

# Amicus *Curiae*

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## **Inside ...**

Introduction

[Read more on page 145](#)

Articles

[Read more on page 151](#)

Review Article

[Read more on page 237](#)

Notes

[Read more on page 244](#)

Book Review

[Read more on page 290](#)

News and Events

[Read more on page 294](#)

Contributors'  
Profiles

[Read more on page 299](#)

Visual Law

[Read more on page 303](#)

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## CONTENTS

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### Editor's Introduction

*Michael Palmer* ..... **145**

### Articles

Mediation: Alternative? Or a First  
Choice for Resolving Disputes

*Lesley A Allport* ..... **151**

Old Wines in New Bottles? Private  
Securities Litigation in China's New  
Securities Law

*Ding Chen* ..... **169**

Proving Chinese Law in the Courts  
of the United States: Surveying and  
Critiquing the Article 277 Cases

*Richard K Wagner* ..... **188**

Online Dispute Resolution  
Simulation: Shaping the Curriculum  
for Digital Lawyering

*Faye F Wang* ..... **216**

### Review Article

Elizabeth Fisher, Jeff King  
and Alison L Young eds—*The  
Foundations and Future of Public  
Law: Essays in Honour of Paul Craig*

*Patrick J Birkinshaw* ..... **237**

### Notes

Human Rights, China and the UN:  
A UPR Mid-term Assessment

*Matthieu Burnay & Eva Pils*  
..... **244**

From PhD Thesis to Monograph:  
A Reflective Account of the Process

*Lisamarie Deblasio* ..... **255**

Miscarriages of Justice and the  
Construction of Criminality in the  
People's Republic of China

*Yu Mou* ..... **261**

Medical Negligence Dispute  
Resolution in China: Social Stability  
and Preventative Measures

*Cedric Tang* ..... **268**

### Book Review

Nadja Alexander and Shouyu Chong  
(2019) *The Singapore Convention on  
Mediation—A Commentary*

*Ling Zhou* ..... **290**

### News and Events

Building Transformation Project  
Update ..... **294**

ILPC Annual Lecture and Annual  
Conference ..... **294**

Legislative Drafting Course . . . . **296**

Selected Upcoming IALS Events  
..... **296**

How to get a PhD in Law ..... **298**

Podcasts ..... **298**

Contributors' Profiles ..... **299**

### Visual Law

Three Courts in Shenzhen, China  
*Ling Zhou* ..... **303**

#### *Amicus Curiae* Contacts

Editor: Professor [Michael Palmer](#),  
SOAS and IALS, University of  
London

Production Editor: [Marie Selwood](#)

Email address for all enquiries:  
[amicus.curiae@sas.ac.uk](mailto:amicus.curiae@sas.ac.uk)

By post: Eliza Boudier

*Amicus Curiae*, Charles Clore House,  
17 Russell Square, London WC1B  
5DR

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## EDITOR'S INTRODUCTION

MICHAEL PALMER

IALS and SOAS, University of London

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In this issue, contributions by Lesley Allport, Chen Ding, Richard Wagner, Cedric Tang, and Zhou Ling examine various issues in dispute resolution. Patrick Birkinshaw offers an extended appreciation of the work of Professor Paul Craig in the field of administrative law and justice. Analysis of legal and human rights developments in mainland China are provided in contributions by Mou Yu, and by Mattias Burney and Eva Pils. Issues in legal education are examined in contributions by Faye Wang and Lisamarie Deblasio. Finally, Zhou Ling reviews work on the Singapore Convention and makes a Visual Law contribution, looking at specialized courts in Shenzhen, southern China.

Leslie A Allport's paper, titled 'Mediation: Alternative? Or a First Choice for Resolving Disputes', reminds us that in the emergence and development of ADR from the 1970s onwards an important setting in which the use of mediation was initially emphasized was community dispute resolution. In the subsequent growth and institutionalization of ADR processes, the need to understand the lessons from the community mediation experience—the place

of social norms in the mediation process and the ways in which collective as well as individual interests could be taken into account by mediation—have tended to be overlooked. Mediation practice today should consider these important features and see mediation as a process of much broader significance than achieving settlement in disputes between parties, offering as it does the possibility of generating and refurbishing social norms and consideration of a wide range of interests. In addition, if mediation is seen as the first choice of process in responding to conflicts and potential conflicts, it has the considerable potential to serve not just as an educative process for disputing parties but also as an important means for preventing disputes.

Chen Ding's contribution, entitled 'Old Wines in New Bottles? Private Securities Litigation in China's New Securities Law', examines problems that arise from the fact that the securities industry in the People's Republic of China (PRC) has long been weak in terms of remedies for aggrieved investors, especially remedies available to the small investor involved in a

securities dispute and seeking justice through litigation. Typically, in a Chinese securities dispute, the number of aggrieved investors is large, but the value of each of their claims is small. The Chinese stock market is dominated by retail investors and their reluctance to engage in litigation results in very low levels of litigation. This reflectance, the essay argues, cannot be satisfactorily explained in terms of procedural complexities, costs of litigation or limited access to class-type actions. Rather, it is to be explained by a lack of investor confidence in the ways in which the people's courts handle such cases—these failings include the courts' refusal often even to accept securities cases, or if accepted then there is significantly delayed case filing, and, even if an award favourable for the plaintiff is made, enforcement difficulties will likely follow. As a result, the litigation track is generally inhospitable to the small investor. Much of this difficulty, it is argued, is to be explained by the vulnerability of the people's courts to local pressures and personal connections, which are used to protect the defendant. The current conservative drift in official policies on the people's courts is unlikely to resolve such problems. Thus, although changes are introduced by a new 2020 Securities Law—which in part borrows from Taiwan experience—such reforms are likely to have only a modest impact in the absence

of more meaningful judicial independence.

Richard Wagner's contributed essay, 'Proving Chinese Law in the Courts of the United States: Surveying and Critiquing the Article 277 Cases' examines treatment in the US courts of cross-border disputes involving PRC parties and issues of PRC law and business culture. The contribution considers the process of proving PRC law in US courts and explores some of the difficulties involved in this process. These include the absence of clear standards for assessing expert testimony and a lack of familiarity on the part of many US judges with China and its legal system. Attention is also given to difficulties in the interpretation of Article 277 of the PRC's code of Civil Procedure dealing with judicial assistance issues—difficulties leading sometimes to erroneous outcomes. The contributed essay offers suggestions on how US judges might best deal with such difficulties.

Faye Wang (WANG Fangfei) contributes an essay—'Online Dispute Resolution (ODR) Simulation: Shaping Curriculum for Digital Lawyering'—which examines how the development of online processes (such as ODR) encourages us to consider curriculum innovation so as to better prepare students for their future participation in a world of 'digital lawyering'. She reports on

a long-term educational project intended to shape modern legal education so that it better suits a professional world in which the work of lawyers and others is increasingly digitalized. Her essay describes her experience over more than a decade with ODR simulation workshops which offer students a virtual learning environment for the development of both legal and digital skills. Students participate in online arbitration and mediation sessions, and their involvement will likely include submission of arbitral awards and mediation settlements, taking technical observation notes and participating in group presentations. Such activities are felt to provide many additional benefits in addition to helping students to learn to cope better with the challenges lawyers and others are likely to face using e-technology in dispute resolution and other aspects of their work. The teaching and learning strategy is thus intended to shape the law curriculum in order to meet the upcoming new rules and the standards of the Solicitors Qualifying Examination.

In his Review Article, Professor Patrick Birkinshaw assesses the book edited by Elizabeth Fisher, Jeff King and Alison L Young and entitled *The Foundations and Future of Public Law: Essays in Honour of Paul Craig*. This volume celebrates the work of Professor Craig and its value for public law discourses. The book speaks directly to its

title and considers in detail six key foundations (theory, case law, legislation, institutions, process and constitutions) and their future development. Birkinshaw's review offers carefully balanced and insightful commentaries on each contributed chapter. Moreover, encouraged by the quality of the contributed essays, including Craig's own analysis of the chosen six key dimensions of public law in the Brexit process up until May 2019, Birkinshaw's commentary concludes by offering his own expansive view of the tasks of public law both now and in the foreseeable future. These include: establishment of the public realm and maintenance of the effectiveness and sustainability of the public realm; regulating relations between public organs and the powers they exercise on behalf of the public in the public interest; ensuring that public power in its numerous forms is accountable; protecting equally under law those affected by such power and facilitating their effective contribution to the political and social context in which they exist; and the protection of human rights and promotion of transparency. These are the tasks of public law and will remain its tasks for the future.

The contribution by Matthieu Burnay and Eva Pils entitled 'Human Rights, China and the UN: A UPR Mid-term Assessment' reports on a workshop, held late last year, which considered the

Universal Periodic Review (UPR) of the evolving human rights situation in the People's Republic of China. The workshop was convened by the Jean Monnet Network on EU–China Legal and Judicial Cooperation.<sup>1</sup> It explored issues in the PRC's expanding presence in and impact on the human rights system of the UN, and also considered the recommendations made during the PRC's third UPR carried out by the UN Human Rights Council on human rights developments, in particular in Xinjiang and Hong Kong. The authors of the Note suggest that, while there are serious divisions in the international community on how best to respond to the deteriorating human rights situation in China, there are also indications that the negative conclusions reached by experts and others about the PRC's recent human rights performance are helping to change minds. There is evidence of declining support for draft resolutions on human rights cooperation proposed by the PRC at the UN, and indications also of continuing commitment to the value of an international rule of law.

Lisamarie Deblasio provides a Note entitled 'From PhD Thesis to Monograph: A Reflective Account of the Process'. This is based on her personal experiences in adapting a PhD thesis, for which

the most significant readers are members of the examining panel for the dissertation, and for whom the most important function is to determine academic competence, for publication as a book. The latter will likely have a wider audience—one which includes students, fellow academics and others—and aim to communicate findings and ideas to that audience and thereby enrich the relevant discourse(s). Her observations will likely encourage and be useful to doctoral graduates contemplating submission, based on an adapted version of their PhD thesis, of a book proposal to a publisher. Dr Deblasio's doctoral dissertation<sup>2</sup> addressed a hitherto under-researched but important area of child law, namely, adoption and the impact of adoption on birth mothers, within a social-legal context. As a relatively specialized area of analysis and perhaps not of general interest, such a study would need modification if it was to be successfully turned from thesis into book. But the experience of writing a doctoral dissertation and preparing a book for publication both suffer from the common ailments of feeling alone and isolated and, oftentimes, plagued by an unjustified lack of confidence in one's own abilities. Such pressures are to be overcome by

<sup>1</sup> This traces its ancestry back to the EU–China Legal and Judicial Cooperation Programme that Bernard Dewit (Avocat, Dewit Law Office, Brussels) and myself designed on behalf of the EU Commission in the late 1990s.

<sup>2</sup> Now published as Lisamarie Deblasio (2020) *Adoption and Law: The Unique Personal Experiences of Birth Mothers in Adoption Proceedings* London: Routledge.

determination, and she concludes with the encouraging advice that any 'lack of belief in your academic aptitude should not prevent you from trying to persuade a publisher to accept your proposal'. Key dimensions of securing publication include clear identification of the novel aspects of the work as a book, taking seriously the guidance provided by the publishers to whom the proposal is to be submitted and then careful consideration of the assessment of the book by external reviewers and, while likely needing to shorten the text at the publisher's request, avoiding overzealous cutting so that a sense of the author's passion is retained and shared by the reader.

Grace Mou's (MOU Yu) Note on 'Miscarriages of Justice and the Construction of Criminality in the People's Republic of China'<sup>3</sup> looks in particular at a high-profile miscarriage of justice reported recently by the media in the PRC. The victim in this case, Mr Zhang Yuhuan, having spent more than two decades in a prison in Jiangxi Province, was China's longest-serving wrongfully convicted prisoner by the time he was released. Mr Zhang was convicted in 1995 of murdering two boys, but, in common with various other wrongful convictions, it was his confessions that were the crucial evidence in his conviction.

However, there were no less than six versions of the confession, and these were in many places inconsistent with other evidence and secured by a variety of means of torture. At the heart of the problem of wrongful convictions, Dr Mou argues, is the unhappy fact that the relevant criminal justice institutions—especially the police and, to a lesser extent, the procuracy—lack sufficient autonomy to check impartially the credibility of evidence used in a prosecution. Miscarriages of justice are manifestations of a very imperfect criminal justice system—one which is in need not only of legal reform but also a transformation in its legal culture.

Cedric Tang's Note 'Medical Negligence Dispute Resolution in China: Social Stability and Preventative Measures' explores another issue in access to justice in China, namely, remedies for medical negligence. In essence the approach taken in the PRC's healthcare system is one that offers both administrative and litigation possibilities for aggrieved patients seeking remedies, but with mediation playing an important role throughout. However, issues of medical negligence, the disputes that may be created by perceived negligence, and assessment of liability in China is situated in a political legal environment in which

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<sup>3</sup> See also Yu Mou (2020) *Construction of Guilt in China: An Empirical Account of Routine Chinese Injustice* Oxford: Hart Publishing.

disputes are not seen as a legitimate assertion of rights but, rather, as undermining social stability. The Chinese system concentrates on enhancing the effectiveness of dispute resolution regimes in securing social stability, and gives insufficient attention to possibilities of dispute prevention, and to better regulating healthcare culture by greater use of non-compensation-based accountability for individual healthcare workers.

In her book review of the study of the Singapore Convention by Nadja Alexander and Shouyu Chong (2019, *The Singapore Convention on Mediation—A Commentary*) Dr Ling Zhou (ZHOU Ling) examines the insights and analysis offered by the two authors of this innovative and important Commentary. The latter is based substantially on UNCITRAL experience of, and policies on international commercial dispute resolution and is an attempt to strengthen the role of mediation as a resolution process in such

disputes, for example, by enhancing prospects for enforcement of mediated agreements. Dr Zhou also contributes to ‘Visual Law’, where she discusses the development of new courts in Shenzhen in southern China. The establishment of such courts is indicative of the PRC’s policies to make Shenzhen, lying just across the border with Hong Kong, not only a major commercial centre<sup>4</sup> for China’s Greater Bay Area but also an arena for significant judicial innovation (especially in relation to international commercial disputes in response to China’s economic transformation and ever-increasing involvement in international trade and investment.

The Editor thanks all the authors for their contributions to this issue, and also Amy Kellam, Maria Federica Moscati, Patricia Ng, Zhou Ling, and Marie Selwood, for their kind efforts in making this issue possible.

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<sup>4</sup> See also Dr Zhou’s recently published study: (2020) *Access to Justice for the Chinese Consumer: Handling Consumer Disputes in Contemporary China* Oxford: Hart.



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## **MEDIATION: ALTERNATIVE? OR A FIRST CHOICE FOR RESOLVING DISPUTES**

LESLEY A ALLPORT\*

Mediator, Trainer and Consultant

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### **Abstract**

This article examines the place of mediation both internally and externally to the civil justice system. The growth of alternative dispute resolution (ADR) and the culture of settlement within formal justice has somewhat absorbed mediation as a process by which to resolve disputes at the door of the court. Yet, it can be argued that its origins lie within the community setting where social norms have a distinct role to play and where collective as well as individual interests have a significant impact. This paper considers the application of mediation in a much wider sense than simply as a tool for settlement. It explores the concept of mediation as an educative process that supports the generation and advocacy of social norms. Mediation can be understood as a form of self-regulation which relies on perceptions of fairness, justice and trust. In so doing, it can be argued that it provides a means of informal justice amounting to *dispute prevention* as far as its relationship to the justice system is concerned. Viewed in this way, mediation provides a genuine first choice as a means to address and resolve conflict rather than an alternative method by which to settle disputes.

**Keywords:** mediation; dispute resolution; dispute prevention; community norms; formal justice; informal justice; process pluralism; alternative; first choice.

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Mediation rests on the premise that people have the capacity to make their own decisions about the issues that confront them, that people can and should assess their own risks, abilities, and limitations in making decisions and addressing issues (Bush & Folger 2012: 49).

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\* The author wishes to thank Professor John Baldwin for his valuable comments on an earlier draft of this essay (as a chapter in my doctoral dissertation). I am also grateful to Professor Michael Palmer for his encouragement and support. Any errors are my responsibility.

## [A] INTRODUCTION

The growth of the alternative dispute resolution (ADR) movement has led to the increasing association of mediation with ADR and civil justice in a way that limits its potential for relationship-enhancing and conflict resolution and results in an emphasis on practical negotiation and settlement. While mediation undoubtedly has a valuable place within the justice system, I suggest in this article<sup>1</sup> that its application need not be restricted to this setting. In my opinion, the further development of the mediation profession would benefit from a collaborative reappraisal of purpose and practice. I would argue that it is essential to develop a common framework, recognized by all areas of mediation delivery, which stands in its own right, independently of the justice system and other formal processes that place a disproportionate weight on settlement. I am not alone in this view. Acland, for example, has pointed out:

Our vision of mediation and of the role of mediators and the deployment of their skills has been curiously unambitious. By nestling in our various ghettos we have perhaps overlooked the greater possibilities for what we do. For the last 15 years or so we have been working hard to bring ADR into the mainstream of legal life. The time has now come to go a step further and bring it into the mainstream of public life. We should start by creating an organisation, or developing the remit of an existing organisation, to end the artificial divisions between mediators operating in different spheres so that we start talking to each other 0150 – and learning from each other – on a regular basis (Acland 2007: 10-11).

Here, I explore the perspectives from which mediation can be viewed outside the ADR context, and in which, as Irvine suggests, it is often unreasonably ‘portrayed as a kind of rogue process: unregulated, private, informal and, potentially, unfair’ (Irvine 2014). In particular, I will turn to Auerbach’s consideration of mediation and its role within communities and explore ways in which this might be relevant today. I argue that the application of mediation could extend far more widely into the public domain, though its versatility makes it even more imperative that mediators define what they do with much greater clarity and consistency.

## [B] MEDIATION AND COMMUNITY

In *Justice without Law*, Auerbach (1983) explores an ideology of communitarian justice and considers how far it can be applied without the need for formal law. As he describes it, success is dependent on

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<sup>1</sup> The origins of this paper lie in chapter 5 of my doctoral dissertation at the University of Birmingham (Allport 2016).

well-understood community values that are defined and respected by its members, each of whom is committed to these values because they have an investment in maintaining their community. Since conflict can be destructive of both individuals and communities, finding effective mechanisms with which to resolve it becomes central to the functioning of healthy communities. Membership of the group demands that disputes are proactively dealt with at an early stage and that disputants take their own responsibility for doing so. Auerbach's conclusion is that our preoccupation with individual rights and formal justice makes this more and more difficult to realize. A further consideration is how this might be achieved when, with increased social mobility, communities are much harder to define. Nevertheless, I think it is useful to explore ways in which modern concepts of community may be understood, the role that mediation plays and the link that this may have with government initiatives other than those associated with the reforms of the civil justice system.

In the context of community education, Clark attempts to understand what 'community' means. He identifies three fundamental components: namely, significance, solidarity and security. A sense of community goes hand in hand with a feeling of belonging or togetherness. 'Solidarity', he says 'encompasses all those feelings which draw and hold people together – sympathy, loyalty, gratitude, trust' (Clark 1996: 43), and it incorporates shared purposes, implying a state of consensus. 'Significance' is described as the awareness of a valuable role to play within a community accompanied by sentiments of worth and achievement. 'Security' is concerned with safety and dependency both materially and psychologically, without which the community itself cannot survive. Clark states that:

The strength of community within any social system is revealed by the degree to which its members experience a sense of security, of significance and of solidarity within it (Clark 1996: 49).

Conflict, as Auerbach's account demonstrates, is a threat to these components and can result in divisions, the loss of social connection and consequent feelings of insecurity and low self-esteem. Mediation aims to mitigate these threats by providing a safe environment in which to address differences. By creating the space for parties both to be heard and understood non-judgmentally, the mediation process gives validity to each participant and builds a sense of significance that is not dissimilar to the two themes of empowerment and recognition that Bush and Folger describe in their writing about mediation. It affords parties the privacy they need to explore their disagreement without fear of reprisal. With its focus on building mutual understanding, mediation encourages a sense

of collaboration rather than competition. Folger and Bush also discuss the importance of recognizing mediation as a process which promotes values that are as important as those associated with social justice. Mediation, they say, fosters civility and, in doing so, offers an educational opportunity that builds community. As they put it:

Parties to mediation are affected in two ways by the process: in terms of their capacity for self-determination, and in terms of their capacity for consideration and respect for others. And *that itself* is the public value that mediation promotes (original emphasis) (Bush & Folger 2005: 81-82; citing Bush 1989-1990: 14-17).

In contemporary society, they continue, people suffer learned dependency, mutual alienation and distrust which results in civic weakness and division. In Clark's framework, this is the result when communities are not functioning well. Folger and Bush observe:

[p]ersonal experiences that reinforce the civic [practices] of self-determination and mutual consideration are of enormous public value – and this is precisely what the process of mediation provides (Bush & Folger 2005: 81-82).

The concept of 'civil society' has its origins in Aristotle's *Politics* where he refers to '*koinōnía politiké*' (κοινωνία πολιτική). He describes a Greek city-state ('polis') which is defined by a shared set of norms and beliefs, in which free citizens are placed on an equal footing, living under the rule of law (Aristotle 335-323 BC: 1252a1-6). The aim of civil society is to achieve common wellbeing or 'eudaimonia'. Plato also describes the ideal state as being a just society in which people are committed to the common good and demonstrate this through the practice of civic virtues such as wisdom, courage, moderation and justice (Plato c375 BC: 427e).

But do these concepts still exist in contemporary society? A decade ago, in 2010, the Conservative Party manifesto promoted the idea of the 'Big Society' as an ideology which proposed to integrate the free market with a theory of social solidarity that would empower local people and communities, taking power away from politicians. It was based on the idea that, by voluntarily contributing to their community, people would invest in it and have some control in shaping it. This is a concept that presents an opportunity to build solidarity, security and significance. Although it was dropped three years later, some of the ideas have nevertheless been developed in other political initiatives. In particular the idea of eudaimonia forms a central part of the Well Being Agenda. This was a cross-party initiative exploring ways to measure the success of society other than through gross domestic product (GDP), and it had a specific focus on taking account of the wellbeing of its citizens. The published

report ‘[laid] out the case for using wellbeing as the overall measure of prosperity, and therefore as the yardstick for public policy’ (O’Donnell & Ors 2014). It considered how wellbeing could be quantified using three main measures:

- ◇ How do you feel (i.e. how happy are you)?
- ◇ How do you evaluate your life (i.e. how satisfied are you with your life)?
- ◇ Do you feel your life is worthwhile (i.e. the so-called eudaimonic measure)?

The report stated that family life, community life, values and the environment are crucial social determinants. It is clear that conflict can occur in all these areas, and it is not difficult to see, therefore, that it has a direct impact on personal wellbeing.<sup>2</sup> In my view, this was an agenda in which mediation, with its ideological aspirations to promote personal responsibility, empower individuals, restore relationships and encourage social connection, could be well placed.

## [C] THE EDUCATIVE ROLE OF MEDIATION

As well as promoting civility, Folger and Bush outline a second benefit to mediation: the educational opportunity it offers in dealing with conflict constructively. This provides another perspective from which to view the role of mediation. Its educative value goes beyond both the current dispute (i.e. it equips people to better deal with conflict next time) and the individuals involved (it incorporates a sense of shared commitment to the community). This educative value of mediation is also discussed by Waldman. Out of the confusion of the debates in the United States surrounding the role and function of mediators, Waldman puts forward an alternative framework which attempts to take account of the role that social norms play in three different mediation models. In the *norm-generating* model, mediators encourage parties to decide their own standards of fairness without imposing norms on them—social, legal or otherwise. ‘The only relevant norms’, she says, ‘are those the parties identify and agree upon’ (Waldman 1997: 718). The model implies that the conflict is both specific and individual. It will have very little impact on the community at large, is of little consequence legally, or is one in which there is no societal consensus. An example might be a workplace

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<sup>2</sup> The [What Works Centre for Wellbeing](#) was set up as a result of the Commission’s recommendations and is funding research in collaboration with the Economic and Social Research Council into four main areas concerning wellbeing: cross-cutting; work and learning; community; culture and sport. For further information see the [website](#).

dispute in which there is a breakdown in communication or a difference in working style. Waldman suggests that this approach:

is well-suited to conflicts in which the goals of enhancing disputant autonomy and preserving relationships are paramount. In these conflicts, the particular outcome reached is less important than the parties' active participation in its construction. Often, empowerment and relational concerns are primary because the competing goal of 'doing justice' through the application of legal or social norms may not be possible, sensible or conclusive (Waldman 1997: 720).

In the *norm-educating* model, the parties remain in control of the outcome; however, the mediator will bring relevant social and legal norms to their notice in order to 'enhance autonomy' and support well-informed decision-making. The model is one that applies particularly well where mediation operates as an alternative to an adjudicated agreement since it draws on features such as legal precedent or case law. For example, in family mediation, parents remain in control of their own arrangements but will nevertheless be influenced by expectations such as that children will spend time with each of their parents or that assets will be fairly divided on the basis of need. The mediator 'is active in ensuring that disputant negotiations are informed by relevant legal and social norms, either by educating the parties himself or by ensuring that they are educated by retained counsel' (Waldman 1997: 732). Waldman suggests that the significance of this model is in its application to disputes which:

invoke norms that embody certain societal conclusions about what is just and unjust and confer entitlements on those who might otherwise remain disadvantaged and marginalized in private bargaining (Waldman 1997: 732).

While parties may not necessarily act on these norms, the importance is in being made aware of them rather than making a decision in ignorance.

Waldman's third model is the 'norm-advocating' model, often used in rights disputes that rely on legal and social norms, but where there are grey areas for negotiation. These kinds of disputes benefit from the informality of the mediation environment but are not appropriate to the first two models because:

the conflict implicates important societal concerns, extending far beyond the parties' individual interests ... and ... [where] one party is so structurally disenfranchised that allowing her to negotiate away legal rights and entitlements would make the mediator complicit in her continued oppression (Waldman 1997: 754).

One such example can be found in the use of mediation in judicial reviews that are conducted in cases where an allegation has been made

against a public authority for not upholding obligations or not following due process. Research conducted in this field in 2009 (Bondy & Ors 2009) examined cases that were largely concerned with individuals who had particular needs (in their health care or educational provision) and who felt that the authority had deprived them of resources to which they were entitled or made decisions that infringed their rights. Working within the framework of legal obligations, mediators nevertheless managed an environment where claimants felt empowered to voice their opinions, and all parties were able to contribute to the drafting of more creative, detailed agreements. Mediators using this model facilitate communication and understanding but take active steps to ensure that relevant norms or legislation are built into the agreement and that ethical codes are not breached.

These models reinforce several of the ideas under discussion in this paper, in particular:

- ◇ that people are able to take responsibility for their own disputes and exercise civility when using mediation;
- ◇ that people are capable of reaching fair outcomes and creating their own justice; and
- ◇ that mediation can be both educative (i.e. it informs decision-making) and contributive (i.e. it builds and reinforces the values of communities and society).

This implies that different kinds of dispute require different processes and outcomes and that participants and practitioners alike have choices to make about what mediation can achieve in their specific situation. Those choices will also affect mediator behaviour, and so, I suggest, they still need to be considered alongside the core principles of mediation practice (Allport 2016).<sup>3</sup> However, Mayer proposes that these principles, though important, should be viewed as aspirations: they are ‘tactics or stances we can take, but not essential defining characteristics of who we are’ (Mayer 2011-2012: 866). Instead, he and his colleagues place emphasis on setting up the right process (see Lande & Ors 2011-2012: 812-816) and creating the environment that allows parties to achieve the outcome they are looking for. Mayer encourages mediators to define themselves by their expertise as conflict resolvers:

Any attempt to define ourselves by what we do – by our methodologies, procedures, or systems of intervention – will inevitably run into the

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<sup>3</sup> See Allport (2016), chapter 8, which examines four key principles of mediation practice: voluntariness, confidentiality, party determination and impartiality. These were identified by respondents in my research taken from a cross-section of mediation practitioners.

incredibly broad variety of approaches that we take ... But we can, perhaps, identify some elements of a common knowledge base that define our field. While there are areas of particular knowledge we need depending on our particular role and area of expertise, as a field we can identify certain common areas of knowledge that we either have or should seek to have. These common areas include conflict dynamics, negotiation, communication, power dynamics, cultural practices, systems theory, intervention processes, and intervention roles (Mayer 2011-2012: 868–869).

Mayer underlines the role of an expert in conflict resolution which, in practice, may take many forms depending on the situation. Waldman's approach also points to the desirability of having a number of resolution processes on offer that take account of the context, the aims of those involved and any legislative or policy framework to ensure appropriate decision-making.

## [D] PROCESS PLURALISM

Both writers, therefore, reinforce the notion of 'process pluralism' which has recently gained credibility among practitioners and scholars. Carrie Menkel-Meadow (2005-2006) built on the work of Lon Fuller who placed great weight on the adoption of the appropriate procedure to meet a particular objective.<sup>4</sup> She asks: 'What human problems are best resolved, handled, or solved by what processes?'

Like Fuller, Menkel-Meadow recognizes that 'ends or goals depend not only on rationality but on emotions, intuitions, and feelings of what is right or fair' (Menkel-Meadow 2005-2006: 565). A variety of processes exist, some driven by reasoning, others by interests, yet others by emotion. Some are open, some closed, some led, some facilitated. The key point is in ensuring that parties are aware of the options available to them and can therefore make a well-informed choice.

Bondy and colleagues provide a good example of process pluralism in action in their study of mediation in judicial review cases (Bondy & Ors 2009). In this context, the issue of human rights is central: disputes are not about personal relationships, rather they often involve an individual against an authority, and a judgment is required.<sup>5</sup> Despite this, the authors point out that several different procedures are offered

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<sup>4</sup> See Winston (2002). Fuller examined various procedures including contract, adjudication, mediation, legislation and administration.

<sup>5</sup> Although Bondy & Ors (2009) observe that because the outcome of cases is so stark—generally rights have been breached or they have not—there is a culture of settlement, and this is often apparent at an early stage, particularly where authorities find themselves at fault.



within judicial review, with discussions and negotiations, ombuds, early neutral evaluation and mediation all being identified as separate options within the pre-application protocol. However, even though it is located in a context that is driving settlement, the authors found that mediation offered specific benefits. Their empirical evidence helps to define some of its distinguishing features. It gave aggrieved individuals an active voice and contributed to their sense of procedural fairness in a situation where they can often feel overlooked. The authors of the report state:

This sense of empowerment can in itself be regarded as a form of positive outcome. Research in this area suggests that procedural justice (process) is often perceived as being as important as substantive justice (outcome) and that satisfaction with both process and outcome can be interrelated. So, for instance, a disappointing result can be more acceptable to a party if it is reached in a way that is perceived as fair, or when a disputant feels heard and understood (Bondy & Ors 2009: 38).<sup>6</sup>

Mediation gave an opportunity for respondents in the study to exercise some control in the shaping of outcomes and highlighted more options than simply legal remedies. It offered a different, less intimidating environment for dialogue and time to pay attention to detail. Most of all it provided a platform for human interaction. Case Study 7 in the examination by Bondy and colleagues is a good illustration of this. It gives an account of a severely disabled woman in a long-term NHS facility whose intimate care routine was about to be taken over by a male nurse. They state that:

Marion's solicitor believed strongly that by meeting her client and hearing her tell her own story the PCT was made aware of the day-to-day reality of her disability and the depth of her concern about who should provide her intimate care. It was suggested that being faced with a human being made all the difference to the PCT's attitude (Bondy & Ors 2009: 78).

The report concludes that, whereas the opportunity to use mediation in judicial review is quite limited, it can, in a certain number of cases, be very beneficial. The authors make the point that unquestioning enthusiasm for mediation in all circumstances does not win the confidence of sceptics and suggest that:

mediation enthusiasts and lawyers alike must each be able to incorporate into their own perspectives the insights gained from the others' experience rather than set up litigation and mediation as mutually exclusive alternatives one of which is good and the other bad (Bondy & Ors 2009: 89).

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<sup>6</sup> See also Genn (2006) whose research is referred to in this quotation.

Effective process pluralism is, therefore, dependent on transparency and clarity of definition if disputants are to make good choices about what they want from a particular process. The attempt to make a clear distinction between the different processes has been made in other jurisdictions. In The Netherlands, for example, there is a recognition that factors such as the level of escalation of a particular conflict or the nature of the dispute (i.e. whether personal or commercial) have an influence on the most appropriate resolution tool. Judge Machted Pel describes how court-based mediation programmes formed part of a wider approach which included an initial conflict diagnosis before users were directed to a particular resolution process (Pel 2008).

## [E] MEDIATION AS A MEANS OF INFORMAL JUSTICE

Other scholars have also attempted to describe multiple purposes of mediation operating outside the justice system. Wezel Stone, for example, considers the place of norms specifically within organizations. She proposes three conceptions of dispute resolution in workplaces. In the first, processes such as mediation and arbitration are viewed as ‘techniques’. They provide a faster and cheaper way of handling disputes and the goal is to avoid conflict. In the second, the ‘public policy view’, mediation and arbitration are seen as vehicles by which policy and law can be implemented on a more informal basis. Similar to Waldron’s norm-educating model, third-party interveners have a role in ensuring that substantive rights are not lost. The final concept is that of self-regulation. Dispute resolution processes are seen as:

method[s] for applying norms and resolving non-justiciable disputes that arise within a self-regulating, normative community. In the self-regulation view, the distinctive value of arbitration [and mediation] is not that it can enforce laws, but that it can enforce fairness norms that are not presently embodied in law. This view is based on the insight that face-to-face communities generate their own fairness norms (van Wezel Stone 2000-2001: 470).

This last perspective brings us back again to the value placed on the use of mediation in establishing and maintaining the cultural norms of a community, in this case within the workplace. Saundry and colleagues also point out that perceptions of fairness, justice and trust, together with organizational support, are crucial to the success of these kinds of informal processes. Once again, ‘justice’ is understood to be a concept that applies not only to outcome but to process and the quality of interaction:

Justice does not simply relate to the outcome of a decision (distributive justice) but critically to the way in which that decision was arrived at (procedural justice) and how this was dealt with by managers and/or colleagues (interactional justice). Accordingly, where decision and actions are seen to be 'just', employees are more likely to co-operate and reciprocate with increased discretionary effort (Saundry & Ors 2014: 11).

