

Access to Justice: Human Rights Abuses Involving Corporations

PEOPLE'S REPUBLIC OF CHINA



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Access to justice and effective legal remedies are crucial elements in the protection of human rights in the context of business activities. It is also relevant to the work of judges and lawyers who promote the rule of law and human rights. Despite its importance, access to justice is hindered by a number of obstacles unique to corporate human rights abuses. The study of state practices in providing access to justice reveals the potential of existing instruments to ensure this right. Scrutiny of state practices in this area will help the international community in its quest for new answers to the challenge of transnational corporate human rights abuse.

This study examines how the Chinese legal order can both limit and aid access to justice for victims of corporate human rights abuses. Although the Chinese legal system has established liability for corporations, in regard to the legal remedies available, claimants face a number of obstacles preventing them from obtaining fair, timely and effective adjudication of their claims. Case studies relating to mining, internet censorship and contaminated food products provide palpable illustrations of these obstacles, evidencing that the legal and political reforms in China are lagging behind the economic and market reforms. Judges lack independence to adjudicate, especially in politically sensitive cases, and the legal profession faces severe limitations. Class action and public interest litigation remain undeveloped, the availability of legal aid is limited, and the law concerning the piercing of the corporate veil has not yet been tested in a human rights case. These factors together make victims' search for justice a daunting task. The study concludes by offering recommendations to improve access to justice in China for victims of human rights abuse by corporations.



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People's Republic of China

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People's Republic of China

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This study was researched and drafted by Dr Surya Deva, Associate Professor at the School of Law, City University of Hong Kong. Mr Calvin Chun-ngai Ho and Ms Christina Yun-ting Lau provided research assistance. Ian Seiderman did the final review at the ICJ. This study is part of the larger ICJ project on Access to Justice and Legal Remedies in cases of human rights abuse involving companies under the direction of Carlos Lopez. Priyamvada Yarnell coordinated the production, Alec Milne assisted.

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Introduction

The study examines the existing laws and judicial and other remedies that are available in the People's Republic of China (PRC or China) to the victims of corporate human rights abuses. The primary objective of this examination is to determine the extent to which the existing Chinese regulatory framework offers an effective remedy in accordance with international law and standards, including those forming part of China's international obligations. The efficacy will be judged in terms of both *prevention and protection from* and *redress of* abuses of human rights by corporations.

Access to justice and effective legal remedies are crucial elements in the protection of human rights in the context of business activities. They are also relevant to the work of judges and lawyers who promote the rule of law and human rights. Despite its importance, access to justice is hindered by a number of obstacles unique to corporate human rights abuses. The study of state practices in providing access to justice reveals the potential of existing instruments to ensure this right. Scrutiny of state practices in this area will help the international community in its quest for new answers to the challenge of transnational corporate human rights abuse.

To contribute to the understanding of the problem and to assist in the formulation of a new agenda to strengthen access to legal remedies in the context of business abuse, the International Commission of Jurists (ICJ) has carried out a project addressing Access to Justice for victims of corporate human rights abuse. This project comprises a series of country studies (Brazil, Colombia, People's Republic of China, Democratic Republic of the Congo, India, The Netherlands, Nigeria, the Philippines, Poland and South Africa) and questionnaires for additional countries. The present study is one of the country studies.

This study ascertains the extent to which the Chinese legal framework has taken cognisance of, and responded to, the well-known substantive and procedural hurdles that victims have experienced globally in making corporations accountable for violations of human rights.¹ China, however, also poses unique challenges to those seeking the realizations of human rights. These challenges are linked to the economic, social, cultural and political conditions prevalent in China as well as its legal system. Although in recent years China has introduced various reforms, it still

1. See, for example, Phillip Blumberg, "Asserting Human Rights against Multinational Corporations under United States Law: Conceptual and Procedural Problems", in *American Journal of Comparative Law*, Volume 50, 2002, 493 (Suppl) (hereinafter Blumberg, "Asserting Human Rights"); Halina Ward, "Securing Transnational Corporate Accountability through National Courts: Implications and Policy Options", in *Hastings International & Comparative Law Review*, Volume 24, 2001, 451; Surya Deva, "Corporate Code of Conduct Bill 2000: Overcoming Hurdles in Enforcing Human Rights Obligations Against Overseas Corporate Hands of Local Corporations", in *Newcastle Law Review*, Volume 8, 2004, 87. (hereinafter Deva, "Overcoming Hurdles").

struggles to observe the rule of law and lacks an independent judiciary. Despite two amendments embodying the rule of law and human rights guarantees in the Constitution of the PRC,² the practice in this respect has not changed much. These factors together make the victims' quest for justice difficult.

