

TAIWAN IN COMPARATIVE PERSPECTIVE

Special Issue: Justice in Comparative Perspective

Guest Editor: Jerome A. Cohen

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Another Landscape, Okabe
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TAIWAN IN COMPARATIVE PERSPECTIVE

Taiwan in Comparative Perspective is the first scholarly journal based outside Taiwan to contextualize processes of modernization and globalization through interdisciplinary studies of significant issues that use Taiwan as a point of comparison. The primary aim of the eJournal is to promote grounded, critical, and contextualized analysis in English of economic, political, societal, and environmental change from a cultural perspective, while locating modern Taiwan in its Asian and global contexts. The history and position of Taiwan make it a particularly interesting location from which to examine the dynamics and interactions of our globalizing world.

In addition, the eJournal seeks to use the study of Taiwan as a fulcrum for discussing theoretical and methodological questions pertinent not only to the study of Taiwan but to the study of cultures and societies more generally. Thereby the rationale of *Taiwan in Comparative Perspective* is to act as a forum and catalyst for the development of new theoretical and methodological perspectives generated via critical scrutiny of the particular experience of Taiwan in an increasingly unstable and fragmented world.

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Taiwan in Comparative Perspective

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Justice in Comparative Perspective

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Editorial

'Justice' is an issue which is of urgent significance for considering the nature of civil society and how a country deals with legacies from the past, problems of today, and threats for the future. While ideas about justice are most clearly developed in relation to law, this special issue also includes cultural analysis and undertakes a comparative perspective. The comparative approach is 'disruptive of what was assumed as logical and natural' and allows the reader to 'make discoveries through different ways of seeing things', and also to direct his or her 'attention to other contexts which on the surface might appear to have no connection' (Yengoyan 2006: 2, 4).

This special issue, entitled 'Justice in Comparative Perspective', is guest edited by Jerome A. Cohen of the Asia Law Institute at New York University. It marks the culmination of a series of events that took place throughout 2009 at the Taiwan Research Programme at the London School of Economics. A regular seminar series on the theme was held over spring and autumn, which allowed authors the chance to have a dialogue, and this was followed by a workshop in which scholars were paired and which further allowed for connections and contrasts to be explored. In this way all participants were able to get a wider cross-disciplinary and cross-cultural view. The events and this journal have brought together a range of regional and disciplinary specialists, enabling lawyers, historians, anthropologists, political scientists, journalists and artists to share and discuss not simply formal, legal and juridical procedures and mechanisms currently extant in Taiwan and other parts of the world (including the UK, China, Hong Kong, Iran and Germany), but to consider issues such as the meaning of justice – its culturally and historically shifting inflections as well as its contemporary representation in and refraction through various media – institutions charged with administering justice, case studies of in-justice, as well as questions of violence, power and forgiveness.

The multi-focal approach of the papers was conceived as a kind of 'thought experiment'. There are clear post-colonial and post-modern theoretical and methodological anticipations for this kind of experiment. From the writings of Thomas Kuhn, Edward Said and Michel Foucault can be gleaned the significance of discourses and paradigms for determining the constitution of 'objects' for scholarly enquiry, the methods appropriate to carrying out that enquiry, the form of the question to be asked and the 'truth' to which the question leads or points. Taiwan is one such 'object'. By thinking about Taiwan comparatively, these papers are a practical move in dialogic deconstruction, and constitute fragments from the conversations that took place at the seminar series and workshop. Critically, the

role of comparative analysis is not simply a search for and then the application of a ready-to-hand adhesive to glue the fragments together, but rather a strategy for fabricating new senses of strange-ness and familiarity firstly with regard to 'our' knowledge of Taiwan and, secondly, *vis-à-vis* 'justice'.

The first paper is Jaw-Perng Wang's clear and detailed overview of changes to Taiwan's Code of Criminal Procedure (CCP) from 1997 until the present ('The Evolution and Revolution of Taiwan's Criminal Justice System'). Wang alerts us to three significant areas in which Taiwan's CCP has been overhauled; firstly, the shift from an inquisitorial to an adversarial set of procedures in Taiwan's courts; secondly, improved safeguards surrounding the rights of the accused and, thirdly, the decline in the power of the prosecutor. A further point of note with regard to this paper is the extent to which these changes have been informed by legal and criminal justice procedures in the West, particularly the United States.

The next four papers deal with justice in relation to the state, in particular state agencies such as Police and immigration officers and they are usefully forwarded in a short introductory essay by Jeff Martin. The first three papers focus squarely on the Police; Jeff Martin's 'Volunteer Police and the Production of Social Order in a Taiwanese Village', Chris Williams' 'Police Governance: Community, Policing, and Justice in the Modern UK' and Michael Palmer's 'Changing Policing in the People's Republic of China'.

Firstly, it is clear from these papers that any consideration of the Police and of policing must include an historical perspective. Taking the long view allows for sustained analysis of the Police and the complex and shifting relationships between them, the State, the courts, the legal profession and other agencies including and perhaps especially the media and the public(s). Jeff Martin's paper presents Volunteer Police in Taiwan as an agency embedded in a certain (colonial) history of state-formation as well as cultural notions of authority and community with the Volunteer Police part of an uneasy series of relationships between the State and the public. Chris Williams positions the Police in the UK in an uneasy relationship between the State, the media and the public, and focuses on Police violence and the problem of Police accountability for their actions. Palmer's analysis presents a detailed account of different Police agencies in China and the tensions between them, the State, moves towards the professionalization of the Police which includes the problem of their legal accountability, an increasingly restless citizenry (especially in rural areas), an equally restless and growing body of defence lawyers as well as critical commentary on China's legal system by international agencies such as the UN Commission on Human Rights.

What is particularly striking about the papers – and this is perhaps something to be inferred from them rather than a point that they each make explicitly – is that 'justice' is not a pure concept or category which the Police are committed to uphold. Rather, policing is produced through particular historically and culturally embedded sets of relations between various agencies (which are themselves historically and culturally produced). As Williams points out, 'policing is more than merely reactive, but also productive of social relations', while elsewhere Martin has pointed out that 'ideas of community order supplying the ideological basis of "public accountability" in policing are not in any way prior to the police-society interaction, but are rather built historically through this interaction'. In other words, policing is not a neutral activity oriented to upholding abstract concepts such as

'law' and 'justice'. Rather policing is an embedded series of social practices through which law and justice are produced and which in turn feed, in circular fashion – and the circle is clearly vicious – to generate more policing.

The fourth paper in this section is Carol Jones' "'Looking North": Hong Kong Images of Mainland Law and Order', which brings a cultural analysis to bear on a series of scandals and phantomatic representations of crime, prejudice, immigration and disappearing children. On the one hand it references widely reported problems with immigration officials policing the 'boundary' between Hong Kong and the 'Mainland'. On the other hand, the paper considers a cultural imaginary reproduced in films, newspapers, stories and rumours of a dangerous Mainland 'other' to Hong Kong sensibilities of civility. Focusing on the case of the disappeared boy Yu Man-hon and the difficulties his mother faced in trying to find him, salient to Jones' analysis is not simply justice and Mrs Yu's inability to attain it through Hong Kong's bureaucracy, but also the modes of address through which justice might be sought ('in the manner of subjects petitioning their Imperial Emperor, it was to Tung [Chee-Hwa] himself that Mrs Yu now turned for justice'), and justice as a notion embedded within an historically contingent cultural imaginary of the 'boundary'.

The next paper – Charlie Beckett's 'Justice and Media: Representations of Suffering in Networked Journalism' – explores the myriad ways in which 'new media technologies' are 'altering the relationship[s] between citizens and the idea of justice'. In the UK, for example, policing has been transformed – and at times embarrassed – by the ubiquity of new, mobile media technologies which publics and citizenries have deployed to provide counter-narratives to 'official' representations of policing in relation to demonstrations, football matches and other, public order events. This paper takes as its point of departure the viral image of Neda, a protestor shot dead on the streets of Tehran whose final, bloody moments were captured on a mobile phone and picked up around the world by 'alternative' and 'mainstream' media outlets. Beckett's point is simple but vital; the new, media technologies are empowering global publics to hold governments, agencies and institutions to account for their actions. This has consequences for how justice as an idea is mobilized and as a social practice is enacted.

The next two papers – Fang-long Shih's 'Memory, Partial Truth and Reconciliation without Justice: The White Terror Luku Incident in Taiwan' and Stephan Feuchtwang's 'Compensation and Acknowledgement: Justice after Destiny in Germany' – both seek to explore issues of official and unofficial memory and responsibility in the aftermath of political violence. Fang-long Shih argues that despite the public recall of Taiwan's 'White Terror' through the construction of monuments, the publication of books, the production of films and authorized government compensation schemes for the recognized victims of state violence, this does not constitute 'justice' because the remembering of the Terror has, in her view, been distorted by political interests. For Shih, justice is tainted or distorted by closed door horse-trading and short-term political calculation. Stephan Feuchtwang's short essay is an extended answer to a question about reparations – in Germany – put to him by the person in charge of the compensation body that was set up in Taiwan in 1998 to compensate the victims of KMT violence. If Shih's primary focus is on memory, Feuchtwang's is on responsibility, but his conclusions are nuanced by the observation that nationalisms are often vehicles for violence

against 'others' and sites for transposing responsibility for that violence away from the 'self' through the articulation of narratives of victim-hood.

Lie Xie's paper deals with environmental justice in China, and focuses on the protests that surrounded plans to construct a waste incineration plant in Beijing. These protests included street demonstrations, media stories and legal challenges and, according to Xie, demonstrate the different but nevertheless inter-related dimensions of seeking environmental justice in China, namely, 'procedure, recognition and participation'. Xie's paper delicately points to the limits of these dimensions, and the importance of extra-legal mechanisms in China for people seeking redress against the government.

There can be no 'final word' on an issue such as 'justice'. But in the empirical materials each paper sets forth and the different perspectives they take, we can imagine a conversation between them and thereby begin to conceive of justice not as something objective in the head but rather something held, momentarily, failingly and in tension, between participants immersed in the social practice of dialogue. The idea that justice could still be justice if it ever were to be imposed or imagined as set in stone is, surely, too foolish to dwell on.

Finally, we would like to acknowledge that this publication was supported in part by a grant from the Tsao Yung-Ho Cultural and Educational Foundation.

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Introduction

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Last December the Taiwan Research Programme of the London School of Economics convened a Special Workshop on developments relating to justice in Taiwan. The workshop presented the perspectives of an able group of diverse scholars and commentators, whose views are represented in this volume.

Justice in Taiwan is, of course, intrinsically important to the island's 23 million people, who struggle daily to fulfill the promise of a democratic political system. Understanding the problems of achieving justice on the island is also important to foreign policy-makers, scholars and other opinion-molders outside Taiwan who know its political and economic significance. To be sure, China, which hopes eventually to reincorporate the island, has the most to learn from it, especially since the People's Republic confronts an even greater, more complex challenge than Taiwan in meeting popular demands for justice.

Taiwan has recently been undergoing a dual transformation. Politically, it is making the transition from an authoritarian dictatorship to a vibrant democracy. Legally, with respect to criminal justice, it has been moving from an inquisitorial system, still marked by some traditional Chinese attitudes but with borrowed continental European forms, to a more Anglo-American type of adversarial system, absent the jury trial.

The military-dominated dictatorship that Chiang Kai-shek's Kuomintang (Nationalist Party or KMT) brought to Taiwan in 1945 at the end of World War II made the previous half-century of Japanese rule look mild by comparison. Like the dictatorship of Mao Zedong that succeeded it in Mainland China in 1949, the KMT party-state was constructed along Leninist lines. In the mid-1980s, Chiang's son, Chiang Ching-kuo, in response to strong domestic and international pressures, initiated the process that has led to recent democratic political and legal reforms. Yet the system still bears some of the traces of KMT authoritarianism.

Both the Nationalists and the Communists have continued to respect the image of Sun Yat-sen as founder of the Republic of China. It spanned almost four decades on the Mainland from its establishment in 1912, following the collapse of the Qing dynasty, to the Communists' ascension in 1949. Only recently, however, has it become possible to test the free operation of the unique separation of powers system that Sun imaginatively devised to combine the virtues of the Western political framework inspired by Montesquieu with those of traditional Chinese government. Sun believed that in China's context the classical three branches of government – legislative, executive and judicial – that prevailed in

various configurations in the West had to be supplemented by two additional branches or *yuan* – an examination *yuan* for recruiting the nation's officials and a control *yuan* for monitoring their performance.

Because Lenin – not Sun – was his true guide, Chiang Kai-shek never sought to freely implement the five-power structure that was erected in Sun's name, but operated it through a dictatorial party-state. Mao Zedong openly rejected Sun's structure in favor of Soviet forms. Now, however, after a generation of gradual political change in Taiwan, a remodeled KMT and its principal opposition, the Democratic Progressive Party (DPP), have an opportunity, for the first time, to demonstrate the workability, and perhaps even the superiority, of Sun's imaginative embellishment of Montesquieu. Students of comparative government will surely note that this gives a unique twist to Taiwan's democratization efforts, and, on the Mainland, Chinese reformers inside and outside the Communist Party necessarily have more than an academic interest in this major innovation in Chinese political-legal culture.

Unfortunately, this democratic experiment with Sun's five-power structure is being conducted by a society that is badly riven by its modern political history. That is the significance of Dr Fang-Long Shih's contribution to this volume, entitled 'Memory, Partial Truth and Reconciliation Without Justice: the White Terror Luku Incident in Taiwan.' It illustrates the long, post-1945 KMT oppression that accounts for the abiding bitterness, indeed hatred, that, more than six decades later, continues to mark the island's daily politics. How Taiwan has managed to transform itself into a functioning democratic polity in a bitterly-divided and mistrustful society is a remarkable story, one that is far from concluded.

The formal criminal justice system was, of course, an essential instrument of KMT oppression. Not surprisingly, the advent of democracy brought forth a host of demands for reforming that system, which has undergone an extraordinary transformation during the past 20 years. Although the reform process has not run its course, what has been accomplished, as Professor Wang Jaw-Perng's informative essay makes clear, amounts to a veritable revolution in the curbing of arbitrary police and prosecutorial power. Not only have prosecutors and judges managed to gain substantial independence from political authority, but, consistent with the adversarial system introduced in 2002, there has also been a significant shift in the balance of power between prosecutors and judges. For example, prosecutors no longer have the power to approve either searches and seizures or detentions pending trial. Court approval must be obtained. Moreover, as part of the adversarial process, prosecutors' trial responsibilities have been enlarged. They can no longer rely on inquisitorial judges to shoulder the main burden of bringing out the evidence at trial; they must now play an active role. The new system also imposes challenging obligations upon judges, who are now to become less active but more neutral decision makers, and upon lawyers, who are expected to take a more dynamic part in trials. All these legal actors are still adjusting, often uncomfortably, to their new duties and opportunities.

The jury is the most famous aspect of the Anglo-American adversarial system. Yet Taiwan's gradual assimilation of that system has thus far excluded any effort to institute juries. One wonders whether, as democracy takes firmer root, there will be a rising demand for some form of popular participation in the criminal process. The implications of such a change would be profound and highly political. One

need only ask whether former President Chen Shui-Bian and his wife would have been convicted on various corruption charges if they had been tried before a representative jury that required a unanimous vote in order to convict. This is not to suggest that evidence of their corruption was lacking but that, in an emotional atmosphere, juries have been known to refuse to convict some defendants regardless of the evidence.

Japan has just joined those countries that have adopted some form of popular participation in criminal trials. It now requires three judges to collaborate with six laymen in deciding both guilt and sentencing in serious cases. South Korea is engaging in a similar reform. Taiwan would do well to watch these developments. It should also take note of China's apparently less genuine, recent attempts in certain provinces to introduce an informal 'jury system' that goes beyond the long-authorized but uneven use of one or two lay assessors in basic court trials.

Taiwan's adversarial system may in practice emerge as a unique compromise between Anglo-American and continental European versions, which have themselves been undergoing change. Yet, whatever the type of criminal process chosen, certain problems are likely to endure because they are universal. For example, the wheels of justice often grind too slowly even in the best and fairest systems, and Taiwan too has had to confront the thorny issues associated with the right to a 'speedy trial.'

This collection of papers also presents some foreign experiences that offer indirect insights into Taiwan's society and justice as well as suggestions for further comparative research. One thing is certain. We have just begun to explore this theme. More detailed conferences are needed. We could easily devote a separate volume to the analysis of how Taiwan has quite successfully reduced corruption among prosecutors and judges, but not local politicians, or how its current experiment with adapting American-style 'plea bargaining' is faring. I hope that this initial workshop and the thoughtful articles contained in this volume will stimulate similar programs and continuing research.

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The Evolution and Revolution of Taiwan's Criminal Justice

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Abstract

Taiwan's original Code of Criminal Procedure (CCP) was enacted in 1935. Before 1997, Taiwan did not change much of its CCP. After 1997, Taiwan started to overhaul its criminal justice system and has since amended hundreds of provisions in the CCP. Taiwan's criminal justice system is extremely different today from what it was in 1935 or 1997. There are three important changes in Taiwan's recent reform of criminal justice. Firstly, Taiwan switched its trial procedure from an inquisitorial model to an adversarial one in 2002. Because of this change, prosecutors and defence lawyers now dominate the trial and question witnesses with great enthusiasm. Quarrels between defence lawyers and prosecutors, which were never seen in the past, have become a daily occurrence in the courtroom. In addition, a modified American-style 'plea bargaining' process was codified into the statute. For example, in 2008, 12,132 cases were adjudicated without trial but instead via a bargaining agreement between the parties. Second, the accused is endowed with more rights, and these rights are better protected than before. For example, the new CCP now requires the police to warn the arrestee of his or her right to silence and right to counsel. Failure to do so will lead to the exclusion of confessions obtained thereafter. Other significant human rights protections are rights such as the right to the effective assistance of counsel, the right of confrontation, the exclusionary rule, and the exclusion of evidence illegally obtained (known in the USA as 'fruit of the poisonous tree'). Third, prosecutors' powers are declining. Prosecutors no longer enjoy the power of issuing pre-trial detention orders for up to two months, and issuing search warrants and electronic surveillance orders. Unlike in the past, the decision whether or not to prosecute is also checked by the court. To date, these changes in Taiwan's criminal procedure have been dramatic and significant, although controversial. The paper reports and discusses these major changes in Taiwan's CCP.

Introduction

Taiwan's original Code of Criminal Procedure (CCP) was enacted in 1935. In 1949, when the government retreated from China, it took the CCP with it to Taiwan. Before 1997, Taiwan did not change much of its CCP. After 1997, Taiwan started to overhaul its criminal justice system and has since amended hundreds of

provisions in the CCP. Taiwan's criminal justice system is extremely different from what it was in 1935, 1949 or 1997.

There are three important changes in Taiwan's recent reform of criminal justice. First, Taiwan switched its trial procedure from an inquisitorial model to an adversarial one in 2002. Second, the accused has been endowed with more rights and their rights are better protected than before. Third, prosecutors' powers are declining.

From Non-Adversarial to Adversarial

Trials in Taiwan were non-adversarial prior to 2002. Article 163, Section I of the CCP provided that 'For the necessity to discover the truth, the court must, on its own initiative, investigate evidence.' Bound by this article, the trial court bore the primary duty of investigation and the duty to decide the truth. Even if the parties admitted or did not contest the facts, the court still had an independent duty to discover and decide the material facts. The judge was designated as the principal person questioning the defendant and all witnesses. The judge was also required to raise all factual and legal issues relevant to the charges, and bore the final duty in establishing the defendant's guilt or innocence. The Taiwan Supreme Court used to declare, 'The evidence that shall be investigated and examined at trial is not limited to that motioned by the parties. The trial court must, on its own initiative, investigate whatever evidence is relevant to the elements of the crimes in order to discover the truth.' (Supreme Court, 61 Tai-Sun 2477 [1972]; overruled 4 September 2001). Failure to investigate the evidence adequately was a reversible error (CCP Article 379, Section X).

Consequently, it appeared that the prosecutor and defence lawyer did not truly commit to their case at trial. In the prosecutor's opening statement, s/he normally read the written prosecution word by word, or said only a few words, such as: 'the facts are indicated and detailed in the written prosecution.' In the closing argument, the prosecutor normally did not make any arguments at all. Instead, s/he only stated: 'I request the court to decide the defendant's guilt or innocence and his sentence in accordance with the law.' In fact, the prosecutor appearing at the trial was not normally the one who prosecuted the accused. All prosecutors were scheduled to take turns at appearing at different trials. Moreover, it was extremely common that the prosecutor obtained no information about the case before the trial.

The Taiwanese defence attorney's powerlessness at trial was also a result of the non-adversarial procedure. Taiwanese defence lawyers did not play a dominant role at trial, but only supplemented the court in discovering the truth. Witnesses were extensively examined by the presiding judge or judges in attendance. Only after the judge's examination might the parties and defence attorney examine witnesses, upon notifying the presiding judge (The old CCP Article 166, Section I). The defence attorney's function was limited to bringing evidence or witnesses to the court's attention by submitting briefs or raising questions before or at trial. It was not uncommon for a defence attorney not to say anything at a trial until the closing argument. A defence attorney's closing argument normally lasted for less than five minutes because all competent attorneys knew that trial judges were averse to long and emotional arguments.

In 2002, the Legislative Yuan amended Article 163 of the CCP as follows: 'For the necessity to discover the truth, the court *may*, on its own initiative, investigate evidence. However, in the interest of justice or in matters significant to the defendant's interests, the court *must*, on its own initiative, investigate evidence.' The wording of the article indicates that Taiwan's trial procedure has moved from a non-adversarial one to an adversarial one. Under this article, the parties, not the trial court, bear the primary duty of discovery. Following the above article, the American-style rules of evidence were largely adopted into the CCP in 2003.

The move from a non-adversarial procedure to an adversarial one is significant. Firstly, since the parties now bear the burden of proof, they play a much more active role at trial than before. Under the new system, witnesses are examined first by the parties, and then by the presiding judge. Without sufficient preparation, the parties cannot examine witnesses appropriately. Now, prosecutors never go to court without sufficient knowledge of the cases they are responsible for. For this reason, many prosecutorial offices at the district level have set up a trial prosecutor team, as distinct from an investigative prosecutor team. An investigative prosecutor is in charge of everything before the prosecution has begun, such as the investigation and making the decision to prosecute. A trial prosecutor is in charge of everything after the prosecution, such as attending the motion hearings and trial. The term 'trial prosecutor' was unheard of in the past. Similar to the trial prosecutors, defence lawyers now do not just sit in the court like an observer. Both trial prosecutors and defence lawyers dominate the trial and examine witnesses with great enthusiasm.

Secondly, judges play a more neutral role at trial. In the old system, following the prosecutor's opening statement was the presiding judge's examination of the defendant regarding the facts about the crime with which he was charged (the old CCP Article 287). That is, the defendant was intensively examined before any other witnesses and the presentation of evidence. The practice violated the presumption of innocence and the privilege against self-incrimination. Worst of all, a defendant would normally take the judge to be his enemy instead of a neutral referee at trial. In the new system, the prosecutor presents evidence and witnesses after his opening statement. Only after all witnesses and evidence have been examined can the court examine a defendant (CCP Article 288, Section III).

In the old system, witnesses were firstly and mainly examined by the judge. Tensions, therefore, were naturally present between interrogators (judges) and those who were interrogated (witnesses). In the new system, prosecutors and defence lawyers dominate the trial and, as noted above, question witnesses with great enthusiasm. Quarrels between defence lawyers and prosecutors, which were never seen in the past, have become a daily occurrence in the courtroom. To solve the battles between parties at trial, rules in regulating methods of examining witnesses were introduced into the CCP in 2003. There are very clear and complex provisions in the CCP regarding which party is to conduct direct examination, cross-examination, redirect examination, and re-cross examination of witnesses (CCP Article 166). The new system also provides guidelines for what kind of questions are allowed or prohibited in examining witnesses, on what grounds a party can object to inappropriate questions, and how the court shall decide on objections, etc. Judges no longer play an active role at trial; they are more like referees now, solving disputes between the parties.

Plea Bargaining

Due to the tremendous increase in workload after the adoption of the adversarial system, 'plea bargaining' was introduced in 2004, effective from 9 April, allowing a prosecutor to bargain with a defendant for a plea of guilty. Whether plea-bargaining should be adopted was fiercely debated in 2003. In general, judges, prosecutors, and defence lawyers were in favour of its adoption, but most scholars opposed it. In fact, plea-bargaining did openly happen in some courts even before its adoption. It was observed that some judges frankly told defendants: 'You have the right to silence and right to trial. However, if you confess and plead guilty, a less severe sentence is likely to be considered.' It was also observed that judges in open court sometimes told or even requested defence lawyers or prosecutors to negotiate with the other party. If the parties came back with the defendant's plea of guilty and a prosecutor's recommendation of a less severe sentence, judges would simplify and expedite the whole trial procedure.

Unlike the practice in the United States, Taiwan limits plea bargaining (negotiation procedure) to non-serious offences only. Under Article 455-2 of the CCP, the negotiation procedure is not applicable to the following offences: an offence punishable with the death penalty, life imprisonment, or with a minimum punishment of imprisonment for not less than three years; or in situations where the court of appeal has jurisdiction of the first instance over the case. For example, the offence of murder or kidnapping for ransom is not 'negotiable'. There were almost no arguments about this when the draft of the plea bargaining provisions were debated in the Legislative Yuan.

Whether a judge should or could directly bargain with a defendant or participate in the bargaining process was also a very controversial topic. The official draft provided not only that a judge could bargain with a defendant, but also that a bargaining process could even happen between judges and defence lawyers without notifying the prosecutor or without the prosecutor's appearance. Both the defence lawyers and prosecutors opposed the draft, for different reasons. Prosecutors did not like the 'secret trade' between judges and defence lawyers. Defence lawyers would never want to bargain with a person who would eventually decide his client's fate if the bargaining did not come to a successful conclusion. Under the strong protests of prosecutors and defence lawyers, the Code eventually provided that a judge is allowed neither to bargain with a defendant nor to participate in the bargaining process between the parties.

Under the Code, a prosecutor may bargain with a defendant over the following areas: (1) the severity of the sentence; (2) asking a defendant to apologize to a victim; (3) asking a defendant to pay a victim an appropriate sum as compensation; or (4) asking a defendant to pay a certain sum to a governmental account or a designated non-profit or local self-governing organization (Article 455-2 of the CCP). Under this provision, a prosecutor must get the victim's consent before agreeing with a defendant for Items (1) and (2). The above items (3) and (4) may constitute grounds for civil compulsory enforcement if the parties agree and the defendant's plea is later accepted by the court. The Code does not forbid other items by which a prosecutor could bargain with a defendant. However, the Code does not give such items any legal effect. For example, a prosecutor could bargain with and ask a defendant to testify against other offenders. If, after the court

imposed a less severe sentence, the defendant refused to keep his or her promise and did not testify against other offenders, the Code does not give prosecutors any right to rescind the sentence. In other words, a prosecutor must assume the risk of broken promise and has no legal remedy against the defendant.

In cases where a defendant comes to an agreement with a prosecutor and pleads guilty, the prosecutor may motion to the court for the 'negotiation procedure'. Although the official draft also allowed a defendant the right to motion for a negotiation procedure, this proposal was rejected for the same reason that judicial participation in the bargaining process was opposed. Therefore, a prosecutor enjoys the exclusive right to motion for a negotiation procedure. The motion for negotiation procedure can and must be submitted at any time after the initiation of prosecution and before the conclusion of closing arguments.

Within ten days after accepting the above motion, the court must examine the defendant and inform him or her of the offence pleaded, the statutory scope of sentencing for it, and the rights being waived (Article 455-3 of the CCP). To ensure there is a factual basis for a conviction, the court must examine a defendant and review the files sent by the prosecutor. The court must also warn a defendant that in pleading guilty, he or she is waiving the right to silence, the right to confront witnesses, the right to trial, the right to ask for investigation into favourable evidence, and the right to appeal except otherwise allowed by the law. In practice, the procedure of examination and admonition normally takes less than 30 minutes. To protect defendants and the integrity of the procedure, an unwaivable right to counsel is afforded to defendants who agree to accept a sentence of more than six months of imprisonment, unsuspended (Article 455-5 of the CCP).

The court is not bound by the agreement between the parties, and may dismiss a motion and hold a trial. The Code explicitly provides many reasons for which a court *shall not* accept a motion. This includes very general reasons such as that the agreement is obviously improper or unfair, as well as specific reasons such as the facts determined by the court are obviously different from those asserted in an agreement.¹

If a judge does not find any specific reason not to accept the agreement, he or she must convict a defendant without a trial. Unlike the practice in United States, if the court decides to accept the agreement, it must sentence the defendant within the scope of the parties' agreement (Article 455-4 of CCP). In other words, the court must dismiss the motion for a negotiation procedure if it intends to impose a sentence exceeding the scope of the parties' agreement. However, upon accepting

¹ CCP Article 455-4 provides seven reasons where a court shall not accept the agreement: (1) either party has withdrawn from the agreement, as described in the previous article; (2) the defendant did not negotiate under free will; (3) A negotiated agreement is obviously improper or unfair; (4) the charge is excluded by Article 455-2, Section I; (5) the facts determined by the court are obviously different from those asserted in the negotiated agreement; (6) the defendant committed a more serious offence related to the case than the offence under negotiation; or (7) the court shall make a judgment remitting the punishment, a judgment of 'Exempt from Prosecution', or a judgment of 'Case Not Entertained'.

the agreement, the court may sentence a defendant only to fines, imprisonment of no more than two years, or suspension of imprisonment under the Code.²

If the court does not accept the agreement, the statements of a defendant or his or her representative or attorney during negotiation may not be admissible against the defendant or any co-offenders in the present case or other cases (Article 455-7 of the CCP).

After the negotiation procedure became effective, the numbers of bargained cases increased tremendously. For example, in the nine-month period between its inception in April and the end of 2004, there were 1948 bargained cases which were disposed without trials. From 2005 to 2008, the numbers of bargained cases were 5182, 6174, 8968, and 12132 in each year respectively. This shows that the numbers keep rising significantly every year.

Better Protection of Human Rights

Confessions

In the past, Taiwan's confession law was governed only by Article 156, Section I of the CCP. The Article explicitly prohibits the police from using illegal methods to interrogate an accused. Any violence, threat, inducement, fraud, exhausting interrogation, illegal detention, or other improper means of interrogating an accused is prohibited under Article 98 of the Code. A confession obtained through any of the above illegal methods must be excluded under Article 156 of the Code.³

The law on confessions made a great leap forward beginning from 1997. Although Article 156, Section IV provides that an accused's 'guilt shall not be presumed merely because of his refusing to testify or remaining silent', it was disputed whether this article means the right to silence. At least, it was clear that the CCP did not have any explicit provision regarding a defendant's right to refuse to answer incriminatory questions. In 1997, the Legislative Yuan amended Article 95. It explicitly provides the accused with the right to silence and also requires that the right is made known before interrogation at all stages of criminal procedure.⁴ The intent of the Article is to clear up the question as to whether an accused has the right to silence. However, the Code says nothing about the consequences of the police's failure to warn the accused of his or her right to silence.

In the same year, Article 100-3 was added into the CCP, stating that the police may not interrogate the accused during 'night time' except as otherwise provided

² Penal Code Article 74 states that: 'A punishment of imprisonment for not more than two years, detention, or a fine may be suspended for not less than two, nor more than five, years from the day the decision becomes final if either of the following circumstances exist and temporary suspension is considered appropriate...'

³ It provides that 'If a confession of an accused is not derived from violence, threats, inducement, fraud, exhausting interrogation, illegal detention, or other improper means, and it agrees with the facts, it may be used as evidence.'

⁴ CCP Article 95 provides that 'While being interrogated, the defendant shall be told what act he or she is accused of, which provisions of the criminal law may apply, that he or she does not have to make statements against his or her will, and that he or she may retain his lawyer...'

by law.⁵ The definition of 'night time' under the Code is the time between sunset and sunrise. The legislative intent is to prevent involuntary confessions obtained during the 'night time'. Again, no provision is given for what to do if police fail to comply with the Article, and this was subject to judicial interpretation until 2003.

In 1998, to protect the reliability of confessions, Article 100-1 was amended such that interrogation of the accused shall be tape-recorded during the whole interrogation session. If necessary, interrogation shall be videotaped during the whole session. The minutes of the accused's statements are inadmissible if they are inconsistent with what is in the audio or videotape.

Although Article 95 requires the accused be given notice of his or her rights before interrogation, failure to administer the notices was unlikely to cause the exclusion of confessions obtained. Even before the amendment to Article 95 in 1997, Article 88-1 provided that when the accused is arrested, the police shall advise the accused that he or she may retain an attorney to be present.⁶ However, Taiwan's Supreme Court declared in a 1983 decision that the police violation of Article 88-1 duty to give notice to the accused does not bear any effect on the statements subsequently obtained, as long as the violation does not affect their voluntariness (Supreme Court, 72 Tai-Sun 1332 [1983], overruled 25 March 2003). The above conservative decision strengthened the police practice of not following the Code and not warning the accused of his or her rights.

In order to change police practice, Article 158-2 was added to the CCP in 2003. It provides that the police's failure to warn an arrestee of the right to silence and right to a lawyer leads to the exclusion of any confession thereafter obtained, excepting there is proof that the police's violation of the duty to warn was in good faith and the confession was voluntary. Article 158-2 is very similar to the American Miranda Rule in that it applies only to accused individuals who are arrested. However, it does not require that the police cease questioning when the arrestee asserts the right to silence or right to attorney. Nor does the arrestee have the right to a public-paid lawyer if he or she is indigent. Currently, warning the accused of their rights before interrogation is a common police practice.

Article 158-2 also provides that confession obtained in violation of Article 100-3 (prohibition of police interrogation at night time) shall be excluded except where there is proof that the violation is in good faith and the confession is voluntary. As stated above, when Article 100-3 was added, it did not include provisions concerning the effect of failing to comply with it, and it was subject to judicial interpretation. The newly added Article 158-2 solves this problem.

Another important amendment to the CCP in 2003 was Article 156, Section III. It was not clear prior to this which party bore the burden of proving the voluntariness or involuntariness of confessions. In an early decision, the Supreme Court even held that without sufficient evidence the court could not hold inadmissible the

⁵ The police may interrogate the accused at night only under one of the following conditions: (1) The accused consents to the interrogation; (2) In the case where an arrest takes place at night, the police check whether a wrongful arrest has occurred; (3) A prosecutor or a judge permits the interrogation; (4) In exigent circumstances(CCP Article 100-3, Section I).

⁶ CCP Article 88-1, Section IV states that 'When arresting an accused under Section I of this Article, the prosecutor or judicial police officer shall advise the accused and his or her family that they may retain attorneys to appear at interrogations.'

confessions made in the police record. In practice, the defendant seemed to bear the burden of proving the involuntariness of confessions. Without actual bodily injury, a defendant almost always lost his or her claim of involuntariness of confession in the 'swearing contest' with the police at trial. The newly amended Article 156 Section III provides that the court shall request a prosecutor to prove the voluntariness of a confession whenever a defendant asserts that it was obtained through improper methods.

In short, the law on confessions has been greatly improved in recent years in Taiwan. In the past, there was only one article regarding confessions: confessions obtained through improper methods are not admissible. Now, the CCP has a much better law of confession than before. Interrogation of the accused shall be audio or videotaped. All accused shall be warned of their rights and the nature of the crime before interrogation. Except as otherwise provided by law, police interrogation cannot be conducted at 'night time', violation of which leads to the exclusion of confessions unless a prosecutor proves the police acted in good faith and the confessions were voluntary. The police's failure to warn an arrestee of the right to silence or right to a lawyer leads to the exclusion of a confession except where a prosecutor can prove the police's good faith and the voluntariness of the confession.

In addition to the amendments to the CCP, Taiwan's Supreme Court has also become very liberal in interpreting the 'voluntariness' of confessions. In the past, the Supreme Court would not exclude confessions unless there was actual injury to the defendant's body or actual proof of the police using third degree interrogation methods such as threatening life or bodily injury. In a 2004 decision, the Court reversed a conviction based on a confession made before a prosecutor when the defendant was told: 'If you confess, you will get a lenient sentence; if not, you will be detained again' (Supreme Court, 93 Tai-Sun 5186 [2004]). In 2005, the Court reversed another conviction when the police told the defendant: 'You and your husband will be detained. You may go home after you confess. You may get a lenient sentence if you admit the facts' (Supreme Court, 94 Tai-Sun 5654 [2005]). Similarly in a 2007 decision, the Court reversed a conviction when the police told the defendant: 'One of the co-defendants has been detained. The other has been released without bail because he confessed to the facts. If you deny the facts, you will be detained' (Supreme Court, 96 Tai-Sun 3104 [2007]). The details of the above interrogation methods would never have been revealed to the court without the newly added 'tape-recording' provision in the CCP. More importantly, without the court's new inclination toward the protection of human rights, the above facts would never have been ruled as 'involuntary statements'.

Right to Counsel

(i) Pre-trial stage

Before 1982, only those who were being prosecuted had the right to counsel. For this reason, at the pre-trial investigation stage, the accused's lawyer could not be present at police or prosecutorial interrogations. For the same reason, if a defendant was detained at the investigation stage, his or her lawyer was not allowed to meet or communicate with him. Unfortunately, according to the CCP the detention period could be up to four months. In 1982, Article 27 was amended to

allow the accused to retain a lawyer *before* trial. Relevant provisions were also amended so that an attorney may be present at interrogations. At the investigation stage, an attorney may at any time, except otherwise provided by law, meet or communicate with the accused if the latter is detained.

Although the accused after 1982 had the right to retain attorneys at the pre-trial stage, the police did not have a corresponding duty to advise the accused of this right until 1997. Only when the accused was arrested by the police without a warrant under Article 88-1 did the Code require that the police advise the accused that he or she may retain an attorney to be present (CCP Article 88-1, Section IV). As stated above, a 1983 Supreme Court decision declared that the police violation of this duty did not have any bearing on statements subsequently obtained.

In 1997, the Legislative Yuan amended Article 95, stating that before interrogation and at all stages of the criminal procedure, the accused shall be warned that he or she may retain counsel. In 2003, Article 158-2 was added to reinforce Article 95. It provides that the police's failure to warn the arrestee of the right to silence and right to a lawyer leads to the exclusion of confession obtained thereafter except if there is proof that the police's violation of the duty to warn is in good faith and the confession is voluntary.

However, it does not require that the police cease questioning when the arrestee asserts his or her right to attorney, although the Code provides an incentive for the police to cease questioning when the right is asserted. Under the Code, within 24 hours of arrest an arrestee must be turned over to a competent court for arraignment, excepting there are other circumstances specified by law. In practice, the police will bring the arrestee to a prosecutor within 16 hours of arrest. Article 93-1 provides that when an interrogation is delayed due to the absence of a defence attorney, the waiting period shall not be included within the 24 hours, so long as the waiting period does not exceed four hours. Consequently, some police stop questioning when an attorney is asked for as this allows them to keep an arrestee in custody for this extra period, and the police find this desirable for a number of reasons even though it is not required.

To prevent police manipulation of this provision, the same Article mandates that the police should not interrogate the accused while waiting for a lawyer. Violation of this provision will lead to the exclusion of confessions thereafter obtained except if there is proof that the police's violation was in good faith and the confession was voluntary.

In a 2007 decision, the Supreme Court has been seen by some to have implied that the police have the duty to cease questioning until the lawyer is present. When the police in that case conducted their interrogation, they knew that the accused had a lawyer and that the lawyer would arrive later. After being told this by the police, the accused stopped answering any questions. However, the police resumed the interrogation fifteen minutes later and the accused made incriminating statements. The Court wrote: 'Why didn't the police wait for the accused's lawyer after knowing he has a lawyer? Why did the police question the accused without waiting for his lawyer's presence? The lower court was wrong in admitting the confession without explaining whether the confession was affected by the above fact' (Supreme Court, 96 Tai-Sun 3104 [2007]).

Unfortunately, in some police stations, the accused's right to counsel means nothing more than that the attorney may be present during interrogations.⁷ Even if the accused's attorney appears at the police station, some do not allow the attorney to speak with the accused. They sometimes ask the attorney to sit far behind the table at which they conduct interrogations. The major function of an attorney at the police station is not to consult the accused, but rather to watch for torture or other improper actions by the police.

In a landmark case in 2009, the Supreme Court tried to reform police practice. The accused in this case was arrested and later interrogated at around 6 p.m. The police ceased interrogation after the accused asserted his right not to be interrogated at night. It was not clear when the accused's lawyer appeared at the police station. The record, however, showed that the lawyer left the police station at around 1 a.m., obviously because he could do nothing there. At around 2 a.m. the police started to interrogate the accused after obtaining the consent from the accused for a night interrogation. The accused then made a confession. However, the Court reversed the conviction and declared the substance of the right to counsel. It reasoned that ordinary people are normally overwhelmed by being suddenly arrested by the police, and therefore lose their free will and ability to give informed consent. The purpose of Articles 95 and 158-2 is to endow the accused with 'the right to obtain a lawyer's assistance and consultation', as well as to impose on the police the duty to warn the accused of that right. If the police fail to honour the accused's right to counsel with a lawyer by way of intentionally delaying the interrogation until the lawyer has left, the confession obtained thereafter shall be deemed to have resulted from dodging the law and shall therefore be excluded (Supreme Court, 98 Tai-Sun 4209 [2009]). In this decision, the Court emphasized that the arrestee had the 'right to obtain a lawyer's assistance and consultation' because informed consent was suppressed by the sudden arrest. Based on this rationale, it seemed that the scope of the right to counsel shall include the right to consult with the lawyer before interrogation.

To protect the right to counsel, a proposed amendment to the Code is under consideration now. This proposed amendment provides that the attorney, who is present at the police interrogation, may at any time request to have a conference with the accused or inform him or her of their rights. The attorney has the right to hear the entirety of an interrogation, and the police may not separate the accused and their attorney in any way. The purpose of this amendment is to correct bad practices.

Although an accused has the right to retain an attorney at the investigation stage, before 2006 the government did not have a corresponding duty to appoint a lawyer for the accused in all circumstances. Dramatically, in May 2006 the Legislative Yuan, under the protest of the Ministry of Justice, amended the Code and required a prosecutor to appoint a lawyer for any accused who is unable to make a complete statement due to unsound mind. This is the first time in Taiwan's legal history that the government's duty to appoint a lawyer for the accused has been extended from the trial stage to pre-trial stage, even though it is limited to

⁷ CCP Article 245, Section II states that 'The attorneys for defendants or suspects may be present when prosecutors or judicial police officers interrogate defendants or suspects.'

those of unsound mind. It is not impossible that the same right might be extended to the indigent accused in the future.

(ii) Trial stage

During trial stage, a defendant has the right to retain his or her own attorney. In certain cases, the court even has a duty to appoint an attorney for the defendant. Failure to perform such a duty is a reversible error (Article 379, Section VII of the CCP). Before 2003, the court had such a duty only in the case of very serious crimes or in cases where a defendant is unable to make a complete statement due to unsound mind.⁸ After adopting the adversarial trial system in 2002, the Code provided that the court had such a duty if a defendant with a low income makes a request for an attorney. Further, in 2004, when plea bargaining was adopted in the Code, it was also provided that the court must appoint an attorney for any defendant who agrees to accept a sentence of more than six months unsuspended (Article 455-5 of the CCP).

(iii) Attorney-client privilege

Before 2009, communication between a detainee and defence lawyer was monitored and recorded, and this recorded information could even be admissible against the detainee at trial.

Article 23, Paragraph 3 of the Detention Act used to provide that when counsel visited an accused on remand, the visit should be under surveillance. The Detention Act authorized not only on-site monitoring by the detention facility personnel, but also eavesdropping, and video and audio-recording, among other measures. In practice, visits by counsel were routinely monitored and recorded pursuant to the above statutory provisions. Article 28 of the Detention Act also provided that: 'Any statement, demeanor, or contents of correspondence sent or received by the defendant suitable for references during investigation or on trial, shall be submitted to the prosecutor or the district court.' This enabled the information obtained by surveillance or audio-recording during visitation to be admitted into evidence against the accused during investigation or at trial. In a 2006 case, the Taiwan High Court delivered a conviction based on such evidence, on the grounds that the Detention Act is a well-drafted and justified law and therefore that evidence obtained according to the Act shall not be excluded (Taiwan High Court, 95 Sun-Sue 1610 [2006]).

On 23 January 2009, the Constitutional Court declared the above provisions unconstitutional. The court reasoned that these provisions, which allow a detention facility to conduct surveillance and audio-recording without considering whether they achieve the purpose of ensuring detention or are necessary for maintaining the order of the detention facility, have hindered the exercise of the right to

⁸ CCP Article 31, Section I provides that 'In cases where the minimum punishment is no less than three years imprisonment, where a High Court has jurisdiction over the first instance, or where the accused is unable to make a complete statement due to unsound mind, the presiding judge shall appoint a public defender or a lawyer to defend the accused if no defence attorney has been retained; in other cases, if no defence attorney has been retained by an accused with low income and a request for appointing one has been submitted, or if it is considered necessary, the same rule shall apply.'

defence and that they have exceeded the scope of necessity. They have therefore violated the principle of proportionality under the Constitution, and are inconsistent with the meaning and purpose of the Constitution, which is to protect the right to litigate. However, the Court held constitutional that 'mere visual monitoring' without probing into the content of discussion was allowable, because of the need to maintain order in the detention facility. The Court emphasized that a detainee has the right to exercise free and unrestricted communications with their defence lawyer. Any law intending to limit such a right must be stipulated in a concrete and precise manner and be subject to the determination of the court. In urgent circumstances requiring a restriction, relevant judicial remedies should be considered, along with related procedures, and there should be a review of the necessity, manner, time and disposition of such restrictions. The Court declared that the above provisions shall be ineffective as of 1 May 2009 (Interpretation No. 654 [2009]).

As a result, the Detention Act has been amended to provide that

When a detainee is visited by his defence lawyer, officials of the detention facility may visually monitor the visit, but cannot hear their communication except otherwise provided by laws. To maintain the order and security of the detention facility, mail or materials sent to or from a detainee's defence lawyer may be checked for contraband.

Currently, a detainee enjoys the right to exercise free and unrestricted communication with his or her defence lawyer.

Exclusionary Rule

Before 1998, evidence illegally found or seized was certainly admissible at trial. Except for the exclusion of confessions obtained through torture or other improper methods, the Code did not have any provisions allowing the trial court to exclude physical evidence under any circumstances. Whether the evidence was illegally obtained was always regarded as a separate issue with which a trial judge had no interest or obligation to investigate. Indeed, it might become a reversible error if a trial judge excluded the illegally obtained evidence. However, in a 1998 breakthrough decision, Taiwan's Supreme Court declared that a court may exclude illegally obtained evidence when it believes that the admissibility of the evidence will impair justice and fairness (Supreme Court, 87 Tai-Sun 4025 [1998]). The Court based its decision on constitutional mandates that liberty cannot be abridged without due process of law, and that a defendant has the right to a fair and public trial.

Following the judicial creation of the exclusionary rule, the Legislative Yuan repeatedly reinforced the rule in the CCP after 2001. The 2001 amended Article 416 provides that upon motion by those who have been searched, the court shall review the legality of the search. If a search is revoked by the court, the trial court may exclude the evidence obtained. This was the first legislative recognition of the exclusionary rule in Taiwan's legal history. In 2002, Article 131 was amended to provide and emphasize the exclusionary rule again. Article 131 requires that in searches under exigent circumstances, prosecutors or the police shall report to the

court within three days after the search. The court may revoke the search if it believes the search to have been illegal. If the police or prosecutors do not report to the court within three days, or the search is revoked by the court, the court may exclude the evidence at trial. The exclusionary rule provided in the above two articles is limited to the elements specified in the articles. In 2003, a much broader exclusionary rule was added into the CCP. Article 158-4 provides that the court may exclude evidence obtained in violation of the procedure prescribed by law. In other words, the exclusionary rule is not limited to illegal searches and seizures. Under Article 158-4, the exclusionary rule is not mandatory but discretionary. In deciding the admissibility of evidence, the court shall balance the protection of human rights and the public interest.

The newly adopted exclusionary rule has resulted in a revolution of criminal procedure in Taiwan. Contrary to the past, the legitimacy of evidence now becomes an issue, and sometimes the most important issue, at trial. Many defence lawyers enjoy and wield their new 'weapon' at trial often. The conduct of prosecutors and police is now reviewed and examined in an open court. As a result, prosecutors and the police now pay much more attention to procedural law than before.

After the adoption of the exclusionary rule, some defendants were indeed acquitted due to the exclusion of illegally obtained evidence. In some cases, prosecutors even refused to initiate prosecutions because evidence was obtained illegally. The accused's rights, therefore, not only exist in words, but also are enjoyed in reality.

After the adoption of the exclusionary rule, Taiwan's courts also recognized the US doctrine of 'fruit of the poisonous tree' (*Nardon v. U.S.*, 308 U.S. 338 [1939]), in two High Court decisions.⁹ The High Court, in those two decisions, also applied the American 'purged taint exception'¹⁰ and ruled that when the taint has been purged (by a defendant bringing forward new evidence), derivative evidence shall not be excluded.

Although the Supreme Court did not explicitly use the term 'fruit of the poisonous tree', its decisions, nonetheless reflected this concept. In a 2004 decision, an accused was tortured by Policeman A at one police station, and was then transferred to another station and interrogated by Policeman B, who did not use any illegal methods. The lower court admitted the second confession made to Policeman B. However, the Supreme Court reversed the conviction and asked the lower court to investigate whether the second confession was produced under the influence of the torture of the first interrogation (Supreme Court, 93 Tai-Sun 6018 [2004]). The case means that the second confession, although no illegal method was employed, is still presumed 'tainted' as long as the first confession was obtained through torture or other illegal means. The Court would not accept the confession unless it has been proved to be 'purged' of taint.

In a 2007 decision, the Supreme Court affirmed that a confession would be presumed to be involuntary if it followed from an illegal arrest. The police in the case illegally arrested the accused and sent him to the prosecutor's office for

⁹ These cases were Taiwan High Court, 91 Sun-Gan (1) 197 (2002); Taiwan High Court, 92 Sun-Gan (1) 299 (2003).

¹⁰ See *Wong Sun v. U.S.*, 371 U.S. 471 (1963); *Brown v. IL.*, 422 U.S. 268 (1978).

interrogation. The lower court admitted the confession made before the prosecutor because no illegal methods could be found. The Court indicated that an illegal arrest would cause physical and psychological compulsion on the accused. It therefore concluded that a confession made before a prosecutor was involuntary because it was compulsory due to the influence of the illegal arrest (Supreme Court, 96 Tai-Sun 3102 [2007]). Actually, the Court did not find any evidence to support its conclusion that the disputed confession had been produced under the influence of the previous illegal arrest, nor did it try to explain its reasoning. It seems that any confession after an illegal arrest shall be excluded. In both the above decisions, the Supreme Court almost required the government to prove that the confession was not tainted by the previous illegal interrogation or arrest. The result is no different from the application of the 'fruit of the poisonous tree' doctrine. This is not surprising, because it is the Supreme Court's tradition not to use academic terms, but only the language of the statutes. In this sense, we can also say Taiwan's Supreme Court has indeed adopted the doctrine of 'the fruit of the poisonous tree.'

Right of Confrontation

(i) Establishment of the right

Under the excuse that it did not serve the purpose of finding the truth, a defendant previously did not have the right to cross-examine a witness or even to meet a witness face-to-face. A judge might examine a witness without a defendant or a defence lawyer present. Any witness's in-court statements were admissible against the defendant as long as the judge read to the defendant the contents of statements and showed him or her the records of statements.

