

The Media and the Courts: Towards Competitive Supervision?

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Abstract

Scholarship on Chinese governance has examined a range of factors that help to explain the resilience of authoritarianism. One understudied aspect of regime resilience and institutionalization has been the growing importance of supervision by a range of party-state entities. Examining court–media relations in China demonstrates that “competitive supervision” is an increasingly important tool for increasing state responsiveness and improving accountability. Court–media relations suggest that China is seeking to develop novel forms of horizontal accountability. Placing such relations in a broader institutional context also helps to explain why common paradigms used to analyse them may be inapplicable in China.

Keywords: China; courts; media; supervision; horizontal accountability; authoritarianism

Deng Yujiao 邓玉娇 was saved by the internet. Deng, a waitress at an entertainment complex in a small town in Hubei, came to national prominence after she stabbed and killed a local official. She argued that three men, all officials, approached her at work and demanded “special services,” a euphemism for sex. When she refused, stating that she worked in the centre’s karaoke lounge, not the bath house, she claimed that one of the men pushed her on to a sofa and attempted to remove her trousers. After a struggle, she stabbed two of the three men.

Local authorities sought to limit media coverage of the case. News spread via blogs, social-networking services and online discussion fora,¹ however, and mainstream media soon took up the case. With online opinion swelling in support of Deng, local authorities removed the two surviving officials from office and freed Deng on bail. Although a local court convicted her of the crime of “intentional injury,” the court also found that she was only partially criminally responsible because she suffered from mental illness.² Deng, who had just weeks earlier been facing a probable murder conviction, was free.

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1 Du An’na, “Cong Deng Yujiao shijian kan meiti dui minyi de biaoda” (“What the Deng Yujiao incident tells us about media representation of public opinion”), *Nanfang baoye wang (Nanfang Group Web)*, 26 August 2009, available from <http://nf.nfdaily.cn/nanfangdaily/cmjy/200908260226.asp>.

2 “Deng Yujiao an panjueshu quanwen” (“Full text of judgment in Deng Yujiao’s case”), *Dongfang fayuan*

Deng was not the first criminal defendant to be “saved by the media.”³ Over the past 15 years the Chinese media have become one of the most important actors in the Chinese legal system. Many observers perceive the media as an important check on China’s courts, serving to improve transparency in, and the fairness of, the system. Yet the story is not so simple. Media coverage also encourages Communist Party officials to intervene in the courts, reaffirming Party oversight of the judiciary and producing rushed trials in which assuaging populist demands for harsh treatment of defendants is more important than legal standards. Courts are also not merely passive recipients of media oversight. They have developed mechanisms for resisting and managing media coverage. Journalists and newspapers are increasingly finding themselves in court, and losing, as defendants in defamation cases.

The relationship between China’s media and courts is important not only for what it reveals about the development of both institutions, but also for the insights it provides into the evolution of Chinese governance. Scholarship on Chinese governance has focused on a wide range of factors that help to explain the institutional underpinnings and resilience of authoritarianism: consensus building through “fragmented authoritarianism,”⁴ the growing diversity of institutions as well as the dynamic tension between centrifugal and centripetal forces,⁵ the nomenclature system⁶ and the persistence of the Party’s internal institutions of control,⁷ the institutionalization of the party-state, the continued use of revolutionary-era policy-making techniques that emphasize adaptation and experimentation,⁸ and the creation of multiple input mechanisms, including village elections and officially conducted polling.⁹ Recent scholarship has also examined how informal institutions and social networks facilitate good

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(*Oriental Legal Observation*), 14 July 2009, available from <http://www.dffy.com/sifashijian/ws/200907/20090714071308.htm>.

- 3 Ou Muhua, “Shi ‘meiti shenpan’ jiule Deng Yujiao ma” (“Did ‘trial by media’ save Deng Yujiao”), *Xiangjiang pinglun (Xiangjiang Comment)*, 17 June 2009, available from http://xjpl.csonline.com.cn/6/200906/t20090618_964227.htm.
- 4 Kenneth G. Lieberthal, “Introduction: the ‘fragmented authoritarianism’ model and its limitations,” in Kenneth G. Lieberthal and David M. Lampton (eds.), *Bureaucracy, Politics, and Decision Making in Post-Mao China* (Berkeley: University of California Press, 1987); Kenneth Lieberthal and Michel Oksenberg, *Policy Making in China: Leaders, Structures, and Processes* (Princeton, NJ: Princeton University Press, 1988).
- 5 Barry J. Naughton and Dali L. Yang, *Holding China Together: Diversity and National Integration in the Post-Deng Era* (Cambridge: Cambridge University Press, 2004) pp. 6–7.
- 6 *Ibid.*; Maria Edin, “State capacity and local agent control in China: CCP cadre management from a township perspective,” *The China Quarterly*, No. 173 (2003), pp. 50–51.
- 7 Pierre Landry, *Decentralized Authoritarianism in China: The Communist Party’s Control of Local Elites in the Post-Mao Era* (Cambridge: Cambridge University Press, 2008).
- 8 Sebastian Heilmann and Elizabeth Perry, “Embracing uncertainty: ‘guerrilla’ policy style and adaptive governance in China,” in Sebastian Heilmann and Elizabeth Perry (eds.), *Mao’s Invisible Hand* (Cambridge, MA: Harvard University Asia Center, 2011).
- 9 Andrew J. Nathan, “Authoritarian resilience,” *Journal of Democracy*, Vol. 14, No. 1 (2003), pp. 6–17. This is a non-exhaustive list.

governance¹⁰ and assist in the sustainability and the evolution of formal institutions.¹¹

An understudied aspect of regime resilience and institutionalization has been the evolution of complementary, and at times competing, supervisory institutions. This article argues that court and media roles reflect the evolution of “competitive supervision,” the increased importance of oversight by a range of party-state entities over individuals and institutions outside traditional vertical lines of control. The courts and the media are two of the many institutions that today engage in horizontal oversight. Their expanded roles are part of a broader trend in which a range of supervisory institutions interact with each other, subject to party-state oversight. Rather than providing opportunities for popular contention, however, horizontal competition among party-state supervisory entities may be strengthening the party-state. Court–media interactions provide an example of how the development of rival supervisory institutions may facilitate the state’s goals of increasing responsiveness and accountability without deeper political reforms. Recognizing the roles of the media and the courts in constructing a system of horizontal accountability also provides a useful complement to recent literature that has emphasized the importance of non-state institutions in constructing systems of accountability¹²: the state itself is creating mechanisms both to encourage internal oversight and to facilitate oversight conducted through individuals and informal institutions.