Wezel Stone also makes the connection between the delivery of 'justice', as it is described above, and its impact on 'organizational citizenship behavior'. Today, providers of workplace mediation training and dispute resolution services<sup>7</sup> set out a philosophy which is not just about training mediators to facilitate disputes within the organization but also supports managers and the whole of the organization to promote a culture that is confident to deal with conflict. In other words, communities and organizations can foster norms that in themselves recognize and acknowledge difference and encourage people to address it positively.<sup>8</sup> The same possibility exists within what Wenger has called 'communities of practice', or 'groups of people who share a concern or a passion for something they do and learn how to do it better as they interact regularly' (Wenger 2013).<sup>9</sup> Similarly, in their book *Change, Conflict and Community*, Kenton and Penn explore at some length the idea of the workplace as a community of practice which is 'effective in enabling people to learn through change and conflict' and is 'dependent on the self-determination, fluidity and openness' of its members (Kenton and Penn 2009: 148ff).

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<sup>7</sup> For an example, see [CMP Resolutions Ltd](#).

<sup>8</sup> The [CMP Resolutions website](#) states:

Supporting the development of intelligent conversations enables a positive, can-do culture that underpins strong performance: better working lives, solution finding and creativity. We call these Clear Air workplaces.

A key ingredient to our work is Conversational Integrity. These interpersonal soft skill capacities are essential for transforming cultures, translating differences and disputes into understanding, trust, collaboration and improved performance.

For 30 years, we have been working at the heart of workplaces, unpicking the issues that come between individuals, teams and departments. We understand the mechanics of interpersonal relationships, how they work and are affected by different structures and management approaches. Our insights give us the knowledge and expertise to better diagnose organisational challenges and recommend interventions that develop Conversational Integrity and build a Clear Air culture.

<sup>9</sup> More information can be viewed at '[Introduction to Communities of Practice](#)'.

## [F] MEDIATION AS DISPUTE PREVENTION

The value of establishing these norms is that, if they work effectively and, more specifically, if they are developed in relation to the managing of conflicts, dispute resolution becomes something more like dispute prevention. Martin Burns describes the increasing use of early intervention strategies by industry bodies in an effort to avoid the escalation of minor disagreements into disputes and to manage difficult commercial relationships. This is a good example of contemporary movements to embed cultural norms within communities of practice, particularly in the construction industry, which can be supported by early interventions such as mediation. Recognizing that ‘the reality to commercial relationships is that conflict is always possible’, Burns talks about the main objective of dispute prevention being ‘to focus minds on how potential problems will be resolved, and doing it early enough to avoid escalating into full blown disputes’. He observes that:

there is an increasing desire for culture change in the way disputes are handled. I see more and more evidence of attempts by decision makers and influencers within the construction industry to develop innovative techniques for managing relationships, reducing conflict and ‘nipping in the bud’ issues that could otherwise snowball their way into courts. There are a number of early intervention techniques that are currently being explored and adapted by industry bodies. Contracts are being amended to include ‘rules of engagement’ for dealing with potential conflicts as they arise. Procedures are being written into contracts with the intention of encouraging parties to sort out their problems straight away, and not let them drift into positioning and eventually entrenchment (Burns 2014: 15).<sup>10</sup>

It is interesting to notice that these concepts are well rooted in the past. Developments within the trading sector seem to mirror the efforts of the original merchant guilds of the 17th century (Auerbach, 1983) which successfully created and implemented their own trading rules. Auerbach writes that the use of processes such as mediation and arbitration have ‘historically expressed an ideology of communitarian justice without the need for formal law’ but rather based on mutual access, responsibility and trust. He writes:

Utopian Christians and mercenary merchants shared the understanding that the law begins where community ends. So they developed patterns and institutions of dispute management that contained conflict within their own community boundaries (Auerbach 1983: 5).<sup>11</sup>

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<sup>10</sup> Martin Burns is head of ADR Research and Development, Royal Institute of Chartered Surveyors.

<sup>11</sup> It should be noted that the processes of mediation and arbitration were less conceptually distinct at Auerbach’s time of writing than they are today.

## [G] MEDIATION AS A FIRST CHOICE

However, as Auerbach and others (for example, Abel 1982 and Nader 1986, 1995)<sup>12</sup> have observed, taking a historical perspective reveals a pattern of oscillation between formal and informal means of achieving justice. More recently, in the UK, the publication of the Woolf Reports (the Interim Report in 1995 and the Final Report in 1996) have had a significant impact on mediation, effectively sparking a revolution in the civil justice system and leading to the prioritization of settlement over adjudication. At the end of the 20th century, disputants were being encouraged to take up informal means of resolving disputes *within* the formal justice system as an alternative to an adjudicated decision.

Today, with the advent of the Children and Families Act 2014 (CFA), and, even more recently, the Divorce, Dissolution and Separation Act 2020 (DDSA), the drive is for disputes to be resolved outside that system wherever possible. Within the education sector, for example, the legislative changes contained in the CFA present the opportunity to establish a norm of early prevention. ‘Disagreement Resolution’, as it is described in the context of the Special Educational Needs Code of Practice (DfE & DoH 2015), is distinguished from mediation as an early, informal and completely voluntary option that can be used at any stage. The distinctions being made in the use of these two different terms are not concerned with process or structure but with the stage at which these processes are used.

In the workplace, a consultation conducted by the Department of Business Innovation and Skills (BIS & HMCTS) 2011: 13, para 25) led to the introduction of early conciliation by the government (implemented in 2014) as an alternative to litigation. Early conciliation requires that prospective claimants submit their details to the Advisory, Conciliation and Arbitration Service (ACAS) which offers conciliation as a first option. If either party rejects conciliation or there is no agreement, a claim can subsequently be filed at the tribunal.<sup>13</sup> Within public-sector organizations, mediation as an early, informal intervention is increasingly incorporated into policy statements, coming under headings such as equality and diversity, dignity or respect at work, or people strategies.

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<sup>12</sup> See Nader (1986) and, commenting in the context of the ‘shift in discourse’ of the late 20th century in the United States, Nader (1995).

<sup>13</sup> The ACAS definition of conciliation is similar to that of mediation generally (in that it is voluntary, confidential, facilitated by an independent third party and leaves parties in control of decision-making). In the case of early conciliation, it is offered as a first step in going to an Employment Tribunal, whereas issues taken to mediation may be broader and less formal. For more information, see the [website](#) where there are guides on both processes.

In the context of family law, legislative changes have, for some years, strived to move cases out of court. The Norgrove Report (2011) recommended the establishment of a Family Justice Service with a single family court, stating that '[t]he emphasis throughout should be on enabling people to resolve their disputes safely outside court whenever possible' (Norgrove 2011: para 4.6). This underlined the importance of trying mediation and, interestingly, implied that the use of the word 'alternative' was unhelpful:

It should become the norm that where parents need additional support to resolve disputes they would first attempt mediation or another dispute resolution service. To reinforce the primary nature of these services 'alternative dispute resolution' should be rebranded as 'Dispute Resolution Services', in order to minimize a deterrent to their use. Where intervention is necessary, separating parents should be expected to attend a session with a mediator, trained and accredited to a high professional standard (Norgrove 2011: para 115).

While the Family Law Act of 1996 never succeeded in implementing the 'no fault' divorce, this has re-emerged again within the DDSA which seeks to make the legal process of divorce less adversarial and adopts a change in language to reflect this.<sup>14</sup>

In 2020 the Family Solutions Group, a multidisciplinary subgroup of the Private Law Working Group, was formed by Mr Justice Cobb with the specific purpose of looking at the 'pre-court' space for families when they separate. Their findings once again call for a change of culture in which a legal response to divorce does not have to be the default option. The recommendations steer separating parents away from acrimonious court proceedings and propose the development of two pathways: a 'safety pathway' for the estimated 20-24 per cent of families that need the protection of the courts for specific reasons; and a 'co-operative parenting pathway' for most families, which recognizes that a whole package of therapeutic and practical support should be available for children and parents outside the justice system. The report states that:

We need to move away from old assumptions that family breakdown is automatically a legal issue in which parents work against each other and towards an acceptance of 'working together' as the norm where appropriate, with professional support alongside to resolve issues (Family Solutions Group 2020: 41 para 133).

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<sup>14</sup> It will be possible to make a joint application to divorce, and there will be no possibility of contesting an application. Decree nisi and decree absolute are to be replaced by conditional and final orders.

## [H] CONCLUSION

In this article, I have explored ways of understanding mediation from different perspectives, particularly as a process that can be used within communities of work, communities of practice and communities of interest, to support and build the fundamental elements of solidarity, significance and security. Through party determination and individual validation, mediation is a process that supports people to participate in the creation and implementation of community norms that can be experienced as just and fair. Critics such as Genn (2010: 195-205) have argued that mediation within the ADR context is seen as providing an alternative to adjudication and is now largely concerned with settlement. In that sense it should be described more accurately as *another* alternative. However, viewing the use of mediation within communities as a means by which to establish and maintain norms of justice and fairness means that it can be offered as the first choice for resolving conflict rather than an alternative to formal justice. Described in this way, mediation can contribute to the kind of culture change to which recent governments in the UK have aspired. This is not to say that additional support measures are not also required or that mediation can replace the need for trial and adjudication where norm generation or education are inappropriate. In my view, these are perspectives that present a more rounded view of mediation and its ideological aspirations, as well as its practical application. For that reason, they are worthy of more detailed exploration by the mediation community. To conclude, it seems to me that there would be benefit in re-examining the use of mediation in communities as a way to foster wellbeing and build a sense of significance, solidarity and security in the face of conflict and disagreement.

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# OLD WINES IN NEW BOTTLES? PRIVATE SECURITIES LITIGATION IN CHINA'S NEW SECURITIES LAW

DING CHEN

University of Sheffield

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## Abstract

Private securities litigation has been very weak since the establishment of China's stock market some 30 years ago. A new law on securities took effect in March 2020 and introduces some reformist changes to this area. This article will examine the likely effect of the new Securities Law on this form of litigation. In particular, it will examine China's most celebrated 'quasi-class action' system, i.e. Special Representative Litigation. This procedure is borrowed from Taiwan's non-profit organization model. The essay argues that, since the new Securities Law has made only limited efforts in addressing the primary reason for the weak private securities litigation, namely, lack of judicial independence, it is unlikely to make any significant changes to private securities litigation in China.

**Keywords:** private securities litigation; securities law; class action; cost of litigation; judicial independence.

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## [A] INTRODUCTION

The People's Republic of China (China or the PRC) established its two stock exchanges, the Shanghai Stock Exchange and Shenzhen Stock Exchange, in 1990 and 1991 respectively. China's securities market has grown exponentially over the past three decades. As of December 2019, there were over 3700 firms listed in the two exchanges and their combined market capitalization amounted to over \$8 trillion, trailing only the US equity markets. However, China's stock market has been a side experiment as a capital allocation channel. It has often been called a casino, with share prices bearing little connection to underlying economic conditions (*The Economist* 2015). During the period of 1992-2018, China's gross domestic product grew by a factor of eight in real terms, much

faster than other large economies. By contrast, among large developed and emerging markets, the Shanghai Composite Index has been one of the worst performing indexes, its performance being somewhat similar to the Nikkei in Japan (Allen & Ors 2020). Moreover, during the period 2000-2018, Chinese investors in the domestic stock market earned negative return in real terms, and the cumulative return of the market was lower than that of five-year bank deposits or three- and five-year government bonds in China during this period (Allen & Ors 2020).

There are various reasons for the poor performance of the Chinese stock market, among which the negligible role of private securities litigation (PSL) is undoubtedly one of the most important (Li 2004; Chen 2012; Huang 2013; Sheng 2015). In accordance with the current literature, PSL is central to financial development and, in the absence of an effective PSL system, one country is unlikely to develop a healthy stock market (La Porta & Ors 2006; Bruno & Claessens 2008; Hartmann & Ors 2007; Djankov & Ors 2008). The lately amended Chinese Securities Law<sup>1</sup> (2020 Securities Law) may bring new hope for improvements to the PSL system. In particular, Article 95 of the law introduces a ‘quasi-class action litigation with Chinese characteristics’ which is celebrated by many commentators as a significant step in improving PSL in China.

This article considers the question: what is the likely effect of the 2020 Securities Law on PSL in China? It contains four sections and is organized as follows: section [B] briefly reviews the evolution of PSL in China; section [C] discusses changes brought by 2020 Securities Law in relation to PSL; section [D] examines the likely effect of the 2020 Securities Law on PSL; the final section [E] then concludes the article.

## [B] THE EVOLUTION OF PSL IN CHINA (1998-2019)

Although China’s stock market was established as early as 1990, there was almost no PSL in China until 2002. Prior to 2002, even if aggrieved investors wanted to sue for damages, they found little support in either the 1993 Company Law or the 1998 Securities Law. Despite this lack of legislative support, since 1998, Chinese investors have continuously made attempts to seek civil compensation. On 4 December 1998, the first civil suit was filed in Shanghai, where a shareholder brought a suit against Hong Guang Industrial for financial losses arising from the defendant’s accounting fraud, following a fine and administrative sanction imposed

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<sup>1</sup> The Securities Law was revised on 28 December 2019, effective from 1 March 2020.

on the company by the Chinese Securities Regulatory Commission.<sup>2</sup> The Shanghai court dismissed the case mainly on the ground that there was in its view no causation between the investor's losses and Hong Guang's false statements (Sohu Caijing 2002).

In spite of the failure of the *Hong Guang* suit, the large number of frauds perpetrated by listed companies had caused investors to bring civil actions against a number of companies around the country. Important defendant companies included Yin Guangxia, ST Houwang and Zheng Baiwen. On 20 September 2001, PSL actions against Yian Technology were filed simultaneously at the Intermediate People's Courts of Beijing, Guangzhou and Shanghai. A wave of lawsuits seemed to be breaking, and this apparently panicked the Supreme People's Court. The next day, the Supreme People's Court issued the 'Notice of the Supreme People's Court on Refusing to Accept Civil Compensation Cases Involving Securities for the Time Being' (known as Circular No 406), instructing courts nationwide temporarily not to accept PSL suits on the ground that the legislative and judicial conditions were not yet ripe.<sup>3</sup>

Circular No 406 provoked intensive criticism from investors, legal scholars, practitioners and the Chinese Securities Regulatory Commission. Thus, on 15 January 2002, the Supreme People's Court issued the 'Notice Regarding Civil Lawsuits against Companies on the Grounds of False Statements' (known as the 1.15 Notice).<sup>4</sup> The Notice stipulated that lower courts may accept PSL suits based on false statements, subject to a condition that an administrative penalty has been imposed on the alleged fraud. Although the 1.15 Notice opened the door for PSL, it also had some obvious shortcomings. First, it explicitly excluded PSL based on other types of market misconduct, such as insider trading and market manipulation. Second, it created an additional obstacle for launching PSL outside Article 108 of the Civil Procedure Law 1991 by requiring an administrative sanction as a prerequisite.<sup>5</sup> Third and probably the

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<sup>2</sup> The Chinese Securities Regulatory Commission is a ministerial-level public institution operating directly under the State Council. In formal terms, it performs a unified regulatory function, in accordance with the relevant laws and regulations, and with the authority by the State Council, over the securities and futures market of China; and it maintains an orderly securities and futures market and ensures the legal operation of the capital market. See Chinese Securities Regulatory Commission [website](#).

<sup>3</sup> Circular No 46 apparently contradicted Article 163 of the 1998 Securities Law which granted investors a right to civil compensation.

<sup>4</sup> It contained only six articles in total.

<sup>5</sup> By doing so, it substantially compromised shareholders' rights and was inconsistent with the principle of judicial independence.

most important, it rejected class action (*jituan susong*)<sup>6</sup> and only allowed individual litigation (*dandu susong*) or joint litigation (*gongtong susong*) in PSL.

The 1991 Civil Procedure Law provided two types of joint action: those actions in which the number of parties is fixed at the time of filing under Article 54, and those actions in which the number of parties is not known at the time the case is filed under Article 55.<sup>7</sup> Article 14 of the 1.15 Notice further required that the number of plaintiffs in a joint action should be finalized before the hearing, which essentially limited the form of joint action to the first category (Huang 2013: 340). Where multiple plaintiffs sue the same defendants for the same misrepresentation in standalone individual and joint actions, the court may ask the plaintiffs in individual actions to join the joint action (Civil Procedure Law 1991: Article 13, para 1). The Chinese joint action with a fixed number of plaintiffs is similar to the United States (US)-style class action (Federal Rules of Civil Procedure: rule 23)<sup>8</sup> in that there are numerous plaintiffs involved and the judgment of the action applies to members of the plaintiff class who have not participated in the lawsuit.

Nevertheless, there are important distinctions between the two forms of action. In particular, the US-style class actions operate on an ‘opt-out’ regime, whereby an action is pursued on behalf of a defined class of unnamed claimants who are deemed to be included in the action and are bound by the outcome unless they ‘opt out’. By contrast, a joint action with a fixed number of plaintiffs follows an ‘opt-in’ approach, under which only the plaintiffs who have registered with the court at the time the case is filed can be bound by the judgment. As a result, the same suit may be repetitively filed and trialled in different jurisdictions, causing a waste of judicial resources and an increase in litigation costs.

Despite the limitations, the 1.15 Notice was welcomed by investors and lawyers. Immediately after the promulgation of the 1.15 Notice, three

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<sup>6</sup> Article 4 states that ‘it is not appropriate to use the form of class action’. However, since the procedure of class action has never been legally defined in Chinese law, there has been confusion as to what it is that the term refers. Most commentators agree that it seems to refer to joint action in which the number of parties is not known at the time the case is filed, as stipulated by Article 55, 1991 Civil Procedure Law.

<sup>7</sup> These provisions were carried over to the 2007 Civil Procedure Law and continued into the 2013 Civil Procedure Law.

<sup>8</sup> Under rule 23(a), one or more members of a class may sue or be sued as representative parties on behalf of all members if the class is so numerous that joinder of all members is impracticable; there are questions of law or fact common to the class; the claims or defences of the representative parties are typical of the claims or defences of the class; and the representative parties will fairly and adequately protect the interests of the class.

investors went ahead to file individual suits in Harbin's Intermediate People's Court, suing Daqing Lianyi and its management for false disclosure and accounting fraud. Soon afterwards, 767 other investors sued the same defendants for the same cause of action. By the end of 2002, nearly 900 PSL suits against 10 companies had been filed, some of which were accepted by the courts (Chen 2003). However, due to the lack of detailed procedural rules governing such a situation, these cases became stalled.

On 9 January 2003, the Supreme People's Court issued 'Several Rules on Adjudicating Civil Lawsuits against Listed Companies on the Ground of False Statements' (known as the 1.9. Guiding or Regulations of 9 January). The Regulations of 9 January contained 37 Articles and set up a relatively complete legal framework for PSL arising from false statements. For instance, it stipulated the different types of misrepresentation (Regulations of 9 January: Article 17), the scope of eligible plaintiffs (Regulations of 9 January: Articles 2, 3), potential defendants (Regulations of 9 January: Article 7) and so forth. It extended the procedural prerequisite to include criminal penalties and administrative penalties made by administrative organs other than the Chinese Securities Regulatory Commission (such as the Ministry of Finance). However, it made no changes to the three key issues in the 1.15 Notice, namely, limiting civil litigation to suits brought on the grounds of false statements, rejecting class action and insisting on the procedural prerequisite. Rather, it added some new restrictions. Among other things, Article 9 provided that all PSL lawsuits must be filed with the Intermediate Court with jurisdiction over the area in which the listed firm is headquartered.<sup>9</sup> Moreover, despite the useful guidelines, the courts remained uncertain about how to apply the rules. As a result, by the end of 2003, except for a handful of settlements, not a single case had been resolved through adjudication by the courts (Sheng 2015).

The possibility of PSL was formally incorporated into statutory law in 2005. Article 152 of the 2005 revised Company Law allows shareholders directly to file a lawsuit in their own names on the condition that they separately or in the aggregate hold 1 per cent or more of the total shares of the company for more than 180 days and must make a demand on the company first. The 2005 Securities Law also extended civil liability to insider trading and market manipulation (2005 Securities Law: Articles 76, 77). But the statutes were largely silent on implementation and the detailed rules were still to be found in the Regulations of 9 January. The latter were designed to deal with cases based on false statements, and so

<sup>9</sup> This provision is inconsistent with the 1991 Civil Procedure Law which allows the plaintiff to choose jurisdiction between the plaintiff's local court and that of the defendant party (Article 29).

difficulties arise in applying the Regulations to cases of insider dealing or market manipulation. For instance, many insider-dealing suits were rejected on a basis of failing to establish causation between investors' financial losses and the impugned insider trading. As a result, from 2005 until the time of writing, there has been only one successful case of insider dealing (*Guang Da Securities*) (*Beijing Youth Newspaper* 2015) and one successful case of market manipulation (*Heng Kang Medical*) (Sina Finance 2020). The number of PSL suits in relation to false statements is also small. There were a total of 65 securities civil litigations launched during the period of 2002 to 2012 which represented only about 25.7 per cent of all the applicable criminal/administrative sanctions which could have led to securities civil suits (Huang 2013). The litigating rate is even lower when examined on the basis of 2000 to 2006 data (Liebman and Milhaupt 2008: 943).

## [C] CHANGES UNDER THE 2020 SECURITIES LAW

The 2020 Securities Law dedicates Chapter 6 to investor protection. In relation to PSL, Article 85 shifts the burden of proof regarding misrepresentation to corporate controllers and *de facto* controllers;<sup>10</sup> Article 94 significantly lowers the threshold for bringing derivative action by removing the Company Law's requirements of shareholding and holding period (2005 Company Law: Article 152). But the most important change lies in Article 95 which provides that PSL can take the form of 'ordinary representative litigation' (*putong daibiaoren susong*) (2020 Securities Law: Article 95, paras 1, 2) or 'special representative litigation' (*tebie daibiaoren susong*)' (2020 Securities Law: Article 95, para 3). On 31 July 2020, the Supreme People's Court released the 'Provisions on Issues of Representative Securities Litigation' (the Provisions) which set out detailed rules for implementing Article 95. On the same day, the Chinese Securities Regulatory Commission also issued a 'Notice on Investor Protection Institutions Participating in Special Representative Securities Litigation' (hereafter the Notice).

Representative litigation suits can be based on false statements, insider dealing, market manipulation and other market misconduct (Provisions: Article 1). The procedural prerequisites are abolished, but plaintiffs are still required to submit *prima facie* evidence in order to have standing

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<sup>10</sup> The revised 2005 Company Law, Article 216, provides *de facto* controllers, referring to those who are not shareholders but can exercise control over corporate conduct through investment, financial agreement or other arrangements, including both natural persons and legal persons.



for bringing representative litigation, including any administrative punishment decision, criminal judgment, admissions made by the defendant, or a disciplinary punishment decision imposed by a stock exchange or other national securities trading places which have been approved by the State Council (Provisions: Article 5 [3]).

Ordinary representative litigation applies where plaintiffs total more than 10 persons (Provisions: Article 5 [1]) and two to five representatives in line with Article 12 of the Provisions are elected and ascertained in the statement of claim (Provisions: Article 5 [2]). Ordinary representative litigation does not require the number of plaintiffs to be finalized before the hearing, if the number cannot be ascertained when legal action is started, the court is required to review the facts of the dispute in question and make an announcement calling for registration (Provisions: Articles 6, 7). The Intermediate Court of the place of domicile of the issuer or of the defendant has jurisdiction over ordinary representative litigation (Provisions: Article 2).

A special representative litigation suit can be launched where an investor protection institution<sup>11</sup> has been mandated by 50 or more qualified investors during the announced registration period, and the investor protection institution then participates in the litigation as a representative (Provisions: Article 32). A special representative litigation suit needs to be filed with the Intermediate Court or Special Court<sup>12</sup> of the place where the stock exchange or other national securities trading places approved by the State Council are located (Provisions: Article 2). The most distinctive feature of special representative litigation is that it adopts the 'opt-out' legal regime under which an investor protection institution can register the investors confirmed by the Chinese Securities Depository and Clearing with the court, unless any investor explicitly refuses to be registered (Provisions: Articles 34, 35). The adoption of an 'opt-out' regime brings special representative litigation much closer to the US-style class action and is therefore labelled as a 'quasi-class action with Chinese characteristics'.

Provisions also grant representative litigation a preferential treatment in costs of litigation, as follows:

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<sup>11</sup> The Chinese Securities Regulatory Commission Notice Article 2 stipulates that investor protection institutions refer to the China Securities Small and Medium-sized Investor Service Centre Limited Liability Company or the Chinese Securities Investor Protection Fund Corporation Limited.

<sup>12</sup> Special courts comprise the [Military Courts](#), [Railway Transport Court of China](#), [Maritime Courts](#), [Internet Courts \(Hangzhou\)](#), [Intellectual Property Courts](#) and the [Financial Court \(Shanghai\)](#). Except for the Military Courts, these courts of special jurisdiction fall under the general jurisdiction of their respective high court.

- 1** refund of court fees—if a qualified investor who has filed a lawsuit before the registration announcement wishes to withdraw the case and join in the representative lawsuit, the court is required to refund the court fees already collected (Provisions: Article 10);
- 2** allocation of legal costs—the court shall support the representative’s request for reimbursement from the losing defendant for reasonable costs like announcement fee, notice fee, lawyer’s fee, etc. (Provisions: Article 25);
- 3** arrangements for court fees—subject to the court’s discretion, the court fees may not need to be paid in advance under special representative litigation and may be wholly or in part refunded even if the plaintiff loses the case (Provisions: Article 39);
- 4** no security for property preservation (conditional)—under special representative litigation, if the investor protection institution applies for property preservation, the court may decide not to require provision of security (Provisions: Article 40).

## [D] THE LIKELY EFFECT OF THE 2020 SECURITIES LAW ON PSL

The 2020 Securities Law and Supreme People’s Court Provisions have a clear effect of lowering threshold and cost-effectiveness in PSL suits. Nevertheless, will these changes necessarily lead to an increasing use of PSL? The answer is probably not. Legal obstacles and litigation costs are only partial reasons for the weakness of PSL in China, and they are by no means the primary difficulties.

### Legal Obstacles and Costs of Litigation

The prerequisite requirement prior to 2020 is often blamed as the reason for the small number of PSL cases in China. It is undeniably the case that the procedural prerequisite limited the scope of PSL to some degree, but it also offered a benefit of piggy-back. The civil court can avoid the difficult task of fact-finding in PSL by simply referring to the prior administrative or criminal decision. Huang Hui found the general view of lawyers is that the procedural prerequisite facilitates, rather than impedes, the pursuing of PSL in China (Huang 2013: 764). Even within the boundaries set by the procedural prerequisite, the litigation rate is stunningly low (Liebman and Milhaupt 2008; Huang 2013). This suggests that abolishing the procedural prerequisite can only have a marginal effect on promoting PSL.

Litigation costs can be a hurdle for bringing PSL suits as well. In China, the litigation costs are comprised mainly of court fees and attorney fees. The attorney fee is generally not an issue for the plaintiffs due to the availability of the contingency fee or risk agency fee system (*fengxian daili shoufei*).<sup>13</sup> Court fees can be problematic as a plaintiff needs to pay a filing fee (Measures of Charging Litigation Fees: Article 13)<sup>14</sup> when filing a case with the court. But, in practice, the filing fee is generally regarded as reasonable and does not appear to represent a serious burden for most investors. For instance, in a study of 1747 court decisions on PSL suits based on misrepresentation from November 2013 to 30 September 2016, it was found that 51.55 per cent of plaintiffs paid a filing fee of less than 500 yuan (around £55); 12.28 per cent of plaintiffs paid a filing fee between 500-1000 yuan (around £55-£111); 23.89 per cent of plaintiffs paid a filing fee between 1000-10,000 yuan (£111-£1111); and only 2.01 per cent of plaintiffs paid a filing fee above 10,000 yuan (£1111) (Xu 2017). In addition, the filing fee can be borne by ‘entrepreneurial lawyers’ in exchange for charging a higher risk agency fee (Huang 2018). Since litigation costs did not constitute a major obstacle for bringing a PSL suit prior to 2020, it is not clear to what extent PSL can be fostered by the measures that are designed to reduce litigation costs under the new law.

## A Quasi-class Action with Chinese Characteristics

China’s stock market is known to be dominated by retail investors. By the end of July 2020, the total number of Chinese investors amounted to 17 million, among which 16.9 million are retail investors (*sanhu*).<sup>15</sup> Thus, in China, market abuse often involves substantial numbers of individual investors with each suffering from a small amount of losses. Most investors have little incentive to participate in PSL as the cost of lawsuits often

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<sup>13</sup> In China, the contingency fee or risk agency fee system (*fengxian daili shoufei*) has long been used in practice. Under the 1997 ‘*Lüshi Fuwu Shoufei Guanli Zanxing Banfa*’ (Provisional Measures for the Administration of Lawyers’ Service Charges) Article 7, lawyers were able to charge fees based on a percentage of the value of the case in monetary disputes. The successor to the above regulation, the 2006 ‘*Lüshi Fuwu Shoufei Guanli Banfa*’ (Measures for the Administration of Lawyers’ Service Charges) has provided more detail on the application of the contingency fee system. A lawyer must first inform the client of the government-guided legal fee standard and then allow the client to choose whether to opt for the risk agency fee. To charge fees on the basis of risk agency, a law firm must enter into a fee-charging agreement with the client. This agreement should stipulate such matters as the division of risks and liabilities between the two parties, the methods of payment and the flat or proportional amount to be charged. The maximum amount charged on the basis of risk agency may not be higher than 30% of the value of the recovery as that value is stipulated in the fee-charging agreement (Articles 11, 13).

<sup>14</sup> The filing fee is charged as a percentage of the claim’s value.

<sup>15</sup> Data source Chinese Securities Depository and Clearing monthly report, available at [Chinese Securities Depository and Clearing website](#).

exceeds its benefit. A US-style class action can be particularly useful in this context. Instead of each shareholder pursuing an individual action, the US-style class action allows the entire shareholder class to pursue a single unified action against a defendant by relying on the efforts of the plaintiffs' representatives and attorneys. The class as a whole then internalizes both the cost and benefits of pursuing the action (Choi 2004). Prior to 2020, the procedure of class action was rejected in China, and its absence is often blamed for the weakness of PSL (Ren 2008; Ni 2019).

Under the new law, a quasi-class action, namely, a special representative litigation suit is made available to Chinese investors. By adopting the 'opt-out' regime, special representative litigation can offer investors a more cost-effective mechanism in pursuing PSL. Nevertheless, does special representative litigation mark a new era of PSL, as many commentators have been expecting? There are at least two reasons not to be too optimistic. Firstly, although class action was not permitted in previous law, 'entrepreneurial' lawyers have long been active in driving PSL in the PRC (Huang 2013: 767-778). These enterprising lawyers are called securities rights lawyers (*zhengquan weiquan lüshi*) in China. Like their US counterparts, they keep a close eye on the stock market, in particular the publication of the Chinese Securities Regulatory Commission's administrative penalty sanctions, to seek out opportunities to file PSLs. They will try to reach potential investor-plaintiffs once such opportunities arise. Under the risk agency fee system, the lawyers normally bear the costs of litigation and, if successful in their suit, will withhold a percentage of the amount recovered as the lawyer's fee (Measures for the Administration of Lawyers' Service Charges: Articles 11, 13). It looks as if the collective action problem in bringing PSL has been effectively mitigated by these lawyers, and it remains to be seen how much of a difference the special representative litigation regime can make in this regard.

Secondly, there is a doubt about the role of the investor protection institution in promoting PSL suits. As discussed earlier, the current rules limit special representative litigation representatives to two investor protection institutions—the Investor Service Centre and the Securities Investor Protection Fund. The Securities Investor Protection Fund was established on 30 August 2005 and is a wholly state-owned corporation funded by the State Council.<sup>16</sup> The Investor Service Centre is a limited liability company that was set up in December 2014. It has five shareholders, namely, the Chinese Securities Depository and Clearing, the Shanghai Stock Exchange, the Shenzhen Stock Exchange, the China

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<sup>16</sup> See Securities Investor Protection Fund website.

Financial Futures Exchange and the Shanghai Futures Exchange. Both the Securities Investor Protection Fund and Investor Service Centre are registered as public interest organizations,<sup>17</sup> operating under the direct administration of the Chinese Securities Regulatory Commission.<sup>18</sup> Empowering a government-sanctioned public interest institution to lead securities class action is a model that originated from Taiwan (Milhaupt 2004; Lin 2007).<sup>19</sup> In Taiwan, it is the Securities and Futures Investors Protection Centre<sup>20</sup> that plays the role of lead plaintiff in representative litigation. The Taiwan model has been praised for its advantage over the US-style class action in addressing the agency costs in the lawyer–client relationship (Fulop 2007).

However, an investor protection institution may not be properly incentivized in pursuing PSL actions for the following reasons.

- 1** An investor protection institution and its staff have little economic incentive in pursuing PSL suits. For instance, the Investor Service Centre holds only 100 shares in every company that is listed on the two stock exchanges,<sup>21</sup> and its staff are paid at a fixed salary, so neither the Centre nor its staff will be financially rewarded from any increase of PSL suit numbers or successful outcomes. Hence, we should not expect an investor protection institution to pursue a more aggressive approach in promoting PSLs, in contrast to the ‘entrepreneurial’ lawyers.
- 2** The investor protection institution has been granted a *de facto* monopoly status of lead plaintiff in special representative litigation. Lack of competition often leads to inefficiency which, in turn, can undermine its capacity in enforcement of securities law. The Chinese Securities Regulatory Commission Notice did not mention

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<sup>17</sup> For details, visit [Investor Service Centre website](#).

<sup>18</sup> This is clearly stated in their websites.

<sup>19</sup> In accordance with the Securities Investors and Futures Traders Protection Act of Taiwan (which came into effect on 12 January 2003). In Taiwan, the institution is based on a government-sanctioned non-profit organization model.

