

East is East and West is West: can China's judicial process meet ours?

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1 Constitutional roots: differences or similarities

The People's Republic of China ("PRC") is a Communist state with a written constitution providing for independence of the judiciary. The unwritten constitution of the politically diverse United Kingdom has historically maintained the tradition of separation of powers, written into the Chinese system whereby the state, PRC or UK, has a separate Executive, Legislature and Judiciary, providing checks and balances on each other. The aim of both forms of constitution is to ensure the rule of law and for the courts to operate to resolve disputes without influence (or, in the Chinese system, undue influence) from any external source.

Unlike the strictly drawn lines set out in the PRC constitution, until recently there was a blurring between the lines of the UK Executive (the Government), whose members are drawn the Legislature (Parliament), and the judiciary through the office of the Lord Chancellor: a Cabinet Minister, a member of the House of Lords and head of the Judiciary.

This apparent anomaly was removed by the passage of the Constitutional Reform Act 2005, followed by the birth of the Judicial Appointments Commission which, since April 2006, has taken over the power to appoint judges, leaving the Lord Chancellor out of the process.

After generations of polemic by constitutional scholars about the blurring of the doctrine of separation of powers, the English judiciary is appointed independently and transparently: no more nodding in the right direction; no more tapping on the shoulder of merit. However, we now we have a recently developing tsunami of constitutional concern, ready to roll over its peak and turn towards the shores of judicial powers. Given that the role of the judiciary in this country is to interpret the law (not necessarily so in China where the law is as written¹), the further concept of the sovereignty of Parliament comes into the equation. In this month's edition of *Counsel*, the Attorney General² moots "the possibility that our courts could, in the future, identify constitutional principles so fundamental that legislation in breach of

¹ In practice, PRC judges give general interpretations of legislation which have the same effect as legislation and, therefore, must be taken into account in any legal argument. Justice Kong Xiangjun, Chief Judge of the Intellectual Property Tribunal, Supreme People's Court (SPC) of the PRC: *Intellectual Property Enforcement in China*, 2011; presentation, U. Washington School of Law

² Dominic Grieve QC MP, *Counsel*. February 2013, 23-24: www.ago.gov.uk

those principles would not be enforced by the courts.” However, it remains his view that, “... as long as the House of Commons remains a democratically elected assembly ... the Courts would have a duty to apply Parliament’s legislation, although judges might always exercise the right to resign”. He was referring to the effect of EU law and whether its tsunami will crash down on the sovereignty of the Parliament of the UK. Were this concept to be applied to the Chinese judiciary, this would be tantamount to a revolution. The constitution is as it is written.

2 Recruitment

The recruitment of judges in England and Wales is now a transparent process: the vacancies are advertised and selection of the most suitable candidate will lead to an appointment. The principles underlying the role of a judge are set out on the website of the Judiciary of England and Wales (2012)³:

"It is vitally important in a democracy that individual judges and the judiciary as a whole are impartial and independent of all external pressures and of each other so that those who appear before them and the wider public can have confidence that their cases will be decided fairly and in accordance with the law. When carrying out their judicial function they must be free of any improper influence. Such influence could come from any number of sources. It could arise from improper pressure by the executive or the legislature, by individual litigants, particular pressure groups, the media, self-interest or other judges, in particular more senior judges."

On that basis, the following should be a quotation from an article about the appointment of the Chinese judiciary:

Judges and senior lawyers admit that the system under which they are appointed is riddled with corruption and open to widespread abuse ... [There was a call] to end the "secret soundings", whereby judges and senior lawyers are consulted on the suitability of judicial candidates⁴ ... growing concern about the unrepresentative background of the judiciary had become more acute because of the "ten-fold" increase in the size of the judiciary since the 1970s ... merit is not the key factor in legal promotions.

