

Criminal Justice in China

Mike McConville et al, Edward Elgar

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Book Review by Sally Ramage

Calibre of editor

Mike McConville is Director and Professor of Law at the School of Law in the Chinese University of Hong Kong at Shatin, Hong Kong. His interest in police law is illustrated no better than in the 1992 book publication by McConville and Shepherd, *Watching Police, Watching Communities*. He has been working on the criminal law of China since 2001, seeking to identify ways in which the gap between the legal theory and practical law in China might be closed by monitoring the operation of the current law and assessing what is needed to enable those charged with its operation to fulfill the aim of the legislators.

Training of China's justice officials

China has had assistance in honing and reforming its justice system including practical training programmed for judges, prosecutors and police officials, much of which has been delivered out-of-country. Attempts have been made to show Chinese judges and officials how trials work in the Anglo-American system of criminal justice. The 15 chapters and 560 pages in this book are very valuable, primarily because of the scarcity of information on the Chinese legal system and the veracity of any information on the Internet and newspapers. This book is at once theoretical and practical. The research findings give authenticity to its contents and I can see that this book is at once useful to criminal and well as commercial legal practitioners. The chapters cover police cases, police powers in relation to detention and arrest, pre-trial preparation,

trial procedure and outcome. It is a moot point whether such rich statistical evidence as contained in this volume could ever be used in court, although it is rich pickings, were it to be used as evidence of violation of a treaty, for instance. Such evidence has been used in the United States of America.¹

Perceptions of China's police

The China Armed Police Force (CAPF), now known as the 'internal guard', is a paramilitary force primarily responsible for civilian policing and fire rescue duties in the People's Republic of China, as well as providing support to PLA during wartime. The CAPF is estimated to have a total strength of two million, with over half its strength employed in its internal security units. It is claimed that the police in China are poorly paid, corrupt and not well trained. Ordinary Chinese regards them with suspicion because it is thought that the police have traditionally been more involved in maintaining government control than solving crimes. It has been alleged that Chinese police often arrest potential witnesses.

Reports of alleged illegal police actions

It has been alleged that police routinely use torture to extract confessions although, under Chinese law, confessions obtained through torture are inadmissible in court. The Chinese police are allegedly up to date technologically. All police officers in Shenzhen allegedly carry satellite-positioning equipment on their belts that allow their movements to be tracked on large resolution maps. When an officer goes indoors and cannot be monitored directly by satellite his location can be determined by tracking his cell phone. The police operation called the Gold Shield Program collects digital data on 1.2 billion of China's 1.3 billion people. There are allegations that corrupt officials have been selling the data to marketing companies.

China's use of modern technology surveillance on par with UK

It has been alleged that police video surveillance is widespread in China with over 200,000 surveillance cameras. At least 200,000 cameras monitor the citizens of Beijing and Shanghai. As of 2007, Shenzhen police had access to 20,000 police

¹ See Amit Pundik, (2011) 'The epistemology of statistical evidence', *International Journal of Evidence and Proof*, Vathek Publishing, Vol 15, No 2, pgs 117-143.

cameras and 180,000 indoor and outdoor closed-circuit television cameras owned by businesses and government agencies and linked into the police system. The police cameras are guided by a sophisticated computer system with software from an American company that can automatically recognize the faces of police suspects and detect unusual activity. The number of cameras is expected to double in the next five years as smaller cities adopt similar systems.

Rule of law compliance

There are many external forces that play a part in the evolution of the criminal justice system in China, including China's commercial activities and related agencies. For instance, China has now joined the World Trade Organisation and as such, has had to fulfil certain requirements with regard to its legal system and rule of law. The WTO's commitments most pertinent to a discussion of its impact on the Chinese legal system are those relating to the rule of law. In general terms, there are two principal approaches to the rule of law: firstly, a more formal or functional approach, and secondly, a more substantive definition based on constitutional values. The first of these is more relevant to this analysis, since the WTO does not envision the rule of law with constitutional values, it being an international regime for the liberalization of trade rather than once concerned with human rights. The WTO commitments relating to the rule of law are: publication and Administration of Trade Regulations; control regional local governments in compliance with WTO;² and judicial review.³ This requires China to be transparent in trade-related

² Uniform Administration ('uniform, impartial and reasonable manner'); Transparency ('all sources must be published and readily available'): Article X and XXIV.