<sup>20</sup> The Securities and Futures Investors Protection Centre was established in 2003. Donors to the fund include the Taiwan Stock Exchange, Taiwan Futures Exchange, GreTai Securities Market, Taiwan Securities Central Depository, the Taiwanese Securities Association, Securities Investment Trust and Consulting Association of ROC, Taipei Futures Association, Fuhwa Securities, Global Securities Finance, Fubon Securities and Entie Securities. At the same time, Article 18 of the Securities Investors and Futures Traders Protection Act requires securities firms, futures firms, Taiwan Stock Exchange, Taiwan Futures Exchange and GreTai Securities Market to contribute each month to the fund. The Securities and Futures Investors Protection Centre is controlled (directly and indirectly) by the securities regulator and the Financial Supervisory Commission respectively.

<sup>21</sup> See [Investor Service Centre website](#).

how to divide the work between the Investor Service Centre and the Securities Investor Protection Fund, but it clearly has no intention of making them compete.

- 3** Last, but most importantly, the investor protection institution lacks independence and is susceptible to political influence. Both the Securities Investor Protection Fund and the Investor Service Centre are administrated by the Chinese Securities Regulatory Commission, that is to say the Chinese Securities Regulatory Commission has ultimate control over their decisions in relation to special representative litigation suits. China's stock market is dominated by state-owned enterprises (Tam 2002; Liu & Sun 2003; Jiang & Kim 2020),<sup>22</sup> and many such enterprises are politically powerful, in particular those controlled by the central government, such as Petro China and China Mobile. It is hard to believe that the Chinese Securities Regulatory Commission will approve a special representative litigation suit that challenges a powerful state-owned enterprise or its senior managers.<sup>23</sup> It is equally unthinkable that the Chinese Securities Regulatory Commission would approve a special representative litigation suit that may lead to a substantial loss for a state-owned enterprise, or to popular protests (*qunti shijian*, literally 'mass action'). Its sanction records show that the Chinese Securities Regulatory Commission has never dared to take on these powerful actors itself, even in the most liberal times. In the current conservative political atmosphere, the leaders of the Chinese Securities Regulatory Commission will find themselves facing serious political or legal consequences, or both, if special representative litigation is not well controlled.

The experience of Taiwan also sheds light on what we can expect from special representative litigation in mainland China. By November 2015, for the 78 ongoing cases pertaining to securities law, 48 civil suits were filed as supplementary suits to the criminal case after indictment, and 28 civil suits were filed parallel to the criminal case but only initiated after indictment. That is, an overwhelming number of cases were filed following criminal indictment. Only one civil suit was filed before criminal indictment, and the remaining one case is absent a criminal indictment

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<sup>22</sup> At the end of 2000, 90% of listed companies were originally state-owned enterprises. A 2003 study showed that approximately 84% of listed companies were viewed solely from the standpoint of equity ownership and not taking consideration of informal mechanisms of influence, directly and indirectly under state control. In the past decade, there are more private companies listed in the Chinese stock market and, as a result, state-owned enterprises currently account for one-third of firm numbers but two-thirds of market capitalization.

<sup>23</sup> They might enjoy a ministerial or vice ministerial rank that is above the chairman of the Chinese Securities Regulatory Commission.

(Shao 2013: 81-84; Wang Wenyue 2017: 461). If the role of the Securities Futures and Investor Protection Centre in enforcing securities actions is indeed somewhat limited in Taiwan (Shao 2013; Wang Wenyue 2017),<sup>24</sup> then that of its mainland counterparts—the Investor Service Centre and the Securities Investor Protection Fund—can only be weaker.

## The Chinese Judiciary

If the procedural prerequisite requirement, costs of litigation or the unavailability of class action could not account for the scarcity of PSL suits prior to 2020, then how to explain the low number of such cases? The answer lies with the judiciary. The Chinese court has been very passive in handling PSL and made every stage of the litigation process inhospitable to investors (Huang 2013; Sheng 2015). Even though the facts of suits had already been decided in the preceding administrative or criminal cases, the courts have constantly refused to accept cases or have delayed case filing (Liebman 2007; Huang 2013: 769-770). And even if a case is accepted, there will be endless hearings waiting ahead (Wang Liming 2017).<sup>25</sup> Even when a judgment or settlement is finally obtained (Wang 2006a),<sup>26</sup> it is often followed by a long period of waiting for its enforcement. The *Daqin Lianyi* case can serve as a reference to the sluggish litigation process: it took the plaintiffs two months to file their cases, two years to obtain a judgment and another two years to receive the actual compensation awarded to the plaintiffs (Wang 2006b). As discussed above, Chinese investors were very keen to seek civil remedies in the late 1990s and early 2000s, but their faith in PSL was gradually crushed by the reality of China's political-legal system.

The inhospitality of the courts in handling PSL can be attributed to various reasons, such as lack of expertise, resources shortage and so on. But the most fundamental reason is a lack of judicial independence. Lack of independence is almost a cliché in discussing the Chinese judiciary nowadays (Peerenboom 2002; Chow 2003; Clarke 2015), and that is particularly problematic in PSL. Under previous rules (Regulations of

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<sup>24</sup> The Securities Futures and Investor Protection Centre preference over utilization of criminal findings may therefore be indicative of lack of intent for full enforcement or reflect insufficient staffing for its *de facto* status as the monopoly enforcer.

<sup>25</sup> For a detailed discussion of hearings, see Wang Liming (2017). Wang has explained that in reality, the practice of 'separate case establishments, collective hearings' is fairly common, whereby courts will wait through to the end of the two-year statute of limitations period before beginning any hearings on the case, with final conclusion of the case coming even later.

<sup>26</sup> Wang (2006a) reports that, until April 2006, among the 20 cases that were accepted by the courts, only two cases have resulted in court judgments ordering compensation to plaintiffs; another four cases have resulted in settlement.

January 9: Article 9), the Intermediate Court of the place of domicile of the defendant has jurisdiction over PSL. The defendant can be a listed company, or its senior managers, or both. A listed company is normally important to the local economy in terms of taxation and employment, especially in less-developed regions. Its senior managers are generally well connected with the local government. Local government has a vulnerability to local pressures and connections, intended to protect the defendant. At the same time, the Intermediate Court is heavily dependent on local government for financial support and other welfare benefits. These difficulties give rise to a so-called judiciary localism.

The Supreme People's Court Provisions have not done much to deal with the issue of judicial localism, except for special representative litigation. In accordance with Article 2, the Shenzhen Intermediate Court, the Beijing Intermediate Court and the Shanghai Financial Court are given jurisdiction over special representative litigation suits. In theory this could generate some positive results: most listed companies lose their local patron; the governments of Beijing, Shanghai and Shenzhen are not dependent on any particular company for economic support; and the above-mentioned courts have the best resources and staff in China. Nevertheless, this is based on the presumption that special representative litigation will be widely used. This presumption, as discussed earlier, is not without its doubts. In other forms of PSL, including ordinary representative litigation, judicial localism remains an issue and investors will continue to suffer. Moreover, in China's current political environment, judicial independence has increasingly become a topic tabooed for public debate, and it would be naïve to believe that the court will act in a more progressive fashion in handling PSL suits.

## [E] CONCLUSION

PSL has been a very weak part of the Chinese legal system since the establishment of China's stock market. Many commentators have placed their hope in the new Securities Law for an improvement in the PSL situation. This article has examined the likely effect of the new Securities Law on PSL. It briefly reviewed the development of PSL in China and examined the recent changes brought by the new Securities Law. It argues that procedural prerequisite requirements, litigation costs and the absence of class action did not seriously impede investors from seeking civil remedies under the previous laws. The measures adopted in the new law that aim to address these issues will only have a modest effect as a result. The article has also offered a close examination of the most celebrated 'quasi-class action with Chinese characteristics'—special representative



litigation—a borrowing of the Taiwan non-profit organization model. This contribution has suggested that, since special representative litigation suffers from a similar incentive issue as its Taiwan counterpart and faces a more severe problem of political control, its role in promoting PSL might be fairly limited. The new Securities Law has made only limited efforts in addressing the primary reason for the weak PSL, namely a lack of judicial independence. As a consequence, it is unlikely to bring significant change to PSL in China.

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## PROVING CHINESE LAW IN THE COURTS OF THE UNITED STATES: SURVEYING AND CRITIQUING THE ARTICLE 277 CASES

RICHARD K WAGNER<sup>1</sup>

East Asian Legal Studies Center,  
University of Wisconsin Law School

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### **Abstract**

The volume of disputes heard by United States (US) courts containing a China element continues to be robust even against a backdrop of political rhetoric concerning an economic ‘de-coupling’ of the US and China. These cross-border disputes often involve Chinese parties and special issues, some of which concern Chinese business culture, but many of which involve interpreting questions of Chinese law. How is proving Chinese law accomplished in these cases and how have US courts performed in interpreting Chinese law? This article first discusses the approach to proving Chinese law in US courts. While expert testimony is often submitted and can be valuable to a US court, the applicable US rule offers no standards by which these opinions are to be judged. And, in the China context, without specific guidance, it can be challenging for a judge, unaccustomed with China or the Chinese legal system to determine which version of the law to believe. Moreover, under the applicable rule, the US court can simply ignore competing Chinese law opinions and conduct its own Chinese law legal research, presumably using English language sources. This can lead to interesting interpretations of Chinese law to say the least. The article anchors its discussion in an examination of those recent cases which have interpreted Article 277 of the Civil Procedure Law of the People’s Republic of China. This is the legal provision of Chinese law that can be implicated in certain situations involving cross-border discovery, and there are now numerous Article 277 cases among the reported US decisions. The article analyses Article 277 by placing it within the larger context of Chinese civil procedure and argues that the language used in the provision has a special meaning

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<sup>1</sup> American lawyer in private practice. Visiting Scholar, East Asian Legal Studies Center, University of Wisconsin Law School, August to 31 December 2020. Special thanks to Professor Ohnesorge and the staff of the East Asian Legal Studies Center.

within Chinese evidence law that has been obscured in those US case decisions interpreting it, leading to erroneous results. The article concludes by offering judges and practitioners some suggestions for interpreting Chinese law in future US cases.

**Keywords:** Chinese law; US courts; Article 277; deposition; cross-border discovery; Hague Evidence Convention; Chinese civil procedure.

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## [A] INTRODUCTION

As a docket watcher, I can attest to the fact that almost every day a case is filed in the United States (hereafter US) that contains a China element. These cross-border disputes often involve Chinese parties and special issues, some of which concern Chinese business culture and the Chinese language, but many of which involve interpreting questions of Chinese law. How is proving Chinese law accomplished in these cases? How have US judges approached Chinese law questions? Is there any guidance that can be offered to make the process less painful for courts and practitioners? This article addresses these questions by examining Chinese law in the courts of the US, surveying and critiquing those cases which have interpreted Article 277 of the Civil Procedure Law of the People's Republic of China (hereafter PRC). This is the legal provision in China that can be implicated in certain situations involving cross-border evidence collection and US discovery. There are numerous US cases now available in the online databases that have interpreted this provision, and we can learn from them in crafting what might be a better approach to addressing complex and often quite technical questions of Chinese law.

I first discuss the orientation to questions of proving Chinese law in US courts. This is followed by an introduction to Article 277 and the context of certain Chinese legal terms that are used in the provision. I then survey and analyse reported Article 277 cases. I close by offering some suggestions as to how US judges might approach future cases in which Chinese law is implicated.

## [B] PROVING CHINESE LAW IN THE COURTS OF THE US

Unlike the courts of the United Kingdom, the courts of the US treat proving foreign law as a question of law, not as a question of fact. Under the applicable federal rule enacted in 1966—rule 44.1 of the Federal Rules of Civil Procedure (FRCP)—a court may take anything into account in making a determination of foreign law:

In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law (FRCP rule 44.1).

This principle in a China context was recently affirmed by the 9:0 decision in *Animal Science Products v Hebei Welcome Pharmaceutical Co* (2018). The issue before the Court in *Animal Science Products* was whether the view of the PRC Ministry of Commerce on the meaning of a particular ministry regulation must be viewed as conclusive.

Justice Ginsburg, writing for a unanimous court:

[Rule 44.1] instructs that, in determining foreign law, 'the court may consider any relevant material or source ... whether or not submitted by a party.' As '[t]he court's determination must be treated as a ruling on a question of law,' ... the court 'may engage in its own research and consider any relevant material thus found' (quoting the Advisory Committee's 1966 Note on FRCP rule 44.1) (*Animal Science Products* (2018) at 1869-1870).

Thus, in determining Chinese law, a US judge may take any relevant material into account in making a determination as to what Chinese law may mean in a given case.

Early commentary, such as that provided by Miller (1967) on rule 44.1 surmised that proving foreign law would still be handled under the new rule through competing expert declarations and submitted extracts from foreign legal materials (Miller 1967: 658). But, while expert testimony is often submitted and can be valuable to a US court, the rule offers no standards by which these opinions are to be judged. And, in the China context, without specific guidance it can be challenging for a judge, unaccustomed to China or the Chinese legal system, to determine which version of the law to believe. On the one hand, there are Chinese law academics who submit opinions on Chinese law, but whose actual experience with Chinese law in practice might be quite limited. On the other, there are opinions from practising lawyers whose independence may be questionable or who, at least in part, may be concerned with how their opinion might be viewed by the Chinese state apparatus. Yet, given the design of FRCP rule 44.1, a US court may decide to ignore competing Chinese law opinions. Miller identified this issue early on in discussing the new rule:

A foreign-law expert is not required to meet any special qualifications; indeed, he need not even be admitted to practice in the country whose law is in issue. It is not surprising, therefore, that federal courts have



not felt bound by the testimony of experts and upon occasion have placed little or no credence in their opinions (1967: 658).

Given the text of FRCP rule 44.1 and competing party expert opinions (some of which may not be very useful), a US judge when faced with a Chinese law question is empowered to simply ask her or his law clerk to conduct Chinese law legal research on the internet—presumably from English language sources—review the clerk’s findings, and then make a determination as to what the Chinese law provision means. Needless to say, such an approach, without more, can lead to interesting conclusions, some of which can be rather far-fetched. I turn now to a brief discussion of sources of Chinese law in order to situate Article 277 of the PRC Civil Procedure Law within the larger context of the Chinese legal system.

## [C] CHINA’S LEGAL SYSTEM AND SOURCES OF LAW

In terms of legal taxonomy, the PRC legal system is a civil law jurisdiction, predominantly code-based. The PRC Legislation Law identifies laws (*falü*, in Chinese), promulgated by the National People’s Congress, regulations (*xingzheng fagui*, in Chinese), promulgated by China’s State Council, local regulations (*difangxing fagui*) issued by provincial governments, and ministry rules (*bumen guizhang*), issued by government ministries, as the primary sources of law in China. Judicial interpretations (*sifa jieshi*) issued by China’s Supreme People’s Court (hereafter SPC) are binding on the courts, but, in the Chinese legal system, case decisions do not, with very limited exceptions, provide primary law source authority in China. In other words, China is not a ‘case law’ jurisdiction. Case collections and compendiums in China are not complete, and there is no unified, authoritative, case collection database in China. Those cases that are available can be helpful in practice, however, even if they are not technically binding on the courts.

In addition to judicial interpretations, China’s highest court, the SPC, from time to time issues guidance to deal with procedural issues or to respond to special situations affecting the courts and litigation. For example, guidance was issued by the SPC to facilitate online and remote hearings during the Covid-19 pandemic.

Moreover, given the nature of the Chinese legal system, statements made by PRC officials in specialized subject matters may be useful for

understanding in practice how certain authorities may view particular issues, such as those concerning judicial assistance in civil matters.

I now examine Article 277 and the meaning of the Chinese legal terminology used in that provision within the scope of Chinese civil procedure and evidence law.

## [D] ARTICLE 277 OF THE CIVIL PROCEDURE LAW OF THE PRC

China's current law on civil procedure is the PRC Civil Procedure Law of 1991. It was first promulgated on 9 April 1991 and has been amended four times, most recently in 2017. While the law has been revised and improved over the years, the text of the legal provision that is at issue here—the text of Article 277—has not changed since it was first promulgated in 1991 as Article 263. Moreover, unlike many other areas of civil procedure, including those concerning the law of evidence, there have been no implementing regulations or judicial interpretations that interpret the text contained in Article 277 or help guide an understanding of the meaning of the Article. With limited exceptions, we have only the text of the Article itself. There is also no provision of Chinese law that links a violation of Article 277 with an express penalty or sanction, a matter discussed in more detail below.

Since it was first promulgated in 1991, Article 277 has been contained in the chapter of the PRC Civil Procedure Law, entitled, in English translation: 'Judicial Assistance'. In terms of the organization of Chinese civil procedure, Article 277 predominantly concerns requests for judicial assistance in cross-border civil matters.

Article 277 provides in English translation:

Any request for judicial assistance shall be made through channels prescribed by [relevant] international treaties concluded or acceded to by the People's Republic of China; or in the absence of such a treaty, any request for judicial assistance shall be made through diplomatic channels.

A foreign embassy or consulate in the People's Republic of China may serve process on and investigate and collect evidence [*diao cha qu zheng*] from its citizens but shall not violate the laws of the People's Republic of China and shall not take compulsory measures.

Except for the circumstances in the preceding paragraph, no foreign authority or individual shall, without permission from the competent authorities of the People's Republic of China, within the territory

of the People's Republic of China, serve process or investigate and collect evidence [*diao cha quzheng*].

Let us unpack the meaning of each of these three paragraphs from the perspective of evidence collection—as opposed to service of process.

Article 277(1) states that any request for judicial assistance must be made through applicable treaties or, in the absence of a treaty, diplomatic channels. In the China–US context, there is one relevant treaty; namely, the Hague Evidence Convention of 1970. The PRC has made a reservation to four Articles of the Convention, but none of these Articles is particularly relevant to this analysis.

Article 277(1) provides that, if there is an occasion for a request for judicial assistance whereby a US court (or party) requires official involvement by the PRC authorities, then those requests must be made through the mechanisms outlined in the Hague Evidence Convention. The PRC organ of government responsible for processing Hague Evidence Convention requests is the PRC Ministry of Justice (hereafter MOJ) Judicial Assistance Exchange Centre. According to the official website of the PRC Ministry of Justice, the MOJ Judicial Assistance Exchange Centre divides its works in relation to judicial assistance in civil and commercial matters into three categories: (1) receiving and processing judicial assistance requests from foreign countries; (2) sending requests for judicial assistance abroad; and (3) fielding questions and providing legal consultation in relation to judicial assistance in civil and commercial matters.

Article 277(2) authorizes a foreign embassy or consulate ‘to investigate and collect evidence’ (the meaning of which in Chinese is discussed below) from its own citizens so long as such does not violate PRC law and the citizen agrees. Article 277(2) thus allows a party involved in US litigation to expressly avoid having to make a request for judicial assistance if the target of the evidence collection is a foreign citizen, that citizen’s embassy or consulate is involved, and the citizen agrees to the investigation and collection efforts. In practice, it can vary from embassy to embassy as to what level of service and assistance a particular nation’s embassy will provide. Put another way, while Article 277(2) authorizes an investigation and collection of evidence from an embassy’s own citizens, it does not mean that the particular embassy or consulate will provide that assistance in practice. It is always best to check first.

Article 277(3) requires more discussion. Article 277(3) provides that, except for the situation involving foreign nationals as articulated in Article 277(2), no foreign authority or foreign individual may ‘investigate and collect evidence’ within the territory of the PRC without permission

from the PRC authorities. From the plain text of this provision, for it to be applicable, there needs to be 1) an ‘investigation and collection of evidence’ (the term in Chinese is *diaocha quzheng*, discussed below); 2) by a foreign organ or (foreign) individual; and 3) within the territory of the PRC.

The terms ‘foreign organ’ or ‘individual’ would appear to be fairly straightforward, although a Chinese national that has been delegated to investigate and collect evidence on behalf of a foreign court or foreign lawyer might be, depending on the situation, problematic as well. The expression ‘within the territory of the PRC’ would also seem to be clear, although that too could perhaps be subject to debate depending on the context, as discussed in the section below regarding video depositions. But what does the phrase ‘to investigate and collect evidence’ mean?

As I argue below, the expression *diaocha quzheng* is something like a term of art within Chinese evidence law and has a special meaning. In the US cases discussing Article 277, the term *diaocha quzheng* has simply been translated (in various iterations) and introduced in English. As such, its technical meaning has not been discussed or debated. I argue that, as a result, the meaning of Article 277 has often been obscured.

## Chinese Evidence Law—Self-collected versus Court-collected

In Chinese evidence law, *diaocha quzheng* is properly understood as an investigation and collection of evidence that is performed by a PRC court or authority or one which is conducted under the auspices of a PRC court or authority. Put another way, in Chinese civil procedure, *diaocha quzheng* (‘to investigate and collect evidence’) ordinarily does not come into play unless an adverse party petitions the court for the right to investigate and collect certain evidence from the other party or from a third party, or the PRC court on its own determines that it is necessary to investigate and collect evidence from a party or non-party so as to be able to adjudicate the case. Chinese civil procedure makes a distinction between *diaocha quzheng* and party-collected or self-collected evidence, in Chinese, *zixing shoujide zhengju*—literally, ‘evidence which is self-collected’. I discuss these two concepts in more detail below.

### **Contrasting ‘Self-collected’ Evidence with ‘to Investigate and Collect Evidence’ within Chinese Civil Procedure**

Within Chinese civil procedure, each party is responsible for producing evidence to support its respective claims or defences. Article 64 of the

PRC Civil Procedure Law (as revised, 2017) outlines this basic principle as follows, in English translation: ‘A party has the obligation to provide evidence for the claims or allegations that he/she/it asserts.’ This ‘self-collected’ or voluntary evidence may take the form of party statements, documents, electronic communications, witness testimony, video and audio recordings and the like (Article 63).

In the PRC, in litigation before a people’s court, if a party wishes to collect evidence from its adversary or from a third party in civil litigation, the party desiring the evidence may seek intervention from the court. PRC Civil Procedure Law, Article 64 provides that, if a party or its litigation representative is not able for objective reasons to collect certain evidence on its own, the court should investigate and collect the evidence. The language used in Article 64 is *diaocha shouji*, parallel to the language used in Article 277, *diaocha quzheng*. The request for an investigation and collection of evidence is ordinarily done by written petition to the court as set out in Article 94 of the SPC Interpretation Concerning the Application of the PRC Civil Procedure Law (2015).

In other words, the starting point is ‘self-collected’ evidence in a Chinese court. Only when for objective reasons a party is not able to self-collect may it seek intervention from the court. Within Chinese civil procedure, a party is permitted (indeed it is obligated) to voluntarily self-collect and introduce evidence, but if a party cannot do it on its own, it can petition the court to investigate and collect the evidence. Unlike US civil procedure, the Chinese legal system, similar to other civil law jurisdictions, takes a circumscribed approach towards evidence collection by adverse parties. There is not discovery as that term is understood in the US. In Chinese civil litigation, adverse party evidence collection cannot take place without the authorization of or under the auspices of the particular Chinese court hearing the case.

This approach to adverse party evidence collection in Chinese civil litigation also informs Chinese law in the context of cross-border litigation. From the perspective of Chinese law, in the context of cross-border foreign litigation, should a foreign party require the assistance of the PRC authorities to collect evidence from its adversary in China, it should consult and follow those judicial assistance provisions contained within the PRC Civil Procedure Law (Articles 276 *et seq*).

As such, Article 277 should not be read to prohibit a Chinese party to ‘self-collect’ and respond to routine discovery requests in US litigation—e.g. requests for production, responses to interrogatories, requests for admission and so on. This can be contrasted with the position under

Article 4 of the 2018 Criminal Judicial Assistance Law, which concerns criminal, not civil, litigation. Article 4 of the Criminal Judicial Assistance Law provides, in relevant part, in translation: ‘Institutions, organizations, and individuals within the PRC’s borders must not provide evidentiary materials to foreign countries and the assistance provided for in this law.’ In other words, Article 4 could be read to prohibit a Chinese party from providing evidentiary materials in response to a US government subpoena, for example. The language in Article 4 would appear more restrictive than that contained in Article 277.

By contrast, Article 277(3) of the PRC Civil Procedure Law does expressly prohibit a Chinese party from providing evidence voluntarily to meet its US litigation discovery obligations. Put another way, in the context of FRCP rule 26, Article 277 does not itself and on its own shield or limit US document discovery. Indeed, Article 277 has been the law in China since 1991, and PRC companies have been involved in US litigation for decades. There have been only a handful of cases in which Chinese parties have resisted FRCP rule 26 document discovery on the basis of Article 277, such as *Milliken* (2010) and the *Sun Group* (2019) case, discussed in detail below. I would argue that for Article 277 to be implicated in routine US document discovery there would need to be a ‘plus factor’, something else at issue in connection with the discovery requests—turning a situation of *zixing shoujide zhengju* (where a Chinese company could self-collect evidence) into one in which it was not permissible for it to self-collect, requiring a need for a *diaocha quzheng* (an investigation and collection of evidence with court involvement)—for example, situations involving bank secrecy laws where the Chinese party was a PRC bank as in *Milliken* (2010); or situations where a foreign party sought to forensically inspect computer systems in China that were used to process classified information, such as in *Hytera* (2019).

With that introduction, I now turn to the Article 277 cases. There are now quite a number of US cases available in online case databases referencing issues concerning Article 277 of the PRC Civil Procedure. A non-exclusive list includes the following: *Popular Imports v Wong’s International* (1995 and 1996); *Milliken & Co v Bank of China* (2010); *Melaleuca, Inc v Kot Nam Shan* (2018); *Motorola Solutions, Inc v Hytera Communications Corp* (2019); *Junjiang Ji v Jling Inc* (2019); *Sun Group USA Harmony City, Inc v CRRC Corporation Ltd* (2019); *Campbell Sales Group, Inc v Niroflex by Juifeng Furniture, LLC* (2020); *Chen v Hunan Manor Enterprise* (2020); *Jacobs v Floorco Enterprises* (2020); *Excel Fortress Ltd v Wilhelm* (2020); *Zhizheng Wang v Hull* (18 June 2020) (hereafter *Hull 1*) and *Zhizheng Wang v Hull* (22 June 2020) (hereafter *Hull 2*).

## [E] US COURT CASES ANALYSING AND INTERPRETING ARTICLE 277

### The Deposition Cases

The first group of US cases that I should like to discuss are those that more generally concern the question of whether a deposition for a US proceeding may take place within PRC territory without violating Chinese law. Unlike in other situations relating to cross-border discovery, China's official position on the question of depositions is captured on the US Department of State's China information webpage for judicial assistance, providing as follows—an earlier version of which did not contain the first sentence:

China does not permit attorneys to take depositions in China for use in foreign courts. Under its Declarations and Reservations to the Hague Evidence Convention and subsequent diplomatic communications, China has indicated that taking depositions, whether voluntary or compelled, and obtaining other evidence in China for use in foreign courts may, as a general matter, only be accomplished through requests to its Central Authority under the Hague Evidence Convention. Consular depositions would require permission from the Central Authority on a case by case basis and the Department of State will not authorize the involvement of consular personnel in a deposition without that permission. Participation in such activity could result in the arrest, detention or deportation of the American attorneys and other participants (US Department of State Travel Notice).

The Chinese law legal basis for the State Department warning would appear to be the third paragraph of Article 277. The deposition would be an 'investigation and collection of evidence' (*diao cha qu zheng*) by an individual within Chinese territory and, thus, may not proceed without permission from the PRC authorities. While there may be some question as to whether information collected pre-trial in the US is 'evidence' as that term is used in Article 277, it would be difficult to conceive a deposition as being something other than an 'investigation and collection' exercise. The very purpose of a deposition is to investigate and collect information that you believe would be helpful to your case or which may be turn out to be harmful to your case later on.

The sanction for violating Article 277 is not expressed in Article 277 and, as discussed below, may be limited to potential immigration law violations in the ordinary situation. Nonetheless, on the basis of the State Department warning, US courts typically conclude that an envisioned deposition taking place in Mainland China would violate Chinese law

and may not proceed in China. In practice, parties often compromise and take their China-related depositions in Hong Kong. Hong Kong, under the one country two systems principle, has not traditionally been viewed as Chinese territory for purposes of Article 277.

### ***Video Depositions and the Covid-19 Pandemic***

The question of video depositions from China has posed some interesting questions, however, particularly in light of the Covid-19 pandemic. The PRC Supreme Court issued a series of guiding opinions on handling litigation during a Covid-19 outbreak and at least one of these encourages video hearings, for example Item 8 of the SPC Notice on Strengthening and Standardizing the Online Litigation Work during the Period of Prevention and Control of the Outbreak of Novel Coronavirus Pneumonia (2020). While such opinions do not specifically relate to cross-border or overseas litigation, they suggest that special times allow for special measures. Moreover, the author is aware of at least one instance in which a PRC court in a foreign-related litigation in China allowed for the use of video in handling aspects of the PRC court case—one party being encouraged to participate in the video conference from overseas.

Depositions by video arguably do not violate the plain text of Article 277. The individual referenced in Article 277(3) would not be ‘investigating and collecting evidence’ (*diaocha quzheng*) within the territory of the PRC. But the spirit of Article 277 would at least seem to be implicated in most situations. Yet, in special circumstances (such as the situation with the Covid-19 pandemic), I think it is at least arguable that a video deposition of a voluntary PRC witness (particularly where the PRC witness was also the plaintiff) should not be considered unlawful under Article 277. It is also hard to see what the sanction would be if a ‘plus factor’, such as those referenced above, was not involved.

That being said, the author knows of four cases at the time of writing in which the question of video depositions has come up, and in none of the cases did the US court allow the depositions to take place by video. In one case, the witness sought for deposition was located in China and opposed the deposition on the basis of Chinese law. In the other three cases, the China-based witnesses requested to be deposed from China, and the deposition-taking party resisted on the basis of Chinese law. A brief discussion of these cases follows.

#### *CAMPBELL* (NC SUPERIOR COURT JANUARY 2020)

In *Campbell*, the witness resisted having a video deposition from China claiming that ‘being deposed in China could subject [the witness] to arrest’.



The North Carolina Superior Court does not appear to have sought expert testimony from the parties on the issue but, instead, performed its own ‘brief internet research’, concluding, on the basis of a blog post from 2009, that ‘it appeared’ the defendants ‘may be correct in asserting that it is illegal, absent permission from the Chinese government, for a foreign attorney or consular official to take a deposition of a Chinese citizen while in China’. The court in *Campbell* does not appear to have made any examination of Article 277 or given any consideration to the fact that the proffered deposition would take place by video and that the interrogator (i.e. the individual seeking to investigate and collect the information from the witness) would not be physically present within Chinese territory. It would also appear that the witness may have been a US citizen. In which case, the US embassy could have been approached to house the deposition, possibly bypassing Article 277(3) in favour of Article 277(2), if such had been permitted.

*CHEN V HUNAN MANOR* (SD NY FEBRUARY 2020)

In *Chen v Hunan Manor Entertainment*, the plaintiffs sought to have the defendants take the depositions of certain of their witnesses in China by video. The defendants resisted claiming that a ‘deposition for the purpose of a foreign litigation was simply illegal in China’. The defendants apparently did not provide the court with any authority to support this contention, and the court conducted its own research, concluding under the decision in *Junjiang Ji*, discussed below (which quoted the State Department warning in the context of a *forum non conveniens* analysis), and *Campbell*, discussed above, that the video deposition could not proceed.

*JACOBS V FLOORCO* (WD KENTUCKY MARCH 2020)

In *Jacobs*, the China-based witness wanted to voluntarily testify for his deposition from China. The witness was also the president of the defendant named in the suit. To support his contention that the voluntary deposition would not run afoul of PRC law, he submitted a two-paragraph opinion from a PRC law firm, Shanghai Hao Dong Law Office, one paragraph of which concerned the question of video depositions and simply asserted, without analysis, in the English translation provided to the court:

Currently, there is no law requiring that a foreign court can obtain a witness’ statements only when such witness testifies in the court, and the law does not preclude a witness from testifying through two-way audiovisual transmission technologies [*sic*] (*Jacobs Docket*, Document Number 86-12).

Not surprisingly, the court did not place much weight on this opinion:

The Court was provided no information regarding the reliability of the legal advice provided by the Chinese firm or the accuracy of the translation. Further the opinion did not purport to rely on any particular source of Chinese law that the court could use to verify its interpretation of the same (*Jacobs* at 50).

While the original Chinese version of the opinion is clearer than the English translation provided, it remains conclusory and without analysis.

It appears the court placed more weight on an email which had been sent from the US Embassy, which contained the State Department warning, and a court reporter's reluctance to participate in the deposition from Mainland China. The court also analysed certain practical aspects of the situation at hand, including the efficacy of having a deposition conducted through the auspices of the Hague Evidence Convention and whether the court could intervene if a discovery dispute arose during the deposition. Moreover, the court was 'unpersuaded' by the defendant's interpretation of the State Department warning and noted the court reporter's reluctance. The court concluded that 'it will neither direct nor encourage the Parties to engage in potentially illegal conduct'. The court also appears to have taken into account the fact that the China-based witness was the president of the named defendant and had previously refused to provide deposition dates.

However, I think the lesson from *Jacobs* is the importance of retaining folks on your team who are trained in both Chinese and US law and putting in the effort when you are seeking to break new ground in the US courts. The judge in *Jacobs* took a conscientious and diligent approach to the Article 277 issue presented, but, had the defendant's Chinese law expert been presented more thoroughly or competently, the result may have been different. Moreover, it is unclear whether the witness in question was even a PRC national who would be caught within the prescripts of Article 277(3) or just simply someone with long-term residence in the PRC. There are indications from the docket record in the case that Mr Tu was a national of Singapore, for example, not the PRC. Under Article 277(2), would it have been possible to approach the Singapore embassy to see if it would agree to shepherd a video deposition of a voluntary citizen of country? This issue does not look to have been raised and addressed in *Jacobs*. But the key issue not addressed appears to have been whether a video deposition conducted remotely, and outside PRC territory, would still violate Article 277(3). In other words, was there a violation of Article 277(3) if the deposition taker was located in the US,

not within PRC territory, and a global pandemic was underway? This issue was addressed by the court, albeit briefly, in *Hall (2)*.

