the Verdict

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CHINESE "COURTS"-----

Western Governments and the Spirit of Berlin 1936

By Clive Ansley
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In my previous article in these pages (Issue 112), I discussed realities of the Chinese "judicial" system, juxtaposed to the "Alice in Wonderland" fantasies espoused by Justice Department counsel Esta Resnick before the IRB and the Federal Court of Canada in the Lai Changxing refugee case.

One of the cardinal tenets of *China According to Resnick* is that the Chinese "judiciary" is completely independent from control by the Chinese Communist Party/Government, because Article 126 of the Chinese Constitution says so.

Great Wall, China

Berlin Wall, East Germany

Shortly after that issue of *the Verdict* came out, I was contacted by Steve Kelliher, who stated:

> "A few years ago I, along with others from the local legal community, attended an information session here in Victoria, billed as 'Advances in the Prosecution of Criminal Offences in China', or something similar. The afternoon was sponsored by the Attorney General's office and featured a delegation of prosecutors from China who, among other topics, explained that the office of the prosecutor selected, trained, promoted, and disciplined the judiciary. Unable to resist, I asked if this relationship might run the risk of jeopardizing the perception of judicial impartiality, in response to which the lead speaker said flatly: 'We do not accept the concept of judicial independence in China.'"

Dating myself, I remember from the 1960s a CBC television feature called *Viewpoint. Viewpoint* was a short commentary on a timely topic which aired each night just after *"The National"* with Earl Cameron, and just before the BC regional news. On April 1st one year, *Viewpoint* was introduced as follows:

> "Tonight our commentator is Professor Tom Jones. Professor Jones is a specialist on Indo-European Poetry at the University of Indiana. He has just returned from a jet trip over Leningrad and will speak to us this evening on the current agricultural crisis in the Soviet Union".

In the *Lai* case, CIC called as an expert witness on the Chinese legal system a Canadian political science professor specializing on Chinese politics. Affectionately dubbed the "Clown Prince" by some who audited the proceedings, Professor X was apparently qualified to provide an expert opinion on Chinese law by the fact that he had never taken a course on Chinese law, had never taught Chinese law, was not trained in law of any kind, had never published on Chinese law, and had no experience with the Chinese "courts". However, he testified that he had visited a number of Chinese prisons and "did not have the impression that there were many innocent people there."

But, in fairness, any misgivings over these less than dazzling credentials may have been assuaged in the view of the panel by Professor X's description of his early education (taken *verbatim from the transcript of his evidence before the IRB)*:

> "when I was very young, I was streamed out of the normal school into special classes for particularly clever children,…. With relation to my relevant experience with regard to China, … I used to walk past a shop called Progressive Books,… that sold materials on China: the works of Chairman Mao, Beijing Review, Chinese literature…. I used to stop in this place and they would give me a nice cup of tea, and I bought a lot of the works of Mao when I was 12 and 13 years old, and I started to subscribe to the Beijing Review. I have been a loyal reader of the Beijing Review now for 30, I guess, let me see, 34 years, I guess.

After opining with certainty on all aspects of the Chinese "judicial" system in both his direct evidence and on cross, Professor X had been cornered and badly hurt by David Matas' cross, when the following interjection by the Minister's representative occurred:

> MR. COLLISON: I think that on the Minister's side here we've allowed counsel to ask a lot of questions that really require legal expertise or judicial expertise in Chinese legal matters. This witness was not qualified as a lawyer or a judge. His expertise was in politics, economic, social, cultural, and law only as it related to the political context. I think these questions in this area are again heading off in that direction. He's really not in a position -- his expertise is not such that he can tell us these things.

Speaking to the media about the IRB Reasons, David Matas addressed the many claims by the Chretien/Martin governments to having made major contributions to developing and advancing the Chinese legal system, through CIDA funded training of Chinese judges. He opined that the only discernible effect of all the exchanges between Canada and China had been to lower Canadian standards so as to more closely approximate the standards of Beijing. The travesty of due process which occurred before this tribunal certainly appeared to bear him out.

Unfortunately, the lay public does not appreciate the difficulty with the appeal process and the fact that the Federal Court can not overturn tribunal decisions unless it can identify clear errors in law. Lawyers recognize that findings of fact or credibility will not be disturbed in the Judicial Review process; the public assumes in effect that Lai has had three "trials" at three different levels, with identical results in each case.

The IRB hearings and Reasons in the Lai case, the flaunting of Canadian evidence laws, and the gross violations of the most fundamental principles of Natural Justice could fill a weighty tome. Later articles in this series will address these issues in detail. I now continue the previous description of how the Chinese "judicial" system works in practice.

THE PRESUMPTION OF INNOCENCE

In Common Law countries most legal practitioners recognize this principle as a legal fiction; that is to say it is a *legal* presumption, but usually not a factual one. Most western lawyers will state that the majority of the clients they defend are guilty as a matter of fact, but it is vitally important for the protection of the commonwealth that the prosecution is required to *prove* that guilt in every instance and that the defendant be presumed innocent until the prosecution has discharged its burden of proof.

The situation is markedly different when we attempt to judge the validity of charges against defendants in Chinese criminal "courts". There is every reason to make not only a legal presumption of innocence in favour of the

defendant, but also an actual factual presumption. Or to state the converse, there is quite literally no reason whatever, as a matter of fact, not just of legal procedure, to assume guilt on the part of any defendant brought before a Chinese "court". The most generous statement which could legitimately be made on behalf of the Chinese criminal "courts" is that some of the defendants convicted may actually be guilty, although there is no reason to assume that the percentage is particularly high.