The study follows the definitions and methodology adopted by the broader ICJ Access to Justice Project. The present study is based on in-country research, consultation with a number of experts and a national workshop held in Hong Kong on 5-6 March 2010 jointly organized by the ICJ and the School of Law of the City University of Hong Kong, where some 40 judges, lawyers, academics and civil society representatives from mainland China and Hong Kong were in attendance. The workshop was organized in Hong Kong for logistical reasons and also to allow unhindered participation and discussion. The study relies on a mixture of doctrinal and empirical tools. To begin with, the relevant Chinese laws, regulations, guidelines, judicial decisions or interpretations, case studies, media accounts, reports, and scholarly writings are reviewed to examine if the prevailing regulatory framework affords an effective remedy to the victims of corporate human rights abuses. This review will also help in ascertaining the obstacles that exist in making corporations liable for human rights violations.

The literature review is complemented with the use of case studies and interviews with various stakeholders to ascertain the gaps that exist between the 'law on paper' and 'law in action'.³ Comparing and contrasting law with practice is especially critical in the context of states like China where social realities often do not match with the legal text.⁴ This report employs case studies on the following subjects:

- Yahoo!'s disclosure of personal information about its web-users to the Chinese government, which resulted in incarceration of several cyber dissidents.

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2. See Article 13 of the Amendment to the PRC Constitution Adopted at the Second Session of the Ninth National People's Congress and promulgated for implementation by the Announcement of the National People's Congress on 15 March 1999; Article 24, of the Amendment to the PRC Constitution Adopted at the Second Session of the Tenth National People's Congress and promulgated for implementation by the Announcement of the National People's Congress on March 14, 2004.
 3. "Although both Chinese legislation and the Chinese legal system have made significant progress, and continue to evolve rapidly, there is generally a large gap between theory and practice." Amnesty International, *Doing Business in China: Human Rights Challenge*, Amnesty International, Berne, 2009, 6.
 4. For example, although the Constitution of the People's Republic of China contains a wide range of fundamental rights in Chapter II, this constitutional text hardly affords any protection to people against the pervasive and routine human rights violations by state agencies. Citizens, in fact, cannot normally rely on the Constitution to sue government agencies. See Oxford Pro Bono Publico, *Obstacles to Justice and Redress for Victims of Corporate Human Rights Abuses* (A Comparative Submission Prepared for Professor John Ruggie, UN Secretary General's Special Representative on Business and Human Rights), 3 November 2008, p.190, www.reports-and-materials.org/Oxford-Pro-Bono-Publico-submission-to-Ruggie-3-Nov-2008.pdf accessed 20 August 2009. The interpretation of the Supreme People's Court in *Qi Yuling v Chen Xiaqi* (2001) gave some hope as to the use of the constitutional provisions for enforcing one's rights. Albert H Y Chen, *An Introduction to the Legal System of the People's Republic of China*, LexisNexis, Hong Kong, Third

- The sale of melamine-contaminated milk products by Sanlu and other Chinese corporations, which resulted in death of several children.
- The implementation and efficacy of the 2008 Labour Contract Law in protecting the labour rights of workers hired by corporations.
- The difficulties faced by the families of the victims of Sichuan earthquake, which killed thousands of school children, in suing corporations for constructing poor quality schools.
- Coal mine accidents that kill thousands of workers every year, leaving the families of these victims to fight an uphill battle in seeking compensation from involved corporations and/or government departments.

As will be apparent from the above list, the term ‘case studies’ is used here in a broad sense: it refers not only to judicial decisions and incidents but also to social-economic-political situations that interact with the legal landscape relating to human rights and corporations. The above five case studies have been selected for a number of reasons. First, these case studies are representative in that they cover a range of human rights areas, including the right to privacy, to freedom of expression, right to health, right to life, corporate-government complicity, corruption, and labour rights. Second, at least one case study (related to the sale of melamine-contaminated milk products) not only highlights lack of adequate regulatory framework but also illustrates how public pressure and criticism could trigger the enactment of new regulations governing food safety. Third, in all these cases studies, victims have tried to employ a variety of forums and avenues to seek justice, thus providing the basis for an analysis of the effectiveness of the existing legal remedies available to the victims of corporate human rights abuses in China.

In addition to case studies, a few relevant stakeholders such as Chinese law experts, judges, lawyers, and non-governmental organisation (NGOs) were interviewed to gain a better understanding of the obstacles faced by victims of corporate human rights abuses in China. Finally, the report takes into account the input received from participants of the workshop organised to discuss this report.