The position in China is, in fact, along the lines of the combined process of bureaucracy and internally determined meritocracy used in our judicial recruitment process since 2006. Most internet searches relating to the appointment of the judiciary in the PRC led to extra-legal judicial processes: “*Happy Girls Judge Quits After Zeng Yike Enters Final 20 ... many netizens support him and criticize her ability/looks ... Gao Xiaosong is the most critical judge on China’s Got Talent.*” Despite that difficulty, it is clear that the process for appointing judges in the PRC is

³ www.politics.co.uk/reference/judicial-independence

⁴ Factors Affecting the Decision to Apply for Silk and Judicial Office: 2000, Lord Chancellor's Department. **Malleson, K and Banda F**

one in which the pervasive influence of the Party is fundamental⁵. This is not a concept which is known in England. However, it is not just China which is known for political meddling in the appointment of its judges. At the other end of the political spectrum, a candidate for an American judicial appointment must be an attorney with the degree of JD (Juris Doctor), have passed his state's bar examinations and have a significant amount of legal experience in practice. Before applying, the candidate is reminded that "this is a very competitive field and that you will need political support to be appointed or elected. Initially, you will also need to impress judicial nominating commission members, especially for state judgeships."

It might be argued that, until the time of the PRC's shift towards global trade development from the 1970s, with the consequent potential for increase in litigation across all bands of the spectrum, there was no need for judges to have any particular legal background and very few were qualified in the law. The required experience was that of administration of the court process. After the establishment of the People's Republic of China on 1 October 1949, under the leadership of Mao Zedong, all aspects of the law were administered by the party and, as is still recognized in the military courts, by the military. In the early days of the state and particularly in the period of the cultural revolution from 1966 – 1976, there were dark days for the rule of law. Since Mao's death, there have been revisions of the constitution, allowing for a mixed economy co-existing with Communist principles, widely developing international business links and the ability of individuals to pursue their own fortunes. There is strict adherence to every aspect of the functions and qualifications of judges as contained in the constitution as set out in the Judges' Law, revised in 2001, albeit subject to interpretation as to how much power the state can, and does, apply to the operation of the law.

The changes in judicial functions in the PRC and application of externally recognized standards arguably derive from the interactions with foreign individuals, businesses and institutions. Until the early 1980s, the role of a judge was largely administrative. Appointments were made from military personnel or court clerks in reliance on court experience rather than any formal legal education. The professionalization of the judiciary is a process which started as recently as the mid-1990s. The current Judges Law (2001) provides for judges to have a law degree or to have passed the state judicial examination with higher qualifications and experience required for a judge of the Supreme People's Court. Even so, there is a limited number of practising lawyers who progress to the judiciary. The civil service salary and benefits are not attractive to lawyers in private practice in the mixed economy although there may be a greater for those practising in the Procurator section of the legal hierarchy.

"Given that the pay for judges is low and that some local courts even have to rely on court fees...to pay for salaries and benefits due to the lack of funding from local governments, the judicial profession in [the PRC] does not nearly garner the respect and social status it deserves"⁶.

⁵ China Law and Governance Review, 2006: www.chinareview.info

⁶ www.chinalawedu.com/news/2005

3 Good judge, bad judge

Regardless of how the appointment was made, it has historically been the case, as well as being enshrined in the law, that a judge in the Courts of England and Wales holds office subject to good behaviour⁷. No English High Court or Court of Appeal judge has ever been removed from office under these powers⁸. One of the continuing powers of the Lord Chancellor is the removal of Circuit and District Judges from post, subject to the agreement of the Lord Chief Justice. The website for the Judiciary of England and Wales refers to the exercise of judicial power to dismiss having been exercised twice. The cases appear to be:

1983: Judge Bruce Campbell was dismissed from office after convicted of smuggling 125 litres of whisky and 9,000 cigarettes into Britain on his private yacht. According to *The Telegraph*, Judge Campbell elected to be dismissed as, in his case, resignation meant that he would lose his accrued pension entitlement⁹.