This article is limited to analysis of court–media relations; further research is needed into the full range of supervisory institutions. It is nevertheless clear that institutions of oversight are essential to party-state resilience. Expansion of the supervisory roles of the media and courts is resulting in increased transparency and greater control.

Background: Commercial Media Meet Developing Courts

Commercialization of the media in the 1990s and the accompanying rise in investigative journalism resulted in increased coverage of legal matters.¹³ Newspapers such as *Southern Weekend* and *China Youth Daily* became well-known for their hard-hitting legal reports, as did television programmes such as *Focus* and *News Probe*. More recently, mass market urban newspapers such as *Southern Metropolitan Daily* and magazines such as *Caijing* and *Liaowang dongfang* have included a large amount of legal reporting. Commercialization resulted both in increased autonomy and in financial incentives to the media to challenge

10 Lily Tsai, *Accountability without Democracy: Solidary Groups and Public Goods Provision in Rural China* (Cambridge: Cambridge University Press, 2007).

11 Kellee Tsai, *Capitalism without Democracy: The Private Sector in Contemporary China* (Ithaca, NY: Cornell University Press, 2007), pp. 6–7, 15.

12 Tsai, *Accountability without Democracy*, p. 4.

13 Benjamin L. Liebman, “Watchdog or demagogue? The media in the Chinese legal system,” *Columbia Law Review*, Vol. 105, No. 1 (2005), pp. 1–157.

limits on content. Commercialization of the media was not the only factor facilitating coverage. Increased attention to law also resulted from party-state emphasis on using the media to boost legal awareness.

The media and the courts interact subject to formal and informal rules that limit both institutions.¹⁴ As with investigative journalism more generally, most oversight of the courts comes from non-local media or from media with a higher administrative rank than the court that is the target. Critical reporting on the legal system generally highlights wrongdoing by low-ranking officials. Local media, in contrast, often rely on court propaganda offices for news and thus are less likely to engage in critical reporting. Courts likewise are most effective at restraining local media.

The growth of the internet has added a new dimension to media coverage of law. Internet news portals such as *Sohu* and *Sina* provide extensive coverage of legal issues, posting articles from traditional print media and supplementing such coverage with online discussion fora, commentaries and original news content. Blogs also play an important role in spreading information, at times fanning the flames of media coverage of high-profile cases. In the Deng Yujiao case, for example, one of her lawyers used his blog to release information about the case, including allegations that one of Deng's alleged assailants had tried to remove her clothing.¹⁵ Another blogger visited Deng Yujiao in detention in a psychiatric ward and posted an account, including pictures of Deng, on the internet.¹⁶

Newspapers and web portals compete to provide the latest details on major cases. In 2009 the “Hangzhou Drag Racing Case” became a national sensation after an illegally modified Mitsubishi, driven by the son of a rich local businessperson, struck and killed a recent university graduate in central Hangzhou. The case went viral after pictures were posted anonymously on the internet within hours of the crash. These included images showing friends of the driver, Hu Bin 胡斌, smoking and laughing at the scene of the accident.¹⁷ Print media and web portals competed to provide daily updates, with web portals dedicating special sections to the case. As debate swelled regarding the possible charges against the driver, the media carried reports based on apparent leaks from the procuratorate's office on what charges would be brought.¹⁸

14 *Ibid.*

15 Xia Lin, “Dui wuyiling an zhong shexian qiangjian fanzui de xianyiren Huang Dezhi tichu konggao” (“Accusation against Huang Dezhi, suspected of rape in the May 10 case”), *Sohu Blog*, 25 May 2009, available from <http://xialinblog.blog.sohu.com/117156484.html>.

16 “Wangyou tufu tanwang zai yiyuan zhong de Deng Yujiao” (“An internet user visits Deng Yujiao in the hospital”), *Chengchi shequ (Urban Community)*, 20 May 2009, available from <http://club.1zcc.com/thread-27806-1-1.html>.

17 “Hangzhou fujiazi ba malu dang F1 saidao wugu luren bei zhuangqi wu mi gao” (“Rich kid in Hangzhou treats public road as F1 race track, impact sent innocent pedestrian flying five metres from the ground”), *Tianya shequ (Tianya Community)*, 8 May 2009, available from <http://www.tianya.cn/publicforum/content/funinfo/1/1455619.shtml>.

18 See e.g. “Hangzhou biaoche zhuangsiren an – zuixin xiaoxi” (“Hangzhou drag racing vehicular death case – latest news”), *Sina.com*, available from http://roll.news.sina.com.cn/s_fjzbc_all/1/index.shtml.

The expansion of media scrutiny of the courts is having two major effects on the legal system. First, rapid dissemination of information makes it difficult for authorities to restrict coverage of sensitive cases. This was seen clearly in late 2005 and early 2006, when a number of Chinese media outlets covered the case of Zhou Yezhong 周叶中, a Wuhan University professor accused of plagiarizing the work of another scholar, Wang Tiancheng 王天成. Zhou was a prominent scholar known for his close links to Party leadership; Wang was a former Peking University lecturer who had been imprisoned for attempts to form a rival political party. After initial coverage of the case in *Freezing Point*, a weekly supplement of *China Youth Daily*,¹⁹ Peking University Law professor He Weifang wrote a critique of Zhou's response to the accusations of plagiarism.²⁰ The article was originally scheduled to run in *Freezing Point*, despite the fact that the Central Propaganda Department had criticized the publication for its earlier report on the case, and had apparently banned the media from further coverage.²¹ *Freezing Point*, which was later temporarily closed for reporting another controversial story, decided against publishing He's article, apparently yielding to higher-level pressure. But the article was posted to a legal website and was widely discussed online.

