

# Lawyers' Rights Watch Canada

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Lawyers Rights Watch Canada (LRWC)

Contact: Gail Davidson

[lrwc@portal.ca](mailto:lrwc@portal.ca)

Tel: +1 604 738 0338

Fax: +1 604 736 1175

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## **Universal Periodic Review of China: Report of Lawyers Rights Watch Canada (LRWC)<sup>1</sup>**

1. This report details the complete failure of the rule of law<sup>2</sup> in China through:
  - a. the absence of an independent judiciary and the required safeguards that would enable lawyers and other human rights defenders to pursue lawful human rights advocacy free from harassment, intimidation, censure and punishment by the government of China; and,
  - b. China's use of the courts and of criminal and civil law to prevent human rights enforcement and to punish lawyers and other human rights defenders attempting to enforce human rights in situations that question state actions or policy.
2. China ranks among the worst violators of human rights among the international community of nations. The Chinese Communist Party (CCP) governs China.
3. China routinely jails, tortures, and in some cases kills citizens for exercising rights purportedly guaranteed by the *Constitution of the People's Republic of China* (Constitution), such as freedom of speech, assembly, and religion. Suppression of these rights by the CCP is compounded by the fact that virtually all Chinese human rights lawyers and defenders who attempt to provide representation to citizens whose only "crime" has been to practice their

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1. Lawyers Rights Watch Canada (LRWC) is a committee of Canadian lawyers who promote human rights and the rule of law internationally by providing support to lawyers and other human rights defenders in danger because of their advocacy.

<sup>2</sup> Defined by the International Commission of Jurists as, "The principles, institutions and procedures, not always identical, but broadly similar, which the experience and traditions of lawyers in different countries of the world, often having themselves varying political structures and economic backgrounds, have shown to be important to protect the individual from arbitrary government and to enable him to enjoy the dignity of man.". Defined by P. Sieghart as, "the principle which requires that there should be laws which lay down what the state may and may not do and by which one can test whether such power which it claims, or any particular exercise of such power is legitimate and a system of courts independent of every other institution of the state, including the legislators and the executive, which interprets and applies those laws.", *International Human Rights Law*, cited in Lord Elwyn-Jones, "Judicial Independence and Human Rights" in R. Blackburn & J. Taylor, eds., *Human Rights for the 1990s: Legal and Political and Ethical Issues* (London: Mansell, 1991) at 44.

religion, or to express an opinion which differs from that of the CCP, are themselves subjected to the same reprisals as were their clients. (APPENDIX I) In the case of Falun Gong practitioners, lawyers are forbidden to provide representation, whether in defense of criminal prosecutions or in bringing court actions against parties which have violated their rights. Moreover, the CCP has forbidden Chinese “courts” from accepting lawsuits on behalf of Falun Gong practitioners.

4. Lawyers and human rights defenders attempting to represent individuals or groups targeted by Chinese authorities are subjected to reprisals, including: confiscation of or refusal to re-issue licenses to practice law (tantamount to disbarment), preventing attendance at “trial”, arbitrary arrest and detention, attacks by police and agents of local authorities, malicious prosecutions, representation by public defenders incapable or unwilling to provide defense. It is commonplace for a lawyer representing a person in dispute with the state to be charged with a completely specious “criminal” offence, and then in turn for the lawyer defending the first lawyer to be similarly charged, resulting in the imprisonment of both lawyers, along with the original client. (Appendix II)

5. In some countries, state authorities are attempting to protect victims of human rights violations but lack either the state machinery to do so, or the means to educate lower level functionaries, police, prosecutors, and courts about basic human rights norms. In China, it is the Chinese Government (the CCP) itself which orders the violations as a matter of policy. LRWC and other organizations charged with protecting human rights and exposing violations often petition the Chinese government and its leaders to immediately and thoroughly investigate grossly illegal and reprehensible human rights violations. No reply is ever received.

6. The practices described in paragraph 1 above violate a number of domestic law and international principles binding on China including: the *Constitution of the People’s Republic of China* (Constitution), the *Universal Declaration on Human Rights* (UDHR), the *Basic Principles on the Role of Lawyers*, the *Declaration on Human Rights Defenders*, the *International Covenant on Civil and Political Rights* (ICCPR), the *Basic Principles on the Independence of the Judiciary* and the *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT).

7. Violations of the Constitution include:

a. Article 126 guarantees judicial independence, yet Chinese “courts” continue to function simply as lower level administrative organs of the CCP, and judges perform no independent judicial function whatsoever.

b. Articles 35 and 36 together guarantee freedom of speech, religion and assembly. But those who put these guarantees to the test face savage beatings at the hands of police, criminal charges on vague grounds such as “inciting public disorder”, “subversion of the state”, “spreading false rumours”, etc., and incarceration.

c. The Constitution also guarantees that Chinese citizens shall be free of discrimination by reason of political belief. Yet anyone who expresses a political opinion at odds with CCP policy or teachings incurs severe reprisals from the authorities and virtually no one may be appointed as a “judge” in China’s “courts” if he is not a Party member.

8. Violations of UDHR include:

a. Article 1 stipulates that all citizens have the right, “individually or collectively to promote the protection and fulfillment of human rights and fundamental liberties at the national and international levels”. Yet the Chinese Government consistently imprisons and tortures those attempting to do so.

b. Article 10 provides that “everyone is entitled to...a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.” Yet impartial and independent tribunals are non-existent in China, as are fair and public hearings. All courts are constitutionally accountable to the People’s Congress and thereby accountable to the CCP.