2013: Peter Joyce, QC, Recorder was removed from judicial office for having brought the judiciary into disrepute. He practised as a Barrister between 1 January 2011 and 30 June 2011 without having a practising certificate issued by the Bar Council, which constitutes a criminal offence pursuant to Section 14 of the Legal Services Act 2007. [He] was found guilty of professional misconduct by a Disciplinary Tribunal of the Council of the Inns of Court, and failed to inform the Lord Chief Justice of this matter. In light of this finding the Lord Chancellor and Master of the Rolls have concluded that his actions brought the judiciary into disrepute and have removed him from judicial office.¹⁰

The judges of England and Wales are no less susceptible than other people to the potential for wrongdoing. The public have the right to complain through the Office for Judicial Complaints about the conduct of judges but there are lesser sanctions available than that of dismissal. Judges have taken the route of resignation after: “they have been convicted of driving under the influence of alcohol; they have been found to have sexually harassed their female staff; they have been deemed, by the incompetence of their judgments, to have ‘weakened public confidence in the whole judicial process’”¹¹. Some are able to avoid the process of inquiry and sanction if their health prevents them from participating in the process. In 2008, much publicity attached to the activities of an immigration judge who had employed an illegal immigrant as a cleaner. He was too ill to participate in the enquiry into his conduct and much public (i.e. newspaper) concern was raised about his entitlement to sick pay during his period of absence. In 1998, HH Judge Richard Gee was tried in connection with an alleged mortgage fraud in his pre-appointment practice as a

⁷ Supreme Court Act 1971, s.11(3): A person appointed to [judicial office] shall hold that office during good behaviour, subject to a power of removal by Her Majesty on an address presented to Her by both Houses of Parliament.

⁸ www.judiciary.gov.uk

⁹ The Telegraph, 1 October 2006, Alasdair Palmer

¹⁰ <http://judicialcomplaints.judiciary.gov.uk/publications/news.htm>

¹¹ Ibid.

solicitor. When the jury failed to reach a verdict, a *Nolle Prosequi* was entered because of the judge's health. He then resigned from the Bench.

No-one with anything to do with the legal profession can believe that it is easy to be a judge. There is always one party who is dissatisfied with the outcome. Of course, in the PRC, the state is also an interested party and there is a perception that the state has the supervening interest: it must not be disappointed.

Lord Judge summarises the position in England:

"Many qualities are required of a judge... He or she must of course know the law, and know how to apply it, but the judge must also be wise to the ways of the world. The judge must have the ability to make a decision.

Decisions can be profoundly unpleasant: for example, to say to a mother that her children can be taken away from her, or to say to an individual that he is going to go to prison for the rest of his life.

Judges must have moral courage – it is a very important judicial attribute – to make decisions that will be unpopular with the politicians or the media and the public, and indeed perhaps most importantly of all, to defend the right to equal treatment before the law of those who are unpopular at any given time.

...But however you draw up the list, and in whatever order, gender, colour of your skin, religious belief, and social origins are all utterly irrelevant. It is you who is the judge."¹²

What then happens in China? BBC news reported in January 2011 that two judges had been fired and a court official suspended in China for having sentenced a man to life in prison for evading road toll fees in a case which highlighted public concern about the high cost of road tolls. This case highlights the recent tendency of the Chinese state institutions to bow to public concern and it shows a readiness, in this case at least, to tackle the problem of the "rogue" judge. Although this case generated much publicity, it is only part of a "responsibility system" which applies, or is supposed to apply, sanctions to judges for improper dealing with parties in court and neglect of duty, a wide concept which inevitably holds the political implication of whether there is an overriding duty to the state.

Whereas the system of appeals in England is designed to ascertain whether there is a legal error, there would have to be a significantly high proportion of successful appeals to alert the need for an investigation into the ability of a judge to exercise his functions properly. The Chinese responsibility systems apply to judges who have made legal errors but the problem is: who decides whether there is such an error? It might be considered to be a perverse application of the law where, given that there are no formal law reports and no reliance on precedent as in the common law system, a judge might be susceptible to sanction because an appeal court makes a different interpretation of the law. This is what happens, even though not permitted officially. Permitted or not within the Judge's Law, a judge may be fined or have an

¹² Lord Judge, LCJ, speaking at Equality in Justice Day, 2008, www.judiciary.gov.uk

adverse comment placed in his career file. The rationale for the continuing use of responsibility systems is historic, dating back to the imperial system of law, practised before the inception of the Communist state¹³.

4 Loyalty

Once the appointment has been made, the critical role of the judiciary within the political entity that is the state is enshrined in the oath of allegiance. There is a secular form of affirmation but the traditional oath is in two parts. The first recognizes the Queen as the Head of State and the second the duty to upholding the law:

I, [], do swear by Almighty God that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, her heirs and successors, according to law.

