

## CLASS 5

### HUMAN RIGHTS, THE INTERNET AND THE FUTURE OF THE CHINESE LEGAL SYSTEM

**Randall Peerenboom, *The Fire-Breathing Dragon and the Cute, Cuddly Panda: The Implication of China's Rise for Developing Countries, Human Rights, and Geopolitical Stability*, 7 CHI. J. INT'L L. 17 (2006)**

Critics fear that China's emergence as a world power threatens the progress made over the last fifty years on human rights. In this view, China is likely to take advantage of its growing economic and geopolitical influence to defend and advocate, even in the face of Western opposition, rights policies and a normative vision of the world at odds with current rights policies based on secular liberalism. This is already beginning to happen, they contend, most notably in the heavily politicized debates over "Asian values" and in China's attempts to influence the policies and restructuring of the UN's Human Rights Commission. As a result, critics accuse China of adopting a strategy of divide and conquer, where the concept of universality is sliced up "little by little, region by region, to the point where there are few teeth left in the UN human rights monitoring and implementation mechanisms." We are, in short, heading for a "clash of civilizations."

It is possible that China, whether democratic or not, might adopt a more aggressive human rights policy based on differing ideologies and competing conceptions and interpretations of rights as part of a cultural war with the dominant United States, and a larger struggle for the hearts and minds of the international community. Yet this is unlikely. China is more likely to focus on bottom-line issues such as trade and national security. A rising China is not likely to feel that the investment in academic debates about moral theory is worthwhile. Although China has criticized the human rights movement for being biased toward liberalism and has begun to strike back at the United States by issuing its own critical report of human rights in the United States, it has done so mainly as a defensive measure, on the theory that the best defense is a good offense. It did not, for example, rush to join Singapore and Malaysia at the forefront of the debates over Asian values, even though many of its positions were compatible with the Asian values platform. Rather, China has sought to portray itself as a responsible member of the international community through increased participation in the international human rights regime. If anything, China is generally perceived as being surprisingly passive in not formulating new proposals or participating actively in international organizations except with respect to Taiwan and issues that bear directly on its own national security.

As a strategic matter, the government is not likely to launch a frontal assault on liberal democracy or seek to persuade others that liberalism is morally inferior to communitarianism or some other view. There is strong support for liberal democracy among the elite in international organizations, despite the poor empirical record of democracies and the many existing critiques of liberalism from both Western and Asian scholars. People tend to stick with what they believe—which is generally what they grew up believing. Philosophical arguments are unlikely to persuade most people to change their fundamental moral beliefs. Indeed, firmly held moral views are stubbornly impervious to contrary evidence regarding the actual consequences of such views or arguments in support of opposing viewpoints.

Even if China's government leaders were inclined to openly question the merits of liberal democracy, China lacks a coherent, normatively attractive positive ideology to export as a substitute. Attempts to advocate Asian values, New Confucianism, and communitarian alternatives to liberalism have suffered from the lack of a systematic, coherent theory. In contrast, despite significant points of contention among liberals, there is a general sense that liberalism has some proper intellectual foundations—although liberalism also benefits from a halo effect, with people assuming that liberalism must be desirable because the richest and most successful countries are liberal democracies. Whether in

the West or in Asia, communitarianism always seems less reputable and less convincing because it lacks a systematic theoretical exposition. It seems more like a marginal critique of liberalism than a credible, full-fledged alternative able to stand on its own. We are still waiting for an Asian (Chinese, Korean, Thai, Buddhist, Confucian, or Islamic) Rawls to synthesize values, beliefs, practices, and institutions into a normatively attractive systematic alternative to liberalism that is compatible with modernity and yet sufficiently distinctive to be more than just a variant of liberalism. At present, Chinese citizens are much too divided about the future of China to produce such a consensus. It will be decades before China reaches a point of relative social, economic, and political stability to produce the kind of thick consensus needed to articulate a credible alternative, and before that alternative can benefit from its own halo effect. By that time, China is likely to have democratized and become more like Japan, South Korea, and Taiwan on contested rights issues. If so, any normatively attractive alternative to liberalism will contain enough common ground with liberalism to avoid a “clash of civilizations.” The debates will be more similar to the debates between liberals and communitarians or conservatives than to the conflict between communism and capitalism or Islamic fundamentalist theocracy and liberal democracy.

For the near future then, China is likely to keep a low profile while it consolidates power—so long as it is allowed to. China first articulated its rights policy when forced to respond to the criticisms of the international community in the wake of Tiananmen. The repeated attempts in Geneva to censure China for human right violations have resulted in a refinement of China’s critique of the human rights regime, more aggressive counter-attacks on other countries, more adept manipulations of procedural mechanisms in the UN human rights system, use of growing economic clout to lobby other countries for support, and investment of more resources to influence the operation and restructuring of human rights bodies. Similarly, China’s response to increased pressure from the Bush administration and the international community to democratize was to issue its own white paper on democracy. Like the earlier human rights white paper, the democracy white paper emphasizes that political reforms must reflect a country’s particular circumstances, including the level of economic development, institutional capacity, and cultural traditions. The report was forthcoming in acknowledging shortcomings and the need for deeper reforms, and described the many obstacles and challenges China faces as a developing country. The paper also responds to the domestic audience pressing for rapid political reforms, both by pointing out that reforms are taking place and by warning activists not to push too hard for immediate, dramatic change.

The next major challenge for China is how to respond to the increasing international and domestic pressure to ratify the International Covenant on Civil and Political Rights (“ICCPR”), which it signed in 1998. On the one hand, China will continue to be criticized unless it ratifies the treaty. On the other hand, ratification will inevitably lead to greater confrontation with the international rights community by forcing China to defend more explicitly its interpretation of a series of contested rights issues. Some reform-minded Chinese scholars have argued that China could ratify the ICCPR without attaching many reservations or statements, on the basis that China’s constitution and other laws already provide for virtually all of the rights set out in the ICCPR. Besides deliberately downplaying the gap between formal laws and actual practice, this view ignores the politics of interpretation. The rights in the ICCPR are stated at a fairly high level of abstraction, and thus are subject to a wide range of interpretation. The ICCPR Human Rights Committee (“Committee”) is charged with interpreting the ICCPR. The Committee’s interpretations tend to be decidedly more liberal than the interpretation of the Chinese government. Although the Committee’s interpretations are non-binding, they do carry weight in the international community, and can and will be used to “shame” China. Were China to ratify the ICCPR, it would most likely do so with either a blanket reservation that the ICCPR has no domestic effect, as the United States has done, or with a series of reservations and statements that greatly limit the domestic impact of the treaty. Either approach is fraught with risk—the United States has been widely criticized for its reservations, and China is sure to be subject to considerably greater criticism.

To be sure, Chinese citizens take tremendous pride in Chinese culture and civilization. Once China has consolidated power, Chinese citizens, led perhaps by charismatic nationalists demanding that

China stand up to the United States and its allies, might push their government to champion a rights policy that reflects “Chinese values.” Of course, not all 1.4 billion Chinese share the same values, and people’s values will change as China becomes wealthier and more urbanized. Nevertheless, fundamental beliefs tend to change slowly. If so, then China would most likely promote human rights policies that are less liberal and more collectivist or communitarian, that offer states a wider margin of appreciation on contested issues, and that reject a neo-Kantian deontic justification for rights in favor of a more pragmatic approach. Ironically, pragmatic Chinese are more likely to be genuinely tolerant of different lifeforms than allegedly tolerant liberals.

Such a human rights policy would challenge the alleged universal consensus on many specific human rights issues, or at least the consensus among much of the cosmopolitan elite in economically advanced Western liberal democracies. But whereas liberal critics see such policies as a dangerous threat to the legitimacy of human rights, supporters see China’s position as a necessary corrective to the hegemony of liberalism and the neo-imperialistic tendencies of the Western-centric human rights movement. Thus, neo-authoritarians, New Confucians, communitarians, and even some members of the new left hope that China may one day provide a viable normative alternative to the formal democracy and liberalism that have failed to resolve the very pressing issues of social inequality and human well-being for so many people in rich and poor countries alike.

### ***Leader of Developing States: The Right to Development and Global Justice***

Developing states see China as their natural ally in the struggle for global justice. Given China’s geopolitical importance and rising economic clout, China is expected to play a leading role in the struggle to persuade wealthy countries to take the right to development seriously. China’s support is also viewed as pivotal in the fight for fairer trade policies that do not result in increased impoverishment of developing countries while the rich get richer. Poorer countries want China to take a strong stand on issues such as access to patented drugs, protection of cultural artifacts and local know-how not recognized under the WTO’s Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”), restrictions on the use of antidumping and safeguard mechanisms to limit imports of textiles and other products from developing countries, increased aid, and perhaps most importantly, the elimination of agricultural subsidies and tariffs in developed countries. China, for its part, has been cautious about assuming the role of representative of developing countries, doing so on a case-by-case basis when the particular policy position favorable to developing countries is consistent with China’s general national interests.

Nevertheless, China’s human rights policies will likely emphasize the need to ensure the material well-being of all humans and to provide them with the tools and conditions to succeed, in keeping with the principles of the EAM [East Asian Model]. There is at least some hope that an increasingly powerful China, even after it becomes a benefactor rather than a beneficiary, will continue to pressure the international community to take seriously the right to development, to address global inequality and to ensure that the poorest countries have adequate resources to develop and maintain political and social stability. China has, for example, canceled over one billion dollars in debt from African countries. It has also emphasized the need to provide preferential treatment to Cambodia, Laos, Myanmar and Vietnam in the framework agreement to establish a free trade zone with the Association of Southeast Asian Nations (“ASEAN”). And it has made a number of pledges to the UN to assist developing countries, including eliminating all tariffs on certain products, offering over ten billion dollars in concessional loans and preferential export buyer’s credit to developing countries in the next three years, increasing aid and providing anti-malaria drugs and medical assistance, and contributing to the development of human capital by training professionals from developing countries.

While optimists hope that China will emerge as a champion of developing states, the more cautious simply hope that China avoids manipulating and exploiting the international trade regime for its own economic benefit, or at least does so to a lesser degree than other superpowers have in the past. Most likely China, whether democratic or not, will do what is necessary to solidify power and protect its own

economic interests, just like the United States and other powerful countries, although it may be more generous and even-handed toward developing states.