In March 2005, Wang sued Zhou for infringing his copyright, claiming more than 70,000 yuan in economic and emotional damages.²² After *The Beijing News* reported on the case, propaganda department officials issued an instruction ordering punishment of the journalists and editors who had been involved in publishing the article.²³ The punishment suggested that the ban imposed after the initial report on the case by *Freezing Point* remained in place. Most media appeared to obey the ban, but the *Beijing News* article remained available on the *China Youth Online* website,²⁴ and a few other publications, including the

- 19 Bao Limin, "Shui gai wei xianfa xuejia 'piaoqie' fuze? – guanyu Wuda xueshu weiyuanhui fuzhuren Zhou Yezhong jiaoshou deng shexian piaoqie de jizhe diaocha" ("Who should be held responsible for plagiarism by constitutional scholars? – Journalist's investigation regarding the suspected plagiarism of scholars including Professor Zhou Yezhong, vice-chair of the Academic Committee of Wuhan University"), *Zhongguo qingnian bao (China Youth Daily)*, 30 November 2005, available from <http://www.acriticism.com/article.asp?Newsid=7180&type=1003>.
- 20 He Weifang, "Zhou Yezhong jiaoshou shijian ji qita (xiuding gao)" ("The incident of Professor Zhou Yezhong and others (revised)"), *Beida falü wang (Peking University Legal Website)*, (n.d.), available from http://article.chinalawinfo.com/article/user/article_display.asp?ArticleID=32016.
- 21 He Yanguang, "Guanyu Zhou Yezhong xueshu piaoqie – gongzheng youyici chengwei ruozhe" ("Zhou Yezhong academic plagiarism – justice is again the weak party"), *Guantian chashe (Guantian Tea House)*, 28 December 2005, available from <http://www.acriticism.com/article.asp?Newsid=7359&type=1001>.
- 22 The complaint in the case was also posted online, see Tang Huang, "Wuhan daxue faxueyuan jiaoshou Zhou Yezhong yin shexian piaoqie bei qisu" ("Zhou Yezhong, a law professor of Wuhan University, was sued for plagiarism"), *Zhongguo lüshizhi (China Lawyer's Blog)*, 16 March 2006, available from <http://chineselawyers.bokee.com/4674870.html>.
- 23 Hu Hua, "Zhongxuanbu juexin chongdang chaoxizhe de baohusan" ("The Central Propaganda Department decides to be a protection umbrella for people committing plagiarism"), *Zhongguo xinxi zhongxin wang (China Information Centre Website)*, 21 March 2006, available from <http://www.observechina.net/info/artshow.asp?ID=38428>.
- 24 Zhang Hong, "Wuda bodao shexian chaoxi yuan Beida jiaoshi lunwen beisu" ("Doctoral tutor of Wuhan University was sued for plagiarism of a thesis of a previous lecturer of Peking University"),

Shanghai Morning Post, also reported on the case.²⁵ In addition, an internal notice from the *Beijing News* fining the editors and journalists responsible for the article and referencing the ban was posted and discussed on the internet,²⁶ thus drawing further attention both to the ban and to the allegations of plagiarism.²⁷ Although there was little subsequent media coverage of the case, Wang posted updates on his blog. The blog was subsequently blocked in China, but the complaints and other documents relating to the case were also posted anonymously to online discussion fora in China. They remained available even after other discussion of the case was removed from major websites.²⁸ Similarly, when the Beijing High People's Court decided the appeal, upholding the original verdict, mainstream media refrained from coverage. But the court decision was posted to the web,²⁹ and one Chinese website, *Tianya*, covered the decision. The *Tianya* report quoted Wang's lawyers as stating that the outcome was obviously the result of political interference, as such an opinion could not have been written by judges who understood the law.³⁰

The authorities do sometimes succeed in imposing near-total bans on discussion of cases on major websites, as was the case in the July 2009 detention of legal activist and scholar Xu Zhiyong 许志永. Even in such cases, information appears to spread quickly via blogs and social networking sites. The growth of email, the internet and microblogs also makes it possible for reporters prevented from working in their local areas to pass information to colleagues elsewhere, often those working at media not subject to local propaganda department bans. Yet the importance of the internet does not suggest that oversight of the courts is now outside state control: there are successful cases of supervision where traditional media take up a case. The influence of internet opinion also draws on the traditional strong position of the media in the political system.

footnote continued

Xin jing bao (*The Beijing News*), 20 March 2006, available at http://edu.cyol.com/content/2006-03/20/content_1338674.htm.

- 25 "Wang Tiancheng zhengshi qisu Wuda jiaoshou Zhou Yezhong" ("Wang Tiancheng formally brings lawsuit against Zhou Yezhong, a law professor of Wuhan University"), *Dongfang zaobao wang* (*Oriental Morning Post Web*), 17 March 2006, available at <http://art.people.com.cn/GB/14759/21864/4210076.html>.
- 26 "Guanyu cuowu kanfa 'Wang Tiancheng qisu Wuda bodao Zhou Yezhong' yiwen de chuli jue ding" ("Decision concerning the incorrect publication of the article 'Wang Tiancheng sued Zhou Yezhong, a doctoral tutor of Wuhan University'"), *Xin jing baoshe shewu guanli weiyuanhui* (*The Beijing News Press Affairs Administration Committee*), 21 March 2006, available at <http://post.baidu.com/f?kz=89749717>, also available at <http://www.acriticism.com/article.asp?Newsid=7866&type=1006>.
- 27 He Yanguang, "Zhou Yezhou academic plagiarism."
- 28 See e.g. <http://hi.baidu.com/%B7%E7%C8%E7%D9%E2/blog/item/24814a4356daa51a73f05dd4.html>.
- 29 "Wang Tiancheng su Zhou Yezhong piaoqie an de zhongshen panjueshu" ("Final judgment in the plagiarism case of Wang Tiancheng versus Zhou Yezhong"), *Fali boke* (*Law Blog*), 24 December 2006, available from <http://tygh.fyfh.cn/blog/tygh/index.aspx?blogid=149272>.
- 30 "Zhou Yezhong shexian piaoqie zhongshen yuangao baixu (zhuan zai)" ("The plaintiff loses in the lawsuit against Zhou Yezhong for plagiarism (reprinted)"), *Tianya shequ* (*Tianya Community*), 23 December 2006, available at <http://cache.tianya.cn/publicforum/Content/No01/1/292073.shtml>.

Propaganda authorities remain able to punish those who overstep the boundaries of permissible content. Nevertheless, it is increasingly difficult to block all reporting on or discussion of a particular case or topic. Such challenges to the traditional model of media control result in new pressures on the courts to take account of views voiced in the traditional media or online, but also provide opportunities for activists seeking to use the law to expose injustice or push for change.