9. Violations of the *Basic Principles on the Role of Lawyers* include:

a. Article 16 requires that “Governments shall ensure that lawyers are able to perform all their professional functions without intimidation, hindrance, harassment or improper interference”. The CPP routinely intimidates, hinders, harasses, and improperly interferes with lawyers and other human rights defenders attempting to carry out their completely lawful duties. Virtually all members of the Chinese human rights bar at present are either incarcerated, under house arrest, disappeared, disbarred, or under heavy-handed intimidation and harassment. (Appendix I)

b. Article 17 provides that “Where the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities”. Again, the “authorities” in China constitute the problem.

10. Violations of the *Declaration on Human Rights Defenders* include:

a. Article 9(5) requires the Chinese Government to conduct prompt, impartial and effective investigations into the coercive measures taken against all these Human Rights defenders. Again, this cannot happen in China because the Chinese Government is itself the perpetrator and to this point has never exhibited any propensity to investigate itself.

b. Article 12(2) requires, “The state shall take all necessary measures to ensure the protection by the competent authorities of everyone, individually and in association with others, against any violence, threats, retaliation, defacto or de jure adverse discrimination, pressure or any other arbitrary action as a consequence of his or her legitimate exercise of the rights referred to in the present Declaration”. It is the Government of China which orders attacks on and prosecutions and arrests of lawyers and other human rights defenders.

11. Violations of ICCPR include:

a. Article 2(3) obligates States to ensure that anyone whose rights are violated shall have a legal remedy, notwithstanding that that the violation has been committed by persons acting in an official capacity. China clearly remains in breach of this obligation.

b. Article 14(1) obligates a state signatory to provide equality before the courts, and, *inter alia*, a fair and public hearing by a competent, independent and impartial tribunal.... People identified as Falun Gong practitioners are arbitrarily denied the right to bring an action before any Chinese “court” and are denied legal representation if charged in a Chinese criminal “court”.

12. Violations of the *Basic Principles on the Independence of the Judiciary* include:

a. Article 1 requires states to guarantee judicial independence and enshrine it in a Constitution or elsewhere in a statute. Although the Constitution, Article 126, purports to enshrine judicial independence, all judicial appointments, removals and functions are exercised under the direct control of the Chinese government.

b. Article 2 requires that “The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.” The reality is that: i) the judge hearing the case does not make the judgment; and, ii) judgment is determined by a committee not present at the ‘hearing’: a committee instructed and

controlled by the CCP Party Secretary within the court; and, iii) the chairperson of the Political-Legal Committee of the People's Congress can, in any event, overrule the court.

c. Article 4 states that: "There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. Chinese "courts" are without exception entirely subservient to the CCP. In cases involving the state, the courts are directly instructed by the CCP.

d. Article 6 stipulates that "The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected." Nothing in the procedure of a Chinese "court" is consistent with the requirements of this article. (Appendix III)

e. Article 10 provides, *inter alia*, that "In the selection of judges, there shall be no discrimination against a person on the grounds of ...religion, political or other opinion...". In violation of this principle, no one who is not a member of the CCP and no one who is a Falun Gong practitioner is eligible for appointment as a judge in any Chinese "court".

f. Article 11 stipulates that "The term of office of judges, ...shall be adequately secured by law". There is no fixed term of office for Chinese judges. The Constitution provides that judges serve at the pleasure of the People's Congress, which has the power to appoint at will and remove without cause. The People's Congresses are completely controlled by the CCP.

g. Article 12 goes further, requiring that "Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists". As noted, the Chinese practice is diametrically opposed to this principle.

h. Article 13 provides that "Promotion of judges, should be based on objective factors, in particular ability, integrity and experience." In the Chinese "judicial" system, promotion is based largely on loyalty and service to the CCP.

i. Article 18 further provides that "Judges shall be subject to suspension or removal only for reasons of incapacity or behavior that renders them unfit to discharge their duties." The CCP, through the puppet People's Congresses, can remove any "judge", at any time, for any reason. See attached Appendix III, Endnote 25)

12. Violations of CAT include:

Torture continues to be a systemic component of the "judicial" and penal systems, a standard procedure employed by police, prosecutors, and prison guards at all levels. The widespread use of torture in China has been confirmed by many human rights organizations including Human Rights in China, Human Rights Watch and Amnesty International and by the UN Special Rapporteur on Torture, Manfred Nowak.

13. As a member of the World Trade Organization, China is required to establish a transparent and genuine legal system. China has steadfastly refused to do so. Although China's legal system requires that trials be public, they almost never are. Moreover, when public trials are held, the trial itself is nothing more than "theater" for the public; the real decision making takes place outside the courtroom by "judges" who were did not preside over he trial.

9. In many countries, governments are genuinely attempting to use their legal systems to improve the human rights situation and bring the perpetrators of abuses to justice. Chinese rulers have no intention to make their "legal system" functional, in any way that would be recognizable to the rest of the world or would conform to international legal principles and standards. The creation of the Chinese "judicial" system has been nothing more than an exercise in public relations and deception, designed primarily to persuade foreign investors that their investments are protected by "law". The structure itself is entirely fraudulent in that (in important, large, or

politically sensitive cases)the “judges” who preside over trials do not decide the cases; the “judgments” are made in back rooms by a committee whose members have not attended the trial, listened to any of the evidence, or (very often) even consulted the file. Moreover, the CCP stands completely above the law and has the power to dictate to the “courts”.