So far, China has adopted a cooperative attitude on economic issues. During the Asian financial crisis, it maintained a stable renminbi (RMB) at the expense of its own exports in order to mitigate the impact of the crisis on its Asian neighbors. In the free trade agreement with ASEAN, China offered unilateral concessions on over 130 agricultural and manufacturing products, granted WTO benefits to countries that are not WTO members, and allowed countries to reap the benefits immediately under an Early Harvest Programme. China has also imposed voluntary export controls on textiles, thereby effectively relinquishing the lower end of the market to Bangladesh and other developing countries. In addition, China allowed the RMB to float within a limited range in response to American pressure, and sought a broad-ranging compromise with the United States and the EU over textiles.

All of these actions are arguably explicable in terms of China's larger interests. Maintaining a stable RMB during the Asian crisis and entering into a free trade agreement with ASEAN solidified relations with neighbors worried about a rising China. Strengthening regional ties thus both diminishes the likelihood of conflict with the region and provides an offsetting balance to American dominance globally and in the region. With increasingly higher production costs, China may lose the lower end of the market anyway to Bangladesh and other poorer countries. Apart from avoiding the imposition of American tariffs on Chinese goods, China's adoption of a more flexible exchange rate defuses inflationary pressures and fosters economic stability. A comprehensive textiles agreement allows all sides to avoid a series of WTO skirmishes that could lead to a trade war.

There can be little doubt that China has already begun to flex its economic muscles. It joined other Asian countries in raising a WTO challenge to the United States over steel imports. It has used its economic leverage to prevent countries from supporting Taiwanese independence and membership in certain international organizations. It has also sought to establish a number of bilateral treaties and various forms of strategic partnerships with countries from Australia to Brazil for both political and economic reasons. A richer and more powerful China will be all the more likely to use its growing economic resources to persuade others to support its policies.

### ***Humanitarian Intervention***

A non-democratic China will remain cautious about infringements on sovereignty, sanctioning humanitarian intervention only when there is widespread and systematic abuse of rights, most likely subject to approval by the UN. It may also support governments that deal harshly with threats to social order, in keeping with the EAM. A democratic China might be more likely to intervene and less likely to condone violent crackdowns to maintain order, but that is doubtful.

Failed regimes present an interesting case. A stronger, more powerful China, whether democratic or not, is likely to perceive failed states as a threat to geopolitical stability, and a source of terrorism that could embolden separatist movements in China. The initial response may be to address the problems created by global inequality and a discriminatory trade system, and to provide material and technical assistance to developing states. The government has, for example, emphasized a "new security concept" that goes beyond traditional state-to-state military concerns and includes foreign policies that emphasize stability founded on a basis of mutual respect and economic development. A hegemonic China, however, may not have much patience for those states that fail to invest in human capital and institutions, or squander resources because of grand political corruption or ineptitude. In such cases, China might either simply walk away, if the risks to China are minimal, or seek to replace the existing regime, if the risks are greater.

**Benjamin Liebman & Tim Wu, *China's Network Justice*, 8 CHI. J. INT'L L. 257 (2007)**

Before beginning our analysis of the impact of the Internet on the Chinese courts, we offer a brief primer in the functioning of . . . the Chinese media. . . . [T]he Chinese media have long occupied a privileged position in the Chinese political system. The media serve as both the mouthpiece and the “eyes and ears” of the Party—not only writing public reports that appear in print or in broadcasts, but also “internal reports.” Internal reports contain information for officials of a particular rank, and are deemed not suitable for public dissemination. This means that when media views conflict with those in the courts, Party officials tend to side with the media.

Commercialization of the Chinese media in the 1990s resulted in major changes. Thousands of new publications appeared, mostly offshoots of traditional Party mouthpiece newspapers. These commercialized papers compete fiercely with one another, often by providing sensational or hard-hitting reports. They also generate profits for their parent publications, which continue in their “official” or “mouthpiece” propaganda roles. The growth of the Internet brought further competition, with papers and web portals now competing to attract readers online as well as in print, often by providing content that skirts the edges of what is permissible.

China’s media regulatory system, although challenged by the growth of commercialized media and the Internet, remains fundamentally unchanged. Regulations restrict who can enter the market—ensuring that the overwhelming majority of publications and broadcasters in China are state-controlled (albeit often in corporatized form). The Party’s Central Propaganda Department (“CPD”) oversees all media content, relying on both circulars that prohibit certain content, and also on a system of post-publication sanctions that target those who go beyond permissible boundaries. Local propaganda departments at the provincial, municipal, and local level likewise oversee content in local media, often supplementing CPD restrictions with their own local restrictions on content.

The job of the CPD and local and provincial propaganda departments has become much more difficult in recent years. The commercialization of the media means that there is vastly more content available than at any prior point in Chinese history. And the growth of the Internet, as we will show, means that news spreads much more quickly than before—often before propaganda departments can react to impose bans. Chinese authorities have not been passive in response to such challenges. As has been widely reported in the Western media, China devotes substantial resources to monitoring and controlling the Internet. This includes ordering websites to prohibit discussion of certain topics, or to remove controversial articles. Sites that go too far are shut down. One result is that self-censorship by commercial Internet news providers is perhaps the most effective means by which authorities maintain control over reporting and discussion of controversial topics online. . . .

### ***External Pressures***

China’s own Internet revolution has made it much easier for the public, the media, and the Party-state to become aware of and criticize the Chinese legal system and its courts. Although that may sound good, the results, from a rule-of-law perspective, have both attractive and less attractive aspects.

Sometimes cheaper information has meant better accountability and pressure for important reform. As we discuss below, courts or legal institutions that are neglecting or deliberately abusing their duties can be exposed and subjected to public or media pressure. Bad decisions, corrupt judges, and unjust procedures are sometimes brought to light by Internet communications, leading to important reforms.

Yet the same mechanism can create excessive pressure on the courts. As we discuss, unpopular decisions can attract a strong public reaction—the “Internet manhunt”—and subsequent political

intervention to quell public outrage. The Internet plays a crucial role in making both Party leadership and the courts aware of public opinion, which is important in a system in which other outlets for public opinion are restricted. But the effect may be more mixed in a system where only one segment of public opinion is being heard, where the media play an active role in generating popular outrage online, and when such opinion is significantly restricted due to Party control and oversight of the media.

#### Greater Accountability

In 2003, Sun Zhigang, a university graduate working as a graphic designer in the southern city of Guangzhou, was detained by police for failing to have the temporary residence permits required of migrant workers. Three days after his arrest Sun was beaten to death while in a local detention center for migrants.

More than a month after Sun's killing, on April 25, 2003, the leading commercial newspaper in Guangdong Province, *Southern Metropolitan Daily*, carried a report on the case, entitled "Only Missing a Temporary Residence Permit, College Graduate Is Beaten to Death." Local Communist Party Propaganda Department officials immediately banned any further discussion of the case in the local media. But the ban was ineffective. The *Southern Metropolitan Daily* article had already been posted to the paper's website on the day of publication, and had been subsequently reposted to numerous other websites. It even showed up on the website of the *People's Daily*, the mouthpiece of the Party.

Within hours, Internet discussion forums filled with discussion of the case. Noting the article in the *People's Daily*, numerous other newspapers subsequently reported on the case, carrying follow-up stories that were also posted and reposted online. On May 13, three weeks after the original report and following weeks of online discussion of the case, authorities announced that they had detained thirteen suspects. A month later, twelve defendants were convicted for their roles in the case, and the two "primary culprits" were sentenced to death and life in prison, respectively.

The impact of the case—and of the Internet—did not end with the trial. Following the arrests in May, a group of academics and journalists launched an assault on the detention system, known as Custody and Repatriation, under which Sun had been apprehended. In an effort coordinated with print and online media, two groups of lawyers and scholars issued petitions calling on the system to be abolished because it was unconstitutional. The petitions themselves were not printed in full in the official media, but were widely available online. Media coverage highlighted their demands, leading to online discussion and reposting of the petition. Reports also noted some of the widespread abuses in the system, including numerous reports of other inmates also being murdered while in detention. Websites provided significantly wider-ranging discussions of the case than those appearing in the traditional media.

Shortly after the June trial of the defendants in the Sun Zhigang case, China's State Council announced that the Custody and Repatriation System was being scrapped and replaced with a system designed to shift the emphasis from punishing migrants to assisting them by establishing "a caring assistance system" of "aid stations" that provide migrants with shelter and food. Although official comments stated that the changes simply reflected changed conditions in China while others involved in the drafting of the new regulations noted that the changes had been contemplated since before the incident, the link between the Sun Zhigang case and ensuing public outcry was clear.

The Sun Zhigang case is an example of how the growth of investigative journalism in China, in particular among the market-driven newspapers that developed throughout the 1990s, combined with the Internet, is resulting in much greater attention to law and the legal system than at any prior point in Chinese history. Prior to commercialization of the media, press reports on the courts tended to be declaratory statements of the outcomes of cases, often written by court officials. Increased competition among the print media brought greater scrutiny to the courts and to legal issues more generally, along with greater critical coverage of decisions perceived as unjust. Yet prior to the growth of the Internet, discussions of cases in one region, even in the commercialized media, often went unnoticed elsewhere, and it was relatively easy for Propaganda Department officials to terminate discussion of cases by

banning further media reports. A daring newspaper, such as *Southern Weekend*, might expose gross injustice, but officials could move swiftly to terminate follow-up reports. Otherwise, courts often operated in relative obscurity. Decisions might be reported in a local newspaper, or not at all.

That is changing. As the Sun Zhigang case shows, thanks mainly to the Internet and the birth of competing Internet news sites, cases that might once have been invisible, or have disappeared, can receive national attention, sometimes virtually instantly. In other cases, websites and web discussion forums spread news of cases where local Propaganda Department officials have instructed the official media not to report on such cases. In addition to the famous Sun Zhigang case, numerous other cases of alleged injustice have attracted widespread coverage and discussion on the Internet.