I, [], do swear by Almighty God that I will well and truly serve our Sovereign Lady Queen Elizabeth the Second in the office of [], and I will do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill will.

Swearing allegiance to Her Majesty does not give her any right to interfere with the judicial process.

Since 2012, Chinese lawyers have been required to take an oath of allegiance to the Communist Party when renewing their practising certificates. The translation in *The Lawyer* (22 March 2012) is: *"I pledge to faithfully [sic] fulfill the sacred mission of a worker of the socialist system of laws with Chinese characteristics, be loyal to the country, loyal to the people, support the leadership of the Communist Party of China, support the socialist system... and strive for the cause of socialism with Chinese characteristics."* There are reports that this is indicative of a state which places its interests above those of judicial independence.

The duty of the judge, whether based on the findings of fact by a jury or within the collegiate framework of tribunals or in the higher appeal systems, is to interpret the law with due regard for precedent and, in announcing his judgment, to give "... sufficient reasons for [his] decision to enable the parties to know the issue to which it addressed its mind and acted lawfully¹⁴".

On December 26, 2012, China's Supreme People's Court and Supreme People's Procuratorate jointly issued guidance on the crime of giving bribes to "persons who perform public service in state organs" Any person found to have paid a bribe of more than RMB¹⁵10,000 (about US\$1,600) to a state functionary to seek illegitimate

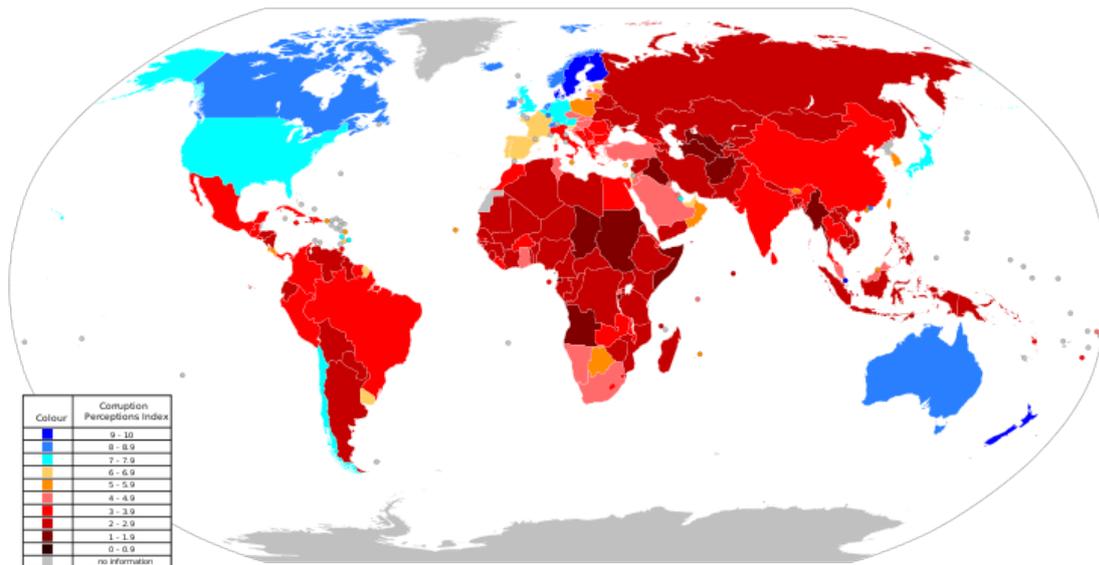
¹³ Minzner, Carl F: *Judicial Disciplinary Systems for Incorrectly Decided Cases: The Imperial Chinese Heritage Lives On; New Mexico Law Review, Vol. 39, 2009.*

¹⁴ *R v. Civil Service Appeal Board, ex parte Cunningham* [1991] 4 All E.R. 310 at 318, Lord Donaldson M.R.

¹⁵ *Renmibi* - ¥ (People's money). The legal tender of the PRC. Often abbreviated as RMB. The unit of RMB is the Yuan.

benefits will be criminally prosecuted in accordance with the Criminal Law¹⁶. This begs the questions of perceptions of whether and, of so, how, undetected bribery operates within the PRC or of what happens if the bribe is less than the amount mentioned.