The second effect of media coverage of law has been to stimulate discussion of legal matters. The internet has facilitated even broader discussion and debate. Seemingly minor cases can instantly become major topics of online debate. These often go well beyond the boundaries of what would be permitted in the print media or on television, as was clear in the debate on the Zhou Yezhong, Deng Yujiao and Hangzhou drag racing cases.

Expanded discussion of legal issues can also be used by activists to push for change. Beginning in 2003, a number of cases were brought by carriers of the hepatitis B virus (HBV), who alleged they were discriminated against when they were denied employment because of their HBV positive status. Many of the early cases led to negotiated outcomes or to plaintiff losses. But the litigation, which included more than 40 cases by 2008, led to widespread media coverage of discrimination against HBV carriers. It also helped to spawn a network of activists seeking to address such discrimination.³¹

The cases, and related media coverage, contributed to changing national laws and policies regarding hepatitis B carriers. First, in 2008, the Employment Promotion Law explicitly banned employers from denying employment solely based on an applicant's status as a carrier of an infectious disease.³² The passage of the law was quickly followed by widespread media coverage of the first successful lawsuit alleging such discrimination: in May 2008 a Beijing court awarded approximately 20,000 yuan in damages to a plaintiff who sued after being denied employment because he carried the hepatitis B virus.³³ Second, in October 2009, China's Ministry of Health announced that it was formulating new guidelines governing physical examinations for admission to schools and for employment, with the aim of ending mandatory testing for HBV. In making the announcement, the Ministry explicitly cited the influence of media coverage of and public opinion on the issue.³⁴

31 Lu Jun, "Zhongguo yigan fanqishi de huigu yu zhanwang" ("The past and future of efforts against HBV discrimination in China"), *Tianxia jiangtan (World Forum)*, 21 October 2007, available from http://www.brooks.ngo.cn/txjt/jthg/mj_071021.php. Many of the developments in HBV litigation have been chronicled by *China Labour Bulletin*, which has been involved in a number of the cases. "China's first successfully litigated Hepatitis B employment discrimination case," *China Labour Bulletin*, 19 August 2009, available from <http://www.clb.org.hk/en/node/100542>.

32 Employment Promotion Law, art. 30.

33 "Beijing shouli yigan qishi shengsu an chen'ai luoding – wenti yiran burong leguan" ("Dust settles after the first successful HBV discrimination lawsuit in Beijing – it remains difficult to be optimistic regarding the issue"), *Xinhua wang (Xinhua Net)*, 2 July 2008, available from http://news.xinhuanet.com/legal/2008-07/02/content_8476530.htm.

34 "Weishengbu zheng zhiding quxiao tijian yigan liangduiban jiance zhidao yijian" ("Ministry of Health is formulating guideline on ending physical examinations for HBV"), *Souhu xinwen (Sohu News)*, 10 October 2009, available from <http://news.sohu.com/20091010/n267253313.shtml>.

Greater availability of legal information and the rapid spread of news are also useful to those working within the legal system. Judges in less-developed areas of China, who only a few years ago frequently lacked basic legal information, now have easy access to a large volume of material online. Judges comment that they routinely go online to locate laws and regulations, to find examples of how courts elsewhere in China have handled similar legal issues, and to read academic opinion on novel or difficult legal issues. Better access to information makes it easier for judges to resist external pressure from both Party officials and others – because they can respond with better-reasoned legal arguments.³⁵

Supervising the Courts

The 2003 Sun Zhigang 孙志刚 case is widely viewed as the best example of how China's media are exposing injustice. Yet is it also an example of how media oversight reinforces Party control of the courts. In March 2003, Sun, a 27-year-old graphic designer, was beaten to death at a detention centre for migrant workers in Guangzhou. More than a month after Sun's murder, *Southern Metropolitan Daily*, the leading commercial paper in Guangdong province, carried an extensive report on the case. The paper also printed a commentary condemning the killing, entitled "Who will take responsibility for the abnormal death of a citizen?" Local propaganda department officials sought to ban further reporting on the case, but it was too late: within hours of publication, the original report had been posted on numerous websites. The reports sparked a wave of outrage online. Other media soon took up the case, forcing the authorities to investigate Sun's murder and punish those responsible. Twelve suspects were sentenced in criminal trials, with the principal defendant, a nurse at the detention centre, receiving a death sentence.³⁶

The most important effect of the case was to hasten changes to the detention system that had resulted in Sun's death. Following the initial reports and subsequent arrests, three young academics issued a petition to the National People's Congress seeking to abolish the "custody and repatriation" system for migrant workers. The timing of the petition was co-ordinated with journalists, who used news of it to write further reports about abuses in the system. A second petition from a group of academics kept the issue in the news. In June 2003, just three months after Sun's murder and two weeks after the trial of those allegedly responsible, the State Council announced that the custody and repatriation system was being abolished.³⁷

In numerous other cases the media have likewise come to the assistance of aggrieved individuals seeking to overturn unjust decisions. Many public interest

35 Benjamin L. Liebman and Tim Wu, "China's network justice," *Chicago Journal of International Law*, No. 8 (2007), pp. 257–321.

36 Liebman, "Watchdog or demagogue?"

37 *Ibid.*

lawyers say that favourable media coverage is often the most important factor leading to a successful lawsuit.³⁸ The threat of media exposure is a powerful weapon that can pressure courts to follow both substantive and procedural law. The increased relevance of law in China has provided journalists with standards to which they can point in criticizing the courts. As a result, judges are paying more attention to issuing well-reasoned decisions that follow the law.

Yet media supervision also reinforces Party oversight of the courts. In many cases media accounts are taken as fact by party-state superiors who oversee the courts. Party officials continue to issue written instructions to courts in individual cases, and officials' views of cases are frequently influenced by the media. Judges comment that they are not afraid of media pressure, but they are wary of the ability of the media to influence party-state superiors.³⁹ Judges contend that the media suffer from many problems similar to those that undermine the courts: corruption and biased reporting. The practice of journalists writing biased reports in exchange for payment has given rise to the saying that "it is better to hire a journalist than to hire a lawyer."