In 1994 a woman named Zhang Zaiyu disappeared. Zhang's family accused her husband, She Xianglin, of killing her. When police found the body of an unidentified woman, which relatives identified as Zhang, in a nearby water tower, they charged She with murder. After She confessed to the murder, allegedly under torture, he was sentenced to death. On appeal, the Hubei Province High People's Court sent the case back for retrial due to insufficient evidence, and She was sentenced to fifteen years in prison for intentional homicide.

Eleven years later, on March 28, 2005, Zhang Zaiyu reappeared alive and married to a different man. An initial report on Zhang's reappearance ran in a local paper in Wuhan, the capital of Hubei Province. Following the report, local authorities banned further reporting on the case pending an official investigation, and instructed the media to use only an officially approved report on the case. But news quickly spread online and to other newspapers. A few weeks later, on April 15, She was released from custody. Media coverage may not have been solely responsible for She being freed—authorities reopened the case immediately after Zhang returned home. But such coverage did appear to assist She in obtaining 460,000 yuan (approximately \$57,000) in compensation for his wrongful incarceration. The settlement was reported to be the largest from the state in Chinese history.

As in the Sun Zhigang case, the media linked the case to broader problems in the Chinese criminal justice system. One report on the She case argued such wrongful conviction cases reflected the pressure placed on local authorities to solve cases and assuage popular anger. Official explanations, in contrast, blamed the case on historical circumstances and the weakness of the legal system at the time of She's conviction and praised the efforts of local authorities to resolve the matter.

Another illustrative example is the wrongful conviction case of Nie Shubin. In 1994, a court in Hebei Province found Nie Shubin guilty of rape and murder. Nie was executed the following year. Eleven years later, in 2005, a second man named Wang Shujin confessed to the original rape and murder.

The confession story was originally reported in March by a reporter from the *Henan Commercial News*, reprinted in the *Beijing News* and followed-up by a report in *Southern Weekend*. All of the reports subsequently were posted and circulated online. Local authorities refused to reopen Nie's case, and the media began to complain of a cover-up. A report in *Southern Weekend*, for example, asked why the local authorities failed to release details of their investigation into the case, and inquired whether the case would "disappear." The report also noted that all details about the case had been removed from the police website. Likewise, a report in the *Beijing News*, issued on March 15, questioned why the police, procuratorate, and court involved in the case had refused to take any action or to comment on the case. Following the report, propaganda department officials apparently ordered the media not to carry further reports on the case. However, reports continued to circulate, both in print and online, suggesting that the ban was either very limited or was widely ignored.

On the same day the *Beijing News* report appeared, the Hebei Province High People's Court launched an investigation into the case. The Court did so after written instruction from leaders of the Political-Legal Committee of the Provincial Communist Party. Although rumors later circulated online that an internal investigation had determined that the case had not been incorrectly decided, as of early 2007 no official decision had been announced.

Nie Shubin's family may still be waiting for justice. But, as with the Sun Zhigang case, the most important effect of the Nie and She cases was not the outcome of the individual cases, but their effect on national policy. At the end of 2005, China's SPC [the Supreme People's Court] announced that it was revising China's procedures for handling capital cases. Under the new rules, final review of all capital cases will be conducted by the SPC. In the past, such review power was delegated to provincial high courts—which were also responsible for hearing appeals of capital cases. The new procedures create a third tier of review. In addition, the SPC rules require appeals in capital cases to be heard in open court. Although pressure for such changes, both domestic and international, had been building for some time, the wave of public attention to the Nie, She, and other wrongful conviction cases during 2005 appeared to be a crucial factor leading the SPC to make the changes.

Most such cases follow a pattern similar to those of the Sun Zhigang, She, and Nie cases. Traditional print media initially report on the case, the report is posted to the media's official web page, and then is reposted to numerous other websites. The articles create widespread discussion online, in particular in web discussion forums. Such discussion and coverage encourages follow-up reports in the print media, reports that are subsequently reposted to the Internet.

The interaction between print and online media is important. Chinese regulations on the Internet restrict the ability of Internet providers to create their own news content. With just a few exceptions, only traditional media are permitted to generate news stories. The number of websites legally qualified to print original news is unclear; a 2004 report stated that 163 websites were legally qualified to publish news, while another 1400 were permitted to offer "news service"—which generally means they are permitted to reprint articles that have already appeared in the official media. Websites with the ability to generate original news content are generally those linked to national, provincial, and local Party mouthpiece newspapers. Another important difference between the traditional media and online media is that the online media are more likely to carry commentaries on cases while they are pending. The traditional media usually wait to discuss cases until decisions have been made.

An additional crucial feature of the Sun Zhigang, She, and Nie cases is that the Internet facilitates coverage by the media in jurisdictions other than those in which a case occurred. In the Nie case, what might have been a local issue was reported by media from Beijing, Henan, and Guangdong. The significance lies in the fact that in many cases local propaganda authorities will block local media from reporting on local cases.

Another recent example of such trans-provincial news coverage is the defamation action brought against the authors of the best-selling—but subsequently banned—book, *An Investigation into China's Peasants*. The book detailed problems facing China's peasants, including abuse and over-taxation by local authorities. A Party official in Anhui Province sued the publisher and author in local court, arguing that the book had defamed him. After an initial flurry of coverage in the print media, the Central Propaganda Department banned further reporting on the case. Despite the ban, widespread discussion of the case continued online—putting the court under pressure not to act too obviously to protect the local official. Continued Internet postings also highlighted the court's ongoing failure to resolve the case.

The *Investigation into China's Peasants* case has yet to be resolved, and the long delay suggests that the court either continues to struggle to determine how to handle the case, or has decided to ignore it. According to a widely circulated email written by the defendants' lawyer in April 2006, the court handling the case has decided to leave the case unresolved and not issue any decision. But it does appear that the continued attention to the case, in part via online media, resulted in pressure on the court to follow procedural norms and not to act immediately to protect local interests.

The Sun Zhigang, She, and Nie cases show how the combined efforts of traditional and online media can force authorities to reopen cases and redress longstanding injustices. Meanwhile, the *Investigation into China's Peasants* case shows how online media may help keep discussion alive when traditional media are barred from such discussions, and how email can be used to spread news of cases where reporting has been banned.



## Internet Populism

In the Sun Zhigang case, public pressure led to more attention to the treatment of migrants within China. Media pressure, fanned by Internet discussion, forced authorities to investigate the case, make arrests, and abolish the detention system that led to his death. The case may have resulted in belated justice for Sun. But it was less clear that those accused of being his killers received fair trials. Public pressure resulted in rushed and closed trials of the defendants, with court judgments that appeared preordained by Party leaders. The trial in the case was held in June 2003, just six weeks after the case first came to light. The Guangdong Province High People's Court affirmed the lower court's decision in the case on June 27, and Qiao Yanqin, the principal defendant, was executed the same day.

Only three official media outlets were permitted to send reporters to the trial. Propaganda officials instructed other media to use only reports from the official *Xinhua News Agency*, and Internet portals were told to terminate discussion of the case. Some journalists and other observers questioned the fairness of the trial, arguing that the death sentence imposed on Qiao Yanqin was excessive, and asked why charges had focused on a low-ranking nurse and other inmates in the detention center, rather than on higher-ranking officials. But such discussions were generally not permitted online or in print. Instead, official accounts focused on praising authorities' speedy handling of the case, and on the court's responsiveness to public opinion. And in a final development, the editors of the paper that originally broke the story of Sun Zhigang's murder were later imprisoned, albeit for "unrelated" corruption charges.

In 2003, Liu Yong likewise found that angry online discussion of a case can lead to execution. Liu, an organized crime boss, was convicted in the early 2000s of a range of crimes, including organizing a criminal syndicate, bribery, and illegal possession of firearms. An intermediate court in Liaoning Province tried his case and sentenced him to death. On appeal in 2003, however, the Liaoning High People's Court reduced his sentence to life in prison. One reason for the reduction was the fact that Liu's confession had been obtained through torture.

A Shanghai paper, *Bund Pictorial*, quickly questioned the reduction in sentence. News of the court's decision spread rapidly online—one major Internet portal ran a headline on its news home page, stating in large font "Liu Yong Will Not Die." The media suggested that Liu's ties to officials in Liaoning Province resulted in favorable treatment. Reporters criticized academics who had written expert opinions—in return for sizable fees—in support of Liu. Web discussion forums filled with angry commentary, denouncing Liu's "lenient" treatment.

Following the public outcry, the SPC decided to rehear the case. The SPC invoked a rarely-used procedure that permits the court to try *de novo* questionably-decided cases. In a carefully scripted trial, Liu's case was heard on a Friday. The court announced its decision—reinstating the death penalty—on the following Monday morning. Liu was executed the same morning.

Media outlets and some academics described the decision as an appropriate response to popular opinion. Various websites carried morbidly detailed accounts of each step of the case—including, on the date of Liu's judgment and execution, hourly reports that described the court judgment, transportation of Liu to the execution ground, transportation of his body to the crematorium, and then return of his ashes to his family. The *sina.com* page on the case included links to more than one hundred articles and commentaries. Some declared the case a victory for "public opinion."

The official media hailed the Liu Yong and Sun Zhigang cases as examples of successful official responses to public demands demonstrating China's progress toward a more just and democratic society. Yet subsequent cases also demonstrate that Party propaganda officials have become increasingly conscious of the need to manage online discussion of cases, and not let public outrage go too far. In two high-profile cases the authorities went out of their way to demonstrate that public outrage expressed online would not necessarily affect or change court decisions.

What became known as the BMW case began in 2003, when, in the northeast city of Harbin, a peasant accidentally drove his onion-cart into a parked BMW. The driver, a woman named Su Xiuwen,

got out, and argued with the driver of the onion cart, Dai Yiquan. After bystanders intervened, she retreated to the car. She then unexpectedly put the car into gear, striking and killing Liu Zhongxai, Dai's wife, and injuring several others.

At trial in Harbin, the issue was whether Su had intentionally or accidentally put the car into forward gear. After a trial notable for its lack of eyewitness testimony, the court ruled the killing an accident and imposed a suspended sentence.