A witness's out-of-court statements made before a prosecutor or at a police station were *per se* admissible against a defendant at trial. In many cases, the Supreme Court held that a defendant did not have the right to confront a witness, and it was at the court's discretion (Supreme Court, 26 Sun 1907 [1937]; 78 Tai-Sun 1488 [1989]; 76 Tai-Sun 6679 [1987]; 72 Tai-Sun 7770 [1983]). However, in 1995 the Constitutional Court in Taiwan declared that an accused does have the constitutional right to confront witnesses (Interpretation 384 of the Grand Justice Committee [1995]). The decision was aimed at the Anti-Hoodlum Act, Article 12 of which provides that 'In handling a hoodlum case, the police or the court shall examine a witness separately in secret if the accuser, victims, or witnesses ask that their names and identities remain confidential... The accused and his retained lawyer may not request to confront or cross-examine secret witnesses.' The Court reasoned that without considering the circumstances of the case, the Act prevents the accused and his lawyer from confronting or cross-examining secret witnesses simply because the accuser, victims, or witnesses request that their names and identities remain confidential. It deprives the accused of the right to defence, and hampers the court's truth-finding function. The significance of this decision is the declaration that a defendant has the right to confront witnesses, and that the right has a constitutional origin.

In 2003, Article 159 of the CCP was amended to recognize the hearsay rule and to reinforce the defendant's right of confrontation. It provides that out-of-court statements of any person other than the defendant are inadmissible except as

otherwise provided by law. Under the new provision, witnesses' statements at the police station are not admissible unless they comply with certain exceptions. However, under Article 159-1, a witness's statements made before other judges are *per se* admissible, with no exceptions. A witness's statements made before a prosecutor are also admissible unless they fall under some exceptions. Of course, the above hearsay exceptions attract great criticism from scholars and defence lawyers.

However, in several 2003 decisions, the Supreme Court declared that although some out-of-court statements are admissible under the Code, courts shall still give a defendant the chance to cross-examine witnesses. It reasoned that the defendant's right to cross-examine witnesses is protected by the Constitution. The fact a court has shown a defendant the minute of a witness's out-of-court statement does comply with the Code.¹¹ Nonetheless, if a defendant at trial can do nothing but deny or admit that statement, the admissibility of the statement not only hinders the search for the truth, but also violates the defendant's right to confront his witness (Supreme Court, 91 Tai-Sun 7369 [2002], 92 Tai-Sun 3421 [2003], 92 Tai-Sun 5415 [2003], 92 Tai-Sun 4540 [2003], 92 Tai-Sun 3824 [2003]). These decisions offset the impacts improperly created by the hearsay rule in the Code.

(ii) Oath Taking

Before 2003, certain witnesses enjoyed the right to lie at trial even though they had the capacity to understand the penalty of perjury. For example, a conspirator with or an employee of the defendant could be a witness but was not allowed to take the oath. Their unsworn statements could be admissible against a defendant, but they could not be charged with perjury if they had lied because they had not taken the oath. The law covered several categories of person: (1) those under sixteen years old; (2) those unable, because of mental disability, to understand the meaning and effect of an affidavit; (3) those are suspected of having a connection with the case as a co-offender, concealing an offender, destroying or falsifying evidence, or receiving stolen property; (4) those who are related to the accused or to the private prosecutor to a certain degree;¹² (5) those whose statements may subject them or related people to a certain degree to criminal prosecution or

¹¹ CCP Article 165 states that: 'Notes and other documents in the record which may be used as evidence shall be read to an accused or their essential points explained.'

¹² CCP Article 180 states that: 'A witness may refuse to testify under one of the following circumstances: (1) The witness is or was the spouse, lineal blood relative, blood relative within the third degree of kinship, relative by marriage within the second degree of relationship, family head, or family member of the accused or private prosecutor; (2) The witness is betrothed to the accused or private prosecutor; (3) The witness is or was the statutory agent of the accused or private prosecutor or the accused or private prosecutor is or was the statutory agent of such witness; (4) A person who has a relationship to one or more accused or private prosecutors specified in the preceding section may not refuse to testify on matters which relate only to the other accused or private prosecutors.'

punishment;¹³ and (6) those who are employees of or who live with the accused or the private prosecutor (Article 186 of the CCP).

Although both the accused and victims kept expressing their great abhorrence of the admissibility of witnesses' unsworn statements, the Legislative Yuan allowed the law to stand for more than half a century. In 2002, after the Code adopted the adversarial system, prosecutors who appeared at trial believed that some witnesses were lying, but could do nothing to stop the 'obstruction of justice'. For this reason, with the support of judges, prosecutors and defence lawyers, the Legislative Yuan did not take much time in 2003 to amend the above law. Now, all witnesses, except minors or persons with mental disability, have to take the oath when testifying at trial. If not, their statement is not admissible.¹⁴

Of course, witnesses still have different privileges when refusing to testify. For example, a doctor may refuse to disclose information about his patient.¹⁵ A defendant's parent may refuse to testify for anything related to their son or daughter. However, if they do not refuse to testify, they must take the oath and could be punished for perjury if they lie.

(iii) Co-defendants

Before revision, the Code did not specifically provide whether a co-defendant's statements should be treated like those of a witness or of a defendant. However, the Supreme Court held that a co-defendant's out-of-court or in-court statement was admissible against a defendant even though the defendant had not had a chance to perform a cross-examination or the co-defendant did not take an oath (Supreme Court, 30 Sun 3038 [1941], 31 Sun 2423 [1942], 46 Tai-Sun 419 [1957]). In this regard, the Court treated a co-defendant more like a defendant than a witness. This was the practice in Taiwan for more than half a century.

As noted above, the Code recognized the hearsay rule in 2003. Under this rule, a co-defendant's out-of-court statements are inadmissible against a defendant except where otherwise provided by law. In the same year, another article was added into the Code providing that a co-defendant's statement at trial is inadmissible against a defendant unless the co-defendant is under oath and the defendant may cross-examine him or her (Article 287-2 of the CCP). In this sense, it is very clear that a co-defendant's statement is no different from that of a witness. However, a co-defendant still keeps his or her privilege against self-incrimination.

¹³ CCP Article 181 states that 'A witness may refuse to testify if their testimony may subject them or a person related to them as specified in section I of the preceding article to criminal prosecution or punishment.'

¹⁴ CCP Article 158-3 states that: 'If a witness or expert witness fails to sign an affidavit to tell the truth, as required by law, his or her testimony or expert opinion shall not be admitted as evidence.'

¹⁵ CCP Article 182 states that: 'A witness who is or was a medical doctor, pharmacist, obstetrician, clergy, lawyer, defence attorney, notary public, accountant, or one who is or was an assistant of one of such persons and who because of his occupation has learned confidential matters relating to another may refuse to testify when he or she is questioned unless the permission of such other person is obtained.'

In 2004, Taiwan's Constitutional Court held unconstitutional the Supreme Court's previous decisions, which established the admissibility of a co-defendant's out-of-court or in-court statement against a defendant. The Justices held unconstitutional that a trial court could admit against a defendant a statement whose declarant was not under oath and who could not be cross-examined by a defendant (Interpretation 582 of the Grand Justice Committee [2004]).

The Decline Of The Prosecutor's Powers

A prosecutor in Taiwan has the same background and qualifications as a judge. They both must pass the same Judicial Officer (Judges and Prosecutors) Examination, and then are trained in the same Judicial Officers Training Institute for the same period. During the training period, they are assigned to courts and prosecutors' offices to get practical experience, as well as taking lectures at the Institute. After training, they become prosecutors or judges according to their own choices and scores at the Institute. A prosecutor may later request to be reassigned as a judge and *vice versa* because they share the same background and qualifications. Therefore, a prosecutor generally thinks of her/himself as no different from a judge except that they play different roles at criminal proceedings.

Detention

Prosecutors used to assume the power of 'arraignment' in Taiwan. Under Article 8 of the Constitution, the police must, within 24 hours after arrest, turn the arrestee over to a competent court for arraignment.¹⁶ Although the Constitution requests that the police turn the arrestee over to a 'court', the CCP provided that the police turn the arrestee over to a 'prosecutor's office'. A prosecutor had very broad authority to detain an accused.¹⁷ Whenever a prosecutor found it necessary and in accordance with one of the listed reasons specified by the law,¹⁸ he or she might detain the accused for up to two months without obtaining the court's approval.¹⁹

In 1995, Taiwan's Constitutional Court held these provisions in the CCP to be unconstitutional. This further established that the prosecutor shall not necessarily share the same authority as the court. Due to the great complexity and importance of the issue, the Constitutional Court gave the Legislative Yuan two years to amend the CCP in this regard. On 19 December 1997, the prosecutor's authority to detain the accused finally came to an end. A prosecutor must apply to the court for detaining an accused.

¹⁶ Article 8, Section II of the Taiwan Constitution states that 'When a person is arrested or detained on suspicion of having committed a crime, the organ making the arrest or detention shall... within 24 hours, turn the person over to a competent court for arraignment.'

¹⁷ The old CCP Article 102, Section III states that a writ of detention shall be signed by a prosecutor during investigation.

¹⁸ The old CCP Article 101 states that: 'An accused may be detained if necessary after examination, and if one of the conditions specified in Article 76 exists.'

¹⁹ CCP Article, 108 Section I states that: 'Detention of an accused may not exceed two months during investigation...'

Right now, within 24 hours after arrest, an arrestee must be turned over to a competent 'court' for arraignment except where there are other circumstances specified by law. In practice, the police will bring an arrestee to a prosecutor within 16 hours after arrest. Then, a prosecutor normally examines the accused and decides whether the arrestee should be released. Prosecutors still have the authority to set up the conditions for release. If a prosecutor intends to detain an arrestee, however, s/he must apply to the court for a detention order. If the court approves the application of a detention order, the arrestee will be detained for up to two months. After this period, a prosecutor may apply to the court for an extension of the detention. However, only one extension is allowed, and it is limited to two months.²⁰

The abridgement of the prosecutor's authority of detention is in practice significant. In 1997, when prosecutors had the authority to issue detention orders, the number of detainees in Taiwan was 21,457. In 1998, the year when prosecutors lost the power to issue detention orders, the number dropped to 7508, about one third of the previous year.

Searches and Seizures

Before 2001, it was to a prosecutor, not the court, whom the police applied for search and seizure warrants.²¹ If a prosecutor conducted a search or seizure, a warrant was not needed even when there were no exigent circumstances.²²

In 2000, prosecutors ordered the searching of a legislator's office and that of a well-known newspaper. These two incidents shocked society and aroused the Legislative Yuan to re-think whether a prosecutor should have the authority to issue a search warrant. It did not take much time for the Legislative Yuan to abridge the prosecutor's power to issue search warrants in 2001, even under prosecutors' strongest protests.

Currently, except in exigent circumstances or as otherwise provided by the law,²³ a prosecutor may not conduct searches or seizures without a court-issued warrant, nor authorize the police to conduct searches or seizures. Violation of the requirements could lead to the exclusion of evidence as described above.

The authority to issue an electronic surveillance order is not governed by the CCP, but by the Code of Protection and Surveillance of Communications (CPSC). In 2001 when the Legislative Yuan amended the CCP regarding the prosecutor's authority to issue warrants, it actually faced the strongest protests from prosecutors who argued that such prosecutorial powers were necessary for effective crime control. For this reason, the Legislative Yuan simply did not want to deal with the issue of electronic surveillance at the same time. Six years later, in 2007, the Legislative Yuan eventually followed the step of the CCP and amended

²⁰ CCP Article 108, Section II states that: 'Each extension of the period of detention may not exceed two months. Only one extension is allowed during investigation...'

²¹ Before 2001, CCP Article 128, Section III stated that: 'A search warrant shall be signed by a prosecutor during investigation...'

²² The old CCP Article 129 states that: 'A prosecutor or judge may personally conduct a search without a search warrant. *But* he shall show his identification card.'

²³ Such as searches incidental to a lawful arrest or consent search.

the CPSC so that prosecutors do not have the authority to issue electronic surveillance orders, but had to apply to the court.

Decision to Prosecute

After the conclusion of an investigation, a prosecutor must issue a decision not to prosecute if he has found that the evidence of the accused's guilt is insufficient.²⁴ Even if the evidence of the accused's guilt is sufficient to prosecute, a prosecutor still has the discretion to issue a ruling not to prosecute²⁵ or a ruling of deferred prosecution²⁶ in the case of less serious crimes.

Before 2002, a prosecutor's non-prosecution decision was not checked by an 'outsider'. A complainant may apply for reconsideration of a non-prosecution decision (CCP Article 255, Section II; CCP Article 256, Section I), and if a prosecutor finds an application for reconsideration to be well grounded, either the investigation must continue or a prosecution must be filed with the court (CCP Article 257, Section I). If the application is dismissed as groundless, the whole file must be sent to the chief prosecutor at a higher court (CCP Article 257, Section II). If the chief prosecutor at the higher court finds the application for reconsideration well-grounded, he may order the prosecutor at the lower court either to continue the investigation or to file a prosecution with the court (CCP Article 258). If the chief prosecutor at the higher court also finds the application groundless, it must be dismissed. Before 2002, non-prosecution decisions became final at this time, and the complainant could not apply for additional reconsideration.

In 2002, Article 258-1 was added to the CCP to give the complainant another channel to challenge a prosecutor's non-prosecution decision.²⁷ Under Article 258-

²⁴ CCP Article 252 states that: 'If one of the following circumstances exists, a ruling not to prosecute shall be made...The suspicion of an offence having been committed is insufficient.'

²⁵ CCP Article 253 states that: 'If a public prosecutor considers it appropriate not to prosecute a case specified in Article 376 after having taken into consideration the provisions of Article 57 of the Criminal Code, he may make a ruling not to prosecute.' Penal Code Article 57 states that: 'When a sentence is imposed, all circumstances of the case shall be considered, and special attention shall be given to the following factors to determine the sentence: (1) The accused's motive; (2) The accused's purpose; (3) Provocation at the time of the offence; (4) Means employed to commit the offence; (5) Living conditions of the offender; (6) Conduct of the offender; (7) General knowledge and intelligence of the offender; (8) Ordinary relations between the offender and the victim; (9) Dangers or damage caused by the offender; (10) Attitude of the offender after committing the offence.'

²⁶ CCP Article 253-1, Section I states that: 'If an accused has committed an offence other than those punishable with death penalty, life imprisonment, or with a minimum punishment of imprisonment for not less than three years, the public prosecutor, after considering the matters specified in Article 57 of the Criminal Code and the maintenance and protection of public interest, deems that a deferred prosecution is appropriate, he may make a ruling to render a deferred prosecution by setting up a period not more than three years and not less than one year thereof, starting from the date the ruling of deferred prosecution is finalized.'

²⁷ CCP Article 258-1 states that: 'If the complainant disagrees with the ruling of dismissal specified in the preceding article, he may, within ten days after receipt of written ruling of

1, after exhausting the remedy procedure within the prosecutorial system, a complainant may apply to the court to open a trial. If the court finds the application for opening a trial groundless, it shall dismiss it. At this time, the non-prosecution decision becomes final and the accused can never be prosecuted except for reasons specified by law.²⁸ If the court finds the application well-grounded, it shall order the opening of a trial. The order is, therefore, deemed as a prosecution. As a matter of course, the accused is deemed as being prosecuted. However, the defendant may appeal the order to a higher court.

The purpose of Article 258-1 is to impose an 'outsider' to check the prosecutor's non-prosecution decision. This Article has also attracted a lot of criticism from prosecutors and scholars. Scholars believe the Article confuses the nature of the court. A court shall not be a supervisor of a prosecutor, and shall not be involved in investigation. Interestingly, in 2003, there were 1,948 applications for opening a trial under Article 258-1, but the court approved only five of them.

Before 2002, there was no mechanism for checking whether a prosecutor had abused the discretion to prosecute. When a prosecutor files a prosecution, the whole file must be sent, including all exhibits and evidence, to the court.²⁹ The transferral of the file means the completion and the end of the prosecutor's investigation. Before 2002, even if a court found that a prosecution case was not supported by sufficient evidence, it still had to open the trial and find out the truth. Since there was no mechanism to check a prosecutor's decision to prosecute, the conviction rate was very low. For example, in bribery cases, the conviction rate was as low as 42 per cent in 1999 and 41.4 per cent in 2000.

In 2002, under strong protests from prosecutors, Article 161, Section II was added to

prevent hasty, malicious, improvident, and oppressive prosecutions, and to protect the person charged from open and public accusation of crime, to avoid both for the defendant and the public the expense of a public trial, and to save the defendant from the humiliation and anxiety involved in public prosecution, and to discover whether or not there are substantial grounds upon which a prosecution may be based.³⁰

Under the new Article, before the first day of trial, a court shall order the prosecutor to supply new evidence within a certain period if it finds the prosecutor's evidence is 'obviously insufficient to support a conviction'. If the prosecutor fails to supply new evidence within the period, the court may dismiss the prosecution. The Article has a very good justification for existing, but most scholars believe it was drafted

dismissal, retain an attorney to make an application in writing, to the concerned court in first instance, for setting the case for trial.'

²⁸ CCP Article 260 states that: 'If a ruling not to prosecute has become final... no prosecution of the same case shall be initiated except under one of the following conditions: (1) New facts or evidence is discovered; (2) Any one of the circumstances for retrial exists as specified in Article 420, Section I, Section II, Section IV, or Section V.'

²⁹ CCP Article 264, Section III states that: 'When a prosecution is initiated, the file and exhibits shall be sent to a court.'

³⁰ This adopted the language of J. Rosenberry, in *Thies v. State*, 189 N.W. 539 (Wis. 1922).

very poorly. First, the time of the review is after the prosecution, not before the prosecution. At this time, a defendant has already suffered humiliation and anxiety from an open accusation. Second, if the court found that the prosecutor's evidence is 'obviously insufficient to support a conviction' it should have dismissed the prosecution directly. On the contrary, the new Article does not give the court the authority to dismiss the prosecution, but requires it to order the prosecutor to supply new evidence. In 'helping' the prosecutor, the court does not play a neutral role.

Conclusion

What are the reasons and forces behind Taiwan's judicial reform? Three major reasons are frequently given. First, abuse of power by law enforcement officials prompted legislators to curtail their powers, and to endow defendants with more rights. For example, defendants at the pre-trial stage had no right to counsel before 1982. In 1982, the police victoriously announced they had a suspect's confession to the first bank robbery case in Taiwan. However, the confessed suspect jumped over a bridge and drowned himself while being escorted by the police in the search for the bank notes. The case was simply closed, the bank notes left undiscovered. Several days later, a civilian, unrelated to the previous suspect, found that a bag his friend had left in his house was full of bank notes. This led to the arrest of the real perpetrator. He confessed. As to the previous suspect, the investigation found that he had been beaten to make a full confession and had killed himself because he could not bear the torture anymore. Society was outraged. The accused's right to a lawyer at a pre-trial stage was therefore established. Another example of abuse of power was regarding the prosecutor's authority to issue search warrants. In 2000, prosecutors searched a well-known newspaper's office and a legislator's office. The legislators and press reacted harshly to the prosecutor's actions. In 2001, the Legislative Yuan took away the prosecutor's power to issue search warrants.

Second, democracy in Taiwan has aided reform of the criminal justice system. In a mature democratic society, people's strong dissatisfaction with the criminal justice system is voiced to the government easily and quickly. Unlike under the earlier dictatorial government, Taiwan's recent democratic government has paid a lot of attention to overhauling the criminal justice system. Moreover, most of the changes in the CCP occurred after 2000, the first year in which the ruling party did not hold a majority in the Legislative Yuan. The ruling party could pass almost no laws without compromising with the opposition party. Generally, the opposition party prefers to limit the powers vested in the police and prosecutors, and to protect human rights. For this reason, more provisions for protecting human rights were added to the CCP.

Third, recent developments in the criminal justice system are very closely related to the judiciary's awakening to its role. In 1994, Taiwan's Constitutional Court held as unconstitutional the secret witness provision in the Anti-Hoodlum Act on the grounds that it violated a defendant's right to confront his witness (Interpretation 384 of the Grand Justice Committee [1995]). Although the CCP explicitly provided that prosecutors had the authority to issue detention orders, the Constitutional Court declared the provision unconstitutional in 1995. In 1998, the Supreme Court

created the exclusionary rule in Taiwan. The Judiciary now plays a more liberal role in protecting human rights than before.

As a result of the three forces above, Taiwan has made great progress in reforming its criminal justice system. The reform in Taiwan is still going on: the Judicial Yuan has sent to the Legislative Yuan a bill regarding the reform of the appellate procedure. It might take two years to complete the legislative process. Even after that, there is still a lot of work to do in Taiwan's criminal justice system, especially in examining and adjusting the implementation of many new provisions in the CCP.

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Policing: Introduction

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Whether or not we follow Weber in defining the state around the exercise of 'legitimate force', the activities of police clearly present us with an exemplary instantiation of modern state authority *per se*. As such, policing is a fruitful focus for comparative discussion of the diverse social and historical processes implicated within the distinctive forms of political association that have become characteristic of modern life in various times and places. This section of *Taiwan in Comparative Perspective* brings together four such discussions. Their juxtaposition promises fresh insight into state-society dynamics and the nature of governmental control in our contemporary world. Taiwan's value as a comparator is, perhaps, nowhere more evident than in a situation like this, where it supplies a point of reference drawing a broad constellation of issues into a coherent discussion. Indeed, 'Policing Studies' itself, as a scholarly project, must constructively bridge a wide spectrum of empirical concerns. An adequate understanding of police can arise only when the erudition of historical and cultural scholarship achieves a constructive dialogue with the weighty practical and professional responsibilities involved in the organization and reform of actual police dispositions. We are presently in the midst of a fruitful expansion of this dialogue across national and disciplinary borders; this section of *Taiwan in Comparative Perspective* provides a particular contribution to this emerging movement.

Like most contemporary social phenomena in Taiwan, her policing is a synthesis. Taiwanese policing fuses elements of indigenous tradition with lingering vestiges of the multiple historical forces that have absorbed the island into the modern World System. The institutional dimensions of this fusion manifest as a hybrid system that blends entrenched aspects of the Continental *Polizeiwissenschaft* which so powerfully informed the emergence of East Asian modernity, with elements of Anglo-American reform acquired during the Cold War and consolidated through the post-'86 transition to liberal democracy. In its practical dimensions, Taiwan's hybridized policing system functions embedded in an overarching cultural sensibility that orients and integrates its eclectic institutional mechanism within the categories of a collective ethos that is, quite self-consciously, centered around traditional ideals of community identity. One of the positive dividends of this Taiwanese aesthetic of fusion and hybridity is that it allows Taiwan to have something for everyone: not least, for scholars of police, an interesting counterpoint to the dynamics of policing described here as obtaining in China, Hong Kong and Great Britain.

The original modern municipal police department was, of course, London's Metropolitan Police. As Chris Williams describes the genealogy of UK policing, a central feature has been an enduring tension between law and order. The relationship between these two contrasting rationales was transformed in a 'watershed in practice' around 1960, which Williams explains in relation to wider processes of socioeconomic and cultural transformation. Williams' analysis of these dynamics in the UK resonates with Michael Palmer's account of ways in which China's current reforms have affected the police role. In particular, Chinese reform has opened up new potentials for law to serve as a restraint on state power. Palmer's discussion of contemporary policing foregrounds certain elements that have limited the realization of this potential, including an entrenched custom of campaign-style policing operations, and the persistence of administrative punishments outside the purview of judicial oversight. Structuring Palmer's detailed institutional account is a larger theoretical concern with the complex dynamics between legal accountability and social responsibility. Palmer's discussion shows us how the tensions of this relationship structure the role of police within China's difficult transformation from revolutionary governance to a status quo in which a social order based on economic inequality is to be granted political legitimacy. The contrast with both Britain and Taiwan – neither of which has ever been ruled under a mandate of communist equality – is illuminating.

At the core of questions about the legitimacy of political and economic arrangements are issues of interpretive processes and cultural values. The meaningful role of law in founding political legitimacy is the central concern of Carol Jones's discussion of Hong Kong. In Jones's words, 'The rule of law is to undemocratic Taiwan what democracy is to Taiwan', i.e., a defining figure of popular discourse, through which the legitimacy of political power is debated and understood. Jones takes the jurisdictional border separating Hong Kong's Special Administrative Region from China's Mainland as a revelatory site in which to examine the cultural bases of popular sensibilities about good governance in Hong Kong. The case of a helpless child who disappeared through the cracks of the system responsible for his guardianship serves as *entrée* to analysis of the cultural scheme defining what Mary Douglas, in *Purity and Danger* (1966), referred to as 'matter out of place'. Through exploring the complex narratives spinning out of this event, Jones shows how the meaning of governmental authority in Hong Kong has taken shape around the historical contrast between the former British colony and its un-colonized adjacent regions. Like Hong Kong, modern police first came to Taiwan as an instrument of colonial rule, and established jurisdictional boundaries that persist into the present day. Where the British colonized Hong Kong, however, Taiwan was colonized by Japan, and the consequences of this difference remain pronounced in contemporary police practice. Some of this is seen in Martin's paper, which examines the motivations driving a village police patrol organized by civilian volunteers. As he shows, the ways that the village is understood as a community and the way it is identified as a territorial jurisdiction are both structured by enduring legacies of the Japanese approach to policing as a mode of indirect rule intended to simultaneously foster and co-opt grass-root social dynamics.

Taken individually, each of these papers stands on its own as a rich case study. Taken as a set, they provide the basis for a comparative conversation that has

great potential to contribute to contemporary discussions of police and policing, in Taiwan and around the world.

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Volunteer Police and the Production of Social Order in a Taiwanese Village

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Abstract

This paper is an ethnographic study of a volunteer police force in a village in Southern Taiwan, focused on identifying the cultural motivations of its functional operations. By reference to a discussion of how this institution fits into a larger division of social control labor, I argue that we should understand it as an active and organic element within the cultural constitution of the state.

Introduction

This paper is an ethnographic study of a group of volunteer police in a Taiwanese village. Their organization is called a *Shouwang Xiangzhu Xunshoudui* (守望相助巡守隊) which could be translated as 'Vigilance and Mutual Assistance Patrol Team' (terminology discussed below). However, for the purposes of this paper I refer to it as a 'Civil Patrol Team' and use the acronym 'CPT'. The CPT as a formal institution can be explained by reference to a variety of different contexts, and in each context its significance appears in a slightly different light. For example, Taiwan's police discuss the CPT as an institution of 'civil power' (*minli*, 民力), understanding it as a subsidiary organ of the local police substation and thereby an integral component within the bureaucratic hierarchy of command that leads up to the National Police Administration within the central government's Ministry of Interior. However, at the same time, the CPT also receives money and operational oversight from certain elected offices of 'local self-governance' (township and village), political entities that are theoretically supposed to be prevented from exerting undue influence within the routine enforcement of law.¹ In tension with both of these governmental hierarchies, the formal constitution, internal administration, and ultimate concern for survival of the CPT as an institution are

¹ That is (as discussed below), the CPT receives roughly equivalent portions of its annual budget from the Township Office (*Xiang Gongsuo*) and their local police precinct. Also, the village chief (an unsalaried position subordinate to the Township Office which is filled by village election) is automatically made a vice-chief within the CPT, giving him 'cadre' status and thus access to the decision-making meetings. Ambiguities and tensions between different sectors of Taiwan's governing apparatus have been amplified by democratization (Chin 2003).

entirely the responsibility of a local 'Community Development Association' (CDA or *Shequ Fazhan Xiehui*, 社區發展協會), an ostensibly 'non-governmental' organization that is administered on the basis of a representational system in which voting power is a privilege of shareholding (i.e. paying) membership. Finally, and of focal concern to this paper, the CPT is understood (primarily by its own members) as a direct agency of the 'locality' (*defang*, 地方) or 'village' (*cunzhuan*, 村莊), i.e. simply a social club emerging from the voluntaristic exercise of civic virtue.

From the standpoint of an anthropological observer, then, the genius of the CPT lies in its functional ability to selectively mix the institutional resources afforded by its simultaneous access to these various forms of license. Functionally, the CPT operates as first-responder to order-maintenance problems and exerts a certain latitude of discretionary control over how these problems are taken up into the police and/or political machinery. At the same time, as I will show in this paper, it serves as a mechanism for integrating political-economic interests within an idiom of disinterested, pre-political and non-economizing 'community'. Thus, without exaggerating the larger significance of the team, we can take it as an exemplary kind of practice for understanding the overall division of labor by which the social order of the village is reproduced.

As mentioned, a central feature of the CPT's particular engagement in this production is its self-conceptualization as an agency of an order that valorizes the 'village' as a natural unit of community. This suggests we consider the following questions: (1) what does it mean that this kind of police work is done by volunteers? and (2) what does it mean that the legitimacy of this police force is generated under the mandate of a *village* social order? This paper addresses these two questions by locating the CPT within the larger overall division of social control labor obtaining in contemporary Taiwan. As I describe it, the organizing basis for this division of labor is cultural. The functional niche or role of the CPT within the village is an expression of what Raymond Williams called a *structure of feeling* (Williams 1977), a culturally particular set of dispositions that animates engagement in the reproduction of social order. By reference to an ethnographic description of this institution, I will suggest that we take the poetic aspect of this structure of feeling as an expression of modern political order in a local Taiwanese vernacular form. Furthermore, I will suggest that studying the qualities of 'Stateliness' involved in the CPT's ritual production of social order might offer a useful way to investigate the substantive cultural foundations of the state itself.

Data for this paper has been drawn from three separate research initiatives, which were undertaken more-or-less simultaneously between January and September 2007. These included my own participant observation with the CPT, the contributions of graduate students in my course on social organization who conducted field studies of other civic groups in the village, and, finally, a nationwide evaluation of Taiwan's community policing policies sponsored by the National Police Administration, in which I participated as an assistant researcher.

The Cultural Motivations of Police Work

An ethnographic ride in a patrol car is a trip through a landscape of trouble. Physical and social geography, the regional calendar, weather, time of day, and

anything else of potential relevance are all taken up and assimilated to the exegetical space of street policing, in which they become the ostensible referents for a discourse of problems:

See, it's raining now, so the thieves will be out ... taking advantage of the noise cover and the empty streets ... and they *love* these student ghettos here, where nobody knows anyone else, where nobody knows who's taking what from whom... Are they our people (*zijiren*, 自己人), or what? (CPT Patrolman²)

Every new vista outside the car's window provokes another worried memory, another anxious possibility, 'And right here, this one time, there were forty foreign laborers, from two different factories they were, all drunk and fighting to kill...' ³ Inside the car, the route unrolls as a list of problems. This list is mnemonic for a typology of technologies of response and management, and this typology, in turn, organizes the distinctive blend of operational policy and folk wisdom that makes up 'police work' (Manning 1997).

As a representational or 'dramaturgical' genre, police work spins out narratives that (despite their characteristic emergence in disarticulate masses of anecdotes and homilies) ultimately wind up into a singular story: the story of society as a moral order. The singularity of this story is imagined. The ideals of order and coherence that define the problems projected onto the world outside a patrol car window exist *in potentia* only, as idealized visions of the harmonious good life. Police work rests, definitively, on cultural imagination.

It is the vehicle itself – literally the patrol car, figuratively practical activity mobilized as creative pursuit of an ideal – that manifests the culturally particular vision of police order as a material force structuring the actual conduct of social interaction. The actual order of society is shaped by cultural visions of order in-and-through the manner in which these visions are embodied in practice.

As ideology is channelled through the substantive reality of instrumental-rational practice, the clarity of society conceptualized as a telic moral order becomes clouded and fragmented. Ethnography encounters ideology obscured within a chaotic space of more-or-less consciously understood imperatives generated by actually existing arrangements between morality and power, legitimacy and force. The logic of police work is not transparent to its ideological motivations, for, as Weber pointed out nearly a century ago, the means-ends rationality that arises from the use of material force to moral ends is 'demonic,' irrational, and categorically impure (Weber 1958). To cite Weber in this context is to invoke a bedrock element in the mythology of modern, republican government. This is the modern ideal that the entire field of relationships between legitimacy and force *should*, somehow, be reconciled within a single agency. If a society can have an ostensibly objective moral order, then it can have only one. The rationale of the modern state is to serve as custodian of this ultimate harmony, guarding it against the degenerative conflicts that arise when 'lower' level concerns fail to rise to

² Comment during patrol, evening of 9 August 2007. The reference to 'student ghetto' is a reference to an area of the village inhabited by about 1000 students of a nearby technical college.

³ Ibid.

standards of universal good. The story of modern police work is thus normatively understood as a story properly told exclusively by the state. Where sub-state (private or parochial) organizations participate in policing, they are understood as agencies of *force* alone, the legitimacy of this force is not theirs to create. If they do happen to be possessed of legitimacy – that is, if they can be properly called police rather than vigilantes – then this meaning has been somehow derived from its singular source, the universal good of which the state alone is the ultimate custodian.

This modernist totality is a mythology, of course (Abrams 1988). Like classical studies of primitive religion, ethnographers of modern states find people producing their own social order through mystified rituals aimed at propitiating absent gods. State above, society below, and in between the rituals of police. From this perspective, an anthropology of the state begins with the meaning of these rituals to the people performing them, and then moves out to trace the wider institutional connections through which these rituals incorporate their common-practitioners into a social group possessed of a coherent cultural identity. And so, following this general methodology, I begin here to describe ethnographic materials revealing a locally compelling version of police ritual.

By examining this ritual as an active element in the wider reproduction of a meaningfully ordered society, we can confront the theoretically interesting question of how locally autonomous sources of legitimate force are routinely integrated into a political imagination that reinforces the unitary centrality of the state. We find the substantive motivations of this in the ritual practice itself, in the symbolic logic that makes it compelling to its practitioners. In listening to what Taiwanese volunteer patrolmen have to say about their own motivations, we find a stately force manifest in sentiments of corporate solidarity.

It's a sort of feeling... the feeling that, inside this group, there are no individual interests to be seen, no individual interests at all. In any other kind of group you have the so-called cliques, and when you have cliques then there are problems with the overall cooperation. But, on the Patrol Team, you see only silent dedication. It's a feeling of silent contribution. You don't get any friction, that feeling of grinding against one another, you don't get that. What you see is everyone suffering together, silently working. In the daytime we all have normal jobs, and then at night we sacrifice our evenings to come here and patrol, for the village, for the whole village... Other people won't do this work. Why not? Because you are always dealing with ignorant people. They find fault with you, they spit and criticize. But us, we brothers here, we co-workers (同仁), we just quietly endeavor. None of us haggle or argue over anything. We just quietly accept it. So, that feeling comes when some so-and-so is criticizing us, or whatever, and we are just quietly persevering in our contribution. In the beginning, the village, the *whole* village, all the villagers from the whole village, they didn't understand. And now they understand. Now they approve. Now they *support* us.

(CPT Patrolman)

Exploring these accounts of motivation reveals a discursive tropology of building community solidarity against various threats. In this, the volunteer police team appears to be animated by a relatively determinate repertoire of forms of care,

directed to the welfare of a community imagined to possess specific properties of corporate good. This conceptual/emotional structure, which might be described in aggregate as the 'spirit of the state', composes the cultural formation centrally at issue in volunteer policing. The community imagined is not the nation, however, but the village, the locality. And the people performing these rituals are not professional civil servants, but housewives, factory workers, shop owners: i.e. volunteers. Through their participation in patrol, these people find forms of agency that allow them to engage forcefully in the creative production of the village as a meaningful social context for their lives. One crucially important dimension of this agency is its capacity to shelter intimate relationships from exposure to legal institutions.

I have just detailed three features of the CPT's volunteer policing – village-level imagination, amateur staff, extra-legal values – which might be taken to imply that the CPT is 'outside' or 'beneath' or somehow otherwise not intrinsic to 'the state' *per se*. I believe the situation to be the opposite, however. We are closest to the essence of the modern state when we find it in the emotional structure of the relationship between its individual and collective subjects. From a vantage point in this emotional universe, legality is not always legitimate, and legitimacy is not always stately.

Vigilance and Mutual Assistance

In Taiwan's early agricultural era folk custom was simple and honest, the residents of village and neighborhood were all intimately familiar with one another. Thus, the practices of 'Vigilance and Mutual Assistance' were quite prevalent. But with entry into the industrial age social custom has transformed: interpersonal relations are weakened, and we have all been turned into strangers no longer possessed of active mutual concern. Gradually, this has led to the degradation of the social order, qualitative changes in the environment, and such a variety of signs of chaos (亂像) that the lives of the community-public (社區民眾) are no longer secure. (Excerpt from the CPT's official account of its own formation)

In Taiwan the term *Shouwang Xiangzhu* (守望相助), 'Vigilance and Mutual Assistance,' is considered a *chengyu* (成語), an aphorism evocative of historically derived significance far in excess of its literal meaning. In the late 1990s, this aphorism was deployed in a government sponsored initiative to encourage the formation of a new type of civil organization as a participant in the overall shift of Taiwan's policing apparatus towards community-policing inspired reform. These organizations, the 'Vigilance and Mutual Assistant Patrol Teams' (referred to as CPT in this paper, sometimes called 'Neighborhood Watch' in criminal justice literature on Taiwan) were just the newest addition to a broad spectrum of more-or-less voluntaristic civilian adjuncts that have been integral to the island's modern police bureaucracy since its earliest inception under Japanese colonial rule a century ago (see Martin 2006). At present, the CPT shares its designation as a modality of 'civil power' with organized groups of Volunteer Police (*Yijing*, 義警) and the Civil Defense Force (*Minfang*, 民防). At the same time, however, the emergence of the CPT in the wider context of Taiwan's political liberalization marked something new: it was the first civil policing adjunct in Taiwan's history not

directly created and administered by higher level offices in the formal government bureaucracy.

The policies establishing the framework for the CPT allowed them to be constituted under auspices of one of three different agencies: the lowest-level elected representative of formal state government (i.e. borough chiefs in the urban areas, and village chiefs in rural areas), the management committees of corporately held high-rise apartment buildings, and the semi-NGO 'Community Development Associations' that emerged in the early 1990s under impetus of Lee Teng-hui's strategic reconstruction of grass-roots political institutions. The formation of Community Patrol Teams has proceeded steadily since their inception; according to NPA statistics the nationwide total grew from 9,509 teams (with 85,460 team members) in 2000 to 13,453 teams (with 146,737 members) by the end of 2006.

The team I studied was established in 1998 by a CDA (which itself was constituted in 1994), making it one of the two longest-established teams in the entire jurisdiction of the local police precinct (a jurisdiction which encompasses four townships, and about 12 teams). It has consistently been recognized as an effective and well-run team by the various government agencies that audit such organizations. In 2007 it had 22 active personnel, of whom 17 were male and five female. The median age of the group was 48 years old, the average age 47, and all but four members held regular full-time employment (all but three if being a housewife is counted as employment). More than half the members were employed as laborers in local factories, three worked in sales, two were shop owners (an auto repair shop and a jewellery store), and one was a full-time politician, i.e. the village chief. Perhaps the most interesting statistical detail about the membership is that slightly less than 60 per cent of the members of the team actually lived in the village where the team was established. This seems odd in light of the degree to which the village provides the hegemonic symbol of imagined community that structures CPT members' narratives of the meaning of their work. However, it simply indicates that 'production of locality as a structure of feeling' (Chatterjee 1998: 59) does not take territorial residence as a necessary criteria; all of the non-resident members narrated compelling personal connections to the village on the basis of kinship, co-worker friendships, or other intimate relationships to which territorial residence was immaterial.

The administrative organization of the team is a shallow hierarchy of three layers: a chief executive, the regular team members, and an intermediate layer of mid-level management. The chief executive is elected to a two-year term by a vote open to all team members, upon which he (all four chief executives have been male) is empowered to fill subsidiary management positions by appointment. These mid-level management positions include three vice-chiefs, six unit-chiefs, and a general secretary. Together, these ten administrative positions are classified as 'cadres' (*ganbu*, 幹部), and management decisions are made through consensus of all cadres at meetings presided over by the chief executive. Membership in the team is open to anyone over the age of 20 who is 'not an alcoholic' (this is written into the bylaws), and a three month probationary period is required before formal membership is granted. With formal acceptance, a new member is given two sets of clothing (one a uniform which looks exactly like a police uniform except that the patches substitute the word 'Patrol Team' for

'Police', the other a set of matching civilian dress clothes that all team members are expected to wear when attending public functions under team auspices) and enrolled in an insurance program sponsored by the Police Department, which covers accidents and injuries sustained while on patrol. They are also qualified to attend training which will eventually qualify them for a license as a member of the Civil Defense Force.

The core activity of the patrol team is nightly patrol. This is conducted between 11pm and 2am in a car painted to look exactly like a police car, complete with flashing lights. This work is organized as the rotating responsibility of six units, each of which ideally consists of four members under the direction of a unit-chief (chronic shortage of personnel means most units contain fewer than five people). The units take turns patrolling; thus each individual team member is expected to show up, uniformed and sober, to patrol only once every six days. In practice things are rather loose, people freely exchange shifts and sometimes don't show up at all (three unexcused absences are technically grounds for expulsion). Only the team chief comes every evening, to unlock the headquarters (housed in a community activity centre shared with the neighbouring village), bring over the patrol car, and generally make sure everything goes off in good order.

The major weight bearing down on the position of the chief has less to do with organizing patrol operations than it does with maintaining solvency. Posted (for the stated purpose of 'transparency') on a bulletin board at headquarters is a monthly statement of CPT finances, compiled by an accountant who volunteers with the CDA. According to this record, the team spends about NT\$ 10,000 per month (roughly US\$ 300)⁴ on routine operational expenses such as gasoline, car maintenance, drinking water, etc. They host two annual recreational activities (a dinner banquet and a daylong 'self-strengthening' tourist outing), each of which costs between NT\$ 50-70,000. And they also purchase uniforms for new personnel and pay their membership fees for the CDA (all CPT members are automatically enrolled in the CDA). Together, this adds up to annual expenses of somewhere in the neighbourhood of NT\$ 330,000 or about US\$ 10,000.

Regular income for the CPT comes from a variety of sources, including annual donations of NT\$ 25,000 given by the CDA, somewhere between NT\$ 20-30,000 provided by the township government, and NT\$ 20,000 provided by the police bureaucracy (which also supplies team members with patrol insurance at no cost). This regular income amounts to only about NT\$ 70,000, or less than a quarter of annual expenses. The deficit is made up in two ways. One is through applying for government grants such as those of the 'Six Stars Project', which makes funds of up to NT\$ 110,000 available for specific items of community policing work such as holding neighbourhood meetings. The CPT has been successful in obtaining these grants (attributed to the assistance of the village chief, a seasoned veteran of the application process), but even with these grants there is still an annual need for at least NT\$ 150,000 in supplementary funds. These are collected through charitable donations.

The team collects several types of charitable donation. One category consists of small amounts of money team members themselves regularly donate in the course of covering sundry expenses. These are negligible compared to the donations

⁴ The exchange rate in 2007 hovered around 33 New Taiwan Dollars to 1 US Dollar.

generated by corporate donors and people who are 'hired' as 'consultants' (*guwen*, 顧問) for a two year period (running concurrently with the term of the chief) in exchange for a donation of at least NT\$ 5000. Official-looking 'contracts', suitable for wall display, are given to these consultants. The current chief has managed to recruit some 30 such consultants, and has also brought in a similar amount of donations from local businesses who did not ask to be recognized as 'consultants'. Together these donations will allow the team to break even during his term (i.e. preserve their current surplus of NT\$ 250,000).⁵

Becoming a consultant entitles one to ask the team to provide an honor guard at personal functions such as weddings or funerals. This sort of symbolic display is also routinely staged at local temple festivals (where the team provides the functional service of directing traffic) and during elections (when individual team members are paired with individual policeman to guard polling stations). However, these daylight appearances are intermittent; the focal activity of the patrol team is its nightly patrol, and it is in this patrol that the primary meaning of the team to its members is found.

Like the regular police, the CPT organizes its patrol through the use of patrol boxes. During 2007, the CPT under study maintained 27 patrol boxes. These were white plastic boxes bearing the words 'Patrol Box' in red letters, containing a small booklet in which, every night, a patrolman or patrolwoman is supposed write their name, patrol-team rank, the time, and the date. When these books were full, they were archived at HQ as tangible proof of services rendered, available for review by any agency with a qualified interest. The route driven between the boxes on a given night is left to the discretion of the driver. Visiting them all is required, but it is a point of explicit policy that the patrol routes should be unpredictable, with the intent that this makes it more difficult for people interested in intentionally avoiding the patrol to do so. Actual driving patterns almost always far exceed the territory mapped by the boxes, due to following the movements of suspicious persons or checking levees, trouble spots, construction sites, or any other variety of *ad hoc* concerns. At root, however, the basic architecture of patrol is defined by the boxes: they provide the formal definition of patrol as an activity (i.e. signing all the boxes is the minimal criteria for a complete patrol) and register the activities of the team as a permanent feature of the landscape.

The placement of the boxes themselves is a synthetic outcome of various forms of calculation. Looking at a satellite photograph of the village (Fig. 1), a clear pattern of three relatively distinct types of land-use is evident. Clustered at the south near the river is a typical nucleated village settlement (presently split in two by an administrative boundary). To the northeast of this, stretching along the provincial highway, is a cluster of factories. And in the northwestern region 'behind' these focal areas is a section of scrubland primarily given over to fish husbandry, although there are in fact numerous factories (many of them without addresses, or other forms of official registration) interspersed with the fish ponds.

⁵ It might be noted here that the regular police also use the practice of 'hiring consultants' as a system of collecting charitable donations. This is organized at the national level through a formally constituted institution called the 'Police Friend's Club', that is staffed by retired police officers and precisely shadows the bureaucratic hierarchy of the police. Further discussion of this organization will have to wait for a future article, however.

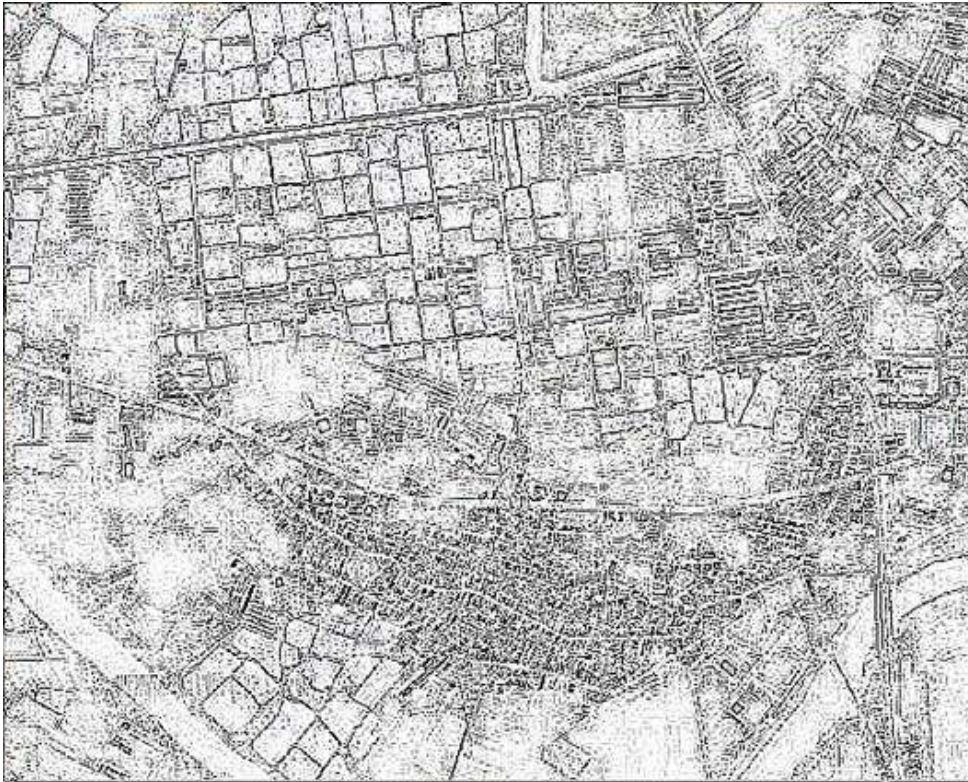


Fig. 1: Satellite view of the village

When the CPT was first established in 1998, the initial staff of administrative cadres selected sites for sixteen boxes with the goal (as they put it) of getting 'full coverage' of the village territory. These boxes were concentrated in the residential area. As the years went on, the practical financing of the CPT became explicitly attached to fundraising from 'consultants', and it soon became standard and explicit operating procedure to hang patrol boxes in response to donations. Thus the 11 boxes that have subsequently been added to the route have expanded the patrol into the factory district (in fact, into the factory districts of two neighboring villages). There is no sense that there is anything awkward about this; team members freely volunteer explanations of the sort, 'We hung this box here because the factory owner gave us NT\$ 50,000 for our new car.' Though it is obvious that favor is being exchanged, it is still interpreted by patrol personnel as a mode through which the factory owner is 'giving back' (*huikui*, 回饋) to the community, as their interest in the security of their own property bleeds out into the collective interest of the community in regional security.

The permanent presence of the boxes functions to mark territory and, like the practice of patrolling with the flashing lights turned permanently on (another feature shared by the CPT and the regular police), advertising the presence of a guardian force is understood as functionally effective in preventing crime. Patrol boxes are only one of many standardized registers for such prophylactic marking of space. Notably, in residential areas, the CPT and police patrol boxes often share the walls to which they are bolted with charms (*fu*, 符): strips of black paper emblazoned

with writings and symbols that constitute a spiritually efficacious power to ward off the forces of evil. One night on patrol, I asked the driver about the charms:

'They are issued by *Qingwang Gong* [the local temple], for the *raojing* [an annual ritual], you know, when the god goes out on patrol...' ⁶, he said.

The god also patrols? 'Yes. Once every year. On his birthday'

The god patrols, like you patrol? 'No, no, no. [laughter] That's like, there are a lot of people, like, a parade... it's totally different.'

I mulled this over. 'OK, it's totally different,' I asked, 'So what is it that makes them both "patrol"?''

He paused in thought a moment, and then replied, 'They are both types of *care* (*guanhuai*, 關懷)'

Structure of Care, Division of Labor

Suppose that everyone focuses only on their self-interest, well then the whole society, the whole, the total group, will just disperse, conceptually at least. So we [CPT] all constantly stress that we are the eternal volunteers. And at the same time we are giving we are also receiving, receiving a kind of happiness, a kind of joy. This locality, this hometown, it gives us a sort of platform on which to perform, where we can fully deploy the meager power of our individual selves... Suppose this institution did not exist, that there was no Civil Patrol Team. Then, naturally, we would not be here right now. We would just be one individual, another individual, another individual, and another individual, going back home to sleep... [But instead,] by participating in this public-interest activity (公益活動), in this group, we get this *sensation*. And when we are outside, then we know the *whole*, really the *beauty* of this whole place. (CPT Patrolman)

The substantive action of patrol occurs in the spaces between boxes. In my observations of this, the CPT exhibited an active voluntarism that contrasted sharply with the sorts of dispassionate obligation I have generally observed with formal police personnel in Taiwan. Particularly enthusiastic are the six 'original elders' (*yuanlao*) who have been with the team since its founding nine years ago. They are the functional heart of the group, serving as drivers and street-level commanders of the six patrol units. Patrol for them is a time for hunting down and cleaning up problems. They stop to move debris off roadways, check doors and gates left uncharacteristically open, ask children on the street what they are doing out so late, follow suspicious (i.e. 'not from around here') people, check levees during typhoons, shut off the headlights of parked cars, poke around construction sites and wastelands used as shooting galleries by drug addicts, and generally engage in a sort of all-purpose surveillance and social grooming.