The report begins in Part 1 with a brief description of the legal position as to the civil and criminal liability of corporations under various Chinese laws. It then critically examines, in Part 2, the legal remedies that victims of corporate human rights abuses could generally invoke. On the basis of this examination, obstacles for access to justice are elaborated in Part 3 of the report. In addition to general obstacles that victims of corporate abuse face all over the world, the study maps the China-specific obstacles (both systematic and corporate-specific) and

Edition, 2004, p.48. This hope, however, did not materialise. The PRC Constitution, therefore, remains a document with no or limited direct legal effect. For more details, please refer to section 1.2 of this report.

examines with reference to selected case studies the adverse impact of these obstacles on victims' ability to seek justice. The conclusion draws some general conclusions and also outlines various recommendations that might help in alleviating the hardships that victims face in making corporations accountable for human rights violations.

Two caveats should be noted at the outset. First, for the purpose of this study, 'China' will be taken to refer only to mainland China, though a reference to the Hong Kong position will be made while dealing with the Yahoo! case study. The reference to Hong Kong is necessary because it was the Hong Kong subsidiary of Yahoo! that disclosed personal information of its service-users and also because victims also sought legal remedies in Hong Kong. Second, in view of the sensitive nature of subject matter, the identity of some of the people interviewed is not disclosed. In fact, anonymity was a pre-condition for providing the relevant information.

1. Legal Liability for Corporations under National Law

Part 1 reviews various laws that may be invoked to make corporations liable for human rights abuses. The review is not exhaustive but only illustrative. Particular attention is paid to identify those laws that are relevant in relation to the five case studies.

1.1 The International Human Rights Framework

China is associated with several international human rights instruments. It has ratified the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD, ratified 1981), the International Covenant on Economic, Social and Cultural Rights (ICESCR, ratified 2001), the Convention on the Elimination of Discrimination Against Women (CEDAW, ratified 1989), the Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (CAT, ratified 1988) and the Convention on the Rights of the Child (CRC, ratified 1992).⁵ China has signed, but not ratified, the International Covenant on Civil and Political Rights (ICCPR), although a policy review process currently underway suggests the possibility of ratification in the near future.⁶ Despite these commitments, the stature of international human rights treaties in domestic Chinese law is minimal (see section 1.2 below). China has consistently lagged in its reporting to treaty-bodies regarding CEDAW and CERD, is currently six years overdue to report for the CRC, and missed one reporting period for the ICCPR.⁷

1.2 Constitutional Law

Currently, the PRC Constitution of 1982 is in force in China.⁸ This Constitution has been amended four times: in 1988, 1993, 1999 and 2004.⁹ The Constitution is generally recognised as the ‘mother law’ (*mufa*).¹⁰ It enjoys “supreme legal

5. See updated ratification status online at: <http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en>

6. Donald C. Clarke, *China's Legal System: New Developments, New Challenges*, Cambridge University Press, Cambridge, 2008, p.155.

7. See updated reporting statuses online at: <http://www.unhchr.ch/tbs/doc.nsf/NewhvVAlISPRByCountry?OpenView&Start=1&Count=250&CollapseView>

8. Constitution of the People's Republic of China, adopted at the 5th Session of the 5th National People's Congress and promulgated for implementation by the Announcement of the National People's Congress on 4 December 1982 (hereinafter PRC Constitution).

9. See Chen, *op.cit.*, note 4, pp.44-46.

10. Chen, *ibid.*, p.47.

status in comparison with any other legislation in the state”¹¹ and no “laws or administrative rules and regulations may contravene the Constitution.”¹² Article 5 of the PRC Constitution embodies the principle of supremacy: “No organisation or individual is privileged to be beyond the Constitution or other laws.”¹³ The Law on Legislation also confirms that the PRC Constitution has the highest legal force.¹⁴ A mechanism has been put in place to invalidate laws or regulations inconsistent with the Constitution.¹⁵

The supremacy of the Constitution, however, has limited practical implications in that “constitutional provisions are not directly enforceable in the absence of implementing legislation.”¹⁶ Nor do the PRC courts have the power to declare a statute or regulation unconstitutional. Although the National People’s Congress (NPC) and its Standing Committee have the power to supervise the implementation of the Constitution and annul any unconstitutional regulation,¹⁷ in practice they have not annulled any regulation.¹⁸ Commentators point out that there are “endless examples of the liberties taken with the text of the Constitution.”¹⁹

Despite the limits of constitutional supremacy in practice and the fact that the Constitution is not directly legally enforceable at this stage, it is still useful to review its provisions relating to human rights for at least two reasons. First, in the future the constitutional provisions might become more relevant if China