As news of the story spread, the reaction on the Internet was overwhelming. *Sina.com*, a leading web portal, reported receiving more than two hundred thousand web postings on the case—even more than the total number of postings regarding the SARS crisis earlier in 2003. The class difference between the owners of the BMW and the onion-cart drove public outrage, as did the questionable nature of the trial. Many speculated that political connections of Su, the wife of a prominent businessman in Harbin, influenced the outcome.

In January 2004 authorities announced that the case would be reexamined. But authorities at the same time banned further reporting on the case and ordered websites to terminate and remove discussions of the case. There seemed to be a clear effort to establish that Internet rage would not overturn the verdict.

Three months later, official media announced that an investigation led by the Heilongjiang Province Communist Party's Political-Legal Committee had determined that the case had been correctly decided. Although official statements declared that the court's decision in the BMW case had been upheld, observers reported that in fact a number of persons involved in the case were sanctioned internally. The sanctions were never announced publicly. The message can be read several ways. One possibility was that authorities did want to protect Su, the driver of the BMW. But the clear message was that malfeasance will be handled internally, and that Internet anger cannot always be allowed to dictate Party or court decisions.

A similar story came in 2005, when websites carried extensive discussion of the case of Wang Binyu. Wang, a migrant worker, was sentenced to death for murdering four people, including his construction site foreman and three family members. Wang's case became famous nationwide following reports in the *Beijing News*. He was a symbol of the hardship and exploitation faced by China's millions of migrant workers. Wang killed his boss after he repeatedly failed to pay him. Said Wang, "I want to die. When I am dead, nobody can exploit me anymore. Right?"

Many online postings and articles took Wang's side, and argued that he should be spared. As with the BMW case, however, online discussion largely stopped following a Central Propaganda Department instruction. Wang was then quietly executed. Although news of his execution was posted to the official *China Court News* website the day after his execution, domestic media did not report on it. Only after the case received attention in the *New York Times* did the domestic media report on Wang's death.

\* \* \*

From these leading cases, and from interviews with journalists, judges, and academics, we can describe a general pattern. First, the growth of the Internet has made it more difficult for courts to conceal information about cases, and more likely that misdeeds will be noticed and reported. Judges state that courts find it hard to conceal information about cases, which increases pressure on courts to handle cases according to law. Courts and Party-state officials that oversee the courts cannot be assured of their ability to silence discussion of cases simply by issuing an instruction banning further reporting. As we've seen, the three most famous cases of Internet influence—the Sun Zhigang, Liu Yong, and BMW cases—all demonstrate how online coverage or discussion can encourage Party officials to intervene. In all of the cases, reports in the print media, reposted to major Internet portals, were enough to set off a chain-reaction.

This, in turn, has led to a new type of Party-state intervention into the operations of the legal system. The interventions come in response to outrage on the Internet and are marked by a determination to resolve the matter quickly: in the Sun Zhigang case, with the rapid arrest and trial of suspects and then a choreographed closed trial; in the Liu Yong case with the SPC apparently being ordered to rehear the

case; and in the BMW case with the investigation of the case by Party authorities. At the same time, Party propaganda authorities curtail any further discussion of the cases other than by officially-approved sources—generally by requiring that the media only use dispatches from the *Xinhua News Agency*. Propaganda authorities also order web portals to remove or ban discussion of the cases: one list of terms automatically filtered by one Chinese blog service included both “Nie Shubin” and “Wang Binyu.” In the final step, official media declare the interventions and resulting decisions to be successful examples of authorities responding to public opinion.

Given the possibility of public scrutiny leading to unstoppable pressure, political intervention, and even possible punishment for judges, courts are taking some preemptive action to better control information. In recent years, courts have taken steps to restrict media coverage of cases, requiring reporters to obtain court approval prior to attending trials. Courts frequently either draft articles about cases in their court for the local media or require that all such articles are screened by court officials prior to publication. Courts have also retaliated against negative coverage, with both courts and individual judges filing defamation lawsuits in response to critical media coverage. In addition, court propaganda or research departments monitor online discussions of cases involving individual courts, sometimes via daily searches to locate discussions of the cases in the media or in discussion forums. Finally, while it is hard to say for sure, courts may be more inclined to decide cases in ways that are less likely to inflame the public, which in the criminal context often means applying harsh sanctions.

The result is a strange, tense, and slightly rivalrous relationship among the courts and the media, major Internet providers, and the Party-state. As we have seen, the courts fear media reports that might result in popular outrage and political intervention. The media, meanwhile, must balance the risk of punishment if they go too far in reporting on sensitive cases with their desire to maximize profit through aggressive or sensational reporting. Party-state officials are concerned with maintaining stability—even at the cost of undermining their claims to be emphasizing rule of law. Unfortunately, this complex web of relationships cannot help but sometimes distract from resolving disputes fairly. The fears of media attention, public reaction, and Party-state intervention do make the legal system more accountable, just not necessarily to the parties before the court.

### *Communications Practices Within the Chinese Judiciary*

. . . We now turn to . . . how the[] communications practices [in courts] have been affected by the Internet revolution. . . .

The use of the Internet by individual judges is beginning to transform communications practices within the judiciary, and, consequently, how law is both used and applied in China. Judges who once worked in isolation, without either easy access to national laws or information about how similar cases were handled elsewhere, now are able to access not only the law on the books, but also how such laws are being applied and debated elsewhere.

The Chinese judges interviewed [here] overwhelmingly commented that they use the Internet to conduct research to assist them in handling cases—especially in hard or novel cases. Perhaps the most interesting outcome of such usage is the slow development of what resembles a non-binding system of precedent in the Chinese legal system. Judges state that they are developing “unwritten precedent” regarding how to handle cases. They note that doing so helps to reduce their workload when they encounter new legal issues. Judges explain that they do not look to other courts’ decisions as “precedent,” but rather only for the purposes of reference, or *cankao*. But even this non-binding “precedent” may strongly influence decision-making.

The reported use of informal precedent dovetails with a rise in the interest in using precedent in the Chinese legal system. Since early 2002, the Zhengzhou Zhongyuan District Court has experimented with a “precedent decision” system whereby the court selects important cases as “models.” Similarly, the SPC has within recent years begun referring to its model decisions as “legal precedent.” However, the Internet-driven use of informal precedent exceeds the scope of these experiments.

Some of the greatest consequences of these developments may be for the more remote parts of China. For example, judges from places like Qinghai Province, in western China, explained that they frequently consult court websites in more developed areas of China to see how they have handled particular legal issues.

This is a break from traditional practice. Judges encountering new legal questions have traditionally sought assistance from their superiors, either in their own court, or in higher-ranking courts. The growth of the Internet suggests that courts may increasingly be able to look horizontally, to courts elsewhere in China, whereas in the past they would have sought assistance from those above them.

Over the long-term, the development of an informal system of precedent may significantly change the Chinese legal system. It may lead to a greater confidence born of national consistency, and the authority of acting in concert. That may in turn lead to greater institutional security and autonomy, as judges rely on the strength of the judgment of others, as opposed to mere personal judgment.

Yet the Internet is not only permitting the development of horizontal interactions among judges, but it is also a mechanism for strengthening existing vertical relationships in the courts, and perhaps even control over individual judges by superiors within the courts. Numerous courts in China have established internal court networks, designed to facilitate court work, improve efficiency, and also strengthen oversight over individual judges. In sum, internal networks show how the Internet may also serve the Party-state's interests in control.

We first explore ways in which judges are using the external web, and then turn to the impact of internal court networks.

#### 1. Finding Cases

The best place for Chinese judges to find useful cases is, ironically, sometimes outside of the courthouse. Few judges in China have access to the external Internet (the Internet as it exists in China) from work, as many courts do not permit judges other than those in court propaganda departments to access the external web from work. In other courts, only the court president has access to the external web. Such restrictions may derive both from concerns that judges will waste time online, and from concerns that judges will use the Internet to reveal confidential or secret information. But in some courts, access to the Internet also appears to be a sign of status—akin to having a car and driver—with only the highest ranking judges permitted to go online from work.

Despite these restrictions, a great many judges say that they use the external network to aid their decision-making, particularly to research legal questions and to see how other courts have handled cases similar to those before them. In the central Chinese city of Xi'an, judges use the Internet to consult cases decided by the SPC, and by the Shaanxi Provincial High People's Court, as well as decisions from other courts. In Shenyang, judges note that they consult both the websites of other courts and media reports for information on cases. Even in areas in which courts lack computers, judges state that they frequently conduct online research when they encounter difficult cases. Some judges have access to the Internet at home; others go to web cafes.

As one judge put it, "the effect is huge." A judge working in a rural county court in central China (which lacks both an internal network and access to the external web) gave the example of determining how to apportion blame in traffic accidents when both sides share liability. Going online, judges "found that in Guangdong there is a standard for the whole province for this." Although not in Guangdong and thus not obligated to use the standard, the court decided to use the Guangdong rule. "In the past we only looked at cases in our court" for guidance, commented the judge. Now the court looks elsewhere.

On the external Internet, judges rely on the same tools that other participants in the legal system use to build legal arguments. Summaries of cases on China Court Web and the websites of individual courts, media reports, and other sources give judges an idea as to how cases have been decided. Judges also frequent prominent academic websites, including the Civil and Commercial Law Website of Renmin

University. Judges say that it is often easier to locate legal materials on the web than on internal court networks, which they say are often incomplete or are infrequently updated. Simply making it easier for judges to locate binding law is an important development: in the past, judges often had no easy way to locate relevant laws and other materials. As one judge explained, courts often have one book for hundreds of people, making it difficult for individual judges to actually locate materials.

The most significant examples of Internet research are in cases where the law is uncertain, or in which judges face difficult legal questions. Judges state that they routinely search websites of other courts for examples of cases similar to those before them. For example, a judge specializing in intellectual property cases in Beijing stated that judges hearing such cases will often look online to see how similar cases have been handled elsewhere, including overseas.