The “corruption map” of the world places the PRC high on the spectrum.



But the way that corruption works differs in degree, both in the value of the corrupting act and in the effect of the act. It is internationally acknowledged that self-serving bribes are unacceptable in any system: the individual is not entitled to promote his interests above those of another in an independent resolution forum where the parties should be able to rely on the impartiality of the adjudicator.

The judge should not be accessible to the offer of a bribe and, if the barrier is overcome, he must be immune from the risk of offer and impervious to any threat in the event of his refusal. There is an argument that a person who has the resources can promote his interests by using the services of better qualified counsel but the advantage of a legally qualified and experienced judge is in the evaluation of the totality of the case rather than a suavely worded argument. In any event, the money put behind a case is not to the benefit of a judge and is for the better attempt at resolution of the issues, not for a guarantee that, right or wrong, the paying party will succeed.

In China, there is the possibility that, notwithstanding the prohibition by law on promotion of state interests above those of the litigants, local party officials have access to judges and can seek to influence the outcome of the case in the interests of local harmony. As the judges are appointed by the state, acting to promote the state's interests follows the requirements of the job and is decidedly at odds with judicial independence. The third party is the state and its views include the

¹⁶ Briefing Note: Clifford Chance, 1 February 2013. www.cliffordchance.com

maintenance of social cohesion. This form of corrupting influence is insidious and entirely at odds with the democratic, perforce the English, concept that a judge shall be immune from any external influence in his evaluation of a case.

Individual corruption is known in China and the anecdotal evidence is that the state is attempting to eradicate it. However, if “corruption” is taken to mean some form of change that deviates from the norm by reason of adverse external pressure, there are other factors that need to be considered when comparing the Chinese and English judicial approaches. The state can, and does, intervene overtly in order to maintain the all-important principle of social cohesion in the PRC. In 2009, two people were executed following the scandal of tainted powdered milk for babies. Civil claims were not permitted to be served during the state prosecutions. The company went into liquidation before the claims could be served. The perception is that state intervention allowed the dispersal of the company’s assets.

There are five issues concerning the Chinese judicial system which relate to the English perception of corruption¹⁷:

- Firstly, there is a different concept of independence within the adversarial system practised in England when compared with the overarching state control of the Chinese inquisitorial system.
- Secondly, although the PRC constitution nominally provides for access to justice for all citizens, state interests must not be overruled or impeded by the legal processes of individuals.
- Thirdly, although judges, by definition and throughout history, make and have made determinations in disputes, their role varies in the PRC according to the pressures applied by external sources. This may be overtly through the frowned-upon responsibility systems or more subtly by judges being made aware of the potential for social unrest if a controversial, albeit just, decision were to be made.
- Fourthly, the English presumption of the value of precedent is yet to be developed with consistency in China.
- Finally, there are grave issues with enforcement. Even if there is a contract which provides for the application of English law and for a hearing in an English court, a judgment requiring enforcement in China have no more than persuasive effect on the Chinese court which will rehear the case and make a judgment of its own. In the event that there is an outright judgment in favour of a party, it may require the personal intervention of the judge, through direct contact with the recalcitrant payer in order to enforce the judgment. This involves a series of processes which are unknown in England: the ability of the party to achieve access to the judge; the willingness of the judge to discuss the case; the judge having a method of approaching the paying party; and some means for the judge to put pressure on the paying party to fulfil the

¹⁷ Thanks for these insights to Judith McMorro, Professor of Law, Boston College Law School, Newton, MA.

obligations imposed by the judgment. Arguably, this could be considered to amount to a new role of judge-turned-bailiff and would go beyond the basic duty of the judge to decide rights and wrongs and make corresponding orders.

5 Fundamental differences

According to the letter of the constitution of the PRC, there is a carefully constructed legal system with appropriate checks and balances. However, the nuances of translation and the interpretation within the language leave gaps in which there is a perception if not of actual corruption but perhaps of the potential for corruption. We are so comfortable with our long-established English system and with the development of the common law that we consider the risk of corruption of our judges to be minimal if not impossible. Our dismissed judges have committed misdeeds other than bowing to the influence of the parties or any organ of the state. If there are differences between the way our judges function and those in the PRC, we need to understand the social and political pressures which may be applied; to recognise that there are bad apples in every basket but in the larger baskets, they have more opportunity to become rotten. As the Chinese economy continues to expand, there is ever more need for each judicial system to understand and respect the modus operandi of the other. We have managed it with our judicial counterparts in all democracies and have ticked along with many a dictatorship. Dealing with the Chinese legal system is an evolving process as the single party state democratises many of its processes.