10. The CCP uses the “legal” system to facilitate, rather than to prevent persecution and human rights abuses. China’s legal system is not intended to function as a safeguard of human rights or against arbitrary and illegal actions by the state. An independent “judiciary” and genuine implementation of the Rule of Law would signal the end of the CCP dictatorship. Although the CCP has often displayed its homicidal tendencies; it has never displayed any predilection for suicide.

11. All governments which are signatories to the ICCPR and CAT have treaty obligations to protect their citizens against human rights violations and to provide remedies for violations. In the case of China, the government itself is the perpetrator of massive and flagrant human rights violations.

12. The legal profession in China, though comprised of many individual members who have struggled bravely to promote the Rule of Law and recognition of basic human rights, is also controlled by the CCP. The All China Lawyers Association (ACLA) is often called the Bar Association of China by foreign commentators. The ACLA is a CCP controlled association with no independence whatever and its purpose is not to protect lawyers and advance their interests, but to assist the CCP in controlling lawyers.

13. There are two fundamental contradictions inherent in the present Chinese “judicial” system. The first is the earlier noted fact that those who hear the case do not make the judgment; those who make the judgment have not heard the case. This is a structural matter which could be easily remediable were there the will to do so. The second is more fundamental. The principle of Party supremacy runs through every aspect of the “judicial” system. The Constitution, in practice if not in actual words, makes the “courts” accountable to the CPP; the *Organic Law of the People’s Courts* sets out the foremost duty of the “courts” as “safeguarding the Proletarian Dictatorship”; the *Organic Law of the People’s Procurate* places the “courts” under the supervision of the prosecutors; top CCP leaders stress the need to increase and tighten Party control over the “courts”. All these facts are totally inconsistent with, and indeed cannot co-exist with the Rule of Law.

Respectfully submitted for to the United Nations Human Rights Council for consideration on the Universal Periodic Review of China by Lawyers Rights Watch Canada.

Appendices I & II attached as separate documents.

APPENDIX I – Summary of reported attacks on lawyers and human rights defenders in China.  
10 pages.

APPENDIX II - Clive Ansley, *THE CHINESE “JUDICIAL SYSTEM”*: A FAIRY TALE OF BEIJING, *Creative Fiction* by Jean Chretien and Paul Martin, Verdict, Issue 112, March 2007.  
10 pages.

Name/Position of Victim	Nature of Attack	Possible Explanation	Current Status of Victim/ Information Database
Adruk Lopoe; monk and activist	<p>*Aug 21, 2007: arrested along with Messrs. Adruk Gyatso and Adruk Nyima, two of his brothers, after they had called for the release of their uncle, Mr. Ronggye A'drak. The others were released but Adruk Lopoe was transferred to an unknown location</p> <p>*Nov 20, 2007: Adruk Lopoe was sentenced to 10 years imprisonment for colluding with foreign separatist force to split the country and distributing political pamphlets”.</p>	In order to sanction his human rights’ activism and his work for youth education and prevention of deforestation and wildlife hunting	The Observatory: CHN 004 / 0807 / OBS 102 (Aug 29, 2007)
Chen Guangcheng; Human Rights Lawyer	*Aug 2006: Unfair conviction of damaging property and blocking traffic (earlier arbitrary detentions, beatings, and his lawyers were obstructed in legal process)	To prevent him from continuing Human Rights activism – Chen revealed a campaign of forced sterilization and abortions in Shandong province.	Waiting a re-trial (Feb 2007 AI report)
Choedar Dargye; Monk from Kagmar Monastery	*Tried and convicted for 12 years in prison.	To stop advocating an independent Tibet	<a href="http://web.amnesty.org/report2004/chn-summary-eng">http://web.amnesty.org/report2004/chn-summary-eng</a>
Dai Xuewu	NO INFORMATION FOUND		
Ding Zilin; Founder of “Tiananmen Mothers” and retired professor	*Jan. 27, 2005: house arrest	To deter Ding’s work with Tiananmen Mothers to get an independent inquiry for the 1989 demonstrations.	<p>*Continued harassment and periodic house arrest (March 2005 AI report)</p> <p><a href="http://web.amnesty.org/library/index/engasa170022005">http://web.amnesty.org/library/index/engasa170022005</a>)</p>
Du Daobin; Civil servant from Hubei Province	<p>*Oct 28, 2003: detained</p> <p>*Nov 2003: tried and convicted of “inciting subversion”</p>	To deter him from protesting against Liu Din’s imprisonment for using the internet to expose human rights abuses	<a href="http://web.amnesty.org/library/Index/ENGASA170012004">http://web.amnesty.org/library/Index/ENGASA170012004</a> (AI 2004 report)
Gao Lading; Human Rights Activist	*Jan 2005: Sentenced to 15 years imprisonment for “illegal gatherings” and “disturbing public order.”	To deter Gao’s work with other farmers in protesting the official seizure of 1,600 acres of land for development in	(March 2005 AI report) <a href="http://web.amnesty.org/library/index/engasa170022005">http://web.amnesty.org/library/index/engasa170022005</a> )

## ***UPR CHINA: LRWC Report***

### ***APPENDIX II***

#### ***THE CHINESE “JUDICIAL SYSTEM”: A FAIRY TALE OF BEIJING***

***Creative Fiction by Jean Chretien and Paul Martin***

##### **Introduction**

The myth of Chinese legal reform, with accompanying claims that the Beijing regime is committed to implementing the “Rule of Law”, constitutes one of the most assiduously cultivated scams in recent political memory. The governments of both Jean Chretien and Paul Martin were deeply committed to portraying the Beijing regime in the most glowing terms and the Chinese “legal” system, or more correctly the lack of a legal system, was initially an impediment.