³ Central government must address areas where WTO was violated and provided a meaningful remedy. An interesting article relating to this issue is by Justin Leslie, "Vindicating common law constitutionalism", *Legal Studies*, Vol. 30, No. 2, June 2010, pp 301-323, quoting T.R.S. Allan's article 'The rule of law as a rule of reason', *LQR* 244:

areas; with laws to be accessed by the public As far as the implementation of the WTO commitments is concerned, China has been active in legislation. China has passed 2000 new laws, abolished 800, and announced 300 laws to comply with WTO membership requirements.

Alleged crimes against humanity

Beyond treaty obligations, 'crimes against humanity' are criminalized in customary international law. The 1996 ILC draft code of crime against the peace and security of mankind advocate a duty to prosecute or extradite individuals accused of genocide, crimes against humanity and war crimes, as defined in the code, and to prohibit such crimes regardless of where or by whom the crime was committed. China's laws hail from thousands of years ago and one noted is command responsibility, in relation to war crimes, from the China of Sun Tzu of 2500 years ago, when the responsibility of a commander extended far beyond criminal liability. Below is a table of the Chinese Dynasties from 2953 'Before Christ' (B.C) to the year of the Republic 1912:

Number	Dynasty	Time
1	The San Huang and the Wu Ti Dynasties	B.C. 2953-2205
2	The three Royal Dynasties: Hsia; Shang and Chow	B.C. 2205-256
3	Ch'in Dynasty	B.C. 221 – 207
4	Han Dynasty	B.C. 207-220
5	The Three Kingdoms	A.D. 220-265
6	Six Dynasties	A.D. 263-258
7	Sui Dynasty	A.D. 589-619
8	T'ang Dynasty ⁴	A.D. 620-907
9	The Five Dynasties	A.D. 907-960
10	Sung Dynasty	A.D. 960-

'Judicial review of executive action is required to ensure that government bodies adhere to the general principles of fairness, equality and proportionality, and that the concrete content of these principles reflects a consistent scheme of justice and a coherent conception of the common good'.

⁴ The Tang Dynasty had its capital at Chang'an –today called Xi'an- the most populous city in the world at the time, equal to, or surpassing that of, the earlier Han Dynasty—a golden age of cosmopolitan culture.

		1280
11	Yuan (Mongol) Dynasty	A.D.1280-1368
12	Ming Dynasty	A.D. 1368-1644
13	Ch'ing (Manchu) Dynasty	A.D. 1644-1912
14	The Republic	1912

Criminal procedure law reform

The motivation for the Chinese leadership to establish a modern legal system was the desire for economic development and the eagerness to demonstrate to the world that China now has a legal system consistent with international legal standards. However, there is still strong resistance as reform efforts started to threaten old power bases and interests. China's five-thousand-year history played an important part in shaping China's current political, legal and social institutions. China's five-thousand-year history played an important role in shaping China's current political, legal and social institutions. The dominant ancient Chinese philosophy was Confucianism⁵, which disliked formal disputes and legal systems in Imperial China, restricted the knowledge of law to the social and political elite. Confucius, the greatest of Chinese philosophers, lived from 551 B.C. to 478 B.C. He said of himself that his function was to indicate rather than to originate, and it was out of the traditions of the past that he constructed a system of ethics and politics. These traditions led back to the earliest of human institutions- the family.

⁵ Taoism, Confucianism and Buddhism have existed peaceably side by side, a surprise only to the European, inured to persecution and accustomed to believe that only one religion, generally the one in which he happens to have been reared, is the true one.