Judges are not the only ones using the Internet in this way. Lawyers also say they use the Internet to conduct research, and that they often will provide judges with printouts of materials they locate online, including information about similar cases elsewhere. One lawyer recounted how, in a case in which his client had been sentenced to death in the first instance, he located a newspaper report regarding a case from the same city in which a defendant in a similar case had been sentenced to fifteen years in prison, not death. The appellate court then reduced the sentence. Public interest lawyers say that they have used websites to link plaintiffs and lawyers who are bringing similar cases nationwide. Lawyers say that law firm websites can also be useful for gathering information about prior cases—and that they sometimes will print out materials from such sites to provide to judges. Likewise procurators say that they frequently use the Internet to conduct research where the law is unclear, in particular in determining the appropriate crime with which to charge a defendant.

Some courts appear to be particularly important sources of precedent. Thus, for example, intellectual property divisions at the intermediate courts in Beijing, or in Beijing's Haidian District (home to many technology companies), are seen as being influential. Likewise, judges in the interior say that they often look for guidance to courts in Beijing and Shanghai—where judges are widely regarded as being better qualified than in many other areas of China.

The practice of using the Internet to look for useful precedent or other guidance is among the most potentially significant developments in judicial communications. However, for the most part, what it does is mimic what we see in other legal systems, both civil and common law. In the next part of this Section we discuss more novel ways in which Chinese courts are using the Internet.

## 2. Innovations

Some of the ways courts use the Internet in China may strike a Western observer as surprising or unusual. Here we discuss several examples where judges have used the network in ways that appear distinct from the rest of the world. The first examples involve using court websites for public relations purposes.

In 2004, the Shiquan County Court in Shaanxi Province came under fire from local media when it dismissed the case of migrant worker Xu Dengkai for being eight minutes late for a hearing. Xu contracted silicosis from work at a local factory and sued to challenge a labor arbitration award. The labor arbitration committee had ordered that the defendant factory pay him 6,200 yuan (about \$775), while Xu argued that he was entitled to 217,206 yuan (about \$27,000). On the date of the hearing, however, Xu arrived slightly late. By the time he arrived, the court had already dismissed his case for failure to appear, forcing Xu to forfeit 14,000 yuan (\$1750) in court filing fees that he had already paid.

The *Huashang News*, a leading commercial newspaper in the provincial capital, Xi'an, wrote an editorial entitled "The Legal System Should Not Be Emotionless." The newspaper argued that dropping the case was an unduly harsh punishment for a litigant who was five minutes late. It pointed out that the plaintiff had to travel by train from outside the mountainous county to arrive at the court by eight thirty. It also wrote that the worker was in poor health as a result of the injuries he had suffered at work.

The court, slighted, turned to the Internet to defend itself online. Its first act was to release a report that argued that it had handled the case fully in compliance with the law. Next, court judges responded to and debated with critics on the court's public Internet message board. One comment posted to the court's electronic bulletin board urged the court to admit that its handling of the case had been incorrect. In response, a court official wrote that because the case was still on appeal it could not be said to have been incorrectly decided. In another exchange, a posting complained that the case was "not readable." The court thanked the poster of the message for the criticism, and stated that the court needed to continue to strengthen its ability "to serve social stability and development." Some of the court's postings were identified as coming from the court president, while others appeared to come from other court officials.

Later on, the court backed down and permitted the plaintiff to refile the case without having to pay the court fees a second time. Without mentioning the controversy or criticism, the court posted a report on the case on its website as an example of how the court was working to further the "advanced education" policy of the Party. The court posted a picture of Xu to the court's homepage, with a caption stating, "Our Court Carries Out Judicial Assistance in the Case of Xu Dengkui." The court noted that it had taken account of the plaintiff's status as a worker from outside the county, and had therefore decided to waive the court fee and schedule an afternoon hearing so that Xu would be able to attend. The report also stated that the court had been praised by the parties to the case and the media.

The Xu case is just one example of how courts use their websites for public relations purposes. Hundreds of Chinese courts—ranging from the SPC to rural county courts—have created public websites. Court public websites frequently include information such as an overview of court work and personnel, news from the court, and discussion forums. Although urban courts were first to establish websites, even courts in some rural areas have sites that provide information about the court, judges, and cases.

Court websites focus on providing information about the court, largely to educate the public about such work, and to achieve other propaganda goals. The SPC's website, for example, includes news on the court, primarily focused on the activities of court leaders; an introduction to each branch of the court and to each judge on the court; explanations, interpretations, replies, and other normative documents issued by the court; selected decisions of the court (but none from the past two years); model decisions from lower courts; and the court's annual work reports to the National People's Congress. The website makes it easier to access the same type of information that the court already makes publicly available through the *People's Court News*, the Court's Gazette, and regularly published books of selected decisions from lower courts.

Another important and widely read site is the China Court Web, which is discussed above. The China Court Web carries news articles regarding the courts, laws and regulations, academic legal materials, and online discussion forums and chatrooms regarding legal matters. The China Court Web is a particularly important place for judges to read about what other courts are doing—and to help find the informal precedent discussed above. The site is run by the *People's Court News*, the official newspaper of the SPC, and thus is directly under the supervision of the SPC. The site includes both content in the paper, and also a wide range of material that does not make it into the print version.

Lower court websites are similar. They focus on highlighting court work and educating the public about such work, either through selected opinions from cases or summaries of cases, as well as articles written by judges. Cases included on websites are generally selected by court propaganda officials with a view to highlighting noteworthy or new cases.

Few courts post all or even many of their decisions online. Indeed, only one court is known to have done so: in 2000, the Guangzhou Maritime Court announced that all of its decisions would be made available online. The court website now includes 777 cases decided between 2001 and 2005. Other courts have similarly pledged to make all cases available online, or all intellectual property cases, but such promises appear to have gone unfulfilled. Most courts continue to post only a small number of selected decisions or case descriptions.

Finally, as is common in the West, court sites also provide information to potential litigants—ranging from court rules and regulations, to explanations of litigation procedures, to instructions on how to file cases and the risks and costs involved in bringing lawsuits. Other courts include hearing times, selected laws and regulations, instructions regarding the formulation of legal documents and examples of such documents, and court legal notices. The Shenzhen Intermediate Court includes a link to live broadcasts of selected court hearings, although the system does not yet appear to be functional. Some court websites also provide online mechanisms for citizens to file complaints about the court—although judges say few such complaints are filed.

The growth of court websites reflects greater emphasis on public relations and media management by China's courts. Courts have increasingly found themselves coming under criticism, in particular from China's newly commercialized media. Courts are also coming into conflict with other Party-state institutions, including People's Congresses, procuratorates, and administrative actors. Websites provide a mechanism for improving the reputations and images of courts, and perhaps thus for raising courts' status in their interactions with other official actors. Both the courts generally and individual judges—in particular court presidents—have an interest in raising their profiles with higher-ranking leaders and with the public. The development of public websites also reflects rhetorical commitment by the courts to the importance of boosting transparency as a means for raising popular confidence in the legal system, and of boosting legal knowledge among ordinary people so as to make the courts more accessible. Internet sites, and in particular court news sites such as the official China Court Web, do make an enormous amount of information available, both to other judges and to the public. Yet like the embrace of the Internet by the Party-state more generally, the content on courts' public websites also suggests a greater emphasis on managing information than on making such information publicly available.

### 3. Judges Online

In 2006, in the Shiquan County People's Court in Shaanxi, an anonymous user posted a message advising the court to ignore a case brought by an elderly woman against her granddaughter for financial support. The message was posted to the court's BBS chatroom, where court officials and sometimes the court president respond to postings from the public (and where the same court had previously defended itself in the Xu Denkai case). The poster argued that the plaintiff's daughter, an alternative source of support, was alive and in another town. The poster suggested that the grandmother was treating the court president like her grandson—expecting him to provide assistance simply because she was elderly.

In a posted reply, a court official stated that the court would do their best to handle the case. Later, the court president himself responded. He stated that he had resolved the case by contacting the local civil affairs bureau, and asking the bureau to provide financial support. The court president acknowledged that it was not the court's role to take such actions, but stated that he had done so because the plaintiff was old, and because the plaintiff recognized the importance of the courts.

As this example shows, Chinese judges sometimes venture onto public websites to handle cases or discuss legal issues with members of the public. Judges even frequent public chatrooms, such as those on China Court Web. Most judges state that they will not discuss actual cases before them in online forums before such cases are decided. But there are also examples of judges using such discussion boards to help determine how to best decide a case. In one example, a judge reported how a colleague had used online discussions with legal scholars and ordinary people to "obtain consensus" as to how a case should be handled. He praised the use of online forums for facilitating interactions between judges and the masses. And even judges who are cautious about participating in online discussions regarding cases themselves said that they nevertheless will sometimes consult such discussions when deciding cases.

Judges also use email to help decide cases. Judges in relatively remote areas say that they sometimes email leading academics to ask their views of particular legal issues. This already was the practice in major cities like Beijing, where judges frequently consult with academics when they encounter

new or difficult legal issues. The growth of the Internet makes it easier for judges in less developed areas to do the same. As an extension of the informal precedent system described earlier, judges say that they also sometimes use the Internet to locate courts that have encountered similar legal issues in the past, and then telephone the judges who handled the cases to discuss how they reached their decisions.

Finally, in recent years, some judges have begun blogging. Web sites such as the China Court Web include blogging sections, where judges discuss a variety of issues, including general views of their work and also sometimes particular legal issues. Some judges appear to be using blogs to advance their own careers—writing in ways that highlight their own work (and how they advance the Party-state's goals for the legal system). Many of the blogs appear to serve a mixture of education and propaganda goals. Thus, for example, Judge Wu Jinpeng, a judge on the Henan Province High People's court, used his blog to describe the court proceedings in a capital case—describing how the court held a public hearing on appeal, and how such proceedings received praise from all parties, including the defendant, who thanked the court for its fair handling of his case. Another judge, identified as Lan Cai, discussed cases ranging from a dispute over an insurance contract, to a claim brought by local residents challenging an administrative regulation. A judge writing under the name Judge Song Zhumei used a blog to discuss criminal cases, asking, in one case, whether particular facts should be treated as an accident or as giving rise to a charge of criminal negligence. And a judge writing under the name Jia Mu used a blog to discuss a range of civil cases, including a claim of harassment via a cell phone message and a medical malpractice case.