During China’s “Warring States” period, centuries Before Christ, a philosopher of the day was known for the aphorism, “A White Horse is not a Horse”. We shall not explore the reasoning behind that statement here; the expression is significant for our purposes only because it is still familiar to every literate Chinese. Today, if the topic is the Chinese “judiciary”, we might alter this ancient sentence to “A Chinese ‘Court’ is not a Court”. The truth of this statement is fundamental to any real understanding of how the Chinese “judiciary” functions, whether the Beijing regime is indeed committed to implementing the “Rule of Law”, whether a Canadian investor could successfully sue a Chinese party in a Chinese “court” (or defend against a Chinese lawsuit), or whether a Chinese fugitive deported to China from Canada could receive a fair trial.

The nature and quality of Chinese “courts” was back on stage recently when it became the focus in a Judicial Review of the Pre-Removal Risk Assessment (“PRRA”) finding in the case of Chinese fugitive Lai Changxing. Lai’s lawyer argued in the Federal Court of Canada what is simply “trite law” to every lawyer or legal scholar having even the most minimal knowledge of the Chinese “judicial” system: that there is no semblance of due process, that there is no such thing as a fair trial in any Chinese criminal “court” (or for that matter any “court” hearing a lawsuit pitting a foreign party against a Chinese party), and that Mr. Lai would be unable to obtain counsel or mount a meaningful defence.

Esta Resnick, a trial lawyer from the Department of Justice who has represented Citizenship and Immigration Canada (“CIC”) throughout its seven year crusade to help the Chinese Gestapo take Mr. Lai into custody, continued her long –standing efforts to clothe the farcical and fraudulent Chinese “judicial” system with respectability, asserting that defendants have the right to legal counsel and to present evidence, that trials are public, and that the “courts”, rather than the Chinese Communist Party, decide cases.

With the single exception of the fact that Chinese defendants do technically have the right to defence counsel, a right which in reality is of little benefit<sup>i</sup>, each and every one of Ms. Resnick’s statements is demonstrably and patently false. Only Ms. Resnick, of course, knows for certain whether those statements flow from a failure on her part to read as widely as does the general public, or whether they are simply necessary because the reality of the Chinese “judicial” system is not conducive to her goal of delivering Mr. Lai into the hands of the Chinese Gestapo.

Under the sub-headline “*Defence of Chinese justice is pure fantasy*”, Rod Mickleburgh commented in the Toronto Globe and Mail of January 18 that:

*“At times, it felt like Alice in Wonderland in Federal Court this week, as government lawyer Esta Resnick argued the merits of China’s criminal justice system....Defendants who are tortured merely have to complain to the authorities and action will be taken, according to Ms. Resnick....The reality, of course is quite different.”*

Mickleburgh spent four years as the Globe correspondent in China and has a much deeper understanding of Chinese realities than does the gullible Ms. Resnick. Mickleburgh quotes at length from testimony of Jerome Cohen before the U. S. Congress in 2005, substantially the same evidence he gave before the Immigration and Refugee Board (“IRB”) when Ms. Resnick called him in 2001, ostensibly to make CIC’s case that the Chinese “judicial” system is a model for the world!<sup>ii</sup> Cohen said in part:

*“The protections afforded by the Criminal Procedure Law are too few, ineffectual, and riddled with exceptions to permit meaningful defence....reticent suspects are frequently subjected to torture.... The outstanding feature of [China’s] criminal investigation is the inability of the suspect, his lawyer, family or friends to challenge the legality of any official actions before an independent tribunal . . . . Political realities preclude this.”*

Ms. Resnick has, in the course of past court appearances in the Lai case, actually implied that the Chinese “judicial” system is superior to Canada’s. When Lai counsel David Matas cited expert evidence previously given before the IRB that there is a 100% conviction rate in the Chinese criminal “courts”, Resnick replied that this is because the Chinese police and prosecutors are so careful and thorough that they just don’t make mistakes! Obviously, in *The Chinese System According to Resnick*, there could be no Donny Marshalls, David Milgaards, or Guy-Paul Morins<sup>iii</sup>.

We have to this point largely focused on what the Chinese “judicial” system is *not*. Essentially, it is not a “judicial” system at all. A Chinese “court” is simply a very low level administrative organ of the Chinese Communist Party. That said, I turn now to a discussion of what the system is in reality, how the “courts” are structured and organized, what happens in a Chinese



“court”, and what faces Chinese trial lawyers when they attempt against all odds to achieve results based on some semblance of the Rule of Law.

## **Organization of the Chinese “Courts”**

### ***National Hierarchy***

Throughout the country, the “courts” are organized to precisely parallel the hierarchical structure of the government and the Chinese Communist Party. The governmental structure is composed of “People’s Congresses” at each level. The local People’s Congress is “elected” at the local level; it in turn elects the members of the Provincial People’s Congress and the Provincial Congresses elect delegates to the National People’s Congress, which passes for the national parliament, but has no power and sits only when the Communist Party summons it to rubber stamp Party decisions.