The media's traditional position as both the mouthpiece and investigative arm of the party-state means that when the courts and media are in conflict, media views are likely to prevail. In contrast to the courts, which developed only during the reform period, the media have long played an authoritative role in the Chinese political system. Reliance of officials on media opinion is accentuated by the fact that national, provincial and local media continue to issue internal reports, or *neican* 内参. Journalists use these to apply pressure in court cases, in place of or in addition to public reporting; in some cases internal reports are used to pave the way for public reports. Journalists also use informal pressure to affect the outcome of cases, telephoning judges to express an interest in a case even when they have no intention of actually reporting on it. Journalists and lawyers say that such actions are sometimes sufficient to alter case outcomes.

The possibility that media supervision will directly subvert court autonomy is manifest most clearly in high-profile criminal cases. Convicted gangster Liu Yong found that media coverage of his case meant the difference between life and death. An intermediate court in Liaoning province sentenced Liu to death for a long list of crimes relating to his role as a leading organized crime figure in Shenyang. On appeal, however, Liu's lawyers persuaded the Liaoning High People's Court to reduce his sentence to life in prison. Among the factors that resulted in the lighter sentence was the argument that Liu's confession had been obtained through torture.⁴⁰

38 *Ibid.* p. 111.

39 *Ibid.* p. 132.

40 The court stated that it had reduced the sentence in light of the facts and circumstances of the case, and noted that torture could not be ruled out. The Provincial High Court Opinion is not publicly available, but the decision is summarized in the SPC's opinion. Zuigao renmin fayuan, "Zuigao renmin fayuan zaishen Liu Yong an xingshi panjue shu (quanwen)" ("Supreme People's Court decision on the second appeal of Liu Yong criminal case (full text)"), *Zhongguo fayuan wang* (*China Court Web*), 24 December 2003, available at <http://www.chinacourt.org/public/detail.php?id=96393>.

A week after the appellate court's decision, a Shanghai paper, *Bund Pictorial*, issued an article entitled "Doubts regarding the decision to change the sentence of gangster Liu Yong to a suspended death sentence."⁴¹ Online news accounts of the case quickly spread, with one major portal stating simply in its headline: "Liu Yong will not die." Media reports suggested that Liu had received lenient treatment because of ties to Party officials in Liaoning. Websites filled with angry comments, expressing rage at the perceived favourable treatment.

The public outcry led the Supreme People's Court (SPC) to intervene in the case, apparently at the instruction of senior Party officials. The court invoked a rarely used procedure pursuant to which it may retry questionable cases *de novo*. The outcome of the carefully scripted retrial surprised no one: Liu was executed the same morning that the court announced its verdict. The media claimed victory, noting that the decision was in line with popular demands.

The Liu Yong case reflects a pattern that has been seen in numerous cases: media intervention leads Party officials to issue instructions to the courts, resulting in rapid trials and harsh punishment of alleged wrongdoers. The media then declare victory, noting that the courts have acted in line with popular demands. Even in the Sun Zhigang case, widely viewed as one in which the media played an important role in advancing justice, media pressure led to show trials of the alleged culprits.⁴² Subsequent cases have followed this model, particularly cases in which online opinion argues that well-connected defendants are getting off lightly.

The Liu Yong, Sun Zhigang and Deng Yujiao cases highlight a central characteristic of media supervision of the courts: courts under media pressure in high-profile cases have little, if any, autonomy to decide cases before them. Media supervision plays more than the role of a watchdog reporting on courts' activities. The media's ability to stir up popular sentiment and thus to influence Party officials reinforces Party oversight of the courts. This is a direct consequence of the combination of the media's traditional roles with marketized mass appeal. But it is also emblematic of the development of supervision in the Chinese political system: effective supervision is equated with substantive outcomes that assuage popular and Party demands, not with a system of clearly defined boundaries among supervisors or rules regarding how they exercise oversight.

The Courts as Supervisors

Courts have not been passive recipients of media scrutiny: they also act as supervisors of the media. Courts and judges are adept at managing and controlling media coverage. In addition, the media are increasingly finding themselves in court as defendants in defamation cases brought in response to critical reports

41 Li Shuming, "Dui Shenyang heibang toumu Liu Yong gaipan sihuan de zhiyi" ("Doubts regarding the decision to change the sentence of gangster Liu Yong to a suspended death sentence"), *Waitan huabao* (*Bund Pictorial*), 21 August 2003, available at <http://news.sina.com.cn/c/2003-08-21/01351583471.shtml>. A suspended death sentence is in practice generally equivalent to a sentence of life in prison.

42 Liebman, "Watchdog or demagogue?"

– the overwhelming majority of which they lose.⁴³ In court–media relations, supervision runs in both directions.

Controlling coverage

Senior court officials have repeatedly emphasized the importance of greater transparency in China’s courts. In a 2006 speech, the then-president of the SPC, Xiao Yang, stated that courts should voluntarily release information about important cases, cease to be passive in response to media coverage, and strengthen their propaganda systems so as to “lead the media to report positively” about the courts.⁴⁴ Xiao’s successor at the SPC, President Wang Shengjun, has likewise spoken of the importance of courts exposing themselves to media supervision and of balancing legal outcomes with the needs of the nation and the Party.⁴⁵ In May 2009 the SPC issued directions to lower courts that call on them to respond quickly to negative reporting, to improve relationships with the media, and voluntarily to provide tips to the media so as to encourage positive coverage of the courts.⁴⁶ Then, in December 2009, the SPC issued a notice calling on courts to become more open and to facilitate supervision by the media.⁴⁷ The notice also called on court propaganda offices to provide news to the media and to ensure that the media accurately report on the courts.

The comments and rules reflect two tactics that courts have used in response to media pressure. Courts have publicly welcomed greater supervision. Concurrently, they have stepped up efforts to control media access and the content of reports. Regulations adopted by the SPC in 1999 state that most cases should be open to the public and the media, but also include numerous vague exceptions and require that media seeking to cover cases obtain permission in advance from the court hearing the case.⁴⁸ In practice, the regulations give judges and courts significant discretion to deny access to the media.

43 Benjamin L. Liebman, “Innovation through intimidation? An empirical account of defamation litigation in China,” *Harvard International Law Journal*, Vol. 47, No. 1 (2006), p. 33.