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11. Lin Feng, *Constitutional Law in China*, Sweet & Maxwell Asia, Hong Kong, 2000, p. 4. Lin points out that the PRC Constitution is considered fundamental law also for a unique reason, that is, for laying down fundamental tasks of the state. *Ibid.*
 12. Lin, *ibid.*, p.17.
 13. The Preamble also states: “This Constitution ... is the fundamental law of the State and has supreme legal authority. The people of all nationalities, all State organs, the armed forces, all political parties and public organizations and all enterprises and institutions in the country must take the Constitution as the basic standard of conduct, and they have the duty to uphold the dignity of the Constitution and ensure its implementation.”
 14. “The Constitution is the highest legal authority; no law, administrative regulation, local regulation, autonomous regulation, special rule or administrative or local rule may contravene the Constitution.” Article 78 of The Law on Legislation of the Peoples Republic of China (adopted at the 5th Session of the 7th National People’s Congress on 15 March 2000, entered into force on 1 July 2000).
 15. Chen, *op.cit.*, note 4, pp.112-14.
 16. Chen, *ibid.*, p.47. See also Sanzhuan Guo, “Implementation of Human Rights Treaties by Chinese Courts: Problems and Prospects”, in *Chinese Journal of International Law*, Volume 8:1, 2009, 161, p.168; Thomas E Kellogg, “Constitutionalism with Chinese Characteristics? Constitutional Development and Civil Litigation in China”, in *International Journal of Constitutional Law*, Volume 7, 2009, 215, p.217 (hereinafter Kellogg, “Constitutionalism with Chinese Characteristics”); Oxford Pro Bono Publico, *op. cit.*, note 4, p.190. This position is also confirmed by Chinese constitutional law scholars. Interview with Dr Zhu Guobin, Associate Professor at School of Law, City University of Hong Kong, on 10 November 2009.
 17. Article 62(2) and 67(1)/(7).
 18. Chen, *op. cit.*, note 4, p.114; Lin, *op. cit.*, note 11, p.299; Kellogg, “Constitutionalism with Chinese Characteristics”, *op. cit.*, note 16, p.220.
 19. Stephanie Balme and Pasquale Pasquino, “Taking Constitution[alism] Seriously? Perspectives of Constitutional Review and Political Changes in China”, paper presented at the Conference on *Constitutionalism and Judicial Power in China* (12-13 December 2006), p.12. See also Vicki Jackson & Mark Tushnet, *Comparative Constitutional Law*, Foundation Press, New York, 1999, pp.248-49.

continues to reform its legal system and moves forward to establish a rule of law society in the real sense, that is, where law limits the exercise of power by the ruling organs.²⁰

Second, lawyers, scholars and NGOs are making increasing use of the Constitution in assessing and criticizing government actions and/or protecting people's rights. Constitutional rights are also employed, albeit unsuccessfully, by human rights activists prosecuted by the Chinese government for various crimes.²¹ If this trend continues, the Chinese courts might not be able to ignore for long a reference to constitutional provisions. For instance, the Beijing Municipal No. 1 Intermediate People's Court in its decision to convict Liu Xiaobo for the crime of subversion of state power not only acknowledged the defence counsel's use of the freedom of speech under the PRC Constitution, but also responded to this argument briefly by noting that the defendant had exceeded the limits of this freedom.²²

Chapter II of the PRC Constitution contains an extensive list of fundamental rights, which could be considered copious by international standards.²³ Certain rights are also enumerated outside Chapter II, e.g., the right to property in Article 13 is under Chapter I on General Principles.²⁴ Overall, it is clear that as compared to pre-1982 constitutions, the 1982 Constitution gives fundamental rights greater prominence.²⁵ Nevertheless, most Chinese constitutional law scholars did not embrace the Western notion of human rights until the 1990s.²⁶

An interesting feature of Chapter II is its enumeration of fundamental duties of citizens. In consonance with the Marxist tradition, this coupling of 'rights' with 'duties' underlines the interdependence of rights and duties under the

20. Although there may be disagreements as to the precise meaning of the 'rule of law', at "its most basic, rule of law refers to a system in which the law is able to impose meaningful restraints on the state and individuals members of the ruling elite." Randall Peerenboom, "Varieties of Rule of Law" in Randall Peerenboom (ed.), *Asian Discourses of Rule of Law*, Routledge, London, 2004, pp.1-2.