The basic protocol of patrol involves a staff of three: one person to drive the car, one to ride in the passenger seat and take care of outside work (signing patrol

⁶ This is a temple to *Sanfu Qiansui* ('Three Houses, A Thousand Years'), AKA *Sanwang* (i.e. 'Three Kings'), who fall into the category of *Wangye* deities (sometimes called Plague Gods) common in southern Taiwan. The temple is a defining symbol of the village community; for example, it is pictured as the center of the Community Development Association's official logo.

boxes, etc.), and one to remain on standby at HQ as a fixed point of contact between the patrol car and police or village residents. During patrol, it is CPT policy to keep the car's engine running at all times and the door open anytime the passenger is outside of the car. Like most places in the world, the village has no great love of police, and the CPT has been known to encounter hostility expressed as unprovoked physical assault. Indeed, there has been at least one case of an organized attack on the team's headquarters. I had a milder experience of this hostility when I once unknowingly parked my car in a contested space next to the HQ, causing five or six members of the family owning the neighboring house to burst into the headquarters and direct a stream of verbal abuse towards everyone present until the car had been moved.

From this and other clues, it is quite clear that the collective subject which the CPT aims to represent is not a pre-constituted social fact. Indeed, it is precisely the process of overcoming forms of 'friction' (in the terms of an earlier quote) which degrades community solidarity where the primary satisfaction of patrol is generated. From this angle, we see ordering society as an always-on-going project, more habits of hygiene than structures of order. Thus, parallel to Steven Sangren's analysis of *ling* in Taiwanese popular religion (1987), it is the capacity to constructively mediate the disorder/order relationship that substantiates the 'spiritual efficacy' of the CPT. It is, of course, but one of many participants in the ordering process, a process that ultimately extends across the entire field of political action. Described in suitably broad terms, the political order of the village is an aggregate production under direction of a diverse class of vocational politicians who, if they are named collectively, are generally called *difang renshi* (地方人士), 'local elites':

These so-called local elites are just people who are a bit more enthusiastic about participating in community affairs: the temple management committee, the village or borough chief, the village secretary, the elected representatives, the ones who are routinely active in the locality. We should just say the local elite. There are even some with no formal status at all, no village chief status or elected representative status, nothing at all. But still, they like to participate in the backstage work [*muhou gongzuo*, 幕後工作]. That so-called backstage work is just, you know, the advisors [*muliao*, 幕僚] and, like people say, the 'column-pedestals' [vote brokers], the vocational participants in local affairs.

(Regular Police Patrolman)

These local elites have found a more-or-less institutionalized place in routine policing through their role as mediators of civil conflict:

When it's not too serious, a verbal disagreement or some sort of personal dispute, then we police are just there to mediate. But there are times when the people, both sides, neither one is willing to give! They don't necessarily always listen to us. So then we call the village chief, or some local elites, maybe some of the township councilors, and we ask them to come down to the scene... and they stand in an intermediate position, and they pacify the two sides.... When people see that the village chief himself has come out to deal with it, well then they just improve their posture a bit, you know. The emotions calm down. So, actually, the

[local elite's] role and the police role are, like, well when we [police] are dealing with a situation, some sort of dispute, if we already know both sides, then that's pretty easy to deal with. We just communicate directly with both sides, and calm things down right away. But when we don't know them, well, then there is no possibility that they are going to give us any face. Each individual is just going to insist they have their own reasons. So, really, then the role of the village chief is just that he knows both sides of the dispute. He is better placed as a bridge, to bridge the difficulties. (Regular Police Patrolman)

As discussed elsewhere (Martin 2007), Taiwanese police view their work in terms of maintaining a balanced relationship between law, reason and sentiment: they keep the peace through negotiating reasonable adjustments to the intimate order of community in respect of the abstract forces of legal institutions. Within this endeavor, the capacity of local elites to operate as what might be termed 'sentiment-brokers' makes them a valuable resource. And as we move beyond the sphere of formal police operations into the civil sphere of voluntary associations where the CPT exists, the relative significance of legal to sentimental values declines, and the core tropes of policing change accordingly. So, even as the CPT's operations resemble those of the regular police in working to mediate between the juridical order of law and the intimate order of sentiment, they become clearly distinguished from police in respect of their relationship to law. Their particular position *vis-à-vis* law is evident from several different perspectives. For example, from the perspective of the village chief, law enforcement is clearly not the only problem-solving game in town:

[How to respond] really depends on the precise nature of the problem. For example there are some things, well, like street fighting and such problems between the youngsters, they, they just go directly to some of the local gangsters (混混), you know, the 'local head-snake' (地頭蛇), the local big-man (老大) is just going to come out and solve those problems, those kind of criminal matters. But now, if you're talking about a violation of a regulation, like a traffic infraction or something, well then sometimes, sometimes they don't want us to get involved, because when regulations have been broken, and the police are writing up a citation... well, we are the ones who 'speak-sentiment' (說情). And we local village and borough chiefs, we elected representatives, we see those things, their nature, well, like suppose you are doing something you know is obviously wrong, or you aren't showing people respect. In that case we aren't going to 'speak-sentiment' on your behalf... Generally speaking, if it's something like a traffic infraction, then the residents here are definitely going to ask the village chief to come down and use a bit of influence (*guanshuo yixia*)... or at home, when a household has a domestic disagreement, then they will get the village chief to come look at the situation. And if there is something troublesome, then we can ask the police to come. Because, when it comes to the judiciary, there is a big difference between the police and the village chief. They are more inclined to believe the police. Because the village chief is embedded in human sentiment (受人情的包圍).

(Village Chief)

All agencies involved in the production of the village social order articulate their goals in terms that encompass distinct legal and sentimental dimensions. Within this, the CPT invokes a somewhat distinctive framing of the precise way that law is made relevant to this order. That is, CPTs consider themselves in the first place to be an agency of the community oriented by values of compassion (*renqingwei*) and mutual assistance. However, as a formally constituted enterprise, their work to these ends intersects with the activities of the regular police; it is through this intersection that their specific relationship to law takes shape. As the Chief of the CPT put it

Whenever the police need us, we help any way we can. And when we encounter a problem, we ask the police to assist us. Because we have no authority to enforce the law, it's necessary for us to ask the police to deal with that. That kind of police-civilian cooperation is simply necessary.

In an interesting inversion of the conventional idea that law and sentiment are antagonistic, CPT personnel use the register of law – and the technology of the file – as the basis for constructing a trusting relationship with police agencies:

We are the Civil Patrol staff, so naturally, well, we should mention here, those government agencies keep files of data on their personnel. They wouldn't just go to a villager they don't know! Like, if the person doesn't have a file inside their organization, if the organization doesn't have that person's basic information on record, then... to call on them for assistance? That's impossible! You know the saying, 'Raise a rat, it chews the bag [i.e. to cultivate the wrong people is to create trouble for yourself]', sometimes it's just like that. So, accordingly, all of us are staff with our basic data recorded in the Ministry of the Interior, or the National Police Administration, or the County Government... we are all registered, we are recorded in the internal register. Naturally they are going to call for us, they will feel more reassured, our data is already recorded in their superior agencies. They call on us for help, naturally they feel more reassured. When everybody is a stranger, and you call on someone to help, you will have the fear: if this turns out to be trouble, then to whom can you turn? The police units, they are also looking out for their own security. (CPT Chief)

The overt public identity of CPT as a social control agency is dramatized in symbolic practices that distance it from any law enforcement function. Their paradigmatic actions exemplify paternalistic concern: finding lost children, checking up on 'independent seniors' without filial offspring, taking food to the hungry on holidays, rendering assistance at traffic accidents, removing advertisements put up by predatory moneylenders, escorting drunks and women home. In self-description, they emphasize their relationship with the regular police as limited to providing assistance and surveillance, reiterating a claim that they have 'no authority to enforce the law'. This is not entirely true; Taiwan's law grants general authority to intervene in crimes in progress and, as we will see, the CPT does this regularly. However, what is behind the insistence that they have no legal authority is the nature of the way they articulate their own localized authority in relation to the 'higher authority' of the state. And it is in this articulation, I claim, that

we can see how a relatively *autonomous* local production legitimate force is presented as 'stately', and thereby made consonant with the overall reproduction of state authority.

As it 'goes over their heads' the enforcement of criminal law becomes an especially meaningful type of event in the community imagination, an event with the potential to either solidify or degrade community solidarity. Positive synergy emerges when state law and community sentiment are aligned. The paradigmatic site for this is civilian discovery and apprehension of thieves *in flagrante delicto*. Crowds of local residents mustered in seizing an unfortunate burglar is a staple of local news in Taiwan. As the chief of the local substation described it, 'those more populist problems (比較大眾化), things that directly impact public interests like stealing stuff or destroying property... that brings the general public out. That kind of stuff has a direct personal relevance to them.' At least three times in the history of the CPT under study, large groups of villagers assembled in the course of chasing down thieves. CPT members consistently identified those experiences as the purest expression of the energies of 'mutual assistance' that animate their foundational mission:

You only have to say that there is a thief somewhere, and then this kind of a solidary psychology arises [凝結的心態就起來了]. It's a kind of unique power of unity. Everyone is out searching together. Everyone comes out together to surround, to advance, to just deal with the situation, together. I have learned this, I have *felt* this... For example there was one time just before New Year's, oh we were so happy! The [electrical appliance] factory's burglar alarm went off, the phone call came, and we were all here [at HQ], so we deployed immediately... But, well, you know, it was not only our team that responded. The villagers too, when they heard that news, well 20 or 30 people all came out and went to go catch those [thieves]. And that, that has really achieved the meaning of 'Vigilance and Mutual Assistance.' You see something like that, oh, it is the most meaningful thing for us. The people, the villagers, it's like they already have achieved consensus, that all-encompassing 'mutual assistance'... And that is our purpose. Really, patrol is not the responsibility of the CPT. It is everyone's mutual responsibility. That is the goal we are trying to achieve. (CPT Patrolman)

But, just as alignment of community sentiment and criminal law generates positive synergy, so does their disjuncture create dissonance. Here is where the CPT's position as an agency fully 'embedded in human sentiment' finds its most direct confrontation with the police position as an instrumental agency of law enforcement. The bonds of human decency oblige CPT members to respect the interests of intimate associates discovered on the wrong side of the law. To manage these obligations, they draw on resources more subtle and sophisticated than the legal apparatus. The purest expression of this dynamic is found in their treatment of juvenile delinquents, for the patriarchal imperative to take care of the young provides an unimpeachable warrant for bracketing the law:

The most difficult thing we ever have deal with is the person from within our own village. Are you going take him, speaking truly here, are you really going to take him and *song* [送, to 'deliver' or remit to formal prosecution]? Are you really going

to *zhua* [抓, 'seize' or take into custody]? An arrest or prosecution is going make for hard dealing with his family, or the others, you know... There was one I recall, near around 17 or 18 years old, maybe 16, just a kid, a high school student, playing the little robber, you know, engaging in acts of thievery. And so we gave chase. And then we caught him... Now, what? You say you want to 'process' [*ban*, 辦, (the verb for processing a formal case)] this? You want to ask the substation to send someone? And the substation, say, hey this kid he's 'deaf and mute', ah, he's from a broken home, and you say you want to prosecute? The police, they take a long view [*kaolüde hen yuan*, 考慮的很遠]. And of course we are thinking way ahead too. Naturally, we are the ones best able to offer the kid some guidance; the ones like that, they need strong guidance. So we just give him some encouragement. Say, 'Hey, you don't need to be that way. If you're in need, if your belly is empty or whatever, just come down to our patrol HQ and we'll feed you some noodles. We'll buy you a meal.' And like this, naturally, it's just more likely that kid can become a person of proper standard [*biancheng yige zhengguide*, 變成一個正規的], a normal person. *That* is our primary objective! Not to say 'I am going to remit you to legal processing. When we deliver you to the courts we have achieved our mission.' We are not going to create those kinds of repercussions. So, the most difficult problem is just when we have caught one of our own villagers. You say you want to 'process' [辦] this? Truly, it can't be processed [真的辦不下]. You say you won't process this? That's no good either.

(CPT Patrolman)

The vision of social control expressed here is a process of guidance and correction, the production of people of proper standard through a patriarchal investment of care – feeding the hungry and offering guidance.⁷ It is policing in its guise as positive engagement in facilitating the natural processes of human development, framed within an intimate order antithetical to 'processing' (*ban*) under the logic of legal institutions. This is not an idle theory. The *yuanlao* of the CPT all possess a sort of masculine charisma, made articulate through their 'war stories' and evident authority within the team, that draws adventure-seeking teenagers into their orbit. Several evenings were spent on patrol with 'interns' recruited from the wrong side of the patrol car's window.

Potential tensions exist between the idioms of policing provided by the CPT and 'law enforcement' *per se*. However, wherever these tensions become manifest, their intrinsic antipathy is contained within a sphere of explicit standards for human conduct. CPT enforcement is, in other words, a respectful and constrained space of 'exception' to law. It is very careful never to challenge the law's fundamental legitimacy; it is merely, respectfully, pointing out that perhaps the law is not *appropriate* to this particular situation. And, thus, the CPTs are not vigilantes; they are an *adjunct* to, rather than a contestant with, the state. They positively embrace the legitimate order of society under state authority. Within their embrace, they establish their own authority as caretaker of intimate community. And they exercise this authority through constructing a subordinate prophylactic barrier around sentimental relationships, managing the application of legal standards in a way

⁷ 'To feed without teaching is a father's error', *Sanzijing*.

that is appropriate to the defining ethos of the community as an intimate community made up of people of proper standard:

[This is a] *Locality* [地方]! We aren't, we don't count as, we aren't like a government organization. We exist *within* our own community, in the village where we were born and raised. And we Taiwanese, we have this basic common quality: 'mutual assistance'. Of course, as agricultural society turned into industrial society, and now into this high technology society, well the *renqingwei* [compassion, literally 'flavor of human sentiment'] has gradually declined. So naturally, we need to take this, take this so-called *renqingwei*, and make sure it's preserved, that everyone still 'mutually assists'. The people before, whenever they had trouble or difficulties, well their neighbors would just mutually assist. So, we are just performing this same kind of a mediating role [牽線的動作], just weaving the threads. Neighbors these days, they have nothing to do with one another. But then, because of some certain element, or when some certain thing occurs, then people will come out and cooperate. And then the elements are there, for working together dealing with things. (CPT Patrolman)

Conclusion

This paper has described a village's volunteer police force, and identified the structure of care that constitutes its core motivations. This structure of feeling consists of a particular type of concern for the welfare of a population, conceived as an intimate community order maintained under patriarchal authority. Its heart is an image of the good society as something that must often be kept insulated from the jurisdiction of legal institutions. On the surface, this could be seen as suggesting the village CPT is a vigilante group, but it is not. Ethnographic studies of police have demonstrated how the instantiation of the ostensibly 'universal' aspects of state authority in particular situations is *always* an outcome requiring significant discretionary work on the part of local agencies. The potential paradox of this situation – enduring and universal authority entirely dependent on situational exigencies and *ad hoc* adjuncts – is resolved through a cultural arrangement. That is, as we have seen in the example of this paper, localized nodes of authority strive to imbue situations under their control with an expansive sense of peace and justice, to endow their particular technologies of control with an aura of 'Stateliness'. Through this, they actively knit the case-wise situations that fall under their realpolitical jurisdiction into a larger political order. Legal institutions and formal bureaucracy are simply two of many resources deployed in this aggregate productive process. The overall order of production is, however, ultimately cultural, and its core is the active work of localized agencies in creatively *translating* across the points of articulation the imagined ideals which assemble localities around a common center.

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Police Governance – Community, Policing, and Justice in the Modern UK¹

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Abstract

The British police have always had the advantage of their image as a predominantly non-violent force which policed by consent. In reality, of course, this image has obscured a significant amount of violence, which was acceptable to the public at large because it mainly concerned marginalized individuals. Yet as the twentieth century witnessed an ever-greater revulsion against the use of violence in everyday life, this police practice came under increasing scrutiny.

This article will use a historical account to analyse the tension between police power and social legitimacy. It will note a series of crises of legitimacy which occurred in the mid-twentieth century and culminated in the 1960 Royal Commission on Police, and which demonstrate the limited extent to which this Commission addressed the problems which had precipitated it.

It then examines the consequences of the on-going legitimacy challenge which, I argue, had a two-stage effect. The first was to create an unprecedented degree of disconnect between police and the communities which they served in the 1980s – a problem exacerbated by racism and economic decline. The second, though, saw the police engage with a new rhetoric of 'community safety' and move towards closer relationships with other public authorities, and smaller organizational units. Nevertheless, these units remain politically unaccountable to the areas that they serve, and connection between the police and the community is institutionalized rather than intimate.

Introduction

Policing, *per se*, has been best defined as the application of the state's claim to the monopoly of force (Bittner 1975). Yet the mandate which the police enjoy to preserve order through force often comes into conflict with the rule of law. This is particularly the case when the norms of the black-letter law contradict social norms. This article will give a brief historical account of the British police institution, looking carefully at the roles of violence, governance, and legitimacy – and also

¹ This article has benefitted from useful comments on earlier versions by Clive Emsley, Bob Morris, and Louise Westmarland.

the ways that in society at large, the ground rules for all three of these factors were changing during the twentieth century. It will concentrate its historical account on policing in the late 1950s and early 1960s, because it is there that a watershed was reached in policing practice, when the space granted to 'unwritten law' significantly contracted. Following this, it will consider how the reaction to this in terms of structures of police legitimacy, first through the issue of racial discrimination, then through the response to a sustained rise in the fear of crime and disorder, have combined to create today's British police style. There is little explicit comparison with Taiwan, but it is written with an awareness of Jeffrey Martin's work on the social and legal habitus of the Taiwanese policeman (Martin 2007). This discusses the dual value systems – of formal law and informal community relations – which dominate the lives of Taiwanese police. In many respects this dichotomy parallels that in the UK between the law in books and the law on the streets.

The Nature of British Policing

From its beginning in the nineteenth century, Britain's new police were there to protect property (notably at night) and to keep the streets clear. They were not especially good at policing private violence, or the crimes of the respectable (Emsey 1996, 71). One key new function of the new police was the attempt to impose order on unruly workers (Storch 1976). The pioneer police advocate Patrick Colquhoun had made it clear that one of the main aims of police reform was to help create a docile body of men and women who could be relied upon to be industrious (Neocleous 2000: 51-53). Their instructions to keep the streets clear and 'move on' groups of people led to many instances of friction with various sections of the public, especially young working-class men (Brogden 1991: 98). This was not total of course; policemen (usually patrolling alone and relying on a rattle or a whistle to summon help) often avoided conflict (Steedman 1984: 151). Nevertheless, the constant pressure to 'move on', often accompanied by summary violence when the targets were juveniles, appears to have made an impact on the way that people behaved on the streets (Storch 1976: 496).

The UK's police and courts had a vast reach by the mid-nineteenth century: for example, it is likely that by the 1870s a third of working-class men in an industrial city like Sheffield had been arrested at least once (Williams 2000: 77-93). The reach of the 'policeman-state' was largely directed towards the poor, most likely to commit offences related to public order on the street, and it was extended when legislation such as the 1880 Education Act – which made it a legal obligation to send children to school – began to impact further on traditional standards of behaviour (Gatrell 1990: 269, 279-281). The police were the institution whose threats underpinned the nineteenth-century view that society could be moulded and reformed: they were there to deal with those who refused to comply. Their particular attention was fastened on the very poorest and on the most mobile: the vagrants. If anything, the perceived threat (financial as well as criminal) from vagrants loomed larger in the countryside than in the towns, and it was one of the factors that mobilized support for rural police reform in the 1830s (Storch and Philips 1999: 56-57).

Often, police power was directed more against those seen as outsiders: these were often strangers to the area, but in many cases particular police attention was fixed on ethnic minority groups: from the Irish in the nineteenth century to immigrants from the Commonwealth and Eastern Europe in the late twentieth. Close attention was rarely pleasant, and often led to friction between the police and some sections of these communities (Swift 1997: 399-421). The traditional police style of the nineteenth century 'new police', therefore, was often couched in terms of hostile interactions on the street. Meanwhile, the society of 1829 had not stayed static. First, the working classes and lower-middle classes were gradually admitted to membership of the political nation – by 1890, most working men had the vote, for example. But as far as policing was concerned, democratization had limits: in the counties, police were controlled by committees dominated by unelected justices of the peace (Emsley 1996: 85). Even though the police in the cities were controlled by elected watch committees, the local urban franchise depended on the payment of property taxes and thus excluded most of the poor. The established pattern of police governance was that policing, although on the face of it locally responsible, was a core state function which needed to be kept further from the hands of the people than did other functions such as welfare, housing, or education (Williams 2004: 96-120).

Another important long-term development in the nineteenth century was the decline in the acceptability of violence as a means of social interaction. Customary violence – which was characterized by physical retribution, expressions of community autonomy, and the maintenance of domestic and public norms – declined throughout the century. A society which had seen violence as an essential prop of the social order and source of social power changed into one that condemned most of its manifestations and sought to limit their effect. As the upper and middle classes withdrew from 'what previously had been a shared culture of violence', the notion of violence became increasingly problematic, and attitudes to it became bound up to the process of differentiation known as 'civilizing'. Thus, concern about violence increased rapidly at a time when actual violence was in all probability static or decreasing slightly. Civilization in its various forms was not necessarily non-violent: it espoused a definition of the limits of acceptable violence which was different and contradictory to those deriving from the 'traditional' view. By the end of the century, even the call for a return to the infliction of pain as a punishment 'had to be clothed in the language of refinement' (Carter Wood 2004: 44). Violence was also seen increasingly as a problem with social causes which could thus be tackled, rather than an inevitable aspect of life. As violent actions became taboo, the portrayal of violence grew more vivid, and was more likely to be seen as a fixed property of the 'unrestrained' lower orders (Carter Wood 2004).

The police system of the nineteenth century changed little in the early years of the twentieth. It was still based almost entirely on foot patrol, delivered by a disciplined bureaucratically-controlled force. This came under strain though from social and economic change. Dispersed settlement in suburbs, and the advent of widespread car ownership, challenged a policing paradigm which had been designed for monitoring and controlling densely-packed and largely static populations (Klein 2007). One way that they dealt with this was by turning to technological solutions: but this in turn created other problems. Police were quick to adopt radio in the interwar period; in the 1930s the modern scheme of control

rooms responding to calls from the public directing officers in cars was introduced (Bunker 1988). The widely-copied 'Unit beat policing' system originated in Aberdeen in 1948, as a mixture of cars and foot patrols (Weinberger 1995: 41-44). In the 1960s, the Lancashire force, faced with the problem of policing the new dispersed suburb of Kirkby, was among the first to move to a system where every police officer patrolled in a car (St. Johnston 1978: 169). For a time this was hailed as the way forward for policing, but soon voices from within the police service as well as outside it began to complain that these new systems had separated the police from the public, and created a new dynamic for police officers who, rushing from problem to problem, were distanced from the community at large, and more predisposed to aggression (Weinberger 1995: 73).

In a process that was sometimes justified with reference to technical change, but appears to have owed more to the fact that 'politically unreliable' Labour members were becoming increasingly powerful on police authorities, the structures of police governance also changed. Before 1914, towns in England and Wales had almost complete autonomy over the way that they policed themselves, subject only to having a force that was large enough to qualify for a government grant. The police authority was the Watch Committee, a sub-committee of the town council, which had the power to hire, fire, discipline and direct its police force (Williams 2007). The First World War had instigated a trend towards more involvement by central government in local policing. National security issues such as the threat of espionage had redefined the police role as national rather than local, and yet the national government preferred to maintain a degree of control over the police whilst evading ultimate responsibility for its actions (Emsley 1996: 138). During the 1920s the Home Office also began to intervene in the appointment of chief constables, with the aim of creating a reliable group who would not be beholden only to a single police authority. From 1934 they funded the training of a police 'officer class' for the first time at Hendon. Thus local autonomy was gradually eroded by Whitehall. The increasing provision of common police rules and conditions of service culminated in the 1964 Police Act, which in effect merged the city forces with their surrounding counties, and universalized the less-democratic county police model (Williams 2007; Critchley 1978: 293-295).

In the twentieth century, police exercised informal control of the social environment: one anecdote can illustrate this, taken from oral history research carried out by Barbara Weinberger into policing during the interwar period:

Barrow boys were a bit of a nuisance causing an obstruction, and that was an offence. But we used to have a working arrangement that if they saw you coming, they would move on, or just lift the handles of their barrows to make a show. I remember one who didn't lift his handles when I came, so I said 'Come on' so he just lifted his handles and I went on my way. (Weinberger 1995: 33)

This is highly similar to a situation revealed by Martin's observation of the contemporary Taiwanese police at work: the police have to be seen to be keeping the paths clear, but do not actually keep the paths clear. On the ground, policing in the interwar period, as before, was often very rough. Backing up orders to move on was the threat of arrest for adults, or force for juveniles. Weinberger identified one

very important element of the task of policing: violence. Often this was against any men who challenged their authority, who were usually drunk:

The worst things we have was a shemozzle with drunks on Friday or Saturday. We knew how to handle them, if you couldn't handle a man in them days you were no good as a PC in them days... I know it's wrong, but we used to give 'em what they give us, and that was the only language they understood, the blaggards. (Weinberger 1995: 158-159)

Sometimes it was retaliatory, in lieu of punishment. In the words of a policeman talking about Norwich in the 1930s:

A PC went to a domestic disturbance. A man had been knocking his wife about, so the PC gave him a hiding. The man said, 'I'm going up to the Guildhall about you'. The PC said 'Alright, you know the way'. Of course, the policeman went out and rang up the station and said, 'Look, there's a man coming in to complain about me giving him a hiding.' And the Inspector met him at the door, and took him round the corner, and gave him another one. (Weinberger 1995: 158)

Police demanded and expected signs of deference from juveniles, and 'knocked their heads together if they didn't get it' (Weinberger 1995: 156). So, violence between police and, usually, young working-class men, and by police on working-class boys, was a key element in the way that the streets were policed.

The Emerging Legitimacy Crisis of Police Power on the Streets

The 1950s occupy a special place in the indulgent tradition of the British police constable, eulogized as the era of *Dixon of Dock Green*. McLaughlin has pointed out the significance of the fictional character of PC George Dixon, first in the film *The Blue Lamp* and then in the TV series *Dixon of Dock Green*, which ran from 1955 to 1976, in creating an imagined England. In this, a consensual police officer both upheld the law and was an integral part of the fundamentally cohesive community which he served. The policeman knew the people on his beat, and knew where they stood. Petty criminals deferred to him and would even co-operate with him in investigating serious crime (McLaughlin 2007: 15-23). This aura of policing as a symbol of the consensual society is important: it feeds into an imagined history which has great importance in debate about policing and society in the early twenty-first century (Loader and Mulcahy 2003). But the 1950s did not look like halcyon years to those who lived through them. The 'golden age' perceived a crime problem. This consisted of rising reported crime, and fear of the erosion of respect and the young out of control (Jackson 2008: 289-308). Some of this was the perennial fear of crime and disorder, but some of it was new. There are several reasons why these changes in the level of crime and the level of respect may well have been real. There was a genuine increase in the disposable incomes of teenagers. They had an increased measure of economic self-sufficiency, and with full employment, fear of the sack for misdemeanours was no real deterrent. The disposable income of under-25s had doubled in real terms between 1939 and 1958. This income was predominantly spent on goods related

to display and sociability. Jobs were more likely to be similar to those of adults, and the purchasing power of youth was concentrated disproportionately in the working class (Abrams 1959: 7, 11, 13). Linked to this, one sociologist ascribed 'trouble' among Scottish youths in the early 1960s to the fact that 'better health and physique, less exhausting jobs and shorter hours mean they have a great deal of steam to let off' (Jephcott 1967: 140). Also, large scale re-housing put them in environments full of young people, less able to learn by observation how adults conducted themselves.

This potential real change in disorderliness was accompanied by a heightened sensitivity to it, deriving from the specific circumstances of the post-war era. There was no 'peace dividend' of lower juvenile crime. Not only that, but the higher expectations associated with the interventionist and expensive welfare state added to this climate of disappointment. So on one side, we had both higher 'real crime' and heightened sensitivity to 'social disorder'; but simultaneously, on the other side there were developments that called into question traditional ways of dealing with both. Many influential sections of the population were demonstrating that they were less willing to tolerate low-level violence against juveniles by the police and others. In 1960 a correspondent to the semi-official journal *Justice of the Peace* noted that:

The salutary cuff with the glove and order to 'move on' may result in subsequent legal proceedings against the policeman today, whereas in days gone by it was accepted as commonplace and profited by. (Breaks 1960)

Informal 'street justice' was losing its legitimacy.

Police officers active in the mid-century tended to see this tendency as manifesting itself in a general reluctance of other people to sufficiently discipline children. This led to the children not accepting their position in the general scheme of things, at the same moment when the police were increasingly prohibited from using the method that kept them in their place: low level informal violence (Weinberger 1995: 153-156). Police surveyed in 1960 seemed to back this up: about a third of them who thought that the relationship with the public had deteriorated put this down to one or more of the following reasons:

Public more knowledgeable: they know more about law. Young people are more antagonistic to authority, lack parental control. Barristers make PCs look foolish in court, court sentences are too lenient. Enforcement of petty regulations in general antagonizes the public. (Home Office 1960c: e.1: 15)

The public agreed, in 1960:

79.4% of public think that police's job has become harder in recent years. 28% blaming more organised and sophisticated criminals but 26% blaming 'more trouble with teenagers and young people, that more crimes were committed by young people, parents did not control them properly, and the police did not have sufficient powers for dealing with them. (Home Office 1960d: e.2: 68)

The idealism of the 1940s was increasingly replaced by cynicism in the 1950s. The Christian institution the London Police Court Mission had issued an annual report in 1947 which hailed the gradual advance of humanitarianism:

public opinion no longer tolerates legalised brutality. This change has come about, not by chance or through the operation of some natural law, but through a few people seeing more clearly than the majority. (LPCM 1947)

But the few began to have doubts by the late 1950s: by 1959 the LPCM report complained that modern youth was being spoiled by 'modern adults' such as psychiatrists, and 'the modern boy has lost his fear of the law' (LPCM 1959).

There were several cases of police violence or corruption which led to the 1960 Royal Commission on the Police. One, which became known as the case of the 'Thurso Boy', is worth exploring, because it sums up an important change in attitude towards police violence. John Waters, a 15 year old boy, was sitting in a café in Thurso, Scotland, in December 1957 when two PCs – Harper and Gunn – entered to check the premises. After some words in the café, Waters was beckoned or led outside by the police. On his return he noticed that his jacket was slightly torn and went back out after them. Words were exchanged, and he allegedly referred to them as 'Gestapo bastards'. They took him into an alley, where Gunn apparently punched him in the face. Harper does not seem to have approved of this. Waters complained to his parents, who told their MP, who asked questions in Parliament until an Inquiry was convened under the 1921 Tribunals of Inquiry Act. Meanwhile, Waters was not charged, and the police were not disciplined. During the interlude, both sides accused each other of trying to drop the case on payment of a sum of money. This kind of informal resolution has a long history, and one of the other factors which prompted the 1960 Royal Commission was the revelation of the amount of money that the Metropolitan Police had been paying out to settle similar cases out of court (Waters Inquiry 1959).

The Inquiry found that Gunn had committed a minor assault on Waters, though also that Waters had used foul language and provoked him. Parliamentary reaction to the Inquiry focussed on the anomalies produced by the use of the 1921 Act: chiefly the fact that the law of evidence did not apply to the constables' testimony. The reluctance of the Inquiry to deal with the refusal of the Scottish Procurator Fiscal to press charges against the men also appeared to limit its effectiveness. But the key point is that for almost the first time, police violence towards juveniles was seen as legally questionable: it had moved from the sphere of the unwritten to that of the written. The Thurso Boy case was not representative, in that it got taken up nationally. But it was an indication of a wider social trend; police tended to see young people in cafes as problematic: part of a youth culture that they did not really trust (Jackson 2008). At the same time, the police themselves were also subject to the suspicion that they were above the law.

The 1960 Royal Commission on Police

As well as a crisis in confidence over police violence exemplified by cases like the Thurso Boy, the public were also aware of a rolling crisis in police accountability. In

1957 the chief constable of Brighton was implicated in a corruption scandal, and in the summer of 1959 the chief constable and watch committee of Nottingham fell out publically over the investigation of allegations of corruption. Consequently, in December 1959, Prime Minister Harold Macmillan announced to the Commons that a Royal Commission on the Police would be formed, under Sir Henry Willinck, who had been an MP, minister and judge in his time. It would look at (*inter alia*) 'the relationship of the police and the public and the means of ensuring that complaints by the public against the police are effectively dealt with.' (Hansard 1959). This was a chance to bring out into the open the contradiction between a police service working on the basis of 'the law on the streets', and a public which increasingly was demanding that they stick consistently to the methods of 'the law in books'. What stands out from a study of its history, though, is the way that this opportunity was missed. The members of the Royal Commission, and the crucial posts of chair and deputy, were vetted to make sure they were reliable. Hence the post of deputy was given to a former general rather than to a trade unionist, on the grounds that the former could be 'impartial', and the latter could not. (Home Office 1960a).

The outcome of the Commission was a report about administration and structures of accountability. The civil service made a big thing of accountability to the House of Commons, which tended of course to place the Home Secretary and thus his staff in the centre of it all. From the start, the Association of Municipal Corporations, representing the elected Watch Committees, was seen by the Home Office as the opposition. The Commission avoided the issue of dealing with the public by taking as given that the 'general public' could be safely divided into innocents (who in the main liked the police) and villains (whose testimony was disregarded). More to the point, the RC was less an exercise in dispassionate evidence-gathering, than one producing a desired outcome. Its Secretary revealed this in a letter to the Chairman about their proposed public opinion survey in June 1960. To the draft list of questions he added another:

do you think that we have the finest police forces in the world? is suggested in the hope that the answer might give the police the vote of confidence which they sorely need. But there is, of course, a risk that it might misfire! (Home Office 1960b)

The image of the British police was being actively maintained. Once the opinion survey was produced, the published analysis revealed that it was deliberately presented to show the police in the most favourable light possible (Home Office 1961). First, the questionnaire itself contained a leading question with regard to police violence, which played down the possibility. The second way results were distorted was by aggregation of people who had had past experience of the police. One section cross-referenced the correlations between people's opinion of the police and their past experience of them, in three categories 'no encounter', an 'unsatisfactory encounter', and a 'satisfactory encounter'. The categories of 'no encounter' and 'satisfactory encounter' were aggregated together: thus it is impossible to compare the opinions of those who had good with bad encounters. The majority who had no dealings with the police were included in a way that makes it difficult to examine the main findings of the survey. The people who had

no dealings with them may have been satisfied with the police, but those who had the most to do with them had a far lower opinion. The concept of the 'general public' was thus defined as to dilute criticism. The third way that the survey was distorted concerns conclusions drawn from the under-representation of youth. The survey designers asserted that their sample was representative in all respects, save only that of age. This *non sequiteur* was used to discredit the opinions of the youngest age-group, whose opinions of the police were consistently the worst. Alongside these sleights of hand went a refusal to draw any unwelcome conclusions from the survey. The implications of 2 per cent of the UK's population claiming first-hand knowledge of major police misconduct were not taken on board by the Commission or by most of the people who commented on its report (Weinberger 1995: 202).

The Commission's terms of reference kept it away from the issue of police power over suspects. For this, the Home Office's Permanent Secretary Sir Charles Cunningham was wheeled in to meet the Chair, the Deputy and the Secretary, who later summarized his boss's position thus:

following a series of incidents... public confidence in the police appeared to have been shaken. It was on this account that the terms of reference centred on relations with the public, necessarily touching on questions of the police officer's accountability and the arrangements of controlling police forces. It had not been intended that the Commission should go into questions relating to the operational work of the police, in their technical efficiency, or the methods which they employ in e.g. searching premises, arresting people, and interrogating suspects. (Home Office 1960e)

A contentious concept of the public is also here advanced as self-evident: these 'arrested people' and 'interrogated suspects' are obviously not the same people as the 'public', and were ruled as not being part of an investigation of 'the public'. Cunningham accepted that 'examination of relations with the public might well involve some examination of allegations that the police have abused or misused their powers.' But in practice the Commission did not do this, steering clear of allegations of abuse.

The Royal Commission reported, and the 1964 Police Act was drawn up. It got rid of elected watch committees, consolidated a national profession of senior police officers, increased the power of the Home Secretary, and reduced the Police Authorities to the role of quartermaster. The 1964 Act also allowed the Home Office to set up common services without any involvement from the police authorities and to amalgamate boroughs and counties – a process that eventually produced 43 territorial police forces (Williams 2007). This centralization went hand in hand with a close attention to central control of police training and accreditation. All these outcomes, it is reasonably clear, were what the Home Office wanted to happen. They moved the system of British police organization further from institutional accountability to the public, and towards a more centralized system, with the positive aim of further professionalizing the service. But the 1960 Royal Commission did not alter the relations between the police and the public, and this continued to be a source of on-going controversy, because the underlying trend for

more people to be less sympathetic to breaches of the formal law by the police had not gone away.

The Racialization Of The Policing Debate In The 1980s

The immediate catalyst for most of this controversy in the 1970s and 1980s was the role of racism in policing and in the wider society. When substantial numbers of West Indian immigrants arrived in the UK after the Second World War, they tended to collect in areas, which made them prey to discrimination and harassment (Pryce 1979). They rapidly realized that the police were no help to them. Despite many attempts on the part of West Indian diplomats and community groups to raise the alarm, relations deteriorated, until by the 1970s a young generation which had seen their parents systematically discriminated against came of age in an era of high employment and a policing style which, while only rarely racist in its intent, was felt as harassment (Whitfield 2004). Those black youths who turned to crime brought down an indiscriminate police response on the community as a whole, which further soured relations. In wider society, the threat of the 'mugger' was seen as a proxy for a whole host of social ills. Criminologist Jock Young described the situation as 'Military policing', characterized by

policing without the consent of, and with the hostility, active or otherwise, of the community. The community do not support the police because they see them as a socially or politically oppressive force in no way fulfilling any protective functions... the police force under such circumstances will not be in a position to receive the type of information from the community which would enable its activities to be characterised by the principle 'certainty of detection'. The crucial consequence of this situation is that an important part of police activity will come to constitute the random harassment of the community at large irrespective of involvement in crime. (Young and Lea 1984: 172-173)

It was in this kind of atmosphere that, faced with high figures for street robbery, the Met launched operation 'Swamp '81' in Brixton in April 1981. One hundred and twelve officers stopped and searched youths (around half of whom were black) for evidence of wrongdoing. Many were convicted under the 1824 Vagrancy Act for acting suspiciously: the infamous 'sus laws'. Of 943 stops, just one resulted in an arrest for robbery, and one for burglary. This operation was the cue for three days of anti-police rioting in the area, which shocked many observers who had failed to realize the extent to which consensus between police and community had broken down.

Lord Scarman's subsequent Inquiry concluded that although the riots were to be condemned, the police could make significant changes to the way that they went about their work. Notably, they ought to put into place permanent consultation schemes with representatives of local communities, and police training ought to be designed so that police officers were aware of the reactions of the communities that they were policing. Scarman did not, though, recommend that the police shift to the idea of 'community policing' which was being advocated at the time by some senior officers such as John Alderson, who called for greater community cooperation between the police and other elements in society so that the police

could help to halt their growing alienation from the public (Alderson 1984: 229). Scarman's 1981 report problematized policing, and presented would-be reformers with a great number of standards against which to test it (Scarman 1982).

From the 1980s, 'best practice' and 'performance indicators' were increasingly set by the government. These meant that although the various objectives of the police were often described in terms of proximity to the community, the local police forces themselves lacked the operational flexibility to interpret them themselves. As Loveday sums it up:

In place of major reform, police services were instead made subject to an increasing range of performance measures which were to be formalised within the Police and Magistrates Courts Act 1994. This provided the Home Secretary with the power to determine national police priorities. These would be published thereafter within every 'Local Police Plan' produced by the police authority and chief officer. (Loveday 2006: 284)

Power was moved to central government, but simultaneously diffused in the direction of the periphery as well – initially to a much lesser degree. The focus of police organization shifted towards the local, as a result of increased government intervention. An Audit Commission report written in 1991 pushed for powerful 'basic command units' (BCUs) below the level of police, and these were set up in 1994 following legislation in 1992. There are over 200 of these, compared to the 45 traditional forces, and they are usually led by a Chief Superintendent with wide powers over uniformed staff, and 200 to 1000 of these under his or her command (Loveday 2007: 325).

At the same time or slightly later as these changes in the way that policing was managed were occurring, others began to alter the way that policing on the streets was carried out in Britain. Through the 1980s, in policing and Home Office circles, 'community' was usually a surrogate term for 'race', and when 'community policing' was discussed, it was seen as a panacea chiefly for the problem of the alienation of ethnic minorities (Rowe 2004: 147). By 1997 this had changed: in the 1980s and 1990s police faced criticism from the left, not merely for policing oppressively, but also for failing to protect the poor from crime (Kinsey *et al* 1986: 86, 202). A developing doctrine in criminology which called itself 'Left realism' included a critique of the democratic accountability of police, but also argued that policing should be effective. 'Left realists' were happier, though, calling for the police to stick to investigation of crime rather than engage in the kind of partnerships with other state institutions advocated by some supporters of community policing such as John Alderson (Kinsey *et al* 1986: 194).

Meanwhile, the headlines were once again about policing and race. In 1990 Stephen Lawrence was killed in an unprovoked racist attack in south-east London, but the failure of the police to catch his killers became a symbol of the Met's alienation from London's black population. The detectives' assumption that the killer(s) knew the victim would have been correct in the vast majority of murder cases: their problems lay in sticking for too long to their assumption that it was not necessarily a racist attack. In 1997, the incoming Labour government called a public inquiry into the case under the judge Lord MacPherson (Rowe 2004). The nadir of the Inquiry for the Metropolitan Police occurred when the author of an

internal report into the investigation was asked to justify it. The witness, a former head of the Yard's elite Flying Squad, was unable to reconcile his positive report with the litany of failure that the Inquiry had heard. His cross-examination by the Inquiry was unhappy, as it rapidly became clear that the internal report – an anodyne description of a routine investigation in which no mistakes had been made – was a whitewash, and his description of it was 'unconvincing and incredible' (Lawrence Inquiry 1998: 197). MacPherson concluded of him:

his value as a witness and his credibility in vital matters had been undermined, for reasons which were obvious to anybody listening to his cross-examination... Some of the answers given and assertions made... were in the full sense of the word incredible. (Lawrence Inquiry 1998: 201)

The depth of the crisis that hit the Met at this point can only be understood if we remember the nature of new policing, which concerns the creation and operation of rational bureaucratic organizations, the governance of which demands that those in charge are sure that they are being told the truth by their subordinates. The Metropolitan Police was at the time under the control of the Home Office, which has always had an interest in making it more efficient, and a tendency to suspect that it could be more fit for its intended purpose. The multiple failures of internal administration discovered by MacPherson meant that the Met was forced to implement the majority of his recommendations. As well as more community consultation, this took the shape of family liaison teams and the creation of a 'Racial and Violent Crimes Task Force' (McLaughlin 2007: 152). The major departure, though, was the admission that policing could be institutionally racist. No longer were police defending their record on the basis of a series of discrete encounters: instead they had been forced to note the extent to which their institution as a whole impacts on society. Merely being accountable to the law alone was no longer enough. The policing agenda, which had from the 1970s increasingly focused merely on serious crime in the name of impartially upholding the law, thus broadened once more to include the way that policing is more than merely reactive, but also productive of social relations (Rowe 2004: 141-142).

The 'left realist' critique of policing in the 1990s was one ingredient in the new round of reforms that followed the 1997 general election. The initial centrepiece of the new Labour administration's approach to crime control was the 1998 Community Safety Act. This set up Crime and Disorder Reduction Partnerships, on which local authorities were represented, to

carry out an audit of local crime and disorder problems, consult with local communities, publish a crime and disorder reduction strategy based on the needs and priorities of local communities, identify targets and performance indicators for each part of the strategy. (McLaughlin 2007: 127)

This was aimed at antisocial behaviour rather than at serious crime: the informal policing of such behaviour exercised in the interwar period by the coppers Barbara Weinberger spoke to has shifted to a formal mode of control. Neighbourhood policing teams now also include amateur special constables, Police Community Support Officers (PCSOs – cheaper and with no powers of arrest), local council

street wardens, and private security patrols, which between them are intended to provide a system of 'reassurance policing' (Crawford and Lister 2004). The aim of the policy shift towards an overt policy of 'neighbourhood policing', which occurred in the first years of the twenty-first century, was 'to reduce the fear of crime and to resolve local problems of crime and anti-social behaviour' by establishing more than 3,000 policing teams at the local level, staffed by a 16,000 PCSO and 13,000 police (HMIC 2008). At the same time, local authorities are restructuring more of their operations in the name of situational crime prevention. Access points are being closed off, concierge services added, warden patrols added, and housing tenancy agreements have been made stricter. Neighbourhood policing has become, in McLaughlin's words 'spectacularised' – made as visible as possible, and often features special operations against selected serious crimes which have a high level of media coverage built in to them (McLaughlin 2007: 137). But this was not zero tolerance policing, for four reasons: First, local councils did not take community safety seriously, and continued to carry out crime prevention work autonomously. Second, the Home Office remained sceptical of the value of the beat police, and focused on the problem of serious crime, wanting policing to be intelligence-led rather than responsive. Third, the police themselves were reluctant to 'expand their mandate and get involved in disputes and sub-criminal matters that were woven into the fabric of certain neighbourhoods' (McLaughlin 2007: 128). Fourth, police were content to manage antisocial behaviour in one place, rather than risk dispersing it through an attempted crackdown.

After 2004 the Basic Command Unit was made more autonomous, but important performance indicator targets were set nationally, with very limited scope for local variation (Loveday 2006: 285-286). Meanwhile, the Home Office has become yet more interventionist in police authorities, to the extent that they are very nearly cyphers, with their residual accountability functions being eroded by both the Home Office's Inspectorate of Constabulary, and the new Independent Police Complaints Commission.

Conclusions

The British police sometimes seem to be groping back towards an ersatz or cargo-cult version of the *Dixon* ideal, but have yet to reach it. Most bobbies are still in cars rather than on the beat, and the officer who is designated to look after a specific area has a lot of ground to cover, and, crucially, is meant to work as part of a multi-agency team. The informal violence that ensured compliance with police orders has become bureaucratized as the Anti-Social Behaviour Order (ASBO). Law on the streets and law in books have been brought into harmony with one another, by a process which has substantially altered the burden of proof in favour of the state at the expense of the suspect.

At this point, it is worth considering Taiwan once more as a point of comparison. First, Taiwan went through an overt process of democratization in the 1990s, one of the key elements of which was the removal of significant discretionary powers from the police (Martin 2007: 673). This was seen as moving it in the direction of the West, which had democratized centuries previously. But do we need also to recognize that the tacit exercise of arbitrary power by the police in the UK had only been gone for a generation or so? This is not to argue that there are stages of

political evolution and some countries are ahead of others – indeed, the same arguments, about the limits of the exercise of legitimate force, were being had at the same time in both countries.

What the UK did in the 1990s, faced with a crisis in professional policing, was to adopt a rhetoric of zero tolerance which moved towards the neighbourhood but never arrived there. Police engaged with other agencies of the state, notably local authority housing departments, in instituting ASBOs. They took part in 'problem-oriented policing' to resolve discrete crime waves. They grudgingly allowed Community Support Officers to appear on the streets, chiefly as a visible reassuring presence. What they failed to do was set up a comprehensive network of substations like the Taiwanese 'paichusuo', and they definitely did not move the police constable back onto a beat in the Taiwanese style, in which one patrolman is personally responsible for a very few city blocks. The rhetoric of policing moved closer to the neighbourhood but the police themselves remained aloof from it. A growing distaste for casual violence had opened up a gap between the desire of police to control the streets and their effective powers to do so: this gap was filled by a bureaucratized power rather than by the police moving themselves, and their accountability, closer to the actually-existing public.

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Changing Policing in the People's Republic of China

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Abstract

This paper examines the role played by the police in the changing relations between Party-State and society in the People's Republic of China (PRC). It concentrates on several key dimensions of the role: the police in the local community, relations between the police and other legal institutions, the use of several processes of administrative justice for dealing with allegations of police misconduct, and the recent strengthening of the system of armed police. The essay also considers policing in the context of the often-uneven processes of legal development and law enforcement in the PRC. The principal focus in this paper is the PSB (Gong'an Ju: 公安局) or Public Security Bureau, and its Ministry, the MPS (Gong'an Bu: 公安部) or Ministry of Public Security. Policing development is also increasingly complicated by the fact that it has also become the site for at least three different and to some extent competing ideologies: those of state and state-sponsored violence, harmonious society, and governance according to the rule of law.

Introduction

In post-Mao China, there has been substantial development and reform of legal aspects of economic and civil relations and institutions. Legal progress in these areas of Chinese social life has, however, not been matched by the growth of much-needed legal controls over the powers of the state. A greater emphasis on the need for a regular legal framework for the exercise of authority has encouraged the introduction of important new values and rights – most notably, in the 1982 Constitution,¹ freedom of person (Article 37), governance in accordance with the rule of law (Article 5, as amended 1999), and the state protection of human rights (Article 33, as amended 2004). However, the impact in practice of such formal progress has not been impressive. The traditional authority of the state, lingering ideals of a coercive socialist dictatorship, and the perceived need to protect rapid economic growth by ensuring a stable socio-political environment,² have all meant

¹ *Zhonghua Renmin Gongheguo Xianfa*: 中华人民共和国宪法.

² A perception the effect of which is exacerbated by an official tendency to encourage moral panics which require strong police response.

much resistance within institutions such as the police to the idea of limiting strong executive powers, and to restricting the influence of the Chinese Communist Party (CCP). The police in China are now located in a difficult interstitial position, sandwiched between on the one hand general developmental goals which reflect increasing commitment to a 'rule of law state', human rights protection, as well as market forces and private property and so on, and on the other, persisting authoritarian norms, institutions and values, many of which retain something of a 'socialist' imprint. The Constitution does, of course, speak to both the new principles of governance and the old Stalinist autocracy, but masks the resulting contradictions by its use of imprecise language and a lack of justiciability. Similarly, the major criminal justice reforms of the 1990s – the 1996 Criminal Procedure Law³ and the 1997 Criminal Law⁴ – embody developments that in some respects assist in the evolution of 'modern' policing in the PRC, while at the same time continuing to grant the police very considerable discretionary powers that hark-back to the pre-eminence of the police in the time of Mao.

At the most general level, the police in the PRC have been moving in the post-Mao era along a policy path of greater professionalism, including specialization (*zhuan yehua*: 专业化), standardization (*gui fan hua*: 规范化), legalization (*fazhi hua*: 法治化), and better education. These developments attempt to move the force away from one focussed on local social control, defence of the CCP, and aggressive suppression of 'antagonistic contradictions'. The process of professional evolution has meant a number of things, including the reintroduction of police ranks as formalized in 1992 by the People's Police Ranking Regulations.⁵ A key development too in the transformation was the introduction in the mid-nineties of a People's Police Law, governing the activities of the civilian police.

Thus, as an integral part of the process of policing reform, under the title *The Law of the People's Police of the PRC*⁶ a major code was promulgated and put into force (28 February 1995) by the Standing Committee of the National People's Congress. According to Article 1, the Law was introduced, *inter alia*, as part of the efforts to make the police exercise their powers more firmly in accordance with the law (*yifa xingshi zhiquan*: 依法行使职权). Reflective of the felt need on the part of the Chinese leadership in particular to bring standards of policing into line with the needs of a socialist legal system and a socialist market economy rather than functioning as a mass-line organ as it did in the Maoist era, the 1995 Law contains provisions on a whole range of aspects of policing, including the structure of the police force, police duties, training, authority, and disciplinary and complaint processes relating to alleged police misconduct. This code replaced the 1957 People's Police Regulations,⁷ a brief document that offered only a short set of

³ 1996 *Zhonghua Renmin Gongheguo Xingshi Susong Fa*: 中华人民共和国刑事诉讼法.