44 Xue Yongxiu, “Xiao Yang: fayuan yao zhudong xiang shehui fabu zhongda anjian xinxi” (“Xiao Yang: courts must voluntarily release information about important cases”), *Zhongguo fayuan wang (China Court Website)*, 15 January 2006, available at <http://www.chinacourt.org/public/detail.php?id=191279>.

45 Yang Weihuan, “Wang Shengjun: quanmian jiaqiang xingshi da’an yao’an shenpan gongzuo” (“Speech by Wang Shengjun: strengthening trial work in major criminal cases at all levels”), *Xinhua wang (Xinhua Net)*, 30 August 2009, available from http://news.xinhuanet.com/legal/2009-08/30/content_11966723.htm.

46 “Zuigao fayuan yaoqiu geji fayuan jishi yingdui fumian yulun chaozuo” (“The Supreme People’s Court asks courts of all levels to respond promptly to media stirring-up of negative public opinion”), *Xinhua wang (Xinhua Net)*, 12 May 2009, available from http://news.xinhuanet.com/lianzheng/2009-05/12/content_11356258.htm.

47 “Zuigao renmin fayuan yinfa ‘Guanyu sifa gongkai de liuxiang guiding’ he ‘Guanyu renmin fayuan jie-shou xinwen meiti yulun jiandu de ruogan guiding’ de tongzhi” (“Notice of the Supreme People’s Court on issuing the six provisions on judicial openness and several provisions on the people’s courts’ exposure to public supervision through mass media”), *Falü tushuguan (Law Library)*, 8 December 2009, available from http://www.law-lib.com/law/law_view.asp?id=305059.

48 “Zuigao renmin fayuan guanyu yange zhixing gongkai shenpan zhidu de ruogan guiding” (“Certain rules of the Supreme People’s Court on strictly implementing an open trial system”), *Falü jiaoyu*

Courts have also become adept at encouraging positive media coverage. They frequently draft articles for the media, or provide details about cases to journalists. They reward judges for obtaining positive coverage or for writing articles about their work that boost courts' reputations. Many courts also require local media to seek prior approval of articles from either court propaganda officials or the judges hearing a case. Although these rules appear to be widely ignored by non-local media, failure to seek approval, or running a critical article, can result in journalists being barred from further reporting on the court. National and local rules ban media from reporting on cases prior to the issuance of first-instance decisions, and bar media from issuing opinions contrary to those of the courts.⁴⁹ In 2006 the SPC announced that it would have an official press secretary and that judges would be forbidden from speaking to the media without prior approval.⁵⁰ Local courts have taken similar steps. Media commentary has portrayed the system as an effort to restrict coverage of the courts, and has criticized the courts for being afraid of media scrutiny.⁵¹

Judges argue that controls are necessary to prevent biased coverage that subverts courts' authority. Journalists, in turn, complain that judges are increasingly using the rhetoric of "judicial independence" to prevent media oversight of the courts. China's courts are not unique in seeking to restrict media coverage; many Western countries also impose significant limitations on coverage of pending cases. In China, however, such efforts appear aimed less at promoting fair trials than at resisting supervision and asserting courts' institutional authority, and they highlight increasing competition between the courts and the media. This competition reflects the party-state's encouragement of a system of controlled transparency: like other state actors, China's courts claim that they are open to scrutiny while at the same time restricting and manipulating media coverage.

Supervision through defamation litigation

Journalists and the media are also ending up in court, as defendants. There has been a sharp increase in defamation litigation in China over the past decade, with

footnote continued

wang (*Legal Education Web*), available from http://www.chinalawedu.com/news/2003_10%5C5%5C2142225821.htm.

49 For an example, see Zhang Huipeng, "Guangdong shengwei xuanchuanbu he Guangdongsheng gaoji fayuan lianhe fawen: guifan caifang baodao shenpan huodong" ("Joint announcement of Guangdong Province Party Propaganda Department and Guangdong Provincial High People's Court: regulating interviews and reporting on trial activities"), *Renmin fayuan bao* (*People's Court News*), 4 July 2003, available at <http://rmfwb.chinacourt.org/public/detail.php?id=58716>.

50 Tian Yu, "Zuigao fayuan: weijing pizhun faguan buying shanzi jieshou jizhe caifang" ("The Supreme Court: judges should not accept interviews with reporters without approval"), *Renmin wang* (*People's Daily Online*), 13 September 2006, available from <http://media.people.com.cn/GB/40606/4809936.html>.

51 "(Meijie piping) fayuan sheli xinwen fayanren, meiti baodao you jinqu?" ("(Media criticism) courts established press spokesperson system, do forbidden areas exist for media reports?"), *Renmin wang* (*People's Daily Online*), 24 September 2006, available at <http://media.people.com.cn/GB/40698/4851777.html>.

the courts hearing 5,195 defamation cases in 2004.⁵² There appear to be no official reports on the total number of cases in subsequent years, but observers note that the volume remains large. Some libel cases are brought against ordinary people or corporations, but a significant proportion is against the media, who complain that defamation litigation is being used as a new form of media control. Four major trends explain the impact of defamation litigation on the Chinese media.

First, both anecdotal evidence and empirical studies suggest that the media lose the majority of cases brought against them.⁵³ They fare worst when sued by officials, party-state entities, and businesses or corporations. They are moderately more successful when sued by ordinary or famous people, although they still lose most of these cases. Chinese defamation law is vague. It thus facilitates court decisions against the media by allowing courts to find the media liable even for small errors or for insulting language, meaning that truth is not always a defence.⁵⁴

Second, defamation litigation has become a significant means of retaliation by targets of “public opinion supervision.” Numerous cases are brought by officials or state or Party entities in response to critical coverage. Plaintiffs include officials accused of misusing funds, officials linked to cover-ups of major disasters, and a prison that sued (and won emotional damages for the prison itself) following a report on a sex-scandal. In a number of instances officials who have already been subject to criminal or administrative sanctions have successfully sued for libel. Most of these cases are brought by relatively low-ranking officials in plaintiffs’ home courts, frequently against non-local media. Not surprisingly, the media lose the overwhelming majority of such cases, highlighting the use of defamation litigation to protect local interests. Likewise corporations have brought numerous suits in response to critical reports, designed both to retaliate against the media and to block further reporting. Courts and judges themselves have brought (and won) a small number of defamation cases in response to critical coverage of the courts.