This structure precisely parallels the structure of the Party, and at every level it is the Party official who holds real power, while the state functionary defers to him. For example, the “mayor” of Shanghai, who is not elected but is appointed by the Chinese Communist Party at the central level, is not really the power holder in Shanghai politics. He must always defer to the Secretary-General of the Shanghai Communist Party.

Theoretically, “judges” are appointed by the People’s Congresses at each level. This means that the local People’s Congresses appoint district “judges”, the Provincial governments appoint the “judges” to the Higher People’s “Courts”, and the “judges” of the Supreme People’s “Court” in Beijing are appointed by the National People’s Congress. In practice, however, the Chinese Communist Party exercises total control over all the People’s Congresses at every level and in reality it is therefore the Party which appoints all “judges” to all Chinese “courts”. Moreover, with extremely rare exceptions, all “judges” are required to be Communist Party members. They may be removed immediately by the Party at whichever level they were appointed. And those who resist Party directives are indeed removed quickly.

At the top of the “court” system, of course, is the Supreme People’s “Court” in Beijing. It is comprised of more than six hundred “judges”, the majority of whom live together in two large dormitory style residences in the capital city. This huge number reflects the fact that these “judges” do not really “hear” cases; rather they “handle” them in an administrative fashion, according to Party instructions.

Directly under the Supreme “Court” are the Higher People’s “Courts” of each province. Under the provincial “courts” come the Intermediate People’s “Courts”, and under them the District People’s “Courts”. Directly under the Provincial “Courts” also, and having status equal to that of the Intermediate “Courts” are the specialized “Courts”: the Maritime “Courts”, Railway “Courts”, Military “Courts”, and the Forestry “Courts”.

One appeal is allowed and that appeal is to the next level above that of the “court” of first instance. The single exception to this rule is that in theory, no death sentence may be carried out until it has been reviewed and approved by the Supreme “Court”. In practice, executions are often carried out immediately after sentence. This is because in 1983 the Supreme “Court” delegated its review powers to the provincial level and allowed the provincial “courts” to review their own death sentences. It has for this reason been commonplace in China over many years to have a death sentence read out by the provincial Higher People’s “Court”, and then to immediately have the review and approval read out by the same “court”, with execution following immediately thereafter. (In response to embarrassing publicity, the government and Supreme Court recently announced new regulations to correct this, but for reasons which will not be canvassed here, there is little ground for expecting any change to flow from these regulations)

In the Lai case, one of the uncounted mistakes and misstatements to be found in the Reasons of the IRB panel was the conclusion that the criminal “courts” are distinct from other Chinese “courts” and assumptions should not be made about standards in the criminal “courts”, based on what happens in the civil and economic “courts”. In fact, the procedures, practices and characteristics to which I shall now turn apply across the board to all China’s so-called “courts”.

One of the most immediately noticeable aspects of the Chinese “bench” is the youth of its “judges”. Just a few years ago, many were retired army officers who had never had a day of legal training in their lives. Today, all new “judges” are required to have a law degree and they are very young, some as young as 23. The average age of a Chinese “judge” today is somewhere between 30 and 35.

We shall shortly see that as a matter of practice, the ranking Communist Party official within each “court” is the ultimate decision maker. But even as a matter of statutory theory, aside from the apochryphal promise of judicial independence found in Article 126 of the Chinese Constitution it is manifestly clear that the “courts” have no independence whatever. The Organic Law of the People’s Procuratorate (the prosecution arm of government) states clearly that the “courts” are under the supervision of the prosecutors. So to apply that to the Lai case and the claims that Mr. Lai could receive a fair trial, Mr. Lai’s “judges” would be subject to the supervision and correction of the prosecutors who would be presenting the case against him. Moreover, the same Constitution which purports to guarantee judicial independence also states that the “courts” are under the “leadership” of the Chinese Communist Party.

### ***The “Trial” Process and the Participating Actors***

In June of 2000, at the invitation of Canada’s ambassador to China, I and three other Canadian lawyers gave an evaluation of the progress of the Chinese legal system, or lack of same, to Madame Justice Beverley MacLachlin and several of her colleagues on the Supreme Court of Canada. The other presenters’ practices had exclusively involved the drafting and negotiation of investment contracts and they had had no contact with the Chinese “courts”. Their presentations therefore focused on the development of statute law and regulations. My focus was on how my clients were routinely fleeced and extorted by Chinese “courts” acting in concert (and usually for a percentage of the “judgement” proceeds<sup>iv</sup>) with Chinese claimants. I stated, truthfully and accurately, that there was no due process whatsoever in the Chinese “judicial”

system, that it was fraudulent and corrupt from top to bottom, and most importantly that the *trend* was in the wrong direction. That is to say that the “courts” were markedly worse than they had been ten or fifteen years earlier, despite the claims of huge progress flowing from Jean Chretien at the time.

The next day I found myself at a luncheon in Shanghai, sitting next to one of the Canadian Supreme Court Justices to whom I had presented in Beijing the previous day. He informed me that the Chinese had that morning taken the group to witness a criminal trial. He referred to my description of the process the previous day and remarked that he had been quite surprised at what he had witnessed during the morning’s trial. He said, “Of course none of us knows Chinese, so we couldn’t really follow what was being said, but it certainly seemed that everyone was taking the proceedings very seriously. The accused had a defence counsel and the counsel was questioning witnesses. Certainly, the judges appeared very serious and involved.” (I wish he had had a chance to observe Chinese “judges” in a trial not attended by foreign dignitaries.)