⁴ 1997 *Zhonghua Renmin Gongheguo Xingshi Fa*: 中华人民共和国刑法.

⁵ *Zhonghua Renmin Gongheguo Renmin Jingcha Xian Tiaoli*: 中华人民共和国人民警察警衔条例.

⁶ *Zhonghua Renmin Gongheguo Renmin Jingcha Fa*: 中华人民共和国人民警察法.

⁷ *Zhonghua Renmin Gongheguo Renmin Jingcha Tiaoli*: 中华人民共和国人民警察条例.

simply worded, broad principles that would infuse the functions, organization and powers of the police.⁸

Nevertheless, the 1995 Law did not significantly narrow down the very extensive remit of police work that had developed in the pre-1979 era. The Law continues to identify a very extensive range of responsibilities, indicating the dominant role that the police are expected to play in regulating society. Thus, Article 2 of the 1995 Law specifies that the functions of the people's police include safeguarding state security, maintaining public order, defending the personal safety, freedom and legal property of citizens, protecting public property, and preventing, stopping and punishing 'illegal and criminal activities' (*weifa fanzui huodong*: 违法犯罪活动). These functions are then elaborated on and extended in Article 6 to include:

- (1) preventing, stopping and investigating illegal and criminal activities;
- (2) maintaining public order and stopping acts that endanger public order;
- (3) ensuring traffic safety, maintaining traffic order and dealing with traffic accidents;
- (4) organizing and carrying out fire prevention and control and supervising routine fire protection;
- (5) controlling firearms and ammunition, and keeping under surveillance dangerous articles such as knives, inflammables, explosives, deadly poisons, and radioactive materials;
- (6) administering special trades and professions as provided by laws and regulations;

⁸ It should be noted that in addition to the People's Police Law, in 2000 the Ministry of Public Security (MPS) issued the Notice Regarding Implementation of the State Council Decision on Comprehensively Carrying Forward Administration According to Law (*Gong'an Bu Guanyu Guanche Luoshi 'Guowuyuan Guanyu Quanguo Tuijin Yifa Xingzheng de Jueding' de Tongzhi*: 公安部 关于贯彻落实'国务院关于全国推进依法行政的决定'的通知). The Notice was intended to strengthen the legal powers of the police while at the same time correcting inadequacies in police work. In this way, standards of local law enforcement would be enhanced and the system of supervision of law enforcement work reinforced. A little earlier, in 1999, the MPS also issued the Notice on General Implementation in Public Security Organs Nationwide of the System of Openness in Police Work (*Gong'an Bu Guanyu Zai Quanguo Gong'an Jiguan Pubian Shixing Jingwu Gongkai Zhidu de Tongzhi*: 公安部 关于在全国公安机关普遍 实行警务公开制度的通知). This implemented a programme of 'rule according to law' and also was intended to enhance institution building. Also, in 2000, the MPS in a Decision on Strengthening Public Security Legal System Construction (*Guanyu Jiaqiang Gong'an Fazhi Jianshe de Jueding*: 公安部 关于加强公安法制建设的决定), defined its plan to establish a comprehensive and regularized corpus of laws, regulations and rules on: police organization; regulating police powers, and the creation of a comprehensive, effective system for the supervision of police enforcement work by 2005. These priorities were reiterated in the MPS Opinion on Public Security Organs Implementing the 'Outline on Comprehensively Carrying Forward Implementation of Administration According to Law' (*Gong'an Bu Gong'an Jiguan Guanche Shishi 'Quanmian Tuijin Yifa Xingzheng Shishi Gangyao' de Yijian*: 公安部 公安机关贯彻实施'全面推进依法行政事实纲要'的意见) 2004, and are intended to promote the legal standards of public security administrative work.

- (7) serving as bodyguards for persons specially designated by the State and protecting important places and installations;
- (8) maintaining control over assemblies, processions and demonstrations;
- (9) administering matters of household registration, the nationality of citizens, and entry into and exit from China, and handling matters relating to the residence and travel of aliens within Chinese territory;
- (10) maintaining public order along border (frontier) areas;
- (11) imposing criminal punishment with respect to criminals sentenced to public surveillance, criminal detention, or deprived of political rights and criminals serving sentences outside prison, and to exercise supervision over and inspection of criminals who are granted suspension of punishment or parole;
- (12) supervising and administering the work of protecting the 'computer information system';
- (13) guiding and supervising security work in State organs, public organizations, enterprises, institutions, and major construction projects; and guiding mass organizations such as public security committees in their work of maintaining public order and preventing crime; and
- (14) carrying out other duties as stipulated by [other] laws and regulations.

This very broad range of functions that the police are still expected to perform suggests several things. First, it may well be one of the main justifications for continuing to characterize the Chinese political and legal systems as constitutive of a 'police state'. Second, it has necessitated significant functional subdivisions within the 'People's Police' in order to deal effectively with the issues confronting the force: public security and crime prevention, criminal detection work, traffic control, foreign affairs (including passports), border security, fire-fighting and prevention, drug control, counter-terrorism, and household registration. Thirdly, it may help to explain why it is that the police are so reluctant to lose their powers of administrative punishment – there is a felt need to maintain a broad and highly discretionary range of administrative penalties, to be applied without the immediate threat of court and procuracy oversight, in order to deal with the many kinds of deviant conduct that the police will encounter in fulfilling these multifarious tasks. In a sense, it is a matching of responsibility and authority.

The principal focus in this paper is the PSB (*Gong'an Ju*: 公安局) or Public Security Bureau, and its Ministry, the MPS (*Gong'an Bu*: 公安部) or Ministry of Public Security. However, indicative of the emphasis placed on the importance of the role of the police, the PSB is only one of several types of police force operating in China today, albeit statistically the most important. Indeed, the officially preferred term for most types of police is now 'police' or *jingcha* (警察) – or People's Police (*Renmin Jingcha*: 人民警察) and the PSB is the dominant but not sole force operating under that label. In the People's Police Law 1995, Article 2, it is specified that the people's police consist of policemen working in public security organs (*gong'an jiguan*: 公安机关, state security organs (*guojia anquan jiguan*: 国家安全机关), prisons (*jianyu*: 监狱), and organs in charge of Re-education Through Labour (RTL) (*Laodong Jiaoyang Guanli Jiguan*) 劳动教养管理机关 as well as Judicial Policemen working in the People's Courts (*Renmin Fayuan de Sifa Jingcha*: 人民法院的司法警察) and in the People's Procuracies (*Renmin Jianchayuan de Sifa Jingcha*: 人民检察院). There are, however, no specific

provisions in the People's Police Law in regard to the duties and functions of the additional types of police. These additional areas of police work are governed separately: the state security police by the 1993 State Security Law,⁹ the prison police by the 1994 Prison Law,¹⁰ and the judicial police by the organic laws of the courts (2006)¹¹ and the procuracy 1983.¹² It may be sometimes necessary in this paper to draw on materials which refer to the 'police' in this broader sense.

At the same time, mention should also be made here of the People's Armed Police Force (*Renmin Wuzhuang Jingcha Budui*: 人民武装警察部队). This force has grown in importance over the past decade, partly in response to growing civil unrest, and partly to fill a vacuum created by the development of a more professionally orientated Peoples' Liberation Army into a force that wants to concern itself with responding to external threats rather than dealing with domestic disorder.

Another feature in the changing landscape of policing in the PRC is the growth of 'privatized' policing. This takes several forms but includes two principal types: the direct employment of local people without the relevant formal qualifications by local police forces, and the creation of private security companies which are often owned and to a degree staffed by the local PSB. To a significant extent, both forms reflect the difficulties the regular civilian police face in carrying out their many duties effectively in a rapidly changing social context.

The Police in the Local Community

As we have noted, the path of change since the late 1970s has, broadly speaking, been away from a police force that is primarily focussed on the local community and strongly motivated ideologically to one that is more professionally orientated and more formally committed to crime control. In the first thirty years of CP rule, the PSB's main function was to control counter-revolutionaries, including, if necessary, by the use of coercive methods. The PSB maintained close links with local-level institutions such as residents committees, both reinforcing the power of these institutions and at the same time drawing upon them to exercise more effective police domination. It also administered a powerful instrument of state command, namely, the household register, including the supplementary special household register of information about political deviance (Dutton 2000: 82). In addition, the police played an important role in the mass campaigns conducted in the interests of promoting class struggle, unrestrained by notions such as due process, for such values were officially characterized as tools of a bourgeois state and the old ruling class.

In the post-Mao period, these links have continued and indeed were strengthened in the 1980s as a part of a programme to develop comprehensive management of public security with, in particular, refurbished local public security

⁹ *Zhonghua Renmin Gongheguo Guojia Anquan Fa*: 中华人民共和国国家安全法.

¹⁰ *Zhonghua Renmin Gongheguo Jianyu Fa*: 中华人民共和国监狱法.

¹¹ *Zhonghua Renmin Gongheguo Renmin Fayuan Fa*: 中华人民共和国人民法院组织法.

¹² *Zhonghua Renmin Gongheguo Renmin Jiancha Yuan Fa*: 中华人民共和国人民检察院组织法.

defence committees. Thus, the 1989 Urban Resident's Committee Organic Law¹³ provides:

Article 3: The tasks of a residents committee shall include:... (4) assisting in the maintenance of public security;

Article 13: A residents committee shall... establish sub-committees for... public security...

In addition, the 1998 Organic Law of the Villagers' Committees¹⁴ stipulates:

Article 25: A villagers committee shall... establish sub-committees for... public security...

As we have also seen, Article 13 of the People's Police Law 1995 requires the police to guide local organizations such as the public security committees in maintaining public order and preventing crime. In addition, in the post-Mao era and directly inspired by the ideas of Deng Xiaoping, the mass campaign continues to be relied on by local state (notably the police) and mass organizations (notably the public security committees), co-operating together under the leadership of the Party and local police chiefs, to campaign against serious crime. Sometimes such campaigns have been conducted in a general way and sometimes have been focused on specific types of crime (Dutton 2000: 63, 72).

Nevertheless, since the early 1980s, a reform process has been in place. The Party's Central Legal Political Committee has encouraged greater reliance on law as part of a new policy of major reforms in the work of the public security organs, and subsequently such reforms have led to the creation of a greater 'professional ethos' in the operation of the police. This has meant a more specialized and law-abiding police force, in which police officers are formally educated in the theory and practice of policing, technical training in subjects such as forensics is provided for specialist areas of police work, police publications such as the *Renmin Gong'an Bao* (人民公安报)¹⁵ provide an information community for the force, and Western learning in the form of criminology and criminal psychology is offered. Alongside these changes, new techniques of policing such as mobile policing and the pillbox system, and the 'emergency hotline' are employed. Moreover, as Dutton has emphasized, even the continued use of refurbished pre-1979 techniques of the police mass campaign, and comprehensive social security (*shehui zhi'an zonghe zhili*: 社会治安综合治理) and so on, have been restored with new meaning (servicing rapid economic development) and new rewards (financial incentives instead of political probity) (Dutton 2000: 63). This process of development has helped to create a certain degree of professional and institutional identity among the police. The People's Police is no longer a force as firmly locked into the local

¹³ *Zhonghua Renmin Gongheguo Chengshi Jumin Wei yuanhui Zuzhi Fa*: 中华人民共和国城市居民委员会组织法.

¹⁴ *Zhonghua Renmin Gongheguo Cunmin Wei yuanhui Zuzhi Fa*: 中华人民共和国村民委员会组织法.

¹⁵ Now available in an online version at <http://www.cpd.com.cn/gb/newspaper>.

community and dedicated to social control and political morality in the way that it once was.

Nevertheless, and despite these changes, as we have indicated above, the police, and especially the local police stations (*paichusuo*: 派出所) and their close ties with neighbourhood committees (which bear important law enforcement and dispute resolution functions at the local community level, especially through their security defence committees), and control of household registration, remain an important aspect of CCP control in China. This control has been especially important in the maintenance of the people's democratic dictatorship, and continues to be important despite the development of some form of civil society in the post-Mao period. Indeed, reliance on local police forces by local authorities for containing civil unrest – especially the so-called 'mass incidents' (*quntixing shijian*: 群体性事件) – has become an important feature of policing in the past decade or so, and in some ways is a matter of growing concern for the PRC's central authorities. Problems such as the excessive use of force by local police are difficult to deal with from the centre, however, in large part because reliance on anti-crime campaigns and comprehensive public security management (see below) has had the effect of reinforcing the powers of the local Party Committees, and the local police, as these were the bodies considered to be best placed to direct these aspects of social control.

Like the mass campaign, the policy of comprehensive management of public security¹⁶ has relied on local state and mass organizations – notably the police and the public security committees – cooperating under the leadership of the Party and local police chiefs to implement long-term policies of the prevention of crime and social reintegration of ex-offenders. The system is considered so important that leadership of it has been made the responsibility of a special body in the Party: the Central Committee for Comprehensive Management of Public Security of the CPC. It has been argued that 'comprehensive management [is] ... the miniaturization and specialization of the Maoist all-round dictatorship of the proletariat ... in the way it operated ... it differed little in form from the Maoist political-ideological campaign for an all-round dictatorship' (Dutton 2000: 75).

Nevertheless, since the mid-1980s local-level comprehensive management of public security has operated through a contract-responsibility system in which members of the security defence committees are paid for their services and rewarded for good performance with bonuses. In addition, because the system of control is now less effective than it once was, as a result of the changing nature of the local community, so a system of using paid local informants in police work has also been necessary. This has brought the police into regular contact with the often marginalized individuals prepared to provide them with relevant information on criminal activity and who are able to do so in part because their own conduct keeps them in touch with the local criminal world. In turn, this has contributed to the development of the problem of police corruption, noted below.

¹⁶ This is an integrated system of local social control, the reasoning behind which is that as deviance is a multifaceted issue, and often the product of a number of causes, so the systems response should be 'comprehensive' in order to ensure a "normal" moral order is maintained (Biddulph 2007: 103-109)".

The household registration (*hukou*: 戶口) system shored up the ideal of the all-embracing urban work unit which bore responsibility for every aspect of a worker's life, and the same system supported the rural production brigade, from which countryfolk were unable to move away because of the restrictions on movement to the cities imposed through household registration. As we have seen, maintenance of the system of household registration is an important aspect of the work of the local police. One very important impact of the economic reforms has of course been increased movement of population and the partial breakdown and relaxation of the system, putting additional pressure on the police while in some ways reducing their power. On the other hand, computerization of the system has helped to make the record-keeping easier and information more transferable between different parts of the country.

Linked with this system were, for many years, two extraordinary powers of detention exercised by the police: Detention for Repatriation (*shourong qiansong*: 收容遣送) and Detention for Investigation (*shourong shencha*: 收容审查). The latter system was developed in the mid-1950s as part of efforts to strengthen the system of household registration by dealing – through processes of detention and repatriation – with rural dwellers who have not been permitted to migrate to urban centres but who had nevertheless done so. It was also used to keep in custody and investigate others suspected of criminal conduct. Subsequently, in the mid-1970s, responsibility for illicit migrants was transferred to the Civil Affairs Bureau, and the detention and investigation of criminal suspects and other deviants left in the hands of the PSB.

Thus, the method of custody known as Detention for Repatriation (*shourong qiansong*: 收容遣送) was made the responsibility of Civil Affairs departments, and this method was until several years ago an important resource for dealing with rural migrants who had moved to the city in breach of the household registration rules. Persons detained under this system were kept in special centres awaiting deportation back to their home village. However, while these centres were the formal responsibility of the local Civil Affairs department, in practice the operation of the system remained firmly in the hands of the PSB. Writing in 2003, one commentator who was himself subject to this detention also noted that even with official papers there was a danger that anybody looking 'different' – for example, by wearing shabby clothes – would be swept up in the system so that:

In practice, detainees in [these] centers tend to be the poor, the mentally ill, migrant workers, women who have been kidnapped for sale on an underground market, and petitioners who have entered cities to seek redress of injustices from government officials. Estimates of the number detained since 1989 run into the millions... The conditions in [these] centers are about as bad as one could imagine. Food and sanitary conditions are abominable, even worse than in regular prisons and labor camps [which the writer has also experienced]. Detainees are routinely subjected to beatings by police or cell bosses, sometimes resulting in death. (Tong 2003: 42-43)

Indeed, as we now know it was the maltreatment of Mr Sun Zhigang, a college graduate from Hubei who was detained in the spring of 2003 under the system after arriving in Guangzhou to take up employment, that led to his death. He died

in custody within a few days of his apprehension, after he was mistaken as a vagrant and detained for failing to bring with him to the city his temporary residency card or his identity card. The unexplained cause of death was the subject of extensive media coverage, and several months later another case of police misconduct also caused great disquiet: the Si Liyi case. A mother was detained by the police in Chengdu for a theft committed to support a drug addiction, and was therefore unable to care for her young daughter, Siyi, so that the young girl died in the apartment where mother and daughter resided. The inadequate response of the authorities to the SARS outbreak at that time further contributed to a general sense of malaise, paving the way for reform.

In addition to creating pressure for police reform in a number of areas (Fu 2005), the Sun case in particular led to the abolition of Detention for Repatriation later in the year. This followed arguments put to the Standing Committee of the National People's Congress under the terms of the 2000 Legislation Law,¹⁷ about the lawfulness of the State Council's 1982 Measures for the Detention and Repatriation of Vagrants and Beggars in Cities.¹⁸ The Administrative Punishments Law 1996,¹⁹ and the Law on Legislation 2000 both provided in effect that it was only by laws passed by the National People's Congress or its Standing Committee that could provide a proper legal basis for depriving citizens of their personal freedom. Accordingly, the system of Detention for Repatriation was unlawful. On 20 June 2003, Premier Wen Jiabao announced the abolition of the 1982 Measures and with them the harsh system of custody that had developed over the course of two decades. As has been emphasized, this was meaningful legal reform of police powers, resulting from a serious citizen initiative (Hand 2006). But at the same time, we shall see below that the incorporation of the related form of custody – *shourong shencha* (收容审查) or Detention for Investigation – into the 1996 revised Criminal Procedure Law has meant that the police still possess very considerable powers of detention prior to formal arrest. Moreover, as we shall also see, administrative detention under the system of the public security administration punishments has since 2005 extended significantly police powers of administrative detention.

The system of *Shourong Shencha* (收容审查) or Detention for Investigation was formalized in late 1957 by the Central Committee of the CCP and the State Council. As it offered a flexible and police-friendly framework for dealing with criminal suspects, reliance on it by the PSB expanded in the post-Mao era, to the point where it was considered by the Ministry of Public Security, various people's congresses and sections of the public to constitute a serious misuse of police authority, and to be a system that lacked a proper justification in law (Biddulph 2005: 221). The introduction of the Administrative Litigation Law in 1990²⁰ also created problems, including the difficulty of determining whether detention for investigation should be characterized as a criminal measure or as a form of

¹⁷ *Zhonghua Renmin Gongheguo Lifa Fa*: 中华人民共和国立法法.

¹⁸ *Chengshi Liulang Qitao Renyuan Shourong Qiansong Banfa*: 城市流浪乞讨人员收容遣送办法.

¹⁹ *Zhonghua Renmin Gongheguo Xingzheng Chufa Fa*: 中华人民共和国行政处罚法.

²⁰ *Zhonghua Renmin Gongheguo Xingzheng Susong Fa*: 中华人民共和国行政诉讼法. Promulgated 1989, in force 1990.

administrative action, a question that was resolved in favour of the latter by a Supreme People's Court (SPC) Opinion (Biddulph 2005: 222). But neither that document nor the Ministry of Public Security's subsequent 'Notice on Several Questions Concerning the Implementation by Public Security Organs of the 'Administrative Litigation Law' of the PRC' (1990),²¹ addressed the basic issues: the problematic nature of the legal basis of Detention for Investigation. Moreover, the declaration by the MPS that it was 'administrative' in nature was not a view that everybody shared, so that the issue came up again in subsequent debates about criminal justice.

Indeed, it was quickly resurrected in early 1990s in the discourse within China about the need for a major reform of the criminal justice system, a development which culminated in the revised 1996 Criminal Procedure Law and the revised 1997 Criminal Law. More importantly, this discourse raised once more the issue of the lawfulness of the system, in particular in view of Article 37 of the Constitution, and its inclusion of a guarantee of freedom of the person in the absence of a lawful arrest:

Article 37: The freedom of person of citizens of the People's Republic of China is inviolable. No citizen may be arrested except with the approval or by decision of a people's procuracy or by decision of a people's court, and arrests must be made by a public security organ. Unlawful deprivation or restriction of citizens' freedom of person by detention or other means is prohibited; and unlawful search of the person of citizens is prohibited.

As a result, the system of Detention for Investigation was formally abolished by the revised Law of Criminal Procedure 1996. As Biddulph has shown, however, the extraordinary and much-criticized powers of administrative detention formerly enjoyed by the public security organs were only seemingly abolished by the revised Law. Many of the key aspects of the system were in fact inserted into the refurbished Law, so that in reality police powers were not significantly eroded by the reform. The standard of arrest was reduced (Article 60), the categories of suspicious person that might be detained were broadened (Article 61 [7]) and the time restrictions relaxed in 'more serious' cases:

Article 69: If the public security organ deems it necessary to arrest a detainee, it shall, within three days after the detention, submit a request to the People's Procuracy for examination and approval. Under special circumstances, the time limit for submitting a request for examination and approval may be extended by one to four days.

As to the arrest of a major suspect involved in crimes committed from one place to another, repeatedly, or in a gang, the time limit for submitting a request for examination and approval may be extended to 30 days.

²¹ 1990 公安部关于公安机关贯彻实施《行政诉讼法》若干问题的通知.

The People's Procuracy shall decide either to approve or disapprove the arrest within seven days from the date of receiving the written request for approval of arrest submitted by a public security organ.

Thus, the reality is that in many circumstances the Criminal Procedure Law 1996 allows the police to detain many categories of suspect for up to 37 days of detention before it needs to meet the legal requirement of procuratorial approval of arrest. The subsequently-issued 'Ministry of Public Security Regulations on Procedures for Handling Criminal Cases' (1998),²² made the regime even more generous to the police. The system of Detention for Investigation may thus no longer exist in name, but the powers that it gave the police have not in fact been significantly altered by the criminal justice reforms of the mid-1990s.

In addition, and despite these apparent reforms, an important continuing feature of the criminal justice system of the PRC is the extensive reliance on the use of administrative penalties, including administrative forms of detention. This reliance is, however, also inconsistent in some respects with the International Covenant on Civil and Political Rights (ICCPR) which China signed in 1998. Although the PRC has, of course, yet to accede to that Convention, by signing the ICCPR China has committed itself not to act in ways that would defeat the object and purpose of the treaty. There is, however, a clear contradiction between the system of administrative detention under, in particular, Re-education Through Labour, in which the police play a very major role, and the failure of the Chinese legal system to provide prompt judicial review of the detention decisions, as required by Article 9 [4] of the ICCPR:

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

China's system of Re-education Through Labour (RTL) was first authorized by a State Council decision 1957,²³ having been practiced since 1949. It is still valid,²⁴ although there are widely divergent views within Chinese legal circles about the future of this detention system. Those who want to encourage a fairly speedy accession to the International Convention on Civil and Political Rights would like to phase it out, as the ICCPR stresses the importance of determining guilt and punishment through courts, and the heavy reliance in China on administrative sanctioning is therefore a barrier to accession. On the other hand, there are officials in China who point out that special regimes exist elsewhere in the world for dealing with juvenile delinquents that do not impose the full rigours of the Criminal

²² *Gong'an Bu Gong'an Jiguan Banli Xingshi Anjian Chengxu Guiding*: 公安部公安机关办理刑事案件程序规定.

²³ *Guowuyuan Guanyu Laodong Jiaoyang de Jueding*: 国务院关于劳动教养问题的决定.

²⁴ 1979 State Council, Supplementary Provisions on Regulations on Re-education Through Labour (*Guowuyuan Guanyu Gongbu 'Guoyuyuan Laodong Jiaoyang de Buchong Guiding,' de Tongzhi*: 国务院关于公布'国务院劳动教养的补充规定'的通知).

Justice system on young people, and that China's system of Re-education Through Labour is not so very different from these special regimes.

In general, Re-education Through Labour is used where the Administrative Penalties for Public Security fail to have the desired effect. It was revised in November 1979 in the form of Supplementary Provisions which were, it is said in their introductory paragraph, introduced in order to 'enforce better' the 1957 State Council Decision. In its scope, the system is very broad – the 1957 Decision declares that the following categories of person may be interned for rehabilitation:

those who do not engage in proper employment, behave like hooligans or petty thieves, and refuse to mend their ways despite repeated admonition, counter-revolutionaries and anti-socialist reactionaries whose acts do not warrant criminal penalties,
persons who are able to work but who refuse to do so, and
persons who refuse to obey their work assignments.

Re-education Through Labour primarily applies to young offenders (late teens to thirties). The ostensible guiding spirit is one of education and reform, although some wages are supposed to be paid for work done. There was originally no maximum term. Since detainees are not being 'punished' but, rather, 'rehabilitated', the interned person under the initial system simply stayed until her or his successful rehabilitation was complete. The term was apparently limited to three years in 1962, and this limit was reconfirmed in 1979, although an extra year is possible 'if necessary' under Article 3 of the 1979 Supplementary Provisions for those who fail to be sufficiently 're-educated'.

The procedure for committing somebody to Re-education Through Labour is that a request for a certain person to undergo rehabilitation through labour is made to the local government authority by one or more local bodies or other actors: the police, work unit, school, parents or guardians can all make such a request under Article 3 of the 1957 Decision. Operating under the leadership of the local Bureau of Justice, the Re-education Through Labour Committees will decide on the case, according to the 1979 Supplementary Regulations. As I have indicated, this form of punishment is a matter of increasing controversy following the PRC's signing of the ICCPR – it is a serious penalty which is not imposed by courts and therefore quite inconsistent with the spirit of the Convention. It is also argued that Re-education Through Labour is authorized under administrative regulations only and therefore is in violation of the Legislation Law 2000. As we have seen, that Law requires that all deprivations of personal liberty be authorized by national law and not administrative regulations. As a process of 'reform', it is one which may involve humiliation of the inmate, mental abuse, and an attempt to re-programme the thinking of the inmate. However, it is a very powerful source of police power in the local community, and is considered a very effective way of dealing with not only the issue of juvenile delinquency but also the problem of the 'Falungong'. It therefore persists.

China ratified the UN Convention Against Torture in 1988. The UN Special Rapporteur on Torture in his report following his visit to China at the end of 2005 (dated March 2006), concluded that the RTL system and other forms of

administrative detention go beyond legitimate rehabilitation measures provided for in Article 10 of the ICCPR:

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

What is important to note here, however, is the fact that the Chinese government is not trying to abolish the system in order to conform to international standards. Instead, the current thinking is to move China towards a codification of the system itself.

The UN Committee Against Torture, however, is clear:

Administrative detention, including 'Re-education Through Labour'

13. The Committee reiterates its previous recommendation to the State party to consider abolishing all forms of administration detention (A/55/44, para.127). The Committee remains concerned with the extended use of all forms of administrative detention, including 'Re-education through Labour', for individuals who have never had their case tried in court, nor the possibility of challenging their administrative detention. It is also concerned with the failure to investigate allegations of torture and other ill-treatment in 'Re-education through Labour' (RTL) facilities, in particular against members of certain religious and ethnic minority groups. While the State party has indicated that the RTL system has recently been reformed and that further reform of the system is currently being envisaged, the Committee is concerned with repeated delays, despite calls from Chinese scholars to abolish the system (arts. 2 and 11).

The State party should immediately abolish all forms of administrative detention, including 'Re-education through Labour'. The State party should provide more information, including current statistics, on those currently subject to administrative detention, the reasons for their detention, the means of challenging such detention and the safeguards put in place to prevent torture and ill-treatment in RTL facilities.

(UN Committee Against Torture 2008)

In addition to RTL there is, as we have noted, another system of administrative punishments. This can be traced back to the 1950s, and is now governed by the Public Security Administration Punishment Law (PSAPL) 2005 (replacing the 1994 Regulations on Public Security Administration Punishment).²⁵ According to this Law, 'Public Security' offences include public order disturbances, traffic offences, prostitution, drug use, and other 'minor crimes' that are considered better sanctioned by administrative punishments than by formal criminal sentences. Administrative punishments may range from a warning or fine to detention. For a governmental system which announced in effect that it is to be governed in accordance with the rule of law, the PSAPL 2005 provides only limited supportive evidence. In addition to establishing more severe punishments than its statutory predecessor, it creates a very large number new offences subject to administrative

²⁵ *Zhonghua Renmin Gongheguo Zhi'an Guanli Chufa Fa*: 中华人民共和国治安管理处罚法.

punishment: for example, 'cyber offences', 'taking on the name of religion or *qigong* to carry out activities disturbing public order' and 'inciting or plotting illegal assemblies, marches or demonstrations'. The PSAPL was also passed in order to provide a basis in national law for short-term detentions of up to 20 days which are not going to lead to a criminal prosecution. In addition, a new category of punishment – withdrawal of licence – is introduced on top of the existing categories of warning, financial penalty, and administrative detention (Article 10). As we shall see, this has more significance than might be thought at first glance. Even more significantly, the 2005 PSAPL reaffirms the role of the police as the organs responsible for determining and administering punishments for public security violations.

Other changes are a little more reassuring. Thus, a whole chapter is specifically designed to limit police power, and more specifically to prohibit the use of torture and violence to obtain confessions (Chapter 5). In addition, a person who objects to a public security punishment decision may directly bring an administrative suit (Article 102), whereas under the 1994 regime, procedurally the person against whom a punishment is to be imposed had to request 'in-house' administrative reconsideration before bringing the public security organs to court in an administrative suit. Thirdly, protection of the minor is improved: a minor aged between 16 and 18 who commits an offence for the first time is not to be subjected to administrative punishments (Article 21 [2]).

The authority provided by the 2005 PSAPL for widespread police use of administrative sanctions is needed, it has been suggested above, in large part because of the very wide range of responsibilities of the police. In addition, such sanctions have proved very convenient for the police in dealing with types of deviant conduct that are felt to be proliferating in the era of economic reform. Drug traffickers and users, prostitutes, juvenile delinquents, burglars and other forms of 'petty criminal' are so targeted. Dutton argues that these kinds of sanction also represent an important source of revenue for a financially hard-pressed police force. The fines imposed on those engaged in prostitution in particular provide especially important funding for local forces, some of which could not operate without such extraction:

Cash-strapped police forces employed the new financial logic of economic reform to remedy the ancient problem of prostitution. Increasingly, police viewed prostitution as a 'milch cow' that would pay, through fines, for the vast array of financial incentive schemes and other costs that held the local [public] security system intact. A mechanism that began as a deterrent very quickly developed into a money-making business ... as police critic Song Haobo [(1994)] explains: In some places, the law enforcement agencies took prostitutes and their clients in, not to detain, control, or educate them, but simply to extract fines. (Dutton 2000: 78)

Throughout most if not all the period of CCP rule since 1949, the budget of the public security forces has been provided by local governments at the same level in the national bureaucracy. However, the felt need to develop greater and more specialized policing in the post-Mao era has placed significant pressure on the system of police financing. Local governments have been reluctant to meet

demands for enhanced police funding, and additional sources of revenue such as those noted above, plus licensing, fines relating to other forms of public order misconduct, motoring regulation and offences, and so on, are therefore needed.

Indeed, as these revenues are not included in the ordinary budgetary calculations of the local police, so they have steadily increased in importance. The rules encourage what Tanner and Green (2007: 666) characterize as the 'predatory fine collection' tendencies of local police forces, especially in the economically more advanced areas where such an approach is both more necessary and more lucrative.²⁶ This, in turn, encourages greater disparities of funding between police in wealthier parts of China and other areas, as well as greater attention in the wealthier parts to problems that will generate funds rather than to those which are necessarily the most pressing. Sometimes the pressure comes from local governments, as they increasingly expect PSB fines, confiscations and fees to compensate for their own shortfalls in finance. As a result, the Public Security leadership has repeatedly complained that lower-level police forces are all-too-often used inappropriately to deal with administrative difficulties such as collecting grain from farmers, resumption of land, as well as enforcing birth limitation rules, apprehending and holding parties to a contract dispute, tearing down the houses of Christians, and collecting arrears (for example, for fines imposed for violation of birth control regulations) (Tanner and Green 2007: 666; see also Fu and Choy 2004).

Another feature in the emerging new landscape of Chinese policing is the growth of 'privatized' policing. This, too, is a development that owes much to the system of police finance and its inadequacies. Private policing takes several forms but in the main includes, first, the direct hiring of local people without the relevant formal qualifications by local police forces and, second, the creation of private security companies which are, in fact, wholly owned and partly staffed by the local PSB. There have been somewhat contradictory pressures at work in police staffing policies, and such pressures have not been conducive to improving the professionalization of the police force. On the one hand, the police have been put under particular political pressure to take on demobilized PLA members by Party

²⁶ Perhaps most notably in the case of Shanghai, where entrapment and framing of suspects for revenue generating purposes became a widespread practice. This approach has become popularly referred to as 'fishing-style enforcement of law' (*diaoyu zhifa*: 钓鱼执法). This term is now widely used to characterize the inventive techniques of police, especially traffic police, for extorting money in the form of fines from vulnerable sections of the public. In a *cause célèbre* in late 2009, a young worker newly arrived in Shanghai, Mr Sun Zhongjie, cut off the little finger of his left hand in protest at the way in which Shanghai traffic police had arrested him for operating an illegal taxi business when in fact all he had done was to stop his vehicle to give assistance to a pedestrian apparently in need of help. The pedestrian turned out to be Chen Xiongji, a traffic policeman intent on entrapment. Initially fined 10,000 RMB for running an illegal taxi business, Sun eventually had the case dismissed, and the fine rescinded. He also received an apology from Shanghai City Administration and Law Enforcement Bureau for Pudong New Area District. He does, however, remain short of one finger (See, for example, *Xinhua* 2009; for an extended analysis of the problem of entrapment and framing for revenue purposes see Wu and Zhu 2009).

political legal departments. On the other hand, there has been the development of 'contract police' (*hetong minjing*: 合同民警), with often untrained or poorly trained recruits such as unemployed youths taken on in order to supplement the local official police force, so that they have come to constitute as much as ten per cent of the local force. The problems such recruits exacerbate or create include a greater tendency to abuse and even torture detainees, and financial misconduct.

Here, it is important to bear in mind that while China may be a suitable case for characterization as a 'police state', especially in the sense that the Party-police nexus is a core feature of the system of social and political-legal control, and the police have a very broad range of functions in that system. This may give rise to a misleading impression, however, for in reality the number of official police on the ground is actually very limited. The total size of the force is below two million personnel, or one officer for every 600-700 persons across the country, with even higher ratios in the remoter, less economically advanced, areas of the country. These low police numbers are also a contributory factor in the growing reliance on contract and related forms of 'quasi-police' with a more specialized brief. Many specific areas of economic and governmental life have their own security units outside the 'civil service' police force. There has also been a substantial growth in recent years in the so-called *bao'an gongsi* (保安公司) or private security companies that are often actually owned and managed by the PSB.

Chinese private security companies differ from those in the West in that they are all wholly owned subsidiaries of the local branches of the Public Security Ministry (PSM). PSM bureaus directly own and operate these businesses. The public security forces monopolize this industry and have complete control over staffing. Hence, the police force has 'allocated' all senior staff positions within these companies to formally high-ranking officials from within the provincial Public Security Bureau or the Ministry of Public Security. These companies now cover about one-third of all urban police work and they derive most of their profits from guarding banks, restaurants, and other such establishments (Dutton 2000).

But the less well-organized companies of this type also tend to be inadequately trained, and to engage in abusive conduct. The widespread development of these security companies has also been stimulated by the development of 'private' housing estates, which very often possess their own security staff.

Some attempt has been made to identify responsibility for the conduct of these private arrangements in the Criminal Law and in official commentary on that Law. Thus, the 1997 Criminal Law includes the provision that:

Article 93, Para. 2: Persons who perform public service in state-owned companies or, enterprises, institutions or people's organizations, persons who are assigned by state organs, state-owned companies, enterprises or institutions to companies, enterprises or institutions that are not owned by the State or people's organizations to perform public service and the other persons who perform public service according to law shall all be regarded as state functionaries.

In a Reply to a request for guidance from the Liaoning Higher People's Court, the Supreme People's Procuracy (SPP) has characterized such policemen as state functionaries, rather than private employers:

In accordance with the provisions as set forth in para. 2, Article 93 of the Criminal Law, a contracted policeman, during the course of performing public service, shall fall within the scope of 'other persons who perform public service according to law'; therefore, she or he shall be regarded as a state functionary. If a contracted policeman neglects her or his duty in performing public service, and such act meets the constitutive conditions as specified in Article 397 of the Criminal Law, the offender shall be prosecuted for criminal liability for crime of neglect of duty. (Supreme People's Procuracy 2000)

The more contractualized approach to policing that increasingly prevails has sometimes taken the police over the boundary of legality, so that police conduct strays into the field of corruption and related forms of unlawful activity (Fu and Choy 2004). In addition to prostitution, gambling is a valuable source of revenue for fines, and both can provide lucrative opportunities for corruption through more direct participation. Karaoke bars are also said to be money-spinning investments in which the police have involved themselves. One of the easiest forms of such involvement is simply by offering protection 'services'.

In 2009, the extent to which such involvement could come to dominate a local police force came to light in the vast inland metropolis of Chongqing. Huang Guobi, whose husband had been dismembered by gangsters who also beat her, had found that the local police station was run by the gang-leader's nephew and that the corruption reached higher levels. However, she persevered, resulting in China's largest-ever criminal investigation. According to one of her supporters:

In fact, the police stations in Chongqing were actually the centre of the prostitution, gambling and drugs rackets... They would detain gangsters from time to time, and sometimes send them to prison, but the gangsters described it as going away for a holiday. The police and the mafia were buddies. (Liu Liangli, quoted in Moore 2009)

Thousands of gangsters were arrested, including a former deputy police commissioner and the head of the city's Justice bureau, and up to a fifth of the local police force were dismissed. The trials are continuing, with at least one convicted defendant executed to date. Official websites appear to publish only the bare details of the cases and the manner in which they are being handled.

Relations with other Law Enforcement Agencies

But, in addition, the dominant power of the police has often also been a source of tension in working relations with other law enforcement agencies concerned with the administration of justice and the national security system, and these difficulties too need to be examined in order to understand fully the changing role of policing in the PRC. Particular attention is therefore given below to relations between not

only the CCP (and by extension, local government) but also the police and the procuracy, and the police and the courts.

In looking at relations between the police and other law enforcement agencies and groups such as lawyers, the fundamental importance of the police-CCP relationship, and the changes to that relationship, are a necessary starting point. In the PRC, the police are a much politicized control agency of the Party, and operate under the 'absolute leadership' of the CCP (Fu 1994; 2005: 243). As a result, although the legal reform process of the post-Mao period has accorded the police some degree of professional autonomy, the public security forces continue to be subservient to the Party. This control is imposed in a variety of ways. For one thing, there is the continued dependence on the strike hard campaign approach for dealing with serious crime and social unrest, which significantly undermines the drive towards professionalization. Relied on most recently to deal with unrest in Tibet and Xinjiang, this approach contains pressures to ignore procedural safeguards in the pursuit of 'substantive results'. For another, the appointment of key police officers remains a matter for the CCP, as indeed are the policies and goals of the police force as a whole. The police continue to be answerable to the local CCP Committees. The latter appoint and remove officers. Moreover, the localized nature of much police organization and work allows Party domination indirectly. The local government funds the police, but these local authorities are of course themselves accountable to CCP committees at the local level. As a result, the implementation of policies emanating from the central leadership very much depends on the *local* Party leadership. So even though the MPS exercises 'unified leadership' over police work, local Party committees have a great deal of discretion in interpreting and implementing policy within the area under their jurisdiction. In addition, even though the People's Armed Police Force (PAPF) anti-riot forces are under the joint command of the Public Security authorities and the Central Military Commission, it is clear that local Party Committees and governments often utilize, on their own initiative, PAPF units in their own territories.

In some ways, though, as a result of the process of police reform, the position of the police *has* been altered. First, the privileged tie with the CCP is now somewhat less advantaged than it once was. Secondly, the police are now one institutional actor among several. The other actors, most notably the courts and the procuracy, are growing in stature, albeit rather shakily sometimes. In a more rule-orientated system, the police have to compete and negotiate with other agencies within government for resources. This does not mean to say that the police will fail in such negotiation. For example, the provisions in the Criminal Procedure Law 1996 implicitly incorporating the Detention for Investigation were in fact the direct result of police lobbying in the course of the drafting process – initial drafts were not nearly so generous to the police on the question of detention time-limits (Biddulph 2005).

In keeping with the organizational control structures that are imposed on other state institutions, the Party leadership from very early on applied a dual system of 'vertical-professional' control by superior level public security organs on the one hand, and, on the other, local party and governmental organ horizontal control. As a result, the local police have two leaderships – professional control by a superior level police organ, and political and administrative control by local leaderships of the Party and the executive. This is seen as a Chinese characteristic that modifies

an institution – public security – transplanted from the USSR (Tanner and Green 2007: 650). It is a system that is also applied to the courts and to the procuracy. And it means that the organizational, personnel and financial power over policing is such that it is more in the interests of local police forces to adhere to the comments and suggestions of local Party and state officials than it is to follow the command and policies of superior levels of the police. Indeed, the basic manner in which the system of Party leadership controls the police has taken the form of *local* Party committee leadership, unlike the PLA, where vertical leadership principles have dominated. This authority and accountability pattern is buttressed by funding arrangements. A series of attempts by the MPS and the Ministry of Finance to channel financial support through vertical channels has been made, but the system of same-level government funding continues despite such efforts at change.

So, professional accountability in police work is significantly undermined by the historically institutionalized exercise of local Party power over the police. This has clearly negative implications for an attainment of a properly professional police force that would contribute to the development of the rule of law in China.

The police do remain a significant buttress of the Party's domination of state power. One of the most concrete manifestations of this buttressing has been the idea that the police would not aim their investigatory work at Party members, so that the practice of shielding party leaders from many police investigations has continued. It is thought that the Chongqing corruption case noted above only came to light as a result of political infighting within the Party. But, in return for its benign treatment, the police enjoy a disproportionate amount of decision-making members within the CCP, and heightened influence in the 'Judicial and Police System' (*sifa gong'an xitong*: 司法公安系统). From the Minister of Public Security downwards, the head of the police is one of the principal leaders in the system, so that:

the head of the public security bureau is generally at the same time a member of the Standing Committee of the Party Committee or the secretary of the Political-Legal Committee. This leads to the universal phenomena of police power being higher than judicial power. (He 2007: 672)

In any jurisdiction, monitoring police work at the local level is difficult, especially as there are many ways of preventing the superior or external bodies from acquiring the relevant information. As a result, and as Tanner and Green (2007) have emphasized, the reporting of crime is an art-form in many jurisdictions but one which is particularly nuanced in the Chinese context. The introduction of responsibility systems to improve accountability and performance on the part of the police has actually encouraged a significant under-reporting of crime, as one might expect from an examination of the use in socialist systems of success indicators to measure output and other aspects of performance. Under-reporting of crime has been a local response to the imposition from above of excessively high quotas for clearing up crime combined with financial disincentives for failing to meet quotas, for under-reporting enables local police to meet current targets and to keep future targets more manageable (Dutton 2000).

Another key problem exacerbated by the failure of the system of superior level professional control has been the lingering practice of torture. At the end of 2005, the UN Special Rapporteur on Torture made an official visit to the PRC. In order to

assess the prevailing situation regarding torture and other possible forms of cruel, inhuman or degrading treatment or punishment, he visited detention centres, Re-education Through Labour facilities and prisons in different areas of the country. His Report concludes that overall torture is in decline, especially in urban areas. There is also some improvement in that torture is no more a taboo subject for discussion. Thus, in contrast to several years ago, the Government is more prepared to acknowledge the pervasiveness of torture practices within the criminal justice system and is making efforts at both the central and local levels to combat torture and ill-treatment. However, the use of torture by the police at the pre-trial stage of the criminal process remains widespread, especially in rural areas.

As a result of the formal recognition of the problem of torture, in the last few years the MPS, the SPP and the SPC have undertaken measures in order to eliminate torture from criminal proceedings and to curb officials' abuse of power. In 2003, the MPS issued specific rules ('Regulations on the Procedures for Handling Administrative Cases')²⁷ which stipulate the legal processes by means of which public security organs should gather evidence and lay down the time limits for investigation and examination of suspects. Since the early 1990s regulations have been issued by the MPS which explicitly prohibit extortion of confession through torture,²⁸ and these have been reinforced from time to time. In addition, since March 2006, China's procurators have dispatched all over the country special audio and video recorders in order to record interrogations of criminal suspects in order to prevent torture (the manner in which these new technologies are effectively used in practice, however, is a different issue!). Particularly interesting are the local attempts to criminalize extortion of confession through torture which have started to emerge since 2000 in different provinces (Yunnan, Zhejiang, Sichuan, Hebei, Hubei, and Gansu).

As noted by Manfred Nowak, the UN Special Rapporteur on Torture, the recent issuing of a quite conspicuous number of opinions and regulations prohibiting the extortion of confession through torture has to be seen as the result of 'the growing willingness of officials and scholars to acknowledge China's torture problem' (UN Commission on Human Rights 2006: para. 46). Notwithstanding these improvements in discourse, however, there is a continuing reliance on torture. As we have noted, the problem is more serious in rural areas, where local authorities are difficult to control. The reasons for the persistence of this malpractice are also to be found in the absence of a rigorously restrictive legal framework. First, China still lacks a proper code of criminal evidence. Even though PRC law codifies the prohibition of torture (Art. 247-248 Criminal Law; Art. 43 Criminal Procedure Law),²⁹ it did not actually express itself on the use of confession extracted through

²⁷ *Gong'an Jiguan Banli Xingzheng Anjian Chengxu Guiding*: 公安机关办理行政案件程序规定. These were revised and reissued in 2006 in order to take into account various changes introduced by the 2005 Law on Administrative Penalties for Public Security.

²⁸ See: 1992 Ministry of Public Security Decision on Firmly Curbing Extraction of Confession through Torture by the Public Security Police 1992 *Gong'an Bu Guanyu Jianjue Zhizhi Gong'an Ganjing Xingxun Bigong de Jueding*: 公安部关于坚决制止公安干警刑讯逼供的决定.

²⁹ And since the early 1990s there have been specific prohibitions on such misconduct: see, for example, the 1992 Ministry of Public Security Decision on Firmly Curbing Extraction of

torture as evidence before the courts until relatively recently.³⁰ Moreover, suspects are sometimes held in pre-trial detention for long periods of time without legal representation and judicial control. Thirdly, neither the presumption of innocence, nor the right to silence nor the right against self-incrimination are meaningfully guaranteed by PRC legislation. Article 12 of the CPL only vaguely alludes to the principle of presumption of innocence: 'no person shall be found guilty without being judged as such by a People's Court according to law.' Moreover, Article 93 of the Criminal Procedure Law seems to run counter to these principles by saying that during interrogation a criminal suspect 'shall answer the interrogators' question truthfully' even though 'he shall have the right to refuse to answer any questions that are irrelevant to the case.' Fourthly, interrogators in criminal detention centres are often poorly trained, have a limited knowledge of the law and still cling to the old ideal that the best mode of proof is oral confession. In addition, they are often under pressure to secure a conviction. Finally, the situation is made worse by the absence of autonomous social and political institutions checking the system – there are no free and critical mass-media, independent human rights monitoring organizations, independent commission monitoring of places of detention, and so on.

Despite the improved efforts to deal with the torture problem, the UN CAT has recently concluded and recommended as follows:

Widespread torture and ill-treatment and insufficient safeguards during detention

11. Notwithstanding the State party's efforts to address the practice of torture and related problems in the criminal justice system, the Committee remains deeply concerned about the continued allegations, corroborated by numerous Chinese legal sources, of routine and widespread use of torture and ill-treatment of suspects in police custody, especially to extract confessions or information to be used in criminal proceedings. Furthermore, the Committee notes with concern the lack of legal safeguards for detainees, including:

- (a) Failure to bring detainees promptly before a judge, thus keeping them in prolonged police detention without charge for up to 37 days or in some cases for longer periods;

Confession through Torture by the Public Security Police 1992 *Gong'an Bu Guanyu Jianjue Zhizhi Gong'an Ganjing Xingxun Bigong de Jueding*: 公安部关于坚决制止公安干警刑讯逼供的决定. Note also: 2001 Supreme People's Procuracy Notice on Strictly Curbing Statements by Suspects Secured by Confession through Torture as a Basis for Case Verdicts (*Zuigao Renmin Jianchayuan Guanyu Yanjin jiang xingxun bigong huoqu de fanzui xianyiren gongshu zuowei ding'an yiju de tongzhi*: 最高人民检察院关于严禁将刑讯逼供获取的犯罪嫌疑人供述作为定案依据的通知).

³⁰ Thus, the use of evidence obtained by torture is now specifically banned by Article 26 of the 2003 Public Security Ministry, Provisions on the Procedures for Public Security Police Handling of Handling Administrative Cases (*Gong'an Bu Gong'an Jiguan Banli Xingzheng Anjian Chengxu Guiding*: 公安部 公安机关办理行政案件程序规定).

- (b) Absence of systematic registration of all detainees and failure to keep records of all periods of pre-trial detention;
- (c) Restricted access to lawyers and independent doctors and failure to notify detainees of their rights at the time of detention, including their rights to contact family members;
- (d) Continued reliance on confessions as a common form of evidence for prosecution, thus creating conditions that may facilitate the use of torture and ill-treatment of suspects, as in the case of Yang Chunlin. Furthermore, while the Committee appreciates that the Supreme Court has issued several decisions to prevent the use of confessions obtained under torture as evidence before the courts, Chinese Criminal procedure law still does not contain an explicit prohibition of such practice, as required by article 15 of the Convention;
- (e) The lack of an effective independent monitoring mechanism on the situation of detainees.

As a matter of urgency, the State party should take immediate steps to prevent acts of torture and ill-treatment throughout the country.

As part of this, the State party should implement effective measures promptly to ensure that all detained suspects are afforded, in practice, all fundamental legal safeguards during their detention. These include, in particular, the right to have access to a lawyer and an independent medical examination, to notify a relative, and to be informed of their rights at the time of detention, including about the charges laid against them, as well as to appear before a judge within a time limit in accordance with international standards. The State party should also ensure that all suspects under criminal investigation are registered.

The State party should take the measures necessary to ensure that, both in legislation and in practice, statements that have been made under torture are not invoked as evidence in any proceedings, except against a person accused of torture, in accordance with the provisions of the Convention. The State party should review all cases in which persons were convicted on the basis of coerced confessions with a view to releasing those who were wrongly convicted.

The State party should establish consistent and comprehensive standards for independent monitoring mechanisms of all places of detention, ensuring that any body established, at the local or the national level, has a strong and impartial mandate and adequate resources.