*ZHIZHENG WANG v HALL (2)* (WD WASHINGTON 22 JUNE 2020)

*Hall (2)* concerned video depositions during the Covid-19 pandemic. While there had originally been agreement to take the deposition of the plaintiff by video from his home in Beijing, the defendants subsequently changed their position, claiming that to do so would expose them to sanctions under Chinese law. The plaintiff disagreed, claiming that the defendant's 'change of heart' was 'harassment designed to inconvenience' and that forcing 'a 69-year-old man to travel puts him at risk of COVID-19'. From a review of the docket in the case, the plaintiff submitted a Chinese law opinion from a PRC lawyer on the Article 277 issue. The defendants did not provide their own Chinese law opinion but simply submitted one that had already been submitted in the Eastern District of New York case of *Junjiang Ji v Jling, Inc.* While somewhat unusual, this approach does not look to violate FRCP rule 44.1 as, under the rule, the 'court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible', including, presumably, a legal opinion submitted in an earlier case in another district. And, in the end, the court agreed with the defendant's view of Chinese law based on the State Department warning and an earlier court's ruling in *Junjiang Ji*, opining:

Defendant's interpretation of Chinese law is reasonable given the language of Article 277, the State Department's advisory, and US case law regarding Article 277. While there is certainly a possibility that the Chinese authorities would construe the law narrowly so that it does not apply to foreign individuals who do not set foot within the borders of the People's Republic of China and who have the cooperation of the Chinese citizen being deposed ... the Court will not require defendant to bet on that outcome.

The opinion in *Hall 2* did not provide any analysis of the text of Article 277, and the conclusion seems in large part to have been based on the reasoning from *Junjiang Ji v Jling, Inc.*, a case which, as I discuss below, employed some interesting analyses of Chinese law, particularly the penalty provisions for potential violations of Article 277.

## Article 277 in a Non-deposition Context

There have been two recent cases of relative importance concerning Article 277 in a non-deposition context. In *Junjiang Ji*, the court was presented with the issue of trial testimony offered by the Chinese plaintiff via video from Tianjin. In *Sun Group*, the Chinese party resisted routine discovery

on the basis of Article 277. Both require a somewhat closer examination and raise interesting questions of proving Chinese law in US courts.

**Junjiang Ji v Jling, Inc (ED NY 31 March 2019)**

This case was before Magistrate Judge Steven I Locke of the Eastern District of New York. Prior to becoming a judge, Judge Locke was in private practice and apparently had some experience with Article 277 or its predecessor during his law practice. Unlike in other cases involving Article 277, in *Junjiang Ji*, we have a trial transcript that preserves much of the debate concerning Article 277 and makes for interesting reading. I quote liberally from it below, available from the public docket.

In *Junjiang Ji*, the plaintiff, Mr Ji gave direct testimony from Tianjin, PRC, via video link because he could not obtain a visa to the US to testify. On cross-examination, counsel for the defendant sought to have the entire testimony stricken as being violative of Article 277. After the direct and cross-examination, the court heard argument on Article 277 the next morning. The argument on Article 277 began with one of the defendant's counsel, a Mr Hang, introducing an English translation of Article 277 in open court which, I argue below, took certain liberties. Mr Hang's English translation of Article 277(3) provided in relevant part:

Except for what is described in the foregoing provisions, no foreign authority or individual is allowed to *serve process, conduct investigation, or obtain evidence within the borders of People's Republic of China* without permission from the authority of the People's Republic of China [Emphasis added].

After introducing his English translation of Article 277, Mr Hang then went on to explain to the court what he believed Article 277 meant. This was followed by questions from the court, set out below:

MR. HANG: So basically the third paragraph says without getting the authority or permission from People's Republic of China, a foreign power, for example, or individual, like the court or attorneys, for attorneys, like US attorneys or foreign individuals and common people cannot conduct proceedings which is part of evidence within the border of the People's Republic of China. That means if the people or witness sitting in the border of the People's Republic of China, the foreign authority or foreign individual cannot take deposition from them or take testimony from them because they are in China, they are China nationals; the legal authority of China; you cannot violate that legal authority. If you violate that law, the penalties could be arrest or detention of attorneys or individuals or participants, including the witness sitting here. He could be arrested or penalty for violation because—

THE COURT: Mr. Hang, those same penalties could apply to attorneys, as well, involved in obtaining the evidence?

MR. HANG: Yes. By the attorney and also the witness.

(*Junjiang Ji* Docket, Document Number 86-4, Transcript of Hearing of 27 March 2018, pages 91-92).

Based on Mr Hang's English translation and explanation, Mr Hang is claiming that the prohibition contained in Article 277 is as follows: no foreign authority or individual is allowed to 1) serve process, 2) conduct investigations, or 3) obtain evidence from China without permission.

However, I respectfully submit that Mr Hang's translation is not an accurate translation of the original Chinese for this paragraph, Article 277(3). As discussed above, the Chinese term which in this translation is being translated as 'conduct investigation, or obtain evidence' is the four-character phrase *diaocha quzheng*—'to investigate and collect evidence'. Moreover, the prepositional phrase 'within the borders of the PRC' does not belong with 'obtain evidence' as this translation suggests. A literal English translation of Article 277(3) would be: 'Except for the circumstances in the preceding paragraph, without having received permission from the relevant PRC organ(s), any foreign organ or individual must not within the territory of the PRC, serve documents or investigate and collect evidence.' Mr Hang's version would seem to suggest that no evidence can be obtained from individuals or companies in China without permission, which is not the prohibition contained in Article 277. Article 277 prohibits a *foreigner from going to China and undertaking an investigation and collection of evidence from her or his adversary without permission*.

At issue in *Junjiang Ji* was whether direct trial testimony through video link from China fell within the scope Article 277(3). From a plain reading of the provision, such activity would not seem to technically fall within the scope of 277(3). The foreign organ or individual would arguably not be within Chinese territory; the voluntary witness would be. Moreover, I believe an argument could be made that the prohibition in Article 277 is not directed at a voluntary Chinese witness who is the plaintiff at trial—or, put another way, the evidence that has been provided, voluntarily.

Going back to the transcript, there is then a brief discussion of whether there are penalties for violating Article 277. And this would seem to be the more important issue for Judge Locke. Mr Hang seeks to introduce a discussion of penalties by referencing depositions, but Judge Locke indicates that he is quite familiar with the issue of depositions in China before inquiring about potential penalties with video trial testimony:

THE COURT: You have provided the Civil Procedure Law copy here. Do you have a copy of whatever expansion of the law that talks about penalties?

MR. HANG: I don't have time to. But I don't have copies, no.

THE COURT: Is that something you can obtain?

MR. HANG: Probably penalties I can obtain. However, I have two articles which is written by US attorney. One of the, I know it is not authority but the US attorney article. Another is by, it is called International Deposition Agency. They mention this. Both of them mention—

THE COURT: Do they mention penalties, in those articles?

MR. HANG: They might talk about it. I can read what it says. It says: '*Beyond being merely frowned upon, participation in unauthorized depositions*' [Emphasis in original]—

...

THE COURT: Mr. Hang, these two articles talk about a deposition being taken in China, don't they? This is not what we are doing here.

MR. HANG: Your Honor, I think it's related article that says no depositions in China. No.

THE COURT: But we are not taking a deposition. We are trying to obtain evidence for a trial. The rule speaks to this but I don't know whether the rule speaks only about depositions. You do not have to prove to me you cannot take a deposition in China. I tried it for years and was unable to do it, so I know you can't. We're talking about obtaining evidence for a trial here. Do these articles speak to that?

MR. HANG: Your Honor, the Chinese law, Article 277, is that obtains evidence within the border of China.

THE COURT: I know that. We have read that. That is what you already read to me.

MR. HANG: Yes.

THE COURT: I'm only interested in articles about obtaining evidence; not at depositions, evidence at trial. And I'm interested in the penalties that you discussed before. Is that something that you can have in court later today or tomorrow?

MR. HANG: I believe I can. Yes.

(*Junjiang Ji* Docket, Document Number 86-4, Transcript of Hearing of 27 March 2018, pages 92-93).

A review of the transcript suggests that counsel for the plaintiff was unfamiliar with Article 277 or with Chinese law more generally, or even with the difference between the PRC and Hong Kong legal systems, and

was unable to counter the arguments made by Mr Hang in open court. The court ruled to exclude the testimony, but required an affidavit from Mr Hang on the penalties for violating Article 277 and allowed post-trial briefs on the Chinese law issues, which became the subject of the subsequent reported case, Judge Locke ruling in open court during the trial hearing on 27 March 2018:

Okay. Here is what we are going to do. First, I am ordering Mr. Hang to produce that section about penalties that relates to a violation of this. The only authority I have before me is 277 of the Civil Procedure Law of the People's Republic of China, the revision dated 2017, effective today and translated from the Chinese into English; as well as Mr. Hang is the only attorney or person in this courtroom who has practiced law in China, and I believe he practiced for 20 years. My reading of the statute is that conducting the proceedings in this present form is a violation of Chinese law, which exposes not only the plaintiff to legal sanctions—and I would submit that is up to him—but also defense counsel, who I am told conducts business in China regularly. Therefore, I am not going to permit Mr. Ji to testify in this matter. ... We will have post hearing briefs on each issue, not just on this. But Mr. Ji is not going to be permitted to provide further testimony in this case in this manner. ... That is the ruling. I will put it in writing later so that, at the end of this case if either of you wants to appeal, you will have something more reasoned and ready.

(*Junjiang Ji* Docket, Document Number 86-4, Transcript of Hearing of 27 March 2018, pages 103-104).

In connection with the post-hearing trial briefs, Mr Hang submitted portions of three Chinese legal documents that he claimed set out the penalties for violating Article 277. The first two were provisions (Article 15 and Article 30) from the Regulations on the Administration of Foreign Law Firms' Representative Offices in China. However, these regulations, issued by China's State Council, are not specifically concerned with a situation in which a party witness is voluntarily testifying from China. Rather, they are simply regulations concerning the administration of foreign law firms which have representative offices in China, and are not particularly relevant to the situation in *Junjiang Ji* which, from the publicly available materials, did not concern the activities of a foreign law firm representative office in China.

The third provision was Article 81 of the Exit and Entry Administration Law of the PRC (2013). But that provision, on its face, would be inapplicable where none of the foreign lawyers were in the PRC. The plaintiff testified via video from Tianjin and the lawyers were all in Brooklyn.

The fourth provision cited was the provision from the PRC Criminal Code (Article 13) dealing with subversion and separatist activities. It would

take a very different fact pattern from that posed in *Junjiang Ji* to see how the trial testimony offered could amount to a violation of Article 13 of the PRC Criminal Code in my opinion. There was no evidence presented of subversion or separatist activities. *Junjiang Ji* concerned a labour claim by former cooks of a Hibachi restaurant in Wantagh, NY. As with *Jacobs*, *Junjiang Ji* may have been decided differently if the Chinese law issues had been more thoroughly addressed by the other side.

Indeed, while *Junjiang Ji* appears to have turned on the question of whether there were penalties for violating Article 277, the provisions submitted in support of such penalties do not appear to have been disputed by counsel for the plaintiff. Judges are placed in a difficult position when faced with litigants who do not defend their Chinese law positions. What are the consequences for violating Article 277? Cases involving a ‘plus factor’, such as bank secrecy, *Milliken* (2010), or state secrecy, *Hytera* (2019), have different provisions of PRC law potentially implicated in a violation of Article 277. But what about the ordinary case?

#### CONSEQUENCES FOR VIOLATING ARTICLE 277 UNDER CHINESE LAW

There is no mention in Article 277 of consequences for violation and the legal basis for the contention in the last sentence of the State Department warning that ‘participants in such activity could result in arrest, detention or deportation of the American attorneys and other participants’ is unclear. One could imagine a situation in which violating Article 277 might raise Chinese immigration law questions, activities that fall outside those permissible within a business visa, but even in those rules the situation is not clear cut.

One illustrative document on the question of sanctions for violating Article 277 in an ordinary situation is an article, written in Chinese, and available online, which was authored by one of the officials in China responsible for rendering judicial assistance and processing requests under the Hague Evidence Convention, the applicable treaty in Article 277 for US/China judicial assistance requests. I believe this article can, in some respects, be viewed as helpful guidance as it was written by a PRC government official and deals with her particular area of expertise and service as an official within the PRC MOJ’s Judicial Assistance Exchange Centre. In discussing possible sanctions for violating Article 277, PRC Official Li Zhiying of the MOJ’s Judicial Assistance Exchange Centre writes, in relevant part, in English translation:

In summary, towards those activities of evidence collection within PRC territory, on the one hand Article 277 of the PRC Civil Procedure Law clearly prohibits them. But on the other hand, regardless of



whether it is a lawyer or a party or witness freely going along with it, under current law, there are no punitive provisions. Moreover, from a practical operational perspective, relevant departments would have no way of knowing about evidence collection activities and freely giving testimony [in a deposition], and penalizing [these activities] would be even more out of the question. So, the prohibitions are really in name only. And considering that direct evidence collection methods are much quicker, would save on judicial resources, and would make cross border litigation more convenient, there would be no harm in directly legislating provisions that would allow for direct evidence collection [activities within Chinese territory] in accordance with certain conditions (Zhiying 2016).

As the article by Official Li corroborates, there would appear to be no express provisions of Chinese law providing sanctions for violating Article 277. The text of Article 277 itself provides no explicit sanction, and there would appear to be no provision of Chinese law providing an express sanction for violating Article 277. Moreover, Article 277 appears in the civil procedure law of China. While there are provisions contained in the PRC Civil Procedure Law that expressly provide sanctions for violation, even in the context of an express sanction for a civil procedure violation these provisions are rarely enforced in practice.

In *Sun Group*, the Chinese party relied on a reply letter from the same MOJ Judicial Assistance Exchange Centre, referenced above, in seeking to push an Article 277 argument even farther—resisting routine US document discovery on the basis of Article 277.

### ***Sun Group (ND Cal November 2019)***

In *Sun Group*, the US company plaintiff brought suit against the Chinese company defendant for alleged breaches of a series of contracts concerning the development of high-speed railroads throughout the US. After initial motion practice, the case moved into the discovery phase of the federal proceeding and the Chinese party, CRRC, moved to require the parties to pursue routine discovery, such as requests for the production of documents, pursuant to the Hague Evidence Convention. CRRC argued that to produce documents in the federal proceeding would violate Article 277 of PRC Civil Procedure Law. This was somewhat different from the situation in *Richmark Corp v Timber Falling Consultants* (1992) where the Chinese company relied on PRC state secrecy laws in a post-judgment context to resist the production of certain documents. In any event, CRRC submitted affidavits from its legal officer and a PRC lawyer to support its contention that Article 277 was implicated. It also submitted a reply letter that was issued by the MOJ's Judicial Assistance Exchange Centre in

response to a CRRC official query. This was a bold attempt by a Chinese company to block routine document discovery in US litigation.

In an interesting and unusual decision, the US magistrate agreed with CRRC, requiring the plaintiff to first attempt to obtain the documents it sought pursuant to the Hague Evidence Convention. Chinese companies have been involved in hundreds of US cases over the years, and this is the first case the author is aware of in which a US court required document discovery to be pursued in a China-related case pursuant to the Hague Evidence Convention mechanism. As such, it deserves some additional attention.

In its opening brief, CRRC took the position that not only did Article 277 prevent Chinese companies from responding to routine discovery requests, but that Article 277 (identified in at least one part of CRRC's opening brief as being part of 'the Chinese civil code', page 9) was designed so as to have PRC courts managing all discovery in litigation overseas in addition to domestic PRC litigation.

The policy underlying Article 277 is the Chinese sovereign interest that its judiciary will supervise and direct discovery activities occurring within the PRC. ... Article 277 therefore promotes uniformity in the Chinese legal system by requiring PRC entities to seek court involvement in the collection and production of evidence for *both* domestic litigation *and* foreign proceedings [emphasis in original].

(*Sun Group* Docket, Document Number 132, CRRC Opening Brief at page 9).

In support of these interesting assertions, CRRC cited a legal opinion (paragraphs 15 and 18) of a PRC lawyer, Jinhua Wei of the W&D Zhonglun Law Firm (*Sun Group* Docket, Document Number 132-13). But to be fair to Lawyer Wei, this was not claimed in the legal opinion. Reading the original Chinese of the opinion (and not the English translation, which, shall we say politely, takes certain liberties), it is clear that Lawyer Wei is referencing nothing more than the concept of *diaocha quzheng* (to investigate and collect evidence under the auspices of the court), which we have discussed at length in this article. In other words, the opinion employs a sort of circular reasoning, which at the end of the day, appears to suggest nothing more than what is already in Article 277; namely, *diaocha quzheng* may not be conducted in China by a foreign organ or individual in connection with a foreign proceeding without permission. Contrary to what is claimed in the passage excerpted above, Lawyer Wei said nothing in those paragraphs of his opinion about the policy underlying Article 277, let alone that China wishes to 'supervise and

direct' all 'discovery activities'. Chinese procedure does not even have discovery as that term is understood in US legal parlance.

CRRC also submitted an affidavit from the Director of the Legal Affairs Department of CRRC, executed in Beijing, in support of its position that no evidence may be provided outside the mechanisms of the Hague Evidence Convention (*Sun Group* Docket, Document Number 132-12). However, one is left with the question as to how it would be permissible for CRRC to have one of its directors submit an affidavit declared 'under penalty of perjury under the laws of the State of California', without violating Article 277, but yet would not be able to voluntarily provide documents outside of Hague mechanisms in connection with its US litigation obligations. Unfortunately, this would appear to be another instance of a litigant trying to have their cake and eat it too. If CRRC was subject to the jurisdiction of the US court, which clearly it was, why didn't it have to play by the rules of the US court?

It is hard to see how the sorts of statements from CRRC excerpted above are to be considered proper support for an interpretation of Chinese law. The notion that Chinese courts are, in a sense, designed and prepared to supervise and manage all litigation in the world that involves Chinese companies is nothing short of preposterous. Chinese judges already have a very busy docket.

The issue was heard before Magistrate Judge Sallie Kim. Judge Kim looks to have evaluated the briefing submissions, including the Chinese law expert opinions that were submitted by both parties, and the MOJ reply letter, balancing interests under the standards articulated by the Restatement of Foreign Affairs and *Société Nationale v District Court* (1987). Judge Kim appears to have placed great weight on the MOJ reply, concluding:

In light of Wei's declaration and the letter by the Chinese Ministry of Justice on this specific issue, the Court finds that Defendant has demonstrated that producing documents located in the PRC in response to Plaintiff's discovery requests would violate Article 277.

But what in fact did the MOJ reply letter state?

The letter from the MOJ's Judicial Assistance Exchange Centre is available from the public docket, submitted in original Chinese and a translation prepared by CRRC. As with the opinion of Lawyer Wei, CRRC translated *diaoqu zhengju*, a term parallel to *diaocha quzheng* used in Article 277, as simply 'discovery'.

While the term and concept of discovery does not exist within the Chinese legal system, CRRC translated the relevant part of paragraph 3 of that MOJ reply as:

When a foreign country intends to propound discovery in the PRC, it shall submit its request to the Ministry of Justice of the People's Republic of China through the channels in accordance to the rules set forth in the Evidence Convention.

(MOJ Reply, paragraph 3, Sun Group Docket, Document Number 132-2).

However, I submit a more accurate translation of this section of the original Chinese of the MOJ reply (Document Number 132-3) would have been:

If there is a need for evidence collection [under the auspices of the court], then the foreign country shall go through [a] way [provided] in the provisions of the Hague Evidence Convention and make a request to China's Ministry of Justice.

In other words, the CRRC translation was reading more into the language used by the MOJ than the MOJ was intending, leading to a conclusion that Article 277 prohibited CRRC from providing documents in response to production requests. Quite to the contrary, in my reading, the MOJ was simply stating that, if there was a need for a *diaocha quzheng* under Article 277, then the foreign court needed to resort to the Hague Evidence Convention. Once again, a sort of safe circular logic, similar to that employed in the Lawyer Wei opinion, and consistent with how PRC ministries typically respond to these sorts of queries based on my practice experience in China.

In the end, Judge Kim may simply have concluded that it was better to first try the Hague Evidence Convention mechanism during a time of heightened tension between the US and China. And yet, such concerns, I respectfully submit, are misplaced, particularly in light of the gamesmanship CRRC employed in presenting its position on the meaning of Article 277. This phenomenon of gamesmanship in China-related US litigation is explored by Campbell and Campbell (2016: 166-169). Unfortunately, the decision in *Sun Group* has further emboldened resistance to US discovery on the basis of Chinese law, illustrated by *Hull 1* on the subject of affidavits. And, ultimately, this will make things worse for Chinese companies embroiled in US litigation in the long run. If the PRC state secrecy cases are to be taken as an example, US courts have become far more suspect of Chinese companies employing Chinese law to resist discovery. You have to pick your battles carefully in US court and work to preserve credibility. Crying wolf by some Chinese companies

in resisting the production of routine business records as ‘state secrets’ has made things very difficult for Chinese companies which are faced with actual issues and prohibitions under Chinese law, such as PRC banks in the context of Chinese bank secrecy laws, and PRC technology companies that are contractors to the PRC national security apparatus.

## [F] WHAT’S A JUDGE TO DO?

The extended discussions in *Junjiang Ji* and *Sun Group* illustrate the challenges US judges face in analysing questions of Chinese law. To get the Chinese law issues right takes time and a thorough examination. Not all issues require full treatment perhaps, but for those that have significance and cannot be worked out by the parties on their own—particularly Article 277 issues which go to the heart of US discovery and case management—a thorough evaluation is prudent.

In the context of Chinese law issues related to Article 277, I offer the following questions to help triage the issue and the approach:

- ◇ Does the activity in question present an occasion for judicial assistance with the PRC authorities? Have the elements of Article 277 been met? If not, Article 277 should not be implicated.
- ◆ Is the activity in question even a *diaocha quzheng* (an investigation and collection of evidence) as that term is understood within Chinese civil procedure? Or would this be more akin to ‘self-collected’ evidence as that term is understood within Chinese civil procedure? Are there other provisions of Chinese law implicated, outside of Article 277 that would prevent a party from self-collecting the evidence—e.g. Chinese bank secrecy laws?
  - Assuming the court has jurisdiction over the Chinese party, and, as a party litigant, has US discovery obligations under the rules of the US court, would providing the evidence be considered voluntary or compelled?
- ◆ Is the evidence collection activity being handled by a foreign organ or foreign individual?
- ◆ Does the contemplated activity take place within the territory of the PRC? If not technically within the PRC, does it still raise issues of Chinese territorial sovereignty? Testimony by video, for example. Have these issues been addressed in the respective expert opinions?
- ◇ What are the sanctions for violating Article 277 in this context? Is this an ordinary situation involving Article 277 or are there other

provisions of Chinese law also implicated; for example, seeking documents from a PRC technology company that fall within the ambit of PRC national security laws?

- ◆ Who is bearing this risk? The party seeking to enforce an eventual judgment in China or both parties?

As to proving Chinese law more broadly, if the Chinese law issue is not only peripheral to the case, the standard approach for the US court should be to require a Chinese law expert opinion from each side, with submission of the relevant law in translation and supplemental materials, if necessary.

But how does a judge evaluate competing expert opinions submitted by party litigants? Consider the following:

- ◇ How substantial is the PRC law legal opinion submitted? Does the opinion dig into the nuances of the particular issue or does it merely cite the law and provide a conclusory opinion? Is it well-reasoned?
- ◇ Does the PRC law expert have expertise both on the theory of the provision at issue, as well as how that provision works in practice?
- ◇ Is the PRC law expert's experience current? Is it a specialized issue? Does the expert have experience with that specialized issue?
- ◇ Does the opinion ring of independence? Even if it is the opinion of a party litigant, does the opinion appear to be independent from the PRC state apparatus or from Western political ideology hostile to China? Does the opinion appear self-serving?
- ◇ Are sanctions for violating the law important to the analysis?
  - ◆ Has the question of sanctions been addressed in the opinion?
- ◇ Does it make sense to cross-examine the experts on the issues raised or perhaps hold an expert conference where the judge can ask questions of both experts?
- ◇ Are there Chinese language issues that are implicated that require additional briefing? Do the parties offer different interpretations of the meaning of the language used in the provision at issue or do they just provide their translations? Do the words used in translation have the same meaning in Chinese procedure as they would in the US? Does the opinion help to explain and translate different legal concepts or just words? Does the translator have a background in cross-border disputes? For example, if there is no concept of discovery in China, how can the original Chinese of a law or official pronouncement be translated as discovery?

US judges are no doubt busy, and the permissiveness of FRCP rule 44.1 allows courts to cut corners in examining technical questions of Chinese law. But, as the extant Article 277 decisions in the online case databases suggest, a more thorough approach is warranted in many cases.

## [G] CONCLUSIONS

This article has explored the question of proving Chinese law in US courts by examining a number of US court decisions which have interpreted Article 277 of the PRC Civil Procedure Law. It has also offered some suggestions for judges in future cases where Chinese law may be implicated and, in particular, in those cases in which Article 277 has become an issue. Recent suggestions in the academy (Clarke 2020; and Jia 2019-2020) that China and the Chinese legal and court system raise special questions for US courts and, as such, questions concerning Chinese law require a different approach than that taken with the laws and legal systems of other nations should be resisted. Even though the Chinese legal system is quite different from the US legal system and getting the Chinese law issue right for a particular fact pattern in a particular US case can be challenging, if it is approached diligently and carefully, the right conclusion can be achieved—in the end, it is actually the flexibility of FRCP rule 44.1 that allows for this.

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# ONLINE DISPUTE RESOLUTION SIMULATION: SHAPING THE CURRICULUM FOR DIGITAL LAWYERING

FAYE F WANG

Brunel University London

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## **Abstract**

Online dispute resolution (ODR) simulation workshops are designed to provide students with a virtual learning environment that empowers our students to gain legal and digital skills for their readiness in future employment. Students are invited to act as complainants, opponents and arbitrators/mediators to resolve a real-life case in a team-based, student-centred and research-informed teaching and learning environment. The ODR simulation workshops have been conducted by the author among both undergraduate and postgraduate law students since 2007 at Brunel University and other places. This ongoing project was initially funded by the Nominet Trust in 2010. Throughout these years, ODR simulation workshops have been well-received by students from different cultures, particularly where English is not their first language. Students were asked to conduct online arbitration or mediation hearings and submit arbitral awards and mediation settlements, as well as delivering technical observation notes and group presentations after the process. This article promotes the use of ODR simulation to effectively enhance students' learning experience, legal skills (i.e. critical thinking, legal reasoning, problem-solving skills) and digital skills. It puts ODR simulation into the context of the shift in teaching approaches in the digital age and explains how modern legal education can be shaped to prepare for digital lawyering.

**Keywords:** online dispute resolution; online arbitration; digital literacy; digital empowerment; artificial intelligence; digital lawyering; flexible learning; team-based learning; student-centred learning, research-informed teaching.

## [A] INTRODUCTION

Online dispute resolution (ODR) is a mechanism for resolving disputes via the use of electronic communications, which broadly includes many forms of alternative dispute resolution (ADR) and e-courts. The use of electronic communications for ODR includes but is not limited to emails, telecommunications application software and other communication technologies. Whilst ODR can be used in most civil and commercial disputes, those involving electronic transactions or internet-related cases are most suitable because electronic evidence can be submitted easily via the internet on the ODR platform (Wang 2017: 8). ODR provides a more efficient, cost-effective and flexible way to resolve disputes than traditional ways (Wang 2009, 2010).

In the age of artificial intelligence (AI), at present, ODR services still require a great degree of human interaction, i.e. human decision-makers. In the partly AI-assisted ODR environment, AI technology may help transcribing evidential audio to text and provide a provisional outcome for a human mediator or arbitrator to review and make the final decision. In the next generation of ODR development, established technologies can be employed to provide automated service in ODR. In the entirely AI-enabled ODR service environment, once a complaint is filed and accepted, and relevant evidence is submitted, a robotic mediator or arbitrator may help us resolve the issue without any human intervention. In the medium to long term, the dispute resolution intelligence machine itself may be able to collect and analyse critical data concerning previous decision-making by arbitrators or mediators, understand the nature of the dispute and the associated rules and laws relating to the case (Wang 2017: 98). In 2015 Arbitrator Intelligence, a global information aggregator, was set up to collect arbitrators' past decision-making information, including published and unpublished international arbitral awards (Arbitrator Intelligence Questionnaire).

With regard to technological developments in ODR provision, service-oriented computing 'offers a promising solution in discovering other appropriate agents, reaching agreements between service providers and customers, managing the joint execution of tasks and dealing with any problems that arise' (Wang & Griffiths 2010: 156). The more recent blockchain technology (a shared and distributed ledger; and an alternative to traditional databases) can support the automated execution of smart contracts (Daniel & Guida 2019: 46-53). It is argued that blockchain and service-oriented computing may be combined as 'service-oriented permissioned blockchain' to optimize services such as verifiable data

(Qiu & Ors 2020). These advanced technologies may be employed in the ODR process to execute arbitration or mediation agreements and shape online written communications to avoid escalating conflict by blocking foul language in the process (Wang 2017: 80).

Modern legal education should educate students in legal and digital skills, assisting the development of their ability for global competence. It has been observed that an increasing number of lawyers in the United States are involved in international cases due to the expansion of legal services driven by a global economy (Kim 2018: 908). The concept of ‘basic global competency’ has been characterized as ‘a basic understanding of international law and awareness of fundamental differences in legal systems and cultures, rather than specific expertise in any particular aspect of international law or foreign legal system’ (Kim 2018: 907). A problem-solving approach is essential to legal education as lawyers are generally considered to be problem solvers (Nathanson 1997: 53). When dealing with cross-border or transnational commercial legal disputes, international commercial arbitration has become one of the most popular methods, surpassing international commercial litigation. This is largely due to the possible benefits of arbitration as a process that is fast and cost-effective and its outcome enforceable. In modern legal education, basic global competence should be extended to the attainment of current digital lawyering skills and the life-long learning skills to understand and develop technologically assisted legal services due to the ever-increasing usage of technologies in legal services. A well-designed ODR simulation workshop (in particular, an online arbitration simulation workshop) would assist students to achieve the above expected learning outcomes, e.g. legal, digital and global competence, and to be ready for their future employment.

This article discusses how the adoption and inclusion of the ODR simulation workshops in legal education could be used to prepare our students’ readiness to use advanced technologies to resolve disputes as legal practitioners in contemporary society. It considers how the methods and practice of ODR simulation workshops can be further enhanced to enable students to gain practical experience in the digital age and inspire them to foresee the future of robotic or other technology in legal services (Wang 2019). It promotes the use of ODR simulation as a generator for student-centred and team-based learning in order to effectively enhance students’ learning experience, legal skills (i.e. critical thinking, legal reasoning, problem-solving skills) and digital skills. It puts this into the context of the shift in teaching approaches in the digital age and explains how modern legal education can be shaped to prepare for digital lawyering.

## [B] DEVELOPMENT OF ODR SIMULATION FOR LEGAL EDUCATION

ODR simulation workshops have been utilized by the author since 2007 in both undergraduate and postgraduate modules, through a wide spectrum of internet law, dispute resolution, international commercial arbitration and international trade law. In ODR simulation workshops, students are invited to form teams acting as complainants, opponents and arbitrators or mediators to resolve a case using online conferencing facilities. These workshops provide an interactive learning platform for subject matter debate and analysis, a real-life experience of dispute and issue resolution in a virtual environment, and low-cost and flexible facilities for teaching and learning, which should enhance students' learning experience and improve their legal and technological skills for future employment. Based on students' feedback in the module survey, they have been well-received by students from different cultures, particularly where English is not their first language. The online platform enables students to communicate with each other in a more relaxed atmosphere than a face-to-face environment.

In recent years, digitalization has produced new requirements in jobs and changed the content and ways that people learn and work (Cedefop 2019). It was estimated in 2018 that more than 80 per cent of workers in the EU required some level of digital competence in their jobs (Cedefop 2018), however, only 58 per cent possessed basic digital skills before the onset of Covid-19 in 2020 (European Commission DESI 2020). There is ongoing promotion in organizations and among academics of 'digital literacy' action plans to provide students with new skills to adapt to the digitalized professional services including legal services (European Commission Flagship Initiative 2010; Thanaraj 2018). A recent focus has been on a 'digital education action plan' to enhance 'digital literacy and competences' throughout education in the second quarter of 2020 (European Commission Communication 2020). The European Commission has stressed:

The need for digital skills goes well beyond the jobs market, however. As digital technologies permeate our professional and private lives, having at least basic digital literacy and skills has become a precondition for participating effectively in today's society (European Commission Communication 2020).

The European Commission White Paper on Artificial Intelligence (2020) further emphasized that:

Harnessing the capacity of the EU to invest in next generation technologies and infrastructures, as well as in *digital competences* like *data literacy*, will increase Europe's technological sovereignty in key enabling technologies and infrastructures for the data economy [emphasis added] (European Commission White Paper 2020).

Meanwhile, the Commission also reinforced the need of the Skills Agenda with an updated Digital Education Plan to make better use of data and AI-based technologies (i.e. learning and predictive analytics) in readiness for the digital transformations of the EU economy (European Commission White Paper 2020: 6). The meanings and requirements of 'digital literacy' may change in different contexts, though it is generally considered that a plan for digital literacy education should not only develop students' skills in information gathering, usage and production, but also develop lifelong learning skills (Thanaraj 2018: 67). In the context of legal education, digital literacy means that law graduates are 'competent in professional, social, cultural and personal communication practices appropriately utilizing a variety of digital media and technologies' (Galloway 2017: 6). In the context of modern legal education, digital literacy may also include general data literacy, in particular the use of big data and analytics, for quantitative legal analysis. It was stressed that lack of general data literacy is a great impediment to the development of the data economy and society (A European Strategy for Data 2020: 10-11).

ODR simulation workshops assist the goal of 'digital literacy' for law students. They offer students an opportunity to learn the current technologies and inspire them to think about possible future development of technologies, in particular how AI could assist law practitioners' cases in areas of filing, processing and decision-making.

ODR simulation workshops also involve a blended learning platform that should empower students to gain legal and digital skills for their readiness in future employment. Empowerment, a linked but different concept to literacy, links individual mental strengths, skills and competencies to fit into the changing society (Amichai-Hamburger & Ors 2008: 1776). It has been argued that 'e-empowerment' (empowerment on the internet) involves different elements, such as reframing individual identity and increasing self-efficacy and skills; bridging cross-cultural boundaries; helping group decision-making and improving accessibility to information (Amichai-Hamburger & Ors 2008: 1776). Digital empowerment emphasizes 'enabling' learners, in particular disadvantaged learners. ODR simulation workshops provide a great degree of flexibility in learning (such as text-based interactions), which is particularly helpful to empower disadvantaged groups of students from different cultures with the same

level of interactive and effective learning opportunities. They also prompt students' perceptions of what technology may be further developed in order to improve access to justice.

