details of the Thought of the Three Represents, as per its inclusion in the Constitution of the CPC as at the 16th National Congress of the CPC held in Beijing from 8 to 14 November 2002, see:
Report Delivered by Jiang Zemin at the 16th National Congress of the Communist Party of China on behalf of the 15th National Congress of the Communist Party of China as of 8 November 2002, and entitled:
Build a Well-Off Society in an All-Round Way and Create a New Situation in Building Socialism with Chinese Characteristics.
Quanmian Jianshe Xiaokang Shehui Kaichuang Zhongguo Tesi Shehui Zhuyi Shiye Xin Jumian.
Renmin Ribao (People's Daily), 18 November 2002, pp. 1-4.

Constitution of the Communist Party of China (Zhongguo Gongchandang Zhangcheng), as amended and adopted at the 16th National Congress of the Communist Party of China on 14 November 2002. For the full Chinese text of this with an English translation in two parts, see: Beijing Review: 45 (19 December 2002), Supplement; 45 (26 December 2002), Supplement.

25. The Thought of the Three Represents is affirmed to comprise part of the official public doctrine in the PRC in the now amended form of the seventh paragraph of the Preamble to the State Constitution. Article 13 of the State Constitution provides in its amended version that the lawful private property of citizens is inviolable, and that the state is to protect according to law the right of citizens to own and to inherit private property (albeit that it is allowed that the state may, in the public interest, appropriate or requisition the private property of citizens for its own use, as in accordance with the laws and subject to proper compensations). The reference details for these and the other amendments to the State Constitution as adopted on 14 March 2004 are as follows:
Amendments to the Constitution of the People's Republic of China.
Constitution of the People's Republic of China.
Zhonghua Renmin Gongheguo Xianfa Xiu Zheng An.
Zhonghua Renmin Gongheguo Xianfa.
GSC, 10 May 2004, Issue No. 13, Serial No. 1120, pp. 4-17.

26. Under the terms of the amendments to the State Constitution as of 14 March 2004, Article 33 stands revised such that there is added to it a new paragraph affirming that the state is to respect and guarantee human rights. The provision on human rights supplements the existing provisions, as contained in the article, where it is affirmed that the nationals of the PRC are its citizens, that the citizens of the PRC are equal under the law, and that all citizens are entitled to the rights and subject to the duties set forth in the State Constitution and in the laws. For the reference details for the March 2004 constitutional amendments, see note 25 above.

27. The official public doctrine in the PRC is that prescribed by the CPC as the power exercising rulership within the state, and with the core of this public doctrine consisting in the so-called four cardinal principles. These provide for the maintenance of the socialist road, the democratic dictatorship of the people, the

leadership of the CPC, and the ideological primacy of Marxism-Leninism and Mao Zedong Thought. As such, the four cardinal principles underline the public commitment in the PRC to the building of the true socialist society, as the precondition for the final realization of communism, and in doing this the four cardinal principles serve to set the ultimate normative standard that is to be adhered to throughout the course of the unfolding of the public policy programme of socialist modernization. In the current version of the official public doctrine of the PRC, as set forth in the Constitution of the CPC as amended in November 2002 at the 16th National Congress of the CPC, it is affirmed that the PRC is now in the primary stage of socialism, and that this stage of socialism will remain in being for a long period of time. As for the tasks specific to the primary stage of socialism, these in their essentials are stated to concern the development of productive forces, adequate to meet the material and cultural needs of the people, as through the effecting of the reform of the existing production relations and the superstructure. In line with this, the principal reforms effected in the PRC since 1978, as with the ones relating to the economic sphere and the legal sphere and relating to the concession of rights within these spheres, stand as reforms that are to be understood to be necessary for, but also as particular to, this the primary stage of socialism and its own defining conditions. Thus it is that it is suggested that the status of the rights of individuals, as within the PRC, is not one of absolutism, as with the prevailing Western liberal conceptions of justice and political morality, but is rather a conditional status as relative to the desiderata of socialism and to the advancement of the final end state of the perfectly realized communist society. (As regarding liberal conceptions of justice and political morality, it is to be noted that the official public doctrine of the PRC is such that the project of socialist modernization is quite explicitly opposed to what is referred to as bourgeois liberalization.) For reference details for the Constitution of the CPC in its amended version as of November 2002, see note 24 above.