Third, a significant number of defamation cases are brought by ordinary people against official Communist Party mouthpiece newspapers claiming harm from media reports that place them in an unfavourable light, with plaintiffs winning many such cases. These results are counterintuitive; the traditional powerful role of the Party press would suggest that ordinary people might be wary of challenging the media. Plaintiff-friendly defamation standards help to explain such outcomes, as does the tradition of party-state control of the media. Chinese defamation law was not designed primarily as a tool for controlling the media. Nevertheless, suits by ordinary litigants succeed in part because

52 The 2004 figure reflected a decline of 7.17% from 2003. *Zhongguo falü nianjian bianweihui, 2005 Zhongguo falü nianjian (2005 Law Yearbook of China)* (Beijing: Zhongguo falü nianjian chubanshe, 2005), p. 152. But the figure was significantly higher than the 3,543 cases brought in 1994.

53 Liebman, “Innovation through intimidation?”

54 *Ibid.*

they do act to restrain the media. The willingness of ordinary people to challenge the official media, and their ability to succeed in doing so, also demonstrates that the media are not immune from oversight by other arms of the party-state.

Fourth, the growth of defamation litigation is having a significant effect on how the media operate, and perhaps is beginning to facilitate professionalism and professional identity among their members. Many in the media portray defamation litigation as unjust attempts to retaliate against or constrain the media. Others, however, note that the media themselves are to blame for many cases. Competition resulting from commercialization has resulted in media that enjoy increased autonomy without significant professional standards and that have incentives to push the limits both regarding permitted content and the facts. This was illustrated in the 2007 “fake dumplings case,” when a report aired on Beijing television claiming to show dumplings filled with cardboard. The story turned out to be false, and the journalist ended up in prison.⁵⁵

Although many awards against the media are for modest amounts, in some cases the financial risk of defamation litigation can be significant, forcing editors to think twice about the accuracy of reports before they are published. Numerous articles aimed at journalists provide advice on how to avoid litigation. Journalists say they now place far greater emphasis than they did just a few years ago on maintaining notes and recordings of interviews, corroborating reports and checking facts before publishing critical articles. They have also united, in conferences and on websites, to discuss defamation litigation, including strategies for combating cases and what they perceive to be unfair legal standards and court decisions. The Chinese Journalists Association, working with scholars in media and law, has attempted to persuade the SPC to issue a new interpretation governing defamation that would provide journalists with greater protection.⁵⁶ The threat of litigation thus may be forcing the media to change their behaviour in ways that neither state regulation nor marketplace pressures have done before.

For some, the increased prevalence of defamation litigation demonstrates the media’s shift away from serving primarily as the party-state’s mouthpiece. Yet the incidence of defamation litigation also reflects a system in which the media are only one among many party-state entities engaging in supervision, and in which they now face horizontal supervision from the courts as well as direct oversight from propaganda authorities. Courts have assumed this new role in response to public (and official and corporate) use of the legal system. They have been able to do so at least in part because such a role is consistent with party-state efforts to ensure that the newly commercialized media remain subject to state oversight. From the perspective of many in the media such increased scrutiny challenges modest steps towards increased media autonomy. From the

55 Benjamin L. Liebman, “Scandal, sukyandaru and chouwen,” *Michigan Law Review*, No. 106 (2008).

56 “Xinwen qinhai mingyuquan yinsiquan xin de sifa jieshi jianyi gao (tiaowen bufen)” (“Media infringements against the rights of reputation and privacy: proposed new judicial interpretation (provisions)”), *Xinwen jizhe (News Reporter)*, No.1 (2008), available from <http://qkzz.net/magazine/1006-3277/2008/01/2263373.htm>.

perspective of the party-state, courts are at times serving as a horizontal constraint on the media, just as the media have come to be important supervisors of the courts. These roles reinforce party-state control by ensuring that the autonomy of both institutions is constrained.

Towards Competitive Supervision?

Tensions between the courts and the media reflect both institutions' rapid changes in recent years. They also reflect an important characteristic of the Chinese political system. Over the past decade, the party-state has encouraged a range of actors to assume roles as "supervisors" of corruption and other abuses that threaten to undermine the legitimacy of Communist Party rule. Many of these institutions have had these roles since the earliest days of the PRC, drawing on China's imperial tradition, and their oversight functions have become more important as the central party-state has sought to address the principal-agent and lack of information problems that have long been observed as threats to the regime. Such institutions include the courts, the media, the procuratorates, the letters and visits system, people's congresses, and Party discipline authorities. Each claims to be a neutral and fair arbiter and investigator; all suffer from weaknesses, including significant limitations on their authority. One consequence is that supervisory institutions are increasingly competing with each other for authority within the confines of overall control by the party-state. Scholarship to date has examined the roles of each of these supervisory institutions, as well as the limitations inherent in hierarchical monitoring.⁵⁷ The dynamic relationship between the courts and media suggests the need for a broader examination of the role of supervision outside vertical administrative hierarchies.

China is seeking to establish a system of controlled transparency, where some of the benefits of greater scrutiny of official action can be obtained without undermining confidence in the state or encouraging direct challenges to Party rule. Encouraging supervision by a range of state actors is a central element of these attempts: supervision facilitates both increased state responsiveness and accountability. Allowing a range of state actors to voice grievances permits the state to appear responsive to public views, and to hold officials accountable, without encouraging non-state actors to play too prominent a role. China thus seeks to obtain some of the checking value of the media without permitting unfettered freedom of speech. Likewise courts have become increasingly important fora for rights-based grievances but lack formal powers over other state entities. Evidence from court–media relations also shows why increased supervision does not mean greater transparency: in most cases oversight is episodic, limited in scope and quickly brought under control. The episodic nature of sensational

57 See e.g. Melanie Manion, *Corruption by Design: Building Clean Government in Mainland China and Hong Kong* (Cambridge, MA: Harvard University Press, 2004); Yasheng Huang, "Research note: administrative monitoring in China," *The China Quarterly*, No 143 (1995), pp. 828–43.

cases resonates with historical emphasis on public spectacle, and suggests that increased public attention to sensational cases or scandal may reflect a continuation of historical tradition as much as it does an expansion of transparency or the development of civil society.