## [C] PEDAGOGY OF USING ODR SIMULATION TO ADVANCE DIGITAL LAWYERING AND MODERNIZE LEGAL EDUCATION

Taking 'digital lawyering' to be 'the use of appropriate, safe, and effective online technological innovations and techniques both for delivering training in legal education and for delivering legal services' (Thanaraj 2017: 11), it is apparent that legal practice and services have become digital, using increasingly sophisticated digital sources (Frostestad Kuehl 2019: 2), including encrypted data and information; blockchain; service-oriented computing; cloud computing; AI; social media; and electronic forensic evidence.

A well-designed ODR simulation learning environment may assist the academic aspect of digital lawyering and further advance the journey to understand the ever-changing technology for lawyering in the digital age. The design of an ODR workshop should focus on the pedagogy of simulation, but it should not be restricted to one single online teaching platform or software such as the institution's chosen platform. Allowing students to select software or a platform for group activities such as ODR simulation workshops empowers them to develop their digital skills. Quality teaching and learning can be achieved consistently by using multiple learning platforms if there are clear instructions, good planning in the curriculum, and minimum technical standards (such as relating to software functionalities and security safeguards). Nevertheless, it would be advisable to choose a university-wide teaching platform as a designated main teaching platform, along with the flexibility for instructors to adopt a wider range of software and technology to supplement group activities.

In order to design a functional and efficient ODR workshop, it is important to know how an ODR workshop can be designed to deliver a set of intended outcomes. *Firstly*, from the perspective of learning legal subject matters, an ODR workshop can be designed to teach substantive law in the form of the legal problem scenario that students are required to solve, and procedural law in the form of the arbitration or mediation procedure that students choose to use. Embedding problem-solving activities into teaching enables students to apply new legal knowledge to resolve legal issues, while integrating legal processes into problem-solving activities may help to develop students' legal skills for future professional

practice (Ryan 2017: 138-139). *Secondly*, from the perspective of learning digital skills, an ODR workshop can be designed to encourage students to explore, learn and test a variety of software before they choose a suitable one for their intended procedure. Reflections on their choices can be part of what is assessed; and students can be invited to venture to think about the future deployment of AI in ODR process. *Thirdly*, from an effective learning perspective, an ODR workshop can provide a team-based, student-centred and research-informed teaching and learning environment.

## Technologically Advancing Legal Education: ODR Simulation Experiences and Technological Reviews

Technologically assisted learning is a flexible-learning methodology which provides increased choice, convenience and personalization in learning. Flexible learning in a traditional face-to-face teaching environment typically begins by allocating group tasks and handing over self-learning materials. Its second phase integrates 'e-learning', namely 'the use of digital technologies and media to deliver, support and enhance teaching, learning, assessment and evaluation' (Sharma & Mishra 2007: 3), or 'the systematic use of networked information and communication technology in teaching and learning' (Armitage & O'Leary 2003), or teaching and learning 'delivered, enabled or mediated by electronic technology for the explicit purpose of learning' (Rossen & Hartley 2001: 109). Significant features of the initial e-learning environment include: a) utilizing digital devices; b) employing electronic software; and c) delivering information without face-to-face appearance.

Since the early 2000s, internet-based course tools for course delivery and management, such as Blackboard Learn and WebCT software, have been adopted by educational institutions (Carnevale 2006), permitting video lectures and discussion forums. In the 2010s, additional tools such as Blackboard Collaborate, Google Classroom, Canvas, Moodle and Brightspace allowed virtual classroom sessions (e.g. Release Notes 2014), known as 'webinars', for lectures, seminars and tutorials, allowing instructors to share their PowerPoint slides and conduct Q&A via voice or instant messaging. Additional video-recording tools, such as Loom and Panopto, can pre-record presentations for teaching and learning. Loom provides advanced recording functions capturing camera, microphone and desktop simultaneously and sharing videos instantly (Loom website). Communication tools, such as Skype, and social media tools, such as Facebook, have further broadened the usage of information technology in teaching and learning.



Between 2007 and 2011, the author held ODR text-based simulation workshops using various platforms, including MSN messenger, IMO, ooVoo, Google Hangouts and Skype. *Firstly*, MSN Messenger, an instant-messaging client software, was most popular among students. Students were inventive, using MSN functions for arbitration and mediation hearings to have fun while learning, e.g. students hit the nudge button which would not just ping group members with an alert or gentle tone but shook the entire conversation window. Unfortunately, MSN Messenger was discontinued from 2012 in most countries and from 2014 in China. *Secondly*, ooVoo was also well-liked by students. It provided a cross-platform instant voice and text-messaging app supporting HD video calling simultaneously with eight people. Students found that functional tools in ooVoo were easy to use, which benefitted the control of the process of arbitration hearings. *Thirdly*, ‘IMO free video calls and text’ was also tried by students who considered it functionable because IMO has the ability to pass files, send music, videos and pdfs etc. without any limitation. *Fourthly*, in 2009-2010, distance-learning students located in different countries and time zones were invited to conduct their ODR simulation on Blackboard Learn. Case scenario and procedural materials were available on Blackboard Learn to prepare for the simulation. Students were asked to conduct mediation or arbitration hearings online within the time limit on Discussion Board non-simultaneously. And, *finally*, Skype was the second most popular communication tool among students, as its communication tools are most reliable, supporting instant voice and video, files, picture and text messaging and group chats.

During this period, in the ODR simulation workshops, as reflected in students’ feedback in each module survey, students were enthusiastic about their ODR experience, some even wishing to repeat the simulation again after the ODR process. However, students often encountered problems with the technology (i.e. broken or incorrectly configured computers or software faults) just shortly before the workshop started. It appeared that some students were panicking and struggling to find alternative computing facilities that were pre-installed with the required instant-messaging software. Under such circumstances, web-based messenger could be an immediate solution, provided that there was a working computer and normal internet access. Web-based messenger provided one-stop browser-based chat rooms connecting all popular communication tools, MSN, AIM, Gtalk, Yahoo, ICQ, Skype etc., without the need of users’ installing any software.<sup>1</sup>

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<sup>1</sup> Such service was provided by <http://web-messenger.eu/> between 2009 and 2011 and <http://cha-cha-chat.com/> in 2011.

Between 2011 and 2020, the author's students continued to use communication tools for ODR simulation workshops for text-based online arbitration and mediation hearings, though students used other functionalities such as video calls for their preliminary hearings or workshop preparation. During this period, students in the postgraduate (PG) modules of internet law (approximately 35 students per academic year) participated in the ODR simulation workshops. The participation rate was between 75 per cent and 100 per cent, depending on the quality of the cohort. Students were expected to reflect on their ODR simulation experience and conduct further research for their coursework, analysing how the efficiency of ODR service can be improved to resolve cross-border consumer internet-related cases. Students found that ODR simulation workshops were interesting, giving them inspiration and helping them with research skills for their coursework, though a small number of students showed frustration when fellow group members were not engaging enough in the process.

Google Hangouts communication software was a new tool that was tested by students during this period. However, Google Hangouts software was not very well liked by students as it only provided instant voice, picture and text messaging but no support for attaching files. Skype became the most popular tool to conduct online arbitration and mediation hearings among students. Since 2011, most communication tools have provided users with instant access without the need of their downloading the app and installing the software. It is also noted that a new generation of instant messaging has emerged. The most well-known products are Zoom, Telegram, Slack and Discord. Zoom was launched in 2011, using a cloud platform for users to share video, voice and content. Telegram, established in 2013, provides multiple user groups, mobile and desktop clients, file transfer and encrypted voice calls. Slack, also established in 2013, provides persistent chat rooms, customizable for business via integration with third-party services. Discord, released in 2015, supports VoIP chat, messaging and has been widely used in the gaming community. During this period, students observed the suitability of the functionalities of these free communication tools to conduct ODR simulation and to enhance the due process of arbitration or mediation hearings. Based on observations provided by students in their presentations and coursework, more specialized software packages with case management dashboards or tools may be helpful to manage evidence submission within time limits and enhance the fairness of the procedure. In addition, there are specialized ODR software packages available in the market. For example, Decider, a UK company, provides an ODR service and offers commercial software

with secure internal messaging, case management tools and auditing facilities (Decider website). Caseload Manager, a US company, offers cloud-based commercial software and a subscription model based on the number of new cases annually (Caseload Manager website). AI-powered tools such as Fireflies, Microsoft Teams and Google Live Transcribe can also be used to transcribe live audio into text to assist evidence gathering and analysis in the ODR process (Fireflies, Microsoft Teams and Google Live Transcribe websites). Students can experiment with these tools in their ODR simulation workshops.

## [D] DESIGN OF AN EFFECTIVE AND FLEXIBLE ODR SIMULATION LEARNING ENVIRONMENT

With appropriate IT facilities and support, ODR simulation workshops can provide a great degree of flexibility in terms of time and location for learning and teaching. Appropriate procedural guidelines and technological supervision are required, and the success and effectiveness of the experience will depend on the design of tasks (Matthew & Butler 2017: 152), namely allocation of roles within the group, preliminary hearings, hearings, students' reflection and feedback etc.

ODR simulation workshops can be designed to serve multiple functions and achieve a wide range of intended essential learning outcomes in legal education as follows.

- 1** ODR simulation workshops generate a flexible and student-centred learning environment. The pedagogy of student-centred learning builds from the students' experience, knowledge base and strengths and keeps students' ambition and desire for learning afloat (Lustbadder 1997: 859). Students appear to learn most and best when they are actively involved in and responsible for their own learning with the help of facilitators (Ponte 2006: 169-170). In ODR simulation workshops, students are required to identify and understand the differences between possible methods of ODR (negotiation, mediation and arbitration), so as to decide which one to use and develop the corresponding procedure for the chosen method. They are provided with a scenario in which to identify legal issues and relevant legislation and are required to debate their arguments and play different roles as arbitrators or mediators, complainants or respondents. This creates a problem-based and role-play learning environment. After the ODR simulation, students present their group work with added reflection and feedback from peers and instructors on their presentations. This generates a student-centred learning

environment that enhances cognitive skills and accommodates different students' levels and styles of learning (Ponte 2006: 171).

- 2** In addition to individually assessed activities (such as answering questions on legal concepts), the workshops involve team-based learning, as students are required to engage with each other collectively. This includes common elements of evidence-based best practice (i.e. cooperative learning, interactive teaching and feedback) and adds in four practical elements: 'strategically formed, permanent teams; readiness assurance; application activities that promote both critical thinking and team development; and peer evaluation' (Michaelsen & Sweet 2011). Team-based learning is commonly used in disciplines such as medical education but has been gradually recognized and adopted in legal education in recent years (Weresh 2019: 304). In an ODR workshop, students must: (a) strategically form their study groups or teams (perhaps with the instructors' assistance); (b) agree on methods, procedures and individual roles of resolving the case (either for mediation or arbitration); (c) prepare materials outside the classroom; and (d) conduct application activities such as preliminary hearings and hearings online. They can also be invited to answer a series of questions on legal concepts within each group in class, reflect on and evaluate the ODR process through peer evaluation and group/team presentation, followed by the instructor's summative and reflective wrap-up lecture.
- 3** ODR simulation workshops boost technologically advanced practice and enable digital empowerment of students to improve their readiness for future employment as students are required to choose the software to conduct their group ODR preliminary hearings and hearings, observing the merits and drawbacks of the functionalities of the chosen software, and thereby practise their computer skills and acquire other necessary digital and legal skills. Some have argued that online engagement in higher education should be considered a form of student participation rather than empowerment, despite the fact that online engagement enables students to form their academic experience from different learning contexts (Costa & Ors 2018: 150). What is correct is that digital empowerment is not a given and will not occur simply by connecting students to the internet (Amichai-Hamburger & Ors 2008: 1786). Well-designed ODR simulation workshops may facilitate digital empowerment by encouraging students to learn legal and digital skills and boost their critical thinking and self-confidence via the internet, while also stimulating critical thinking about the impact of new technologies

in legal services, the enhancement of due process in legal practice in the digital age, and the future readiness of being professionally competent (including skills for life-long learning for substantive and procedural law, and digital literacy) for employment.

- 4 ODR simulation workshops also support research-informed teaching as they encourage the development of students' critical thinking and reasoning skills. Students are required to prepare debating materials by completing the reading list and following the instructions, observing and reflecting on the ODR process and providing a group/team presentation after the workshops. Students are encouraged to discuss whether their chosen software provided efficient and appropriate functions to assist their ODR hearings and help facilitation of fair procedures and, if not, suggest how it can be improved. Students also conduct research into the differences in terms of styles, strategies and procedures in negotiation, mediation and arbitration and incorporate their practical experience and research findings into their coursework assessment. It was argued that 'teaching can be research-informed in the sense that it draws consciously on systematic inquiry into the teaching and learning process itself' (Griffiths 2004: 722). However, there is no consensus on the interpretation of research-informed teaching as some academics even considered it to be just a marketing tool (Carr & Dearden 2012: 273). A variation of terminologies for the research and teaching nexus (such as research-led, research-tailored, research-oriented and research-based) have also been used by academics and institutions, depending on their agenda and emphasis (Nicholson 2017: 43). Recent work on the linkage of research and teaching at the postgraduate-level in maritime law to non-law students, showed that integrating the research-informed teaching approach in the curriculum may help 'systematically address the progressive nature of learning' (Zhu & Pan 2017: 437). The example of ODR simulation workshops may help shape the conceptual understanding of 'research-informed' teaching in legal education. Research-informed teaching, based on the experience of ODR simulation workshops, means that the process of teaching and learning is linked, integrated and interacts with up-to-date and curiosity-driven research involving both instructors and learners, in a continuous cycle in which instructors use their research expertise (substantive and procedural law on specific subject matters) to inform and inspire their students via lectures, seminars, activity instructions and reading lists. In turn, students research relevant

legal and technical issues and give feedback to the instructors for their further reflection and research, and so on. This process may intertwine with other appropriate teaching skills and methods, such as student-centred and team-based learning group activities.

## [E] SHAPING THE LAW CURRICULUM TO MODERNIZE LEGAL EDUCATION AND ADVANCE DIGITAL LAWYERING

Driven by globalization, legal education should be equipped to prepare students to meet the emerging trend of global law firms which manage multi-jurisdictional practice and need lawyers with international law knowledge (Faulconbridge & Muzio 2009: 1358). ADR modules have become common in the law school curriculum, first in the USA and then after debate in Australia (Australian Law Reform Commission 1997), its pedagogy allowing interdisciplinary elements including but not limited to law, communication skills, social sciences, management, psychology and game theory (New South West Law Reform Commission Report 1991: 41; Douglas 2008: 126). In more recent years, law schools have become more aware of the importance of introducing standalone ADR subject modules in their law curriculum and subsequently using ODR simulation in their practice (Ainsworth & Ors 2019: 95).

In the age of information technology, globalized communications magnify the need of digital competency in employment, which requires graduates to have basic digital literacy and skills and, more importantly, to be empowered to adapt to ever-changing technological developments in their professions, including as lawyers, judges, arbitrators, mediators and other legal practitioners. It was argued that, due to practical differences between ADR and ODR, law schools should consider incorporating ODR elements into their ADR teaching in the law curriculum (Goldberg 2014: 13). More recent use of Modria, a text-based ODR platform (founded in 2011 and acquired by Tyler Technology in 2017), was considered as adding to the benefits of using ODR simulation for ADR students (Ainsworth & Ors 2019: 101). Researchers also conducted a survey on the benefits and limitations of the use of ODR for legal education where students were invited to use an ODR platform to prepare for traditional face-to-face mediation role-play (Grant and Lestrell 2020: 92) known as 'blended learning' (Ireland 2008; Douglas & Ors 2019). The survey showed that the online component enabled students to easily exchange and access information, including facts, legal problems and to build mutual trust among students to work together (Grant & Lestrell 2020: 100-101).

However, some researchers argued that ODR should not form part of the traditional curriculum at some law schools (Simmons & Thompson 2017: 222). For example, in 2015 researchers conducted an online mediation simulation for students among four universities in England and Canada to generate a cross-bordered collaborative learning environment in which they faced the challenge of a lack of student participation (Simmons & Thompson 2017: 240-241).

Student participation appeared to be a common issue for those universities recently testing ODR simulation for legal education, though it never seemed to be a concern for the author's student-led online simulation sessions between 2007 and 2020. However, between 2019 and 2020 one out of five groups appeared to lack full participation while they also showed lack of attendance in lectures and seminars. In the author's experience, the designs and continued redesign of suitable tasks may be the key to motivate student's enthusiasm. Groups or teams should be strategically formed among students. In-class lectures and seminars before ODR simulation workshops should be carefully planned to boost students' curiosity and stimulate students' desire to conduct the ODR simulation in order to work out answers by themselves. A well-designed ODR simulation can be embedded into the law curriculum, reflecting on all levels of structure, enabling students to gain legal and digital knowledge and skills in an interactive, flexible and effective student-centred learning platform so that it also empowers them with life-long learning of knowledge and skills.

The effectiveness and flexibility of ODR simulation workshops could also help students to be equipped to meet the standards of the Solicitors Qualifying Examination (SQE), which the Solicitors Regulation Authority plans to introduce as a new route to becoming a solicitor from 1 September 2021 subject to final approval (UK Solicitors Regulation Authority 2020). The SQE comprises two parts, namely: functioning legal knowledge assessments (SQE1) which include dispute resolution; and a single legal skills assessment (SQE2) which includes six skills—client interview and attendance note/legal analysis, advocacy, case and matter analysis, legal research, legal writing and legal drafting (UK Solicitors Regulation Authority 2020).

It is noteworthy that prior to the new route being implemented, the current route to qualification for solicitors and barristers in the UK includes three stages:

- 1 the academic stage, including Qualifying Law Degree (QLD) or non-law degree plus Graduate Diploma in Law (GDL). Alternatively, the

QLD and GDL must include six foundation law subjects, plus legal research skills;

- 2** the vocational stage, including the solicitors' Legal Practice Course (LPC), or the barristers' Bar Professional Training Course (BPTC); and
- 3** practical training, including two years of recognized training plus a practical skills course or pupillage.

When the new route is implemented, qualification for solicitors in the UK will likely be extended to include four stages: 1) the academic stage—this is different from the current route in that it can be a degree in any subject or any other equivalent qualification; 2) the training stage, including completing a minimum period of two years of qualifying legal work experience; 3) SQE1 stage, passing the first part of the centrally assessed SQE which contains legal knowledge with dispute resolution (SQE1 functioning legal knowledge assessments will consist of two 180-question examinations); and 4) SQE2 stage, passing the second part of the centrally assessed SQE which contains six legal skills (UK Solicitors Regulation Authority Decision 8 June 2020).

The UK law school curriculum is in need of an update to reflect these changes. In particular, changes need to be made to educate and navigate students who still choose law as their degree in the first stage. In the author's view, from a meta perspective, a law curriculum needs to be designed to aid effective understanding of law and regulations from different contextual perspectives such as social, technological and historical perspectives, and not only to focus on legal content. From a micro perspective, a law curriculum needs to be specific to core law subjects with a wider range of selective law subjects and non-law subjects, plus teaching six skills through practical exercises and activities. Dispute resolution is one of the core subjects and legal skills that SQE1 and SQE2 assess. ODR simulation can be used to teach both substantive and procedural laws of any law subject matter (in particular, dispute resolution), plus legal skills. From a macro perspective, a technologically advanced, research-informed, student-centred and team-based learning environment needs to be generated to equip students to gain legal knowledge and skills, including digital skills. Although the six skills to be assessed by SQE2 do not include digital skills, digital skills and literacy are essential to the success in achieving the six identified skills. For example, digital literacy and competency can aid students' ability to conduct 'client interview' by electronic means and help them to learn; how to write 'attendance note/legal analysis' using technological devices; how to gain 'advocacy' skills in virtual courts; how to use computing algorithms to assist 'case and



matter analysis’ in the age of AI; how to use databases to conduct ‘legal research’; and how to use grammar-checking functionality in software to improve the standard of ‘legal writing and legal drafting’.

## [F] CONCLUSION AND REFLECTIONS

ODR simulation in legal education promotes a technologically advanced, research-informed, student-centred and team-based learning environment which facilitates negotiable, collaborative and cooperative skills, stimulates independent and critical thinking, cultivates legal reasoning and digital skills, and fosters life-long learning and research on legal and digital subject matters. Well-designed ODR simulation workshops empower our students, especially certain disadvantaged students (e.g. due to language obstacles), to gain legal and digital skills for their readiness (including digital competence, legal skills and life-long learning skills) for future employment.

Based on the author’s ODR simulation workshop experience between 2007 and 2020, preparation and planning (from both instructors and students) is the key to the success of the ODR workshops. ODR simulation workshops are also a fun learning process, which helps to achieve additional learning outcomes compared with the traditional problem-solving teaching approach. It was observed that there are four key learning outcomes achieved by students through problem-solving activities, namely, decision-making skills, contextualized knowledge, student autonomy and collaborative learning skills (Ryan 2017: 146-147). Based on the author’s observations, additional benefits from the ODR simulation experience include practising teamwork and developing professional ethics, legal and digital practical skills through a virtual platform for multicultural learners (i.e. to meet the need of learners from different cultures and countries and, often, with English language barriers). It also inspires students to develop an awareness of challenges that lawyers may face using technology-assisted processes in resolving disputes and stimulates further research in the embedding of AI in legal services. The experience of ODR simulation workshops may help adapt our teaching approaches to our law students in the digital age and shape our curriculum to prepare digital lawyering in the modern legal education.

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Caseload Manager

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**ELIZABETH FISHER, JEFF KING AND  
ALISON L YOUNG EDS—*THE FOUNDATIONS AND  
FUTURE OF PUBLIC LAW: ESSAYS IN HONOUR OF  
PAUL CRAIG***

PATRICK J BIRKINSHAW

Emeritus Professor of Public Law, University of Hull

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**P**aul Craig is the UK's foremost academic administrative lawyer of his generation. Along with countless others, I have gained enormously from his research and publications in administrative law, European Union (EU) law, EU administrative law, comparative public law and global administrative law. The book under review—not 'so much a *Festschrift* but rather an occasion for scholars to rise to the intellectual challenge Craig has set us' (page 2)—emerged from a conference in 2018 to celebrate his oeuvre and contribution to public law scholarship. Twenty chapters, including the introduction, from leading figures in public law scholarship provide insights and challenges into the six selected foundations of public law: theory, case law, legislation, institutions, process and constitutions. Note that the theme is foundations and their future development. Each foundation is explored in the book in three chapters: two covering UK and EU law and one exploring reflections prompted by the previous two chapters.

The editors explain that, in their opinion, the chosen foundations are almost self-evident topics from, as Craig refers to it, the ‘public law cake’ (page 399). As the editors further explain, their explorations inevitably encounter concepts which are central to public law such as sovereignty, executive power, the law-making process, the rule of law and the separation of powers. These latter are featured throughout the collection, although perhaps the rule of law should have received discrete and greater attention in this age of executive fiat and propensity to personal rule.

The first section on ‘Theory’ deals with the state: in Walker’s chapter on EU law and national (state) law and their different heritage and bases; for McLean it is an enquiry into the authority claims of the administration through various centuries from the 17th to the 20th; and for Barber the question is ‘What is the point of the state? And what is the point of public law?’ When I was a young lecturer, a constant conference attender with far greater experience than I asked each presenter of a paper, no matter what their topic (with increasing audience mirth on each repetition) the same question: ‘What is your theory of the state?’ I wonder whether a chapter should have addressed ‘What is the province of public law?’

On ‘Case Law’, Young offers a critique of the shortcomings of the analogical method of reasoning in common law methodology in public law cases. She seeks greater reassurance in the inductive method. I think the ideas need development in a longer format. Competing articulations of the public interest in case law and the extent of constitutional principle in protecting individual or group entitlement make for complexity and controversy. In judicial review a remedy is discretionary and *locus standi* hovers in the foreground. In my view, judgment is a question of art not science. One expects that the reasoning will unpack and explain the motivation behind a judgment so that we get as clear a picture as possible of the premises on which a judgment is based and how it fits with deep constitutional doctrine; and how convincing it is.

De Búrca analyses the impact of UK judges on the Court of Justice of the European Union (CJEU) following Edwards’ earlier work, and one should add that of Lord Woolf. The questions, now that the UK has left the EU, are intriguing, but much of the evidence, as the author states in the case of the preliminary reference procedure, is ‘inferential’ (pages 124-125). Endicott asks how judges make law and, in the section on ‘Legislation’, Sales considers the absent legislator (areas in which the legislator hasn’t spoken or has spoken only in outline) and the interpretative work of the courts in creating concrete normative content for law in such an ‘absence’. Sharpston, a UK Advocate General before the CJEU, speaks with



inside knowledge to illustrate how the CJEU interprets EU legislation—legislation the technical quality of which has been frequently maligned by UK judges.

One wonders whether the ‘Future’ should include the cyber world, tech giants, IT and their future national, regional and global regulation. Curtain, in ‘Institutions’, covers the EU state, which she argues has been constructed by close EU and state institutional inter-penetration, and the automated state, comprising the mish-mash of public and private actors and interoperability of data sharing in the EU. Harlow and Rawlings, in ‘Process and Procedure’, cover in their final section the advance of automation and the problems this poses for traditional values relating to procedural justice, fairness and accountability.

The state we’re in is addressed in several chapters: for example, on Brexit, King on use of delegated legislation under the EU Withdrawal Act under ‘Legislation’, and Douglas-Scott, in ‘Constitutions’, on the sovereignty question in the Brexit and post-Brexit campaign and its denouement, which nicely brings out the inconsistencies and diametrically opposed invocations of this concept by the UK government. Brexit is also the central feature of Craig’s chapter (below).

Most striking is the short contribution from Freedland who writes on ‘Process and Procedure in a Disordered State’. The disorder is Brexit as he sees it, although this was challenged at the conference by an interlocutor who argued that Brexit was *not* productive of times that were anything other than normal, as Freedland suggested. I was not present at the exchange, but to suggest that Brexit represents normality is breathtaking. This does not deny that crisis may become normal. Freedland makes some very interesting points which are underdeveloped in his chapter. The robustness of existing processes and procedures to maintain constitutional stability and continuity is raised, together with the devising of institutional mechanisms to restore the UK’s position in the international order after its departure from the EU. In support of Freedland, can the intentional breach of international law in a Bill (the Internal Market Bill 2020) be regarded as anything other than abnormal and reprehensible, even if used as a negotiating ploy and the offending provisions subsequently withdrawn? What could give greater encouragement to those states who consistently breach internationally accepted legal standards? I do not confine this to the usual suspects. ‘It seems to me’, Freedland continues, ‘the Brexit process has reached a point at which there is a real prospective danger of outcomes which will represent or will bring about such a failure in the arrangements

and procedures for the governance of the UK and the maintenance of its economy and society' (page 331), in short, the maintenance of sustainable governance.

But the drama of prorogation and the unanimous *Miller No 2* judgment on the prorogation of Parliament could not be addressed, nor the government-appointed 'independent'<sup>1</sup> panel to study and make recommendations for administrative law and judicial review. Likewise, the government Bill to ensure that power of dissolution of Parliament returns to the royal prerogative and Prime Minister and is outside the purview of the courts.<sup>2</sup> This was widely and wrongly reported in the press and media as an attack on *Miller No 2*. It may become so. To these may now be added the investigation into the Human Rights Act 1998 and the relationship between the Court of Human Rights and domestic courts and whether domestic courts are being unduly drawn into areas of policy.<sup>3</sup>

Nor, of course, could the impact of Covid and the public law implications be brought to consideration in this volume. This is most definitely not a normal context for the foundations of public law to operate within, although crisis management is no reason for public law to take a back seat. I saw no references to executive power as impacted by Donald Trump's headstrong and volatile presidency nor its impact on administrative, regulatory and constitutional law in the USA. Trump may be going, someone please tell him, but Trumpism is far from a spent force. The events at the Capitol on the day Congress convened to confirm the presidential votes in the Electoral College offer a grim prospect for the future and democratic constitutionalism. The UK Prime Minister is a paler version of the departing President, but many of Boris Johnson's actions are inspired by a wish to let the executive run free, propped up by parliamentary sovereignty and his large majority, the power of the public purse, patronage, spite, retribution and misinformation. What

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<sup>1</sup> The chair is Lord Faulks QC, a former Conservative minister who has argued for a more restrained judiciary, a clear division between law and politics and judicial incursion into the latter, against the *Miller No 2* [2019] UKSC 41 judgment and against the Human Rights Act 1998. These hardly suggest the quality of 'independence'. See Briggs 2020.

<sup>2</sup> Section 7 of the Succession to the Crown Act 1707 preserved the prerogative of proroguing Parliament. Dissolving Parliament was removed by the Fixed Term Parliaments Act 2011, restored by the 2020 Bill. It was the preservation of the prorogation prerogative that the Supreme Court addressed in the *Miller No 2*, ruling that 'every prerogative power has its limits, and it is the function of the court to determine, when necessary, where they lie' (paragraph 38).

<sup>3</sup> 'Government Launches Independent Review of the Human Rights Act' (2020) Press Release 7 December London: Ministry of Justice.

a study this would make for government accountability, responsibility, responsiveness and transparency.

Fisher examines the binary divide between the traditions of law and administration in the UK and USA in 'Institutions'. Lawyers have failed to comprehend the context, detail and complexities of public administration, she argues. Her focus is Donoughmore (1932) and the US Attorney General's Committee Report on Administrative Procedure (1941). This seems to me the presentation of an argument that has lost some of its currency and needs to be sustained by more recent examples, even assuming, correctly, that the two reports are 'fundamental'.

Davies analyses the NHS in 'Institutions' to bring out how a complex institution operating under a statutory framework may, or may not, be made subject to the rule of law in its governance and institutions. The pertinent governing provision is the Health and Social Care Act 2012. This, she points out, was enacted to introduce greater marketisation and competition in health provision with contracting as a central component. However, health provision has moved towards a more integrated form of healthcare under one provider. Although very different from the scheme introduced under the 2012 Act, no new legislation has authorised this change, and legal challenges in the courts because of an inappropriate legal base for the developments have failed. She criticises the cases in the High Court and Court of Appeal for their lack of nuance and contextual comprehension. The developments, the courts ruled, did not lack 'foundational legality'.

Procurement has featured prominently in the Covid experience, which Davies obviously could not address. The pandemic has led to award of contracts by government departments under which the provisions of EU procurement law were suspended because of 'emergency'. What unfolds is a tale of favouritism bordering on corruption, waste, secrecy and gross inadequacy (see National Audit Office (NAO) 2020a and 2020b). I repeat what a study Covid would make for an examination of foundations and the future of public law. As I write we only await Covid 'case law' as an organising concept from the book's themes, although the dispute between headteachers, councils and the Secretary of State for Education and city mayors and the government suggested the potential of a contemporary *Tameside* and other central / local clashes in the courts. The most notable judicial intervention to date has come from the retired Lord Sumption's scathing critique of government lockdown policies and police action (Sumption 2020).

Mendes, in 'Process and Procedure', tackles the question of giving reasons in EU law as both a means to encourage more open administration and better exercise of powers by EU bodies and to facilitate judicial review. Under 'Constitutions', Saunders analyses multilevel constitutionalism—multilevel governance within the state. One can only say, watch this space. Maduro and Queiroz write on a hard law approach to states' systemic violations of Article 2 of the Treaty on European Union, the values of the EU, and the interaction of EU and national courts: a very timely piece, given the recent efforts of the European Council to attach payments to states from the EU Covid-19 fund to undertakings from states to abide by the rule of law. Unanimity would allow those states whose actions in appointing and removing judges and limiting freedom of the press have drawn criticism, Poland and Hungary, to defeat the proposed measures, forcing the Commission to devise action that would not require a unanimous vote. As I write, it appears a settlement has been achieved involving 'non-victimisation' of the criticised states and approval of the scheme by the CJEU, though this may be optimistic given that within days Hungary had passed anti-gay legislation and laws restricting opposition parties.

The collection is rounded off by Craig's chapter examining the six highlighted dimensions of public law in Brexit until May 2019. Sadly, the drama of the parliamentary prorogation and subsequent confrontations in the Commons, the general election and so much else could not be covered. Craig's concern is with the way the Brexit process has 'pressure-tested' the public law regime in the UK and EU. So, to take the first two examples, he covers, under 'Theory', parliamentary and popular sovereignty and, on the EU side, intergovernmentalism and supranationalism. From the UK side, prime-ministerial government, Parliament and devolved regions are in 'Institutions and Accountability' and the presence of two presidents (though of course Nigel Farage's UKIP and the Brexit party constantly parodied the multiplicity of 'Presidents' in the EU), institutional decision-making and liaison with member states. As ever, Craig is on the ball with panoramic vision and characteristic intensity in analysing constitutions, rights, legislation, case law.

This is an interesting and stimulating collection of essays. It would be possible to engage in an article-length response to each of the chapters. The space at my disposal does not do justice to the quality of the research, argumentation and presentation of the authors, whether I disagree with their views or not. Craig should be delighted that his ideas and work have generated such a worthy response in this publication.