The criminal "courts" are often responding to directives from the central government to "strike hard" at criminal elements in the course of periodic "crackdowns". During these periods, police are routinely admonished to solve cases very quickly, make arrests, and to "use whatever methods are necessary" in order to carry out these goals. An accused in practice has virtually no procedural rights from the time he is detained until the time he is convicted and conviction is a virtual certainty once he is arrested. Police use whatever methods are required to secure convictions, including torture, fraudulent promises of lenient treatment for confessions, and threats against family members. Police, prosecutors, and "judges" routinely collude, share files which are kept from defence lawyers, and agree among themselves on "judgement" and punishment before the trial has occurred. And the entire process is usually squeezed into a very short time period. Rigorous investigation is noticeable by its absence.[1] All these factors dictate that there can be no basis for assuming criminal guilt on the part of any defendant simply because organs of a police state have asserted that the individual has committed crimes.

REFORM OF THE CHINESE CODE OF CRIMINAL PROCEDURE: THE PRESUMPTION OF INNOCENCE

Both the *Chinese Code of Criminal Procedure* and the *Criminal Code* were extensively revised in 1996 and 1997, respectively. Canadian lawyers and legal scholars played a significant role in the redrafting of these procedures, and many "judges" were sent to Canada to study the Canadian legal system. The Canadian Ambassador to China stated publicly after the revised codes came into effect that:

> It is impossible to over-emphasize the importance of the fact that for the first time in more than 5,000 years of history, the presumption of innocence has actually been formally written into the Chinese criminal law.[2]

But despite this optimistic view, and despite the fact that the presumption is now almost universally declared to be a part of the *Code of Criminal Procedure*, it has not had the slightest impact on the criminal "justice" system and the undeniable truth of the matter is that the presumption of *guilt* is absolute in the Chinese criminal "courts", notwithstanding the alleged statutory provisions to the contrary.[3]

I have interviewed Chinese prosecutors on this subject. All those with whom I have talked have pointed to the so-called statutory Presumption of Innocence as one of the most significant among the revisions made to the Code. However, all have gone on to laugh openly at the idea and to state that it has made no difference whatever to their own procedures, to those of the "courts", or to the percentage of defendants found guilty (the percentage is estimated by prosecutors and defence lawyers alike to fall very little short of 100%).

THE PRESUMPTION OF INNOCENCE AS REFLECTED BY "JUSTICE" MINISTRY AND LAW FIRM ADMINISTRATIVE PRACTICES

This subject is not exhausted by a simple finding that the presumption of innocence does not exist in the Chinese criminal "court" system, notwithstanding the provision of Article 12 of the *Code of Criminal Procedure* that "no person shall be found guilty without being judged as such by a People's Court, according to law".[4] The situation is actually much worse than that. Not only is there no presumption of innocence, but on the contrary the presumption of guilt is so deeply ingrained in the criminal system that the very act of pleading "Not Guilty" is quite literally considered an affront to the police, the prosecutors, the "court", and the state. Indeed, one of the problems facing a genuinely innocent accused arises from the twin facts that:

1) He is certain to be found guilty in any event, since virtually no one is ever found innocent; and
2) If he pleads "Not Guilty", he will receive a more severe sentence (assuming he is not already facing the death sentence) because of his "bad attitude", as evidenced by the very act of asserting his innocence.

In each urban centre there is a standing directive issued jointly by the "Justice Bureau" (the local extension of the Ministry of "Justice") and the All China Lawyers' Association[5] to all law firms within their jurisdiction, setting out the actions required in the event that a client actually insists on pleading "Not Guilty!" The directive makes clear that such a plea is considered as a highly unusual and most undesireable phenomenon. It instructs the heads of law firms to promptly inform the Justice Bureau and the Lawyers' Association of any case in which a plea of "Not Guilty" is planned and to handle it with great care. I have been informed by a number of Chinese lawyers that their own law firms enforce a strict rule requiring that any lawyer planning to plead a client "Not Guilty" must inform the senior partner in the firm and the individual lawyer must thereafter work directly with the senior partner; on no account may he proceed on his own. The senior partner, in turn, is under orders from the "Justice" Bureau and the All China Lawyers' Association to keep those organs informed at every stage of the defence.

Not surprisingly, almost all defendants plead guilty and in any event virtually all are ultimately "*judged*" to be guilty. I have interviewed a number of Chinese criminal defence lawyers over the years (beginning long before the case involving Lai Changxing). On occasion I have encountered defence lawyers who actually claimed success in defending their clients in Chinese "courts". In particular, one rather well known lawyer claimed a success rate of about 40%. This lawyer enjoys an unusually good relationship with many "judges" in the criminal "courts", which might explain a success rate much higher than expected. Nevertheless, when I pressed this counsel on the definition of success, he made it clear that he had never succeeded in having a client found innocent. He measured success in terms of having a relatively lenient sentence imposed, or having an earlier sentence reduced. Acquittal was simply not a viable option for the "court".

RIGHTS OF AN ACCUSED AFTER ARREST AND THROUGHOUT THE CRIMINAL PROCESS

Immediate right to counsel

On the face of it, the revised *Code of Criminal Procedure* offers yet another major advance in terms of protecting the accused. Under the previous version of the Code, accused persons had no right to meet with legal counsel until seven days before trial. Now, according to the statute, the accused has an immediate right to counsel upon arrest.[6] Disappointingly, this right also is more apparent than real.