(UN Committee Against Torture 2008: [from Articles 2, 11 and 15])

Nevertheless, it is also clear that for some commentators within China, the difficulties of the sort outlined above mean that the professionalization of the police force and police work has not gone far enough. It is argued that there needs to be a fundamental rethinking of the position of the police, and a clearer separation of the basic administrative task of maintaining public order and criminal investigations. The Chinese police station is an administrative institution responsible for maintaining public security. It is also an institution for investigating criminal offences. The combination of two different functions makes the supervision of policing power difficult. So, it is argued, there is a real need for greater functional specialization, with in effect 'community policing' and detective

and investigation work made less interdependent. Other, related, areas of necessary reform include a clearer linkage between authority and responsibility within the police, a clearer line to be drawn between public and private matters and less police involvement in the 'private', greater attention to the principle of 'due process' and more effective judicial control (*sifa shencha*: 司法审查) (Hu 2008).

The creation of meaningful and effective systems of procuratorial and court control of police conduct in the contemporary PRC is still, however, also hindered in a quite fundamental fashion by the political and legal framework within which the procuracy and the courts must operate. The Constitution (at Articles 126 and 131) and the relevant organic laws declare that the procuracy and the courts are to operate independently, without executive interference. However, the reality is that the basic principle of the political legal and police system is that dual leadership – with horizontal leadership taking priority, and the use of political-legal committees to guide the work of all three institutions (police, procuracy and the courts) – undermines such autonomy and protection from interference (He 2007: 672). Among other things, in this system financing and personnel decisions – including procurators' and judges' salaries and promotions – are controlled by the executive and ultimately the Standing Committee of the People's Congress at the same level. This encourages the problem of 'localism' (*difang zhuyi*: 地方主义) in what should otherwise be professional decision-making. As I have stressed, local government and people's congress leaders occupy important positions in local Party committees, thus providing a powerful process of decision-making in which local administrative bodies such as the police can influence or even impose outcomes in the procuracy and the courts in their dealings with the police. This danger is exacerbated by the fact that within the Party at any given level, the chief of the police usually enjoys a more authoritative position than the heads of either the procuracy or the courts. The entrenched authority enables the police to resist criticism and reform.

In a recent article, two critics point to problems embedded in the current prosecutor-police relations under the current system of criminal procedure. They assert that deficiencies in the Procuracy's supervision system mean that there is insufficient accountability in the management of the Public Security's criminal case register (filing a criminal case) and criminal investigation. More generally, the two processes of investigation (police) and prosecution (procuracy) are not linked up effectively, so that necessary cooperation between the procuracy and the police in the handling of cases is often lacking. In addition, the police see procuratorial checking negatively, as a form of control, and therefore defy it (Zhang and Fu 2009).

Economic change in China has led to the demise of the urban work unit and the extensive drift of country folk to the cities, resulting in the weakening of local community ties and, in their place, a world of market economy and contract. The police have consequently found themselves with a new impediment. For, now embedded in a more legalistic environment, their work has become further complicated by the need to deal with lawyers. The lawyers' system built up in the 1950s in the PRC had been abandoned in part because it had become too closely identified in the eyes of the Party with criminal defence. In the post-Mao period lawyers have been careful to reinforce the official view that their main task in the era of reform is to facilitate rapid economic development. Heroes of the economic

revolution, they have tended to concentrate their efforts in commercial and civil law, and to avoid confrontation with the authorities by engaging in criminal defence and administrative suits against the government, often preferring instead to solidify ties with officials and other crucial decision-makers to the extent that they have become known as the *guanxi xuejia* (关系学家) or 'connections experts'. To this form of 'self-censorship' was added the restrictive provisions of the 1979 Criminal Procedure Law, which allowed very little pre-trial contact between a lawyer and a defendant, and in practice often reduced the lawyer's role to one of securing a lenient sentence in return for confession. In addition, the lawyer was a 'state legal worker' under the provisions of the 1980 Provisional Regulations on Lawyers.³¹ The 1996 Lawyers' Law³² ostensibly enhanced the status of lawyers, and removed the 'state legal worker' characterization, and the 1996 Criminal Procedure Law gave defence counsel somewhat more effective rights of defence.

However, rather than marking out a definite improvement in access to criminal justice, the formal reforms have made the criminal process an arena of tension between the police and a growing class of criminal defenders. Indeed, the past decade has seen the emergence of the growing group of 'rights protecting' (*weiquan*: 维权) lawyer-activists, lawyers who pursue interests and concerns that are larger than those of their immediate clients who have retained their legal services. The Party, however, still wants to manage the privatized legal profession so as to buttress its own position. As a result, local authorities have sometimes been very aggressive against those who cross the line, sometimes arresting such cause lawyers, sometimes withdrawing their business licences so that they cannot practice, sometimes even going so far as to arrange for them to be beaten up by *agent provocateurs*. So, the difficulty the Chinese leadership faces in accepting a genuinely independent legal profession is another serious barrier to China's attainment of international rule of law and human rights standards in the area of policing.

Among the difficulties that are placed in the way of effective criminal defence are the provisions of the Criminal Law 1997 on the use of evidence. Article 305 provides that a lawyer who:

destroys, falsifies evidence, assist parties concerned in destroying, falsifying evidence, threatening, luring witnesses to contravene facts, change their testimony or make false testimony is to be sentenced to not more than three years of fixed-term imprisonment or criminal detention; when the circumstances are severe, to not less than three years and not more than seven years of fixed-term imprisonment.

In addition, Article 38 of the 1996 Criminal Procedure Law stipulates that:

Defence lawyers ... shall not help the criminal suspects or defendants to conceal, destroy or falsify evidence or to tally their confessions, and shall not intimidate or

³¹ *Zhonghua Renmin Gongheguo Lushi Zanxing Tiaoli*: 中华人民共和国律师暂行条例.

³² Lawyers' Law of the People's Republic of China, issued on 15 May 1996 to take effect on 1 January 1997, amended on 28 October 2007 and effective on 1 June 2008 (*Zhonghua Renmin Gongheguo Lushi Fa*: 中华人民共和国律师法).

induce the witnesses to modify their testimony or give false testimony or conduct other acts to interfere with the proceedings of the judicial organs.

Further, the Lawyers' Law 1996, Article 35 declares that:

A lawyer shall not commit any of the following acts in his practice activities:

- (6) provide false evidence, conceal facts or intimidate or induce another with promise of gain to provide false evidence, conceal facts, or obstruct the opposing party's lawful obtaining of evidence; or ...
- (8) disrupt the order of a court or an arbitration tribunal, or interfere with the normal conduct of litigation or arbitration activities.

These provisions make it sometimes very difficult for defence lawyers to work properly on behalf of their clients, and in an important recent analysis of their situation Fu Hualing has concluded:

Lawyers are intimidated and prosecuted [in China today] because they have become more proactive, aggressive and innovative in defending their clients' and their own rights, posing legal challenges that the prosecution has never encountered before. This challenge is possible because criminal justice in the past ten years has created opportunities and incentives for a growing legal profession. Thus, the predicament of lawyers today should be examined in the context of a profession in transition. (Fu 2007: 96)

Accessing Administrative Justice: Complaining about Police Conduct

As part of efforts to make the police a more accountable body, space within the Chinese legal system has been made for citizen complaints alleging police wrongdoing that has violated the rights of the accuser. Various systems have been put in place with the ostensible goal of facilitating and handling appropriately such grievances. However, the lack of overall effectiveness of access to justice in respect of police misconduct is a matter which worries the central leadership in China.

A general, structural problem is that complaining against the executive lacks genuine, firm roots either in traditional Chinese legal culture or in the principles of the peoples' democratic dictatorship, and is therefore not welcomed by local authorities. And, such forces have the power to resist complaints even where made lawfully. The CCP's Director of the Central Committee for the Comprehensive Management of Public Security, Luo Gan, acknowledged this point, albeit with somewhat ambiguous conclusions, in a speech on the growing problem of civil unrest in the Chinese countryside. According to a 2007 report from *Xinhua*:

China's top security official ordered authorities of various levels to dissolve social conflicts and meanwhile, continue to crackdown on crimes to ensure that the Communist Party's 17th National Congress is held in a peaceful environment.

Luo Gan, director of the Central Committee for the Comprehensive Management of Public Security, urged local Party and government officials to do more mediation in dealing with social disputes or conflicts.

'Reasoning, consultation and negotiation should be applied in a comprehensive way to dissolve social conflicts,' said Luo... Luo asked local officials to listen to and work on the complaints and pleas raised by the masses 'to ensure their problems can be effectively resolved'. (*Xinhua* 2007)

While mediation may indeed be a better way forward in many cases, as suggested by Mr Luo, what it actually means in practice is not altogether clear, and the simultaneous emphasis on 'cracking down' on crime is strongly reminiscent of Mao's approach for dealing with different types of contradiction: antagonistic and non-antagonistic (see Mao 1957).

Three avenues of complaint in cases of alleged police misconduct are considered here: letters and visits (*xinfang*: 信访), administrative review (*xingzheng fuyi*: 行政复议), and administrative litigation (*xingzheng susong*: 行政诉讼). The first two of these processes are essentially 'in-house' systems for dealing with complaints lodged by Chinese citizens. They are seen as alternatives to administrative litigation, and as more consensual avenues to administrative justice than judicial review and similar types of litigation. Although I do not as yet have materials on the precise manner in which 'letters and visits' and 'administrative review' are currently functioning as avenues of justice in the instances of complaints against the police, some general observations are possible. These suggest that there may be room for improvement, and that both systems are undergoing change.

Thus, the Letters and Visits system enables citizens who disagree with administrative decisions to lodge a complaint with a special office established to handle such matters within the relevant administrative body (see, for example, Minzner 2006). This mode of complaining is low-cost, non-confrontational, and growing in importance. Its popularity reflects in part the continued belief that, as in imperial China, officials bear a quasi-parental moral duty to correct bureaucratic wrongdoing and errors. The system has also been utilized by country folk who, in the past ten years or so, have become increasingly restless, largely as a result of often-unlawful confiscation of their land for construction and other developmental projects. Inadequate compensation and subsequent environmental degradation often present significant additional complications. The attempt by rural folk to bring complaints against the authorities under this system has been met with local official resistance: complainants have been unlawfully detained, assaulted or even subjected to torture. As a result, rural protests have proliferated.

In reaction to these developments, there have been several important changes. First, the regulations governing Letters and Visits have been revised in an effort to make them more effective (see Palmer 2007b).³³ Second, new police units have been established in order to suppress more serious cases of unrest (MacCartney 2005). There is also anecdotal evidence that local government is prepared to go further, and to use *agent provocateurs* and criminal gangs in order to suppress local complaints about administrative misconduct at the local level. But in addition

³³ 2005 *Guowuyuan Xinfang Tiaoli*: 国务院信访条例.

to these developments, which I describe in greater detail elsewhere (Palmer 2007a), a new policy has been introduced specifically intended to draw together citizen and State by the creation of Letters and Visits Mediation Sub-Centres (*Xinfang Tiaojie Fen Zhongxin*: 信访调解分中心). These centres use experienced community mediators to handle the increasingly difficult State-citizen 'contradictions' and to release the growing tensions (*bjcs.gov.cn* 2005-2006).

The important process of Administrative Review (also sometimes referred to in English as Administrative Reconsideration) permits an aggrieved citizen to challenge an unsatisfactory decision by filing an application for review at the next superior level within the same branch of government. Some 25 per cent of all administrative review cases dealt with over the past ten years or so concern allegations of police misconduct. In theory, this process encourages informed decision-making in respect of difficult issues, and enables the administration to understand better the workings and problems of subordinates. For the complainant, the system is relatively quick and less confrontational than litigation. The scope of reconsideration is also very broad, for the superior level may review both the legality and the propriety of particular administrative conduct, including an abstract act.

In contrast to the system of administrative litigation, Administrative Reconsideration allows for the use of mediation as a decision-making process. Most hearings are conducted on the basis of the complaint file, as the Law stipulates at Article 22 that 'in principle, administrative reconsideration shall take the form of written examination.' This position was recently confirmed in a clarification of the issue by the State Council. The Law provides much space for negotiating and mediating a compromise between the complaint and the administrative body that made the decision about which a complaint has been lodged. If a party disagrees with an attempted mediation then she or he may bring suit in a people's court.³⁴ As in the system of Letters and Visits, increasing encouragement is being given to use of mediation in administrative review cases, as part of the Party-state's efforts to make the system more effective and to help China create a more stable and harmonious society (Chu 2006). Overall, however, the administrative review regime for responding to complaints from citizens is limited in effectiveness by the difficulties created by the political environment in which it has to operate. Thus, there is an apparent lack of independence in the process of reconsideration and an increasing awareness that superior levels are inclined to defend what they see as the interests of the agency rather the person who has brought the complaint. The issue of administrative review in relation to the powers of the police is sufficiently sensitive for special rules to be introduced

³⁴ The precise wording of the relevant article – that is Article 8 – in the 1999 Administrative Review Law (*Zhonghua Renmin Gongheguo Xingzheng Fuyi Fa*: 中华人民共和国行政复议法) indicates that mediation is extensively relied upon where there is a 'civil dispute' between the parties. In practice, however, negotiation and mediation are extensively relied upon to deal with administrative issues. Specific encouragement of mediation in administrative review decision-making, and recognition of resulting mediation agreements as legally binding, are now provided in Article 50 of the 2007 Regulations of the PRC on Implementing the Administrative Review Law (*Zhonghua Renmin Gongheguo Xingzheng Fuyi Fa Shishi Tiaoli*: 中华人民共和国行政复议法实施条例).

several years ago: the 2003 Provisions on the Procedures for the Handling of Administrative Review Cases by Public Security Organs. These were then revised in 2006.

Thus, in China – as in many other jurisdictions around the world – there are well-established alternatives to the courts for seeking administrative justice. It is clear, however, that such alternatives contain inherent limitations in the PRC, and that for the ordinary Chinese citizen this means that the courts and their powers of adjudication may sometimes seem to be the most effective way forward. My understanding is that approximately one-fifth of all administrative cases in China over the past decade so involved the police or a Re-education Through Labour committee as a defendant.

It was partly with the difficulties of citizen suits against the police that in 1989, when the Administrative Litigation Law was introduced, the use of mediation (*tiaojie*: 调解) was specifically banned as mode of decision-making in determining the substantive issues in a complaint, although its use by the administrative chambers of the courts was (and is) permitted for dealing with compensation awards. As one informant explained to me: if a public security officer has hit me on the nose unlawfully, what is there to mediate? Either the police officer hit me, or she or he did not. I have elsewhere (Palmer 2007a; Palmer 2009) demonstrated in some detail not only the basic limitations in that Law in holding government officials, including police officers, to account but also explored the manner in which judicial practice has undermined the prohibition on mediation that was at the heart of the Administrative Litigation Law. There have been many complaints that such unofficial mediation may be processually flawed, especially in Basic Level People's Courts where the parties are less likely to be legally represented. Outcomes are achieved by the judge applying pressure or even coercion, using legally inappropriate trade-offs, or simply procrastinating until the plaintiff withdraws. The plaintiff may also suffer from informal bullying, which the court is unable to eliminate, from the defendant state organ, designed to force the plaintiff to mediate and to settle on adverse terms. One recent investigation, which examined nearly 200 cases, found that only in one out of every five cases did the plaintiff consensually withdraw. In all the remaining cases, a degree of coercion 'encouraged' withdrawal of the complaint (Wang and Wang 2005). Nevertheless, early in 2008, the Supreme People's Court gave the practice informal recognition, introducing new rules of court which implicitly acknowledge that one of the outcomes in administrative cases is often a mediated settlement.³⁵ In these new

³⁵ *Zuigao Renmin Fayuan Guanyu Xingzheng Susong Chesu Ruogan Wenti de Guiding*: 最高人民法院关于行政诉讼撤诉若干问题的规定 [Supreme People's Court Rules Concerning Several Problems in the Withdrawal of Administrative Suits], approved by the 1441st Meeting of the Adjudication Committee of the Supreme People's Court, promulgated on 1 January 2008, and in force 1 February 2008. Available at http://news.xinhuanet.com/legal/2008-01/16/content_7432440.htm. See also 'Guanyu renzhen guanche zhixing 'Zuigao Renmin Fayuan Xingzheng Susong Chesu Ruogan Wenti de Guiding' de Tongzhi': 关于认真贯彻执行'最高人民法院关于行政诉讼撤诉若干问题的规定'的通知' [Notice on Seriously Carrying Out the 'Supreme People's Court Rules Concerning Several Problems in the Withdrawal of Administrative Suits'], *Zuigao Renmin Fayuan Gongbao* [Gazette of the Supreme People's Court], No. 1 for 2008, pp.19-20.

rules, the term ‘mediation’ (*tiaojie*) is not used: instead, the Court uses the expression ‘settlement’ (*hejie*: 和解) and assumes that in many instances the settlement will have been achieved by active mediation by the main trial judge.

The People’s Armed Police Force

As we indicated earlier, in addition to the many kinds of civil police found in China today, there exists an increasingly powerful force: the People’s Armed Police (*renmin wuzhuang jingcha*: 人民武装警察). Although the system of police ranks has been applied to the armed police, this force falls under the leadership of both the State Council and the Central Military Commission in a combined system of ‘unified leadership and hierarchical command’ (*tongyi lingdao yu fenji zhihui xiang jiehe*: 统一领导与分级指挥相结合) (Law on the People’s Armed Police 2009, Article 3). As a result, it is difficult to see how the People’s Armed Police will escape the tension between vertical professional control and local government and party influence that has caused so many problems for the civil police, especially as much of the funding for the personnel and operations of the force comes from local government.

The People’s Armed Police Force (PAPF) is responsible, *inter alia*, for the suppression of disorder (Articles 1 and 7 of the Law on the People’s Armed Police Force 2009). Its methods of suppression, according to the 2009 Law, may include ‘taking necessary measures (*biyao cuoshi*: 必要措施) to stop or disperse assemblies of people who threaten social order’, and this gives the armed police very broad, coercive powers. These powers have been used very recently to control unrest in China’s western, inland regions. There have been many complaints in recent years that local governments rely on the People’s Armed Police for inappropriate purposes, including tax collections, fines, arrears, and disputes over land ownership. It seems from the new law that the avenues for securing redress against this malpractice are limited:

Article 30: The people’s armed police shall, in the execution of missions, accept the supervision of the people’s governments and relevant departments thereof, citizens, legal persons and other organizations.

Any citizen, legal person or other organization shall have the right to report or complain about violations of laws and disciplines by the people’s armed policeman to the people’s government at or above the county level and the relevant department thereof or the People’s Armed Police Force.

Article 31: Where the people’s government at or above the county level or the relevant department thereof receives any report or complaint from a citizen, a legal person or any other organization about any violation of laws or disciplines by any people’s armed policeman or finds that any people’s armed policeman violates a law or disciplines in executing a mission, it shall notify the PAPF in a timely manner.

Article 32: The PAPF shall, after receiving a report or complaint from a citizen, a legal person or any other organization or after being notified by the

people's government at or above the county level or the relevant department thereof about any people's armed policeman's violation of law or disciplines, investigate and punish the violation in a timely manner.

Article 33: The PAPF shall conduct supervisory inspections on the implementation of laws and administrative regulations and compliance with discipline by the subordinate people's armed police.

Given the wide ranging powers of the People's Armed Police Force, the systems of leadership and finance that have been put into place, and the emphasis in the complaints and grievance systems on administrative processes managed by local governments, it is hard to escape the conclusion that the People's Armed Police Force will persist as a difficult 'rule of law' issue in the years to come. Or, as two commentators recently advised in rather modest terms: 'PAP leaders ought to pay more attention to the legitimacy and accountability of the institution' (Sun and Wu 2009: 126).

Reflections

Some thirty years after a process of reform and engagement with the outside world was initiated, and ten years after a constitutional amendment committing the Chinese leadership to 'governance in accordance with the rule of law', the People's Republic of China continues to be governed by a political and legal system in which the Communist Party occupies a leading and dominant position. The police remain key instruments of support for the maintenance of this supremacy. This helps to explain why the police continue to play such a critically important role in state-society relations, albeit in some very significantly changed ways. Key aspects of this power is the continuing use of administrative – rather than judicially-based – forms of punishment (including the RTL) 'labour camps', 'strike-hard' campaigns against serious crime and social disorder, and the comprehensive management of public order.

And while the legal framework within which the police operate may have become more formal and regular over the past thirty years, with accompanying professionalization, autonomy and procedural justice in the criminal process (together with greater public awareness of the rights of the individual), the impact of this framework has not necessarily been to reduce police power. Indeed, changes in the position of the police have probably been more a function of the socio-economic changes within which the police operate rather than the framework itself. Many of the changes – especially the negative developments in policing – are the unintended and unanticipated consequences of the reform efforts. The contractualization of police work has had manifold consequences. Much of this difficulty too has to do with local resistance to well-intentioned reform efforts. The rise of the PAPF, with its quasi-military ethos, is another particularly important development, but one which may be seen as an intensification of the old 'strike-hard' approaches to difficult problems of order maintenance rather than a move away from such an ethos. Indeed, it seems that the police in China, considered overall, are not only the site of struggles between long-established and well-

entrenched thinking that sees the police as a key element in the maintenance of the people's democratic dictatorship (and its control of civil society), and a more professional police orientation. The police are also sandwiched between conflicting pressures emanating from between central government and local government. Policing development is also increasingly complicated by the fact that it has also become the site for at least three different and to some extent competing ideologies: those of state and state-sponsored violence, harmonious society, and governance according to the rule of law.

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‘Looking North’: Hong Kong Images of Mainland Law and Order

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Abstract

Where Taiwan has democracy, Hong Kong people have legal rights and the rule of law. However, since the 1997 retrocession of Hong Kong to Mainland China, Hong Kongers have feared that their way of life is threatened by the looming chaos of crime that is Mainland China. The territorial border is now a mere ‘boundary’; Hong Kong’s legal institutions have proved a weaker defence than hoped. Supplementing these defences, local people have erected a new, cultural frontier, in the form of ghost stories, rumours and graphic reports of what happens to those who cross into the liminal space between Hong Kong and Mainland China.

Introduction

At 11.30 a.m. on 24 August 2000, Yu Man-hon, a 15 year-old autistic boy with a mental age of two, ran away from his mother at Yau Ma Tei MTR¹ station in Hong Kong. The family had just eaten *dim sum* in Yau Ma Tei and were returning home when Man-hon ran off. Somehow, he made his way to the Lo Wu checkpoint, crossed the border into Mainland China and disappeared. Ten years later, his parents still search for him; a photograph of Man-hon and the details of his disappearance is still to be found on the Hong Kong Police Missing Persons website.

The failure to re-unite mother and child ‘happily ever after’ makes this a cautionary tale of the kind told to children to ensure they never stray. As one Hong Kong reporter wrote at the time,

Everyone seems to have a theory about Yu Man-hon. On the day he ran away from his mother at Yau Ma Tei MTR, he disappeared into the world of speculation. During the course of writing this, I heard the following possibilities: that he had fallen into the hands of gangsters who were forcing him to beg in another province (Hubei, Guangxi, Yunan, take your pick); that his organs were about to be taken from him and sold unless his family paid a ransom; that he was eking out an

¹ The MTR (Mass Transit Railway) is the Hong Kong underground system connecting to Kowloon Canton Railway (KCRC) trains taking passengers across the Hong Kong/China Border at Lo Wu.

existence in various towns in Guangdong. Many people said with conviction, he must be dead, but that too is just a theory. There is no proof of anything about Man-hon's life beyond the moment when Hong Kong immigration officials sent him... across the border to Shenzhen... in the belief that the mainland was a place where a boy who couldn't speak, and who urinated in and threw food around an interrogation room belonged. (*South China Morning Post* 4 March 2001)

Another wrote:

As a result of this systematic laxity, Man-hon was handcuffed to prevent him hurting anyone and handed back to the Shenzhen Immigration Department, which assumed its duty was done when it dumped him in the street. In a city where street children are so common, that may not have been an unexpected response but it is hardly caring... (*South China Morning Post* 22 September 2000)

Once handed over to the Chinese side, Man-hon was unable to retrace his steps. He became, instead, stranded in a twilight zone, the liminal space that is the Hong Kong/China border, known neither to be alive nor dead. His mother, however, still searches for him:

In the dreams, he is with us, together and happy like we were in the past. But when we wake up and find it was just a dream, the pain is just unbearable... We miss Man-hon very, very much. We miss him more whenever there's a typhoon or the weather is hot, worrying if he is sick, has a place to hide or food to eat. (*South China Morning Post* 25 August 2001)

Yu Man-hon Disappears

Despite his disabilities and the fact that he possessed no travel documents, Yu Man-hon managed to cross the border at the Lo Wu border checkpoint. Mainland officers on the Chinese side intercepted the boy at 1.47 p.m. He seemed to them to be mentally disturbed. He was dressed like a Hong Kong resident and, they said, he 'did not respond when their staff spoke Putonghua but made some response when they used Cantonese' (*South China Morning Post* 22 September 2000). Subsequently, they asked their Hong Kong counterparts to verify his identity and returned him to the Hong Kong side. Here, HKSAR² Immigration officers conducted a 65-minute interview with him:

When an officer asked Man-hon in Cantonese and Putonghua his name, nickname and address, he got no response. A search was then conducted... He noticed that the boy's wrists bore marks of being handcuffed before, apparently. His belly carried some rashes, the lower part of his legs bore some scars and his feet were dirty... A senior officer then took off the boy's clothes and checked his shoes to see whether there was anything that might suggest the boy's identity. They found the boy was not wearing underwear and the trademark label on his T-shirt had been removed. His rubber shoes, according to the knowledge of the immigration officer

² Hong Kong Special Administrative Region.

and senior immigration officer, were of a well-known brand in the Mainland...officers later changed their approach, praising the boy about his clothing and asking his favourite TV programmes and singers...like Wah Chai [Andy Lau], Gi Gi and Kwok Fu-shing, etc. Again, the boy showed no response at all... Man-hon was served with a lunch box and a can of coke. He became impatient and stood up, messed around and intended to rush out of the room... [he] became emotional and impulsive when officers tried to stop him, swinging his hands around, kicking his legs and spitting at them... The officers then handcuffed Man-hon to a chair and the boy was said to have calmed down. When the officers tried to get a response from him by using simple words such as 'dad', 'mum' and 'water', Man-hon did not follow and only uttered sounds like 'ah' and 'naughty' when he urinated on his chair. (*South China Morning Post* 22 September 2000)

The HKSAR Immigration officers concluded that Man-hon could not possibly be a Hong Konger, refused to allow him back into Hong Kong and, at 7.05 p.m., returned him to the Mainland. The last person to see him, a Mrs Chan, later told a Radio Television Hong Kong (RTHK) phone-in programme:

'He walked through the counter, an officer stood up and shouted at him and a few other officers were also alerted...I could tell from his appearance that he was mentally disabled. I followed him to the Shenzhen border, thinking he must be lost and wanted to find his family'... Man-hon was finally stopped by a mainland official when he tried to pass through the Shenzhen immigration controls. 'They grabbed him and he struggled. I shouted in Putonghua, 'He has problems, don't hit him!'" Mrs Chan said the Shenzhen officials later asked her to leave. She said dozens of people must also have witnessed the drama... 'My heart sank. I saw someone who badly needed help, but I didn't know how to save him.' (*South China Morning Post* 1 September 2000)

An Immigration Department inquiry in the HKSAR subsequently revealed that both the Shenzhen officers and at least one of the HKSAR officers had suspected that Man-hon was 'mentally handicapped' (*South China Morning Post* 22 September 2000). Another inquiry, by the Ombudsman, identified four main blunders:

- The immigration channel supervisor at Lo Wu failed to report that a person had crossed the checkpoint illegally earlier in the day;
- The immigration officer who interviewed Man-hon had failed to abide by departmental guidelines on the handling of mentally handicapped people;
- Immigration officers had returned Man-hon to Shenzhen without paying adequate attention to the consequences of the fact that he was mentally handicapped;
- Although Man-hon's mother had reported her son's disappearance to Kowloon East's Missing Persons Unit earlier in the day, a police inspector at the New Territories Regional Command & Control Centre had failed to circulate details of Man-hon's disappearance, despite being tasked to do so

almost an hour before Man-hon was sent back to Shenzhen. As a result, no information about his disappearance was available to the Immigration officers when they did seek police help in identifying Man-hon.³

At the end of their interview with Man-hon, one of the Immigration Officers had stated that the boy 'was similar to a mentally handicapped person and could not communicate in a normal and clear way' (*South China Morning Post* 22 September 2000). Though Immigration Department guidelines required that professional help and/ or an independent adult (e.g. parent, guardian) be employed when the interviewee appeared to be 'mentally impaired', (*South China Morning Post* 22 September 2000) no help was sought.

Crucial moments were lost in the initial days of the search for Man-hon. The boy disappeared on 24 August, but it was not until 28 August that the Immigration Department contacted the Mainland authorities to try and re-locate him. On 31 August, the Chief Executive contacted the Mayor of Shenzhen to seek assistance; on the same day, the Secretary for Security contacted the Director General of the Guangdong Provincial Public Security Bureau (Liang Guoju) to ask for help in searching other Mainland cities outside Shenzhen (LEGCO Security Panel 2004).

In Hong Kong reporter Frank Ching commented on the 'cold hearted indifference' towards the vulnerable, most visible in Hong Kong's treatment of Mainlanders (*South China Morning Post* 25 January 2003). The Immigration Department was accused of 'discrimination, of 'lax attitudes and prejudices', its officers having assumed that a boy whose clothing seemed 'too cheap for a Hong Kong youth' must hail from the Mainland (*South China Morning Post* 17 December 2000). The Police likewise were criticized for their 'disdainful attitude towards Mainlanders'. Cyd Ho Sau-lan, a LEGCO member, said 'This also shows the officers judge people from their looks. The boy did not wear famous brands but was in very casual dress, therefore he was treated this way...' (*South China Morning Post* 24 September 2000). A public opinion survey at the end of September 2000 reported that 66 per cent of the public placed the blame for Man-hon's disappearance entirely on the Immigration Department, whilst 64 per cent thought that the Immigration Department discriminated against handicapped people, as well as people from Mainland China (*Singpao Daily* 25 September 2000).

A BBC interview with the Yu family also linked Man-hon's fate to wider criticisms of Hong Kong immigration officials' treatment of those they suspected of being illegal immigrants ('Ils') (BBC News 31 August 2000). Pejorative stereotypes of 'Ils' were widespread in Hong Kong, depicting Mainlanders as rough 'country bumpkins', ignorant and uncouth compared to their fashion-conscious, sophisticated Hong Kong compatriots.

Mrs Yu complained that vulnerable persons such as Man-hon, being 'unproductive' members of society, were regarded with indifference by the Hong Kong government. By contrast, Hong Kong schoolchildren made cards of support for the Yu family. The press speculated about Man-hon's fate as a vulnerable person trying to 'survive on the streets' of a lawless Shenzhen. Experts argued that 'seeking survival' was 'a basic instinct' and that Man-hon did not need to be

³ Executive Summary Ombudsman's Report available at http://www.ombudsman.gov.hk/concluded/2001_04_01.doc.

intelligent to find food, stay warm, and find shelter. He might fall down, drown, be assaulted or 'get ill by eating food which is dirty. But as long as he's in places with people he should be okay as I believe it's a Chinese tradition that people will offer help' (*South China Morning Post* 6 September 2000). Mrs Yu believed that Man-hon was still alive and 'may try to go out to look for food when there are fewer people in the streets' (*South China Morning Post* 1 November 2000). She believed that Man-hon 'knew the way home' but had become trapped in the no-man's land of the border.

Betwixt and Between

Man-hon disappeared in the seventh month of the Chinese lunar calendar – the time of the Hungry Ghost (*Yue Lan*) festival, when restless spirits are temporarily released from hell to wander the earth in search of sustenance.⁴ It signals a liminal time in the Hong Kong calendar. Spirits of the dead not yet incorporated into the afterlife are said to be caught by a thin thread to the society to which they once belonged. The festival reaches its peak on the 15th day of the month (August in the 'Western' calendar) 15 days after which the ghosts must return to the underworld. During this period, children are said to be particularly vulnerable to being drowned or snatched away; they are warned to return home early and not to wander around at night. To stop restless spirits making trouble, incense is burned and meals placed outside the home for the spirits to consume. Entertainment is offered to the 'hungry ghosts' – elaborate seating platforms and large bamboo and iron stages are erected in playgrounds and car parks for ghosts to watch performances of Chinese opera. Paper boats and lanterns are set to sail on water to guide lost ghosts and spirits home. Fake money (Hell bank notes), paper models of cars, computers, houses (with servants), plasma TVs, and mobile phones are all offered up to the dead spirits by ritual roadside fires.

Stepping over the threshold between Hong Kong and China at such a time, Man-hon stepped into a dangerously unstable zone between two worlds, slipping from the orderly safe world of Hong Kong into the chaotic world of Mainland China. By failing to 'reappear' in that other world, he remains permanently liminal, caught – as Hong Kong people are themselves caught – between two places, in transition, suspended in the space 'betwixt and between'.⁵ As liminals, they glimpse how things might be different – visions of utopian paradigms, inversions of the social order or, as Abbas (1997) writes in his account of Hong Kong at the moment of transition, 'reverse hallucinations'.

Sightings and Disappearances

Eighteen days after Man-hon disappeared, a half-naked boy who looked like him was found wandering in the Buji district of Shenzhen at 2 a.m. (*South China Morning Post* 10 September 2000) A month later, a 7 year-old mentally

⁴ For further details, see www.essortment.com/all/hungry/ghostfes.

⁵ For van Gennep, Turner and others, the term 'liminality' referred to a particular stage in a process of transition (often referred to as 'rites of passage'). The word 'limen' itself is Latin for 'threshold'. See also St John (2001), cited in Tilbury, Toussaint, and Davis (2005).

handicapped boy was found at Yau Ma Tei MTR, almost three hours after escaping from his family's Shekkipmei flat whilst his mother was in the bath (*South China Morning Post* 1 September 2000). In late September 2000, a 10-year old boy without travel documents was found between the Lo Wu bridge and the SAR immigration counters; he was returned to Shenzhen only after the Social Welfare Department was called in to assist and the Shenzhen authorities were able to verify that he was a Mainland resident. Another autistic boy was found in Lo Wu after running away from his mother in Shekkipmei (*South China Morning Post* 20 September 2000). A 17 year-old girl (on medication for depression) disappeared in November 2000. A 72 year-old woman 'suspected of suffering from mental problems' was found in Beijing and returned to Hong Kong (*South China Morning Post* 20 September 2000). In November 2000, Chan Fong, an elderly Hong Kong woman suffering from dementia, was found by PSB officers wandering in Shanghai without any travel documents, the third time that month that an elderly Hong Kong person had been found wandering alone on the Mainland (*South China Morning Post* 18 November 2000). Though they could not communicate with her in either Cantonese or Putonghua, officials managed to establish that she was a Hong Kong resident; she had officially passed through Lo Wu on 6 November. How she had travelled to Shanghai was unclear. Having found her, officials were reluctant to let her go for fear that she would not be able to fend for herself, but Hong Kong officials hesitated to accept her back without first gaining the consent of her son, whom they could not trace.

Despite assurances of procedural changes following Man-hon's disappearance, such incidents continued to occur. In February 2001, a 22 year-old autistic man, Tsoi Wa-kau, was found in the departure hall on the Huanggang side of the border without any record of him having passed through Lo Wu. Mr Tsoi had apparently run away from a sheltered workshop near his home in Ma On Shan and boarded a bus to Dongguan. He was found the next day when Mainland border guards, thinking that he might be Man-hon, approached him. Although he carried no identifying documents and could not communicate clearly, he understood the complex Chinese characters used in Hong Kong. When Mainland authorities contacted their Hong Kong counterparts, the HKSAR police confirmed that they had received a missing persons report the previous day of a man answering his description. He was then returned to Hong Kong. In May 2001, a four year-old girl, Lee Lok-lam, 'almost staged a repeat of the Yu man-hon incident' when she ran away from her aunt in Hunghom KCRC station at 1p.m. and was found half-an-hour later, wandering the platform at Lo Wu (*South China Morning Post* 6 May 2001). Another 'mentally retarded' teenage girl without any identification documents was found wandering around the departure hall at Lo Wu with a rucksack on her back; no-one had reported her missing. After questioning, she was handed over to the police and admitted to a hospital for observation.

On Mother's Day 2001, the Hong Kong media reminded the public of the days Mrs Yu spent waiting for news, and of the toll taken on her as she trekked through Guangzhou searching in vain for her son. On the second anniversary of Man-hon's disappearance in 2002, there were reports that Ngan Yau-lan, an 82 year-old woman with senile dementia, had boarded a train in Kowloon Tong and disappeared. Her children reported her missing that evening and searched for her in Shenzhen. She had slipped through the Lo Wu checkpoint without travel documents

and was later found by staff at a bus terminus in Xiasha, more than 5 miles from Lu Wu on the Mainland side. According to her family:

When we went to Shenzhen, a Mainland immigration officer told us there was nothing he could do and blamed Hong Kong for letting her cross. On the Hong Kong side, an officer told us they had too many people crossing the border and losing a few was inevitable... It was so lucky some nice people found her and called us. If they hadn't, we could have lost her and she might never have come back (*South China Morning Post* 25 September 2002).

By spring 2001, the Hong Kong press was wondering whether Man-hon could still be alive. Children *did* survive on the streets of Shenzhen, but Mrs Yu said that many Mainlanders had told her that 'mentally disabled people are often collected and dumped in remote areas' (*South China Morning Post* 3 December 2000). Over the months searching in Fujian, Jiangxi, Guangxi and Hunan, she herself had seen nearly 2,000 mentally disabled children wandering the streets (*South China Morning Post* 8 March 2002). She had collected a box of photographs of such children:

There was an unkempt boy squatting in bushes in the middle of a highway, and another perched on a drain pipe in the middle of God knows where. There was a Polaroid from a PSB station of an adolescent, grinning vacantly, propped against a stained wall by an officer. There was, unforgettably, a photograph of a naked boy, like a wolf-child, with a couple of nonchalant hawkers loitering in the background... None was Man-hon but, to his mother, they could have been; the message they send us is that if these little wrecks can bob along amid the tide of Guangdong humanity, perhaps he can too... At Shawan we saw this: a poor lad, sitting on the ground inside the PSB compound, occasionally picking his teeth, his face blackly spotted with filth and some skin disease, unable to speak. When PSB officers asked him if he was Yu Man-hon, he had nodded; but if they had asked him if he was Marilyn Monroe he would surely have agreed in the same, uncomprehending way. Charles Dickens could have written about that lost child: he looked like a 19th century waif who had washed up in a concrete yard, in a concrete town, clutching several pieces of coconut and surrounded by a small crowd who stared at him as if he were a wild beast. He wasn't Man-hon, of course, but he must, once, have been someone's son: an unknown tragedy amid all the other desolate tales that have become part of this bigger story... (*South China Morning Post* 16 April 2002)

Against this background of a heartless and cruel Motherland, Mrs Yu emerged as a symbol of selfless motherly love. She travelled across the border each day at 7.30 a.m. to wait in a hotel room in Shenzhen, hoping to hear news; each evening, she returned home (*South China Morning Post* 4 January 2001). She spent each day:

wait[ing] by herself in a hotel room in Shenzhen. Her husband... works as a caretaker on a Kwun Tong estate and takes care of Yu-cho [Man-hon's brother] so he can make only occasional trips across the border. Her brother, Li Yuefang, spends every day searching for his nephew; he rings his sister with progress reports and she tells him about the latest apparent sightings, phoned in by the public. Some are crank calls, some might be genuine, but brother and sister have

to sift through them all because someone, someday, might call with the information that will lead to Man-hon... (*South China Morning Post* 4 January 2001).

In December 2000, Man-hon briefly disappeared again, this time from the Hong Kong papers (*South China Morning Post* 10 December 2000). However, his story continually resurfaces every year, around the anniversary of his disappearance in August, and at Halloween, when Hong Kongers tell ghost stories. Seven years after his disappearance, another autistic child, Tai Chi-kwan, aged 7, was spotted by three Hong Kong visitors as she wandered around a shopping centre in Shenzhen (Glory Plaza) more than 20 hours after she disappeared from Hong Kong (*Hong Kong Standard* 30 May 2007). Establishing the girl's identity was aided by the fact that she wore a Hong Kong school uniform and because her parents had already lodged Missing Persons reports with both the Hong Kong and Shenzhen police authorities. For the press, the incident 'revived memories of Yu Man-hon, an autistic boy who has been missing for almost seven years after he ran away from his parents at Yau Ma Tei MTR station and slipped across the border undetected... He has never been found since...' (*Hong Kong Standard* 31 May 2007).

To prevent further incidents, an overhaul of existing systems of surveillance was undertaken. Mrs Yu lent her voice to the call for a cross-border unit to establish what had happened to Man-hon, and to help others whose relatives had disappeared on the Mainland. The unit was established in January 2003. The Shenzhen-Hong Kong land Boundary Police Co-operation Scheme strengthened cross-border liaison and 'facilitated joint efforts on both sides in combating crimes at boundary areas' (LEGCO Security Panel 2004). However, complaints that the Mainland police extorted money from those they detained cut across the Scheme's endeavours to persuade Hong Kong people to report their victimization to Mainland authorities.

The Hong Kong police established a command control centre as a focal point for all government departments checking on missing persons; training was improved and information more readily disseminated. The force upgraded its computer system and initiated a new system of e-mailing missing person reports throughout Hong Kong. The Immigration Department announced that it would be spending HK\$134.8 million to improve border checkpoints, installing 114 security cameras. A LEGCO Panel called for 'enhanced sensitivity' on the part of public officials when dealing with persons with disabilities (mental or physical) and/or communication difficulties, so as to deal with them 'in a fair, just and sensitive manner' (LEGCO Security Panel 2004).

However, the roll-call of the lost and missing grew, as did complaints of official indifference. In April 2002, a 'mentally retarded' man was detained awaiting repatriation to China. Cheung Hoi-sang had sought right of abode in Hong Kong, one of a number of Mainland children born of Hong Kong residents to do so after 1997. The Immigration Department argued that it had detained him whilst considering his application because it feared he would otherwise abscond. As a result,

About 100 protestors ... stormed the Waterfront police station in Central to try to secure his release, and staged a sit-in outside Victoria prison in Central, where Mr Cheung was later transferred... His mother, Wong Yuet-yuen, who has visited her

son in jail, said 'He's terrified. His face is very pale. My heart broke when I saw him'.... [his lawyer] Mr Chan said ... 'he cannot be expected to fend for himself in China. He has never travelled alone in his life.' (*South China Morning Post* 16 April 2002)

In January 2002, Lee Shung, a partially senile, 'bewildered 71 year-old mainland tourist' was mistaken for an illegal immigrant and sent back over the border (*South China Morning Post* 5 October 2002). The man and his wife were Mainland residents, two-way travel permit holders who had come to Hong Kong to visit their daughter on the Tai Hing Estate, Tuen Mun. Mr Lee had become lost and was found wandering in Tin Shui Wai without travel documents or an identity card. The police mistook him for a Chinese illegal immigrant, held him in a detention centre and then repatriated him to the Mainland, where he was briefly detained in Shenzhen before being sent back to his home town. After his wife reported him missing, he was returned to Hong Kong. Whilst 'he did not suffer the fate of Man-hon', Hong Kong reporters (*South China Morning Post* 25 January 2003) wanted to know why officials had sent Lee across the border without verifying his identity. Such persons:

...face not only the depredations of criminals in our society, but are also potential victims of the forces of law and order... There is a dark side to Hong Kong, one that is not always visible except to the poor, the handicapped, the mentally impaired, the aged, the ill and the otherwise underprivileged – the most vulnerable members of our society. It is an uncaring attitude, a lack of sympathy for those less fortunate, which seems to characterise some of the people in power... (*South China Morning Post* 25 January 2003)

In Hong Kong, such stories encapsulate worries about border security, the degradation of public life, and a Motherland peopled by indifferent officials and greedy hoaxers.

The Socio-Political Context

The Yus were in many ways typical of the Hong Kong poor. Famously *laissez faire*, the Hong Kong government had only ever provided minimal social welfare for needy families. The post-1997 regime was less committed to welfare colonialism than the British. It also demonstrated 'a keen appreciation for models of patrician leadership exercised in Hong Kong during the sixties' (Turner 1994: 8), appointing senior Hong Kong figures to positions of power, shrinking the franchise and adopting a highly-centralized, top-down, executive-led approach to governance. Post-1997, the gap between rich and poor widened; unemployment rose, social welfare was a lower priority than it had been for the British (always answerable to the UK Parliament for their treatment of the Hong Kong Chinese). The Tung administration pursued policies of more direct benefit to the Hong Kong elite than to its grassroots.

The Yus were grassroots Hong Kongers. Their difficulty in looking after Man-hon was typical of many Hong Kong families caring for the disabled or elderly. In a city dominated by a discourse of 'bootstrap capitalists' and *laissez faire*, self-reliance was valorized and state support for the weak minimal. The poorest elderly lived in

'caged dwellings'; hospital staff routinely restrained the mentally disabled by tying them to their beds (one woman, trapped by a strap across her neck, was strangled when she fell out of her bed). At home, some families' only option was to restrain dependant family members.

The Yus found themselves in exactly such circumstances. Mrs Yu suffered from muscular dystrophy after contracting polio when she was three. Caring for Man-hon tested her endurance – diagnosed as autistic when he was 2 years-old, he was unable to speak, sometimes overactive, strong, and sometimes violent; he also enjoyed running away, seeing it as a game of 'chase' (*South China Morning Post* 31 August 2000). She did her best:

It is like a war every time I take him out. I have to repeatedly tell him not to run away and to stick close to me. But sometimes he won't listen and we end up having a tug-of-war in the street. I used to be on my knees on a busy road begging my son not to run away as I could not catch him up (*South China Morning Post* 31 August 2000).

She tried to discipline Man-hon with rules and punishments:

...When he ran away, I would scold him loudly and when he didn't go to the toilet properly, I would make him clean up... Sometimes I wanted to beat him, but I simply couldn't. When I got angry and spoke loudly, he would come close to me and kiss me. (*South China Morning Post* 31 August 2000).

To keep Man-hon safe, she routinely locked the doors to their 20th floor flat, but:

Man-hon was always trying to escape. A key hangs on a long ribbon near the kitchen. When Man-hon and his mother came home from school every day, she locked the front door immediately and hung the key round her neck. She made sure the windows were fastened. She had a nightmare that Man-hon would run away and she would never find him... he went missing for several days in 1998. He came home from school as usual with his mother, and as she put down her bag and reached for the key he slipped out and ran. That night, he was found hiding in a private housing estate in Ma On Shan; the residents thought he was an illegal immigrant and he was taken to the ... hospital, but it was a week before the police got round to telling his mother where he was ... At the beginning of the summer Man-hon bolted in Lok Fu MTR station. The police found him, hours later, sitting in McDonald's in Diamond Hill. When he ran away from Yau Ma Tei station on.... August 24th... the first clue Yu had that he might be on the Mainland came when a friend told her she'd glimpsed him on the Chinese side of the border the following day (*South China Morning Post* 17 December 2000).

Mrs Yu's story was one with which many Hong Kongers could empathize. Her experience of government touched a raw nerve in Hong Kong society of the time. Facing increasing criticism, in October 2000, the LEGCO (Hong Kong Legislative Council) Security Panel took the unprecedented step of publishing two internal reports (by the Police and the Immigration Department) into Man-hon's disappearance; both recommended changes (LEGO 2000). Publication, the

Government argued, was 'in the interests of transparency and public accountability' (LEGCO 2000). It was also aimed at mitigating wider public dissatisfaction with the Tung administration. In 2000, the New York Times had christened Hong Kong the 'City of Protests' due to the frequency of mass street demonstrations. These would culminate in the massive 1 July 2003⁶ march through Hong Kong by 500,000 people, creating 'the worst governance crisis to date... [and] widening the political gap between Hong Kong's government and citizenry' (Cheung and Wong 2004: 894).

Opinion polls showed that Tung enjoyed lower popularity than the last British Governor, Chris Patten. His administration was even 'more colonial' elitist, more closed, more remote and less democratic than the British (Vickers 1999; Cheung and Wong 2004; Goodstadt 2000), even more 'skewed in favour of the 'business' sectors' (Cheung and Wong 2004: 882). Embarrassingly, in June 2000, *AsiaWeek* even rated Hong Kong's top tycoon, Li Ka-shing, the most powerful man in Asia; China's President, Jiang Zemin, came second (*Sunday Morning Post* 18 June 2000).

Hong Kongers were feeling disillusioned with their new rulers. There was a prevailing air of deep pessimism about the city. The promise that Hong Kong people would rule Hong Kong was seen as hollow, whilst a series of administrative fiascos had deepened the public's lack of confidence in the government. The Avian flu and SARS crises, the humiliation surrounding the new airport's opening, the Department of Justice's lame refusal to prosecute Sally Aw, the exemption of the New China News Agency from Hong Kong law, and the Government's failure to defend the Court of Final Appeal (CFA) against Mainland interference had all served to dent confidence in the rule of law, the territory's defining characteristic (see below). Poor handling of the Asian Financial Crisis also raised doubts about the 'performance legitimacy' of a government without a democratic mandate (Huntington 1991). The Man-hon incident exemplified this weakness of leadership and indifference to the plight of ordinary people.

Turning to 'Uncle Tung'

The Tung administration was also characterized by 'a reinforced paternalism, more 'Confucian'... [with] less accountability downwards... more caution and conformity upwards... Uncle Tung's paternalistic, patronising style and his top-down, executive-led government echoed an older colonial era, but it suited the new sovereign 'very nicely' (Vickers 1999: 6). A 'Confucian values' campaign in Hong Kong emphasized conservative Chinese culture. Chinese culture 'study groups' sprang up throughout the public sector from the police to the civil service; a new Commission was established to promote Chinese culture and, in at least one university, the study of Chinese culture was made compulsory. This campaign, coupled with the active promotion of Putonghua, reinforced the sense that Hong Kongers own main language and culture (Cantonese) were inferior to those of their new 'colonial' masters.

⁶ 1 July is the anniversary of Hong Kong's retrocession to China, and as such has become a significant occasion for protest.

Concomitantly, the deliberate dismantling of the many channels of grassroots communication established by the British since the 1970s reduced opportunities for the expression of grassroots grievances. An increase in street protests was one consequence. But the revival of Confucian paternalism also meant that 'Uncle Tung' himself came to be seen as the ultimate locus of power. In the manner of subjects petitioning their imperial Emperor, it was to Tung himself that Mrs Yu now turned for justice.

In October 2000, following a request by Mrs Yu for more support in the search for her son, the Government agreed to set aside around HK\$200,000 to pay for notices about the boy's disappearance, to be placed in the Mainland media (*South China Morning Post* 3 November 2000). At the same time, an anonymous donor offered a HK\$1 million reward for information leading to his recovery (*South China Morning Post* 1 November 2000). Other social organizations set about raising funds to support the search. In September 2000, the *Singpao Daily* argued that the search for Man-hon could be divided into three parts: the Mainland Public Security 'gave labour'; Hong Kong 'rich men donate money'; and the Yu family 'gave sweat' (*Singpao Daily* 4 September 2000).

For the Yus, the money was welcome but, they argued, the failure of Government to provide support sooner had harmed their chances of finding Man-hon in the first few days after his disappearance, when several sightings had been reported. As one correspondent to the *South China Morning Post* put it, 'All that these parents needed was a little help from people who are supposed to be leaders and organisers' (*South China Morning Post* 10 December 2000). Others demanded that someone be held accountable:

It would be reasonable to expect that after such an incident a concerted effort would have been made to bring those responsible to account and to take clear, precise and transparent measures to ensure that such a travesty would never happen again... perhaps the Government could tell us who shall be held accountable over the Yu Man-hon tragedy and what specific measures the Hong Kong Government... has taken to ensure such an incident will never happen again. (*South China Morning Post* 30 August 2001)

One implicitly critiqued the post-1997 administration: 'I am sure that if this boy had come from a family belonging to the 'elite' of Hong Kong society, the Government would not be absolving itself of responsibility in this matter' (*South China Morning Post* 6 September 2001).