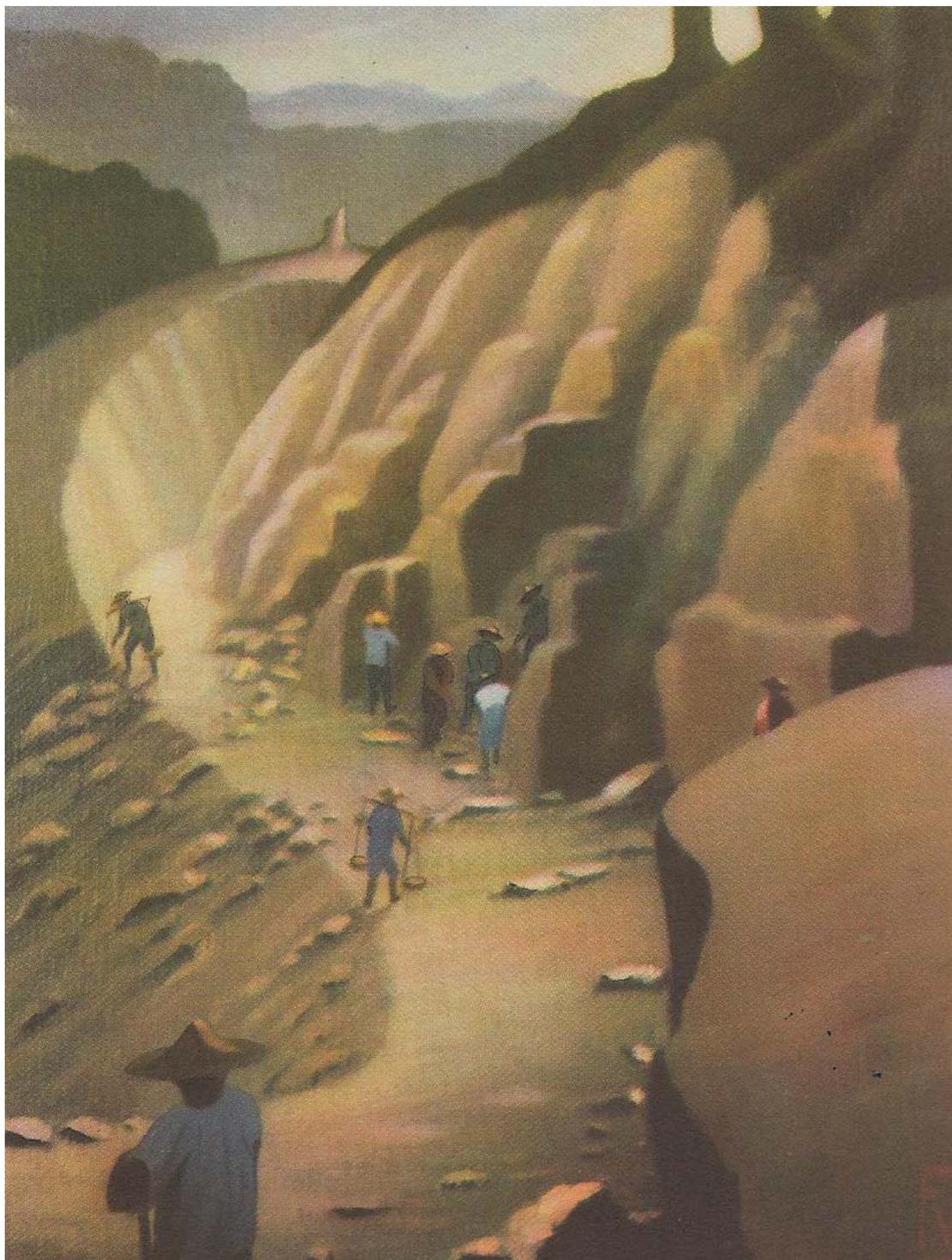


The institution of the family

The establishment of the family is attributed to Fu His who, about the year 2900 B.C., fixed the marriage ceremony and established the rule of exogamy to which the Chinese have adhered ever since. All Chinese civilization has sprung from the relationship between members of the group composing the family. Religion, philosophy, social organization, political theory and practice, all have this one root. In China, the family is the microcosm of the State, the pattern upon which the State has been moulded. The Chinese have always thought of the State- the Social Order- as a group, larger and more complicated, but essentially of the same character as the family:

'The sense of responsibility in human conduct makes human society possible. In a state of society where everybody acts solely and in perfect accord with this sense of moral obligation, there would be an ideal existence in which not only police, but also, all government would be unnecessary. In China, this moral obligation was recognized as the fundamental basis of the social order and the State made the perfect attainment thereof in men its sole aim. Consequently, in the social order, the scheme of education, the method of government and all social appliances have for their aim and object to educate men to a sense of this moral obligation; and all those habits, tastes, modes and pursuits of life alone are encouraged which are calculated to make it easy for men to obey the moral obligation. The ideal goal which Chinese civilization sets before men is the complete and perfect realization of true moral being and moral order in mankind.'

Ku Hung-Ming, (1926) *The Spirit of the Chinese People, with an Essay on Civilization and Anarchy*,
Charleston, Nabu Press.



Note that China had little crime despite much trade

In the years 1486, 1497 and 1514, China began a new epoch of trade with Europe and at the beginning of the sixteenth century, there was a flourishing

trade and during that time, the 'Songshi' were the group known as the litigation masters who drafted complaints for litigants and provided legal advice.

The late Qing Dynasty was a period of openness, marked by an influx of Western culture. (It is to be noted that from 1637 to 1833, only 16 cases of violence were recorded as committed by foreigners, and during the same period, there were five cases of murder by Chinese on foreigners, according to the American historian, Morse. The Chinese government established law schools and the first generations of Chinese lawyers started practicing in courts. As to trade on the high seas, the Ming dynasty was overthrown in 1644 and the Tartar Dynasty established full control over the coastal regions. A Manchu dynasty, known as Ch'ing, ruled over China from 1644 to 1912. In 1715,⁶ the East India Company opened a factory in Canton, placing their trade with China on a regular and permanent basis until 1834. Then the 1842 Treaty opened the first Treaty Ports to foreign trade and residence. The Chinese trade to England was a huge amount of tea,⁷ silk, porcelain,⁸ lacquer and many other Chinese products.⁹

China's legal system

In 1906, two ministers, Shen Jiaben and Wu Tingfang, drafted a Criminal and Civil Procedure Law consisting of 260 articles, considered the origin of modern Chinese procedural law, and it was from this point on that criminal procedure became part of the curriculum at imperial academies but was never passed because of regional opposition by provincial governors. When the Nationalists came into power, they set out to modernise China's legal system so that foreigners could no longer evade liabilities in Chinese courts.

During the establishment of the legal profession, China was still a feudalistic society under the rules of emperors and feudal warlords. The social structure was highly hierarchical and class distinctions were rigorously enforced.

Traditional teachings placed a high premium on the supremacy of sovereign

⁶ A second Emperor of the Ch'ing Dynasty, the great K'ang His, reigned for 60 years from 1662 to 1723. During this time, the Imperial Manufactory at Ching Te Chen was rebuilt and for 150 years up to the end of the eighteenth century, superb porcelain of every style and class was produced there in large quantities for export.

⁷ Tea was not known in China before the end of the Han Dynasty in the third century A.D. The Dutch brought tea from China to Europe early in the seventeenth century.

⁸ The potter's wheel was invented in the reign of the Yellow Emperor in 2700 B.C.

⁹ China's plants have adorned British gardens and parks with more than 7,500 species peculiar to China's lands.

interest. Cultural resistance is embedded in the Chinese attitude towards crimes and criminals. The Chinese society traditionally has very low tolerance for crimes. Even though the general public were wary of the arbitrariness, cruelty and tyranny in the criminal process, they were not particularly sympathetic to the plight of the accused due to their low tolerance for crimes and hence criminals or those who were likely to be criminals. Such identification originated from the belief that all men are offenders, at least on a psychological level. China had begun to reform its criminal law years before such commercial considerations as required by the WTO and in 1979 China introduced a new criminal law and in 1996, a criminal procedure law. In China, the primary responsibility for detecting crime, identifying offenders and deciding on charges to be brought, lie with the police, although there is much reliance on informers, victims and the public to bring criminal activity awareness to the police.