All of these cases appeared to be examples of already decided cases—judges do not appear to blog about pending cases. Moreover, none of the judges interviewed [here] mentioned blogs as an important source of information in deciding cases. This is not surprising; the use of blogs in China has exploded during the period in which we conducted our research. But it does appear that blogs are emerging as another important mechanism through which judges both share information about cases before them, and perhaps also interact with the public and the legal community regarding interesting or novel cases.

In sum, Chinese judges are experimenting with a variety of new ways of using the Internet to either handle their legal duties or conduct public relations. The long-term implications of these activities are not clear. Nevertheless, China may serve as an interesting case study for the rest of the world.

### Internal Networks

Use of the external Internet and the development of court public websites represent just one aspect of how Internet technology is changing China's courts. One reason most judges are not able to go on the external Internet from work is that many Chinese courts have constructed internal court networks (another is that many basic level courts lack computers).

The developments we describe above regarding how judges use the Internet have gone largely unnoticed in academic and media writings in China. The Chinese media have, however, covered in detail the development of internal court networks—networks that can be accessed only by court personnel. These networks, known in Chinese as *juyu wang*, generally link judges within a particular court; in some more developed areas they link lower courts with higher courts. In some respects internal networks provide similar types of information and opportunities for interaction that are provided on the external Internet: judges have easier access to laws and regulations and some selected cases than in the past and, in some courts, can share their views about cases with other judges in chatrooms. Internal networks, like the external web, make it easier for judges to do their jobs.

Yet the information on such sites is limited to that selected by court officials, and thus is often far less comprehensive than what is available on the external Internet. Judges using internal networks are limited to seeing those materials that their superiors want them to see. In addition, internal networks are also an important mechanism for monitoring work by individual judges. In this respect courts' use of the Internet may be seen as a parable for China's embrace of the Internet more generally: more information is



available, and judges are able to do their jobs more efficiently (and, one hopes, more fairly), but the Internet is also serving the state's interests in imposing oversight and control.

In a 2002 notice, the SPC instructed all courts in China to set up networks or individual computers with software allowing judges to search laws and other legal materials. Courts have gradually complied with the notice. Reports in 2003 and 2004 on the development of the Internet in China's courts stated that 500 to 600 of China's approximately 4000 courts had established internal networks. Many more courts appear to have set up internal networks since then, or are in the process of doing so.

Discussions of the role of internal networks focus on their role in making courts more efficient. Thus, for example, reports have noted that developing internal networks raises court efficiency by strengthening information management and "leadership methods" in the courts. Reports have also noted the importance of court networks in facilitating supervision of lower courts by higher courts.

Not surprisingly, courts in economically developed areas have taken the lead in developing such networks. In Jiangsu Province—one of China's richest—a 2006 report noted that computer networks had been established in 116 of the province's 123 courts. Yet courts in less developed areas—ranging from Heilongjiang in the northeast to Tibet—have also developed court networks and have publicized their use in increasing both efficiency in and supervision over local courts.

Many basic level courts, in particular in rural areas or county towns, lack networks or computers. Judges at a rural county court in Jilin Province reported that the only people in the court with web access are the court president and the vice-presidents; judges have no access to either an internal network or to the external web. Only court leaders have computers. Judges at both a county and an intermediate court in the central province of Hubei commented that they lack any web access, and that many courts lack computers.

In general, internal networks have four primary functions. First, they provide searchable databases of laws, regulations, some cases, and other binding normative documents. Many courts include a database of national and local laws developed in conjunction with the SPC, the *People's Court Press*, and the Chinalawinfo Center at Peking University. The database includes SPC interpretations, replies, and other documents, as well as some cases. Internal networks thus provide judges with electronic forms of the types of materials they have traditionally consulted in deciding cases, making it easier for judges to access such materials. Judges also receive information about new laws, regulations, and interpretations via notices on their internal court networks. Over time, how, why, and by whom the information included on internal webs is collected may have a major impact on how courts function and apply the law. Controlling information on internal networks—which the SPC is doing by requiring all courts to use standardized software—is also a mechanism for controlling how judges decide cases.

Second, some court internal networks include discussion forums in which judges discuss topics ranging from new cases to the quality of food in the court cafeteria. These forums are similar to those that exist on the external web, but are accessible only to judges from a particular court or courts. In some courts judges comment that such discussion forums are rarely used to discuss substantive matters. In others, however, such as in Jiangsu Province, judges say that such internal discussion forums—which are accessible to most judges in the province—have become important forums for discussing new legal issues and, occasionally, pending cases. The system includes numerous discussion forums, moderated by individual judges, where judges can discuss cases (and other issues) anonymously. One judge noted that the forums allow judges to learn about new developments, both in China and overseas. Likewise, all judges in Shanghai can participate anonymously in discussions on the Shanghai court web, which links all courts in the city. In addition, the Shanghai Second Intermediate People's Court's internal network includes a section in which judges can discuss "difficult legal questions" that they encounter in cases. The discussion is also accessible to judges in lower courts under the intermediate court's jurisdiction. A report on the court's website stated that court officers can discuss abstract legal issues encountered in individual cases. The court also organized a team of experienced judges to provide information in response to such abstract questions.

As we have noted, Chinese judges frequently discuss cases that are under consideration with their peers and superiors, including superiors in higher courts. Discussing pending cases on discussion forums is thus an electronic version of the forums of vertical consultation that already exist. Yet such discussion forums may also facilitate debate in which judges might be less willing to engage face to face with other judges or with their superiors. For example, one report on the Liu Yong case recounted how judges on the Liaoning Province High People's Court had discussed the case on their Internet network while it was under consideration—but did so anonymously out of concern for retribution. Nevertheless, such discussion takes place in a controlled environment, one in which only court personnel participate, and one that is monitored by court superiors. It may be that judges are more willing to participate in such discussion when they know it is unavailable to the public. On the other hand, judges may also be wary of speaking too freely in a system run by the courts with an explicit goal of boosting oversight of judges.

Third, internal networks serve to disseminate information to judges, in particular about recent court developments. Internal websites sometimes include representative cases from provincial or municipal high courts, as well as notices and interpretations from such courts. Local court leaders also sometimes include specific materials or cases from their own court on their internal websites. These materials are designed to inform and educate judges; such cases are often selected because they either are particularly good examples and are thus worthy of study, or they carry a particular message. Thus, for example, in Beijing, courts can view interpretations from the Beijing High People's Court, as well as those from the SPC. The Beijing High Court posts descriptions of important decisions (but not court decisions themselves) on its internal website for judges in the city to review.

Fourth, and arguably most important, internal networks facilitate oversight of individual judges and even courts. In many cases it appears that the networks have become a significant mechanism for higher-ranking judges to monitor the work of those below them. In so doing, internal networks reinforce the hierarchical and bureaucratic structure of China's courts. Many internal court networks provide information regarding the status of cases, such as party names, dates on which cases were filed or dates of scheduled hearings, and whether a case has been resolved. In most cases, such information is available only to judges handling such cases and their superiors, although in some courts all judges can view such information. In others, however, such information is available only to court superiors; judges complain of being required to enter extensive administrative information regarding cases into the computer system which they themselves cannot even access. The monitoring function is backed-up by other technology. In some courts in Beijing and Shanghai, court presidents, vice presidents, and heads of individual divisions can watch live video streams of the proceedings in any courtroom under their jurisdiction. At the SPC, all judges are required to log in to the court network as soon as they get to the court, so that superiors can monitor who has arrived at work.

Court judgments are likewise usually available only to a limited number of judges and court officials. In a few courts it appears that all judges with access to the internal network can view all or most decisions from their own courts, but most networks only allow court leaders to view decisions (other than those selected by court propaganda officials as worthy of posting on the network). As one court president explained, decisions are not generally available on the internal website because they are "secret." Thus court presidents and vice presidents often can view all cases in their courts, and heads of divisions within courts can view decisions in their division, but ordinary judges have access to only those cases they have decided. As one judge in an intermediate court put it, each judge in the court is allowed to view different information depending on his or her status. In addition, in some jurisdictions in which networks connect lower and higher courts, some higher court judges are able to view decisions in lower courts in their jurisdiction.

In Beijing, for example, only high-ranking judges can view decisions. The situation in Beijing is noteworthy in part because it marks a departure from the more open system that was in place when the Beijing courts first created an internal court network. At the time, judges could view all cases decided by any court in Beijing. Judges could also view cases in their own courts in which they were not involved. The Beijing High People's Court altered the system, creating instead a system that permits only higher-

ranking judges to access such information. The progression in Beijing appears to represent a more general trend. As court networks have developed, courts have become more sophisticated about both the type of information provided and the degree to which higher-ranking judges are able to use the system as a tool for oversight.

It would be wrong to view efforts to use technology to improve oversight of judges as entirely pernicious. As we have noted, there are many problems in China's courts—including corruption, incompetence, and other forms of malfeasance. If internal networks are able to ensure that cases are heard and decided on time—within the time limits stipulated in law—it would be a major step forward for the fairness of the Chinese system. The same is true with having live images of court proceedings available to court superiors: the fact that proceedings are on camera may reduce incentives to engage in obvious misconduct. In this regard, however, the development of court internal networks reflects the development of the Internet in China more generally. Restricted access to the Internet serves the state's interests in oversight and control. But restricted access may be better than no access, and in the legal system it may mean courts that function more fairly, more efficiently, and more consistently.

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**Stanley Lubman, *Looking for Law in China*, 20 COLUM. J. ASIAN L. 1 (2006)**

The preceding two decades have been marked by dramatic and impressive accomplishments in the development of investment vehicles, and of critical substantive areas of law. At the same time, the influence of CCP policies continues, manifested for example in the Catalogue and the operation of an often opaque approval process. Substantive commercial law still lacks important details in such areas as securities law and real property law. And although governmental transparency is growing, many administrative regulations remain *neibu*, leaving much to be desired in the level of transparency.

Fundamental problems confront efforts to create and implement an effective legal regime. [L]egal uncertainty . . . continues to exist not only because carrying out economic reform and dealing with its social consequences are difficult processes that will necessarily require much time, but also because defining the goals of economic reform and guiding its course are works in process. It need only be noted that while privatization of the economy has continued, there is continued uncertainty about the future of large SOEs, the inefficiency and insolvency of which have led state-controlled banks to provide huge amounts of nonperforming loans that imperil the entire banking system. In the meantime, the building of a social safety net is a slow process. Also, the non-state economy is growing in complexity, presenting new problems of legal definition and regulation.