I told him that the “trial” he had witnessed would almost certainly have been staged, complete with professional actors playing the parts of judges, accused, prosecutor, and defence counsel. Moreover, they would have rehearsed for days before the arrival of the Canadian jurists. This is something Beijing routinely arranges for the benefit of foreign lawyers, judges, and legal scholars.

But more importantly, even a real “trial” in China is in fact nothing more than theatre. A foreign observer, videotaping the process, could be forgiven for looking around and concluding that the proceedings were genuine. Gone are the days when Chinese “courts” were just dirty rented rooms in crumbling tenement buildings. Today, a Chinese “courtroom” looks exactly like a real courtroom in countries with real judicial systems. They are bright, shiny, well furnished; they have counsel table for each party, witness stands and a raised and impressive “bench” for the three presiding “judges”. Beijing has also become sufficiently sophisticated to realize that blue military style uniforms with visored caps do not really project a sense of judicial majesty. Therefore, for some years now, Chinese “judges” have been clad in black judicial robes and they look for all the world like real judges.

The three robed “judges” sit above the courtroom behind the raised bench looking suitably solemn (when foreign visitors or the media are present, but looking bored otherwise and in fact absenting themselves from time to time as the evidence unfolds in cases which do not attract public scrutiny). Witnesses are called for each side in civil cases; no witnesses for the accused are ever called in a criminal “trial”. Lawyers for each side cross examine the other party’s witnesses.

Documents are from time to time passed up to the “judges”, who appear to gravely consider them. However, there is no Discovery at any point in the Chinese “judicial” process. It is common for one party to produce at “trial” a huge written opinion from a purported expert, which opinion has not previously been provided to the other side. It may run to a couple of hundred pages. At this point the “judges” may ask the other side for a response to this thick document. The document then goes into evidence. The author is not in court and the other party has no time to examine the contents of the document. If those contents support the “judgement” the

Party Secretary within the “court” has determined should issue in the case, then they may be cited in the Reasons; but not otherwise. In any event, in a civil case involving a dispute between a Chinese and foreign party, any expert report put forward by the Chinese party will be accepted and any such report proffered on behalf of the foreign party will be rejected as a matter of course<sup>v</sup>.

But when the hearing is concluded, the role of the “judges” is effectively over. It is at this point that anyone with knowledge of what happens next fully appreciates the validity of the statement that the hearing itself is strictly theater.

I turn now to the single most important factor in demonstrating the fraudulent nature of the Chinese “courts”, and the one which limits them to the role of theatre. There is a current saying amongst Chinese lawyers and judges who truly believe in the Rule of Law and this saying, familiar throughout all legal circles in China, vividly illustrates the futility of Canadian attempts to “assist China in improving its legal system” by training judges. It is *“Those who hear the case do not make the judgement; those who make the judgement have not heard the case.”*

This saying reflects the function of the “Judicial Committee”, the most important body within each “court”. The “Judicial Committee” is a standing committee composed of between five and seven “judges”, depending on the size of the “court”. It meets regularly, usually once a week. It is here, behind closed doors, completely away from public view and scrutiny, that most cases are decided. Nothing which has transpired in the “courtroom” has any impact on the “judgement”. In one afternoon, a Judicial Committee may decree the “judgements” in up to 25 pending cases. In virtually all instances, the Judicial Committee rules on these “judgements” without having heard any of the witnesses or, indeed, having attended the hearing. Moreover, I have often been informed by personal friends who sit on judicial committees that the members have not even consulted the file on the case, before ruling on the “judgements”. The key to disposition by the Judicial Committee is the input of the Communist Party spokesman on the committee.

In a case involving a substantial claim by a Chinese party against a foreign party, or, for that matter, a substantial claim by a Shanghai party against a Chinese party from elsewhere, the discussion within the committee usually centers on the economic health of the Plaintiff and on how quickly the plaintiff needs the money.

In a criminal case, the verdict will have been decided before the trial and the deliberations of the Judicial Committee are largely limited to the content of the Reasons to be drafted.

Whether the case be civil or criminal, the circle of fraud is closed by the fact that the Judicial Committee does not sign the “judgement” it has decreed. Ensuring that the committee remains faceless and invisible, it instructs the “judge” who presided over the hearing to draft the Reasons and the Reasons then are issued over the signatures of all three “judges” on the tribunal which heard the case. So the public has no clue that the “judgement” was decided behind closed doors by individuals with no knowledge of the facts and no interest in the law.

One would think that the Judicial Committee’s function would be sufficient to ensure that all “judgements” of Chinese “courts” would be politically driven, rather than judicially driven. Not so. As a final precaution, the architects of the “judicial system” have ensured that the most powerful

person at any level of the hierarchy is not the Chief Justice of the “court” at that level. Indeed, the most powerful person is not a “judge” at all, and has no legal training. He is the Chairman of the Political Legal Committee in the People’s Congress at every level. In the almost unimaginable event that a “court” at any level were to render a “judgement” in defiance of the Communist Party, the Chairman of the Political Legal Committee has the power to simply overturn the decision of the “court” and substitute his own.