I have asked Chinese prosecutors about the effect of this immediate right to counsel. It should be reiterated at this point that prosecutors work hand in glove with police from the moment an arrest is made. In every discussion I have had with Chinese prosecutors I have asked if they actually comply with the new provision and afford defence counsel access to their clients. Again, the responses have been astonishingly frank:

1) The police and prosecutors will not tell the suspect that he has a right to counsel. Unless he is fully aware of his theoretical rights under the law and has the courage to assert these rights, the subject will not arise.
2) Lawyers are not permitted to meet with their clients until the

police have finished their interrogation of the client.

3) Even then, the prosecutors with whom I have spoken state that police will not usually allow counsel to meet with his client until the matter reaches the "trial" stage and all interrogation has been concluded, unless the lawyer is either inexperienced or known to be one who "does not cause trouble".
4) A police officer must be present at all times during any meetings between client and counsel.
5) Counsel may not discuss the facts of the case with the client. He may only quote the law governing the offence with which the client is charged. If counsel asks his client any questions about the facts of the subject case or the circumstances surrounding the arrest, the police officer is under orders to terminate the interview immediately.[7]
6) Prosecutors have informed me that some of the more advanced detention centres have replaced the police officer normally present during lawyer-client interviews with a video monitor.
7) Within the bounds of the restrictions discussed to this point, prosecutors and police will allow a lawyer access to his client providing "he is not one of those lawyers who always makes trouble. If he is that type, we don't let him see the client".
8) The police and prosecutors also have complete discretion over the frequency of meetings between client and accused.
9) If the right of client/lawyer access guaranteed under the new Code is denied, the law unfortunately provides no remedy.[8]

Right against self-incrimination

No such right exists in China, either in theory or in "black letter law". On the contrary, the statutory provision is that every individual with knowledge of a matter before the "court" may be called upon to give evidence and this includes the accused.[9] In addition, if the accused denies guilt in the process of giving evidence, this denial will invariably be cited by the prosecution as evidence of a "bad attitude" and used against him at the sentencing stage of the procedure.

One defence lawyer told me of a case in which his client's sister was prevented by the police from delivering a letter and a book to him. The letter advised him to talk to no one except his lawyer. The book dealt with the subject of personal development and in particular stressed the need to be strong and not to give in when facing difficulties. The police officer told the sister that the letter and the book both delivered the wrong message. He advised her to write another letter advising her brother to cooperate fully with the police and tell them everything he knew about the case.

A standard slogan which accurately represents a fundamental principle of Chinese criminal procedure reads "Deny guilt and be punished severely; confess and be treated leniently." These words are commonly posted on the walls of the police interrogation room and the prosecutor's offices. Only recently have Chinese legal scholars begun to take issue with this principle.

Defence lawyers state that accused persons are often told by police and prosecutors that "We know everything from other sources anyway, so you might as well confess. If you do, we will tell the court of your good attitude and you will receive a lighter sentence." Then, when the defence lawyer argues for leniency at trial on the basis that the defendant confessed, the prosecutor, who in reality had no independent evidence, frequently opposes the motion and tells the "court" that he already possessed all the evidence and the accused had no choice but to confess, but did not tell the investigators anything they did not already know.

The right to select defence counsel

All Chinese lawyers must attend an annual study session lasting approximately one working week. This meeting includes professional development programs, as well as political instruction. Shanghai lawyers have been instructed in these sessions that in the event of a particularly "big" or "sensitive" case, they should not accept it if approached by the client. In these cases, the lawyers have been told that the "court" will appoint a defence lawyer for the accused.[10]

The procedure was somewhat modified in 1998 by the "Justice" Bureau of Shanghai, which instructed Shanghai lawyers in that year that if defendants in "important" or "big" cases sought to retain them, the lawyers should first report to the "Justice" Bureau for comment and approval before formally accepting the case.

Shanghai lawyers have informed me that in criminal cases pressure on the individual lawyer or his firm from the Bureau of "Justice", the All China Lawyers' Association, and the prosecutors is routine. If a case involves political factors, a prospective defence lawyer is commonly informed, sometimes openly and sometimes privately, that it would not be appropriate for him or his firm to take on the defence of the accused.

The structure of the legal profession and the administrative organs which govern it is important in this context. There is only one lawyers' association for all China. It has branches in every province and city. An internal rule requires that the Chairman of the All China Lawyers' Association and the chairmen of all branches must be officials from the Ministry of "Justice" (Beijing) or from the "Justice" Bureaux in the case of local branches. The Ministry of "Justice" controls the issuing and revocation of lawyers' licences.

RIGHTS OF DEFENCE COUNSEL FROM ARREST OF CLIENT TO FINAL DISPOSITION

Right of access to evidence in the possession of the Prosecutor

One of the most important apparent reforms written into the 1996 *Code of Criminal Procedure* was the provision that the accused (or his counsel) has the right to inspect and copy all evidence against the accused in the prosecution files.[11] I have discussed this reform with several prosecutors and asked them if it has been implemented in practice. Without exception they have candidly and laughingly told me that they easily evade this provision by simply creating two files. The complete file is for use only by themselves, the police and the "court". In the words of one prosecutor, "Lawyers and suspects *cannot* be shown the full file." They do not include in the file provided to defence counsel any materials they feel could be of assistance to the defence.

Moreover, the "court", which is the entity charged with providing the prosecutor's file to the defence, usually hands over a file containing only a *list* of the evidence, rather than the evidence itself, informing the defence counsel that the "court" has not yet received the materials from the prosecution. This technicality is not considered grounds for delaying the "trial" and in practice the "trial" almost always proceeds without the defence having been provided with the evidence to which it is entitled by law.