Another factor . . . is that the overriding goal of the CCP continues to be maintaining its dominance. As a result, the political will of the leadership to deepen law reform remains weak. The current CCP policy on the role of law is, on its face, one that no Western democracy could criticize: "Rule the country by law". This national policy was announced in 1994 by President Jiang Zemin and given wide publicity. But the phrase was only part of the sentence in his speech. He then said that another element of the CCP policy was to "protect the long-term stability of the nation," a code reference to maintenance of the dominant leadership of the CCP. Although the phrase, "rule the country by law," was later inserted into the Constitution, the Constitution still enshrines the guiding principles of China Marxism-Leninism, Mao Zedong Thought and Deng Xiaoping Theory, all doctrines that insist on CCP dominance. Thus, as much as "rule by law" is formally emphasized, the unwillingness of the CCP to place itself within the reach of the law remains unchanged in practice.

Critical too is the autonomy of local governments, which . . . challenges the frequent weakness of the center in holding them to adherence to national laws and policies. Localism and local protectionism impact the courts, and are manifested in the wide discretion that local officials exercise over the administration of FDI [foreign direct investment]. But these and related emphases must also be

considered as forces that reflect a constant and currently unresolved tension between the center and local level governments. Recent research has looked at the impact of that tension on China's capacity to meet its obligations under the WTO. Mertha and Ka observe that local protectionism is so strong that "it is practically impossible for the leadership in Beijing to maintain sustained and systematic monitoring across China, with the possible exception of a handful of key issues, because enforcement costs are prohibitive." With this in mind they have looked at attempts to centralize regulatory bureaucracies in three areas: the standardization of commercial practices, the regulation of financial services and the regulation of the production and sale of agricultural commodities, all "part of the attempt to decrease their vulnerability once China lifts its trade restrictions on services and agriculture."

Among their conclusions is the belief that although there is "tremendous variation" among attempts at centralization where it has been attempted, it stops at the provincial level, and that while provincial governments can "rein in local excesses," the central government "does not necessarily re-establish control in Beijing, but, rather, concentrates it among China's provinces, autonomous regions and provincial-level municipalities." They conclude that in the three sectors they discuss,

clashes between macro-level economic policy making and entrenched bureaucratic and local interests dim the prospect of the smooth implementation of WTO-related policy and institutional change, at least in the short and medium term.

These statements not only underline the significance of the fragmented authoritarianism that marks Chinese governance today, but its depth and tenacity. At this point, it is impossible to predict how the central-local tensions will play out, but it seems certain that they will continue to be in contest for the near term, and, as a result, will further contribute to a lack of uniformity and consistency in the making and implementation of law, with inevitable consequences for certainty in Chinese law.

Moreover, underlying both the continuing creation of and experimentation with new institutions are deeply-imprinted cultural patterns and expectations that shape the wielding of authority, especially outside Beijing; these can only be changed gradually. I hold to this view despite the signs of growing legal consciousness among the Chinese population, awareness in the central government that it is indeed growing, and the ongoing efforts of a cohort of Chinese law reformers who are working on or promoting new legislation that some, at least, regard as legal reforms that may promote political reform.

Against the background of my own experiences in China and my general appraisal of the legal environment for FDI, early in 2004 I met in Beijing with a group lawyers and businessmen who have all been involved in one way or another with FDI in China for considerable periods of time, some for many years, and who are knowledgeable about the matters I have discussed here. I asked them to assess the current business environment.

The consensus was a commonsensical one that carries a mixed message: in the longest-established areas of FDI, such as setting up joint ventures of the types originally authorized in 1979, the accumulated body of experience is now considerable. Regulation and its procedures have grown in standardization, transparency and regularity; consequently, uncertainties have been reduced in these areas. Also, as experience has been accumulated by foreigners who entered into joint ventures, the difficulty of finding reliable Chinese partners and working well with them has led numerous foreign investors to prefer WFOEs instead.

The group further agreed that in newer and emerging areas such as capital markets, foreign equity investment, venture capital, and mergers and acquisitions, uncertainties abound. Corporate governance standards are nascent in their formulation and more often than not unheeded in practice. We also agreed that the distinction between relatively developed areas of law and newer ones is not absolute, and that as a general matter, progress is being made only slowly in increasing transparency and bringing the acts of administrative agencies under closer scrutiny and control according to legal standards.

Significant agreement with these views has been expressed elsewhere in the U.S. business community in China. For example, the American Chamber of Commerce in Shanghai noted in 2004 that Shanghai officials had "announced a new openness initiative that will make available internal documents

and allow local officials to directly address problems of citizens and foreign companies alike.” At the same time, however, the report adds:

Recent progress notwithstanding, our members continue to see inconsistency in local officials’ interpretation of Chinese regulations. Decisions on fees or fines are often imposed arbitrarily and without uniformity. Many regulatory documents are still restricted to internal use (*neibu*) and are thus not always shared with interested companies.

Consistent with this report is the conclusion in a survey of members of the U.S.-China Business Council, which found that lack of transparency was ranked as the third most important issue of concern to them in 2005, although it had been sixth in the survey of the preceding year.

A look back over the history of FDI in China since 1979 yields a mixed picture of accomplishments and persistent problems, and it is not easy to sort out the prospects for the future. Contemplating the future is even more difficult if we expand our perspective beyond the legal framework for foreign businesses to take into account essential features of the society into which foreign businesses situate themselves and which inevitably affect the meaningfulness of law.

### ***Concluding Thoughts: Looking Ahead***

It is not only the structure and policies of the Party-state that impede legal reform; ongoing changes in Chinese society further complicate the task.

A dramatic alteration in the involvement of the Party-state in the lives of the populace, for example, has occurred. State control over the lives of many Chinese has been noticeably relaxed. They are increasingly free of the tyranny that their work units exercised over them; they are relatively freer than they have been since 1949 to speak and think as they please, although within certain boundaries; some have gained social mobility and economic opportunities unparalleled in prior Chinese history. Swept up in these changes, China is undergoing a crisis in values. Although more than half a century of Communist rule has eroded older traditions, after a quarter century of reform the Communist ideology has increasingly lost its coherence and legitimacy, and now appears glaringly hollow to many Chinese. This means that law reform must be carried out amidst a whirl of conflicting values that disturb and confuse Chinese society. An obvious result of the decline of faith in socialism is the moral vacuum in which new spiritual cults and Western religions rise to challenge the Party. . . .

Some of the most obvious problems that China faces today and which directly confront the task of law reform include the growth of economic disparities, not only between the countryside and cities and between the China coast and inland, but also between winners and losers in the economic reforms: the gap between richest and poorest is one of the largest in the world.

In the meantime, social mobility has increased—over 125 million migrant workers have left the countryside to work in the cities—and there has been a breakdown of communal and workplace ties. These dramatic changes have contributed to social unrest. Crime is rising; the number of public protests and demonstrations is increasing, and in the countryside legal resources are sadly lacking for peasants who wish to use formal legal means to protect the rights of which they have become aware.

The Chinese leadership mistrusts civil society, and therefore closely watches and regulates non-governmental organizations for fear that they could become centers for political dissent and apply pressure for political change. The leadership is so paranoid about political opposition that it continues to limit media freedom, block access to Internet sites that might spread ideas deemed politically subversive, and restrict public discussion of sensitive topics.

Among the changes in values that have been set in play by the reforms is legal culture, an admittedly vague but useful catchall concept meant to encompass attitudes toward law on the part of officials and the populace alike. Although it may appear indefinite and is difficult to measure, demonstrable manifestations of it are critically relevant to understanding legal uncertainty in China today

. . . . As a preliminary to speculation on possible paths of legal development in the near and long terms, the following discussion contrasts some obvious attitudes of the Party leadership with others that seem to exist, both within the Chinese Party-state and among the Chinese populace.

#### Slow Development of Administrative Law

As committed as the leadership is to maintaining the dominant role of the CCP, it has also recognized the need to implement law to respond to popular concerns about the need to control official behavior and to protect newly defined private rights. Acceleration of economic reform was a motive for the leadership's decision in the late 1990s to accelerate China's joining of the WTO; accession has generated further impetus and necessity for advancing legal reform, notably in expanding control over administrative arbitrariness. In recent years, law reformers' attention has been focused on revising and expanding the scope of laws adopted in the 1990s that began to create a body of administrative law not previously known in China. These include the Administrative Litigation Law, which came into force in 1990 to permit, under limited circumstances, suits against government agencies; the State Compensation Law, adopted in 1994, under which state agencies could be subjected to tort liability, although standards of liability are seriously unclear; and the Administrative Reconsideration Law of 1999, which created procedures for review within agencies, but without external oversight over such reviews. Other laws have been adopted to standardize the imposition of sanctions by administrative authorities and procedures that govern their handling of licenses. Transparency in the legislative process and in administrative rulemaking, by for example utilizing public hearings, is also being encouraged, although tentatively and unevenly.

The mere existence of a law under which agencies may be sued symbolizes both the progress that legal reform has made since it was begun in 1979 and the distance that has yet to be traveled before China's legal institutions evolve into a legal *system* that upholds the rule of law. An uncertain territory lies between a frail nascent legality and a vast expanse of official behavior that is unregulated or barely regulated by law. Further efforts to narrow the gap remain under consideration both in the LAO [Legislative Affairs Office] of the State Council and the Legal Affairs Committee of the Standing Committee of the NPC.

#### Reform Aimed at Changing the Legal Culture of Officials

The realization has grown among some higher level officials that creating a meaningful legal system involves more than merely staffing courts and passing laws. Recognition is slowly growing that in order to strengthen legal institutions, government officials and the general populace at large must value and support them, thereby granting them legitimacy. The amalgam of traditional and Maoist attitudes carried over from pre-reform legal culture cannot change quickly, especially given the ambivalence of the Chinese leadership toward law as well as the persistence of legislative techniques and bureaucratic practices which, reflecting previous attitudes and practice, impede the growth of law and attitudes toward law that would strengthen legality.