Some of you Middle Templars of the 21st century will become involved in Chinese law as English business interests in China expand and more of our nationals set up businesses or go to work in China in its “socialist market economy”. They will commit and be the victims of crime, suffer and commit economic wrongs and, in general, participate in the widening of the concept of “to each according to his needs”.

Even as Karl Marx spins in his grave, as lawyers we thrive on the resolution of disputes and must learn the ways of the Chinese legal system and cope with the uncertainties of what should be, and in most cases is, a defined system. China is a vast developing area of international legal potential. The large legal firms have China departments. Counsel must follow in their footsteps¹⁸.

John Hersey, the Pulitzer prize-winning novelist, describes a fundamental and enduring cultural difference between the traditional Chinese and foreign visitors:

“The [ship’s] cook was by turns amused and horrified by my, to him, uncouth and barbarous American habits. When he saw me one day deposit two blasts of nasal phlegm in a square of cloth and treasure these excreta in one of my

¹⁸ For example: the Employment Law Association is holding a breakfast workshop on 27 February with the blurb: “China’s labor [sic] and employment law regime has undergone dramatic changes in the last 5 years. Statutes that are influenced by European models clash with the political, economic and social realities of today’s China. The speaker will cover typical challenges in managing employee relations, trade unions and collective bargaining, and recent significant changes to rules governing labour dispatch and temporary agency employees.”

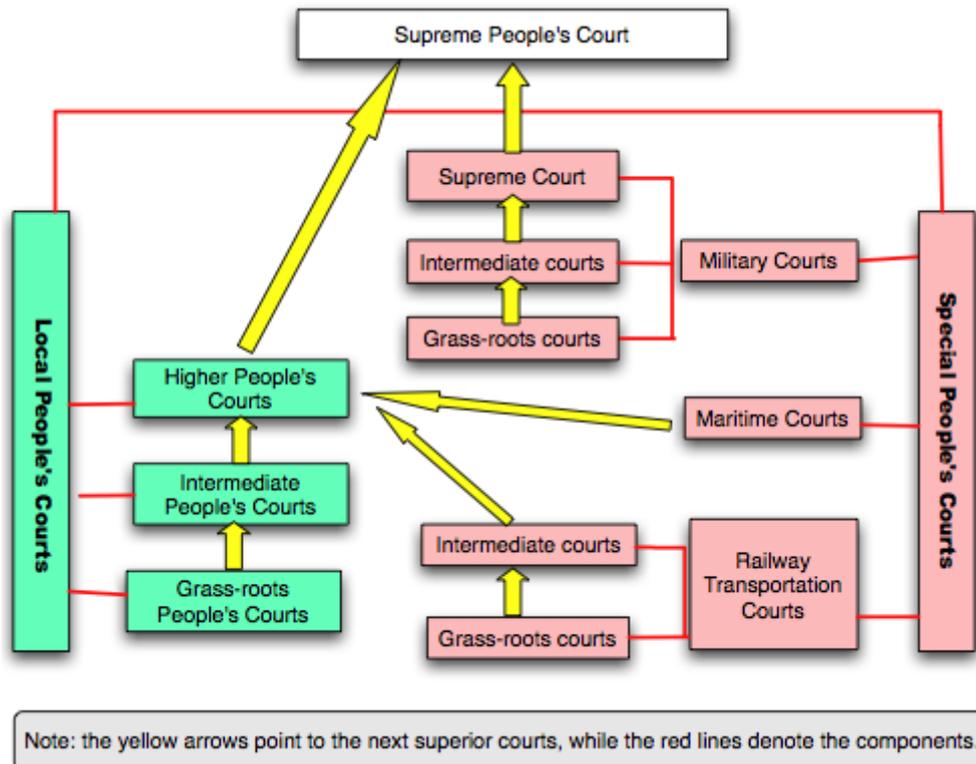
pockets, he actually went to the owner and complained, requesting that I be put ashore at the next port on the river¹⁹.”