The law actually stipulates that only evidence which has been examined by the opposing party may be accepted by the "court".[12] However, there is no law of evidence in China (other implications of this fact will be examined below) and in practice there is no legal remedy when the "court" routinely admits prosecution evidence which has never been disclosed to the defence.

Immediate and ongoing right to meet with client

Notwithstanding the provisions of the revised *Code of Criminal Procedure*[13], the universal practice is to prohibit defence counsel from meeting with the accused until the police and prosecutors have completed their interrogations, during which time the suspect will be repeatedly reminded of the basic principle that failure to confess will bring harsh treatment, but leniency may be obtained in return for a "good attitude", as evidenced by a confession.

Even the written law unfortunately provides no specific time limit within which the lawyer must be granted access to his client. It is only provided that he should be given access "after" the interrogation. In practice, requests by

lawyers to prosecutors or police for meetings with their clients are routinely answered by statements that a particular police officer or prosecutor must by present for the meeting and that that person is presently unavailable. If the defence counsel in a given case is considered by the prosecutors to be a "troublesome lawyer", the meeting may be postponed indefinitely. Indeed, it may never take place.[14]When defence counsel argue that they have a right under the new *Code of Criminal Procedure* to meet with their client, prosecutors respond with the statement that the decision to refuse a meeting is not being made under the new Code, but under internal detention center regulations.[15]Again, the law provides no remedy when the lawyer is denied access to his client.

THE "TRIAL" PROCESS

Inclusion/exclusion of evidence

As mentioned earlier, there is no Law of Evidence in China (although there are draft statutes for both civil and criminal litigation), either in statutory form or in the form of evidentiary rules formally adopted by the courts. Consequently, it is not possible for the defence to exclude any evidence introduced by the prosecution, for any reason. There is not even any legal mechanism for excluding confessions obtained by torture or documentary evidence obtained by illegal searches. According to the *Code of Criminal Procedure*, such evidence is inadmissible. But when "courts" admit such evidence, which they invariably do, there is no remedy.

Perhaps most troubling, hearsay evidence in its most extreme forms is readily admissible, and there is no apparent recognition by the "courts" of any inherent problem in admitting evidence which is third or fourth hand by the time it is tendered. The recent procedural revisions have provided defence counsel for the first time with the right to cross examine witnesses at trial, but the effect of this change is rendered meaningless when the actual source of the information is not in court.[16]

Pre-trial collaboration among "judges", police, and prosecutors

I have earlier noted that the special "4.20" task force formed by the Chinese government to investigate and prosecute the defendants in the case involving Lai Changxing includes "judges" of the Chinese Supreme "Court"[17]. The obvious impropriety inherent in this arrangement is not widely recognized in China. Before the 1996 revisions to the *Code of Criminal Procedure*, the practice was for criminal cases to be jointly prepared by the "court", the prosecutors, and the police. The new Code prohibits this collaboration, but I have been assured both by defence counsel and by prosecutors that in practice the documentary evidence prepared by the police and prosecutors, together with all their allegations against the accused are still almost always passed to the presiding "judges" well in advance of the "trial". Prior to 1997, "judgments" were normally always written before the formal "trial" took place. How much change has occurred with respect to this matter is uncertain, but the fact that the "judges" have normally seen all the prosecution evidence and have discussed the case with prosecutors before "trial" certainly raises a serious concern that "judgments" may still be written prior to "trial".

In cases where the "judges" who will handle the case believe that the evidence may be insufficient to enable them to defend a "guilty" verdict, they commonly provide their views to the prosecutors and ask them to come up with more evidence. If the case is considered a "difficult" one, an internal meeting of "judges" will be convened to which prosecutors are always invited. Defence lawyers are never invited.

THE RIGHT TO CALL DEFENCE WITNESSES

In theory: court discretion

Even in theory, there is no absolute right of any party before the "court" to call witnesses. The "court" always has complete discretion in the matter of whether to allow any witness to testify. In the event that a witness does testify, the effect of Articles 42 and 47 of the revised *Code of Criminal Procedure* theoretically allows each party to cross examine the other's witnesses. But if this right is not afforded the defence, there is no remedy provided in law and there is in any event no law of evidence. In this context, it is interesting to note that if Lai Changxing were to face trial in China, the confessions of those whom he is alleged to have bribed would most assuredly be introduced in evidence against him. But the most important among them have already been executed, which renders their cross examination even more difficult than usual.

In practice: intimidation of witnesses

I met a substantial number of potential witnesses for Lai in China. Without exception, they were terrified about the possibility of their identities being disclosed to the Chinese authorities. Several signed affidavits providing information favourable to him, but only upon receipt of formal legal undertakings from CIC and from CIC counsel that the affiant's name would never be disclosed to anyone except the tribunal hearing the refugee claim. Even having received these assurances, all affiants without exception remained very fearful. None would have been willing under any circumstances to appear on Lai's behalf before a Chinese "court". Indeed, I myself received undertakings from the tribunal and lawyers for the Chinese government in Canada that my identity would not be disclosed.[18]

Intimidation of defence counsel and defence witnesses

Western lawyers and western governments have in general lauded the revised 1996 and 1997 codes as having significantly advanced the rule of law in Chinese criminal courts. As we have already seen, there are indeed several significant improvements in the ***legislation***. However, Chinese law is honoured in the breach more often than not by Chinese "courts" and government organs.[19]