The State Council has turned its attention to this problem, as evidenced by promulgation in 2004 of the "Implementation Programme for Comprehensively Promoting the Exercise of Administrative Functions in Accordance with the Law." This document noted that

Administrative policy-making procedures and mechanisms are not sufficiently sound. Non-compliance with the law, law enforcement of the law, and failure to investigate violations of the law happen from time to time, causing significant resentment among the people. Mechanisms for supervising and restraining administrative acts are not sufficiently sound; some unlawful and improper administrative acts are not stopped or corrected in a timely and effective manner; and there is no timely recourse for the harm

done to the legitimate rights and interests of the parties that are subject to administrative management.

The balance of the document calls, essentially, for adherence to the rule of law in a manner that echoes values consistent with the Western ideal of the rule of law: it emphasizes the need for clear definition of the functions of administrative agencies, standardized behavior, fairness, transparency, effective supervision, and effective safeguards. Institution-building, full and correct enforcement of norms, and uniformity in the legal system are stressed, and rationality and procedural regularity are repeatedly mentioned. In discussions in March 2004, LAO officials emphasized that the mentalities of officials had to be shaped so that they would understand, accept and discharge their functions in a manner consistent with these principles.

To what degree progress toward these lofty goals will be achieved remains, of course, in doubt. Premier Wen Jiabao, in a speech in 2004, stated that the “Implementation Programme” noted above “puts forward the necessity of basically attaining the goal of building a government with the rule of law through making unremitting efforts for about 10 years.” Institution-building will be a work in progress for a long time, and changing the legal culture will take even longer. Wen stated that “crucial” to promoting administration through law was whether “the leadership attaches importance to work in this respect and grasps implementation.” Leadership commitment to raising the level of Chinese legality, however, has obviously been crucial all along, and the basic contradiction between the rule of law and CCP dominance remains unaddressed. The Congressional-Executive Commission on China has observed that the Chinese government has placed “heavy rhetorical emphasis on respect for the Constitution and ‘administration according to law,’” and has articulated laws and policies consistent with that goal. It adds, though, that “[g]overnment officials retain enormous discretion . . . and existing legal mechanisms neither permit Chinese citizens to enforce their constitutional rights nor provide a consistent and reliable check on arbitrary administrative acts.”

#### The View From Below: Citizen Attitudes Toward Law

Among many reasons for the “disappointing lack of effectiveness of enacted law” in China today, one knowledgeable observer of Chinese legal development has noted,

the concept and doctrines of legality, unlike the precepts of Confucianism, has never occupied a central role in traditional imperial China. There has not existed a legal culture with elements like officials’ fidelity to law or citizens’ consciousness of their legal rights, which provide the necessary conditions for the effective operation of a modern Western-style legal system.

Although popular legal consciousness remains influenced by traditional attitudes that did not include insistence on legality, reform has brought about ongoing changes. More Chinese citizens are becoming aware of the possibilities for relying on the laws that the Party-state has given them in litigation to vindicate rights expressed in that legislation. Recent amendments to the Constitution raise the possibility of increased protection of rights. Legislation implementing those amendments has not yet appeared, but some, such as a draft nationwide property law, is under discussion. While the Chinese Constitution currently remains, as it has been throughout the history of the PRC, an aspirational document that is not justiciable, enforcement of constitutional rights has become a topic of increasing interest.

Competing currents in Chinese legal culture are now discernible. While there is a lack of eagerness to promote reform from above, there are signs that from below, from Chinese society itself, citizens’ attitudes toward the law are evolving. I offer an illustration from my own experience:

For over 35 years I have been traveling to China, and when I tell Chinese that I have been specializing in Chinese law for over 40 years, they often laugh because they think there is little to study. One day I had that kind of conversation with a taxi driver, who repeatedly exclaimed, “We don’t have any real law.” Our discussion continued during a lengthy ride to China’s largest law school, and when we

reached my destination, I asked him to wait while I went inside. When I returned to the taxi, he remarked that I had been gone a long time, more than an hour. When I reminded him that I had told him I would be gone that long, he said, "Yes, I knew I would have to wait, that's not a problem. My question is, since our country has so little law, how could you find enough to talk about for an hour?" We continued to talk, and at one point he said, "You don't understand. Do you know about campaigns?"

Yes, I said; there were often campaigns to enforce specific laws more strictly.

"No," he said, "you still don't understand. I am a taxi driver. If I steal from my company I should be punished. This month, the month of March, there is a 'Strike Hard' campaign going on to punish crime heavily. If I stole in February, before the campaign, I would have received a certain punishment. But if I steal this month, I would be punished more severely. That's not fair. The law should be the same in March as it is in February."

This taxi driver understood some basic concepts of the rule of law, and I have heard his sentiments echoed by many other ordinary citizens. Peasants and workers who have increasingly protested against arbitrary official behavior in recent years have often invoked published laws as the basis for their protests. Some Chinese legal scholars, officials and intellectuals have called for a truly national and autonomous judiciary that applies standards of procedural fairness. Some businesses in the non-state sector desire stronger protection of their transactions and property through rules enforced meaningfully and consistently by the power of the Chinese state. The Chinese media often discusses significant court cases and issues related to the law; there are also considerable influences from abroad conveyed by the foreign and domestic media, the Internet, and foreigners doing business. Additionally, foreign nongovernmental organizations such as the Ford Foundation, The Asia Foundation, the Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) and the Yale Center for Chinese Law organize foreign experts to advise on a range of law reform projects.

## Prospects

### 1. The Near Term

Stepping back from the welter of reports and impressions that attempt to assess or summarize a confused picture, it is no surprise to find continuing disagreement among foreign observers. An investor characterized in a *Wall Street Journal* article as a "strong proponent of the coming China century" compared China today with the United States after the Civil War, when the U.S. "had no rule of law." Consistent with this view is a *Taipei Times* editorial, which noted that a group of Taiwanese businessmen "who have been defrauded, conned and swindled in China established an association to advocate their rights and rights of others who have shared similar fates."

At the same time, the perceptions of foreign investors and the problems they encounter in China are sometimes produced by their own ignorance. As one writer noted:

Where China is concerned, there is a long history of foreigners shedding their normal caution and being transported by heady visions of limitless gain. Where else, after all, offers so many opportunities to participate in such a phenomenal growth story? And whatever the risks of plunging in, how much greater are the risks of being left out?

In my own experience in China since 1972, I have often been amazed at how little effort some clients and other businessmen made to educate themselves about problems encountered by foreign investors in China. Other China specialists report that many new and current investors in China are equally as uninformed as their predecessors. Such ignorance is only part of the superficiality of knowledge and caricaturization of China that is too common in the West.

The combination of legal uncertainty and foreign unfamiliarity with the business environment led to an assessment in a survey of business in China in 2004 by *The Economist* that referred to risks



[f]or businesses already facing a host of challenges. China's developing capitalism is not solidly based on law, respect for property rights and free markets. It is unbalanced and potentially unstable. Multinational companies operating in China have often failed to produce an adequate return on their investment, or indeed a profit of any sort. That is partly their own fault, because they overestimated the market and underestimated the competition. With experience, more are getting it right. However, the business climate in China remains capricious and often corrupt.

I would modify this judgment by weaving into it the conjecture that the near-term prospects seem to be the continuation of a *rolling uncertainty* that has marked the last twenty five years. The major causes that have been discussed here seem likely to maintain their influence. The development of FDI since 1979 suggests that as new or expanded forms of foreign business activity emerge and practice accumulates, uncertainty is restrained and reduced, although the regulation of FDI seems likely to continue to be marked by the problems that have been discussed here, absent a deepening commitment by the Chinese Party-state to legal reform. In addition, the economic nationalism and backlash against FDI that have recently become noticeable continue to grow, so the problems faced by prospective foreign investors will reflect new difficulties.

## 2. Beyond the Near Term

Further legal development depends on the future of the economic growth that underlies legal reform. Indefinite continuation of the torrid rate of the first twenty five years seems unlikely. Quite apart from this obvious uncertainty about the near term, however, are questions about the future path of general legal development in the years to come. Regardless of how many new institutions are created and new laws promulgated, whether for FDI or for wider application, a legal culture must evolve that will support consistent enforcement and application of laws, both new and old.

We cannot know now how deeply Chinese law in the future will bear the imprint of pre-Communist China's legal culture and the Maoist institutions and practices of the current Party-state that still exert strong influence. In particular, we cannot know the future trajectory of the rule of the CCP. One scholar has suggested that for the Chinese leadership to subject themselves to the rule of law they would have to "abandon beliefs, values, expectations and habits that have endured in China for over a millennium. In other words, they would have to abandon culture as well as self-interest." It is not necessary to subscribe to this extreme view to take seriously the burden of history that rests on modern Chinese law.

Certainly the history of economic development in East Asia since WWII suggests that legal development will not follow a path similar to that of the West, and that we cannot presently predict the configuration of legal institutions that will become permanent. One scholar has suggested that "informal and non-state institutions may go a long way forward toward providing the predictability and security that investment requires." While this view does not completely describe the Chinese system, it does call to mind the tactics that foreign investors and local governments have employed to fashion a degree of relative predictability and expectations ample enough to support sustained growth in foreign investment. Another scholar has commented that "contrary to some theory, less legal-rational means of market control may actually permit greater economic and social predictability, at least in the short-term."

But what might lie beyond the short term? It is easy to assume that a liberal-democratic rule of law is unlikely to evolve in China. But there is also evidence that Western concepts of law, even if they can be applied only with difficulty, are not irrelevant, either to the thinking of law reformers or the Chinese populace.

The search that I undertook forty years ago has changed, because China has undergone, and continues to be in the midst of, remarkable transformations. There is an impressive amount of Chinese law on the books now, and more will continue to appear. When I began, one question was whether law could ever be a lens that could be useful for viewing and deepening foreign understandings of China. The

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last twenty five years of Chinese history provide a ready answer, but another even more pointed question is present today: What is, and what will be, the significance of law in the governance of the Chinese Party-state? The challenge of that question is greater today than that posed by the earlier one, because China has itself now joined in the search for law.