The development of multiple supervisory institutions, and of competition among them, is part of the institutionalization process that has fostered regime resilience. Existing literature has examined the institutions and forces that help to explain regime stability in China. The evolution of horizontal supervision is another example of the resources and tension the Chinese state has been able to draw on as it seeks to maintain control and improve governance without democracy. It is thus part of the process of institutional reforms that have been observed as crucial aspects of regime perseverance and legitimacy.⁵⁸ Overlapping and competing institutions work to reinforce central oversight as they pursue at times conflicting interests. Diversity of and differentiation among multiple supervisory institutions are evidence of greater institutional complexity and strength, rather than signs of divisions that threaten political stability. The lack of clearly defined roles for each of the supervisors also permits flexibility in policy implementation.⁵⁹

The development of supervision is an important part of the contemporary narrative of state responsiveness. Supervision remains within the control of the state, but it responds to and draws on public input in a way that permits party-state entities to appear responsive. Sensational media cases are generally those where online discussion helps to spread and fan the flames of discussion, but outcomes are controlled and depicted as being responsive to public demands. Court rhetoric likewise emphasizes the importance of public views, and outcomes are often portrayed as being consistent with public expectations.

Courts and the media are shaped by the demands imposed on them by popular views: both institutions have assumed new roles at least in part in response to public use and demands. Popular use of the courts and media may be examples of the process of institutional conversion and adaptation observed by Thelen and Tsai.⁶⁰ Evidence from court–media interactions suggests that public participation in supervision shapes institutional evolution in ways that make such institutions better equipped to appear responsive, thus promoting their own authority at the same time as they facilitate party-state goals.⁶¹ The role of the public in influencing both the courts and the media also resonates with those who have observed

58 David Shambaugh, *China's Communist Party: Atrophy and Adaptation* (Berkeley: University of California Press, 2008), p. 3; Nathan, "Authoritarian resilience."

59 For further discussion of the importance of flexibility as a policy tool, see Heilmann and Perry, "Embracing uncertainty."

60 Tsai, *Capitalism without Democracy*, p. 35; Kathleen Thelen, *How Institutions Evolve: The Political Economy of Skills in Germany, Britain, the United States, and Japan* (New York: Cambridge University Press 2004).

61 Similar observations have long been made with regard to numerous policy domains. For example, see David M. Lampton (ed.), *Policy Implementation in the People's Republic of China* (Berkeley: University of California Press 1987), p. 9.

the importance of informal institutions⁶²: there is an unexpectedly large space for public participation, and such participation may actually improve state capacity.

Competitive supervision does not appear to be fostering political contention. Just as the Party's strategy of "divide and rule"⁶³ may be a mechanism for maintaining party-state control, encouraging or permitting a range of supervisory entities to play more aggressive oversight roles is fostering regime resilience. Although at times used strategically by activists to further their goals, the existence of competing supervisory organs does not appear to be giving rise to the forms of popular contention that O'Brien and Li have observed as resulting from divisions between central and local authorities.⁶⁴ Similarly, the growing importance of populism in the courts suggests that the state is seeking to harness, rather than be controlled by, popular opinion.⁶⁵

Court-media interactions also demonstrate why common rule of law or media freedom paradigms used to understand media and court development may be inapplicable in China. Commercialization of and competition in the Chinese media are not necessarily leading to greater media freedom, just as increased use of the courts does not suggest that courts are serving as checks on other arms of the state. Greater roles for public criticism, or for the airing of grievances in court, may be examples of the historical trend of the party-state encouraging public criticism and seeking information from the ground level⁶⁶ rather than a shift towards democratization. Media that highlight abuses in the legal system may be subverting court autonomy and reinforcing Party oversight by encouraging official intervention into the courts. Likewise, court responses to media oversight largely seek to constrain the media.

Supervision in China is often viewed as ineffective because of the lack of autonomy of the supervisors. Court-media interactions suggest that China is seeking to develop a form of horizontal accountability, in which state institutions check abuses by other arms of the state.⁶⁷ China fails to meet key prerequisites identified in the literature on horizontal accountability, including democracy, the creation of legally empowered oversight institutions and enforceability of decisions in the courts.⁶⁸ Nevertheless, some roles that the media and courts play in China resonate with identified mechanisms of accountability in democratic or transitional systems: the pursuit of the right to obtain an

62 Tsai, *Accountability without Democracy*.

63 Elizabeth Perry, "Studying Chinese politics: farewell to revolution?" *The China Journal*, No. 57 (2007), p. 14.

64 Kevin J. O'Brien and Lianjiang Li, *Rightful Resistance in Rural China* (Cambridge: Cambridge University Press 2006).

65 Liebman, "A return to populist legality?"

66 Perry, "Studying Chinese politics;" Nathan, "Authoritarian resilience."

67 Larry Diamond, Mark F. Plattner and Andreas Schedler, "Introduction" in Andreas Schedler, Larry Diamond and Marc F. Plattner (eds.), *The Self-restraining State: Power and Accountability in New Democracies* (Boulder, CO: Lynne Rienner Publishers 1999), p. 3.

68 Guillermo O'Donnell, "Horizontal accountability in new democracies," in Schedler, Diamond and Plattner, *The Self-restraining State*, pp. 38, 39.

explanation,⁶⁹ the existence of a range of actors who are able to impose sanctions against unlawful actions by official actors,⁷⁰ and the trend towards making political leaders accountable for actions that do not necessarily violate the law.⁷¹ Novel forms of horizontal accountability appear to be emerging in China as a strategy for pre-empting the development of vertical accountability, in particular by non-state actors that could lead to broader democratic challenges. A defining characteristic of supervision in China is its episodic nature rather than the predictable and rule-based system identified as a requirement of accountability.⁷² The effect of horizontal accountability in China also remains limited; neither transparency nor answerability is achieved.⁷³ Nevertheless, court–media relations provide evidence that horizontal oversight is an increasingly important governance tool.

69 Richard L. Sklar, “Democracy and constitutionalism,” in Schedler, Diamond and Plattner, *The Self-restraining State*, p. 53.

70 O’Donnell, “Horizontal accountability in new democracies,” p. 38.

71 Philippe C. Schmitter, “The limits of horizontal accountability” in Schedler, Diamond and Plattner, *The Self-restraining State*, p. 61.

72 Andreas Schedler, “Conceptualizing accountability” in Schedler, Diamond and Plattner, *The Self-restraining State*, p. 19.

73 *Ibid.* p. 20.