21. For instance, Liu Xiaobo, a co-author of Charter 08, stated the following in defence to the charge of subversion of state power: "The country must respect and protect human rights, according to the powers given to the people in Article 35 of the Constitution. My freedom to express different opinions is the right of free speech given [to] me as a Chinese citizen under the Constitution. Not only should it not be limited or removed by the government; on the contrary, it should be respected and protected by the law. So the accusations against me infringe my basic rights as a Chinese citizen and are against the basic law of China." "Guilty of "Crime of Speaking"" (Translation of the statement of Liu prepared for the court), *South China Morning Post*, 9 February 2010, A12.

22. The court judgment reads: "During the trial, the defendant Liu Xiaobo argued that: He was innocent; he had merely exercised his right to free speech as granted by the Constitution. ... Liu Xiaobo's actions have obviously exceeded the freedom of speech category and constitute criminal offense." *Liu Xiaobo case*, Criminal Case No. 3901 (2009). English translation available at <http://www.hrichina.org/public/contents/press?revision%5fid=172717&item%5fid=172713> accessed 26 February 2010.

23. Chen, *op. cit.*, note 11, p.54.

24. Introduced by Article 22 of the 2004 Amendment.

25. Yash Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law*, HKU Press, Hong Kong, Second Edition, 1999, p.89; Lin, *op. cit.*, note 11, p.262.

26. Chen, *op. cit.*, note 4, p.53.

Constitution.²⁷ Article 33 of the Constitution makes this connection between rights and duties explicit: “Every citizen is entitled to the rights and at the same time must perform the duties prescribed by the Constitution and other laws.”

China signed the ICESCR and the ICCPR in 1997 and 1998, respectively. It ratified the former in 2001, and is said to be considering ratifying the latter.²⁸ It is not certain, however, if the ratification of the ICCPR in itself will significantly enhance the protection of human rights in China. The PRC Constitution is silent on the domestic status and application of international treaties and the Chinese courts are generally not willing to apply treaty provisions.²⁹

In 2004, the PRC Constitution was amended to declare that the “State respects and preserves human rights.”³⁰ Various other provisions elaborate specific human rights guarantees. For instance, Article 35 guarantees citizens “freedom of speech, of the press, of assembly, of association, of procession and of demonstration.”³¹ The Constitution also protects the freedom and privacy of correspondence,³² declares the personal dignity and residences of citizens to be inviolable,³³ and secures freedom of the person, including against unlawful arrest and detention.³⁴ Chinese citizens also enjoy a fundamental right to “criticise and make suggestions regarding any State organ or functionary.”³⁵

The Constitution confers on workers a right to rest.³⁶ Citizens have the right to receive ‘education’,³⁷ and “material assistance from the State and society when they are old, ill or disabled.”³⁸ Article 42 further provides: “Through various channels, the State creates conditions for employment, enhances occupational safety and health, improves working conditions and, on the basis of expanded production, increases remuneration for work and welfare benefits.”

These constitutional provisions could potentially be used in relation to corporations as well for at least two reasons. First, the last paragraph of the Preamble

27. Chen, *ibid.*, p.56.

28. This issue will be discussed in detail at an international conference in Beijing on “Ratification and Enforcement of International Convention on Civil and Political Rights” jointly organised by the US-Asia Law Institute of NYU School of Law, the Centre of Chinese & Comparative Law of City University of Hong Kong, and the Institute of Law of Chinese Academy of Social Sciences, on 5-6 December 2009.

29. See Guo, *op. cit.*, note 16, pp.163-66, and generally.

30. Article 33 of the PRC Constitution.

31. *Ibid.*, Article 35.

32. *Ibid.*, Article 40

33. *Ibid.*, Articles 38-39.

34. *Ibid.*, Article 37.

35. *Ibid.*, Article 41.

36. *Ibid.*, Article 43.

37. *Ibid.*, Article 46.

38. *Ibid.*, Article 45.

to the PRC Constitution provides that “*all enterprises and undertakings in the country must take the Constitution as the basic norm of conduct, and they have the duty to uphold the dignity of the Constitution and ensure its implementation.*”³⁹ Second, one could read an obligation to comply with constitutional (human) rights in Article 5 of the Chinese Companies Law, which lays down that: “a company shall comply with the laws and administrative regulations, social morality, and business morality. It shall ... bear social responsibilities.”