A short ending perhaps is to proffer some thoughts on what is the purpose of public law? I suggest several: to establish the public realm and maintain its effectiveness and sustainability. To regulate relations between public organs and the powers they exercise on behalf of the public in the public interest. To render public power in its myriad forms accountable and to protect equally under law those affected by such power and to facilitate their effective contribution to the political and social context in which they exist. Some might see the protection of human rights and promotion of transparency as ideologically driven liberal individualistic reveries. I have no hesitation in adding these. These are the tasks of public law and will remain its tasks for the future.<sup>5</sup>

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# HUMAN RIGHTS, CHINA AND THE UN: A UPR MID-TERM ASSESSMENT<sup>1</sup>

MATTHIEU BURNAY

Queen Mary University of London

EVA PILS

King's College London

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## [A] INTRODUCTION

In a world where the international legal order is on the defence,<sup>2</sup> the Universal Periodic Review (UPR) of China's human rights situation epitomizes the challenges inherent to the work of the United Nations (UN) bodies responsible for the monitoring and protection of human rights. We must be clear about the flaws, before considering what the European Union (EU), its member states and Europeans more widely might do to address them. It is in this spirit that the Jean Monnet Network on EU-China Legal and Judicial Cooperation (EUPLANT) convened a workshop to address China's growing role and influence in the UN human rights system, as well as an assessment of recent developments in the Xinjiang Uighur Autonomous Region (XUAR) and in Hong Kong in relation to recommendations put forward during China's third UPR conducted by the UN Human Rights Council.<sup>3</sup>

Over the past few years, following the nomination of Xi Jinping to Party General Secretary and President of the People's Republic of China (PRC), the Chinese Party-State has worked to perpetuate and intensify a system of governance to which human rights violations are inherent—in criminal

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<sup>1</sup> This research and event took place in the context of the Jean Monnet Network EUPLANT (EU-China Legal and Judicial Cooperation) financed by the Erasmus+ Programme of the European Union (Ref: 599857-EPP-1-2018-1-UK-EPPJMO-NETWORK).

<sup>2</sup> For an account of current debates, see Eilstrup-Sangiovanni & Hofman (2020) and Ikenberry (2020).

<sup>3</sup> 'Human Rights, China and the UN: A UPR Mid-term Assessment', public seminar chaired by Matthieu Burnay with panel contributions by Sophie Richardson and Eva Pils, 7 December 2020.

justice and access to justice; in public communication, now including social media; in the economic systems of exploitation and dispossession; and in the denial of political participation rights to all of its citizens (Pils 2018). There has always been much to criticize, but it is only under Xi Jinping that the trend of reform towards improvements was decisively reversed. Xi Jinping's 'New Era' has hence been described as 'the end of an era' (Minzner 2018) or a 'third revolution' (Economy 2018) marking a deepening of authoritarianism in China's governance. Teng Biao, one of the exiled critics of the system, has rightly characterized the turn under Xi as 'high-tech totalitarian' (Teng 2020).

The workshop began with a presentation by Dr Sophie Richardson (Human Rights Watch) that situated the UPR within the wider context of China's engagement with the UN. It then moved on to discussing two of the most pressing human rights issues in China today. These interrelated discussions reflected the fact that Xi's 'New Era' impacts the world, even as some of its worst consequences so far have been visited on two regions on the margin of this new empire—in human rights terms, the bleakest and the most advanced.

## [B] CHINA'S AMBITION TO CHANGE THE UN HUMAN RIGHTS SYSTEM

In line with the Party-State commitment to strengthen the country's 'discourse power and influence in international legal affairs' (CCP Central Committee 2014), China has become increasingly engaged with UN bodies as part of its broader strategy to become an active shaper and sometimes shaker of global governance at both institutional and normative levels. Against the background of what has been described as a crisis of the liberal international order, the Party-State clearly perceives there is a momentum for China to reform existing institutions and change existing norms to make them serve China's interests (Burnay 2020). These developments are particularly visible in the framework of UN Human Rights bodies. In the words of Richardson, drawing on her experience as China Director of Human Rights Watch, 'Chinese authorities are trying to rewrite norms and manipulate existing procedures not only to minimize scrutiny of the Chinese government's conduct, but also to achieve the same for all governments' (2020a).

At institutional level, China was recently re-elected by the UN General Assembly to serve a consecutive three-year mandate at the UN Human Rights Council starting in January 2021. Yet, interestingly, one could notice a sharp decline in the support for China's membership between

the 2016 election (180 votes in favour) and 2020 election (139 votes in favour) (Richardson 2020b). And, although China's membership of the UN Human Rights Council gives it an important avenue to influence the UN human rights framework, it nevertheless also brings China's own human rights record under increased scrutiny. For example, in April 2020, China was appointed to one of the five seats of the Consultative Group of the UN Human Rights Council. This influential committee is responsible for the selection of the key advisers and investigators who support the work of the Human Rights Council. In the coming year, this committee will be responsible for the appointment of global monitors on freedom of speech, health, enforced disappearances and arbitrary detention—in light of its systematic violations of this right (see below), an 'absurd and immoral' development in the words of the head of the non-governmental organization UN Watch (UN Watch 2020).

Within the UN Human Rights Council, China has not only attempted to silence criticisms against its own human rights record but also to promote a discourse driven by the Party-State's domestic discourse, norms and interests. This has, on the one hand, meant that China's normative activism in the UN Human Rights Council has promoted a conception of sovereignty and non-intervention as absolute (Hsu & Chen 2020). On the other hand, it has led to the propagation of Xi Jinping's notion of the 'community of shared future for humankind'—a conveniently open phrase that can serve to justify China's global power expansion. The Party-State's view on human rights is also informed by a strong emphasis on the right to development (China Human Rights White Paper 2016), which serves Beijing's narrative on mutually beneficial cooperation with developing countries in particular.

## [C] HONG KONG'S ACCELERATING COLLAPSE AS A MANIFESTATION OF GLOBAL AUTOCRATIZATION

During the last UPR in 2018, the situation of the 8 million inhabitants of the Hong Kong Special Administrative Region (HKSAR) on China's South coast was already precarious, but there was no acute crisis. The region had gone through a mass campaign of demonstrations for democratic elections in 2014, followed by a crackdown on the initiators, and there were fears, partly grounded in the Chinese government's unilateral claim in 2017, that the international treaty upon which Hong Kong's system is based was no longer binding. The UPR *Conclusions and Recommendations* in 2018 included Australia's recommendation to 'uphold the rights, freedoms and



rule of law embodied in the one country, two systems framework for Hong Kong’ (Australia 28.343) and Canada’s recommendation to ‘ensure the right of Hong Kong people to take part in government without distinction of any kind’ (Canada 28.345).<sup>4</sup>

Within the two short years since then, however, Hong Kong’s legal-political system has been brought to the brink of collapse. An attempt to create legislation that would have allowed extradition of criminal suspects from Hong Kong into China’s feared criminal justice system triggered peaceful street protests at an unprecedented scale and—following heavy-handed, repressive responses from the authorities—violent clashes between students and the police (Davis 2020; *Time Magazine* 2020). The situation seemed to be untenable, and the world waited with bated breath for the central authorities’ response, which came the following summer. In June 2020, the PRC enacted a ‘Law for the Protection of National Security in the Hong Kong Special Administrative Region’ (NSL) which came into force on 1 July 2020.<sup>5</sup>

Although less than half of the promised 50 years of transition had passed, the provisions of the NSL, as well as the institutions set up under it, spell the end of Hong Kong’s constitutional system, supposedly safeguarded by the Sino-British Joint Declaration, an international treaty, and by the applicability to Hong Kong of the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights. The law introduces broadly defined crimes of secession (Article 20), subversion (Article 22), terrorist activities (Article 24) and ‘collusion with a foreign country or with external elements to endanger national security’ (Article 29), likely to be used to punish peaceful political criticism. It establishes a PRC-led security apparatus within the HKSAR; substantially ousts judicial review over NSL matters; and allows some cases to be diverted entirely into the mainland criminal justice system—effectively bringing back ‘extradition’ with a vengeance, albeit under a different name.

Moreover, as though this were not bad enough, the central authorities have since administered further shocks to Hong Kong’s imperilled constitutional system. In November 2020, they ousted four legislators belonging to the oppositional pro-democratic-reform wing (Government of the HKSAR 2020; National People’s Congress Standing Committee 2020), prompting their colleagues to resign in protest. In December 2020, at a ‘Legal Forum’ featuring speeches from several high-ranking officials and

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<sup>4</sup> UN Human Rights Council 2018b, comments by Australia (28.343) and Canada (28.345).

<sup>5</sup> For a reliable English translation of the authoritative Chinese text, see China Law Translate 2020.

academic advocates frequently wheeled out to speak on behalf of the central authorities, the deputy head of the central government's Hong Kong and Macau Affairs Office spoke cryptically of 'judicial reforms' in Hong Kong in a speech that also postulated that only those who 'love Hong Kong and the motherland' should rule Hong Kong (Zhang 2020).

There is no doubt that these changes have undermined Hong Kong's civil and political rights by effectively criminalizing government criticism. They thereby remove the foundations of what was once a thriving and vitally important civil society, able to address human rights issues not only in Hong Kong but also in mainland China and beyond. They are threatening academic freedom, as numerous academics have been affected by varying levels of political persecution (Wang 2020; Wong 2020; *The Economist* 2020), including the criminal convictions of Professors Benny Tai (Hong Kong University) and Chan Kin-Man (Chinese University of Hong Kong), and, although some independent media organizations are holding up against pressure, the high-profile arrest of 'Apple Daily' media entrepreneur Jimmy Lai under the new NSL seems symbolic of threats to media freedom (Davidson 2020).

## [D] ABUSES AND CRIMES IN THE XUAR

While the trends discussed so far are deeply concerning, it is the situation in the XUAR that raises the most profound current human rights concerns—concerns that were beginning to be raised in 2018 but that have dramatically increased in the meantime (Byler 2020; Harris 2020; Mahmut 2020; Klimes & Smith-Finley 2020; UN Human Rights Council 2018b).<sup>6</sup>

There, beginning in 2017, the authorities have interned an estimated 1 million or more individuals, predominantly belonging to ethnoreligious minorities including the Uighurs, targeting those deemed at risk of 'religious extremism' under (local) domestic law with measures including incarceration, forced labour, rape, forced 'medication', torture and suspect deaths in custody. Additionally, the government is engaging in mass online and offline surveillance; monitoring and control—including facial recognition technology; enforced 'homestays' by Han Chinese officials; a reported campaign of forced sterilizations disproportionately affecting minority women; the removal of children from families; the destruction or 'disneyfication' of cultural and religious sites; and the repression of domestic criticism and advocacy accompanied by an elaborate state media disinformation campaign (Smith Finley 2020).

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<sup>6</sup> For a periodically updated bibliography, see Fiskesjø 2020.

Many of these practices violate China's own criminal law, as well as international human rights law. Furthermore, they systematically violate numerous core human rights norms, including: the rights to life, liberty and integrity of person; right not to be tortured; the right to reproductive self-determination; the rights to freedom of expression and freedom of religion or belief; antidiscrimination rights, and so on—rights protected under the Universal Declaration of Human Rights, UN Convention against Torture, UN Convention on the Rights of the Child, UN International Convention on the Elimination of All Forms of Racial Discrimination and other instruments; as well as the rights to be protected from forced labour, also in transnational supply chains, enshrined in the Slavery Convention and in the *ius cogens* norms of customary international law.

At the time of the 2018 UPR, Xinjiang was already widely discussed, as is reflected in proposals to 'implement the recommendations of the Committee on the Elimination of Racial Discrimination on Xinjiang and allow the United Nations unrestricted access to monitor the implementation' (United Kingdom); and to 'abolish all forms of arbitrary detention, including internment camps in Xinjiang, and immediately release the hundreds of thousands, possibly millions, of individuals detained in these camps' (United States of America) (UN Human Rights Council 2018b: 28.22, 28.23 and 28.177).

But our understanding today, most concerningly, indicates that these practices also constitute crimes against humanity, as defined by the Rome Statute of the International Criminal Court (to which China is not a party) and raise the spectre of genocide (Smith Finley 2020; Wan 2020).

## [E] CONCLUSION: A GLOBAL POWER CHALLENGED, IF NOT CHECKED BY INTERNATIONAL LAW?

At first glance, the efforts of 'the international community' to address China's human rights violations through the UN appear to have been an almost total failure. Duelling statements on the situations in Hong Kong and Xinjiang have shed light on the existence of opposing coalitions in the Human Rights Council. When the Hong Kong NSL was adopted, a coalition led by Cuba emphasized it is 'not a human rights issue and therefore not subject to discussion at the Human Rights Council' (Cuba 2020), while a coalition led by the UK emphasized the NSL has 'clear implications for the human rights of people in Hong Kong' (Foreign and Commonwealth Office 2020). When the first reports on mass detention in XUAR emerged in August 2018 (UN Office of the High Commissioner

on Human Rights (UN OHCHR) 2018), the issue quickly escalated and came under increased international scrutiny including in the framework of the UN Human Rights Council. It led to two successive rows of duelling letters in 2019 and 2020. In the summer of 2019, 22 state representatives called for China to ‘respect human rights and fundamental freedoms ... in Xinjiang’ (22 States 2019) in response to which another coalition of more than 50 states submitted another statement justifying China’s action by referring to the ‘grave challenge of terrorism and extremism’ in the region (Xie & Bai 2019). Another round in this rhetorical fight took place one year later when the German Ambassador to the UN submitted a statement on behalf of 39 nations calling upon China ‘to allow immediate, meaningful and unfettered access to Xinjiang for independent observers’ (Statement by Ambassador 2020).

In a nutshell, debates on Hong Kong and Xinjiang in the UN Human Rights Council have not led to any concrete responses. Rather, they have shed light on the very divisions that exist within the international community regarding the universality of human rights, in particular where China is concerned, and UN human rights bodies lack effective mechanisms to secure compliance with powerful member states’ international human rights commitments. Beyond the human rights mechanisms of the UN, moreover, it is also clear that there would be extraordinarily challenging obstacles to seeking accountability through the mechanisms set up to deal with international crimes (Wan 2020).

And yet, despite the structural weaknesses of the UN human rights system and the mechanisms of public international law more widely, the workshop also reminded us of the centrality of adherence to norms whose substance has remained relevant not only to the victims of their violation, but also to the embattled idea of an international rule of law (Sandholtz 2019). ‘[P]eople need to appeal to institutions beyond their government’s immediate control’ (Richardson 2020b). Not only does China’s growing presence and visibility in the UN human rights system put its own human rights record under greater international scrutiny, one can also note that China’s ability to shape and shake UN institutions and norms have not always been as successful as expected. In that sense, the alarming deterioration of the human rights situation in China has, *inter alia*, led to a call by 50 experts to create a China-specific mandate or take other ‘appropriate measures’ (UN OHCHR 2020). In addition, records of the UN Human Rights Council proceedings demonstrate a declining support for draft resolutions proposed by China on ‘mutually beneficial cooperation in the field of human rights’. While the 2018 Resolution (UN Human Rights Council 2018a) was adopted by 28 to 1 with 17 abstentions,

there was a clear declining support for the 2020 Resolution (UN Human Rights Council 2020) that was adopted by 23 to 16 with 8 abstentions (Richardson 2020b).

Against this background, initiatives at bilateral level (i.e. human rights dialogues) or the adoption of Magnitsky-style legislation should be seen as complementary to the existing multilateral framework. Whilst the robustness (and weakness) of the UN human rights framework will likely be challenged again before China's next UPR, there is a strong need to avoid any kind of cynicism and to reaffirm the centrality of multilateral platforms that enable individuals, civil society organizations and governments to shed light on human rights violations wherever they happen.

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## FROM PHD THESIS TO MONOGRAPH: A REFLECTIVE ACCOUNT OF THE PROCESS

LISAMARIE DEBLASIO

School of Law, Criminology and Government,  
Plymouth University

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### Abstract

This essay provides a personal and reflective account of the process of adapting a PhD thesis, which was written for a panel of examiners to demonstrate academic competence, to a monograph, which in simple terms is written for a wide audience including students and academics with the aim of communicating ideas. It is hoped that this article provides insight to postdoctoral researchers who may be thinking about submitting a proposal to a publisher for adaptation of their PhD thesis to a monograph.

**Keywords:** thesis adaptation; monograph; academic publishers.

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### [A] INTRODUCTION

I was first introduced to the idea of adapting my PhD thesis to a monograph in the summer of 2018 by my PhD supervisors during my ‘mock *viva*’. Having just submitted my 90,000-word thesis and anticipating the real *viva voce* in three weeks’ time, I assumed they were being flippant. They were aware that I had spent over three years immersed in the literature, the research and methodology. I had spent a further year writing up the findings and several more months feverishly trying to identify the kind of mistakes and errors that I had heard PhD examiners love to find in a thesis and highlight with a large yellow felt-tip before announcing the candidate has not passed. Even if my supervisors were serious, this felt like a walk before a crawl—I had to pass my thesis defence first. I also felt strongly at that moment that I did not want to read my thesis again for a very long time. It was something I had been attached to emotionally for so long, I needed to put it away for a while, so I could remember there was more to me than just being a PhD candidate.

I managed quite successfully to pretend the subject of a monograph had not been mentioned, this despite the examiners during my *viva voce* asking me how I planned to develop my work. It was not that I did not want to develop the thesis to disseminate to a wider audience than the university open access research repository, where my thesis would ultimately reside; it was simply down to a lack of belief in my own ability. I wondered how I could possibly transform my thesis into something that people would want to buy, read and even reference, let alone persuade a publisher that I could. The other perceived obstacle was the subject of my PhD. I had addressed a largely under-researched area of child law, that of adoption and the impact on birth mothers within a social-legal context. Although this is an important area of law, it is relatively specialist and not of universal interest.

In October 2018, soon after being awarded my PhD and with an awareness that my peers expected me to follow up my thesis, I knew that I had to address the issue of the monograph. So, having been provided with a contact at Routledge publishing house<sup>1</sup> by a colleague, I decided I had nothing to lose by emailing an enquiry. I was surprised to receive a response almost immediately and, after my initial email was passed to a number of different departments, I was contacted by the editor for Routledge Research in Law and was provided with some helpful literature on the differences between a thesis and a monograph. There was plenty to think about in the guidance, for example, the overall focus of a thesis is on the author and what they have learnt. The monograph focuses on the reader and what they will find of interest. Where academic scaffolding is concerned, the thesis must explain in depth what it is going to show. This is often done with the use of headers, exposition and pointers as to what each section contains. The monograph presents the core argument clearly without the need for pointers. Chapters such as the literature review and methodology may be superfluous to the overall work, despite being such essential elements of the thesis. I remembered the feeling I had at the beginning of my PhD, analogous to climbing Mount Snowdon. Looking at the 'thesis to book' guidance, I once again felt as though I was at the bottom of a mountain, but this time the higher summit of Ben Nevis, and, without the regular 'foot-ups' by my supervisors, this stood to be an unknown journey.

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<sup>1</sup> Part of the Taylor & Francis Group.

## [B] THE PUBLISHER'S REVIEW PROCESS

The cliché ‘fake it until you make it’ is sometimes apt. The publishers asked me to complete a book proposal template. Without experience of what I should be communicating, I was ill informed as to what Routledge would expect from me. Before completing the proposal, I looked at other law monographs which provided me with insight about structure and style, but which also dented my confidence further and triggered mild panic—the authors were confident, practised and proficient, and I wondered whether they had ever felt as out of their depth as I did at that moment.

The review process required me to justify my proposal with reference to key messages from the completed research, the overall aims, the potential market and current competition. I tried to consider my research as a book already published: who would read it, and why, what other similar books were available, why was my book unique? I started to see that I could possibly market a topic that was rarely researched as a unique insight to legal phenomena that little was known about, thus disseminating important new knowledge. My proposal was then sent for external review to a panel of reviewers of my own choice. Unsure if I was being wise or naive, I sent the editor a list of academic lawyers and well-known researchers into child law whose work I had cited in my thesis. By this point, I was feeling my way in the dark and had no idea what the outcome of the review would be.

Several weeks later, I received the feedback from the reviewers, which was comprehensive and critical but essentially positive. Overall, the reviewers supported my argument that there was an absence of socio-legal literature on adoption law and associated issues, meaning my proposal was timely and relevant. The reviewers also noted that publications that focus on the impact of law on marginalized individuals are needed to inform practitioners, academics and students. The reviews were then presented to the publishers’ editorial board which approved the project. I feel that the novel aspect of the work identified by myself and by the reviews played a key part in the publisher’s decision to offer me a contract, which I entered into in February 2019, agreeing to provide Routledge with a transcript of the finished book by March 2020.

## [C] DECONSTRUCTING THE THESIS

I had just over a year to turn a thesis, which with references came in at around 200,000 words, to a 100,000-word transcript, which would

include all references, plus other text such as tables and appendices. I had my contract, a list of author guidelines on everything from style to copyright and a senior editorial assistant as a point of contact. I had no idea where to start and experienced that ‘climbing mountain’ feeling again. I discovered that the community of postdoctoral monograph authors was strangely silent on the process of adapting their theses, as though there was some esoteric element to the activity that I was yet to determine. There was very little guidance available, although the essay ‘Thesis to Monograph: Notes from the Judges’ Bench’ by Anne Laurence (2019) was inspiring because it simply advocated the uniqueness of monographs, along with the recognition that the writer’s passion for the subject covered should not be suppressed by severe editing to meet the book word limit.

Over the next seven months, I dedicated as much time as I could to revising the thesis. I realized that this adaptation should not involve a complete rewrite but a focused modification or revision of each chapter. The word limit demanded a great deal of deletions and the inclusion of some new case law and legislation to bring the topic up to date. As with my PhD journey, this was a lonely experience, often clouded with uncertainty. The editor at Routledge played no part in this stage and, although she responded to my queries, she made it clear that decisions concerning what to include or not were mine alone to make. The editing process was time consuming and painstaking. I struggled to edit out parts of the story that I felt were important to the message, yet I had to be ruthless. Over time, the transcript began to take shape. The chapters dealing with the law were more concise, and the parts that articulated the stories of the birth mothers became central to the message, which was my overall aim. Looking back, the reworking process was essentially an intuitive one, as much as it was intellectual. In the absence of peers to review and feedback on my work, I was required to critique it myself, which is a valuable skill to develop. Only *I* could decide when the transcript was ready to send to the publisher, and this level of autonomy felt like an important milestone in my academic and professional progress.

## [D] THE FINAL STAGES FROM SUBMISSION TO PUBLICATION

I sent my final draft to Routledge in February 2020, a few weeks before the contracted deadline. I felt apprehensive and uneasy about the quality and standard of my work. I had no experience to draw upon and envisaged all manner of responses that I might receive from the editor, ranging from ‘this needs more work’ to ‘are you serious?’ The only clause in my

contract that I could recall at this time was ‘the publisher reserves the right to reject the final transcript’. I realised this was not a useful thought process and, fortunately, as I had a lot of teaching during that period which kept me busy, there was no time to ruminate on the outcome.

The first indication that things were moving forward was in early March when I was contacted by the editorial assistant advising me the production process had begun. At this point, I was sent the publication schedule, which detailed all of the stages my transcript would go through. The plan was for the book to be available in July 2020. I was, of course, excited by this but found myself waiting for the rejection email. I am pleased to report that the rebuff I had wasted so many hours constructing in my imagination never arrived. The production process was swift and well managed. I worked with the copy editor through May and June. She made it clear that they were working to strict deadlines to get the book published on time. I did not feel pressured, but I would stress that editors expect their authors to meet the deadlines they themselves have to meet. This means the edited drafts sent to you for approval should be prioritized and returned. I personally found this stage straightforward. There were very few changes made to my final draft beyond some queries on secondary references, but to my surprise the editor left the content as I wrote it. I had feared large amounts of revision eating into my summer break: in fact, there were none at all.

Following my approval of the final proofs, my book was sent to press on 4 July 2020. It is difficult to articulate how I felt at that point: there was a sense of achievement and celebration that surpassed the feeling that accompanied the submission of my PhD thesis; there was no *viva* to pass this time around. The real sense of accomplishment came at the end of July when I received a copy of my monograph through the post from Routledge (Deblasio 2021). There were periods over the previous year when I had questioned my capacity or ability to finish the work to a high enough standard. The deadline loomed in the back of my mind over those months, and, even though I am not a procrastinator, I am aware that a lack of confidence in one’s ability can prevent them from progressing and reaching their potential.

I was my own worst critic but, despite my lack of belief in my ability, I carried on. I am a determined person and often have to ignore the negative inner voice and forge ahead towards my goals. Having a book published and well received has been a turning point for me in terms of my academic confidence. My advice to postdoctoral researchers who want to publish their thesis would be to make enquires to publishing houses. A lack of

belief in your academic aptitude should not prevent you from trying to persuade a publisher to accept your proposal. That self-doubt will be challenged along the way in a very similar manner to the PhD process. You do not necessarily need to be 100 per cent certain that you can do it at the beginning of the process; the important thing is that you think you *may* be able to do it, and time will do the rest.

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# MISCARRIAGES OF JUSTICE AND THE CONSTRUCTION OF CRIMINALITY IN THE PEOPLE'S REPUBLIC OF CHINA

YU MOU

School of Law, SOAS, University of London

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## Abstract

Another high-profile miscarriage of justice was reported recently by the media in China, highlighting widespread issues concerning torture and other police malpractices within the Chinese criminal justice system. Drawing from analysis in my book on the *Construction of Guilt in China*, this Note outlines the key drawbacks of the Chinese criminal process which contribute to wrongful convictions, namely that none of the legal institutions exhibits the autonomy to check the credibility of the evidence impartially. Alongside the problems caused by miscarriages of justice, they are also indicative of the symptoms of a weak criminal justice system, thereby opening up opportunities for future reforms.

**Keywords:** miscarriages of justice; China; criminal justice; case construction.

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## [A] INTRODUCTION: ANOTHER MISCARRIAGE OF JUSTICE

From the early 2000s, wrongful conviction cases have often been newspaper fodder in China. As many as 180 cases in which innocent people were falsely convicted of serious crimes have been reported by the media over the last two decades. In August 2020, the Chinese media headlined another quashed wrongful conviction. This time, the victim of the miscarriage of justice, Zhang Yuhuan, achieved a record—he was China's longest-serving wrongfully convicted inmate, having spent 27 years within a prison in Jiangxi Province. Zhang Yuhuan was convicted in 1995 of murdering two boys, whose bodies were found in a local reservoir. Like many other wrongful convictions, the key evidence which

the prosecution relied upon was Zhang's confessions (Xinhua Net 2020). There were six versions of his confession, providing inconsistent details of the crime scene, weapons used and his motivations. These confessions were later proved to be elicited by torture which entailed a deprivation of sleep, physical violence and quadriceps savaged by a trained police dog (Pengpai 2020). The retrial judgment announced by the Jiangxi High Court declares that the confession evidence was 'irrelevant (*quefa guanlianxing*)', 'lacked exclusiveness (*buju paitaxing*)' and was not 'reliable enough' (*zhenshixing cunyi*) to support the conviction of Zhang. This final evaluation confirmed the harm caused by torture, police brutality and other malpractices in the Chinese criminal justice system.

## [B] CONSTRUCTING THE CASE FOR THE PROSECUTION

Despite the exceedingly long-term incarceration of the innocent man, the case of *Zhang Yuhuan* (2019) is in many ways a 'typical' miscarriage of justice case in China. In this instance, we can find the shared pattern of fallibility in which cases are routinely processed and develop into wrongful convictions. In my book on the construction of guilt in China, I have analysed how these wrongful convictions have come about (Mou 2020: 3-18). Whilst it is true that the origins of most miscarriages of justice can be traced to the early stages of the police investigations, these cases demonstrate the functional deficiency of the criminal justice system as a whole in preventing innocent individuals from being wrongly accused and convicted. It should be noted that all criminal cases are primarily constructed by the police and, to a lesser extent, the prosecutor. The case construction is not limited to a certain aspect of the process (such as recording interrogation records, witness statements or compiling forensic analysis). It infuses 'every action and activity of official actors from the initial selection of the suspect to final case disposition' (McConville & Ors 1992: 12). In most circumstances, the way in which a prosecution case is presented has been a joint effort of the police and the prosecutor.

The way cases are constructed in mainland China today is therefore a very important issue. Article 200 of Criminal Procedure Law 2018 states that, in order to convict the defendant, the *corpus delicti* must be clear and the incriminating evidence should be reliable and sufficient (*zhengju qieshi chongfen*). This Article, interpreted by the Supreme People's Court, requires an establishment of a chain of inculpatory evidence,



pointing to the same facts without reasonable doubt.<sup>1</sup> This is known as the corroboration rule (*yinzheng zhengming yuanze*), according to which a conviction should be based on facts of the prosecution case which are supported by corroborating evidence. In carrying out their investigation function, the police must engage in activities that acquire, select, reject and edit evidence in such a way as to ensure that all evidence in a case is consistent and points to the guilt of the accused without reasonable doubt. Once the prosecution case has been constructed by the police, the case dossier containing all the evidence is then transferred to a prosecutor, who is responsible for evaluating the strength and persuasiveness of the police case and decides whether a supplementary investigation is needed. The prosecutor will then carry out a series of actions, including a thorough examination of the case dossier, interrogating the suspect, interviewing the victim and witnesses, if needed, and drafting a case report on her decisions. The review process is designed to facilitate prosecutors to reach a rational decision on whether the case should proceed to trial. Although prosecutors are often portrayed as guardians who ensure the correct enforcement of law under the Chinese Criminal Procedure Law (Article 104 of the Criminal Procedure Law 2018), in reality they are mostly concerned with conviction rates. Their oversight of the police's case is usually lost from view by pressures to secure guilty pleas, to tidy up dubious statements or inconsistencies, and to maximize the chances of conviction.

## [C] IN WANT OF FAIR TRIALS

While the courts demonstrate laudable courage to correct the wrongs of their own making in cases like the *Zhang Yuhuan* case, the sheer number of wrongful convictions revealed and quashed in the last two decades strongly suggests that the judiciary has failed to serve as the last bastion against injustice (He 2016). It has long been acknowledged that the concept of the Iron Triangle<sup>2</sup>—the coalition of the police, the procuratorate and the judiciary—defines the criminal process in China, leaving the defence with

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<sup>1</sup> See Article 104 of Interpretation of the Supreme People's Court on the Application of the Criminal Procedure Law of the People's Republic of China 2012: 'the truthfulness of a piece of evidence shall be examined by taking into consideration the overall evidence of a case. The strength of a piece of evidence to prove a fact shall be examined and judged based on actual circumstances from the perspectives of the degree of relevance between the evidence and the fact to be proved, and the linkage between different pieces of evidence. A piece of evidence shall be admitted as the basis for deciding a case only if: it is inherently related to other pieces of evidence; it and other pieces of evidence all point to the same fact to be proved; and there is neither any irremovable contradiction nor any inexplicable question.'

<sup>2</sup> In China, the three criminal justice institutions have dominated the criminal process. They are known as being of 'the same family', collaborating and protecting one another.

little standing, status or influence within the system (Nesossi & Trevaskes 2018). Indeed, defence lawyers have played a robust role in reopening and quashing the convictions in the reported miscarriages of justice. But their input in the initial critical trial phase has often been absent. In the case of *Zhang Yuhuan*, no defence lawyer was appointed to defend the accused, although the law had made it clear that it was the court's duty to notify a legal aid agency and to designate a defence lawyer in representing a defendant who might be sentenced to life imprisonment or the death penalty (Article 34 of Criminal Procedure Law 2018). This omission of the judiciary, luckily, was too significant a procedural irregularity to be ignored, which enabled the case to be reopened (Pengpai 2020).

It is worth noting that miscarriages of justice are certainly not limited to major and influential cases. There are a vast number of 'ordinary' cases which are treated in an equally unfair (if not worse) manner as those serious cases being reported. These 'ordinary' cases may not be interesting enough to attract public attention, and therefore may never be reported by the media. They are sometimes considered less important because the suspect is not of significant social standing, or the offence does not carry a long-term of imprisonment or the death penalty. All victims of miscarriages of justice, however, suffer similar long-lasting consequences. The implications of miscarriages of justice include and are not limited to: an imposition of unnecessary pain and psychological trauma on the falsely accused individuals and their families; a waste of resources of the criminal justice system; a jeopardized safety level of the public at large if the real perpetrator was not apprehended; undermining the legitimacy of the criminal justice system; distortion of the popular beliefs about crime through the dissemination of inaccurate information (Cole 2009); and the irreversible outcome of lost lives in jurisdictions where the death penalty still widely applies, as in China. Amongst the damage that can be enumerated, the moral harm caused by the conviction of an innocent person to society has the most far-reaching impact and is the hardest to repair (Choo 1996).

## [D] OPPORTUNITIES FOR CRIMINAL JUSTICE REFORMS

Despite the dangers and harm caused by miscarriages of justice, it is undeniable that they are also symptoms of a weak criminal justice system. They may signify the underlying 'unhealthy condition' of the system which needs urgent treatment. In the past, high-profile miscarriages of justice have produced many reforms of criminal justice. In the UK, for

example, the establishment of the Criminal Cases Review Commission, the statutory body responsible for investigating miscarriages of justice in England, Wales and Northern Ireland, was a direct product of a number of convictions exposed as wrongful in the 1970s.<sup>3</sup> These miscarriages of justice also prompted the setting-up of the Crown Prosecution Service and a national duty solicitor scheme for providing legal advice to suspects in police stations. These reform measures have now become an integral part of the criminal justice system in England and Wales. In the context of mainland China today, miscarriages of justice also have widespread repercussions. Perhaps the most prominent of these have been two revisions of Criminal Procedure Law, which occurred in fairly quick succession, in 2012 and 2018 respectively. New measures, such as synchronized video-recording during interrogation were introduced to prohibit torture and other police malpractice (Article 121 of Criminal Procedure Law 2012; Article 123 of Criminal Procedure Law 2018).<sup>4</sup> Exclusionary rules have also been incorporated in criminal procedure law.<sup>5</sup> To date, the effect of these reform measures has been conspicuously disheartening.

Using the exclusionary rule of evidence as an example, studies have found that the evidential threshold for triggering and surviving the exclusionary procedure is particularly high. Evidence to be admitted in order to open the exclusionary inquiry is expected to satisfy the tough requirement that proves the direct link between misconduct of the police officer and the procedural irregularity. Although the burden to prove the source of illegally obtained evidence is on the prosecution, this burden of proof has often unwittingly been shifted to the defence, which was invariably asked to offer critical information on the names of the interrogators, when, where and how the torture took place, the disputed intended content, etc (Zhang 2015). Even if the illegally obtained evidence in question was excluded, there was no guarantee of an outcome in favour of the defendant. Ye and Wu's (2015) and Xu and Fang's (2016) research show that none of the cases in which unlawfully obtained evidence was excluded ended with acquittal in their samples. Similarly, other studies have persistently found that video-recordings produced by the police have

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<sup>3</sup> These wrongful convictions include the Guildford Four (1974), the Birmingham Six (1975), the Maguire Seven (1976) and Judith Ward (1974).