Treatment and position of defence counsel

Ironically, many Chinese defence lawyers argue today that the actual situation for the criminal defence bar has significantly deteriorated as a result of the "reform" of the Chinese *Criminal Code* in 1997. This is because Article 306 of the revised *Criminal Code* creates a new criminal offence specifically for defence lawyers. This article makes it a criminal offence for any defence lawyer to present false evidence to a court. This may perhaps sound innocuous or at least unobjectionable on its face, but in practice it has had a chilling effect on the defence bar because of the way in which it has been interpreted by the "courts". The problem arises in those rare cases where a lawyer insists on pleading his client "Not Guilty", an action which all lawyers have been warned can bring trouble for them. Essentially, the reasoning process is:

1. The accused denied his guilt and provided evidence to support his innocence.
2. Nevertheless, the court has found him guilty.
3. Therefore, it follows that the testimony of the accused before the court was false.
4. It also follows that the defence lawyer must have counselled the accused to commit perjury.
5. Therefore the defence lawyer is sentenced to prison under Article 306.

One very prominent defence lawyer, long regarded as a "troublemaker" and a "thorn in the side" by prosecutors because of his vociferous defence of clients, was very seriously affected by the new provision of the *Criminal Code*. He was arrested under Article 306 and convicted, but he appealed his conviction. The higher court ruled that the evidence was insufficient and set aside the conviction. But, in customary fashion, the appeal court did not enter an acquittal on behalf of the lawyer. Rather, it just told the prosecution to gather more evidence and try again. This process was repeated four or five times before the prosecution finally allowed the matter to lapse. But in the meantime, the lawyer was severely beaten by police while in custody and sustained several broken bones in his face.

Several defence lawyers to my knowledge have also been charged under this Article as a result of infringing the rule that during the period when the police are still investigating the matter, the lawyer is prohibited from discussing with the accused anything other than the name of the crime with which he is charged, the elements of that crime in law, and the punishment to be expected. The lawyer is also authorized to apply for bail, although this is almost never granted. Further, in theory, the lawyer is allowed to lodge a complaint on behalf of the accused if the latter has been beaten while in custody.[20] Again, this virtually never happens because both client and lawyer fear the consequences.

According to the statistics of the All China Lawyers' Association, from 1997-1999 there were eighteen lawyers charged under Article 306, and fifteen were convicted.[21] According to Mr. Ning Hong of the Membership Department of the All China Lawyers' Association, in 1995 the Association received only a dozen or so requests from member lawyers for protection against infringements of their rights. However, during 1997 and 1998, immediately following proclamation of the revised *Criminal Code,* the Association handled more than seventy such cases. Since the new *Criminal Code* took effect 80% of all requests from members seeking protection have involved charges under Article 306.

In the course of conversations with Chinese criminal defence lawyers in 2003, I was told that there were then more than twenty defence lawyers now serving prison terms as a result of convictions under Article 306. Considering the extreme rarity of "Not Guilty" pleas in the Chinese courts, this is a distressingly large number.

Aside from those charged under Article 306, defence lawyers and senior partners of law firms are routinely informed by prosecutors in "sensitive" cases that it would not be in their best interests to defend the accused.

Today, we estimate that there are perhaps as many as two hundred defence lawyers incarcerated either under Article 306, or as a result of spurious charges laid against them as reprisals for their human rights advocacy on behalf of individuals persecuted by the Chiness authorities.

Defence witnesses

Normally, there is no need for police or prosecutors to actually threaten potential defence witnesses. All Chinese citizens know that it would be most unwise to appear in "court" and contradict the case brought by the state. As noted elsewhere in this report, professing innocence before the "court" is considered an inexcusable affront to the state, the prosecution, the police, and the "court" itself. It is rare indeed for a potential witness to voluntarily appear on behalf of an accused, and the defence has no legal power to compel attendance of witnesses.

In most cases, this fear on the part of potential witnesses applies even in the case of character witnesses who might be expected to be called by the defence at the sentencing stage. If the government is asking for a severe penalty and has denounced the defendant's character in all the media, no individual would be so foolhardy as to appear in "court" on behalf of this "enemy of the state". In the case of Lai Changxing, this problem has obvious and serious implications. There is simply no possibility that any potential witnesses Lai might like to call, either during the "trial" itself or at the sentencing stage, would dare to testify. Any potential witnesses for Lai will have a very genuine fear of suffering beatings at the hands of the police[22], being themselves imprisoned, and possibly even losing their lives. No defence witnesses gave evidence in the "trials" of the eleven individuals already executed as a result of charges involving Lai Changxing.

JUDICIAL INDEPENDENCE

The principle of party supremacy

This is a principle of seminal importance to the issue of whether China can ever achieve its stated goal of implementing "the rule of law". The principle that the Party exercises leadership in all things is enshrined in the Constitution and is also recognized in many statutes.[23] The concrete effects of this principle include the fact that there is direct Party input into the rendering of "judgments" within the "courts"[24], the fact that the Communist Party can effectively (though not according to statute) appoint and remove "judges"[25], and the fact that all judges must be members of the Communist Party.[26]

In the autumn of 1989 Ren Jianxin, at that time the Chief Justice of China, published an article entitled "On 'Judicial Independence' in the Chinese Courts", which was carried widely in the Chinese press. I was retained to provide an opinion to a foreign Supreme Court shortly thereafter which involved a legal assessment of the Chinese "courts". I translated Ren Jianxin's article into English. In that article, Ren derided those in Chinese legal circles who, in his words were "always harping hysterically about the notion of so-called 'judicial independence'." He went on to say:

> The so-called concept of "judicial independence" is the poisonous product of a rotten capitalist society. The only duty of a judge in a Chinese court is to carry out the instructions of the Chinese Communist Party.[27]

Admittedly, that statement was made eighteen years ago. But the only significant change in that reality is that today no Chinese official would ever make such a statement openly. Nevertheless the statement represents the Chinese "judiciary" today just as accurately as it did in 1989.