Throughout my years in China, one of my closest friends was a Judge and first rate legal scholar who eventually was elevated to the Supreme “Court” as head of the Transportation Division. He divulged to me many of the inner workings of that “court”, but for many years I could not cite him as a source. His untimely death in 1997 released me from this constraint. CIC argues that Lai Changxing would receive a fair trial if sent back to China, notwithstanding that the former Chinese Premier had publicly opined that Lai should be executed “ten times over”. But my friend on the Supreme Court related to me on several occasions how President Jiang Zemin would regularly call up the Chief Justice of China, inform him that a given case would soon come before the Supreme Court, and then give instructions concerning the “Judgement” which would be required. The Chief Justice would then appoint a group of “judges” to handle the case according to the presidential instructions.

In closing, I turn to a final peculiar aspect of the Chinese criminal “justice” system which speaks to the Lai case, but also to the system in general. Anyone researching the disposition of criminal cases in China will be struck by two curious facts. First, the vast majority of Chinese criminal cases result in confessions by the accused. The “trial”, therefore usually is about mitigation and sentencing. The second curiosity flows directly from the first. Most Chinese defence lawyers have seldom ever had a client enter a plea of “Not Guilty”.

It is literally true that a “Not Guilty” plea is considered a gross insult to the “court”, the police, and the prosecutors. It necessarily implies that they are wrong, and/or negligent and they jealously guard the fiction espoused by Esta Resnick in the Lai case that “they are so thorough and careful that they just do not make mistakes.” So unusual is a guilty plea that most local “Justice” bureaux have issued standing instructions to all members of the defence bar on what to do in the unfortunate event that a client insists on pleading “not guilty”. The three most important of these require the lawyer to first notify the “Justice” Bureau of this unexpected turn of events, and then to notify the senior partner in the lawyer’s law firm; thereafter the matter must be handled by the senior partner and an outline of the defence must be presented to the “Justice” Bureau before trial.

A slogan appearing on the wall of all police interrogation rooms reads *“Confess and receive leniency; deny your guilt and be punished harshly.”*

For these reasons, defence counsel are almost always limited at “trial” to speaking to sentence, in hopes that a mitigation argument might save their client from execution and result in mere imprisonment. This was driven home to me in discussion with one noted defence lawyer. I interviewed a number of criminal defence lawyers during my time in China and until this particular occasion all reported that they had never won a case. Now, when I asked the same question, the lawyer responded that he had been successful in approximately 40% of his cases.

I was astounded. But when I pressed for details, I found that this lawyer measured “success” in terms of sentence reduction; he had in fact never obtained an acquittal for a client.

I shall close this article with a brief discussion about the current deplorable plight of Chinese defence counsel. CIC, in the Lai case, assures the Federal Court of Canada that Lai would enjoy the right to counsel. The fact is that it would be very difficult to find counsel who would take this case, given the media crusade against him over a seven year period by the Chinese Government and the Chinese Communist Party. Indeed, Chinese lawyers are forbidden by “Justice” Bureau edicts to accept “sensitive” cases, without Bureau approval. And often this approval is withheld; the Bureau appoints its own defence counsel in place of counsel chosen by the accused.

Second, any lawyer with the courage to take on the case would, judging by recent precedent, have his licence to practise law suspended at best, and face imprisonment at worst. Some years ago, the Chinese government decreed that Falun Gong practitioners did not enjoy the right to defence counsel; it prohibited all Chinese lawyers from defending practitioners and it prohibited all Chinese “courts” from accepting lawsuits brought by practitioners. Over the last three years, scores of Chinese lawyers have been disbarred, imprisoned and tortured for bravely insisting on defending Falun Gong practitioners and political dissidents. Moreover, more than two hundred defence lawyers have been sentenced to prison terms under Article 306 of the Chinese Criminal Code.

Article 306 appears totally innocuous on its face. Essentially, it makes it a criminal offence for defence lawyers (though apparently not prosecutors) to suborn perjury or otherwise facilitate the introduction of false evidence to the “court”. The problem is not with the wording, but with the way in which the “courts” have been instructed to interpret that wording. Defence lawyers run afoul of Article 306 in two ways, each of which leads directly to prison. Both involve those difficult clients who refuse to plead guilty.

The first involves an interesting “logical” analysis by the “court”. The reasoning is: The accused says he did not commit the crime (perhaps offering an alibi); but the “court” has found him guilty (as is inevitably the case); therefore, by definition the accused was lying; since the accused was lying, it must have been his counsel who put him up to it. Hence counsel and client are sent off to prison hand in hand.

The second scenario is not entirely dissimilar. Under Chinese law, not only police practice, defence counsel may not meet with the accused until the police and prosecutors have completed their investigation. By this time the accused has confessed, normally encouraged by torture. Then when client and counsel eventually meet, client tells counsel a story which differs in material aspects from what he has told his police interrogators. But since defence counsel is given no access to the prosecution file, he will not know the details of his client’s confession. If he argues a theory which differs from what the prosecution has in its file, then the lawyer is found to be lying to the “court” and is sentenced to prison.

The second scenario occurs much less frequently than the first. This is because normal procedure requires a police officer to be present during all conversations between client and defence lawyer and the lawyer is forbidden to ask his client any particulars about the incident which resulted in the client’s arrest. He is restricted to explaining the section of the Criminal

Code under which his client is charged, and discussing his client's health and state of mind and presumably the weather. These restrictions conflict with provisions of the CPL, but unfortunately neither police, nor prosecutors nor "courts" normally evince any discernible interest in the subject of law.