It must be noted, however, that the above contention is subject to several limitations. The exercise of rights, for example, might be limited – by relying on the language of Article 51 of the Constitution⁴⁰ – on grounds of serving collective interests of the state or society.⁴¹

A more serious obstacle, however, is posed by the current nature of the PRC Constitution. As noted before, the PRC Constitution has no direct legal effect in the sense that one cannot employ the constitutional text to challenge any government decision or assert one’s human rights.⁴² Guo rightly points out that “the major shortcomings of rights under the Constitution lies in the non-enforceability in courts of constitutional provisions.”⁴³ Although lawyers might refer to the Constitution to advance arguments, judges normally do not cite constitutional provisions in their judgments.⁴⁴ The 2001 interpretation of the Supreme People’s Court in *Qi Yuling*,⁴⁵ discussed below, raised some hope as to the future use of the constitutional provisions for enforcing one’s rights.⁴⁶ Chinese scholars also

39. (Emphasis added). Even foreign companies are under a similar obligation: “All foreign enterprises and other foreign economic organisations in China, as well as joint ventures with Chinese and foreign investment located in China, shall abide by the law of the Peoples Republic of China.” *Ibid.*, Article 18.

40. Article 51 reads: “The exercise by citizens of the People’s Republic of China of their freedoms and rights may not infringe upon the interests of the state, of society and of the collective, or upon the lawful freedoms and rights of other citizens.”

41. Jackson & Tushnet, *op. cit.*, note 19, p.248.

42. Kellogg notes that “in practice, these rights provisions ... are viewed by many as little more than empty promises, with virtually no legal effect.” Kellogg, “Constitutionalism with Chinese Characteristics”, *op. cit.*, note 16, p.217.

43. Guo, *op. cit.*, note 16, p.168. This is also echoed by the Professor Cohen: “There is no effective way to enforce constitutional right on the mainland. ... Mainland courts ... have sometimes been eager to enforce constitutional rights and are bombarded with requests from rights-conscious citizens. Yet they are prohibited from responding.” Jerome A Cohen, “Taiwan’s Constitutional Court: A Model for Beijing?”, in *South China Morning Post*, 29 October 2009, A13.

44. This is confirmed by two judges of the High People’s Courts. Interview with Judge No 2 and Judge No 3, on 9 November 2009. Guo cites two replies issued by the Supreme People’s Court (in 1955 and 1985) that might have contributed to the hesitation shown by the Chinese courts to apply constitutional provisions in deciding cases. Guo, *op. cit.*, note 16, p.171. See also Kellogg, “Constitutionalism with Chinese Characteristics”, *op. cit.*, note 1616, p.221.

45. *Qi Yuling v Chen Xiaoli and Chen Kezheng*, Reply of the Supreme People’s Court to the Shandong High Court (13 August 2001).

46. Ji Weidong, “Judicial Reform in China and Its Political Implications”, p.13, <http://www.reds.msh-paris.fr/communication/docs/weidong.pdf> accessed 10 November 2009.

mention a few prior instances in which the courts did cite constitutional provisions.⁴⁷ One study indicates that the courts have referred to constitutional ‘norms’ (not provisions) in over thirty cases.⁴⁸

The *Qi Yuling* interpretation – which is known as ‘China’s first constitutional case’ or ‘China’s *Marbury v Madison*’⁴⁹ – deserves a brief review here.⁵⁰ The context and circumstances in which the Supreme People’s Court gave this interpretation is particularly striking because this was a case filed by an individual against other individuals (and not government or public bodies). The first defendant, Xiaoqi, stole the college entrance examination scores of the plaintiff, Yuling, and got admission to a college by using the identity of the plaintiff. Xiaoqi subsequently secured a job in a local bank on that basis. Yuling sued the defendant pleading before the court that Xiaoqi not only stole her identity but also infringed her right to education under the PRC Constitution. Yuling claimed compensation for violation of her constitutional right. As the Shandong High Court was not sure how to deal with this argument, it sought guidance from the Supreme People’s Court, which ruled that the plaintiff’s right to education under Article 46 of the PRC Constitution⁵¹ and Articles 9 and 81 of the Education Law⁵² has been violated and that she could claim damages for this infringement of a constitutional right.

The *Qi Yuling* interpretation “sparked off a national debate about the direct effect and justiciability of provisions in the Chinese Constitution.”⁵³ It is suggested that the interpretation “was meant to trigger an explicit use of the Chinese Constitution by the courts.”⁵⁴ But apparently this did not happen. In fact, in December 2008, the Supreme People’s Court withdrew its *Qi Yuling* interpretation (along with

47. Chen, *op. cit.*, note 4, p.48 and the materials cited therein.

48. Kellogg, “Constitutionalism with Chinese Characteristics”, *op. cit.*, note 16, p.231, and generally pp.228-31, relying on Wang Lei, *Judicialization of the Constitution in China: Selected Cases* (2003). See also Randall Peerenboom & Xin He, “Dispute Resolution in China: Patterns, Causes and Prognosis”, in *East Asia Law Review*, Volume 4, 2009, pp.52-54.