The Tung administration seemed deaf to these criticisms. The Yus were left to print and distribute their own missing persons posters, travel to and from Shenzhen every day, conduct the search and foot the bill. Over the years, they juggled their jobs and other family commitments with searching the streets of Shenzhen, Zhuhai and Dongguan. In 2001, it was reported that Man-hon's father was even considering early retirement, cashing in his pension in order to fund the costs of finding his son (*Apple Daily* 21 August 2001).

Meanwhile, whilst the Ombudsman's report had identified systematic errors and recommended disciplinary action, in July 2001, the Civil Service Bureau's internal disciplinary inquiry cleared all those involved of negligence and unprofessional conduct. A public outcry followed. James To Kun-sun, acting chairman of the

LEGCO Security Panel, expressed shock at the discrepancy between the two sets of findings and pressed the administration to give a public account (*South China Morning Post* 18 July 2001). In late July the Civil Service Bureau took the exceptional step of releasing a summary of its report (Civil Service Bureau 2001). The strong public reaction to its findings threatened to undermine public confidence in the civil service, hitherto regarded as a cornerstone of Hong Kong's stability.

Responding to the acquittal of the Immigration Officers, Man-hon's parents said that they did not wish to see them lose their jobs as they too had their own families: 'we just want justice to be seen to be done'. The real responsibility, the Yus felt, lay with the Hong Kong government:

...They said there were many missing children on the Mainland. I know many children go missing on the Mainland. But it's not us who took Man-hon there. He has gone missing because of a series of mistakes by the SAR and Mainland authorities. Had they kept Man-hon at a reception centre instead of releasing him in Shenzhen on his own, he could have been found by now. (*South China Morning Post* 28 April 2001)

Tung Chee-hwa came in for particular criticism. A month after Man-hon's disappearance, Mrs Yu had written to Tung seeking urgent help in the search for her son:

My poor boy has been lost and left on his own for a month now. We have terrible visions of bad things happening to him every night in the past month... Please make use of all channels of communication with mainland authorities to come up with any possible way to get him back. (*South China Morning Post* 22 September 2000)

Apart from a brief 15 minute meeting following this request, Tung was reported not to have 'spoken a word to the Yu family' until another petition was handed to him in 2001. In between, Mrs Yu unsuccessfully requested several meetings. In April 2001, she asked to meet Mr Tung and Regina Ip Lau Suk-yee, Secretary for Security. According to the press, Mrs Ip was said to be too busy; Mrs Yu was advised to go home. Mrs Yu then staged a protest sit-in outside Government headquarters (*South China Morning Post* 19 April 2001). Mr Yu returned home to look after their other son, leaving his wife to camp outside the government offices all night before he re-joined her in the morning. Then:

Yu Man-hon's parents submitted a petition to Chief Executive Tung Chee-hwa yesterday after waiting for three hours from 7 a.m. outside the Central Government Offices. Mr Tung talked briefly to the parents and promised to arrange for someone to meet them after taking the petition letter at about 10 a.m. But the couple had to wait until about noon before Mr Tung's special assistant, Chan Kin-ping, met them for about 30 minutes... Yu Wai-ling said she was disappointed with the attitude of the Government. 'The government is very insincere. They're playing around with us. Mr Tung said he would arrange for someone to meet but later I was asked to leave, and told that Mr Chan was out... When I insisted on meeting Mr Tung they asked me to wait for Mr Chan, who was in a meeting. When I met him, he just kept

recalling what the Government had done to help find Man-hon. But what's the use of talking about this?' (*South China Morning Post* 25 August 2001)

Tung, who had made Confucian paternalism a trope of his administration, finally held a 10-minute meeting with Mrs Yu and assigned two aides to liaise with the Mainland authorities in the search for Man-hon. On the anniversary of Man-hon's disappearance in 2001, Mrs Yu wrote a second letter to Tung:

Do you still remember? A year ago today, the Hong Kong Government handcuffed my son with a pair of handcuffs used for criminals and forced him to leave his birthplace – Hong Kong... The fate of the boy was changed on that day... the child has suffered for a year. His parents have also suffered the pain for a year. (*South China Morning Post* 24 August 2001)

Mrs Yu tried to present another petition to Tung in May 2002 but, after a three-hour wait, he failed to appear (*South China Morning Post* 22 May 2002).

Five years after Man-hon's disappearance, in September 2005, Mrs Yu reiterated her feeling the family had 'very much been on our own all these years.' She said the government had done little to help them: 'they keep saying they sympathise with us out in reality they do very little to help us' (*South China Morning Post* 1 August 2005). According to one report, immigration officials at the border had even mocked Mrs Yu when she tried to use the counters for disabled people at Lo Wu in order to cross the border faster on her daily trips to Shenzhen to look for Man-hon (*South China Morning Post* 3 December 2000).

Interviewed in 2007, Mrs Yu said that, 'Just like any other mother' she would 'not give up the search for my child until and unless I see his body'. She continued to visit the Mainland 'the minute any possible information on Man-hon is received'. She also continued to write to the Chief Executive in the hope that he would press the Mainland government to help with the search (*South China Morning Post* 3 December 2000).

Ho Hei-wah, Chair of the Human Rights Commission, called the Man-hon case 'the most serious mistake I have ever heard of... The Immigration Department has not treated the boy as a human being. Any person with minimal conscience would not have abandoned a child in Shenzhen, especially if he cannot express himself' (*South China Morning Post* 30 August 2000). Highlighting the systematic failings of the Tung administration, he argued that, 'It is not just about having Tung Chee-hwa make a call to the Shenzhen mayor. The officials have to work out concrete plans to search for the boy' (*South China Morning Post* 2 September 2000).

The Yus thus joined the growing ranks of people with grievances against the HKSAR administration (*South China Morning Post* 12 September 2000). Their plight symbolized a more generalized experience of one of the most powerful arms of government, indexed by a catalogue of human rights abuses and violations:

Lawyers and human rights experts argue that the incidents are not just isolated blunders but point to inherent problems in a department with too much authority... A Human Rights Monitor report submitted to the UN Committee Against Torture... received allegations of 'verbal abuse, threats, duress, improper pressure, unlawful isolation, denial of access to the telephone, misrepresentation of the options

available, extraction of signatures by lies or mental pressure, having papers signed without letting the victims know the nature or content of the document, denial of bail and unnecessary or unjustified detention, discrimination towards certain minorities or nationals.' (*South China Morning Post* 12 September 2000).

Right of abode claimants⁷ detained by Immigration officials were reportedly woken in their cells in the middle of the night by having torches shone in their eyes, asked to sign unexplained documents, and subject to strip-searches (*South China Morning Post* 12 September 2000). Such incidents indicated a culture of abuse of vulnerable people by powerful government officials, exactly the kind of problem which the rule of law was supposed to remedy.

Justice and The Rule of Law

The rule of law had served the Yus poorly. Government officials, when they did eventually acknowledge their failures, did so out of court. The Commissioner for Immigration apologized to Man-hon's parents, admitting that his Department had been wrong to make such a mistake. A senior Immigration Officer visited the Shenzhen hotel (Yu Wai-ling's base during her search) to apologize to her. According to the press, he told her that 'Even if we have to say sorry 1,000 or one million times, we'll do it' (*Mingpao Daily* 24 September 2000). However, Yu Wai-ling herself said that she still had not received a direct apology from Tung, and was disappointed with the attitude of officials.

In December 2001, following advice, the Yus resorted to official legal channels for righting wrongs committed by public officials, submitting a High Court writ seeking justice from the police and Immigration departments, and/or compensation from the HKSAR (*Singpao Daily* 31 December 2000). Mrs Yu reportedly accused the Hong Kong Government of 'coldness and apathy... the high ranking officials [treating] this disabled child like dead grass... something worthless, ground down into bureaucratic dust and blown away' (*South China Morning Post* 4 March 2001). Security Bureau officials contested the family's claim for damages for negligence (*South China Morning Post* 4 January 2001), but in 2003, the parents received an offer of HK\$1 million compensation, which they rejected. In 2006, it was reported that they had eventually accepted a HK\$2 million out of court offer (*Singpao Daily* 1 January 2006).

Such out-of-court settlements typically include the proviso that liability is not admitted. In a Hong Kong increasingly anxious about the erosion of rule of law, this was seen as yet another instance of the legal system favouring the rich and powerful over the poor and powerless. The rule of law is to undemocratic Hong Kong what democracy is to Taiwan: the key signifier of its identity and its difference from Mainland China. The rule of law offered Hong Kong people legal rights instead of political rights, legal accountability rather than political accountability. It was conceived principally as promising justice and fairness, equality before the law, a restraint on the arbitrary exercise of executive power, an ability to call government

⁷ Since 1997, a series of cases had progressed through the legal system contesting the right of certain categories of Hong Kong residents to 'right of abode' status.

officials to account, and the maintenance of a level playing field in a society hitherto characterized by corruption, cronyism and nepotism.

China's poor reputation in this regard had long engendered fears that the independence of the judiciary and the impartiality of the courts would be compromised. A hyper-vigilant public was quick to spot the slightest sign of this. In the mid-1990s, a row broke out over China's opposition to the number of foreign judges appointed to the HKSAR's Court of Final Appeal (CFA). The presence of foreign judges on the CFA was seen as a means of preventing Hong Kong becoming 'like China'. In 1997, another row erupted when Immigration Officers complained on a radio phone-in programme that a People's Liberation Army General, General Zhao, insisted on crossing the border without the requisite papers. As one of them put it, 'even the Governor' had in the past been required to present the proper papers. University students brandished the slogan, 'It matters if you are never so high, no-one is above the law'.

Further signs of erosion generated a public outcry. In 1998, the Chinese News Agency, *Xinhua*,⁸ escaped sanction for its breach of Hong Kong's 1995 Personal Data (Privacy) Ordinance regarding the production of information held on Legislative Councillor Emily Lau Wai-hing; the son of a leading judge escaped prosecution for a drugs offence; and when the Secretary for Justice, Elsie Leung, explained that her Department had decided that it was 'not in the public interest' to prosecute pro-China media figure Sally Aw, she faced the accusation that 'some people' were clearly above the law (Gittings 2007).⁹ Leung was also criticized for her Department's failure to effect the repatriation from the Mainland of Cheung Tze-keung ('Big Spender') for crimes committed in Hong Kong. Cheung and his gang were subsequently tried and executed in Guangzhou. At the time, the case was seen as a 'chilling precedent' and Leung's 'refusal to seek the return of the suspects for trial in Hong Kong was widely portrayed as a black mark for the rule of law' (Gittings 2007).¹⁰

The 'Big Spender' case temporarily cast the Mainland in the role of 'Protector' of Hong Kong, ridding the territory of an arch-felon (something Hong Kong's own liberal legal system had failed to do). But the image of the Mainland coming to the rescue of Hong Kong was flawed. Hong Kongers already knew what to expect from

⁸Lau sought disclosure of the information held on her by *Xinhua*. The agency failed to comply within the stipulated 40-day time limit, a criminal offence under s.19 of the Ordinance. Lau subsequently sued *Xinhua* but lost her case in the High Court. No action was taken against *Xinhua* by the Department of Justice on the grounds that it was a 'state organ'.

⁹Sally Aw, chairwoman of the Sing Tao Publishing Group, faced charges of circulation fraud at the *Hong Kong Standard*. Aw was a member of the Chinese People's Consultative Conference, and a friend of the Tung family. Whilst her co-accused were charged and convicted, Aw escaped sanction. A subsequent 'No confidence' vote by LEGCO regarding Elsie Leung was only narrowly defeated.

¹⁰In 2001, two Hong Kong residents and a Mainland man were arrested in Guangdong for their involvement in the kidnapping and murder of an 11-year-old Hong Kong boy, Chan Chi-sin. The absence of a rendition agreement gave rise to uncertainty as to whether all three would be tried on the Mainland, whether the two Hong Kong residents would be returned to the HKSAR, or whether all three would be returned to Hong Kong to stand trial for an offence committed in Hong Kong.

the Mainland criminal justice system. Sentencing rallies were held, executions carried out and bodies burnt before grieving Hong Kong relatives had the chance to arrive. The Hong Kong media regularly carried photographs of criminals being paraded in public through Shenzhen streets prior to execution, of blood-spattered clothing and other personal debris strewn over Mainland execution grounds; occasionally, telephoto lenses captured the mass execution itself. Such images underlined the 'power to punish' those who offended within China's borders; the 'Big Spender' case was also an object lesson in the power to punish those who offended in the HKSAR.

Violence of the kind used against the 'Big Spender' gang can be 'immensely productive'. It authorizes 'war' against those who imperil the social order and justifies state monopolies over the means of coercion. The figure of the arch-felon serves 'as the ground on which a metaphysics of order, of the nation as a moral community guaranteed by the state, may be entertained, argued for, even demanded' (Comoroff and Comoroff 2006: 279). The status of villains such as 'Big Spender' and his gang as 'outlaws' and the state's response to them

underscores the fragility of order and gives focus to popular preoccupations with the threat of social meltdown ... Thus it is that, in their *imaginaire*, a metaphysics of disorder – the hyperreal conviction, rooted in everyday experience, that society hovers on the brink of dissolution – comes to legitimise a physics of social order... (Comoroff and Comoroff 2006: 280)

However, the sense that Hong Kong hovered 'on the brink of dissolution' owed as much to the nature of the Mainland criminal justice system as it did to fears of a break down in local law and order. Moreover, insofar as the territory 'hovered on the brink', it was the incursion into Hong Kong of Mainland crime and criminals which fuelled this scenario.

The 'Big Spender' case was thus a deeply ambivalent symbol. On the one hand, the Motherland was the benevolent sovereign rescuing Hong Kong from criminals. However, she had demonstrated that she could, if she wished, devour her wayward children as easily as succour them. Academic discussion at the time centred on the absence of a rendition agreement between Hong Kong and the Mainland. None of the pre-handover negotiations had addressed this crucial issue. There was, thus, a real danger that the same thing could happen again – Hong Kongers apprehended in China for a crime committed in Hong Kong could no longer depend on being repatriated for a fair trial. The 'Big Spender' case demonstrated a willingness by regimes on both sides of the border to manipulate this grey area of the 'one country, two systems' formula.

Unlike foreign observers, Hong Kongers had never envisaged China changing Hong Kong by putting tanks on the streets. Instead, they anticipated a gradual degeneration of their way of life. Initially, spirits were lifted by the 1999 Court of Final Appeal landmark judgment regarding the right of Mainland children to stay in Hong Kong. However, that judgment – hailed as a victory for the independence of the judiciary and the rule of law – was superseded when the government invited the Standing Committee of National People's Congress (NPCSC) to intervene, leading to the first interpretation of the Basic Law by the NPCSC and resulting in what Jacob has called a 'crisis by mistake' scenario (Hong Kong Transition Project 2006).

The case of *Ng Ka-ling v Director of Immigration*¹¹ provoked 'the worst constitutional crisis yet seen in the history of the HKSAR' (Gittings 2007). Whilst the Motherland intervened ostensibly to 'save' Hong Kong from chaos, her actions fundamentally undermined confidence in the territory and reminded Hong Kongers of China's preference for politics over law.

The NPCSC's 'reinterpretation' of the Basic Law tapped into local fears that Mainland illegal immigrants were 'swamping' local schools, hospitals, housing, undercutting local wages and taking local jobs. The media claimed that Hong Kongers were being crowded out of local maternity wards by Mainland women 'sneaking' into the territory to have their babies and therefore obtain right of abode; ruthless Chinese Illegal Immigrants ('IIs') were said to be the source of the rise in violent crime. The HKSAR government produced somewhat suspect statistics supporting the argument that an influx of 'right of abode' claimants would swamp Hong Kong's infrastructure.¹² Official projections in the Hong Kong Government Territorial Strategy Review in September 1996 estimated that the territory's population would grow from 6.3 million to 7.3 million in 2006. Less than a year later, in July 1997, the government forecast a rise of 30 per cent in the next 20 years, from just under 7 million to 8.21 million (Lau 1996). It also embarked on a 'zero tolerance' policy:

In April [1997] to signal their unwillingness to tolerate illegal immigration, 50 Hong Kong immigration officials, backed by police, fire fighters and social workers, returned to China a nine-year-old mainland girl who was smuggled into Hong Kong when she was one or two years old. Since January 1997, 1,400 illegal child migrants have been returned to China, compared with fewer than 100 during last year (Lau 1996).

The crackdown intensified as 30 June 1997 grew nearer:

Hong Kong – In the still midnight air, only the coils of razor wire pointing in the harsh yellow floodlights hinted at the divide between the vast poverty of China and the compact neon glitter of Hong Kong... Along the fence, in green camouflage fatigues and with a pistol strapped to his waist, the Hong Kong immigration inspector whispered into his radio to his ambush team ahead in the darkness... The inspector... explained 'Our job is to catch IIs'... Far from the border, in the shadow of the gleaming towers of Hong Kong's business district, Ching Hau-ngoh tries to puzzle out how to outwit Eng and his forces... her chances are diminishing. Arrayed against her are Hong Kong's armed police and, in China, more armed police recently added to the border fence. At the land border are the fences topped with razor wire and in the harbour, high-speed patrol boats... Like many thousands

¹¹ See *Ng Ka Ling and The Director of Immigration* (FACV No. 14 of 1998); [1999] 1 HKLRD 315; *Ng Ka Ling v Director of Immigration* (No. 2) [1999] 1 HKLRD 577; *Tsui Kuen Nang and The Director of Immigration* (FACV No. 15 of 1998); *The Director of Immigration and Cheung Lai Wah* (FACV No. 16, 1998) (29 January 1999); *Chan Kam Nga v Director of Immigration* [1999] 1 HKLRD 304.

¹² In 1996, the Hong Kong government estimated that between 60,000-100,000 children were eligible to come to Hong Kong after 1997. See Lau (1996).

of people here... Mrs Ching, whose molasses-thick Chaozhou dialect betrays her Mainland roots, hopes to remain in Hong Kong and live here with her children. (*New York Times* 23 May 1997)

Local sympathy for the 'Ils' and the 'right of abode' children was now tempered by 'the overwhelming fear' that 'if there were no rules on immigration the territory's well-being would be jeopardized... 'There are thousands like them''. At least 90,000 Mainland-born children of Hong Kong parents were rumoured to be waiting to migrate to Hong Kong (*Hong Kong Standard Editorial* cited in Gargan 1997). A month before 30 June, reports spoke of 'a surge of illegal Chinese immigrants storming the territory's ramparts'. The 'Huddled Masses' of Chinese illegal immigrants were escaping from China to Hong Kong at the rate of 450 per day, 'putting a strain on Hong Kong's social system' (*Economist* 1996). Hong Kong was 'under siege'; children as young as 10 were said to be entering Hong Kong 'numerous times' to commit crime (*South China Morning Post* 14 September 1996). Hong Kongers were invited to envisage their city as swamped by backward country bumpkins, dirty, uncouth, avaricious, grasping and unfashionable 'Ah Charn' figures:

...often...portrayed as ignorant but essentially harmless country bumpkins, or as psychopathic criminals. In the former case, 'Ah Charn' is someone to be ridiculed, but also someone to be educated and assisted, and this image thus reinforces Hongkongers' sense of their own superiority. In the latter version, the portrayal of Mainlanders as objects of fear represents the threat that Hong Kong people see them as posing to their way of life... (Vickers 2005: 65)¹³

The Motherland would 'save' Hong Kong from this fate – at some cost. The CFA's decision in January 1999 in favour of the right of abode claimants made China 'see red' (Jacob 1999). The decision was lambasted as an 'intolerable attack on the authority of the highest sources of constitutional power in China' (Gittings 2007). Senior PRC officials informed the Secretary for Justice that the ruling needed to be 'rectified'. There were 'increasingly venomous attacks' by pro-Beijing bodies in Hong Kong (Gittings 2007). The Government itself claimed that the judgment would 'open the floodgates' to at least 1.67 million Mainland migrants. The independence of the judiciary, a core plank of Hong Kong's way of life, was now (re) presented to Hong Kongers as a threat to their own personal interests, and to the stability of Hong Kong.

Internationally, however, it was the attack on the CFA which was seen as the real threat to the rule of law. It unsettled commercial interests, for whom the independence of the Hong Kong judiciary underpinned business confidence in the territory, opening up the possibility that China might over-rule future court decisions of which it disapproved (such as judgments against Mainland business interests). The American Chamber of Commerce defended the CFA, stating that it considered 'the rule of law and an independent judiciary to be paramount to Hong Kong's status as a centre for international commerce and finance' (quoted in the *Financial Times* 24 February 1999). The head of the Washington-based Heritage Foundation

¹³ See also Leung (1992).

observed that the legal system had been rendered unpredictable, and that the law was 'up for grabs' (quoted in the *Financial Times* 24 February 1999). Locally, cartoons appeared in which the word 'Final' was crossed out in the phrase 'Court of Final Appeal' and replaced by the words 'Semi-Final'; the legal profession led a dramatic silent march against the NPCSC's intervention. There was, however, little doubt as to the ultimate outcome of this contest:

...A chastened court was by this time in no position to resist, accepting that it was bound by the NPCSC's unlimited power to interpret the Basic Law in *Lau Kong Yung v Director of Immigration* six months later... [the court's] rapid retreat was ... memorably described by Professor Jerome Cohen... as the court veering from being 'unnecessarily provocative' to the opposite extreme of having 'unnecessarily prostrated itself before Beijing' within less than a year. (Gittings 2007)¹⁴

In October 1999, in a related court case, over 200 protestors gathered outside the CFA building:

... some held banners... most listened intently to the arguments broadcast via a television link, even though they could not understand the English used. They have pledged to come every day until the hearing ends. Mrs Lui, 45, from Guangzhou said the court was her last hope: 'I started applying for a one-way permit to Hong Kong when I was five. Now 40 years have passed but I still do not have one. My elderly mother is very sick now. I want to stay to take care of her'. Eung Kit-kwai, whose husband has stayed in Hong Kong for less than seven years, said she had been fighting for the right of abode for her elder son from the Mainland: 'If he really cannot stay here, I will take him back to the Mainland. I want him to receive formal education instead of being an illegal immigrant... Now Hong Kong is under Chinese rule, I don't have much confidence. But of course we still want to try our luck. We will keep waiting' (Leung and Lee 1999).

In August 2000, a number of by now desperate right of abode protestors entered Immigration Tower, setting fire to flammable liquid (which they had intended to pour over themselves). Two immigration officers died and several protesters were badly injured. Whilst horrified by this violence, the realization also dawned on some Hong Kongers of the associated costs of the right of abode saga:¹⁵ a survey conducted in July 1999 showed the public's perception of the fairness of the judicial system to be at an all-time low (HKU POP 1997-2001).

Like the Yus, the right of abode children and their parents, felt let down by Hong Kong's bureaucratic and legal system. The Yus felt that the HKSAR government had done less than it could – or *should* – have to help. Neither the universalistic

¹⁴ See also Cohen (2000) and *Lau Kong Yung v Director of Immigration* [1999] 3 HKLRD 778.

¹⁵ Hong Kong television news, for example, carried a brief interview with a local woman carrying her shopping home from the market on a housing estate. She said that she did not want to see Hong Kong overrun with migrants but that she also 'felt sorry' for the rule of law.

rights of the law, the particularistic paternalism of Uncle Tung, nor the embrace of the Motherland had delivered them the justice they sought.

The Mainland's Response

Initially, the Yus found Mainland officials more helpful in their search for Man-hon. During a meeting with Shenzhen public security officials and two NPC delegates in March 2001, Mrs Yu was told that 'The officials... had children of their own and would do their best to help find her son' (*South China Morning Post* 7 April 2001). In January 2001, as the family marked Man-hon's 16th birthday, the Shenzhen PSB again pledged that it had not given up the search for Man-hon: 'Tens of thousands of officers' from Guangdong Public Security searched for Man-hon (*South China Morning Post* 8 January 2001). When, in November 2000, 23 Civil Aid rescuers volunteered to conduct a search in the hills of Shenzhen, they were welcomed by Mainland authorities as long as they remembered 'to abide by mainland laws' (*South China Morning Post* 23 November 2000).

According to the Shenzhen PSB, this kind of response 'had never happened before... To my understanding, it's the first time that such a large-scale operation has been conducted by the Public Security Bureau to find a missing boy' (*South China Morning Post* 5 September 2000). This bode well for cross-border co-operation. Over 7,000 Shenzhen Public Security Bureau staff combed the cities as well as remote rural areas (LEGCO Security Report 2004: Appendix B). Radio and television stations in Shenzhen and Guangdong – as well as China National Radio – appealed for the public's help in finding Man-hon. The Acting Assistant Director of HKSAR Immigration (Tang Man-kit) and Mrs Yu appeared together on Shenzhen television. Posters showing a black-and-white photograph of Man-hon were displayed on Mainland streets, buses, trains, border control points, as well as in Man-hon's favourite eating place, McDonalds. Shenzhen community organizations were mobilized. Chinese language paging companies in Hong Kong and on the Mainland disseminated information about Man-hon; Chinese websites carried the boy's details under the banner 'Missing in China' alongside Hong Kong and Shenzhen police and immigration phone numbers. The KCRC displayed posters about Man-hon at its rail stations; Shenzhen Transport Bureau did likewise. By October 2000, the Shenzhen Public Security Bureau was receiving on average 100 calls a day about Man-hon. Hospitals and 'centres for the mentally handicapped' were checked; China National Radio extended its broadcasts about Man-hon to Fujian, Guangxi and areas south of the Jiangxi River.

But the honeymoon was short-lived. In October 2000, Man-hon's father and a group of 13 relatives and reporters were detained for four hours by the Mainland authorities at a railway station in Jianxi province, *en route* to Shenzhen; the reporters were ordered to surrender their film (*South China Morning Post* 9 October 2000). Around the Lunar New Year 2001, Man-hon's uncle was 'almost attacked by a group of people with knives' when he went to check an abandoned housing complex in his search for Man-hon (*South China Morning Post* 4 March 2001). The Hong Kong press reported that Mrs Yu had received a less than enthusiastic response from China's political elite when she flew to Beijing to seek the help of then Premier Zhu Rongji and Hong Kong delegates to the National People's Congress. She was told it was 'inappropriate' for her to fly to Beijing, that the

Premier could not handle every petition, and that whilst officials in Guangdong were already trying their best to search for her son, the chances of finding him were slim. Mrs Yu was 'threatened by the Beijing Liaison Office and Shenzhen security officials that the search for her son might be suspended if she took the case to Beijing' (*South China Morning Post* 15 March 2001). Asked to comment on the case, the Guangdong Party Secretary, Li Changchun, said he 'had no idea who Yu Man-hon was' (*South China Morning Post* 15 March 2001). In Hong Kong, Beijing's response was interpreted as showing that the Mainland's liaison office was 'unwilling to help Hong Kong people to communicate with the central Government' (*South China Morning Post* 15 March 2001).

Mrs Yu persisted, sending a petition to the United Nations and to the-then British Prime Minister, Tony Blair, urging them both to pass on her request for help to the Chinese leadership (*South China Morning Post* 24 August 2001). In 2002, she met with the Deputy Director of the Guangdong Public Security Bureau, Zheng Shaodong, in the lobby of a hotel in Dongguan. According to the Hong Kong press, Yu Wai-ling 'knelt sobbing' in front of the Deputy Director, begging him to 'find me an answer, whether he's alive or dead' (*South China Morning Post* 23 May 2002):

After helping Mrs Yu to a seat, Mr Zheng took her petition letter and reassured her that Guangdong officials would continue to look for Man-hon...'Not only is Guangdong concerned about the case but so many other provinces and areas on the mainland... If he's here, we will find him'... (*South China Morning Post* 23 May 2002)

The promise went unfulfilled.

The Indifferent Father and Mother(land)

Finding both the HKSAR administration and the Mainland authorities increasingly unhelpful, the Yus appealed directly to the public. On 28 August 2007, the seventh anniversary of Man-hon's disappearance, Mrs Yu, aided by friends, made a YouTube video appealing to ordinary citizens of China and Hong Kong for help (Mrsyeunguk [Yu L. W.-L.] 2007). In November 2009, interviewed on an RTHK programme,¹⁶ she remained angry with the Government – though it had offered her compensation, her goal was not money but finding the truth. A tearful Mrs Yu said that the Government had not really helped her look for Man-hon. It had done little more than help her send some letters to the Mainland authorities and print some missing person posters. She felt it had not done anything more because she was only an ordinary citizen and the life of the underprivileged was cheap. If her son had been the son of Tung Chee-hwa, he would have been found. As it was, he was devoid of any value, an autistic, mentally retarded child who could not work and thus made no contribution to society – the government, she thought, did not esteem such people; it despised them and 'always looked down on disabled kids'. She wanted to know the truth about what had happened to her son, and until she did, she could not hold a requiem service for him, could not 'bring his soul back to Hong Kong'.

¹⁶ The programme can be viewed at <http://www.youtube.com/watch?v=JHiCQNEFQSk>

In China itself, the Yus received hundreds of hoax calls and ransom demands from people who claimed to have kidnapped their son (*South China Morning Post* 14 May 2001). One caller, who demanded 50,000 yuan, asked Mrs Yu if she had ever heard of organ transplants and whether it had ever occurred to her that this fate might befall her son (*South China Morning Post* 4 March 2001). Another wrote that he did not want to harm Man-hon, that it was her enemies who were doing this to her, and if she wanted her son to come home she must send 500,000 yuan (*South China Morning Post* 4 March 2001). Another said that if Mrs Yu wished to see her son alive again, she must send him one million yuan. After a fresh round of 'sightings' in 2002 Mrs Yu asked:

I have faced such hoaxes many times over the past year. How long do I have to endure such torture?... Such behaviour for cheating money was just so heartless – and it is just for a few thousand dollars (*South China Morning Post* 17 May 2002).

One caller claimed that Man-hon had been caught by Shenzhen police officers under a footbridge at Dongmen two days after his disappearance, detained at a police station for two days, starved, interrogated and beaten before he died in police custody and his body cremated (*South China Morning Post* 5 March 2001). A newspaper reported that Man-hon had

...hung around the railway station for a few days, where someone saw him being beaten with a broom while he begged at a noodle shop. Then the reliable sightings ended, and the crank calls – cruel, greedy, unforgivable, prompted by... a reward of HK\$1 million – began (*South China Morning Post* 17 December 2000).

In October 2000, the Hong Kong press highlighted the dangers posed by street beggars in Shenzhen:

Beggars in Shenzhen can be found in many places, such as places near the Lo Wu train station, outside big discos and nightclubs or near the border. Almost all Hong Kong people who have been to Shenzhen have experienced the nuisance caused by the beggars... some people pretend to be beggars and wander on the street for the purpose of collecting intelligence for the crime syndicates. Once they have chosen a 'target', they would snatch or rob their property... All these activities severely endanger the life and property of the Hong Kong people. (*Sun* 10 October 2000)

In September 2000, three weeks after Man-hon disappeared, the Hong Kong press carried a series of articles on the children begging and scavenging on the streets of Shenzhen. These highlighted 'the extent of the problem on Hong Kong's doorstep', estimating that there were at least 200,000 street children (*liu lang er tong*) in China, half of whom were orphans; others were runaways and/or the indigent children to migrant workers who flocked to Shenzhen in search of work (*South China Morning Post* 17 September 2000). At points of transit, such as the railway station and the border checkpoints, these children gathered to beg or scavenge for food left by tourists, accost strangers crossing the footbridge from Hong Kong to China asking

for money, sometimes acting in an aggressive fashion (*South China Morning Post* 17 September 2000). Mainland criminals were alleged to put children with physical or mental incapacities (such as Man-hon) on the streets to beg:

These criminals also kidnap children from different places in Mainland China, then beat them up so as to prevent them from resisting. The children are organised into begging syndicates. In each begging syndicate, there are 20-30 children... some child beggars are brought to Guangdong to beg by their parents because the amount of money that a child beggar can get in Guangdong in one year is the equivalent of 10 year's income for the family in their hometown. These beggars... are still required to pay 'protection fees' in order to beg in a 'territory' controlled by the crime syndicate concerned. The begging syndicates... each have their own territory... the police never deal with the problem seriously... [they] just tell the beggars to go away... they do not sincerely try to help Hong Kong people. (*Xin Bao* 3 September 2000)

As if to underline the particular dangerousness of the Shenzhen into which Man-hon had disappeared, another story from late August 2000 reported the discovery of a headless corpse in a Shenzhen park: 'The corpse was cut up into 16 pieces and put into two bags...' (*Mingpao* 27 August 2000). A 2002 report detailed the trial of four Mainland defendants charged with killing a Hong Kong man in Shenzhen city, cutting his body into pieces using steel saws and choppers, and throwing away the bags containing the body parts (*Wen Wei Po* 17 October 2002). Another report from 2003 described the discovery of an ex-convict arrested in Hebei province for 65 murders across China. Whilst the Mainland authorities imposed a news blackout on the story, a regional tabloid leaked it, dubbing the man the 'Monster Killer' (*South China Morning Post* 15 January 2003; original report in the *Yanzhao Metropolitan Daily* 14 November 2003). The Hong Kong press linked the story to another, concerning a couple arrested in Shenzhen on suspicion of killing 12 women who disappeared from a Shenzhen employment agency after seeking work in Buji Township (*Shenzhen Daily* 12 November 2003). Both stories were linked to a statement by Luo Gan, head of Mainland public security, admitting that the law and order situation was deteriorating despite the government's two-year long strike hard campaign (*yanda*).

Shenzhen: The 'Wild West'

Such stories fed fears amongst Hong Kongers that crime and corruption loomed just across the border, threatening Hong Kong's stability and reputation as one of the world's safest cities.¹⁷ The brothels and karaoke joints of Shenzhen were seen as the source of sexually-transmitted diseases and immoral behaviour. In Hong Kong, local men were reported as being lured by Shenzhen prostitutes, robbed and killed. In August 2000, shortly before Man-hon's disappearance, the *Apple Daily* reported that a Hong Kong lorry driver was stabbed by thieves at the border checkpoint, dying of his wounds. In September 2000, the paper reported that another three lorry drivers were beaten and stabbed at the Man Kan To Control Point. The

¹⁷See, for example, Mosher (1992).

deterioration in public order on the Mainland meant that 'no-one dares drive to the Mainland' (*Apple Daily* 14 August and 3 September 2000; *Sing Tao* 3 September 2000). The Hong Kong film, *The Six Devil Women* delivered a cautionary tale of local men tricked into picking up female hitchhikers in Shenzhen, only to fall victim to Mainland crime gangs. In September 2000, a month after Man-hon's disappearance, local papers carried another story of a Hong Kong man killed by a gang of more than ten people inside a Shenzhen disco, less than 100 metres from the Public Security Bureau office. The man was shot twice in a disco frequented by Hong Kong visitors:

... many Hong Kong people who were having tea at a hotel nearby were shocked by the poor public order in Shenzhen. They said they... would pay extra attention when visiting the Mainland in the future. The disco was located in Shennan Dong Road, where there are many discos and entertainment places. In recent years, due to the poor business environment, the discos have hired so-called 'lightheds', that is those with triad backgrounds, to recruit customers for them. Some of these people are Hong Kong triad members... [and] there are conflicts between them... killings happen often in the area, and some of the deceased are Hong Kong people [because] the 'lighthouse' is responsible for recruiting Hong Kong people to come to Shenzhen for their entertainment. (*Apple Daily* 25 September 2000)

Shenzhen nightclubs were harbingers of danger for other reasons too. In September 2008, a fire in the *Wuwang* club claimed the lives of five Hong Kong victims, including three teenagers.¹⁸ A 2007 study also revealed that young adults from Hong Kong found it easier to obtain drugs at raves and discos in Shenzhen, where they were cheaper and arrest less likely (Lau, Tsui, Lam, and Lau 2007):

Shenzhen, China: Flash-lit by synchronized lasers, a nightclub heaving with Hong Kong teenagers vibrates to the latest dance hit as a pair cavort on the stage in the skimpiest of outfits... It's a typical Friday night but while many of the clubbers hail from Hong Kong the venue itself is not in their home city. Welcome to Shenzhen. Shenzhen is cheap, it's vibrant and it's close – and crucially for many of those who regularly make the weekend trip, it's a good source of recreational drugs... Club owners here target the Hong Kong market because they can afford higher entrance fees than local people and drinks that cost three times more... 'We have people who come late, stay until the early morning and go back to work the next day'. They also appear to appreciate easier access to illegal drugs... With police in Hong Kong frequently checking the clubs there, Shenzhen has become a better choice... (*ChannelNewsAsia.com* 2007)

Shenzhen was the 'wild west', a 'frontier' town, lawless and amoral, the mythical city of Brecht and Weill's 'Mahogany', 'an imagined city made of flesh, with Chinese characteristics...', full of prostitutes, destitutes, thieves, scam artists, touts, pimps, 'a gimcrack, shiftless, fly-by-night sort of place made from hideous jerry-built towers...' (Peter N-H 2006). Lo Wu's commercial centre was allegedly 'run by Chiu Chow...

¹⁸ The fire started when fireworks were set off inside the club as part of a pyrotechnic show (*South China Morning Post* 22 September 2008).

some of the 'bosses' look like they just stepped out of a Hong Kong triad movie, white suits and all' (sztaitai 25 April 2006).

One of the city's six main districts (Boan district) experienced 18,000 robberies in one year, eight times more than in all Shanghai (French 2006).¹⁹ The *China Daily* also reported that Guangdong 'suffered the highest occurrence of criminal cases, especially robbery-related cases, on the Chinese mainland' (*China Daily* 27 January 2005). In 2006, robberies in Guangzhou were reported to be running at 68 per day, leading to concern about the deterioration of safety on the streets amongst both the general public and high-level Party officials (*South China Morning Post* 30 August 2006). A series of 'shocking murders and kidnappings' led to reports in Hong Kong that Shenzhen was 'losing the fight against crime' (Ying 2004). Overall crime in Shenzhen had 'soared', serious crimes rising by 75 per cent, assaults by 38 per cent and murder by 35 per cent (*South China Morning Post* 14 February 2004). 18 Hong Kong people had been murdered in Shenzhen since 2001. In January 2005, a Hong Kong man was reportedly left brain-dead after being stabbed in the eye during a robbery in Shenzhen:

Ng Wai-keung, 41, was knifed in the left eye at Huanggang at 8 p.m. on Monday and taken to Futian people's Hospital for surgery. He arrived with a 15 cm dagger sticking out of his eye... Huanggang is a popular red light district in Shenzhen and is frequently visited by Hong Kong people. Crime is a serious social problem in Shenzhen. The authorities have blamed a lack of police officers and the huge floating population. (*South China Morning Post* 23 February 2005)

In June, another report documented an attack by four armed men on a Hong Kong man visiting a Shenzhen karaoke bar with his Mainland wife (near the border checkpoint at Huanggang). The savagery of attacks on Hong Kong targets was noted in the Hong Kong media (*South China Morning Post* 27 June 2005). In May, the former Vice-President of Phoenix TV and his family were found murdered in their Shenzhen home; two Hong Kong truck drivers were kidnapped late at night in June (*South China Morning Post* 8 June 2004). Figures for the first nine months of 2004 showed that there were 177 cases of Hong Kong people being robbed on the Mainland (*South China Morning Post* 25 November 2004). A string of crimes targeting Hong Kong people in 2004 prompted the Secretary for Security to warn Hong Kongers to be extra vigilant when travelling to China.

In stark contrast, in 2007, Hong Kong was rated the safest city in China (and the second most beautiful) (Li 2007).²⁰ Openness, clean government, a sense of fairness and a low crime rate were credited for its position as an international financial centre. There were signs, however, of the increasing 'gangsterization of Hong Kong public life' (Chan 2000). In August 1998, 'an outspoken radio broadcaster was seriously wounded by two assailants wielding carving knives... bringing back ugly memories of the leftist convulsions of 1967' (Chan 2000). In 2008, two leading Hong Kong lawyers were the subject of violent attacks and an alleged assassination plot. Major crime figures linked to triad activities in Hong Kong

¹⁹ Shanghai, with a population of 18 million, reported 2,182 robberies in 2004.

²⁰ Shanghai was the second-safest city, followed by Nanjing, with Beijing being rated the most beautiful.

were reportedly 'walking free' in Shenzhen, where they enjoyed links to the rich and powerful, including the police and CCP leaders (*Washington Post* 31 December 2000).²¹ One triad leader was said to have organized a meeting in a Shenzhen disco with a view to hiring a Mainland hit man to kill a rival in Hong Kong; guns were openly inspected at the disco 'with seeming impunity' (*South China Morning Post* 11 November 2007).

The 2005 hit film *Election* was also popularly understood to symbolize these two competing visions of Hong Kong – the one a city run by gangsters loyal to tradition and 'the brotherhood', the other a modern, 'city of law'.²² An increase in Mainland prostitutes fuelled complaints that 'innocent female residents' had been mistaken for prostitutes; demands were made to prevent the entry of 'doubtful females' at border crossings (*South China Morning Post* 25 October 2000). Shenzhen's red light areas (such as Shazuicun, Xinzhoucun, Shuiweicun, Huangquancun and Huangbeilingcun) were a maze of brothels, massage parlours and karaoke bars where:

...prostitutes make up the majority off the residents and gangsters act as the de facto government... Seven out of ten women who live here are prostitutes, and two of the remaining three are mistresses... The lucrative prostitution business attracted gangsters from the mainland, Macau and Hong Kong. Drug trafficking, kidnapping and all sorts of crime followed... The gangsters often openly defy orders of the public security officers. 'About three years ago, a squad of police tried to raid the village [Shazuicun]. The gangsters mobilized hundreds of members and blocked the entrances. The two sides faced off and the police had to retreat', recalled one resident... (*South China Morning Post* 22 August 2004)

The kidnapping of businessmen and/or their families captured international attention. In 1993, Australian citizen, James Peng, was kidnapped from his hotel room in Macau by Mainland police and taken over the border. Held in detention for 10 months, he was then tried on corruption and embezzlement charges arising out of a business dispute with Champaign Industrial Company, owned partly by highly placed Chinese officials including Ding Peng, the niece of Deng Xiaoping. The charges carried the sentence of death.²³ The Hong Kong media described Peng's midnight abduction as 'Kafka-esque'; attempts by the Australian government to intervene on Peng's behalf proved unsuccessful; requests by Peng's wife to visit him were denied. Two other, American, businessmen were also being detained in China as a result of business disputes.²⁴ In October 2005, a Hong Kong businessman was kidnapped in front of his wife and dozens of onlookers in a Shenzhen street:

²¹ The *Washington Post* article identified 192 major Taiwanese criminals operating in Shenzhen and Guangzhou.

²² Some saw the film as an allegory of what could happen to an 'upstart' Hong Kong intent on challenging tradition by insisting on democratic elections.

²³ At this time, the PRC's Criminal Code contained 65 capital offences, including financial crimes.

²⁴ The men were Dr Philip Cheng Hui-ho and Chong Kwee-sung. The US government successfully secured their release.

The incident took place at about 4 p.m. in Shangbulu in the Futian district of Shenzhen. The Hong Kong businessman was in a car with his wife and a driver when they were intercepted by two cars outside a car-wash centre. Six crew-cut men in black jumped out and dragged the man from his car. At least three were armed with long knives, according to the wife... she said the men shouted in Putonghua with heavy northeastern accents... Shenzhen is one of the richest cities on the Mainland but also suffers the highest crime rate. Hongkongers have frequently been the target for criminals... 178 [Hong Kong] residents had sought help after being kidnapped or illegally detained on the Mainland in the first months of last year. (*South China Morning Post* 23 February 2005)

In October 2008, the representative of a British scrap metal company was abducted from a Shanghai airport when he went to Ningbo to seek overdue payments from a Ningbo company (Dickie 2008).²⁵ Other family members (including children) were also held to ransom during business disputes.²⁶ In 2004, LEGCO reported on Hong Kong residents encountering personal safety problems in the Mainland. About 85 per cent of the cases occurred in Shenzhen city and consisted mainly of fraud, false imprisonment, robbery, theft and wounding. Shenzhen was reported to witness more kidnappings than any other Mainland city, and to account for over half such cases in Guangdong province (Chow 2005b).

Those whom the state deemed socially or politically undesirable could also find themselves subject to criminal or administrative detention; many – held *incommunicado* – simply ‘disappeared’.²⁷ This had implications for those in Hong Kong who were openly critical of the PRC, and those who had acquired foreign nationality as insurance against 1997 (the Chinese government insisted that Peng was a Chinese citizen even though he held an Australian passport, see *South China Morning Post* 15 June 1995). His fate could befall anyone doing business in China who fell foul of the state and/or its political factions (*South China Morning Post* 9 October 1994).

The worsening security situation was said to be scaring off investors and businessmen, prompting an attack on local officials by a visiting Party Secretary, who told them he ‘felt ashamed of what I have seen... Rule of law is the cornerstone of a stable society. If we do not punish those who break the law, it will lead to total anarchy’ (quoted in *South China Morning Post* 30 December 2005).

(B)ordering The Twilight Zone

In Hong Kong, Lo Wu itself has itself become the locus of urban myth:

²⁵ The victim was a foreign businessman.

²⁶ In 2001, a new scheme was introduced whereby Mainland security officials were to notify the HKSAR government and relatives of the whereabouts of and charges against Hong Kong people being detained.

²⁷ In 1995, a Hong Kong woman jailed secretly in Shenzhen for ‘disrupting social order’ claimed that her trial had been unfair because she had not been allowed to call witnesses; neither her family nor her lawyer were informed of her trial. For other examples, see Congressional Executive Commission on China 2003 Annual Report *Rights of Criminal Suspects and Defendants* at <http://www.cecc.gov>.

...a 54-year-old minibus driver died after being mugged in a public toilet on the fourth floor of the immigration building in Lo Wu – three floors below an office of the security bureau. Lau Tat-pang apparently put up a struggle, but was hit on the head and left unconscious... he died of a brain haemorrhage on the way to hospital. (*South China Morning Post* 30 December 2005)

At the height of the CFA controversy in 1999, there were widespread rumours of Hong Kong people being drugged in the Lo Wu toilets, being robbed or having their kidneys removed for sale on the Mainland. In 2003, the Hong Kong papers carried a story of the four year old son of a Hong Kong hawker, who was kidnapped at Lo Wu, taken to Shenzhen, and held for ransom (*Hong Kong Economic Times* 31 May 2002). The boy:

...went to the toilets of the third floor of the Wanjia Supermarket. His uncle waited outside but did not see him come out... 'We waited and searched everywhere in the supermarket until past midnight, but did not find him' Ms Ma [his mother] said... The family says the Shenzhen police and the supermarket were slow to help. The supermarket allegedly declined to let family members see the [CCTV] tape until last night, while the local police did not take any action until [the next day]... The boy is a Hong Kong permanent resident although he stays with his mother and goes to school in Shenzhen. His father, a fruit seller in Hong Kong, rushed back from Hong Kong and offered 10,000 yuan ... to anybody who helps find his son. The family distributed hundreds of pamphlets bearing the boy's photograph to passers-by in Shenzhen... The case has revived memories of missing Hong Kong autistic boy Yu Man-hon... (*Hong Kong Economic Times* 31 May 2002)

The boy was eventually rescued with the help of the PSB.

In 2005, a United Nations working group on forced and involuntary disappearances asked Hong Kong's Society for Community Organisation to submit a report on the Man-hon case (*South China Morning Post* 1 August 2005). In January 2007, a UN report on disappearances in China urged the Chinese government to 'elucidate the fate of whereabouts of persons who have allegedly disappeared, including children and mentally challenged individuals.'²⁸

Lo Wu is a liminal zone, synonymous with transgressive behaviour, such as illicit sex and drug-taking. The border itself is seen as a membrane protecting Hong Kong from contamination by the Mainland. Cross-border co-mingling is thought to allow unseen dangers and disease to seep through, feeding what Abbas identifies as a kind of *fin de siècle* concern with decadence (Abbas 1997: 4) in post-1997 Hong Kong. 1997 had made the border more porous. Officially, the frontier is no longer a 'border' but a 'boundary', though the barbed wire and concrete posts remain. Lo Wu, the terminus of arrivals and departures, marks space as non-space, neither 'here' not 'there' (Lloyd 2003). It is a "transitory, betwixt nature" gap between worlds

²⁸ UN General Assembly Human Rights Council Implementation of General Assembly Resolution 60/251 on 15 March 2006 Report of Working group on Enforced or Involuntary Disappearances A/HRC/4/41.

where ‘almost anything may happen’ (Turner 1974, cited in Pritchard and Morgan 2005). For Man-hon,

when he sprang out of the train carriage at Yau Ma Tei and began his journey into the headlines, [he] thought he was free [but] ahead of him there were handcuffs and unkindness and awful fear. (*South China Morning Post* 17 December 2000)

The liminality of the border was already established as part of Hong Kong’s cultural *repertoire*. In 1992, a Kowloon Canton Railway Company (KCRC) advertisement for its through-train from Hong Kong (Hung Hom) to Guangzhou (Canton) was removed from television channels after provoking a territory-wide flurry of rumours.²⁹ Filmed in a wood on the Mainland, the advert showed children playing at being a train:

It was supposed to be a cutesy clip of innocent fun, but it disturbed more than a few souls after it aired. For most of the ad, six children are clearly seen playing the game, but from the 25th to the 27th second, a seventh child suddenly appears – and the director swears there were only six children on location. A young girl joins the end of the train, her hair loose, and, even more disturbingly, the chubby boy she is holding appears to have blood smeared across his lips. According to legend, the boy died soon after filming... *feng shui* masters, exorcists, psychics, priests and even psychologists [gave] their own interpretation of the phenomena... According to various ‘expert opinions’ the woods had acquired negative energy following the death of a young girl... [It was] perhaps the most terrifying TV commercial in the history of Hong Kong... The ad ran for a month in 1993, before being re-shot with no ghostly seventh child. But the campaign was soon pulled. (*HK Magazine* 12 August 2005)

In 2006, the Hong Kong MTR banned posters advertising a Japanese horror film from its trains because they depicted the image of a ghost child. The movie itself (*Ghost Train*) dealt with people who were haunted after picking up lost items on the train. The taglines for the film:

offered three creepy warnings that clearly didn’t sit well with the MTR or its potential riders: ‘When you are taking the train there are three taboos: 1) Don’t pick up any lost items; 2) never sit on the last train; and 3) when you’re on the subway, don’t look to the end of the tunnel’... The poster was deemed too scary... (*HK Magazine* 12 August 2005)

Such tales are fuelled by statistics showing that 70,000 children are known to have been snatched every year in China (Dwyer Hogg 2007).

The Man-hon incident thus fed into a repository of Hong Kong folk lore of lost souls, ghosts caught between worlds, resonating with the underlying anxiety that, under Mainland rule, Hong Kong itself would ‘disappear’ into another world. Bringing people back from such places required specific rituals and techniques. A few weeks after Man-hon’s disappearance, the Yus consulted a *feng shui* expert ‘who

²⁹ The clip is available on YouTube at http://www.youtube.com/watch?v=GTtBTJw_zVw.

recommended a golden-coloured quilt and pillowcase' be placed on Man-hon's bed, as well as:

...a tank filled with bright, endlessly pulsating plastic fish... There is a *lai-see* packet under the pillow. Nothing is to be moved until Man-hon returns. A huge poster of the Hong Kong cityscape, pictured from the Peak, hangs above the empty bed'. (*South China Morning Post* 17 December 2000).