I have for many years found it astonishing that foreign legal scholars specializing in Chinese law almost never address this most fundamental issue. Almost all the western scholarly legal writing on the subject of the Chinese legal system focuses on the analysis of new Chinese statutes and regulations, their interpretation by various government organs, and policy statements by government leaders. This or that statute is hailed as a step forward which will clear up previously vague areas of the law and make investment safer. But seldom if ever do legal scholars squarely face the very simple and fundamental fact that the rule of law is undeniably and absolutely incompatible with the principle of Party supremacy, and particularly with

the overt position of the Chinese government that the "courts" must accept the leadership of the Communist Party.

THE JUDICIAL COMMITTEES

To this point in the report we have addressed problems of the "trial" process on what might seem to be the implicit assumption that, no matter what the inherent defects, the "trial" which takes place within the courtroom is actually determinative of the disposition of the case. That is to say, our discussion has proceeded to this point as if the "trial" conducted in the public view is a real trial and the presiding "judges" will ultimately write a "judgment" based on the evidence they have read and heard in the course of the trial. Unfortunately, this is not the case.

It is not at all cynical to say that the "trial" itself is just a dramatic performance in a public theater (the "courtroom"), open to visitors from both inside China and without (in selected cases), which often plays no role in determining the "judgment" ultimately handed down by the "court" over the signatures of the "judges" who have presided at "trial". Often, those "judges" find themselves in fundamental disagreement with the "judgment" they are forced to write and sign, but which has been dictated by others. The formal "trial" would seem to serve no purpose other than to create the illusion amongst observers that they are witnessing a form of due process and that the drama they witness will determine the outcome.

In fact, the tribunal of three judges which hears the case has only the power to *recommend* a judgment in the case it has just heard. The three "judges", in sight of the public, listen to witnesses, question witnesses, listen to cross examination of witnesses[28] by opposing counsel, and accept documentary submissions. But at the end of this process, the presiding "judge" on the tribunal must take the recommendations of his tribunal to the Judicial Committee, which consists of five or more "judges" who did not attend the trial and have not read the documentary evidence. This committee may or may not accept the recommendations of the tribunal. Very often the Judicial Committee over-rules the tribunal, but significantly its members do not sign the "judgment" it dictates or in any other way take responsibility.

The fact that the "judgment" is ultimately determined by "judges" who have not participated in the "trial" is obviously disturbing in itself. *A fortiori* the realization that the Chief "Judge", who more often than not lacks any legal training, sits on the Judicial Committee and that the Party Secretary within the court is always a member. I often learned the details of actual discussions within the Judicial Committee and many times experienced a situation in which the presiding "judge" had made his presentation to the Judicial Committee, only to be told by its members that he had not given sufficient weight to the interests of the state and that the Party wanted the matter resolved differently. The presiding "judge" is then told to write a "judgment" coming to a totally different conclusion from the one he recommended as a direct result of having heard and examined the evidence. In summary, the "judgment" is determined by a group of "judges" who have taken no part in the "trial" process and are not acquainted with the evidence. They are concerned only with ensuring that the "judgment" accords with the wishes of the Communist Party.

The February 2001 issue of *Chinese Lawyer* carried an article by a judge of the Sichuan Higher People's Court entitled "Extent of the Judicial Committee's Involvement in the Trial Process". This article specifically addressed the inherent illegitimacy of the Judicial Committee system[29]. The writer argued the following points:

The Judicial Committee is completely lacking in authority to examine and decide cases

There are only two laws governing the Judicial Committee's powers. The *Organic Law of the People's "Courts"* stipulates only that the Judicial Committee should discuss "important and difficult cases".[30]The second relevant law is the *Code of Criminal Procedure*[31], which stipulates only

that if a given case is considered to be "important, complicated, and/or difficult", the tribunal should ask the Chief "Judge" to decide whether it should be discussed and decided by the Judicial Committee.[32] However, it is the author's opinion that neither of these two provisions bestows any power or authority on the Judicial Committee to examine and decide cases. He argues that:

> a) The *Organic Law of the People's "Courts"* only allows the Judicial Committee to discuss cases, but gives it no power to decide them.
>
> b) The *Code of Criminal Procedure* ***does*** purportedly confer power of decision on the Judicial Committee but the author argues that this provision is effectively *ultra vires* because the Code governs only the conduct of criminal cases and the "courts" themselves are governed by the Organic Law.
>
> c) Metaphorically speaking, he argues that the Judicial Committee is essentially an opaque "black box", because while the formal court procedures are governed by identifiable rules and are visible to the public, there are no rules governing the deliberations of the Judicial Committee which nowadays has become the real decision-making organ.[33]

If the Judicial Committee examines and decides the cases, the open trial hearing becomes a mere formality

The judge who has presided over the trial gives only an oral report to the Judicial Committee. It is therefore impossible for the committee to determine whether any errors of law or fact were made by the tribunal, even if the committee were disposed to do so.

Allowing the Judicial Committee to examine and decide cases leaves judges dependent and lacking in responsibility

The author argues that:

> Because of the Judicial Committee, most "judges" never consider or review the cases independently, and believe that if there are any complicated or difficult issues, then the case will be referred to and decided by the Judicial Committee. So they are unlikely to invest significant time and energy in understanding and deciding the case.