49. Thomas Kellogg, “The Death of Constitutional Litigation in China?”, in *China Brief*, Volume IX, Issue 7, 2 April 2009, p.4.

50. This review is based on the English translation of the judgment provided by Mr Calvin Chun-ngai Ho.

51. Article 46 reads: “Citizens of the People’s Republic of China have the duty as well as the right to receive education. The state promotes the all-round moral, intellectual and physical development of children and young people.”

52. Article 9 provides: “Citizens of the People’s Republic of China have the right and duty to be educated” On the other hand, Article 81 reads lays down that “In case of infringement upon the legitimate rights and interests of ... education receivers ... in violation of the present Law to the extent of any loss or damage, the civil liabilities thereof shall be investigated into.”

53. Chen, *op. cit.*, note 4, p.48. See also Kellogg, “Constitutionalism with Chinese Characteristics”, *op. cit.*, note 16, pp.232-33.

54. Kellogg, *op. cit.*, note 49, p.5 (citing an article written by Justice Huang Songyou of the Supreme People’s Court). Ji observes: “The most important point here [in the interpretation] is to allow the local courts to invoke a constitutional provision in making judgment.” Ji, *op. cit.*, note 46, p.13.

several other interpretations) because it “no longer applied.”⁵⁵ Therefore, courts should no longer apply the interpretation in the future.

1.3 Labour Laws

China has put in place several labour laws to protect the rights of workers. The Labour Law of China regulates “labour relationships” and seeks to “protect the legitimate rights and interests of labourers”.⁵⁶ It applies to all enterprises, individual economic organisations, state organs and public organisations.⁵⁷ Article 3 of the Law recognises several important labour rights in the following terms:

“Labourers shall have equal right to employment and choice of occupation, the right to remuneration for labour, to rest and vacations, to protection of occupational safety and health, to training in vocational skills, to social insurance and welfare, to submission of labour disputes for settlement and other rights relating to labour stipulated by law.”

The Labour Law also guarantees workers “the right to participate in, and organise, trade unions in accordance with the law”⁵⁸ and prohibits discrimination in employment on the ground of ethnicity, race, sex, or religious belief.⁵⁹ Furthermore, the Law provides for equality of opportunity between men and women in employment matters,⁶⁰ prohibits enterprises from hiring “minors under the age of 16”,⁶¹ and makes provisions for working hours, rest and vacations.⁶²

The Labour Law confers on the administrative departments of labour the power to supervise and inspect the implementation of labours laws and regulations by enterprises.⁶³ In the *Tany Jin* case these provisions were successfully invoked by a worker against the Labour Bureau of Dangtu County to compel the department to perform its duty to protect workers’ rights.⁶⁴ In the instant case, the worker

55. Donald Clarke, “Supreme People’s Court Withdraws Qi Yuling Interpretation”, in *Chinese Law Prof Blog*, 12 January 2009 http://lawprofessors.typepad.com/china_law_prof_blog/2009/01/supreme-peoples.html accessed 10 November 2009; Kellogg, *op. cit.*, note 49, p.4.

56. Article 1 of The Labour Law of the People’s Republic of China, adopted at the 8th Meeting of the Standing Committee of the 8th National People’s Congress on 5 July 1994.

57. *Ibid.*, Article 2.

58. *Ibid.*, Article 7.

59. *Ibid.*, Article 12.

60. Article 13 reads: “Women shall enjoy the equal right, with men, to employment. With exception of the special types of work or post unsuitable to women as prescribed by the State, no unit may, in employing staff and workers, refuse to employ women by reason of sex or raise the employment standards for women.” *Ibid.*

61. *Ibid.*, Article 15.

62. *Ibid.*, Articles 36-45.

63. *Ibid.*, Articles 9, and 85-87.

64. *Tany Jin v. Labour Bureau of Dangtu County*, <http://www.colaw.cn/caselaw/labor.htm> accessed 2 November 2009.

requested the Labour Bureau to redress the situation of delayed payment of, and unreasonable deductions from, his wages by a building materials company. The Labour Bureau forwarded the letter to the Materials Bureau for further action, but did not follow up the matter. The Dangtu County People's Court ruled that the "Labour Department of Dangtu County had both the duty and the power to supervise, examine and dispose of the situation of the employers' compliance with labour laws and regulations" and that the Labour Bureau could not be considered to have performed its obligations by simply forwarding the letter to another department.⁶⁵ This case demonstrates that in appropriate cases the Chinese courts could help in protecting labour rights when requested to do so.