As the Lunar New Year approached, Mrs Yu observed the tradition of buying new clothes for Man-hon as a gift (*South China Morning Post* 28 January 2001). On Man-hon's birthday, she did not make him a cake, but only because 'I don't know when he will be back' (*South China Morning Post* 4 January 2001). She also prayed for her son at Wong Tai Sin temple,

...where she drew a lot that carried an oracle suggesting her son would be found in a few months. A fortune-teller told her the oracle spoke of the blooming of Plum Blossom in Guangdong, suggesting the boy was healthy, would get help and return home by spring. (*South China Morning Post* 14 September 2000)

At least 10 psychics claimed knowledge of Man-hon's whereabouts:

...people have demanded thousands – hundreds of thousands, millions – of yuan... Yu and her brother have gone to the expense of hiring a car that psychics might be driven, uselessly, around Guangdong; such people, having insisted on payment in advance... evaporated when Man-hon did not materialise. (*South China Morning Post* 8 March 2002)

Conclusion

Writing of the transition years, Abbas sees Hong Kong cultural forms as a kind of rebus, projecting the city's desires and fears, its cultural space a 'space of disappearance'. Hong Kong culture had developed, Abbas says, techniques for disappearance, 'working with disappearance ...using disappearance to deal with disappearance' (Abbas 1997: 8). The rupture with the past provoked by the transfer of sovereignty was exactly the kind of disjuncture associated in the collective consciousness with 'transgression, liminality and lawlessness', a time of slippery dislocations and morphing (Comoroff and Comoroff 2006: 2).

For van Houtum and van Naerssen (b)ordering highlights the practice of 'discursive differentiation between us and them'. They frame the practices of inclusion and exclusion as techniques of nation-building, a project on-going in post-Mao China, part of which is the goal of ultimately reunifying Taiwan with the Mainland; Hong Kong's 'One Country, two Systems' formula is the template for this. Assertions of Hong Kong identity which challenge or throw doubt on this formula are perceived as unpatriotic. Those who assert the distinctiveness of Hong Kong's political and legal systems are deemed 'troublemakers', 'outsiders', and 'un-Chinese' (van Houtum and van Naerssen 2002: 127). In her story, 'Marvels of a

Floating City', Hong Kong writer Xi Xi depicts Hong Kong as 'something apart from the rest of China',³⁰ a place suspended between two worlds:

...The floating humans do not have wings, which means they cannot fly. All they do is stay afloat in the air, silently, solemnly, with no means of communication between them. The city sky is afloat with people like raindrops in an April shower... Why should everyone in the city share the same dream of being afloat in the air? One school of psychologists has drawn this conclusion: this is a collective manifestation of the Third-Side-of-the-Straits Complex. (Xi Xi 1997, quoted in Armentrout 2007)³¹

In the Man-hon story, the Mainland is an excessive presence, a looming disorderliness which threatens to swamp Hong Kong. 'Other-worldly' happenings, abductions, killings, and disappearances confirm the border itself as fluid and changing. Co-terminous with a weakening of the physical and legal 'defences' of Hong Kong, these stories erected a new, cultural barrier around the city.³² The world on the 'other side' was a world 'reversed'; the moment of crossing the border a 'moment of discontinuity, of in-betweeness' (Sheilds 1991: 191), and Man-hon's fate part of a collective mythology, a social imaginary (Sheilds 1991: 23).

Hong Kong is neither 'here nor there'. Such liminal spaces are often associated with images of death and decomposition (Turner 1967), of invisibility, and of ghosts; as the *Twilight Zone* TV series put it, 'the middle ground between light and shadow'. Hong Kong's transition from a British colony to Chinese sovereignty occurred at just such a point, at midnight on 30 June 1997.³³ During the hours of darkness, the status of Hong Kongers was altered. Psychically, socially, and structurally, they became 'marginals' with no cultural assurance of a 'final stable resolution of their ambiguity' (Turner 1974: 233). Whilst the official process of transition was completed on 1 July, they were fated to remain in 'no man's land', full reintegration with the Mainland not destined to take place for a further 50 years. Until then, they were left hanging in mid-air.

For Chow, Hong Kong's return to the 'Motherland' was in any case never 'natural' but a forced return; China 'masqueraded' as a saviour whilst all the time coercing Hong Kong into submission. (Chow 1993a: 183). Hong Kong is:

... the maiden who cannot defend herself against the dragon, the imperialist, and must therefore be delivered from her plight by the rescue operation of a St. George. Alternatively, Hong Kong is in need of a mother: she is longing to be reunited with China... (Chow 1993b: 184)

³⁰ Xi Xi, 'invents a floating city that resembles Magritte's *Castle in the Pyrenees*, with its floating people'. See Armentrout (2007).

³¹ As Armentrout observes, the allusion to the 'Third-Side-of-the-Straits' is a reference to Taiwan.

³² Comoroff and Comoroff (2006: 22) here are harking back to Thomas Hobbes and Hannah Arendt.

³³ As the rain pelted down, some saw this as 'the gods washing away the stain of colonialism', whilst others said that the 'sky was crying because the British were leaving'.

In Hong Kong, the metaphor of a 'long-lost child returning to the mother' was seen somewhat cynically. In 1997, schoolchildren and adults were made to repeatedly perform celebrations of the handover on 'decorated floats, with singers singing handover songs, celebrating the coming handover, which weave through streets and alleys.' (Lee 2005: 146-147) In one case,

... The primary students in Yuen Long district are to act out the play with the theme of '*baby swallows returning to their nests*' in turns in every hall of their district; while festooned vehicles parade noisily through indifferent crowds and murmuring tramps. (Lee 2005: 147)

As Lee observes, 'the metaphor used here hints that the act of returning to the mother's nest is not something natural but something that is artificial and construed for show' (Lee 2005: 147). Sarcasm and the supernatural are ways of resisting this, a cultural or symbolic code related to the historical conditions and socio-political context in which it emerged (Jackson 1989: 66). Suppressed dissent emerges through other forms. Supernatural expressions suggest the possibility of other worlds, of changing experiences of time and place; ghosts hover between worlds, appearing at fractured times and places. Transitory and amorphous, they easily cross material boundaries. They defy control.

Even without outright political repression, legal curtailment and active censorship,³⁴ Hong Kongers face being smothered by the Motherland. This makes their marginal expressions all the more important. Superstition, ghost stories and Hong Kongers' episodic fascination with 'other-worldly' phenomenon give voice to that which is otherwise drowned out, a means by which the otherwise unsayable can be articulated. Oblique critique is necessary to survival for, as Armentrout notes (2007), Cantonese culturalism is posited as a threat to stability; those encouraging centrifugal forces that pull Hong Kong Chinese away from being a clone of the Mainland are 'troublemakers'. If and when Hong Kong people acquire the right to rule Hong Kong a Hong Kong independence movement might emerge which would threaten social stability (Lin 2002, cited in Vickers 2005: 76). To forestall this scenario, Hong Kong must be made to 'disappear'.

A whole *repertoire* of stories, symbols and signs has arisen to shield Hong Kong from this fate. For those 'inside' the border, van Houtem (2005: 677) suggests, (b)ordering practices reflect a desire 'to distance oneself from the Other in order to uphold the (fantasy of the) self during feelings of fear or anxiety'. The constant re-telling of Man-hon's story inscribes the border on the social and psychic worlds of Hong Kong. Man-hon's fate provides a metaphor for the fate of Hong Kong, a cautionary tale of what happens when 'wayward children' transgress.

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³⁴ A BBC report in 2007 cited a 'recent survey' of the Hong Kong Journalists association which showed that 30 per cent of the 506 journalists questioned admitted to practising self-censorship (BBC News 2007)

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Justice and Media: Representations of Suffering in Networked Journalism

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Abstract

This paper looks at how violence is represented in the contemporary news media and asks how the nature and effect of that representation may be transformed as journalism changes. It further considers whether that makes a difference to the moral or ethical claims of news communication, as suggested by Roger Silverstone's Media and Morality (2006).

According to Atsuhide Ito:

This is how we get to know violence as image, and painting embodies it as a real object rather than mere image. Painting coerces the generations of viewers to be complicit in historical violence. It does not make one feel guilty for the crime but it makes one guilty for the pleasure one derives from the proximity to the violence and its transgressive potential. Transgressive potential by which I mean that the event of violence as a disruption may mark a turn of justice for what is to come.

(Ito 2009)

I am a journalist, and it's not often that I find myself comparing what I do to what an artist does. But journalism would make a similar claim: journalism attempts to present the 'mere image' as a 'real object', or at least a narrative about or representation of reality. That narrative has to negotiate the hazards of spectatorship and spectacle – but it aspires towards a potential for engagement, even for agency, beyond simple media performance and iteration. As part of a cosmopolitan project it may even aim for justice:

...the world's media are an increasingly significant site for the construction of a moral order, one which would be, and arguably needs to be, commensurate with the scope and scale of global interdependence. Insofar as they provide the symbolic connection and disconnection that we have to the other, the other who is the distant other... then the media are becoming the crucial environments in which a morality appropriate to the increasingly interrelated but still horrendously divided and conflictual world might be found, and indeed expected. In short, any ambitions for a genuine, meaningful and ethical civil society that might extend beyond states... must take how that world is represented in the world's media seriously.

(Silverstone 2006: 7)

This leads us to consider, in what ways are new media technologies and practices altering the relationship between citizens and the idea of justice?

Let us start with imagery. Proverbially, the image speaks more loudly in the media than words. However, in this paper I hope to show that in the end it is the words and voices that give imagery effective context in terms of justice. The other critical factor that gives journalistic imagery context and a kind of reality is the audience.

For example, let us consider images of Kabudwal, a lush waterfall surrounded by greenery.¹ The picture might be thought to show the British Lake District or perhaps an Amazonian tributary, but in fact it is north-western Iran. Photographs do, of course, 'lie'. Visual information draws upon our prejudices, our pre-existing knowledge, and takes signals from the context. In this case the photo gives us a 'right' response – 'it is beautiful' – and a 'wrong' or mistaken response, because it is Iran, not Ambleside.

Another image from Iran is less beautiful, and depicts violence: this is the famous image of the dying Neda Agha-Soltan, who was killed during the June 2009 Election protests. The image was taken from an amateur mobile phone video which recorded less than a minute of time of her shooting. It was posted on the video sharing website YouTube, where millions have viewed it in various manifestations. It was published at a critical moment in the protests, when the reporting of many disparate actions in the international media still felt provisional and ungrounded. Suddenly this iconographic imagery of one woman emerged directly from the streets of Tehran. It offered the authentic immediate relation of a brief phase of drama and violence. The video sequence and the series of still images that flowed from it helped the diverse protests in the international media to coalesce into something personal and human. It was an expression of citizen journalism on a global scale. But the way it was taken up and connected into other citizen media and professional, corporate and public media means that it is also an example of what I call Networked Journalism, explained in my book *SuperMedia* (Beckett 2008).

Networked Journalism is a description of the way that the news media is now connected, interactive, non-linear and conditioned by public participation. It is a synthesis of traditional mainstream media and new emerging forms of topical reporting and commentary such as blogs and social networking sites such as Facebook. Mobile telephony, email and micro-blogging sites such as Twitter contribute to this easily accessible and inter-related networked topical communications. As I describe it, it is an aspiration as well as an analysis of what is happening. I argue that it is changing the production of journalism profoundly. It is altering the power relations within news media and between journalism and society. It offers opportunities for new configurations of political expression and organization.

Let's return to Neda and Iran. One video posted to YouTube shows the scene in another context, telling the story of her death in a very different way and with a

¹ See here for the image: http://medlem.spray.se/davidgorgan/Forest_Waterfalls/KabudWal_waterfall.jpg.

special purpose. The video is titled 'Neda Agha-Soltan, killed 20.06.2009, Presidential Election Protest, Tehran, IRAN'.² It is interesting that at least one of those still images must be another woman, so it is not an entirely accurate representation. It is clearly part of a polemical propagandist message that seeks to generate solidarity and resistance to the violence against Neda and the protestors. It appears to be 'amateur', but judging by the number of views on *YouTube* it has been an effective form of communication.³ Looking at the comments posted in response to the video shows that it is a contested message that is provoking a series of ideological arguments, if not a particularly positive or constructive debate.⁴

In the case of CNN, this time we see how citizen journalism is networked into a major global commercial media organization.⁵ The footage is set within a professional context with the use of graphics and the formulae of a live presenter narrator followed by a location reporter who adds commentary and contextual information. The avowedly 'objective' news channel is overtly championing the polemical and political value of Neda as a heroine of the Iranian opposition. This obviously fits in with CNN's ideological and editorial framework. It also shows how the drama of the imagery and the narrative generated by the citizen media help condition the professional account. It is important to remember that CNN, like many global mainstream broadcasters, was in fact quite slow to pick up on the story of the Iranian protests. Much of the early coverage of the protests was initially being mediated on informal internet platforms such as the micro-blogging social network site Twitter. A Twitter campaign to encourage CNN amongst others to cover the story was possibly instrumental in helping to engage the corporate media in the Tehran events. Even when the mainstream international broadcasters did begin to cover the story, they were heavily limited in their coverage by reporting restrictions and so remained heavily dependent on citizen journalism.

So it is empirically true that the internet and digital communications technologies have given us an abundance of information and perspective on Neda; she also has her own Wikipedia page.⁶ These web pages are themselves sites of moderated contestation where different contributors are allowed to offer varying information and interpretations of what happened to Neda and its significance. It is not stable, it changes and continues as a narrative as long as people interact and contribute to it.

There are also other perspectives on Neda which question the very authenticity on which the image is based. Both the Iranian authorities and a tiny minority of western bloggers have suggested the whole sequence is a fake.⁷ Perhaps in a kind of homage to Jean Baudrillard and the Gulf War they claim that it never

² Uploaded by AliJahani 21 June 2009. Available at <http://www.youtube.com/watch?v=76W-0GVjNEc>.

³ Over 1 million views as of October 2010.

⁴ 4,200 comments as of October 2010.

⁵ "Neda" Becomes Rallying Cry for Iranian Protests', CNN 22 June 2009, <http://www.cnn.com/2009/WORLD/meast/06/21/iran.woman.twitter/>.

⁶ http://en.wikipedia.org/wiki/Death_of_Neda_Agha-Soltan, created 29 June 2009,

⁷ *American Titanic*, 'The Neda Iran Hoax', 21 June <http://theamericantitanic.wordpress.com/2009/06/21/the-neda-iran-hoax/>.

happened. Certainly, when seen through the multi-platform, multi-sourced, diverse genres and re-versioning of this incident through networked journalism, it has a post-modernist feel. Certainly, this succession of imagery in different contexts is conditional on each mode of production and treatment, especially the voices and texts that accompany and frame it. However, through its networked nature and meta-mediation the imagery has become more, not less political.

That incident and the very imagery that represents it have been put into a variety of narratives: text, voice, witnesses, creative design, music, maps, and graphics have all been deployed. These mediations are all subject to the new conditions of networked news communication:

- They were often created by non-professional journalists
- The consumer was able to comment upon them
- The citizen was able to take the imagery and refashion it
- The citizen was able to produce their own contexts and responses to the mediation and share that with others
- The citizen was able to relate to and contest both the mainstream media and alternative versions and often to subject both to comparative analysis.

This is a significant alteration of the process of news media communication. In the case of Neda and the Iran protests this had an impact on transnational public consciousness and international politics. At the time of writing President Ahmadinejad is still in power and the situation in Iran appears more repressive than it was before, although protests continue, so I am not making any claims that the ultimate effect or result of this mediation was somehow more liberal or humanitarian. What I would argue, however, is that the potential for a more cosmopolitan media is present in this kind of journalism.

News media used to see itself as a Fourth Estate. The classic claim in western liberal democracies was that the purpose of journalism was to use truth to hold power to account. Journalism was a quasi-profession with barriers to entry, special craft skills, an exclusive culture, and self-defining institutions. It was a fortress and a series of fortresses. The value of this was that in exchange for income from either taxation or more generally from advertising and subscriptions the journalist would produce – amongst a lot of other material – the information for society to make decisions and acquire the insight into the workings of power that would make those in authority accountable. This included campaigning, investigative, analytical and informative journalism. This was done in a top down linear way. News was a manufacturing industry that created information products that were consumed in a generally passive way by the public. Letters pages and phone-ins were the limit of interactivity.

This is all changing as new media technology combines with other social trends such as improved education, increased individualism and a re-shaping of identity and community to transform our consumption of news media. Traditional mainstream media will still dominate news flows but everything it does will be shaped by the role of the 'people formerly known as the audience' (Rosen 2006). The media industry has lost its monopoly over the distribution of the facts and commentary that we called 'News'. News itself has lost its mass media meaning

which was, in effect, 'the facts brought to you by a process called professional journalism'. In the Internet Era, as soon as something is known it can be known by everyone, immediately, everywhere. The moment that the Neda video was uploaded the 'new news' story was over. The mediation continued but, as we have seen, in diverse ways often directed by citizens, not professional journalists.

Networked journalism allows at least a modest redistribution of power in the mediation of events and issues. It is still possible to attempt to hide events from the world: look at Gaza in 2008, Sri Lanka in 2009, or Iran now. But generally, the act of hiding is itself made manifest by the omnipresence of media and the abundance of information and data. The real task of journalism is now not just disclosure but connection and understanding. However, conventional journalism can only act as a forum for dialogue, a space for contestation. To go beyond that requires literacy and agency. Networked journalism appears to offer the possibility of enabling both. In addition, the principles of networked communications are now part of political activism, helping to reform and invigorate collective action as suggested by Hamid-Reza Jalaeipour, an Iranian dissident at Tehran university:

In this movement the role of leaders is not indispensable. It relies on social networks in which one individual sits by a computer and gets connected to massive networks of friends and relatives, and exchanges political comments and news. Even if the leaders of this movement are arrested or killed, these networks, operating under the skin of the society, will come up with another leader.

(quoted in Bozorgmehr and Khalaf 2009)

So we see how political activism is directly connected to and is part of networked journalism. However, there is nothing inevitable about any political outcome regarding networked media. Justice is ultimately enacted through the realm of institutional politics, not communications. Although politics may begin with the public sphere and mediation, it ends with the people who have power.

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Memory, Partial Truth and Reconciliation without Justice: The White Terror Luku Incident in Taiwan

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Abstract

During 1952-1953 the village of Luku in Taiwan became the focus of a military campaign to uncover and arrest alleged 'communists', with the result that nearly all the adult male population were either executed or given long prison sentences. This paper considers how this 'Luku Incident' has been remembered, using the theoretical perspective of social memory. The paper provides an overview to what happened, and then examines how the incident was forgotten during the martial law period, which lasted until 1987. It then elaborates how the remembering of Luku has been created since then, and how the incident has been remembered in certain ways for specific purposes by different social groups representing different political interests. It is shown that the way the incident has been remembered has been directed more by short-term political calculation than by a regard for truth, justice or reconciliation.

Introduction

Since September 2004 I have worked with Stephan Feuchtwang (2009a; 2009b) conducting interviews and research on the Luku Incident and the transmission of memories of the event. However, when we began, a number of political activists, documentary film-makers and historians were ahead of us. They had already interviewed the majority of the Luku survivors and there were films, articles, and books about the Luku Incident already in the public domain. I was questioned by one after another of the victims: 'We have been asked about this before, why do you come to ask us about it again?' Moreover, the victims' descendants were extremely reluctant to be interviewed, saying that at the time of the Luku Incident they were either too young to understand it, or had not been born; all they knew about it was what they had learned from their older family members. They suggested to me that if I wanted to know what had actually happened I should interview their seniors, because they were the ones who had experienced it.

The Headmaster of Yongding School (the primary and junior high school in the Luku area) told me that his school did not teach the Luku Incident to students. He explained the school's difficulty, saying that:

Except for a cleaner, who comes from Shiding township (to which Luku belongs), the rest of the staff are all from outside Shiding. We have asked older local people about the Luku Incident, but they were not willing to talk about it. Since our teachers do not know what actually happened at Luku, and given the complexity of the incident, about which there are a variety of different and even contradictory understandings, we decided not to mention it in the classroom.

As well as this, a young man in his late twenties, whose two uncles had been imprisoned respectively for eight and twelve years, said to me that 'maybe it is not necessary to remember the Luku Incident, to include it in textbooks, or for it to be taught in schools, because to recall it can bring conflict into society. The incident is past, and the grief suffered will be gone sooner or later.'

My Approach to the Luku Incident

Stephan and I began our research on the Luku Incident at the end of a brief period during which the Incident had been recognized publicly. I asked myself how I could write something that would be different from the previous representations of the incident in secret files (now made public), government statements, documentary films, and in activist and scholarly articles and books. These sources claim either to disclose what really happened or to re-construct the historical 'facts' of the incident, but such documents can only be a representation. Representation resides in a relationship between something that stands for, or is associated with, something else. Particular representations of the Luku Incident may serve only as 'partial truth', but they contribute towards the construction of 'social memory', which is my particular concern in this essay. The ways in which the 'social memory' of Luku is fostered will affect how the incident is judged from the perspective of justice.

The notion of social memory entered anthropological discourse through Maurice Halbwachs' emphasis (1925 [1975]) on the social basis of memory and his idea of 'collective memory'. According to Halbwachs, as elaborated by Assmann (2006):

Memory is a social phenomenon. It grows into us from outside. Its neural foundation can be thought of as memory's 'hardware'...But, its contents and the use we make of it are determined by our intercourse with others, by language, action, communication, and by our emotional ties to the configurations of our social existence...In the act of remembering we do not just descend into the depths of our own most intimate inner life, but we introduce an order and a structure into that internal life that are socially conditioned and that link us to the social world. (Assmann 2006: 1-2)

As such, memory is both individual and collective. Halbwachs argues that collective memory is a common store of knowledge that is preserved by a social group, particularly groups bound by kinship, religious and class affiliations, from which individuals are able to acquire, to localize and to recall their memories. That is to say, what we recall or what is evoked in us exists in a relationship with the wider material life of the society to which we either belong or have belonged, and is expressed in connection to places, dates, persons, phrases, objects, images

and so on. For Halbwachs, it is not because thoughts are similar or contiguous in time that we can recollect them, but rather because recollection, either of the recent or the distant past,

forms part of a whole ensemble of thoughts common to a group, to the groups with which we are in a relationship at present or have been in some connection in the recent past...Groups provide individuals with frameworks within which their memories are localized and memories are localized by a kind of mapping. We situate what we recollect within the mental spaces provided by the group. (Halbwachs in Connerton 1989: 36-37)

Mental space, according to Halbwachs, is always with reference to specific physical spaces or localities that are occupied by particular social groups. Halbwachs also demonstrates how different social groups with different pasts have different memories attached to the different physical and mental spaces of that group.

However, Halbwachs does not explore the social practices through which collective memories might be manufactured and passed on within the same social group from one generation to the next. Paul Connerton addresses this by arguing that, 'images of the past and re-collected knowledge of the past are conveyed and sustained by (more or less ritual) performances' (Connerton 1989: 40), and in particular through commemorative ceremonies and bodily practices. Memory, then, is not merely a matter of individual recall but is social, conveyed by collective performances such as commemorative ceremonies, documentation, the building of memorials, and education.

Connerton tends to understand ceremonies 'as a species of performative' (Connerton 1989: 70), i.e., as rituals, noting that they are often held repetitively at special places at fixed times. He observes that ceremonies/rituals 'do not simply imply continuity with the past by virtue of their high degree of formality and fixity; rather, they have as one of their defining features the explicit claim to be commemorating such a continuity' (Connerton 1989: 48). Clearly, commemorative ceremonies play a significant role in the shaping of communal memory. But, what is being remembered in commemorative ceremonies? Connerton's answer is that 'a community is reminded of its identity as represented by and told in a master narrative... Its master narrative is more than a story told and reflected on; it is a cult enacted' (Connerton 1989: 70). In other words, 'If the ceremonies are to work for their participants, if they are to be persuasive to them, then those participants must be not simply cognitively competent to execute the performance; they must be habituated to those performances. This habituation is to be found...in the bodily substrate of the performance' (Connerton 1989: 71).

Remembering is indeed in order to belong. Jan Assmann argues that 'all culture is a struggle with oblivion' and culture is a 'constant process of making visible and articulating, of presentation and preservation' (Assmann 2006: 81). During this unceasing labour, memory plays a significant role in creating 'markers in the struggle against the furies of disappearance and forgetting, and builds stopping places in the river of change and disintegration' (Assmann 2006: 81). For Assmann, memory consists more of inventions than of innate human characteristics, and he argues that 'inventions could only be passed on to future

generations with the invention of inventions, namely, the invention of memory' (Assmann 2006: 81). By this, Assmann means 'writing, initially in the general sense of a system of notation of the contents of memory, and then in the special sense of the notation of language itself' (Assmann 2006: 81).

To summarize, then: firstly, following Halbwachs, memory is not merely personal or individual, it is social and attaches to specific socially constructed places; secondly, following Connerton, memory is not merely social but is performed and thereby embodied and, thirdly, following Assmann, it is social and materialized literally or fictionally, in language.

In what follows, I will firstly provide the background to what happened at Luku in 1952-1953, drawing on interviews and data from official reports that were formerly secret. I will then examine how the Luku Incident was forgotten during the martial law period in Taiwan, which lasted until 1987. I will finally elaborate how the remembering of Luku has been created since then, and how the incident has been remembered in certain ways for specific purposes by different social groups representing different political interests in the democratic period.

What Happened at Luku in 1952-1953?

The Luku Incident is generally subsumed within the broad term 'the White Terror', but more people were either killed or jailed at Luku than in any other single incident during the White Terror as a whole. The term White Terror was borrowed from the Russian civil war of 1918 to 1921, when the so-called Whites led by former Tsarist officers fought the Bolshevik Red Army. The term has been adopted in Taiwan to describe the counter-revolutionary, or more precisely, anti-communist violence exerted by the right-wing KMT between the 1950s and the 1980s.

The KMT (Kuomintang, also known as the Chinese Nationalist Party) was defeated by the Chinese Communist Party after World War II and gradually retreated from Mainland China to Taiwan during the late 1940s (see Phillips 2007). Here, the KMT made efforts to eliminate communists and their bases from all over the island. Between 29 December 1952 and 3 March 1953, ten thousand KMT soldiers under the command of General Gu Zhengwen surrounded the village of Luku, located in the mountainous area of Shiding on the borders of another three towns/townships: Xizhe, Nangang, and Pingxi. According to the KMT Secret Service (the Bao Mi Ju, later renamed Qing Bao Ju, the Military Intelligence Bureau), there was a 'communist armed base' in Luku. They found a single pistol, 165 home-made bombs, 7 mines, five PRC flags, ten red army armbands, two banners of the Taiwan People's Militia, and 43 maps (Chang and Gao 1998: 19-39), and approximately 183 villagers were arrested. Three quarters of those detained were illiterate, poor, and were employed working long hours in the local coal mines. In total 36 villagers were executed. A further 97 villagers (including 19 teenagers) were sentenced and imprisoned for a total of 871 years.

Forgetting Luku

For the rest of the 1950s, most of Luku's men were gone, either dead or in prison. The only people left were widows, grand-parents, and young children. Soon after, Luku village was renamed Guangming. The village had been given the name

'Luku' during the Qing Qianlong era (1736-1795), indicating three stone-caves there inhabited by wild deer (Shiding Xiang Gungso 2001: 88). However, in July 1953 in a joint village assembly of Shiding Township, the acting village head of Luku, Xie Mingzhao, claimed that 'Luku' was in fact a bad name: *ku* connotes a den of thieves or rebels, and so the name suggested criminality and sedition. He suggested changing it to Guangming (namely Bright Light), after the official name of Luku Caimiao. The majority of the villagers consented: through renaming the village as Guangming, perhaps the village's fortunes could be made brighter. The proposal to rename Luku was later approved by the Taiwan Provincial Government and enacted by the Shiding Township Government. Xie Mingzhao was later appointed as the representative of Shiding Township Assembly. After this, the name 'Luku' disappeared from road signs in the area, but also from government records. The change in name suited the then-ruling KMT government, which wished to eliminate the history of the White Terror from public memory. The KMT strategy disconnected people from their past and thus created a public amnesia in Taiwan in order to solidify its political power and interests and maintain its regime throughout the martial law period.

The Luku survivors were terrified at their connection with the incident. It became a taboo subject. Nobody dared to mention it in public. Trust among the villagers was broken, as they had been forced to implicate one another in their confessions. The Luku residents were already isolated from the outside world and now they were also alienated from each other. Moreover, from the mid-1960s, one after another, the local coal mines were closed down, and households were forced to move elsewhere in search of employment. The mountain paths were soon overgrown by weeds. One villager, Liao Fan-shu, told me that at that time, he had to cut back the weeds from the path to make his way from his home to the fields in order to plant sweet potatoes. It took too much of his energy and time. It was practically impossible for people to live in Luku when there were no decent jobs and no decent roads. Luku/Guangming village was eventually abandoned and gradually forgotten.

The terrifying trauma of the incident itself, the renaming of the village, the lack of jobs and the poor roads, coupled with the fact that at this time Taiwan was in the grip of a violently repressive, militarized state, meant that the Luku Incident was forgotten, in the sense that personal memories of the incident could not be voiced publicly. The records of it ever having happened were hidden in the Secret Service's files and in the private consciences of the victims and the perpetrators. A Luku villager, Li Wen-ming, told me that, 'since my childhood I had been occasionally overhearing my father and village seniors talking about the incident behind closed doors. But, if an outsider was present they would not say anything. There would be no way for them to answer questions asked by strangers about the incident.' The incident was repressed from public memory, but private grief remained unresolved: a widow, Liao Zhengxiu, whose husband had been executed during the Luku terror leaving her with his old mother and six young children, said to me that, 'not talking about the incident publicly does not stop me from remembering it. Every night in bed when it is quiet, I think of it and cry into my pillow.'

Remembering Luku

Thirty-five years later, in 1987, martial law was lifted. The political transition to democracy followed soon after, and in 1991 official recognition was given to the victims of the 2-28 Incident, a massacre that had occurred in 1947 and which marked the beginning of martial law (see Edmondson 2002). In 2000 the KMT lost power to the main opposition party, the DPP (Democratic Progressive Party, also known as the Taiwanese Nationalist Party), and since then debates about Taiwanese identity have been contested all over Taiwan. Indeed, such debates have formed a critical feature of social and political life in Taiwan over the past decade. Taiwanese people have tried to remember their history in order to make that history their own and to give themselves a sense of historical agency.

From the mid-1990s to the mid-2000s, Pan Qi-hui, serving as the Head of Luku/Guangming village, has been assisting Taipei County government in building thirty to forty roads so that all the houses in Luku/Guangming are now once again accessible. He explained to me that

at the time of the Luku Incident, there were no roads in the village. It was a dead end. No wonder so many villagers did not understand the government and were cheated by outsiders. By building roads, I hope that future generations will have better access to the outside world, a fact that will prevent anything like the Luku terror from happening again.

In the last ten years, Luku people have returned to repair the houses they abandoned. In particular, the old people, including surviving victims, now spend their daytime in their houses in Luku, and take the bus home to Nangang or Xizhe before sunset. As such, the possibility for remembering Luku publicly has been created.

In the mid-1990s, a novelist named Lan Po-chou, who is leftist and pro-unification with China, went to Luku to trace Taiwanese communist footprints. Lan made two documentary films based on his research for a Taiwanese television station, entitled *The Red Base* (1997) and *The Last Battle* (1997), in an attempt to re-construct a communist past in Luku and by implication, in Taiwan as a whole. According to Lan, eight among the twelve adults who were either released without charge or found not guilty after being tried were 'real' communists. Only one was a Luku resident and the other seven were outsiders.

Apart from Liao Fanshu, who was an illiterate coal-miner, Lan only interviewed 'real' communist intellectuals and members of local elites who had escaped execution but had been placed under KMT surveillance for the rest of their lives. Lan focused on a real communist who was a Luku insider, Chen Chun-Ching. Through his interviews with Chen, Lan re-constructed a Luku communist past: sometime after 1947, one after another (in total about ten) communist intellectuals had been brought to Luku by Chen, who helped them to settle in. They intended to establish a base in Luku, and organized reading groups and youth groups. When they ran out money, they were regularly re-supplied from another communist base in southern Taiwan. They cut their own wood and cooked for themselves, while grain and clothing were brought for them from the low-lands.

Lan's documentaries were shot with him and his interviewees on location, conducting a conversation about the activities of Taiwanese communists. He explained that by taking his communist interviewees back to the original sites (such as where the reading groups had been held or where the PRC flags had been erected), he hoped to bring memories back to conscious recall. Also, by presenting his interviews in this way, he hoped to demonstrate that stories of Chinese communists in Taiwan had not been made up, but were based on factual information, real people and real sites. He believed this would counteract criticism from those who want Taiwan to be separate from China (primarily DPP supporters).

In contrast, the pro-DPP historian Chang Yen-hsien saw this as a distortion of the Luku Incident, and in 1997 he and his two research assistants, Gao Shu-yuan and Chen Feng-hua, began to search for those Luku people who were 'non-communists' and therefore 'innocent' of the KMT charges against them. They completed two volumes, entitled *Investigation and Research on the Luku Incident* in 1998 and *The Luku Incident: the Villagers' Frozen Tears* in 2000, which were funded and published by the Taipei County Government when Su Zhen-chang, a senior DDP member, was the County Head.

Chang's two volumes include interviews with seventy victims or their family members: except for Chen Xunyan, who was a communist, sixty-nine were innocent of the charges made against them by the KMT. Chang attempts to reconstruct the life histories of these victims with a focus around the difficult times of the Luku Incident. In the beginning of his post-script to the first volume, he writes that

Investigating the Luku Incident made me think of the poor peasants and miners who lived in cold villages: through blood relationships and traditional social networks they were caught in what was to them an unrecognisable and unpredictable political whirlpool. They had no way to understand the views of the leaders; they became sacrificial offerings. (Chang and Gao 1998: 318)

In his concluding remarks, Chang states that

the rulers arrested and tortured the innocent ruthlessly, interrogating them under duress, making false accusations, and sentencing them, neglecting their fundamental human rights. They were forced into silence for many years. (Chang and Gao 1998: 318-319)

One of many examples of this injustice is the case of a Luku miner, Liao Dejin. In an interview with Chang Yen-hsien in 1997, he testified:

At the time everyone in the village was struggling to eat three meals per day, just wanting to ensure their stomachs were not empty...Although we were in our early twenties, our understanding of the world was at the level of pre-school children because we had no contact with the world outside Luku. For example, in my case until this happened I had been in Taipei city once...They said we had participated in the Communist Party and worked for the Communist Party and intended to overthrow the government. But, was this possible with our low understanding?

What was the KMT? What was the Communist Party? What was the difference between these two parties? We didn't have a clue. Who was a Communist Party member? We could not tell. (Chang and Gao 1998: 90-91)

Liao Dejin described his detainment, interrogation and sentencing as follows:

Many of the villagers were detained, tortured, and interrogated in a small room in a local temple, known as Luku Caimiao. The room was around 5 or 6 square metres. But, there were about 100 men and women crammed into it. So, we each had to squat against the next person's legs... I was detained in this position for almost a month. I was taken for interrogation:

Q: Do you know Liao Musheng?

A: Of course I know him. Liao Musheng is my uncle. We live in the same house. I would be lying if I said I don't know him.

Q: Do you know Chen Qiwan and Chen Tianqi?

A: Of course I know both of them. Chen Qiwan is our village head and Chen Tianqi is his son. They are both headmen in the village. How could I not know them?

When the soldiers asked me these questions, I answered that I knew them and then I was beaten...

Finally, I was sent to the Military Court in Taipei. I was tried by a Judge.

Q: Have you seen any strangers in your village?

A: Yes. But, Judge, is it right that just because I have seen strangers in the village that is evidence of my guilt?... Judge, do you know everyone you meet on the street?

The Judge did not answer my questions but immediately announced that the trial was over. After the trial, I was beaten ruthlessly until I said I did know some of the strangers in my village. (see Chang and Gao 1998: 93-94)

As the result, Chen Qiwan, Chen Tianqi and Liao Musheng were all sentenced to death and Liao Dejin was sentenced to eight years' imprisonment. There are many more similar testimonies like Liao Dejin's in Chang's two books. It is interesting to note that Liao Dejin also provided more or less the same testimony, in interviews with me in 2004 and 2005.

One year after Chang's initial investigation, in December 1998, the Legislative Yuan passed the Regulations regarding Compensation for those wrongly sentenced (either to imprisonment or to death) during the martial law period either for sedition or as communist spies. This was soon followed by the establishment of the Compensation Fund Corporation, which is a statutory body under the administration of the Executive Yuan, although not a court, and which has dealt with applications for compensation since April 1999. The compensation amounts range from NT\$ 100,000 for one month's imprisonment, up to NT\$ 6,000,000 for execution. In the case of the Luku Incident, most of the victims were sentenced to eight, ten, or twelve years' imprisonment or to death, and typical compensation

payments were in the range of NT\$ 3,600,000, NT\$ 4,200,000, NT\$ 4,600,000, or NT\$ 6,000,000. Indeed, Chang's two volumes have served as kind of endorsement for those Luku people who were wrongly sentenced and thus are entitled to be granted compensation money.

On 29 December 2000, the 48th anniversary of the Luku Incident and soon after Chang's second volume was published, the Luku memorial (Fig. 1) was established and formally opened by the Taipei County Government under the DPP administration. The Luku memorial, located down a hill at the intersection of Xizhe, Shiding and Nangang, is a sharp but twisted blade made of shining stainless steel. It represents the public recall of the KMT military dictatorship and the torture and murder of civilians, but the simultaneous erosion of the Taiwanese communist past. In my interview with Li Wen-ming, who since childhood has been eavesdropping on adults talking about the Luku Incident behind closed doors, I asked him what he thought of the memorial. He said, 'I feel so glad at seeing it! The memorial is itself a licence, a licence which permits us to speak out loud about the Luku past that was held deep inside our minds for years.'



Fig. 1: The Luku Memorial (photograph © Fang-Long Shih)

As I mentioned at the beginning of this paper, the local Yongding School did not teach students about the incident in the classroom. However, I was informed by the Headmaster, Guo Zhengxiong, that the school held a trip 'Walking toward the Future of Guangming' on 17 February 2004. All of the students visited the ruined building of what was once a branch of their school in Luku/Guangming as a way of understanding the history, and development of their school. On the way, they stopped at the Luku memorial, where the teachers used the text on the memorial to introduce the local Incident to students. This text contains only about 300 words, providing the date, the place, and the number of the innocent Luku civilians tortured and murdered by the KMT military dictatorship.

By the end of 2003, 7084 applications for compensation during the White Terror had been received by the Compensation Fund Corporation. Among them, 1052 were rejected as fraudulent and a further 57 were refused. If anyone making a claim is found to have actually been a communist, he/she is excluded from compensation. Indeed, even after the lifting of martial law, the fear of 'communists' is still vivid in Taiwan. In my interview with a Luku man Li Wen-ming in 2005, when he heard the word 'communist', goose bumps instantly appeared on his arms.

End of the Recognition of Luku

The victims have got their compensation, the memorial has been erected, and the 300 word text now serves as a source for recalling the Luku Incident. However, the recognition of the Luku incident seems to be at an end, and sooner or later the remembering of Luku will be impossible. After the incident during the KMT regime, the original village name Luku was replaced with the name Guangming. Again, since the recognition of the incident during the DPP administration, the original road name Luku Road has now been renamed Xiding Road. Those who lived through the incident are old and will soon have passed away, and their second and third generations are generally unwilling to talk about what happened. Moreover, references to it in school books and Taiwanese history books and documentary films are few and far between. Apart from the stainless steel memorial and its text, any and all references to Luku are slowly but surely disappearing. This corresponds to the attitude of the newly elected KMT government: 'In order to create a harmonious society, we all should forget the sad past and look forward to a prosperous future!'

However, have the ways in which the 'social memory' of Luku was fostered during the period of public recognition affected the ways that the incident is judged from the perspective of justice? Almost every time after my interviews with the widow Liao Zhengxiu, who has received NT\$ 6,000,000 for the unjust execution of her husband, she asked me: who do I think should be responsible for her husband's death?

During my conversation with Chen Feng-hua, who worked with Chang Yen-hsien on the second volume, she said to me:

On reviewing the Luku Incident, the [DPP] government was only concerned with granting victims compensation money, but was unwilling to get those guilty sentenced. None of those responsible were arrested. This is like giving someone, who is going through a spell of bad luck, money. This sounds more like charity than compensation.

During my interview with Chen Jiu-xiong, who was one of the 19 teenagers wrongly held under house arrest for seven years without trial, he told me that he and the other 18 Luku boys and girls were arrested by General Gu Zhengwen and kept in his houses; the girls were used as his private house-keepers, cooking, doing laundry, feeding chickens and ducks etc. while the boys provided him with various forms of free labour, such as carrying, carpentry, driving, mastering dogs etc. Jiu-xiong indicates that in order to claim compensation money, they had to maintain a good relationship with General Gu, because they needed him to give

evidence of their service during their period of house arrest. He then emphasized that according to the Buddhist teaching of Karma (cause-effect), 'Good deed results in good karma and bad deed results in bad karma,' General Gu in his old age suffered loneliness and infirmity and nobody cared for him.

In my interview with Liao Fan-shu, who was illiterate and wrongly sentenced for eight years, he told me that he was set up by a Luku resident named Zhou Xi-yuan. A few days before the Luku Incident, Liao was resting at home as his leg had been injured during a coal mining accident. One night his neighbour Zhou Xi-yuan came to his house, saying that his uncle was looking for someone to cultivate his farm. Liao replied with his consent. The next day, Zhou brought a sheet of paper, asking him to sign it explaining that it was the contract. So, Liao did as Zhou requested. Liao went on to say that he was then arrested, taken to the Luku temple, and later sent to the military court for trial. Zhou Xi-yuan was called as a witness, and used the paper as evidence that Liao had agreed to join in the communist organization. Liao could not defend himself and was imprisoned for eight years. Liao told me that although Zhou Xi-yuan had a comfortable life as a KMT cadre he died suddenly in a car accident while still young. It was believed that Zhou Xi-yuan was haunted by ghosts seeking for revenge and justice.

Partial Truth and Reconciliation without Justice

It has been difficult, if not impossible, to construct a shared or agreed memory about the Luku incident in Taiwan, divided as it is into blue and green camps. How might the remembering of the Luku Incident bring conflict to Taiwan? I suggest that it is not the remembering of the Luku Incident itself which may cause conflict in Taiwan but the ways in which the Luku Incident has been deliberately forgotten and then deliberately remembered in a certain way.

The memory of the Luku Incident has been sustained and transmitted during the DPP administration through social practices, such as documentation, writing, memorials, compensation, and such like, and highly charged and personal memories of violence and terror have been transformed into monuments and bureaucratic procedures, though those memories are periodically resurrected out of anonymity by DPP Taiwanese nationalists as examples of shared sufferings, shared fraternal ties and shared interests (see Whitehouse 2000: 21-23), indeed, as markers of community. If the DPP has given the victims of Luku recognition, it is recognition within limits: public monuments and money (so long as you were not a communist — in which case arbitrary arrest, detention, torture and death appears justified), but no apology from the KMT generals who ordered it, and no trials for those who manipulated the delicate Cold-War situation to torture and murder civilians in the name of anti-communism.

In Taiwan, truth, justice and reconciliation come second to short-term political calculation. I wonder if this is attributable to Confucian hierarchical values, namely, that the senior never to the junior. However, this does not mean the junior does not demand justice.

There is no single truth or a right way of memorializing the Luku Incident. Truth is multi-layered. However, Lan's and Chang's representations of the Luku Incident

can be understood only as 'partial truth', the most meaningful memory from their perspective. Social memory is a complex process that depends on stability and openness. Memories of the Luku Incident cannot avoid confusion, dis-continuity, and ambivalence. We should create possibilities for remembering the Luku Incident free from political distortion. Remembering the Luku Incident might be one way to guarantee peaceful co-existence for all the social groups with different political agendas in Taiwan. As a Taiwanese researcher but as a Luku outsider, I want to remember the Luku White Terror in order to foster a sense of belonging to Taiwan and to face a shared past of violence, terror and uncertainty. The transition to democracy in Taiwan has little meaning without the recognition of the place of horror we have come from.

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Compensation for and Acknowledgement of Former State Violence in Germany – An Implicit Comparison with Taiwan

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Abstract

German acknowledgement of the injustices committed under its Nazi regime is exemplary in two senses. One is the sheer scale of atrocity to be acknowledged. The other is the scale and depth of the acknowledgement organized and paid by the federal and local states of Germany. The precondition for acknowledgment was a sudden change of narrative and regime, initially imposed by the occupation forces, but taken up with increasing amplitude by the Federal German state. This is comparable with the changed narrative and regime in Taiwan, precondition for acknowledging the White Terror, a human injustice on a very much smaller scale. I use the idea of 'contexts of redemption' to describe this precondition. They are contexts created by world politics, in which world powers are engaged in the creation of new nations. Issues of international justice and the precedent of an international, cosmopolitan court of justice to try war criminals soon became enveloped in the ideological and military confrontation of the Cold War. In Germany for some historians this became a way of avoiding the centrality of Nazi annihilation of Jews and Gypsies, and in school history the derogatory description of the former East Germany was a similar deflecting issue. At the same time, guilt for the programme of annihilation and enslavement has been amply acknowledged. This mix of guilt, shame and deflection is examined. The prevalence of victimhood as the basis for nationalism is regretted and questioned.

Introduction

When Shih Fang-long and I were in Taipei pursuing our research on the Luku Incident, we spent some time with the person in charge of the White Terror Compensation Fund, who organized financial and ceremonial reparation for its victims. At one point we went to lunch with him. I had told him about the whole comparative project of which the Luku Incident was one third; the other parts concerned the Mainland Great Leap famine and the German (Nazi) Third Reich. On the way to lunch he asked how compensation and acknowledgment were handled in Germany. What I am going to present now is by way of an extended answer. At the time, the great difference upon which I dwelt and in which he was interested, was that in Germany some of the perpetrators were tried, whereas in

Taiwan none were. I could also have commented that the compensation paid out was incomparably larger in Germany. This reflects the difference in scale of the state violence for which reparations were made, but it also reflects the fact that in Taiwan compensation was a one-off payment, whereas reparation to the descendants of killed Jews and to the Jews forced to flee the Nazi programme of murdering Jews were continuing payments, like a pension, until they died.

Most of the victims of the White Terror were compensated for gaol sentences; relatively few (in what was of course a much smaller number of victims in the first place) were executed. The nature as well as the scale of state terror called 'the White Terror' was altogether different than that of the Nazis. But the contrasts may bear some points of significant difference or some concepts for thinking about them both.

The Scale of State Violence: War And Holocaust

The largest single incident of the White Terror, the one in Luku, was devastating in Luku, but to have an idea of the devastation brought about by the Nazi leadership of Germany taking the country into a war of conquest of its neighbours, let alone the attempted annihilation of Europe's Jews and Gypsies, you would have to multiply Luku into every part of Taiwan, and that is just thinking about the devastation of Germany, not the devastations wrought by the invasions and occupations of Europe by the Nazi-led armed forces.

Another point of contrast is that the Luku Incident was an event in a continuation in Taiwan of a civil war, between the Guomindang and the Chinese Communist Party, whereas the war in Germany was a Nazi war of aggression, eventually opposed by allied forces who fought against the Nazi axis. They did so as an act of justice in at least two senses. One was that of honouring a treaty with Poland, signed by Britain and France, in case of invasion to come to the others' aid. Until his invasion of Poland, Hitler's war of expansion was to some extent justified by the unjust restrictions put upon Germany by the Treaty of Versailles that settled the armistice with which the First World War had ended. Even his annexation of large parts of Czechoslovakia that were German speaking could have been justified. But the Nazi invasion of Poland was blatantly not about restoring the injustices of the Treaty of Versailles that ended the First World War. It was to remove most of the Polish people into various forms of forced labour and take their land for Germans to farm or build on (Evans 2008: 11). Continued conquest of Eastern Europe and the USSR (Ukraine, Belorussia, and Russia) had the same rationale. So a second sense of a just war could be invoked; it was a war to free the people of Poland and then the other countries enslaved by German occupation and rule.

Justice opposed Destiny. The promise of the Nazi leadership was that Germany's racial destiny of greatness and prosperity would now be fulfilled. Any doubts were forbidden or, in the last two years of the war, when German cities were being fire-bombed and the German forces were thrust back onto battle lines within Germany, Goering and Hitler said that if the German people were defeated, they did not deserve their destiny.

The Chinese civil war was fought on both sides with a strong sense of justification, each claiming to represent the future of China, each portraying the other side as betrayers of that future. They were civilizational claims, as well as

being nationalist, with the Communist claim coming closest to the anti-Nazi allies' claim to represent a world justice, but by 1952 each side had become separated in another ideological divide that became known as the Cold War between two kinds of political economy and their ideologies of Freedom and of Socialism. State violence, such as that committed in Taiwan, and that committed by the Nazis and their opponent states, is not just a matter of geopolitics, nor reducible to interests in a political economy or in reasons of state. It is also irreducibly ideological: Hitler's intention to exterminate the Jews of Europe cannot be reduced to a reason of state, nor can Jiang Jieshi's claim to represent Chinese civilization and its modern fate, even though many of their officials and they themselves also sought to promote themselves and aggrandize their leadership. In terms of world history, the White Terror was a product of the Cold War that followed and created quite different conditions to the different kinds of fascism and wars against fascism that characterized the twentieth century until the Cold War. The Cold War's actual wars became subject to the growing body of precedents for a system of what has been called cosmopolitan justice, international courts trying crimes against humanity, the earliest precedents being precisely those created in the improvised court in Nuremburg that set up justice against the Nazi pursuit of racial destiny. Incidentally, Nuremburg was well chosen since it was there that the Nazi regime devised the anti-Semitic laws of racial exclusion implemented in 1934. But here there is a contrast to note. None of the leaders of the main powers in the Cold War was ever brought before a court of justice. The Cold War was, by contrast, like a global civil war, neither side able to claim universal justice against the other.

Justice Imposed: Germany's Defeat and Occupation

I move now to the complete change brought about by the defeat and occupation of Germany, a long process continuing now, something to compare with the change brought about by the ending of military and Guomindang rule in Taiwan from 1987 onwards. This will take me from world history and the acts of state violence committed in it down to the much more intimate and personal responses to these acts and their transmission in the changed political regimes of Germany and Taiwan.

Concentration camp guards had forced the nearly dead inmates to pile the dead into open pits, now some of the guards were forced to bury them properly. At the top of the hierarchy, some Nazi leaders were tried in Nuremburg for the newly minted crime of genocide. The allies also enforced a complete change of school curricula. Under Hitler history was a triumphant arrival at what he called a Third Reich that would last a thousand years, a triumph of destiny. This was changed to a completely new trajectory of two kinds of democracy – socialist in the Russian zone of a victory over capitalism responsible for fascism, without accepting any responsibility for the Nazi past, plural democracy in the American, British and French zones, a history that had to acknowledge its Nazi past.

How did the German survivors of the war, the soldiers and the far more numerous women and children, many of whom had fled west from the advancing Russian army and were refugees in the devastated cities, respond to this victory of justice over destiny?

Two of the most notable general responses were silence and victimhood. Silence about what was before their eyes, the devastation that was material witness to the horrors of fire and the stink of buried bodies, a silence that remained until very recently, and so was not simply the result of a preoccupation with basic survival. It became a frantic energy of clearing the rubble into piles from which to salvage building materials and rebuild the cities, an energy that produced the German economic miracle. Victimhood could with justice be claimed by all. But non-Jewish, non-Gypsy Germans were victims of a regime that many had supported and from which most had benefited. It was also a victimhood that was professed as a way of denying responsibility for the disappearance of Jews and Gypsies and the deaths in forced labour of Slav peoples, from whose work and expropriated property so many had benefited.