Issues unresolved

Torture is one subject matter much bandied about on the Internet and in newspapers, and so is fraud and bribery. This book does not attempt to enter into the details of each and every criminal offence as a legal textbook would. Indeed, it is far superior to a legal textbook in its research findings. I would urge Edward Elgar to consider producing another book, the subject being the criminal procedure in China, especially in view of intellectual property breaches, terrorism,¹⁰ bribery, environmental crimes,¹¹ extradition, human rights,¹² fraud and corruption - matters that may stumble many an English law firm with offices in China. The criminal law is intertwined with political instability; commercial, employment and other laws and must not be dismissed or set aside as of no importance except to offenders. That China and its laws affect everyone is evident thus: China's property bubble is starting to deflate after years of housing prices gone wild. Residential prices are heading downward in some major cities, damping some undesired real-estate

¹⁰ See Harry W. Richardson, Peter Gordon, and James E. Moore, (2009) *Global Business and the Terrorist Threat*, Edward Elgar. 'The benefit of terrorism security regulations is avoided terrorism losses' (page 274).

¹¹ See the report, Govt of China, *Environmental challenges in China: determinants of success and failure*, Economic Report no. 34/02, Project no. 36190; ISSN: 0803-5113, ISBN 82-7645-519-0. The report states that air pollution is serious in China.

¹² Pollution kills the Chinese people and failure by the govt to take measures kills people. For instance, through air emissions, lead, emitted by lead-fuel, enters the blood and causes cardiovascular diseases, neurobehavioral effects and IQ loss in children, and increases mortality. Lead is harmful at all levels of exposure and can be characterized as an obvious and high-priority environmental public-health problem.

speculation but raising the prospect that the Chinese economy may slow more rapidly than anticipated, with profound consequences for global growth.

Rule of law

The chief reproach levelled against the Chinese criminal justice system is still that it ignores the Rule of Law, clinging to the idea of a sense of moral obligation. However, the West sees human rights as important and opines that the function of the State is to provide machinery to enable people to assert their rights, enjoy their rights undisturbed, and defend their rights against the encroachment of others.

China's Civil Law system

The reason for the Penal Code of Yu (Yu was Shun's successor in the year 2205 B.C.) was because the government of Hsia had fallen into disorder and in Shang times, the Code of T'ang was set up. In the Chou period, the decay of government led to the passing of the Code of the Nine Punishments.



Capital Punishment in China

Capital punishment in China is administered for a variety of crimes, but the vast majority of executions are for convictions of murder or organised drug

trafficking. The highest number of people are executed in China annually, although other countries (eg. Iran and Singapore) have higher execution rates per capita. Article 49 in the Chinese criminal code forbids the death penalty for convictions of children who are under the age of 18 at the time of the crime. Also, the Special Administrative Regions of Hong Kong and Macau have separate judiciaries and local laws and do not have capital punishment.

Conclusion

This very important book on criminal law in China is essential reading for lawyers. The authors examined data extracted from official case files and interviews with judges, prosecutors and defence lawyers to describe criminal trials in Mainland China and illustrate that China's criminal law is functional and bureaucratic, with shortcomings such as the lack of transparency and accountability for detainees. It is hoped that, with the extensive background information in this review of *Criminal Justice in China* by Mike McConville et al, published by Edward Elgar in 2011, the reader's curiosity has been whetted enough to order this important text, which subject suffers from a paucity of writings, apart from this book.

Note to pictures in this review:

- (1) Emperor Ch'ien Lung in Tartary, ready to receive Lord MacCartney, the first British Ambassador in 1793
- (2) Building the Burma Road
- (3) High-ranking Chinese- 1810