"A CHINESE COURT IS NOT A COURT"

Perhaps the first step for an English speaker attempting to make some sense of the Chinese legal system is to realize that he is a prisoner of his own language. As soon as we invoke the word "court", we conjure up in our own minds the picture of a learned judge of mature years, steeped in the law, sitting before the court in judicial robes, weighing evidence, determining facts and dispassionately applying the law to those facts without regard to special interests. This mental snapshot, unfortunately, bears not the remotest resemblance to what is termed a "court" in China. This is essentially because there is no separate judicial power in China (as compared, for example, to executive and legislative powers).

For an understanding of the inherent characteristics of a Chinese "court", there is nothing more essential than to first grasp the fact that there is no such thing as a judiciary in China, in the sense in which that term is understood elsewhere. "Courts" are not independent bodies charged with the dispassionate application of law to facts and the dispensing of judgments which may conflict with the express policy goals of government. The "courts" in China are nothing more and nothing less than administrative organs of the Chinese government/Communist Party. Neither the government nor the Chinese Communist Party (which is the real power) has ever contemplated the concept of judicial review or in fact judicial independence of any kind.

During the Cultural Revolution and the years immediately following it (in fact right up to July 1st, 1979) there were no written laws or rules of any kind enabling citizens to know when they were committing a transgression for which they might be punished. In that context, the publication of the *Criminal Code* and the *Code of Criminal Procedure* certainly constituted a marked improvement. But we must never lose sight of the fact that no allowance whatsoever has been made for independent interpretation of the law by the "courts". The "courts", as we have already seen, take their directions from the government/Party at every level and function simply as administrative organs for the implementation of government decisions. It is simply not open to the "courts" to interpret the law in any manner which differs from Hu Jintao's interpretation.

The tremendous conceptual gap between the functions of Chinese "courts" and Canadian courts becomes immediately apparent when one compares the personnel and function of the Chinese Supreme "Court" with those of the Supreme Court of Canada. As all Canadians know, our Justices do not take directives from the Canadian government; nor is their function to implement government policy. On the contrary, they often declare laws passed by the Canadian government to be unlawful and render them null and void.

The "judges" on the Chinese Supreme "Court" regularly assemble for lectures by Communist Party cadres in the course of which they are instructed that while they should of course pay some attention to law when handing down "judgments", they should also "pay close attention to the social and political consequences of your judgments". Neither the Chinese Supreme "Court" nor any other Chinese "court" has ever issued a "judgment" which knowingly contravened either government/Party policy or government/Party directives.

It is quite literally true that Hu Jintao could this day dictate a "judgment" to the Chinese "court" which would try Lai Changxing, were he to be returned to China. That "judgement" would be written immediately and would be awaiting the "trial" upon Lai's return. If Hu has not yet outlined the required "judgment" for the "court", he surely will do so as soon as he is assured that Lai will be returned. Once he does, there can be no question whatever of the "court" coming to any other "judgment." Neither law, nor evidence, nor any kind of due process will play any role in the "judgment" or the sentence which the court will hand down.

It sometimes seems to me that discussions such as this of necessity take on an abstract and ethereal character. I end with an anecdote which I hope conveys something of the real impact the Chinese "court" system has on the lives of real people in China.

During my last two years as a lawyer in China, I was in charge of hiring Chinese lawyers for the English firm with which I was associated.

I received a resume and application from a young lawyer one day which differed from others I had seen, in one striking aspect. It listed the usual information relating to degrees, educational institutions attended, legal experience, etc. We were looking for a young corporate/commercial lawyer. The applicant had impressive academic credentials and five years of corporate law experience with one of the biggest and best Chinese law firms in Shanghai.

But the last thing listed was that immediately after graduation, the person had clerked for "judges" in the Forestry "Court", and during that period, "I had personal charge of 22 death penalty cases."

I found it somewhat strange that an applicant would include such a thing in a resume, given the nature of the position sought.

In the interview, I saved this for last and then asked what the applicant had meant by having "personal charge" of death penalty cases.

He described the procedure from beginning to end:

> "Police officers would come into the court building with a prisoner and ask for a meeting with some judges. At the meeting, they would explain that their prisoner was a very bad man and deserved to be sentenced to death. They would then explain the circumstances and the judges would agree that the death penalty should be imposed.

> The judges would then assign me the task of looking up and selecting the appropriate article of the Criminal Code under which the prisoner should be sentenced. I would do so. Later, there would be a hearing for the formal imposition of sentence, after which the prisoner would be returned to cells until execution time.
>
> My responsibility did not end there. On the day of execution, I had to requisition a vehicle, pick up the prisoner from cells and escort him to the execution ground, where he would be shot in the back of the head. An ambulance was always standing by with the engine running, to receive the prisoner's organs immediately after they were removed as I watched.
>
> Finally, I left the court because I could not stand it any more. I was haunted in my dreams at night by reliving the trips to the execution ground. These young men were always frightened to death, shaking, sometimes begging me to save them. I could do nothing…."

1 It is appropriate at this point to recall a key theme from *China According to Resnick:* There is a 100% conviction rate in Chinese "courts" because the Chinese police and prosecutors are simply so incredibly careful and thorough that they don't make mistakes.