<sup>4</sup> Also, video-recording mainly applies to serious crimes, including crimes in which defendants might be sentenced to the death penalty or life imprisonment. According to the police reform agenda, video-recording during the police interrogation will gradually be applied to all criminal cases in China.

<sup>5</sup> Article 56 of Civil Procedure Law 2018 (Article 54 of Civil Procedure Law 2012) states that 'confessions by a suspect extorted through torture and other illegal means should be excluded'.

regularly been tampered with. They were either edited, did not record the entire interrogation session, or were directed in such a way that the interrogation was apparently rehearsed, failing to effectively constrain police behaviours (Ma 2015).

## [E] CONCLUSION

Clearly, there has been a strong resistance within the criminal justice system to meaningfully implementing the reform measures. The criminal justice institutions have, it would seem, continued to fail to effectively prevent innocents from being convicted and punished. Changing the law, in this sense, has not in any significant way transformed the behaviour of the police and courtroom actors in ordinary, everyday cases. A new round of criminal justice reform may have been initiated to emphasize the harm of and to prevent miscarriages of justice. But the new reform measures, given the context of continuing policies and practices, will likely not impact significantly on the legal culture of the system, so that meaningful change is frustrated.

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# MEDICAL NEGLIGENCE DISPUTE RESOLUTION IN CHINA: SOCIAL STABILITY AND PREVENTATIVE MEASURES

CEDRIC TANG<sup>1</sup>

University of Hong Kong

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## Abstract

Medical negligence is an important issue in China today, threatening to undermine the party-state policy objectives of social stability and the right to health, thus requiring effective solutions. China's response includes a dispute resolution regime for issues of medical negligence, structured as a bifurcated administrative and court regime and supplemented by mediation. This Note examines this dispute resolution regime, its difficulties and possible ways of reform. More specifically, it explores whether the current assignment of liability is appropriate when considered in the context of the system's relationship to the policy objective of social stability and suggests that social stability may be more efficiently achieved by greater utilization of preventative measures.

**Keywords:** medical negligence; medical disputes; China; mediation; social stability; right to health.

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## [A] INTRODUCTION

Currently, medical negligence is an active problem in China, where several state and party policy objectives are simultaneously at play: firstly, maintenance of overall political and social stability; and, secondly, the citizen's right to health. A dispute resolution regime has been created which is a bifurcated administrative and judicial system, supplemented by mediation.

Here, it is observed that current legal research evaluating China's medical negligence dispute resolution regimes tends to focus on

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<sup>1</sup> I express my gratitude to the reviewers of this Note. I also thank my wife and family for their encouragement and support. All mistakes remain my own responsibility. The views and any remaining errors contained in this Note are solely mine.

addressing regime effectiveness in terms of serving the patient's right to health, suggesting an underlying assumption that patient welfare is a primary concern of the Chinese party-state as the policy maker, where social stability is an incidental by-product of positive patient outcomes (Harris & Wu 2005; Ding 2009; Xi & Yang 2011; Biddulph 2015; Ding 2015; Fu & Palmer 2017).

In the context of the current literature, this Note primarily addresses the question: *does the current assignment of liability in China's medical negligence dispute resolution regimes, as set out in its written rules and policies, properly serve its own intended policy objectives?* This Note attempts to answer this question by analysis of written rules, party policies and reasoning based on the following views.

- ◇ First, from the Chinese Communist Party's (CCP) perspective and conceptualization of rights and policy objectives, the right to health is likely less important than the prime objective of social stability. This will be explored through examination of current regimes, as constructed by written rules and party policies, to illustrate and explain why, in instances when the two policy objectives in question interact, the current regimes are intended and designed to favour social stability, even at the expense of health outcomes.
- ◇ Secondly, the current regimes are nonetheless essentially reactive measures in nature, targeting *suppression* of social instability, and that suppression is an approach inherently limited in securing the prime policy objective of social stability.
- ◇ Thirdly, that instead of the current approach involving reactive measures, in terms of the system's and regimes' congruency with the policy objective of social stability, the more efficient solution would be the introduction of and reliance on preventative measures.

This Note attempts to add value through examining China's medical negligence problem from an alternate perspective: in that, while suggestions for dispute resolution regimes aimed at improving patient outcomes may be desirable and even viable in the abstract, they will be disagreeable to the party-state if such suggestions detract from the goal of maintaining social stability. Therefore, in exploring practical options for reforming the system, it is important to bear in mind the hierarchy of policy objectives: to begin by actively seeking out solutions which further the social stability agenda, as well as examining whether they assist patient outcomes. It is only logical that these are the only types of solutions that the party-state will seriously consider and accept, and that other solutions are likely relatively undesirable. It is hoped that this Note

provides some perspective in identifying practical and realistic solutions for policy-related legal issues in China.

The structure of this Note is as follows. First, the Note explains the implications of medical negligence for the state and party policy objectives of social stability and the right to health, justifying China's view of medical negligence as a problem that demands effective solutions, and explaining why the CCP views the importance of the right to health as secondary to social stability. Secondly, building on existing literature and through the lens of themes such as fairness and consistency—being the tools of the primary objective of social stability—this Note critically examines China's medical negligence dispute resolution avenues. Thirdly, it examines the current system's lop-sided and primary focus on dealing with social instability through reactive measures as solutions and suggests why this is inefficient. Fourthly, the contribution suggests that social stability is more efficiently achieved by greater utilization of preventative measures. Possible preventative measures which may be introduced are also explored, such as by regulating healthcare culture through assigning greater non-compensation-based personal accountability on medical workers. Finally, the Note concludes by summarizing how, through examining preventative solutions complementary to the current system, it might contribute to current academic discussions on China's medical negligence problem.

## [B] MEDICAL NEGLIGENCE IN THE CONTEXT OF PARTY-STATE OBJECTIVES

In addition to physical injuries and economic losses, especially for the individual, medical negligence disputes are particularly concerning for the state and the CCP that leads it, as the party-state considers such disputes as detracting from its policy objectives of social stability and the right to health.

### Social Stability

Deng Xiaoping, the paramount leader of China during the first decade or so of the reformist policies introduced in the late 1970s, advised that China has to 'preserve stability above all other concerns' (Trevaskes & Ors 2014). Social stability has remained a top concern of the party-state and is viewed as a precondition for successful economic development. Stability and unity under China's one-party-state are considered as preconditions for necessary economic growth. Social stability maintenance is seen by the Party as critical for preserving the CCP's power, especially as social



instability is believed to have created the circumstances which enabled the CCP itself to assume power in 1949 (Trevaskes & Ors 2014; Biddulph 2015). For the CCP, not only is social stability maintenance a critical component of economic success and a guarantee for the Party's preservation of power, but it also facilitates day-to-day socio-political control.

The paramount importance of social stability as a policy objective is clearly evident and very pervasive in China's legal system (Harris & Wu 2005; Chen 2011). Western ideals of the rule of law are seen as a 'tool' by means of which ruling-class dictators oppress the people (Chen 2011). In contrast, the CCP sees itself as a representation of the will and interests of the people, and thus the CCP is the embodiment of the people. Being one and the same as the people, there is no need for law to assist the people to keep the Party in check. This encourages a paternalistic view of the role of government, in which the state is expected to deal with a wider range of difficulties than might be expected of governments elsewhere. In addition, China has deep-rooted traditional reservations about law's effectiveness in governing disputes and giving fair outcomes, stressing instead the importance of mediation as a form of third-party intervention.

Today, law is viewed by the party-state leadership essentially as a tool for administering, achieving and maintaining social stability 'in accordance with the law', through regulating and managing citizen behaviour (Central Committee of the Communist Party of China 2006; Trevaskes & Ors 2014). Since the early 2000s, the goal has been to ensure a socialist harmonious society with orderly, conflict-free social interactions, where confrontational relationships amongst individuals or between individuals and the state, including those brought about by medical negligence disputes, are prevented or halted 'above all other concerns', even at the expense of fairness to individuals (Trevaskes & Ors 2014). This can be seen in the administrative and court-focused avenues of justice which are geared towards eliminating disputes and ensuring social stability, prioritizing positive 'communal' outcomes over fairness, due process and procedural justice. In this spirit, China has also strongly encouraged mediation, which is a process seen to give firmer control over outcomes and more effectively harmonize relationships between parties (Trevaskes & Ors 2014).

## The Intersection of Social Stability and the Right to Health

China is also well aware of the importance of individual citizens' right to health and has corresponding international healthcare obligations, for

example in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the United Nations Millennium Declaration (Biddulph 2015). Promises for the right to health are also entrenched within the Constitution of the People's Republic of China (as amended in 2018) in Articles 21, 33 and 45. In domestic implementation, China has set itself healthcare outlines and targets, such as in the Human Rights Action Plan 2012-2015 (Biddulph 2015).

In some situations, tension arises when attempting to balance social stability and the right to health: social stability is about harmonizing relationships for the benefit of society as a whole, whereas the right to health has roots in the interests of individual patients. Medical negligence disputes highlight the conflicting interests between these two policy objectives: when citizens' right to health has been violated, their expressions of grievance are threats to social stability. The way China resolves this tension when it comes to medical negligence disputes evidences the fact that social stability—and prevention of disorder—is prioritized ahead of the right to health, representing citizens' individual rights and quality of life.

Even if reconciliation and prioritization of the two conflicting policy objectives can be resolved, medical negligence disputes will nonetheless continue to impose a double threat towards both policy objectives: first, as an actual source of social unrest, threatening social stability and party survival; and, second, as a display of China's inadequacies in complying with international obligations and constitutional promises. Hence, regardless of how China's policy objectives are conceptualized, medical negligence, the disputes to which it gives rise and their subsequent effects are problems that demand effective solutions.

## [C] MEDICAL NEGLIGENCE DISPUTE RESOLUTION REGIMES AND ISSUES

China deals with medical negligence mainly based on a fault-based compensation model. An integral part of this model is fault-finding and granting compensation through dispute resolution processes that are located either in administrative or court systems, and, in many cases, mediation is also utilized. Examination of these regimes will in part borrow from existing literature and commentary (Harris & Wu 2005; Ding 2009; Xi & Yang 2011; Biddulph 2015; Ding 2015; Fu & Palmer 2017). Through this, I attempt to further establish that the regimes, as intended by design, are more concerned with social stability than individual patients' right to

health. The support of this will therefore rely on the CCP's written rules and policies, which are manifestations of its subjective intentions.

## The Administrative Regime: Its Issues

The two key items of legislation for the administrative regime are the Regulations on Handling Medical Accidents 2002 (RHMA) and the Regulations on Prevention and Handling of Health Care Disputes 2018 (RPHHCD). There is no express statement in the RPHHCD that it supersedes the RHMA, and hence an overarching issue is that it is uncertain whether the RPHHCD was intended to supersede, clarify, or run in parallel with the RHMA. This will be further explored below in comparing the two legislative documents.

The RHMA, at Article 1, states its purpose as follows: first, to correctly handle medical accidents; second, to protect the lawful rights and interests of patients and medical institutions, as well as their medical work; third, to maintain the order and safety of medical practice; and, fourth, to promote development of medical science. In comparison, the RPHHCD, at Article 1, is different in its purposes, as it aims, first, to properly (instead of correctly) handle medical disputes (instead of accidents) and to prevent such medical disputes, with the second and third purposes remaining the same in substance and the removal of the fourth purpose—to promote development of medical science. It is not entirely clear whether medical disputes and medical accidents are analogous, distinct categories, or if one is the subset of the other.

From their stated purposes, the ambitions of the RHMA and the RPHHCD are not only to provide administrative-conducted arbitration for handling medical negligence disputes and granting compensation, but also to describe a wider comprehensive regulatory framework for healthcare quality assurance, reporting requirements, regulatory supervision and administrative disciplinary actions (Harris & Wu 2005). For our focus and for an aggrieved patient harmed by alleged medical negligence, the most practically useful components of the RHMA and the RPHHCD are their arbitration frameworks, theoretically capable of granting compensation to patients and hopefully alleviating their dissatisfaction towards any harm done to them. However, due to various issues discussed below, it is questionable whether the administrative regime is earnest in fairly and sufficiently compensating patients, or whether it is intended as a 'box-ticking' display that China has administrative-conducted recourse for medical negligence.

### ***Scope and Threshold***

RHMA arbitration has been characterized as light touch and highly protective of healthcare workers (Harris & Wu 2005; Xi & Yang 2011; Biddulph 2015). Article 2 gives the definition of ‘medical accidents’ but also provides a hurdle for aggrieved patients, where they must prove: first, ‘breach’—violation of legal requirements or regulations, or a breach of standards of care; and, second, ‘causation’—such violation or breach has caused personal injuries to the patient. Article 33 also exempts a wide range of adverse medical outcomes from being ‘medical accidents’, mostly to do with unforeseen or emergency situations.

In addition, Article 4 also heightens the threshold for eligibility, excluding injuries which are insufficiently serious. Article 4 classifies ‘medical accidents’ into four grades in accordance with personal injury seriousness. Even Grade IV, the least serious, requires the medical accident to have caused obvious/substantial/tangible injury.

Through the combination of Articles 2, 4 and 33, for the purpose of resolving medical negligence disputes through fault-based compensation, the RHMA’s arbitration framework has a narrow scope and a high threshold.

In comparison, the RPHHCD at Article 2 is also used to provide definitions, here for ‘medical disputes’, to mean disputes between healthcare workers and patients caused by diagnosis and treatment activities. The RPHHCD therefore has a lower threshold as compared to the RHMA, since there is no requirement to prove causation or breach (unlike the RHMA at Article 2). The classification methods under the RHMA at Article 4 and the exemptions in Article 33 also appear to have been removed in the RPHHCD, shifting the identification of damage and fault onto the arbitration process, as seen from the RPHHCD at Articles 34 and 36.

It also appears that the RPHHCD is wider in scope as compared to the RHMA, since the definition of ‘medical disputes’ appears to cover situations of ‘medical accidents’ as well. However, there is uncertainty of applicability as between the RHMA and the RPHHCD when a situation qualifies as both a ‘medical dispute’ and a ‘medical accident’. The RPHHCD at Article 55 perhaps sheds light on this issue, stating that ‘handling administrative investigations of diagnosis or treatment related medical accidents’ must be in accordance with the RHMA. However, the phrase ‘administrative investigation’ cannot be found in the RHMA, making it unclear which RHMA procedures are referred to by the RPHHCD at

Article 55 and therefore leaving unclear when the RHMA has exclusive jurisdiction.

### ***Conflict of Interest***

The RHMA's arbitration review process, determining whether a 'medical accident' occurred and its classification under Article 4, has been criticized as being overly protective of healthcare workers (Harris & Wu 2005; Xi & Yang 2011; Biddulph 2015). Under Articles 21, 23 and 24, the arbitration review process is conducted by an expert panel selected randomly from city-level medical association-established databases of experts. Under Article 21, the decision of city-level expert panels may be appealed only once, in which case a new panel will be selected from provincial-level expert databases. These panels have been widely perceived as lacking in independence, impartiality and fairness, since experts within databases are hand-picked by medical associations, and experts are essentially investigating and determining liability of colleagues and medical institutions within their local medical community, meaning decisions risk becoming tainted with extraneous conflicting considerations of personal reputational and relationship management (Harris & Wu 2005; Xi & Yang 2011; Biddulph 2015). Even though expert panels' determination and classification are not binding on courts, in practice courts will almost always defer to panel decisions (Xi & Yang 2011; Biddulph 2015). In effect, once a patient has chosen to pursue their claim through the RHMA, a panel with conflicting interests becomes the gatekeeper for whether they receive compensation in both the administrative and judicial regimes.

One key difference in RPHHCD arbitration as compared to the process under the RHMA is that expert databases are no longer established by medical associations. Instead, perhaps in an attempt to address the criticisms of the RHMA's expert databases' lack of independence, under the RPHHCD at Article 35, databases are now jointly established by the governmental health departments and the courts. However, the role of expert databases has been substantially reduced under the RPHHCD at Articles 34 and 41, since the starting point for arbitrations is to instead appoint medical associations or the courts, with no indication of who has the right to elect between medical associations and the courts. Only in situations where medical associations or the courts have no available personnel should arbitrating parties turn to the expert databases. Additionally, there are no appeal procedures against expert decisions under the RPHHCD. As such, in terms of patient protection in the selection of arbitration-conducting personnel, the RPHHCD addresses some of the problems in the RHMA, but at the same time itself creates problems.

### **Compensation**

On top of the difficulty in initiating the RHMA's arbitration process and the bias in its review mechanisms, compensation amounts recovered under the RHMA at Articles 50 and 51 have been characterized as grossly inadequate, even given China's low living standards (Xi & Yang 2011; Biddulph 2015). On the other hand, the only mention of compensation in the RPHHCD, at Article 44, is one which states that the amount is to be determined in accordance with the law, without specifying which law is to be relied on. It is therefore unclear, under the RPHHCD, whether eligibility for compensation and the amount should be guided solely by the principles of fairness, justice and timeliness as mentioned in Article 4 without elaboration; or whether it should also refer to the RHMA at Articles 2, 4, 33, 50 and 51 or elsewhere.

Low compensation amounts have been justified by the rationale that most medical institutions in China are state-owned, and compensation should be kept low to prevent resources being diverted away from the improvement and stability of the state, which the CCP views as higher in priority than the vindication of individual rights (Xi & Yang 2011). However, this rationale is defeated by the fact that patients can in practice opt to claim through the court system, which provides generally higher amounts of compensation and is perceived as relatively fair and impartial, meaning that the low compensation amounts of the RHMA and the inadequate compensation provided for in the RPHHCD have in effect deterred arbitration and also encouraged forum-shopping (Biddulph 2015).

### **The Judicial Regime: Its Issues**

In lieu of the administrative regime, aggrieved patients may seek from the court system compensation for damages caused under the Tort Liability Law 2010 (TLL) which operates within the General Principles of the Civil Law 1986. The basis of claims for medical treatment damages are set out within Chapter 7—Liability for Damages Caused by Medical Treatment—of the TLL, with specific issues clarified by the Supreme People's Court's 2017 Interpretations on Several Issues Concerning the Application of Law in the Trial of Cases of Medical Negligence Liabilities (hereafter, the Interpretations).

#### ***A More Patient-friendly Regime***

The TLL has been characterized as more patient-friendly than administrative arbitration (Xi & Yang 2011; Biddulph 2015). The reversed burden of proof in Article 4(8) of the Several Regulations on Evidence in

Civil Proceedings 2002, which required defendant healthcare workers to prove that their treatment was not negligent nor causative of medical harm, has been done away with by the TLL, albeit with the onus of proving causation of loss or injury shifted back to claimant-patients. The TLL offers safeguards, putting claimant-patients in control of establishing their own case (Xi & Yang 2011; Biddulph 2015). Article 58 sets out situations where fault on the part of the medical institution is presumed. Thus, Article 58(2) presumes fault when the medical institution hides or refuses to provide medical records in connection with a dispute, in effect creating a duty of disclosure. Article 58(3) also presumes fault if the medical institution forges, falsifies, or destroys medical records, providing further safeguards towards claimant-patients' access to records critical to their claims. The Interpretations at Article 6 give further clarification by defining 'medical records'.

In comparison to the administrative regime, the court system in practice awards higher compensation amounts, with surveys showing that courts have awarded up to three times the amount of the administrative regime for patients in comparable situations (Xi & Yang 2011). Furthermore, the TLL provides a wide scope and definitive identification for types of damage eligible for compensation, including personal injuries, disabilities and death, along with expenses for all these damages, under Article 16, and damages for mental injury and distress, under Article 22. The Interpretations clarify that patients may submit evidence of damage or seek Article 9 appraisal of damages for claims in relation to: diagnosis and treatment; insufficiency of explanation and seeking of consent by healthcare workers; and drug defects—respectively under Articles 4, 5 and 8.

### ***The Court's Role: Ambiguous, Confusing and Uncertain?***

Despite its strengths, the TLL is not without its problems. Even though it has favourable compensation amounts and clearer headings of losses compared to the administrative regime, the TLL is uncertain in its principles and methods for calculating the compensation quantum (Xi & Yang 2011; Biddulph 2015). Moreover, since the TLL does not seek to replace administrative arbitration, on a literal reading of the two together, the role of the court becomes ambiguous, providing two different measures for assessing medical negligence harm and compensation without clarification on how to reconcile situations where there is overlap. There are varying court practices across different parts of China in relation to damage assessment, some courts choosing to rely on the TLL and pre-existing judicial rules, while other courts apply the provisions of the RHMA instead (Xi & Yang 2011; Biddulph 2015).

Possible clarification of the court's role in medical negligence disputes may be found in examining another issue in the court regime, namely its high litigation costs. Legal fees and evidence gathering are expensive for ordinary citizens, with lengthy trial processes and compensation award procedures (Biddulph 2015). Admittedly, this is an issue prevalent in numerous other jurisdictions as well. However, in recent years, the concern of elevated costs caused through delays has been somewhat exacerbated by China's push for mediation, where the courts have actively participated in encouraging mediation (Biddulph 2015; Guangzhou Intermediate People's Court 2019). Court officials, bound by oath to be subservient towards the CCP and its policies, are mandated to support the party-state's policy objective of social stability, under which mediation, a harmonious non-confrontational process, has been favoured. As a result, courts have been increasingly inclined to discourage litigation and may even delay filing claim applications, because a decrease in cases tried and appealed and more cases resolved through mediation are objective quantitative measures of their locality's peacefulness and harmony, which translates to positive indications of their performance and societal management prowess. As such, being consistent with social stability coming first over the right to health, the proper question to answer in assessing the judicial regime and the role of the courts is not whether the courts successfully protect the rights of aggrieved patients, but what their role is in protecting social stability, whether they are successful in this regard and only then examining if this incidentally protects patients.

Here, the courts are bound to steer their decision-making towards the best outcomes for suppressing the roots of instability and dissatisfaction. On the other hand, in fulfilling this obligation towards social stability, there seems to be no express prohibition of discretionary departure from protecting the rights of aggrieved or harmed patients. For example, the White Paper on Medical Disputes in Guangzhou Courts 2015-2017 (the White Paper) begins at Chapter 1(1) with the comment that 'the number of cases received has declined steadily, and the relationship between doctors and patients has developed relatively harmoniously and improved'. The quantitative measures examined first within the Chapter are the number of first instance trial and appeal cases, where a fluctuating number of trial cases per year<sup>2</sup> is described qualitatively as 'steadily declining' and the number of increased cases appealed<sup>3</sup> is described as 'basically keeping

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<sup>2</sup> Number of accepted trial cases by year (year, cases): (2012, 299); (2013, 353); (2014, 555); (2015, 342); (2016, 255); (2017, 298).

<sup>3</sup> Number of appealed cases by year (year, cases): (2012, 46); (2013, 67); (2014, 99); (2015, 80), (2016, 82); (2017, 127).



steady'. These 'steadily decreasing' and 'basically keeping steady' case numbers are then conclusively equated with the improvement of doctor–patient relationships and the success of pre-trial mediation.

Chapter 2(1) goes on to state that 'the main practice of the Guangzhou court is to adapt to the situation and continue to improve the medical dispute mediation', setting out in the first paragraph the observation that:

The Guangzhou courts have made various efforts to improve and optimise the medical dispute mediation mechanism, to accurately grasp the basic laws of doctor–patient conflicts, to fully integrate various types of resources such as justice and administration, and to guiding patients to rationally safeguard their rights.

There are two points of interest in the White Paper. First, there is no mention of court litigation during discussion of the Guangzhou court's 'main practice'. The implication is that Chinese courts' role, at least for medical disputes, is not confined to administering justice objectively within courtrooms but is also inclined to pro-active dispute management in handling cases of medical negligence.

Secondly, guiding patients to safeguard their rights effectively is mentioned as one of the Guangzhou court's efforts in relation to medical dispute mediation, where mediation is part of Guangzhou court's main practice, but litigation is not. This seems to suggest that a patient choosing litigation, a contentious confrontational path, is seen to be irrational, while the CCP- and court-approved option to compromise and co-operate through mediation is rational. At the level of the individual, this suggestion is illogical, as there are situations where litigation is the more beneficial and hence the better choice, for example when wronged patients have favourable prospects of winning in litigation, and where courts may award full compensation, in contrast to receiving possibly lower amounts as a result of mediating, compromising and settling. The Guangzhou Court's statement can therefore likely be seen to mean that 'rational safeguarding of rights' includes the interests of the party-state, with mediation serving the greater good of delivering a harmonious resolution beneficial for social stability. The implication is that Chinese courts, through their perception of the utilitarian value of mediation, are endorsing an approach and societal framework where individuals should compromise their individual rights, in the interests of wider society—and in practice the courts may even actively encourage such compromise.

The courts' preference for mediation is reiterated in the RPHHCD at Article 6(2), where it states that the courts are responsible for guiding the mediation of medical disputes, raising question of whether this means

the courts should refrain from applying the TLL and instead solely rely on mediation to resolve the parties' differences.

In light of all this, aggrieved patients, even when well-informed that litigation is costly and lengthy but are still willing to pursue it, are faced with three uncertainties: first, they are uncertain whether courts will accept their claim application, since case numbers is one of the courts' important performance measures and from the judges' point of view is preferably kept low; second, knowing that courts prioritize the CCP's interests over individual rights, patients are uncertain whether courts will be aggressive or forceful in persuading them to settle through mediation, or whether they even have any real choice in the matter; and, third, they are uncertain what measures and rules courts will in practice apply in assessing damage.

Therefore, and overall, even though the court system is relatively patient-friendly compared to the administrative regime, the combined effect of the express role and implicit attitude of the court in steering patients towards mediation, together with the inherent uncertainties of the adjudicative process, means that, realistically speaking, under the current system, aggrieved patients stand the best chance of getting any sort of compensation through mediation. This is not necessarily because mediation will sufficiently protect their right to health, but because the alternative avenues of redress are less compatible with the party-state's policies and, hence, less viable for the aggrieved patient. So, while the courts have indeed successfully played their part in maintaining social stability, this has been at the cost of patients' prospects of securing their legal rights.

## Medical Mediation Issues

As noted above, China's current preferred resolution process in medical negligence (and many other types of case) is mediation (Ministry of Justice & Ors 2010; Ding 2015; Fu & Palmer 2017). Unlike the administrative and court-based adjudicative remedy systems, mediation is not focused on fault-finding and assigning compensation. Instead, it is about patients and medical institutions negotiating, co-operating and then compromising to find a settlement. The CCP and the state strongly prefer mediation over arbitration and litigation, as they view mediation as non-confrontational and harmonious, thus in line with their ideals of social stability and a conflict-free community.

Operating under the People's Mediation Law 2010, mediation has been the most popular dispute resolution mechanism (Biddulph 2015).

Despite this, China's medical dispute mediation is still in its embryonic stages, where mediation models have been separately developed and implemented by individual provincial and municipal governments, with noticeable variations (Ding 2015; Fu & Palmer 2017). Depending on patient locality, the mediatory system and approach may vary.

The People's Mediation Law 2010 and mediation models across regions are uncertain because they do not stipulate clear step-by-step procedures (Ding 2015; Fu & Palmer 2017). For example, for the model operating under the Shanghai Hospital Patient Disputes Prevention and Mediation Measures 2014, mediation applications may be refused on the ground that 'the case is otherwise considered unsuitable', without elaboration on what constitutes 'unsuitable', giving a possibly free-standing power for rejecting applications.

Patients also mistrust the mediation process's fairness, feeling that the regime facilitates hospitals' goal of minimizing compensation during negotiations, as ultimately the regime and hospital are both state-owned (Biddulph 2015). If settlement is overly aggressively encouraged, it becomes *de facto* imposition of the CCP's socialist policies on individuals, since settling requires a certain degree of abrogation of an individual's rights to health and access to justice, for the sake of the greater common good of social stability. In fact, China's settlement and mediation success rate does indicate signs of over-encouragement for settlement, being unnaturally high when benchmarked against international standards of 70-80 per cent success rate (Hong Kong Mediation Centre 2015; Cheng 2019; International Dispute Resolution and Risk Management Institute 2019; United Kingdom Centre for Effective Dispute Resolution 2019).<sup>4</sup> In comparison, China had an 88 per cent success rate for medical mediation from 2010 to 2013. Looking at three cities specifically, Shenzhen, the most modest, had an 80 per cent success rate from 2010 to 2013; followed by Shanghai at 82 per cent from 2011 to 2013; and Ningbo with 91 per cent for centres, and 93 per cent for committees from 2008 to 2013 (Wang 2014; Wenhuibao 2014; Wu 2014; Xinhua Net 2014; Ding 2015; Fu & Palmer 2017).

Although it is possible that China has a magical formula for mediation, making it a significantly more successful process than it is in other

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<sup>4</sup> Teresa Cheng, Hong Kong's Secretary for Justice, expressed the view that the 'result is encouraging' for the 62% success-rate of the West Kowloon Mediation Centre. The Hong Kong Mediation Centre, and the International Dispute Resolution and Risk Management Institute both suggest that international success rates for mediation can be as high as 70-80%. In the United Kingdom, the Centre for Effective Dispute Resolution claims a success-rate of 80%.

countries, there seems to be nothing unique about its mediation framework that might justify such a possibility. The most plausible explanation seems to be that success rates have been artificially driven up. Particularly eye-catching is that in 15 per cent of cases within the 82 per cent success rate of Shanghai the parties settled without the aggrieved patient receiving *any* compensation, begging the question of what exactly motivated those patients when they decided to settle. The observation here is that China's civil mediation situation may be similar to its very high 99.9 per cent criminal conviction rate, which has been criticized as 'a deeply flawed' justice system without procedural fairness (Connor 2016; Huang 2016). Arguably, driving up the success rate is more detrimental to mediation than it is to the criminal justice system, as mediation has emphasized harmony and reconciliation through better communication between disputing parties. Overemphasis on success rates and results-based measurements puts form over substance and defeats the instrumental value and major benefits of mediation in achieving substantive social stability.

## [D] THE BIGGER PICTURE: REACTIVE MEASURES

### Administrative and Criminal Sanctions

Apart from compensation liability, two other major outcomes in medical negligence disputes are criminal penalties and administrative disciplinary sanctions. Key rules regarding criminal measures include the Special Action Plan on Severely Cracking Down on Medical Crimes (National Health and Family Planning Commission (NHFPC) & Ors 2016); the Supreme People's Court's 2014 Opinions on Punishing Crimes Involving Medical Disputes and the Maintenance of Order in Medical Institutions; the Special Action Plan on Maintaining the Order of Health Care Practice and Penalizing Violation and Crime Targeting Doctors (NHFPC & Ors 2013); the Notice on Maintaining the Order in Health Care Institutions (Ministry of Health & Ministry of Public Security 2012); and the Notice on Further Strengthening the Administrative Work for Hospital Safety (National Health Commission 2009). The common denominator in these rules is that they are aimed at protecting medical institutions and workers by focusing on what is seen officially as the deviant conduct of patients, reiterating the possible criminal sanctions under the Criminal Law 1997 and the Security Administrative Punishment Law 2005. However, while there is a focus on punitive deterrence towards patients, these rules are silent regarding negligent healthcare workers' accountability. Criminal sanctioning of healthcare workers seems to be only available for extremely

serious cases, with a maximum three-years' imprisonment for the high threshold of gross negligence causative of death or severe harm under Criminal Law 1997, Article 335 (Harris & Wu 2005).

Outside of criminal punishment, Chinese hospitals' management cannot discipline or terminate individual healthcare workers for misconduct, as this is instead a power entirely vested in the light-touch administrative regime (Harris & Wu 2005; Xi & Yang 2011). Under the RHMA at Article 53, in the event of a breach of administrative laws where the consequence is not serious enough for criminal punishment, healthcare workers face sanctions such as demotion or lawful dismissal. The RPHHCD perhaps has the intention to give greater accountability to healthcare workers, introducing the concept of prevention in its purposes under Article 1, with Chapter 2 devoted to 'Medical Dispute Prevention'. The RPHHCD at Chapter 2 stipulates responsibilities for institutions and workers, such as abiding by medical and health laws and professional ethics, provision of training and management, proper communication regarding disclosure and management of risks, protection of medical records, and dispute resolution. The RPHHCD at Chapter 4 stipulates that the possible tangible consequences for breach of specific expressly mentioned conduct may be fines ranging from RMB10,000 to RMB100,000 together with the confiscation of illegal profits, suspension of practice for one to six months, or licence revocation. However, Chapter 4 does not make clear how the expressly mentioned conducts correspond to Chapter 2 responsibilities, or how the disciplinary sanctions of suspension and licence revocation are to be exercised.

The principles under which discretion is exercised in the imposition of disciplinary sanctions are largely unavailable for public perusal. However, reference can be taken from one publicly available draft for consultation, the Accumulated Scoring Method for Medical Institutions and Physicians in Shenzhen (Consultation Draft) 2019 (Shenzhen City Health Committee 2019). Under this draft, doctors are given 12 penalty points when a medical institution is held to be responsible in full due to the doctor's medical negligence; six points when the institution is primarily responsible because of the doctor's conduct; four points for secondary responsibility; and two points for minor responsibility. Scoring is to be reset every calendar year, and when doctors in any given year accumulate 12, 18 or 24 points they are to be issued a warning, suspended for three months, or deregistered, respectively. If a doctor is held to be fully liable for the negligent death of only one patient, they will merely receive a warning letter. For such a doctor to be deregistered, they must be fully liable in negligence for the death of two patients in a single calendar year. If this draft consultation

is representative of the administrative disciplinary framework, then it seems the disciplinary regime is extremely light touch.

### All Reactive Measures?

Viewing the system's entire suite of measures in the round, the two main forms of outcome are, first, monetary compensation for which medical institutions are vicariously liable and, second, criminal, or administrative sanctions imposed on patients. In addition, disciplinary and criminal sanctions for individual medical workers are exercised only in rare circumstances (Xi & Yang 2011; Ding 2014).

Even if we assume that all the issues discussed above are somehow resolved without compromises supportive of maintenance of social stability, the direction which the current system has taken will tend to be inefficient. The current system does not effectively deliver prevention of medical negligence, since monetary liability is vicariously borne by medical institutions, and, although they are motivated to prevent negligence in hopes of reducing liability, they lack the disciplinary powers by which to hold individual medical workers accountable for misconduct. Likewise, the light-touch administrative disciplinary framework does little to deter medical workers from negligent conduct, with a lack of motivation to minimize their own negligence.