Reconstruction, with the help of the US Marshall Plan, required the continuance of the main economic corporations and the state and legislative organizations, including ex-Nazi judges. Many Nazis remained in Germany. So it is of interest to learn how the following two generations descended from these Nazis saw their parents and grandparents.

Welzer and the other authors (2002) of *Opa War Kein Nazi (Grandpa was no Nazi)* conducted 142 interviews in 40 families, a snowball sample, done between 1997 and 2000. From these interviews they isolated 2535 stories and classified them (2002: 11). Here are two of their conclusions:

In our view, our most important finding is that the child and grandchild generations of German families show a strong tendency to stylize their parental and grandparental generations as heroes of everyday resistance... Another central element of the stories of the Third Reich handed down is the conviction that the Germans were victims – victims of war, rape, being prisoners of war (*Kriegsgefangenschaft*), scarcity and destitution (*Mangel und Not*). (Welzer *et al* 2002: 16)

They conclude that victimhood is also a displacement, a way of avoiding war guilt. That was already the prime response of Germans immediately after defeat. It is also true and beyond doubt that millions did suffer dreadful hardship in the firebombings, battles, refugee trains, treks and ships away from the advancing Russian front. Nevertheless, one of the most interesting ideas of *Opa War Kein Nazi* is that the transmission of Third Reich experience works in a framework of exchange or *transposition (Wechselrahmen)*, transposing to Germans the German atrocity of victimization of Jews. They point out the same had happened immediately after the war, when the icon of skeletal figures behind barbed wire was used to portray German prisoners of war (Welzer *et al* 2002: 91). A similar transposition occurs in stories of German prisoners of war and refugees transported in that other icon of the Holocaust, cattle-wagons.

Another of their findings is that the younger generations seek ways of retaining a good relationship with parents and grandparents, diminishing the possibility of interrogating their elders, by sympathizing with the fact learned at school that they must have been terrified of the Nazi comradeship and then of the 'Russians' (Welzer *et al* 2002: 88). Further, they find that the younger generation edit out even those things that parents and grandparents say about their being complicit

witnesses of the killing of Russians and Jews, telling only preferred stories of their protecting Jews or of their being forced to join the SS or the SA, the more specifically Nazi Party armed forces.

This is just one of a very large number of different kinds of investigation conducted in Germany by German scholars about the bearing of responsibility for the Nazi regime.

Has there been any equivalent in Taiwan, for instance of interviews with Guomindang police and prison guards and government officials from the White Terror period, and their children?

The Federal German State

State acceptance of responsibility came about through international relations, not through a political movement. The process of remembering the Nazi annihilation of Jews had already started with the British and other occupation forces making perpetrators face the sights of the camps. Then, from 1951 Konrad Adenauer as Chancellor, who employed as his state secretary a lawyer who had contributed a legal commentary for the implementation of the Nuremburg Racial Laws under the Nazi regime, committed the German state to reconciliation with the state of Israel and with Jews throughout the world, as an act less of moral compunction than of *realpolitik* in Germany's interests (Fulbrook 1999: 61, 66). He committed the German state financially to compensate the state of Israel and eventually with regular remittances to compensate identified Jewish survivors of Nazi persecution wherever they now lived.

Adenauer's self-interested agreement to compensate then began to expand into other acknowledgments of the Nazi annihilation of Jews. After the Nuremburg trials of Nazi war criminals by allied international judges and prosecutors in 1945, the first *German* trials of Nazi war criminals began in 1958. These trials continued in various West German cities culminating in the Auschwitz trial in Frankfurt, December 1963-August 1965, which coincided with the trial in Jerusalem of Adolf Eichmann, the main administrator of the final 'solution' to the Jewish problem, including the rounding up of mixed-race Jews in 1944. As Mary Fulbrook comments, the sentences in the German courts were extraordinarily mild but the facts had been put before the German public in ways more home-grown and forcefully effective than what the Allied occupiers forced upon ex-Nazi military and government personnel in the months after their defeat. The Frankfurt Auschwitz trial may well have sparked off the questioning of the older generation in the post-war generation that began in the late sixties (1999: 67-95).

Many among the generation that became university students in the late 1960s and the 1970s made it their political duty to investigate the guilt of the senior generation. But this was still a minority activity, the fervour of which was against the backdrop of at best partial acknowledgement. In April 1985 the visit of reconciliation, as it was called, by US President Reagan and West German Chancellor Kohl to the Bitburg cemetery that included not just regular soldiers but also the dead of the SS (Secret State) battalions who had been made responsible for the final annihilation of Jews, became a prime trigger for vigorous and tense demonstrations and for debate about victimhood among German historians and politicians. The debate among historians was set alight by the comparison of Nazi

atrocities with previous Stalinist atrocities – the deportation and starvation of millions of those labelled rich peasants and purges of thousands suspected of plotting against Stalin. It was not just an analogy. Some German historians treated it as a partial justification: repeating the Nazi claim to have been a bulwark against Bolshevism, but now in the matured world division of the Cold War on the side of Freedom against Communism.

Against this, the guilt of perpetrating the atrocities against Jews was made ever more evident and substantial in the form of memorials for the victims of the Holocaust and Jewish museums recalling the communities of Jews that had been eliminated. They reinforce what has long been part of state schools' history curricula. It is compulsory to teach about the Nazi period: Hitler's rise to power, the establishment of his dictatorship, its persecution of political opponents, its racial elimination policies, the reticence and opposition of German citizens, the instigation of world war, and the suffering of the German population as a result. These are topics for history classes in high school. It is a curriculum of facing up to the Nazi past but also of treating it as a regime both of and against the German people, a people pictured as reticent at worst, resisting at best.

German textbooks now are de-nationalized. They stress the division of Germany in the Cold War, the place of Germany in a European Union and its unification within that Union. The memoirs, collections of witness testimonies, museums, and television and radio programmes available to students are various and numerous, many of them recommended in school textbooks. A new history and a new Europe is a contextual redemption, the provision of a new context for a new history born of past suffering, and the displacement of guilt and shame.

On tours of Berlin, the tour guide refers to the Nazi Period as 'the Second World War', as if she were non-German¹. Defeat and occupation were suffered as guilt and as shame. Now some of the young seek simply to disown it. Other young Berliners openly acknowledge guilt, without claims of victimhood. They express shame about their nationality by preferring to identify themselves with the part of Germany in which they were brought up, rather than with the whole country. So there is an interesting amalgam of acknowledgment and avoidance at the same time in Germany.

The New Jewish Community Organizations: Clear and Unambiguous Victims

Watchfulness against anti-Semitism, keeping records of incidents and drawing them, especially politicians' anti-Semitism, to the attention of the Federal government is a major function of the Federation of Jewish Communities. It and the municipal Jewish Communities themselves are semi-state representative organizations. Jewish populations have grown, largely by immigration from the USSR/Russia. This is part of the reminder of the *shoah* (catastrophe), which is the preferred Hebrew name for what elsewhere is now called the Holocaust. Every year, in the Fasanen-street synagogue of the Berlin Community (Gemeinde), the chosen anniversary of this reminder, the Day of Remembrance for the Shoah, includes the reading of every name of Berlin Jewry driven to death or gassed in the camps, 55,696 names taking 36 hours to read out, in which politicians in the local

¹ Thanks to Ursula Howard for this information.

and central government feel obliged to take part. It also upholds a standard of loyalty to the state of Israel, the longed-for security of a homeland for Jews. A huge white banner is hung across the front of the Berlin Community synagogue, as a fixture, on which was written in large black letters 'Berliner Juden für Israel' (Berlin Jews for Israel).

Israel is another contextual redemption, to add to the European Union. Israel redeems Jewry from the long history of European Christian scapegoating and modern anti-Semitism. It is the prime example of a state built on righteous victimhood, built as one among the world's nationalisms by a Zionism that was then overdetermined by the Holocaust after the defeat of the Nazis as the one safe place for Jews in the world, built by Jewish self-help and the aid of the USA, which was also the source of the main financial aid for the reconstruction of Europe and of Germany in particular. The European allies and the USA redeem the guilt and shame of the Holocaust by the creation and support of Israel.

It could be said that the new histories and the recognition of the White Terror as a crime against humanity, including the apologies offered for it by the Guomindang, including its current leader, is a contextual redemption of the same party's guilt. But the context is a new kind of nationalism, of Taiwan as a distinctive Chinese state, a multi-party democracy.

Conclusion

Recognition of responsibility for crimes against humanity requires a turning of the past into a past with which the present has broken. The state that recognizes responsibility is never the same state that was responsible, despite some continuities with it. It must already have undergone a transformation and its justifying history, in its schools and memorials. It is already part of a new narrative of itself and the people it represents.

No acknowledgment can be 'adequate' to such atrocity, to those who have lived through it. But no state has done more to acknowledge its responsibility for the crime.

No state has as abundantly as has the German Federal State accepted and made sure that responsibility for such crimes is known to its population.

The Nazis represented the German people as a race victimized by an unjust Treaty and a conspiracy of Jews and Bolsheviks. Victimhood is the stance that seeks acknowledgment, and realization in emancipation that can be described in many ways as just, though in the case of the Nazis it was described rather in terms of destiny than of justice. In the new history of a Germany to be reconstructed eventually as a powerhouse of a unified European economy, victimhood has remained a claim to recognition that Germans did suffer – and that claim is both just and a displacement of shame and guilt for being beneficiaries and bystanders if not perpetrators of the worst atrocities on the largest scale that the world has ever known.

Is it possible to accept and or assign responsibility without taking the position of a claimant when every nationalism poses itself as an emancipation from victimhood?

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Environmental Justice in China's Urban Decision-Making

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Abstract

Environmental decision-making is a field where justice claims are made and justice discourse articulated. This article examines and assesses the notion of environmental justice in China. It begins by reviewing literature on the dimensions of environmental injustice claims, considering both academic discussions and articulations by environmental justice movements. The paper then assesses the dimensions of recognition, participation, and procedural justice in China's environmental decision-making, treating them as processes and sites through which claims of injustice are generated. The case of Beijing inhabitants mobilising against an incineration plant planned for the Liulitun area is described and analysed to illustrate the justice discourse developed in the environmental decision-making process, which saw a dynamic emerge between stakeholders who included local inhabitants, the media, and different government departments. The article concludes with an outline of the main dimensions of environmental injustice in China, noting their causes and implications for China's politics.

Introduction

China, a country developing with a tremendous rapidity, is greatly involved in the world economy and is strongly affected by globalization. The birth of capitalism in China has created a drastic imbalance of wealth distribution, widened the gap between rich and poor, and caused serious environmental degradation and resource depletion. Beyond damage to the natural environment, there has been substantial impact on the social and economic welfare of the Chinese, resulting in public health problems, forced resettlement, and social unrest.

Alerted by the fact that environmental problems have formed a bottleneck for sound socio-economic development, the Chinese Party state has initiated reform of its environmental governance. One of the main measures advocated by the Communist Party is to expand mechanisms for political participation in policy-making. In 2007, the Seventeenth National Congress of the Communist Party of China noted that the public is to be consulted on policies that have significant impact on their interests. Other measures include promoting government accountability, improving transparency and disclosing government information to the public.

Environmental policies in China have been questioned and challenged by Chinese citizens in recent years. The public has gained awareness of its legal rights and has shown enthusiasm for articulating opposition to unjust treatment by government officials on environmental protection matters, while an increasing number of lawsuits are filed against governmental environmental protection agencies: the first ten months of 2009 saw as many Environmental Administrative Reconsideration cases as the total number for 1997-2007.¹ A majority of these suits have resulted from cross-sector decision-making, and many are concerned with land, health threats, urban planning and estate exploration (Vice Minister for Environmental Protection Yue Pan, quoted in *China Environmental News* 2009).

During the same period, China has also witnessed the burgeoning of civil society, characterized by a rising number of associations in an expanding public space. There has been a veritable explosion of non-governmental organizations (NGOs) at both national and local levels, estimated to number around 354,000 (*Xinhua* 2007). These range from charities to scientific associations, trade and business associations, cultural groups, professional societies and youth groups, with environmental NGOs being the most active in the political arena. The expansion of public space is also illustrated by the growing autonomy that media and the internet enjoy in China. Throughout the last decade, more and more media have gained growing independence from the Party state. Sullivan and Xie's examination of environmental networks in cyberspace has shown that the internet has had a significant influence on the evolution of environmental activism and on the potential emergence of social movements in China (Sullivan and Xie 2009).

This article discusses the notion of environmental justice in China. By examining discourses raised in environmental policy-making in China, it explores the processes and causes that produce injustice. The case of Beijing inhabitants in opposition to an incineration plant in Liulitun is described and analysed in terms of dynamic interactions among stakeholders with different interests.

The Concept of Environmental Policy-Making

Environmental decision-making is defined as 'a varied search for understandings of society to facilitate meaningful and legitimate political actions, agreed upon in mutual interaction, to improve our collective quality of life' (Hajer 2003: 191). This definition indicates that environmental policy-making is a dynamic process that may generate a distinct set of action forms with different outcomes (Corbera *et al.* 2007), and that this process is likely to cause tension and conflict. Environmental problems to be resolved are often scientifically complex and uncertain (Jordan 2001), making environmental decision-making worth examination for the environmental injustice that it may produce.

¹ 'The Measures for Environmental Administrative Reconsideration and Litigation' (2006) is a major legal document for the public to defend their environmental interests against government.

Notions of environmental injustice have been developed both in academia and in the environmental movement. Four main concerns have been raised: those of *distribution*, *recognition*, *participation*, and *procedure*.

The significance of *distribution* has dominated justice theory and thinking for a long time. Derived from Marxism, justice is found to be rooted in systems of production (Dobson 1998), which produces institutional classism and racism and market imperatives. These are the causes of inequality in the distribution of environmental hazards and their impacts. Distributional injustice is therefore understood as the result of socio-spatial patterning of the environment, which produces outcomes and impacts on health and well-being. This understanding of inequalities tends simply to reduce injustice to disproportionate proximity or unequal spatial patterning (Walker 2009). It ignores the geographical relations that are intertwined with socio-spatial patterning, and how other forms and scales of such patterning can also contribute to environmental vulnerability or well-being.

This leads to a consideration of *recognition*. Schlosberg (2004) argues that recognition and/or respect are inherent preconditions for distributive justice. In Rawls' liberal justice theory, the equality of persons is taken to mean equal respect for all citizens, and so recognition refers to identifying or respecting group differences, including different social characteristics of class, ethnicity, cultural and institutional exclusion, or experience of prior injustice by social oppression (Fraser 1997). This aspect of justice has been widely strengthened in the US environmental justice movement, in which various racial and other groups articulate injustice discourses by claiming that their identities have not been recognized. (Harvey 1996; Brosius 1997; Fan 2006). Recognition is also related to accepting one's rights to possess and express legitimate knowledge about environmental issues. Citizens, as carriers of their own social commitments and assumptions, have begun to develop environmental knowledge (Beck 1992). Broader questions of public distrust of institutional science arise, as the public becomes increasingly informed, environmentally aware, and sensitive to the partiality of expert-political information (Beck 1992; Wynne 1994; Bickerstaff and Walker 2005).

Environmental justice therefore also encompasses *participation*. From a pluralist perspective, participation stresses the actual behaviour and actions that are associated with justice articulation. Environmental movements have expressed demands for political access, the right to a voice, to be heard and to participate, suggesting that community-based democratic participation needs to be established in the construction and on-going process of governing institutions (Schlosberg 1999; 2004). However, these democratic values do not necessarily apply universally, particularly in the Global South. It remains questionable whether all social groups have access and are competent to articulate and practise environmental justice activism (Williams and Mawdsley 2006; Featherstone 2003).

Justice as *procedure* refers to the 'justice' or 'appropriateness' of policy formation (Zavestoski, *et al.* 2006; Walker 2009). This perspective emphasizes the process of environmental policies, and highlights that a claim of injustice may be made if processes are not open, transparent or fairly conducted, or if the public is not treated with respect by authorities or by other participants (Tyler

and Lind 1992; Maguire and Lind 2003). This means giving consideration to questions such as how 'those who are most affected' should be defined. Justice as procedure is also related to contexts where the rules and practices of decisions are made and constructed socially and culturally. The 'rightfulness' and 'legitimacy' of a decision refers to the extent to which policy decisions are accepted by individuals/communities (Adger *et al.* 2003), as divergent beliefs exist about what constitutes a legitimate political act. Relevant literature has focused on the prescriptions for how procedural environmental justice should be achieved (Lake 1996), or what constitutes fairness in decision-making (Hunold and Young 1998). These aspects of procedural justice are significant for solving environmental problems in which the political logic of state or regions is intertwined with the complexities of geographical spatial patterning (Walker 2009).

These notions of justice are closely related, and this is particularly so for distribution, recognition and participation (Scholsberg 2004). As discussed above, the notion of distribution needs clarification and can be regarded as contained in recognition. While the notions of recognition and participation focus on agents and actions that are involved in policy-making, procedure stresses the dynamic processes at work. Therefore, these are the three notions that are here adopted in order to examine environmental justice in China's policy-making.

Environmental Policy-Making in China

Although the Party state in China has a monopoly rule over environmental governance, formal institutions as well as informal actors are involved in environmental policy-making. This section assesses the potential injustice that is generated in China's environmental policy-making. It first examines formal institutions and their compliance with policy-making laws, with an emphasis on the justness and fairness in these processes. It then examines the effectiveness of participation in policy-making, which occurs both directly through filing environmental complaints and indirectly through the NPC and CPPCC. Third, to illustrate how recognition as justice is realised in China's environmental policy-making, it explores GONGOs and NGOs as agents representing and articulating public environmental interests.

Environmental policy-making and legitimacy

The Chinese state monopolizes environmental governance, and environmental protection organizations are located in the state's administrative structure. They are not independent and do not possess authority over other functional units at different administrative levels. This framework suits coordination within one industrial sector, but works poorly when cross-sectoral interests are combined (Zheng 2001; Ma and Ortolano 2000), especially when the Chinese Communist Party (CCP) is involved (Jahiel 1998).

As a consequence of this environmental governance structure, the legitimacy of environmental policies has become increasingly challenged, especially those that are issued at local level. Local environmental governance is seriously impeded by a lack of transparency, rule of law, and official accountability (van

Rooij 2006; Lo and Leung 2000; Economy 2009). The Environmental Impact Assessment Law is enforced weakly and violated (C. Wang 2007); environmental impact assessments are often manipulated, and sometimes industries can get help from local environmental officials, or at least secure their non-interference (Bernard, Wall, and Wang 2006). Large construction projects are approved at the local government level, despite a potentially substantial environmental impact that ought to be approved by higher authorities.² The central authorities are well aware of these problems and have taken measures to counterbalance local authorities' power, such as sending a special supervision team from the State Council to supervise local environmental management (Pan Yue, quoted in *Xinhua* 2007). However, many environmentally-significant projects that should be halted are allowed to continue, even after warnings from central authorities. According to studies of China's urban development, local authorities have developed into entrepreneurial states which aim to maximize profits and obtain development gains from the substantial power they have over projects (He and Wu 2005; Zhang 2002; Zhu 1999).

Legal framework on environmental governance

In the past 20 years, an environmental law framework has been established in China, with well over 100 environmental laws and hundreds of regulations. As prescribed by a series of legal documents, including the Environmental Impact Assessment Act (EIA) and the newly-promulgated Environmental Strategic Planning Law,³ individual citizens are entitled to get involved in environmental decision-making through public consultation. In the case of urban water pricing reform, it has been argued that through the organization of public hearings, Chinese citizens have increased opportunities to be formally involved in environmental governance (Zhong and Mol 2008). Moreover, the public is also empowered to supervise environmental quality and to enforce government policy by accessing environmental information. According to the 'Measures on Open Environmental Information for Trial Implementation, adopted by the Ministry of Environmental Protection' (MEP) in 2007, citizens are entitled to request information from environmental protection agencies, and a greater

² According to the 'Notification on Strengthening Construction Projects' Environmental Impact Assessment Approval through Administrative Ranking' (2004), MEP approval of the EIA is required for projects that have an investment of US\$ 75 million or more; also, specific descriptions are required on the nature of construction projects. The 'Strategic Environmental Impact Assessment' (2009) replaced the 'Regulation on Environmental Impact Assessment through Administrative Ranking' (2002-2009) and provides more specific requirements on what type of projects should be sanctioned by central authorities. These three regulations were promulgated by the Ministry of Environmental Protection.

³ These are complemented by the 'Environmental Protection Administrative Licensing Hearings Provisional Measures' (2004) and the 'Provisional Measures for Public Participation in Environmental Impact Assessment' (2006).

disclosure of information is required both from governmental bodies and private enterprises.

Citizens are also entitled to challenge environmental protection agencies' policy decisions. The Ministry of Environmental Protection established the 'Measures on Environmental Administrative Reconsideration' (MEAR) in 2008 to curb unjust treatment of citizens by government officials on environmental protection matters.⁴ This law expands the legal framework of the Administrative Reconsideration Law⁵ and the 'Regulations for the Implementation of Administrative Reconsideration Law',⁶ providing guidance on the administrative reconsideration work at MEP and its subordinate environmental protection agencies. In comparison with previous legal precedents and procedures on administration litigation, the law now covers a broader range of areas upon which citizens can seek judicial relief against unsatisfactory administrative decisions. According to central authorities, these laws are appropriate measures that facilitate government agencies to review and correct problems (*Xinhua* 2006). Recently, a few cases of environmental public interest litigation have taken place in China, indicating the promise of an emerging revision of litigation laws, which are expected to advance environmental enforcement and the rule of law (Standaert 2009). Nevertheless, the current law gives only very simple stipulations for realizing decisions made following administrative reconsideration, and guaranteeing enforcement of decisions remains a problem (Yang 2002; Ma 2005).

In sum, these legal documents have no further articles specifying how to realize public participation in decision-making, and they therefore limit the public's access to the policy process (Buckley 2006). They permit citizens to challenge only an unsatisfactory decision that has already been made, instead of allowing their participation in policy formation. Moreover, the ability of these laws to promote accountable administrative conduct has been limited by the lack of an independent judiciary in China (see Palmer 2006).

Participation in Environmental Policy-Making

Environmental complaints

Currently, the environmental policy-making system in China is designed so that the public can resolve environmental pollution problems through the dispute resolution system and the environmental complaint system. This serves as an institutional channel through which the public's grievances can be addressed,

⁴ This law replaces the 'Measures for Environmental Administrative Reconsideration' and the 'Response to Administrative Lawsuits' promulgated by the State Environmental Protection Administration in December 2006.

⁵ The law of the People's Republic of China on Administrative Reconsideration was adopted by the Standing Committee of the National People's Congress, 29 April 1999, and was effective from 1 December 1999.

⁶ 'Regulations for the Implementation of the Law of the People's Republic of China on Administrative Reconsideration' was promulgated by the State Council, 29 May 2007, and was effective from 1 August 2007.

and court judgments can be challenged by filing complaints (*xinfang*) about environmental problems to Environmental Protection Bureaus. The same mechanism is used to resolve other civic disputes.

However, the institutional design impedes the effective recognition of citizens' interests and demands. The special offices established to receive filed complaints do not have the authority to conduct investigations or make decisions. They pass their files to government administrative agencies of the same rank or inferior to them for a response. Lacking an independent and competent judiciary, government bodies are less responsive to citizen complaints (van Rooij 2010); they are either ineffective at accepting citizens' demands or they even violate laws. It is suggested that citizens have lost trust in the complaints system and that this is why the number of complaints filed has been falling in recent years (Feng 2007). The complaints system is therefore futile for articulating environmental concerns (Bretelle 2003), and seems rather to be a way for the state to exert social control on citizens who disagree with political authorities (see Palmer 2006).

NPC and CPPCC

China's primary legislative body, the NPC (almost 3,000 members) and its many different local and regional branches, represents one institutional arrangement for public participation. It aims to realize citizens' rights by investigating, listening to problems, providing legal suggestions and supervising legal implementation. The Chinese People's Political Consultative Conference (CPPCC) is another important organ in the institutional structure, providing the masses with the possibility of participating in political consultation. Its role and powers are somewhat analogous to an advisory legislative upper house, and it functions as an important forum for promoting socialist democracy in the Chinese political system.⁷

The NPC and CPPCC are crucial institutional arrangements for articulating and coordinating public interests (Cho 2006). This is illustrated both by organizational development and by the power gained from independently influencing policies. One important indicator is the establishment of the Environmental Protection and Resource Conservation Committee (EPRCC) in 1993, as a Standing Committee of the NPC, among nine other standing committees. In recent years, the EPRCC has also been established at all territorial levels across the country. In 1998, the CPPCC in turn established the Population and Resource Protection Committee as a standing committee. According to the PRC constitution, Local People's Congresses (LPC) and their respective standing committees are authorized to adopt local regulations (*difang fagui*), provided these regulations are in accordance with superior legislation and regulations. Legally, LPCs enjoy extensive powers of approval and control over government activities, in particular where finances are concerned, although in reality their power is usually symbolic and the NPC has seldom upheld its

⁷ The CPPCC has not been formally included in the PRC Constitution. However, there have been occasional proposals to formalize this role.

oversight power; real power has been asserted only on occasion (Pei 2006; Cabestan 2006).

Another problem inherent with the political bodies representing the public is that environmental issues do not seem to be their major concern. According to statistics provided by Friends of Nature, a national ENGO in China, at the CPPCC's 2008 conference only 2.1 per cent of a total 4,526 reports were related to the issues of protecting the environment and natural resources (Friends of Nature 2009). In comparison with 1,864 reports which were concerned with economic development, the mere 95 environmental reports indicate that issues relating to the public's environmental concerns are not yet the main focus of political bodies in China.

Recognition in Environmental Policy-Making

GONGOs

'Government Organized Non-Governmental Organization' is a special category of NGO which has close relations to governmental institutions while not being part of the government. Traditional GONGOs were established by the Chinese Communist Party as mass organizations within the mainstream political structure of the Communist Party: for instance, the Trade Union, the Peasants' Union, the Federation of Industry and Commerce, the China Communist Youth League (CCYL), and the All China Women's Federation. They serve the political output system by means of their policy enforcement and monitoring activities. In environmental protection, new GONGOs have been established, such as the Chinese Renewable Energy Industries Association (CREIA, established in 2000) and the All-China Environmental Federation (ACEF, established in 2005). In the past two decades, GONGOs have acquired a certain level of independence and have begun to play a leading role in setting professional standards and norms in the policy decision-making process (Wu 2002; Zhang 2003).

As GONGOs have acquired a greater independence, they have also begun to articulate the public's environmental interests by cooperating with ENGOS (Wu 2002; Xie 2009). GONGOs bridge environmental groups with the government and become a platform for environmental activists to interact with political authorities (see Xie 2009). Through GONGOs, voluntary environmental groups can implement their projects by using administrative structures that GONGOs possess and strengthen the implementation of their programmes (Zhao 2004). Nevertheless, many GONGOs still function as administrative organs and act as the supervising institutions of voluntary environmental groups. They have not been acting proactively in empowering the public and challenging the ruling party and its legitimacy.

NGOs

The growth of environmental non-governmental organizations (NGOs) is one notable development in China's environmental governance. By October 2008, 3,539 environmental groups had been registered with the Ministry of Civil Affairs or its local bureaus (All-China Environmental Foundation 2008). As well as those

which have been registered, there are perhaps an equal number of unregistered environmental NGOs, including web-based organizations, grassroots ENGOS, or ENGOS registered as business organizations.⁸

Although lacking resources in organizational development, such as personnel, office facilities or funding, ENGOS have been active in raising the public's environmental awareness, supervising polluting enterprises and participating in environmental decision-making (Xie 2009; Yang 2005). In carrying out their activities, NGOs are entitled to participate in policy consultation, as prescribed in both the Environmental Impact Assessment Act (EIA) and the newly promulgated Environmental Strategic Planning Law. As well as this, personal connections have proven to be one way of coping with an undemocratic political system in accessing policy information and influencing policy processes (Xie 2009; Xie and Mol 2006). Moreover, Chinese ENGOS have also formed an alliance with the media. Whereas efforts at building public consensus through the media take a long time, the social impact can also be powerful (Yang 2005; Xie 2009).

In sum, there are very limited options through which citizens can articulate their concerns and be heard in environmental policy-making. Established political bodies such as the NPC and CPPCC and their local branches remain the major channels by which citizens collectively express their concerns. Under the monopoly of the Party state, ENGOS – as one form of institution to represent citizens' interests – have yet to be recognized by either the public or political authorities.

We can therefore conclude that procedure as justice is lacking in China's environmental policy-making. Recognition is relatively low in China's political system, with ineffective participation mechanisms available for individual citizens to get involved in policy formation processes. This explains why individual citizens increasingly choose to use direct action to produce pressure when their interests are violated (Feng 2007). In particular, demonstrations and protests are common in rural areas where formal institutions reflect weak participatory mechanisms.

The Environmental Justice Movement in China: the Case of the Anti-Liulitun Incineration Plant

Waste management in contemporary Chinese cities is increasingly challenged, with municipal waste (MW) being produced at an unprecedented speed. The metropolitan area of Beijing generates about 184,000 tonnes of MW each day, with an average increase of 8.42 per cent annually, similar to the global average, and the city's capacity to accommodate MW is increasingly declining. As 90 per cent of the current MW is buried, available land that can be used for burying MW rapidly reducing each year.

Since 2000, the Beijing Municipal Government has been discussing how to enlarge its MW accommodation. Most importantly, waste quantity reduction is to be achieved, and policy options are aimed at substantially reducing household

⁸ The survey undertaken by the All-China Environmental Foundation (2008) may have had difficulties reaching groups that are without formal legal status.

waste and increasing recycling. Supported by central government, two influential policy papers were promulgated with this in mind.⁹ In 2005 the Haidian district government announced plans to build a waste incineration plant next to the Liulitun landfill, with an investment of approximately 112.5 million US Dollars, with the capacity to incinerate 1,200 tonnes of rubbish per day. After the Beijing Environmental Protection Bureau (BEPB) approved the project's environmental impact assessment in November 2005, the construction of the plant was planned to start in March 2007 and completed before the start of the 2008 Beijing Olympic Games.

The decision to construct the waste incineration plant was greeted with strong opposition from residents who lived in the nearby estates of Yihe Shanzhuang (YSZ) and Baiwang Xincheng. These are commercial estates that only the middle-class can afford. YSZ is located west of the landfill, and at the shortest point only 1 km distant from it. Completed in the end of 2007, Baiwang Xincheng has a built area of 1.72 sq. km, housing approximately 27,000 residents. Also within the area, Muoli Garden (BMG) and Zhonghai Fenglian estate (ZFL) are both located south of the landfill. As homeowners in these well-built estates, the residents are mostly well-educated social elites, constituting civil servants, university lecturers, software engineers, and IT professionals whose organizations are located nearby. Together, the residents submitted petition letters and environmental administrative litigation, and developed a media consensus to defend their environmental interests.

Potential conflict exists between the Beijing government and the Ministry of Environmental Protection, which is in charge of responding to environmental administrative litigation. The Beijing Area and Land Planning Bureau approved the project and it was labelled as one of its major ecological projects. Inside the MEP, opinions on solutions to waste management are not coordinated. One group of high officials insists that the building of incineration plants should be a major solution to the pressing issue of waste management, while another group of MEP officials has reservations about this solution and had pressed for the Environmental Impact Assessment Law to be implemented so that the public can be consulted on the policy (Ministry of Environmental Protection 2007). Due to social leverage applied by the local residents, the MEP halted the project.

Social Mobilization

A collective consensus was formed among homeowners from YSZ, BMG and ZFL. They started by opposing the stench from the Liulitun Landfill; it filled the air and was suspected of causing health problems. Homeowners from YSZ, BMG and ZFL discussed their opinions and articulated criticism through discussion boards on housing websites.¹⁰ From the news, the residents learned

⁹ These are the *White Paper on Beijing Household Waste Management* and the document on *Beijing Municipal Planning for Solid Waste Management (2006-2010)*, available respectively from <http://www.bxsdl.com/upload/book/b2008040314264615.pdf> and from <http://www.beijing.gov.cn/zfzx/ghxx/sywgh/t705871.htm>.

¹⁰ The sites are substantial and have search functions. They are <http://house.focus.cn/msglist/1396> and <http://bj.bbs.house.sina.com.cn/forum-10888-1.html>.

of the government's decision about the incineration plant and were increasingly concerned about the health implications, especially the emission of carcinogenic dioxins. By using the online discussion boards, both online and offline connections were built. Inhabitants were organized against the incineration plant, with special action groups formed in BMG and ZFL to lead opposition activities with a distribution of labour and expertise.¹¹

The primary strategy was to lodge a complaint, drafted by professionals who had accumulated extensive scientific knowledge of carcinogenic dioxins from incineration systems. The complaint was well-supported by environmental legislation that regulates the construction of power generation from waste,¹² including reports of negative effects caused by incineration plants in other parts of China, and reports of cases of cancer induced by incinerations around the world. The complaint collected about 10,000 signatures and was submitted to the MEP, BEPB, Haidian District Government, and the Beijing Municipal Administration Commission. By post and through the internet, copies were sent to news agencies and government bodies in the Municipal and State governments.

Liulitun inhabitants also actively mobilized local resources. Through contacting representatives from Haidian People's Congress, they successfully put the issue on the political agenda of the Beijing People's Congress. Further, a representative on the Haidian CPPCC lives in the area, and so the issue was also brought to the agenda of this political body. Major companies in the area, such as Yongyou Software, were approached and sympathy was gained. As an important economic actor in the capital, Yongyou agreed to support residents' contacts with municipal officials to push for a solution.¹³

During the process of submitting complaints, residents become aware that their articulation through the complaint system was actually effective.¹⁴ Their frequent contacting of government agencies brought responses which strengthened their belief that legal measures could affect policy decisions. Together, 137 residents resorted to legal measures with requests for environmental administrative reconsideration submitted (with the help of a lawyer) to the MEP and to the Beijing Strategic Planning Commission.

To press the government for a fair response on the administrative reconsideration lawsuit, on Environment Day (5 June) about 1,000 organized

¹¹ Groups are set up with different focuses. The financial group is responsible for fundraising, public relations, and contacts the media, while the law group is in charge of examining issues relating to environmental law and other legal documents. A command centre coordinates all activities.

¹² This document cites a government document collectively issued by the MEP and National Development and Reform Commission in 2006, strengthening the principle that environmental impact assessments are to be conducted on biomass or waste generation projects. It forbids waste incinerator plants from being constructed in medium or large-sized cities. Further, it stipulates that these plants should not be located at locations where wind will blow the emissions into cities.

¹³ However, it did oppose the construction of the incineration plant.

¹⁴ This is the view expressed in an on-line journal by a residents' committee against the incinerator, and can be seen here: <http://lvsebaiwang.blshe.com/post/10360/367614>.

residents protested in front of the MEP office building. They expressed their opposition and concerns by displaying posters that read 'we refuse cancer', 'oppose incinerating garbage', and 'we want good health'. This collective action was informed by a Xiamen citizens' demonstration against a chemical factory a few days earlier,¹⁵ and it succeeded in having the MEP halt the construction.

Discourse Formation

Residents were not willing to accept projects that might have negative effects on them. They expressed and disseminated their opinions by posting articles on internet sites and discussion boards. The issue was incorporated in a national policy discussion after it was raised by Zhou Jinfeng, a Beijing representative in the CPPCC in March 2007, generating media attention and further frequent contact from the public. The residents' concerns gained support from a number of national media outlets. Public consensus was formed on three issues: the necessity of establishing public consultation; the public administration's accountability in environmental governance, and the extent to which the decision should be based on scientific grounds.

Public consultation and approval of policy

Inhabitants claimed that the process of public consultation required by the EIA was 'not fairly-conducted' and was 'lacking in justice'. According to the official environmental impact assessment report, project information was disclosed to the inhabitants and a public consultation meeting was conducted. In its public survey of 85 people, 71 per cent agreed to the construction, and a few resident representatives were sent on a trip to Shanghai to learn about the Hongqiao incineration plant there. However, in the environmental administration reconsideration document filed by resident representatives, it is pointed out that the conducted survey involved only 100 participants, out of a total of 11,000 local residents. The majority of local residents stated that they were not aware of the project until it was announced three months before construction was supposed to start. Together they demanded a 'fair, just and professional' consultation be conducted (Y. Wang 2007a).

A small number of residents who participated in the government's public hearing also complained that the government's information was misleading and false. They were told that 'waste incineration plants have no negative environmental impact', that 'incineration can generate electricity', and, most importantly, that a solution existed for reducing the smell from the dumps. Concerned by these objections, a few university students designed another public survey on opinions about the planned plant in 2007 and disseminated it through the internet. Four hundred residents voluntarily participated in this. Although the questionnaire was rather simple and brief in its design, 97.5 per cent of the interviewees believed that measures preventing pollution from the

¹⁵ On 1-2 June 2007, about 10,000 Xiamen citizens protested on the streets against a Paraxylene plant to be built in the city.

incineration plant would be 'unreliable' and hence 98 per cent opposed the planned waste incineration plant. Only 2 per cent showed no opposition.¹⁶

Public administration in environmental governance

A strong public consensus was formed on the accountability of the BEPB's approval of the project. Pressured by the public, the BEPB disclosed the project environmental impact assessment on the incineration project (the EIA report) and the official approval, neither of which had been publicized previously. The reliability of this report, however, was regarded as strongly suspect by inhabitants, scientists and the media. The report did not consider carefully the potential harm that would come with the incineration plant, nor the scientific evidence suggestive of this. The report was instead very positive, stating that during the incineration process almost no toxic effects are produced once the temperature and timing are controlled, and that controls would prevent pollution (Beijing Municipal Environmental Protection Bureau 2007). Strong opposition came from scientists and experts, who argued that current technology made it difficult to monitor and control toxic emissions. It was also noted that the report had neglected to account for the cooling process after incineration, when carcinogenic dioxins are most likely to be produced. Residents believed that such important information was being deliberately omitted to avoid opposition to the project.

There was also strong suspicion of the Beijing Municipal Research Institute of Environmental Protection (BMRIEP), which was responsible for conducting the environmental impact assessment on the project. The BMRIEP was accused of lacking impartiality and independence because of its working relationship with the BEPB. The media cited past reports on institutes that have close working relationships with EPBs to conduct environmental impact assessments, and stressed corruption cases among some staff. This indicates that the administrative accountability of government bodies cannot be guaranteed in environmental governance (Li and Wang 2007).

Additionally, the administration of the Haidian District government was suspected of lacking accountability. The Hong Kong media was the first to report that the decision to develop the Liulitun incineration plant had involved a corrupt political official, Liangluo Zhou, head of Haidian District government. He took part in the development of more than 51 per cent of the land area in Northern Haidian between 2002 and 2006, including the planning of the Liulitun incineration plant (21 *ShijiJingji Baodao* 2007).

Decision-making and its scientific basis

One major public consensus formed about this incident is that the government's policy is not developed on a sound scientific basis, and that the public's well-being might be threatened. The government was strongly condemned for its plans to build a highly risky incineration facility that may cause harm to

¹⁶ The discussion board site was again used to circulate the questionnaire, see <http://house.focus.cn/msgview/1396/97572386.html>.

residents. Inhabitants printed and hung on their residences slogans that read: 'we oppose the incineration plant in the name of all our families', 'we don't want to breathe toxic air', and 'we don't want to live in fear of cancer'.

The original intention of the policy was also explored. The media disclosed that the government gives a high preference to efficiency in waste management (Zhang 2007). Newspapers reported that Haidian district has been confronted with growing pressure over waste management. Liulitun landfill is the major waste management facility in the district, but the production of 2,500 tonnes of garbage produced daily goes far beyond its capacity of 1,500 tonnes. As the planning of waste management in Beijing requires each district to manage garbage in its own administrative area, the problem has to be solved by Haidian government alone.

Waste incineration is believed to be more effective in reducing the quantity of MW, while the electricity that is to be produced from the incineration process could be sold with considerable subsidies from the state, thereby balancing the high cost of building the plant. This answer was rejected by the residents and the media. They dismissed the Haidian government's claims to be accountable, and distrust grew. The historical origin of the debate was traced back to a decision made in 1995 to approve Liulitun Landfill. The environmental impact assessment of the project had led to objections from the BEPB, which indicated that 'the construction of [a] landfill is not appropriate because of its potential negative environmental impacts'. The BEPB believed that the project might contaminate groundwater and warned that 'no permanent facilities should be built within the distance of 500 metres to the landfill'. Haidian district, however, against the warnings of the BEPB, developed the surrounding area into residential estates which attracted many due to the area's beautiful geographical appearance. But it was soon claimed that the site was contaminating the groundwater and that this had led to health problems among local residents, including increasing cases of cancer (Liu 2007). Haidian district government and the BEPB were consequently accused of exposing the public to a degraded environment, and of showing no concern for mitigating the negative effects that the construction of a landfill would entail (*Sina.com.cn* 2007; *China Business Times* 2007).

The debate has also focused on the location of the incineration plant. According to Haidian district, Liulitun was chosen because of its proximity to the current landfill, which will 'lower transportation costs and make dumping the remnants to the landfill convenient'. However, local inhabitants showed a NIMBY ('not in my backyard') attitude in their opposition, refusing to have the incineration plant close to their homes, and stressing that 5,000 inhabitants live within 500 meters of the designated site. Additionally, inhabitants also emphasized that Liulitun houses the nation's top universities, software industrial parks and the country's astronaut training base. The building of an incineration plant would therefore affect the development of business and trade across Haidian and affect the 'hexie' ('harmony') of this area, because Baiwan Xincheng was 'planned as Haidian's largest residential area... and aimed at

providing good living conditions for professionals working in nearby science and technology parks'.¹⁷

Further, inhabitants also stressed Liulitun's geographical importance to the whole city of Beijing. Liulitun is described as being in a '*Shangfeng shangshui*' position in relation to the capital, from where the dominant wind would carry hazardous toxics in the air towards the whole city. Moreover, as Liulitun is very close to Miyun reservoir, which is Beijing's main source of drinking water, they concluded that the contamination of groundwater from incineration would endanger the water quality of all of Beijing's inhabitants. This argument about the importance of Liulitun for the whole of Beijing was adopted by Beijing representative Zhou, CPPCC representatives, and a number of media outlets. Liulitun is called a '*min'gan*' ('sensitive') location that would put Beijing's 9 million inhabitants at risk. Therefore, a consensus was formed on 'relocating' the planned incineration plant (see also Y. Wang 2007b; Zhang 2007).

This incident shows that a strong public consensus affected specific policy decisions. The MEP halted the project by acknowledging both the residents' opposition to the project location and the lack of public participation in the EIA process. Being the administration in charge of litigation, it is at its own discretion to make a decision on the future of the incineration plant. In February 2009, Haidian District government's annual report disclosed that it was resuming and speeding up construction of this project, and the MEP was once again involved in a campaign to ban the project.

Concluding Remarks

The anti-Liulitun incineration plant campaign led by local residents was a success. It shows that citizens have acquired a high level of awareness about their 'lawful rights' (O'Brien and Li 2006). The success of this campaign has significant implications. It enlightened Chinese citizens in other parts of the country about how to defend their interests when they are exposed to environmental risks and hazards, most apparent on the same issue of building incineration plants (*Nanfang Daily* 2009). The campaign also illustrates how urban citizens respond to the rapid growth of environmental problems of a metropolitan character (Badshah 1996; van der Heijden 1999).

Reflecting on notions of justice, this case shows that procedure, recognition, and participation are relevant aspects of environmental justice in relation to China. Among the three dimensions, procedural justice seems the most relevant. As is illustrated by this case study, as the state apparatus monopolizes environmental governance, procedural justice in relation to administration is crucial for gaining policy legitimacy. But with limited functional dispersal of power between the legislative, the executive and the judiciary, the administration is hardly accountable, generating claims of procedural injustice. One factor that is

¹⁷ The complaint was filed to a number of government departments, including the MEP and BEPB, as noted on a message to the webforum <http://bjmsg.focus.cn/msgview/1396/1/72368685.html>; the administrative litigation document has been posted on this site: http://blog.people.com.cn/blog/template/blog_template.html?log_id=1172558402774986&site_id=36753; See also *Sohu.com* (2007).

attributed to the growing demand for procedural justice is the Chinese government's improved transparency and information disclosure. The Chinese government has shown increasing willingness to adopt a scientific approach in making decisions. Scientific evidence is given close attention and form a basis for when policies are formed. Therefore, when scientific evidence is lacking, policies are perceived as unjust.

Recognition is an aspect that is often neglected in China's environmental policy-making. Mechanisms for taking account of various interests are largely ineffective. As indicated in this case, strong claims of injustice exist when different demands are not recognized. Not only formal institutions (Haidian People's Congress and Haidian CPPCC) are contacted, but also informal mechanisms (such as demonstrations and the creation of a public consensus) were adopted to articulate inhabitants' interests and objections. It should be noted, however, that informal institutions such as the media and internet coverage have also played an important role in strengthening inhabitants' demands to have their voices heard. This proves that despite China's political context, the mass media plays an active role in defining environmental issues and the risks to which individuals are exposed (Beck 1998). Another factor attributed to the successful mobilization of resources is that in this case those affected were mostly middle-class. This explains why urban environmental protests tend to be more effective than their rural counterparts, even if the latter go through the same formal mechanisms, including complaints and legal suits (see van Rooij 2006; Brettell 2003). Rural protests do not incorporate or rely on informal mechanisms, and the success of urban citizens shows how certain social groups are more capable of having their interests recognized. This shows how another form of injustice – related to recognition – can manifest in a context where huge social disparity exists (see Williams and Mawdsley 2006).

Without doubt, this insufficient recognition is closely linked to a low level of participation. Under the monopoly rule of the Party state, there are only very few channels for participation. Therefore, demand for participation is an equally important dimension of justice as recognition, and requests for participation also widely exist in other types of policy fields. However, the growing middle class has become increasingly defensive over their interests, especially as related to environmental issues that might have an immediate impact on their daily life. As indicated by this case, those who have sufficient legal knowledge or resources have begun to utilize legal measures against government decisions. They are not simply satisfied by being recognized, but ultimately press for involvement in decision-making processes. This shows the formation of a steadily growing force demanding democracy, with environmental governance as its experimental field.

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Book Reviews

The Idea of Justice by Amartya Sen. London: Allen Lane, 2009. 468 pp., £25.00 hardback, 978-1-846-14147-8

It may be far too obvious a beginning to start with thinking about the title of Amartya Sen's dense but highly readable and thought-provoking book on justice. Yet it is through reading and re-reading the title that the reader is challenged to think about whether we are being delivered the definitive idea of justice. I propose three readings of the title that lets us make sense of Sen's account of justice as a fundamental political and social concept that defines our world. The three accounts that emerge out of these readings form the distinct but interrelated parts of the book. The first reading is a question about the idea of justice. What follows is not an argument about the 'nature of perfect justice' but about 'the identification of redressable injustice'. The second reading questions the validity of Sen proposing the idea of justice. In his work we find that Sen argues for a pluralism of reasonings about justice, open to comparative and critical inquiry. Third, are we being presented with an idea of justice or more? Sen's inquiry into the nature of justice, framed by an understanding of injustice, is intimately linked to the advancement of justice and just causes in practical ways reflecting long-standing as well as current concerns about the state of the world and the societies we live in.

In a world of crises and manifest injustices, with no obvious institutional arrangements that provide immediate and lasting solutions, this book is a respectful but timely critique of Rawls and Rawlsian theories of justice. It is of course only a partial and not full departure from Rawlsian theories of justice that are primarily focused on transcendental concepts of justice and the search for those institutional frameworks that are seen to lead to the realization of perfectly just societies. However, in *The Idea of Justice*, Sen offers an alternative reading to the question of justice. Partly building on key ideas of the importance of concepts such as fairness, impartiality and liberty, Sen's work moves between a rigorous analysis of Rawls's theory of justice and an original account of his own reason-led comparative theoretical and empirical perspectives on justice. His arguments swing deceptively easily between Western and Indian accounts of justice, but with a strong focus on 'the voices of reason.' In drawing on a reason-led comparative method of thinking about justice, this book serves to open up the debates on justice and proceeds by moving between different poles of argument: between content and method, between institutional structures and peoples' behaviour and between big questions of global justice and detailed analyses of the problems Sen associates with what he calls the contractarian approach.

Sen professes to be part of one of the two main historical traditions of thinking about justice. To be more specific, he aligns himself with one of the two dominant approaches within European Enlightenment thinking, namely with those that highlight a comparative approach to justice. Sen views the works of Adam Smith, Mary Wollstonecraft, Jeremy Bentham, Karl Marx, as different as they are, as part of an alternative approach to justice by basing thinking about justice on the interplay of institutions and the actual behaviour of individuals and social groups. This approach therefore responds to injustice in the world, and is viewed by Sen as a defensible and desirable way of departing from the contractarian approaches of Hobbes, Locke, Rousseau, Kant, and in the twentieth century, John Rawls, to whom the book is dedicated. The departure from transcendental institutionalism that carries within it the notion of a perfectly just society is defensible because of the pluralism of reasonings about justice and it is desirable because of the work this approach does in thinking about injustice in the imperfect world as we experience it.

Quick to argue that the intellectual background of the book does not make it a particularly 'European' work as it is part of a universal tradition of reasoned argument, Sen rather elegantly weaves two concepts developed in ancient Indian jurisprudence, *nyaya* and *niti*, into his approach. Although both concepts stand for justice, the inclusive and broader concept of *nyaya* is rooted in a realist philosophy and is concerned in the main with the world that emerges. In terms of justice, *nyaya* stands for the idea of realized justice, as compared to *niti*, which refers to a narrower view of justice that is based on ideal codes of conduct and organizational propriety. In his departure from transcendental institutionalism, using a comprehensive term such as *nyaya*, Sen finds a compelling lever to critique Rawls' influential concept of justice that is heavily biased towards finding one set of fundamental principles of justice, and one set of institutions that serve to realize the aim of a perfectly just society. The interplay of *nyaya* and *niti* is part of Sen's argument for opening the debate on justice to take account of a pluralism of reasonings about justice, which may converge or differ, and which may each be critically subject to the question of impartiality. In short, Sen argues that it is logically and empirically indefensible and unfeasible to look for a single set of answers to the complexity of justice as an idea and injustice as an experience.

It is in line with Sen's search for an approach to injustice that he provides us not only with a comprehensive theoretical account of justice but in the second half of the book also draws on his and others' work that focuses on capabilities, resources, freedoms and rights as the material foundations for creating more just institutional structures and enabling individuals to overcome inequities and deprivation. It is only through the multiplicity of theoretical and other voices and through the multiplicity of spaces and means of redressing injustices that we can begin to think about justice and injustice in a comprehensive rather than narrow, geographically and intellectually bounded way. Moving across boundaries – from the nation-state to the global level – and opening up positional confinement, as Sen calls it, *The Idea of Justice* cannot but be an account that will be developed further by theorists and practitioners alike. This book is indeed a comprehensive account that speaks with the authentic voice of Sen – embodying historical traditions, departing from dominant twentieth-century thinking of justice, and inviting new and comparative modes of thinking. We may disagree, contest, and

argue, but we will find much engagement with this invitation to re-think our notions of justice, moved forward by Sen's formidable yet accessible reason-led arguments.

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Articles should contain a comparative perspective in the widest sense. This could mean comparisons between Taiwan and other parts of the world, Taiwan in the past and in the present, different regions and cultures of Taiwan, or different methodological and disciplinary approaches to the study of a theme or issue concerning Taiwan. Articles for inclusion in the eJournal should be around 8000 words, and should follow the Harvard style of referencing. Manuscripts should begin with an abstract of around 100 words.

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