2 His Excellency, Howard Balloch, speaking to the Canadian Business Forum in Shanghai, October 1996.

3 Both Chinese and western commentators, whether or not they agree that progress has been made in practice, always acknowledge that the revised *Code of Criminal Procedure* does in fact introduce the presumption of innocence. Interestingly, the Chinese term used in China by legal scholars discussing the issue is a direct translation of the English words "presumption of innocence". But, surprisingly, these words are not to be found in the revised *Code of Criminal Procedure*. The article cited as establishing the presumption in fact says only that no accused person "may be found guilty before being judged guilty by a People's Court", which is a different matter altogether and does not of course even address the issue of presumption of innocence, or the onus of proof which the presumption entails.

4 The evolution of the myth that the presumption of innocence had been inserted in the new Code of Criminal Procedure in 1996 is fascinating. Western jurists advising the Chinese on the drafting of the new law, including Canadians, had pushed for its insertion. But what appeared in the law as proclaimed was the wording cited here, which says only (with apologies to Yogi Berra) that "no one is guilty until they are guilty". It is a classic example of linguistic, cultural and philosophical differences between China and the West proving impenetrable. It betrays a total failure to understand the essence of the presumption, and how it affects the onus of proof, or how it avoids foisting upon an accused the impossibility of proving a negative.

Subsequently, pro-Beijing commentators without legal training, such as Ambassador Balloch, began trumpeting the alleged acceptance of the presumption. To close the circle, virtually all Chinese lawyers today will tell you that Article 12 of the Code establishes the presumption of innocence. They believe it is there, because westerners say it is, and "surely the western commentators must recognize it when they see it." I have even run across the odd western lawyer in China who has declared the presumption to be alive and well and living in Article 12. But in each such case, pressing the speaker on the wording quickly reveals that the speaker has not yet gotten around to actually reading the article.

5 The Chinese name of this organization is often translated into English as "Bar Association". It is nothing of the sort. It has no independence; it cannot protect its members against government, though it sometimes does attempt to do so, and like every other entity or organization in Chinese society, it is tightly controlled by the Communist Party. Its real function is to assist the Communist Party in exercising control over its member lawyers.

6 Article 96 of the *Code of Criminal Procedure* provides that "after the criminal suspect is interrogated by an investigation organ for the first time or from the day on which compulsory measures are adopted against him, he may appoint a lawyer to provide him with legal advice and to file petitions and complaints on his behalf for obtaining a guarantor pending trial. If a case involves state secrets the criminal suspect must obtain the approval of the investigation organ for appointing a lawyer."

7 One defence lawyer expressed his feelings on this issue to me in somewhat facetious terms:

> All I can do is ask my client what he thinks about the weather, how he is feeling, whether he likes the food, and whether he is enjoying himself in the detention centre.

8 See Tian Wenchang and Zhou Hanji, "Criminal Litigation: Lawyers Are Confused About You", (*Chinese Lawyer, 2000,* Vol. 11, p. 39), in which the author discusses the most serious problems faced by lawyers in practice when trying to meet with their clients, arrange bail, and inspect the prosecution file. He states, *inter alia,* that:

> Article 96 of the *Code of Criminal Procedure* stipulates that a lawyer may meet with the accused during the investigation period and in addition Article 11 of the circular "Concerning the Code of Criminal Procedure: Regulations Governing Certain Problems of Enforcement", issued jointly by the Supreme Court, the Supreme People's Procuratorate, the Ministry of Public Security, the Ministry of Justice, and the Legal Working Committee of the National People's Congress, provides that in any case not involving state secrets, a lawyer wishing to meet with his client does not require approval. But in practice when a lawyer wants to meet his client in a case not involving state secrets, approval is invariably required. Often the police simply use the excuse that the case "involves state secrets" in order to refuse such a meeting. The circular also provides that the investigating organ should arrange a requested meeting between client and lawyers within 48 hours, or at most five days. But in practice, most investigation organs do not follow these regulations. The average time is from one week to one month or even longer.
>
> Although Article 75 of the Code of Criminal Procedure requires that if the organ handling the case cannot finish the investigation within the legally specified period (this period varies according to whether the accused is "detained", or "arrested"), the lawyer has the right to apply for bail on behalf of his client, in practice when the lawyer makes such a request (to the police or prosecutor) there is normally no response. (And at that point there is no remedy provided in law)

9 Article 93 of the *Code of Criminal Procedure* states that:

> When interrogating a criminal suspect the investigators shall first ask the criminal suspect whether he has committed any criminal act and let him state the circumstances of his guilt or explain the circumstances of his innocence. Then they may ask him questions. The criminal suspect shall answer the investigator's questions truthfully but he shall have the right to refuse to answer any questions which are irrelevant to the case.

10 Perhaps this explains the behaviour of defence counsel in a late 1980's trial which was televised from Guangzhou and watched by a large audience in Hong Kong. Counsel sat silently throughout "trial" and took no part in the proceedings. Finally, when asked by the "court" to make a submission on sentence, he rose and stated:

> After listening to all the prosecutor's evidence, I too find you guilty! You have brought shame and disgrace to all your family!

11 Article 36 of the *Code of Criminal Procedure*

12 *Code of Criminal Procedure,* Articles 42 and 47

13 Article 96, Paragraph 2 of the *Code of Criminal Procedure* states that:

> The appointed lawyer shall have the right to be informed by the investigation organ of the crime of which his client is suspected and may meet with the criminal suspect in custody to inquire about the case. When a lawyer meets with a criminal suspect in custody, the investigation organ may in light of the seriousness of the crime, if it deems it necessary, send its personnel to be present at the meeting. If a case involves state secrets, before the lawyer meets with the criminal suspect he must obtain the approval of the investigation organ.

In practice, the police/prosecutors invariably "deem it necessary" if they allow a meeting at