## [E] A SUGGESTION FOR REGULATING IN CONGRUENCE WITH POLICY OBJECTIVES: GREATER NON-COMPENSATION-BASED ACCOUNTABILITY FOR HEALTHCARE WORKERS

It is appreciated that there have been monumental improvements to China's healthcare provisions, with vast resources invested into medical research, increasing quality and calibre of doctors, and the expansion of the healthcare network infrastructures. Nonetheless, regarding preventative measures, improvements in administrative regulations and supervision of healthcare culture is overdue. The benefit in regulating healthcare culture is that, even when rules are not fully stated and spelled out, workers will still take responsibility for applying them in a way that makes sense and take the initiative in patient care (Zaring 2017). The broad-brush method of regulating healthcare culture is simple: to have pull-factors incentivizing behaviour consistent with patient care and, at the same time, have push-factors deterring and penalizing misconduct.

In the context of global financial risk-culture regulation, it has been suggested that this culture may be driven by disincentivizing misconduct through greater tangible personal accountability, complemented with tangible incentives for compliance (Zaring 2017). The same suggestion can be made for China in developing healthcare culture regulation: imposing meaningful consequences for individual medical healthcare workers when they are negligent while, at the same time, having tangible incentives such as discounted professional licensing fees, or altering the structure of remuneration-based incentives to award compliance with healthcare culture instead of profit-linked performance measures.

In exploring possible meaningful consequences, it is likely that monetary accountability tied to patient compensation is sub-optimal, as this has the undesirable effect of patients being unable to fully recover awarded compensation if the individual liable cannot afford it. The straightforward suggestion here is to create a stricter, standardized set of administrative disciplinary rules which are prescribed by law, transparent and available to the public, eliminating the discretion of local administrators in exercising disciplinary sanctions, with lower-threshold meaningful consequences through longer suspensions and deregistration.

## [F] CONCLUSION

China's healthcare system has progressed far, at a very rapid rate. However, medical negligence and disputes are still perceived as threats to social stability, with China focused on optimizing the effectiveness of dispute resolution regimes as reactive measures. It is suggested that, as compared to reactive measures, preventative measures are more congruent with efficient safeguarding of social stability and may be implemented by regulating healthcare culture through imposition of greater non-compensation-based accountability for individual healthcare workers. China can take a leaf from the metaphorical book of Han dynasty idioms, and to 'mend the fence after the sheep are lost'. It is important to remember that overemphasis on damage control and suppressing dissent is not effective in the long run, and that stability may be better achieved by addressing, in the first place, the root causes of dissent.

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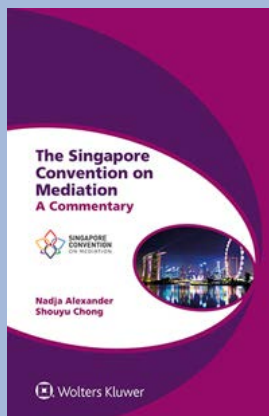
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**NADJA ALEXANDER AND SHOUYU CHONG (2019)**  
***THE SINGAPORE CONVENTION ON MEDIATION***  
**—A COMMENTARY**

LING ZHOU

Associate Research Fellow, IALS, University of London

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Nadja Alexander and Shouyu Chong (2019) *The Singapore Convention on Mediation—A Commentary* is published by Wolters Kluwer: Alpen aan den Rijn in hardback, priced at £141 ISBN: 978-94-035-1481-9

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Adopted in December 2019, the United Nations (UN) Convention on International Settlement Agreements resulting from Mediation (also known as the Singapore Convention on Mediation—the ‘Convention’) applies to international settlement agreements resulting from mediation (‘settlement agreement’). By 12 September 2020 it had been signed by 53 states and entered into force. States signatories to the Convention include two with the largest economies in the world, namely the United States and China. The fact of the Convention will likely encourage global attention on Singapore, and the accession to the Convention of China and the United States in particular will very probably enhance Singapore’s profile as a major international dispute resolution centre in the Asia-Pacific region.

Although not an official commentary, the examination and explanation of the Convention in the excellent book (2019) *The Singapore Convention on Mediation—A Commentary* by Professor Nadja Alexander and Shouyu

Chong comes close to being such a document (especially with its endorsement by Anna Joubin-Bret, The Secretary, UN Commission on International Trade Law (UNCITRAL), and Director, International Trade Law Division, UNCITRAL) and certainly will assist lawyers and parties engaged in international commercial transactions in drafting dispute resolution clauses and in handling disputes which have already arisen where the parties are inclined to seek to conclude their disagreement with an international mediated settlement agreement. The book shows how the 2018 Convention builds on the work of UNCITRAL over a period of some four decades in seeking the better handling of international commercial disputes and enforcement of mediation agreements. The 1980 UNCITRAL rules on conciliation were followed, after some two decades' experience, by the introduction in 2002 of the Model Law in International Commercial Conciliation, and then, after another nearly two more decades of experience, the Singapore Convention was introduced. The latter is characterized as a product of negotiation and consensual decision-making, following a proposal by the United States delegation at UNCITRAL. The Convention aims at providing an international framework for mediation of commercial disputes that would be appropriate for party-states regardless of their legal cultures and degree of economic development.

The study by Alexander and Chong provides a detailed (article by article) and insightful commentary on the Convention. The authors encourage us to see the Convention as offering a framework that will encourage greater use of mediation in international commercial dealings, as well as an understanding of key provisions that will assist legal practitioners and parties in dispute. The authors provide, in a substantial opening chapter, an exploration of the context within which the Convention emerged and was drafted by Working Party II within UNCITRAL. It also provides a concise and helpful explanation of the nature and role of UNCITRAL, as an international agency set up in 1966 as a subsidiary body of the UN General Assembly, and intended as a mechanism for unifying and harmonizing international trade law, and status and diffusion of its model normative documents.

An insightful commentary is also provided in the introductory chapter on the 'Object and Purpose of the Convention' and the international law context of the Convention, as well as issues of enforcement (considered to be important worries that have helped to create the Convention) and future development. Thus, attention is given to issues arising from several provisions in Article 5, dealing with mediator (mis)conduct as a ground for refusal of relief, and suggestions are made on how the Convention might serve as an important template for states looking to adopt effective

and comprehensive mediation systems for commercial disputes. The text of the Convention itself is provided at Appendix A, and at Appendix B is the revised UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 (amending the UNCITRAL Model Law on International Commercial Conciliation, 2002). The heart of the book is, however, an examination of the specific provisions of the Convention—for most of the 16 articles in the Convention a whole Chapter is in effect provided. The exception is Article 5, concerning Grounds for Refusing to Grant Relief. This is dealt with in four separate entries and, at over 60 pages in length, may be seen as the core element in the book. Strong analysis is accompanied by illustrative case materials. It examines enforcement mechanisms and the bases for refusal to allow relief: contract-related, mediator (mis)conduct, public policy and subject-matter related reasons. More generally, issues covered include: international mediated settlement agreements as an innovative form of legal instrument in international law; the bearing of the Convention on private international law; the meaning of ‘international’ in the types of dispute covered by the Convention; the kinds of settlement agreements that may be characterized as within the scope of the Convention; the possibilities for contracting states to declare reservations; the enforcement processes that may be used under the provisions of the Convention; the absence of a seat of mediation; the approach taken to recognition and enforcement of international mediated settlement agreements by the Convention; and the latter’s connection to other international instruments such as the UN Model Law on International Commercial Mediation and the New York Convention on Arbitration.

As the authors point out on their first page, the Singapore Convention has the capacity to enhance the attractiveness of mediation within regional initiatives, such as China’s Belt and Road Initiative. With the development of the Belt and Road, Singapore has been able to push its own professional service strengths in Southeast Asia in the fields of finance, trade and legal affairs. As a place of choice for dispute resolution, Singapore has been increasingly favoured by international commercial entities. Thus, for example, the Singapore International Arbitration Centre (SIAC) is now one of the world’s most important arbitration institutions. To support the development of mediation in the commercial field, Singapore established the Singapore International Mediation Center (SIMC) in 2014. This is in effect a supplement to the SIAC and the Singapore International Commercial Court. Through the establishment of these three entities, Singapore provides a robust set of dispute resolution solutions for parties involved in cross-border disputes. The introduction of the Singapore

Convention will likely further Singapore's strengths, especially in relation to its rivalry with Hong Kong, which has also been attempting to promote itself over the past decade or so as an international centre for dispute resolution. And yet, Hong Kong too may be strengthened by the Convention and China's participation in the Convention, as Hong Kong is drawn in increasingly to the planning and development of the Greater Bay Area in Guangdong Province. The area's development plans include the creation of a diversified ('multi-door') dispute resolution mechanism in the Greater Bay Area, giving Hong Kong greater access to legal services in the mainland. This is in turn likely to assist Hong Kong to maintain a strong position as an international legal and dispute resolution service centre in the Asia-Pacific region. China's signing and accession to the Singapore Convention means that China will recognize and implement settlement agreements generated through commercial mediation, including a large number of settlement agreements for various commercial disputes brought about by the investment and construction of the Belt and Road Initiative, and the mainland authorities are likely to prefer Hong Kong to Singapore as a centre for resolving such disputes, especially where Hong Kong has collaborative projects for dispute resolution with closely neighbouring Shenzhen.

The Singapore Convention is an innovation in international commercial dispute resolution, and the excellent examination offered in the Alexander and Chong book will doubtless assist dispute resolution professionals and others in understanding the workings of the Convention. The book is also a major step forward in the academic analysis and discourse of international commercial mediation and, therefore, an important contribution to the study of ADR processes.

## NEWS AND EVENTS

COMPILED BY ELIZA BOUDIER

University of London

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### Building Transformation Project Update

The second and final phase of works has started on the lower floors of Charles Clore House.

Phase 2 will include new lighting on the book storage floor, the transformation of the toilets on the three lower floors and the upgrading of the Institute's Archive Storage facility.

The Institute is grateful to all who have donated towards the IALS Transformation Project. Sincere thanks go especially to the Clore Duffield Foundation for its incredibly generous gift of £500,000. The Foundation's association with IALS began in 1970 when Sir Charles Clore, one of Britain's most successful post-war businessmen and philanthropists, donated significant funds to the University of London towards the new building for IALS. Charles Clore House was officially opened in 1976 with both Sir Charles and his daughter Vivien Duffield attending the opening ceremony. After Sir Charles' death in 1979, Vivien Duffield assumed the Chairmanship of the Foundation and created her own Foundation in 1987 with the aim

of continuing her family's history of philanthropy. The two Foundations were merged in 2000 to become the Clore Duffield Foundation. The Clore Duffield Foundation has funded more than 65 museums, galleries, heritage and performing arts learning spaces across the UK since 2000.

### ILPC Annual Lecture and Annual Conference: 'AI and the Rule of Law: Regulation and Ethics'

Lord Clement Jones CBE delivered a timely and fascinating International Law and Policy Centre (ILPC) Annual Lecture for 2020 entitled: 'AI: Time to Regulate?'

Lord Clement-Jones is a consultant of DLA Piper where former positions held include London managing partner (2011-2016), head of UK government affairs, chairman of its China and Middle East Desks, international business relations partner and co-chairman of Global Government Relations. He is chair of Ombudsman Services Limited, the not-for-profit, independent ombudsman service that provides dispute resolution for the communications, energy, property and copyright licensing



industries. He is a member of the Advisory Board of the Association of Insurance and Risk Managers in Industry and Commerce and board member of the Corporate Finance Faculty of the Institute of Chartered Accountants in England and Wales where he also chairs its Artificial Intelligence (AI) in Corporate Advisory–Expert Consultative Group. He is a founder member of the OECD Parliamentary Group on AI and a member of the Council of Europe’s Ad-hoc Committee on AI. He is also a senior fellow of the Atlantic Council’s GeoTech Center which focuses on technology, altruism, geopolitics and competition.

The ILPC Annual Lecture 2020 launched the successful first online two-day [ILPC Annual Conference 2020](#) which had more than 300 registered attendees. Topics discussed and debated included:

- ◇ accountability and transparency in AI systems
- ◇ automated decision-making and privacy rights
- ◇ data ethics and innovation
- ◇ surveillance and data privacy
- ◇ online harms and the regulation of social media
- ◇ predictive policing
- ◇ data-driven responses to Covid-19

Other key speakers from academia, policymaking, and legal practice at the conference included:

- ◇ Ellis Parry (Information Commissioner’s Office)
- ◇ Professor Joanna Bryson (Hertie School, Berlin; University of Bath)
- ◇ Dr Julian Huppert (University of Cambridge; Home Office Biometrics and Forensics Ethics Group)
- ◇ Graham Smith (Of Counsel, Bird and Bird)
- ◇ Dr Michael Veale (lecturer in digital rights and regulation, UCL)
- ◇ Hamed Haddadi (Imperial College London; Brave Software)
- ◇ Professor Lorna Woods OBE (University of Essex)
- ◇ Carly Kind (director, Ada Lovelace Institute)

Lord Clement Jones’ lecture and selected academic papers from the ILPC Annual Conference’s interdisciplinary plenary sessions and panels, presented by academic experts across the UK, Europe, Africa, Asia and North America, will be featured in the peer-reviewed journal of [Communications Law](#) (published by Bloomsbury) forthcoming in 2021.

Live recordings from the two-day conference, including Lord Clement Jones’ lecture, are available to watch now on the [IALS website](#).

## Legislative Drafting Course: Sir William Dale Centre

The dates for the 2021 IALS Legislative Drafting Course are 21 June-16 July 2021. For the first time since its inception in 1964 the course will be delivered online because of the Covid-19 restrictive measures. The fees for 2021 have also been reduced so this year is a great opportunity for all those who wish to attend but cannot normally do so because of the distance or cost. For details, see the [Brochure and Application Form](#).

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## Selected Upcoming IALS Events

### ***The Director's Seminar Series: Law and Humanities in a Pandemic***

#### **Pandemic Planning, Models and Regimes of the Body**

**Wednesday 17 February 2021**

**13:30 GMT:** online seminar (Zoom)

'Masking Then and Masking Now: Compliance and Resistance during the 1918-1919 Influenza Pandemic' by David Carter, University of Technology Sydney, and Mark De Vitis, University of Sydney.

'Models and Lawmaking: Knowledge, Trust and Authority in a Pandemic' by Ting Xu, University of Essex

### **(Re)Imagining the Human Condition through Covid-19**

**Tuesday 16 March 2021 18:30**

**GMT:** online seminar (Zoom)

'Covid-19 and the Legal Regulation of Working Families' by Nicole Busby, University of Glasgow, and Grace James, University of Reading

'Playing with Wench Tactics: Thinking about Rhythm, Routine and Rest in Decelerating University Life after the Pandemic' by Ruth Fletcher, Queen Mary University of London

'Law, Every Day Spaces and Objects, and Being Human' by Jill Marshall, Royal Holloway, University of London

### **Gendering the Pandemic**

**Wednesday, 21 April 2021:**

15:00 GMT: online seminar (Zoom)

'Women, Violence and Protest in Times of COVID-19' by Kim Barker, The Open University, and Olga Jurasz, The Open University

'Bahraini Family Laws During the COVID-19 Pandemic: Questioning the Re-emergence of Gendered and Sectarian Identities' by Fatema Hubail, Georgetown University in Qatar

'Law's Invisible Women: The Unintended Gendered Consequences of the COVID-19 Lockdown' by Lynsey Mitchell, University of Abertay, and Michelle Weldon-Johns, University of Abertay

### **The Margins and the (Epi)Centres: Place, Space and the Pandemic**

**Wednesday, 19 May 2021 1800**

**GMT:** online seminar (Zoom)

‘Ethical Limits of Pandemic Governance: International Refugee and Human Rights Law Redefined?’ by Nergis Canefe, York University

Pandemic, Humanities and the Legal Imagination of the Disaster’ by Valerio Nitrato Izzo, University of Naples Federico II

‘The Pandemic and the Ship’ by Renisa Mawani, University of British Columbia, and Mikki Stelder, University of British Columbia & University of Amsterdam

### ***W G Hart Legal Workshop 2021: New Perspectives on Jurisdiction and the Criminal Law***

**26 April 09:30 to 28 April 2021**

**16:00:** online workshop (Zoom)

**Academic Directors:** Professor Lindsay Farmer (University of Glasgow), Professor Julia Hörnle (Queen Mary, University of London), Dr Micheál Ó Floinn (University of Glasgow), Professor David Ormerod QC (Law Commissioner and University College London)

**Speakers include:** Alejandro Chehtman (University Torcuato di Tella, Argentina), Mireille Hildebrandt (Vrije Universiteit

Brussels), Uta Kohl (University of Southampton), Katalin Ligeti (University of Luxembourg), Clare Montgomery QC (Matrix Chambers), Cedric Ryngaert (University of Utrecht), Ian Walden (Queen Mary, University of London)

In recent years there have been significant challenges to traditional concepts of jurisdiction in the criminal law. The increasing complexity of certain financial transactions and the advent of technologies like cryptocurrencies have raised questions about where conduct has taken place, and the authority of certain nationally based agencies to investigate and prosecute offences. In response, states have claimed jurisdiction over conduct on contested grounds of ‘extraterritorial’ jurisdiction and tenuous interpretations of the concept of territoriality. Jurisdictional concurrency over offences is increasingly commonplace, with negative and positive conflicts of jurisdiction each raising complex legal and policy issues which impact the efficacy of the criminal law.

The academic literature on jurisdiction has been slow to respond to these challenges. There is an extensive practical/practitioner literature, primarily focused on the development of solutions to issues as they come up in practice, while other jurisdictional debates are occurring in academic silos without

broader engagement with the overarching concepts. The concept of territorial jurisdiction remains central to both the investigation and prosecution of criminal offences today notwithstanding the new developments. The aim of the workshop is to bring together practitioners and academics to reflect on the challenges to concepts of jurisdiction and to stimulate new perspectives on jurisdiction and the criminal law.

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## How to get a PhD in Law—National Research Training Days

IALS offers a popular ‘How to get a PhD in Law’ programme of national research training days to assist MPhil and PhD students in law registered at universities across the UK. In 2021 The programme will be held online.

### **Day 1: Thursday 18 March 2021 10:00-16:30**

The PhD journey: supervision, research ethics and preparing yourself for upgrade and vivas

### **Day 2: Friday 30 April 2021 10:00-16:30**

The PhD in law and research methods

### **Day 3: Wednesday 26 May 2021 10:00-16:30**

Researching, disseminating and publishing in the digital world

## Podcasts

Selected law lectures, seminars, workshops and conferences hosted by IALS in the School of Advanced Study are recorded and accessible for viewing and downloading from the [SAS IALS YouTube channel](#).

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## CONTRIBUTORS' PROFILES

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### LESLEY ALLPORT

Lesley Allport has had a long career in mediation, including mediation training (for more information see [www.ladr.net](http://www.ladr.net)) and regulation. Working initially as a family mediator in the 1980s, she has been involved in developing new areas of practice, such as special educational needs and disability conciliation, and gives public service on various boards and committees. She mediates conflicts within families, education and workplace disputes, has experience in community mediation and is trained to mediate in cross-border family disputes and parental child abduction cases. In 2016 Dr Allport was successfully awarded her PhD at Birmingham University Law School, which involved empirically researching the comparative growth of mediation by looking at mediators working across a variety of contexts and identifying core common aspects of mediation practice. Email: [lesley.allport@ladr.net](mailto:lesley.allport@ladr.net).

### PATRICK J BIRKINSHAW

Patrick Birkinshaw is Emeritus Professor of Public Law at the University of Hull. He was Editor in Chief of the quarterly journal *European Public Law* between 1995 and 2018. He has authored

numerous books including: *Government and Information* (with Dr Mike Varney 2019) and *European Public Law—The Achievement and the Brexit Challenge* (2020). He worked as a specialist adviser to the Commons Public Administration Select Committee and frequently acted as a government adviser. He was a member of the transparency team for Nirex and the Nuclear Decommissioning Authority and was an ombudsman on information requests. He has worked on several national research councils. Email: [p.birkinshaw@emeritus.hull.ac.uk](mailto:p.birkinshaw@emeritus.hull.ac.uk).

### MATTHIEU BURNAY

Matthieu Burnay is a Senior Lecturer (Associate Professor) in Global Law at Queen Mary University of London. He is also a Visiting Professor at Beijing Normal University and Paris 1 Pantheon-Sorbonne, as well as an Associate Researcher at the Leuven Centre for Global Governance Studies, University of Leuven. He has an interdisciplinary background in law, political science and history. He holds a PhD in Law from the University of Leuven and a Double MSc degree in International Affairs from Peking University and the London School of Economics. His main research interests are in

global law and governance; the study of the political and legal aspects of EU–China relations in global governance; as well as the comparative study of the rule of law in Europe and Asia. His recent publications include *Chinese Perspectives on the International Rule of Law: Law and Politics in the One-Party State* (Edward Elgar 2018). Email: [m.burnay@qmul.ac.uk](mailto:m.burnay@qmul.ac.uk).

#### DING CHEN

Ding CHEN is currently a Senior Lecturer at the School of Law, University of Sheffield, and a Research Associate at the Centre for Business Research, Cambridge University. She has undertaken extensive research on law and development, with a particular interest in the rule of law, corporate finance and corporate governance. Email: [ding.chen@sheffield.ac.uk](mailto:ding.chen@sheffield.ac.uk).

#### LISAMARIE DEBLASIO

Dr Lisamarie Deblasio is a Lecturer in Law at the University of Plymouth. Her research interests include public child law, domestic abuse prevention and the impact of the law on vulnerable groups of women. Email: [lisa.deblasio@plymouth.ac.uk](mailto:lisa.deblasio@plymouth.ac.uk).

#### YU MOU

Dr Yu Mou is a Lecturer in Criminal Law at SOAS, University of London. Her research interests lie in comparative criminal justice, especially in the country of China. Her work focuses on the criminal

justice system in China, which is set within a broad range of contexts of political, occupational and legal cultures, from the value of deference to authority, hierarchical structures, retribution and deterrence, to the integration of these into the state apparatus which determine the way state power is exercised. She is the author of a book entitled *The Construction of Guilt in China: An Empirical Account of Routine Chinese Injustice* which won the Society of Legal Scholars Peter Birks Prize for Outstanding Legal Scholarship 2020. Email: [ym19@soas.ac.uk](mailto:ym19@soas.ac.uk).

#### EVA PILS

Eva Pils is Professor of Law at [King's College London](#) and an affiliated scholar at the [US–Asia Law Institute](#) of New York University Law School. She studied law, philosophy and sinology in Heidelberg, London and Beijing and holds a PhD in law from University College London. Her current research addresses autocratic conceptions and practices of governance and dimensions of legal and political resistance. Her most recent book, *Human Rights in China: A Social Practice in the Shadows of Authoritarianism*, was published in 2018 by Wiley. At King's, she teaches courses on human rights; law and society in China; and authoritarianism, populism and the law. Before joining King's in 2014, Eva was an associate professor at The Chinese University of Hong

Kong Faculty of Law. She has held visiting appointments at École des Hautes Études en Sciences Sociales (Paris) and at Columbia University (New York) and is a legal action committee member of the [Global Legal Action Network](#). Email: [eva.pils@kcl.ac.uk](mailto:eva.pils@kcl.ac.uk).

#### CEDRIC TANG

Cedric Tang is a Postgraduate Certificate in Laws (PCLL) candidate of the University of Hong Kong (HKU). He graduated with a Juris Doctor (JD) (Hons) from HKU, a Master of Pharmacy (Hons) from University College London (UCL) and is a UK and HK registered pharmacist. He has experience in a multi-national pharmaceutical corporation and community pharmacy settings and has published in the pharmacy-field. Email: [ctang92@connect.hku.hk](mailto:ctang92@connect.hku.hk) and [cedrictang92@gmail.com](mailto:cedrictang92@gmail.com).

#### RICHARD K WAGNER

Richard Wagner is a lawyer in private practice focusing on China-related disputes and investigations. He has acted as lead counsel, consulting lawyer, or worked behind the scenes for many ground-breaking cases in China-related litigation and arbitration in the United States and in Asia. He is known for testing new theories and processes, including on issues of first impression related to electronic evidence in Chinese courts, the attorney-client privilege in a China context, People's Republic of China (PRC) state secrecy and

blocking statutes implicated in US litigation, and the enforcement of US court judgments in China. He has served as a Chinese law expert in numerous US and foreign proceedings, including several which have concerned Article 277 of the PRC Civil Procedure Law, the subject of his article in this journal. Richard has law degrees from the George Washington University School of Law (JD, 2002) and SOAS (LLM, Chinese law, 2008) and was formerly a visiting scholar with the East Asian Legal Studies Center of the University of Wisconsin Law School. Email: [rkwagner@rkwnet.com](mailto:rkwagner@rkwnet.com).

#### FAYE F WANG

Faye Fangfei Wang is Senior Lecturer in Law at Brunel University London. Her research interests include cyberlaw, digital intellectual property rights, commercial law, comparative law and alternative dispute resolution. Her research considers how law is challenged by the innovation of technology in both common and civil law systems. She has published five monographs in these fields. Her latest book, *Online Arbitration* (Routledge) was released in 2017, examining the legal feasibility of online arbitration in the age of artificial intelligence. She has also written quarterly Europea Union reports on intellectual property (IP) law for the IP Society of Australia and New Zealand and its journal from 2009 to 2019. She served as

Convenor of the Cyberlaw Section for the Society of Legal Scholars in the UK from 2009 to 2016. Email: [faye.wang@brunel.ac.uk](mailto:faye.wang@brunel.ac.uk).

#### LING ZHOU

Ling Zhou is an Associate Research fellow at the Institute of Advanced Legal Studies, Research Associate at the Qianhai Institute for Innovative Research (QIIR) in Shenzhen, and also a post-doctoral Fellow at the China Centre for Special Economic Zone Research, Shenzhen University (SZU). Her main research interests include civil justice and dispute resolution, socio-legal studies, consumer protection and Chinese legal development. She gained her DPhil in Law from Oxford University in 2018, where for her dissertation she conducted empirical research, examining various types of dispute process and their effectiveness in

responding to consumer grievances and complaints in mainland China. Her monograph on consumers' access to justice in China was published by Hart in 2020. At QIIR, she leads government projects concerning harmonization of rules in the Greater Bay Area in China, and at SZU she works on financial consumer protection, especially protection for consumers' personal financial information. Her most recent publications include (2020) 'Access to Justice in Higher Education: The Student as Consumer in China' 244 *The China Quarterly* 1096-1117 and 'Unrepresented Parties as Professionals in China's Consumer Dispute Processes' in Moscati, Palmer & Roberts (eds) (2020) *Comparative Dispute Resolution* Edward Elgar. Email: [ling.zhou@sas.ac.uk](mailto:ling.zhou@sas.ac.uk).



## VISUAL LAW—THREE COURTS IN SHENZHEN, CHINA

LING ZHOU

Associate Research Fellow, IALS, University of London

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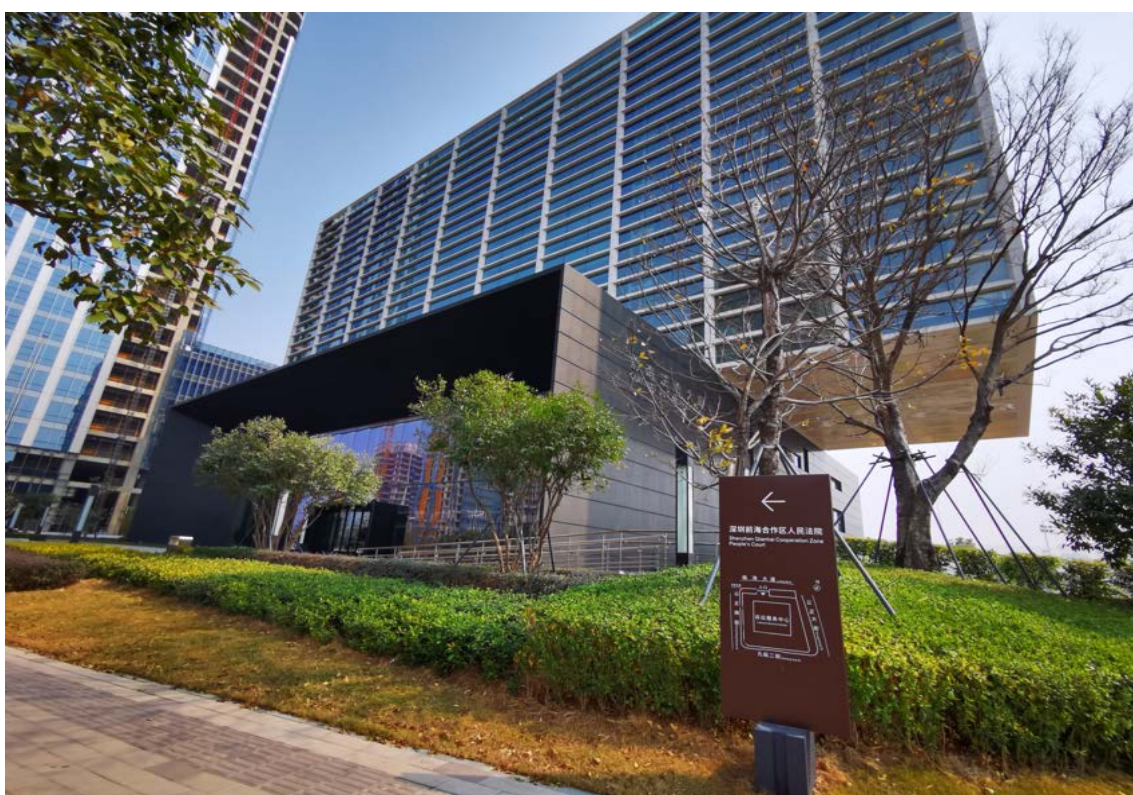
Situated in southern China, neighbouring Hong Kong, Shenzhen has become one of the most rapidly growing urban areas in the world, following its establishment in 1979 as China's first Special Economic Zone. With an official population of some 12 million—and unofficial estimates suggesting that 20 million is a more accurate figure—Shenzhen has grown exponentially as an experimental centre for China's economic reforms and engagement with the outside world. In its efforts to integrate China's socialist system with a market economy and international investment and trade, it has grown into a major component of the Greater Bay Area (Pearl River Delta) and is also an arena for significant judicial innovation in response to China's economic transformation. It is a key centre for technological and financial innovation and is sometimes characterized as China's Silicon Valley, and at other times as China's Manhattan. A billboard celebrating the former Chinese leader and initiator of economic reform, Deng Xiaoping, continues to be on display more than 20 years after his death. Shenzhen enjoys very close business, trade and social ties with Hong Kong<sup>1</sup> and has become a strategically important arena for handling the Hong Kong–mainland relationship.

Within Shenzhen itself there is an innovative pilot project intended to foster these ties and officially called the Qianhai Shenzhen–Hong Kong Modern Service Industry Cooperation Zone. The basic-level People's Court, established in December 2014 in Qianhai, exercises jurisdiction over Shenzhen's commercial cases that involve Hong Kong, Macau, Taiwan or foreign parties. It is the most used forum for handling Hong Kong-related cases in the whole of China. The Qianhai Court has attempted to put into place innovative and important judicial reforms. These

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<sup>1</sup> For an excellent analysis of Shenzhen's development see O'Donnell & Ors (2017). See also my studies of the consumer protection in Shenzhen: Zhou 2017, 2020a, 2020b, 2020c and, more generally, 2020d.

include: firstly, allowing Hong Kong residents to join its three-member collegiate panel (as people's assessors) to deal with Hong Kong-related cases; secondly, employing Hong Kong legal and other practitioners as mediators for handling Hong Kong-related cases; and, thirdly, allowing parties (where there is mutual agreement) to choose to apply Hong Kong law for the handling of Hong Kong-related cases. As it has an important role in the resolution of cross-border cases, the Qianhai Court carries out a great deal of research into foreign law, appoints judges who have received degrees from universities in common law jurisdictions and has established partnerships with arbitration and mediation institutes in Hong Kong and also Belt and Road Initiative<sup>2</sup> jurisdictions.



*The Qianhai basic-level People's Court*

As part of a robust programme of judicial reform, in January 2015 China's Supreme People's Court (SPC) established its First Circuit Court in Shenzhen. This Circuit Court has a broad geographical jurisdiction, covering the provinces of Guangdong, Guangxi and Hainan. Cases decided by the Circuit Court are deemed to have been decided by the SPC itself, and the purpose of such courts is to try to avoid unwelcome local pressures on judicial decision-making. Indeed, in its early years, some potential plaintiffs and appellants misunderstood the court to be part of the Central Inspection Team of the Communist Party and therefore sent

<sup>2</sup> On China's Belt and Road initiative, see, for example, OECD 2018.

in petitions and other requests that fell well outside the Circuit Court's jurisdiction. The Circuit Court's jurisdiction is narrower than that of the SPC itself, focusing on handling first instance and administrative, criminal and commercial appeal cases, and foreign, Hong Kong, Macau and Taiwan-related cases requiring judicial assistance—but cases of a sensitive nature, concerning, for example, review of death penalty, state compensation, execution of judgments and intellectual property, remain the responsibility of the SPC in Beijing.

As a major addition to the family of 'international commercial courts' around the world, the SPC also established a China International Commercial Court (CICC), in effect competing with tribunals such as the Dubai International Financial Centre (DIFC), the Singapore International



*Lawsuit Service Centre of the Supreme People's Court First Circuit Court in Shenzhen*



*The CICC under construction*

Commercial Court (SICC) and the Astana International Financial Centre (AIFC). However, unlike DIFC, SICC and AIFC, as a branch of the SPC of China, CICC does not welcome the idea of hiring international judges, while nevertheless using English, where possible, in the handling of cases. Thus, CICC judges need to be proficient in both English and Chinese, and, with parties' agreement, materials prepared in English may be submitted directly to the court without translation.<sup>3</sup> Among its special innovations are provisions which allow determination of disputes over the validity of arbitration agreements, saving parties' time by removing the need to go through lower-level courts. The CICC is intended to handle international commercial cases, especially for Sino-foreign disputes on international trade and investment, or Belt and Road project disagreements. Currently, the CICC is lodged in the same building at the SPC First Circuit Court, in Luohu District, but in due course the two courts will move to their own grand premises in Qianhai.

<sup>3</sup> See Holloway (2020) for further details of the CICC and its comparative significance.

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