In future articles, I shall discuss the Rule of Law in China, the actual trial process (with examples drawn from my own cases), the political rationale underlying the court system, and the determined efforts by previous Canadian governments to "whitewash" the Chinese "judicial" system.

## Endnotes

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<sup>i</sup> This issue will be the subject of a future article. Suffice it to say here that the Chinese defence bar is a demoralized, intimidated, and threatened group. Defence lawyers are in practice, though not according to the provisions of the Chinese Code of Criminal Procedure ("CPL"), denied access to the prosecution's file on their client. The case, though again this is forbidden by the CPL, is in practice usually prepared by the judges, prosecutors, and police acting in concert. There is no meaningful discovery of any sort. Defence counsel who insist too vigorously on their legal right to visit clients in the lockup frequently experience serious beatings at the hands of the police. And finally, many lawyers end a criminal trial by being sent to prison along with their clients, sentenced under a provision of the Criminal Code which applies exclusively to defence lawyers. We estimate that there are between two and three hundred defence lawyers now serving prison sentences for simply attempting to represent their clients as they are ethically bound to do. Moreover, at this very moment there is a full scale campaign in China to intimidate and emasculate Chinese human rights lawyers. Lawyers Rights' Watch Canada lists close to a hundred human rights lawyers and other human rights advocates who are now in prison, or who face "criminal" charges, or who have had their practice licences illegally confiscated.

<sup>ii</sup> This bizarre event will also be the subject of a future article. Cohen did not give conflicting evidence on these two occasions. He is an eminent and highly respected scholar. Ms. Resnick and CIC apparently called him as a witness, not for what he would actually say, but for the weight his very presence would lend CIC. Cohen's evidence largely supported Mr. Lai's case that he could not receive a fair trial. But the IRB panel facilitated CIC's strategy and, in its Reasons, set Cohen up against other defence witnesses, stating that they "preferred the evidence of Cohen" to that of Lai's witnesses. That of course appears perfectly reasonable on its face, to anyone who reads the Reasons without having read the transcripts of evidence. The problem is that there is virtually no significant contradiction between the opinions of Lai's expert witnesses and the opinion of Cohen, who was called by CIC against Lai. The result is a kind of sleight of hand which allowed CIC and the IRB to convey the impression that Cohen had given his "Certificate of Good Housekeeping" to the Chinese "judicial" system, which he most assuredly had not.

<sup>iii</sup> Other fascinating open court observations by Ms. Resnick include the statement that the Chinese courts are independent because Article 126 of the Chinese Constitution says so. We would note that Articles 35 and 36 of that same Constitution guarantee Chinese citizens freedom of speech, freedom of assembly, and freedom of religion. The savage beatings by Chinese police of those who seek to exercise these constitutional freedoms have thus far apparently escaped Ms. Resnick's notice.

Faced with evidence that one witness had been interrogated without interruption for 56 straight hours, Ms. Resnick stated that it was against Chinese law to interrogate anyone for longer than twelve hours at a stretch and "this man should have pointed out to the police that they had gone overtime, and asked to go home"!

While these statements may afford some comic relief to the trier of fact, they sometimes have tragic overtones. CIC representatives and their legal counsel gave formal legal undertakings in the Lai case that witnesses in China giving

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affidavit evidence in support of Lai would be Protected Witnesses and under no circumstances would their identities ever be made known to any Chinese authorities. Tao Mi was one of these witnesses. She had originally given Chinese police a statement implicating Lai in criminal activities, which had been introduced against Lai by CIC before the IRB. But months later she attended at my office in Shanghai and repudiated that statement, saying she had made it after two months of torture at the hands of the Chinese police. She stated repeatedly that “If the police find out I talked to you, I am dead!” CIC apparently thought this statement should be tested, so they turned over her statement, and apparently the statements of all the other Protected Witnesses as well, to the Chinese police. CIC arranged with the Chinese police to have Tao Mi picked up, brought to the Canadian Consulate-General, and interrogated on videotape by an RCMP officer, in the presence of a Chinese Gestapo officer. We have been unable to contact her since, which unfortunately lends credence to her statement that she would be dead if the Chinese police found out. On videotape, she denied having met with a Canadian lawyer in Shanghai, to the surprise of no one on the planet except for CIC and the members of the IRB panel, who accepted the statement at face value. At the Judicial Review of the IRB finding, David Matas observed that it was absolutely outrageous and indefensible to interrogate Tao Mi in the presence of the very people who she said had already tortured her. Not so, said the agile Ms. Resnick. *“Torture is against the law in China. If Tao Mi had been tortured, she could have complained to that Chinese police officer in the room and the police would have investigated.”* Alice in Wonderland, indeed!

<sup>iv</sup> One of the many problems with the Chinese “courts” is that “judges”, in reflection of the low social esteem in which they are held as very low level civil servants, are very poorly paid. When I was handling litigation in China, the average salary of a “judge” was about US\$250 monthly; but his *income* was often well over \$100,000 *per annum*.

<sup>v</sup> In one very major case I handled in the Shanghai Maritime Court, the “judgement” was at least partially based on “evidence” in the form of an oral statement made to the “judges” by an engineer they had met by accident. The “judges” could remember neither the kind of engineer they had encountered, nor his name. And of course, he was not available at “trial”. But they nevertheless incorporated his opinion into their Reasons.