If we use and store our hankies differently, how much greater are the differences in our judicial systems?

¹⁹ John Hersey: *A Single Pebble*. 1956, Hamish Hamilton (1959): “*John Hersey’s evocative novel of a young American who came to China to build a dam across the Yangtze and who finds that its mighty gorges and dangerous whirlpools are matched by the depths and swirling currents of human emotions.*”

APPENDIX 1

Chinese Court Structure (1)



APPENDIX 2: Contemporary writing

Stanley Lubman²⁰ writes a regular feature and blog for the Wall Street Journal.

On 28 October 2012, in an article entitled “**Reading Between the Lines on Chinese Judicial Reform**”, he says: “Of the many broken institutions in China calling out to be fixed as Beijing prepares to welcome a new generation of leaders, the country’s judicial system is among the most important. In an era of improved communication and increasing public scrutiny, the consistently poor performance of China’s courts, which are controlled by the Communist Party, threaten to seriously undermine the party’s legitimacy. The question is whether China’s leaders would ever consider loosening their grip on the judicial system enough to solve the problems that plague it.” He refers to a recent Government white paper concluding that “China’s judicial system urgently needs to be reformed, improved and developed.” Instead of referring to the accomplishments of the party, judicial reform has taken on a national rather than a political connotation. He notes that the white paper restricts its criticism of the judicial system to “defects and rigidity” and points out that “nothing is said about core problems, such as the lack of judicial independence or the legal culture of police, judges and prosecutors that lingers from the Maoist period and fosters widespread disregard of laws already in effect.” In the light of a case reported earlier in 2012, in which “various agencies of the judicial system co-operated in violating criminal procedure rules, including the use of torture, to secure convictions against people suspected of involvement of organized crime”, we are reminded that hope for judicial reform lies with the new government leadership. He quotes Professor He Weifang of Beijing University Law School as having recently urged that judicial power be treated “*as a special kind of power, very different from executive or legislative power*” and that efforts be undertaken “*to make judicial power to be able to operate independently.. [the White Paper] does not lay out a concrete path directing the future of legal reform of China. It is an attempt to praise the current leaders.*” The article concludes “that the next leadership must continue to address legal reform, something it acknowledges is still a work in progress.”

Stanley Lubman’s article, “**Chinese Criminal Procedure at its Worst**” (7 August 2012) refers to “an intense Internet campaign to publicize gross violations of China’s Criminal Procedure Law by police and judges”. The use of the internet is arguably an alternative to the massive street demonstrations which carry the risk of political de-stabilisation. The background to the matter arose in March 2010, when “Li Qinghong, a real-estate businessman, was sentenced to 19 years in prison for alleged involvement in organized crime, arising originally from a charge of gambling. When a “crackdown” campaign against organized crime was launched in 2010, the Guizhou Provincial Coordination Office to Fight Organized Crime organized a meeting to mobilize police, prosecutors and courts to cooperate closely. A large panel of defence lawyers maintained that the case was “a test of the entire criminal defence system, because it involved illegally obtained evidence, false testimony and the complicity of police and the courts in these procedural violations.” The article says: “... more than 10 defendants testified [at trial] to having been tortured, the police were not allowed to testify, and the court refused to exclude evidence that allegedly had been obtained illegally...In addition, during the proceedings the court expelled four lawyers for their aggressive arguments on procedural violations.” It is alleged that court officers put pressure on some of the defendants to discharge their lawyers from outside Guizhou with

²⁰ Stanley Lubman has assisted me with the approach to research for this talk and has generously permitted me to quote freely from his work. He is a long-time specialist on Chinese law and is a Distinguished Lecturer in Residence at the University of, Berkeley, School of Law. He is the author of “*Bird in a Cage: Legal Reform in China After Mao*,” (Stanford University Press, 1999) and editor of “*The Evolution of Law Reform in China: An Uncertain Path*” (Elgar, 2012). See <http://blogs.wsj.com/chinarealtime/tag/stanley-lubman/> for all his articles.

the assurance that they would receive lenient sentences if they did so. The defence teams made massive use of social media because of “[the] traditional media’s lack of attention to the case”. This had the effect not only of “raising netizens’ awareness of the issues at stake in their case” but also “helped to protect the lawyers’ personal safety.” There are appeals pending in the case, the defendants having only partially succeeded. The article concludes by referring to the power of the internet vying with that of “the authoritarian Party-state, strong and entrenched ... but with the appeal in this case pending, a further Internet offensive could dilute the strength of police and judges who are violating the law. This case could also inspire other lawyers to publicize injustices they encounter in the criminal process—and spur pressure from society for greater adherence to the rules and procedures of that process.”

In his May 2012 article, “**Two Big Stories, One Conclusion: China Has No Legal System**”, Stanley Lubman refers to “the illegal harassment of Chen Guangcheng and the reign of Bo Xilai in Chongqing each in their own way [signalling] the fundamental weakness of Chinese law and the extent to which it serves as a tool to maintain the Party’s control of Chinese society.” He explains how Chen, “the blind self-educated *barefoot lawyer*, was a victim convicted in a sham trial, imprisoned for over 4 years, and subsequently illegally held under house arrest for two years and brutally beaten by security forces before he escaped.” Chen has since been allowed to leave the country but the Bo matter is ongoing, leaving the question still open as to “whether formal legal measures will eventually be used to punish alleged violations of law.” He refers to serious allegations against Bo and goes on to say, “In considering the possibility that Chinese criminal law might be invoked to punish misconduct in either case, it would be a mistake to think of China’s legal institutions as a *legal system*. Legal institutions in China, especially the criminal law, are part of a political system that ultimately directs their application and their use. They are essentially grounded on the dominant notion that law is to be used to keep the Party in power.” He asserts: “Laws are not implemented in a uniform manner in China. They are often vague, giving local officials the opportunity to ignore or vary their application and to exercise considerable discretion in many cases. Enforcement can be overly lax (as in cases of unlawful property takings by local governments or violations of food safety laws), excessively harsh, or downright ignored, as they were by officials in Shandong where Chen was harshly treated.” His prediction that the most that could have been expected in Chen’s case was “a conclusory statement about an investigation and its termination” has been partially fulfilled. At the time of writing the article, Bo Xilai had “been punished by removal from his position as Party Secretary of Chongqing and expulsion from the Party’s Central Committee. Under Chinese law and practice, members and officials who are found to have committed serious legal offenses are first punished by the Party’s own disciplinary organs, and then turned over to the police and courts for criminal prosecution. At the moment, this seems likely to be Bo’s eventual fate.” He posits that the way that Bo will be treated may be a landmark for the new Chinese leadership if it is to reduce the Party’s overriding demands as against greater adherence to law in the execution of its policies. He says, “It is too early to tell whether the new leadership that is expected to begin taking over this fall might initiate measures that would reduce the dominance of Party policy – and, potentially, their own authority — over law.”

Appendix 3

Further reading

Judicial Reform in China

Information Office of the State Council
The People's Republic of China
October 2012, Beijing
First Edition 2012

A Quiet Revolution: An Overview of China's Judicial Reform

Author: Chris X. Lin
Asian-Pacific Law & Policy Journal. Vol 4. Issue 2 (Summer 2003) 255-319

Arbitration in the People's Republic of China

Authors: Ulrike Glueck and Falk Lichtenstein.
Pub: CMS Cameron McKenna LLP

The rise of an arbitration giant: an overview of the development of the Chinese law on arbitration and the CIETAC Rules

(2011 15(2)VJ [*The Vindobona Journal of International Commercial Law and Arbitration*]
217-232

Author: Tom Christopher Pröstler, www.maa.net

The "Production" of Corruption in China's Courts – The politics of judicial decision-making and its consequences in a one-party state

Journal of Law & Social Inquiry, May 2011
Author: Ling Li, US-Asia Law Institute NYU School of Law Contact: ll83@nyu.edu

Malpractice Mobs: Medical Dispute Resolution in China

Author: Benjamin Liebman, July 12, 2012
Columbia Law School Public Law & Legal Theory Working Paper Group
Paper Number 12-301
Forthcoming, Columbia Law Review 2013