In 2008, the Chinese government strengthened the protection available to workers under the Labour Law by enacting the Labour Contract Law,⁶⁶ the Employment Promotion Law,⁶⁷ and the Labour Dispute Mediation and Arbitration Law.⁶⁸

The Labour Contract Law was enacted "in order to improve the labour contract system, define the rights and obligations of both parties to a labour contract, protect the legitimate rights and interests of workers, and establish and develop a harmonious and stable labour relationship."⁶⁹ This law – which expands the requirement of signing labour contracts under the Labour Law⁷⁰ – mandates that a written labour contract must be concluded to establish a labour relationship.⁷¹ The Labour Contract Law makes a provision for an open-ended contract for certain types of workers⁷² and lays down that labour contracts shall have provisions, among others, regarding job description and the place of work; term of the contract; working

65. *Ibid.*

66. The Labour Contract Law of the People's Republic of China, which was adopted at the 28th Meeting of the Standing Committee of the 10th National People's Congress of the People's Republic of the China on 29 June 2007, came into force on 1 January 2008 (hereinafter Labour Contract Law).

67. The Law of the People's Republic of China on Promotion of Employment, which was adopted at the 29th Meeting of the Standing Committee of the 10th National People's Congress of the People's Republic of the China on 30 August 2007, came into force on 1 January 2008 (hereinafter Employment Promotion Law).

68. The Law of the People's Republic of China on Labour-dispute Mediation and Arbitration, which was adopted at the 31st Meeting of the Standing Committee of the 10th National People's Congress of the People's Republic of China on 29 December 2007, came into force on 1 May 2008 (hereinafter Labour Dispute Mediation and Arbitration Law).

69. Article 1 of the Labour Contract Law.

70. Li Jing, "China's New Labour Contract Law and Protection of Workers", in *Fordham International Law Journal*, Volume 32, 2009, pp.1083, 1105-06, 1110-27; Yin Lily Zheng, "It's Not What is on Paper, But What is in Practice: China's New Labour Contract Law and the Enforcement Problem", in *Washington University Global Studies Law Review*, Volume 8, 2009, pp.595, 598-601; Marisa Anne Pagnattaro, "Is Labour Really 'Cheap' In China? Compliance With Labour and Employment Laws", in *San Diego International Law Journal*, Volume 10, 2009, pp.357, 362-67; Congressional-Executive Commission on China, *Annual Report 2008*, p.43, http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_house_hearings&docid=f:45233.pdf accessed 11 September 2009 (hereinafter, CECC, *Annual Report*).

71. Article 10 of the Labour Contract Law.

72. *Ibid.*, Article 14. For instance, an open-ended contract is mandatory if the worker, who has been working for the employing unit for a consecutive period of 10 or more years, proposes or agrees to renew the new contract.

hours, rest and vacation; remuneration; social insurance; and protection against occupational hazards.⁷³

It is clear that this law, the draft of which had attracted a significant amount of opposition from business organisations,⁷⁴ made provisions to safeguard rights of contract labour – an important issue in the context of China where so many people work in export factories as migrant workers. There were reports, however, that companies began taking steps to evade the law even before it came into force.⁷⁵

The Employment Promotion Law confers on workers “the right to employment on an equal footing” and prohibits discrimination on the grounds of workers’ ethnic backgrounds, races, gender, religious beliefs.⁷⁶ Against the background of a significant population having hepatitis B, Article 30 confers an important guarantee: “No employment unit, when recruiting employees, shall refuse to employ a job candidate on the basis that he/she is a carrier of any infectious pathogen.”⁷⁷ In addition to protecting the right to employment of disabled workers,⁷⁸ the law also guarantees gender equality in the right to work.⁷⁹ What is significant is that some of these anti-discrimination provisions have been invoked by the courts to award compensation in a few cases.⁸⁰

In the context of China (where strict residency restrictions prevent people from moving freely to find work or settle), an important right is enshrined in Article 31: “Rural workers who go to cities for employment shall enjoy equal right to work as

73. *Ibid.*, Article 17.

74. See, for instance, the opposition by the American Chambers of Commerce and the US-China Business Council. Global Labour Strategies, “Behind the Great Wall of China”, http://laborstrategies.blogs.com/global_labor_strategies/files/behind_the_great_wall_of_china.pdf accessed 28 October 2009. See also Li, *op. cit.*, note 70, p.1109.

75. Michael A Santoro, *China 2020: How Western Business Can – and Should – Influence Social and Political Change in the Coming Decade*, Cornell University Press, Ithaca, 2009, pp.38-39; CECC, *Annual Report*, *op. cit.*, note 70, p.42; China Labour Bulletin, “Going it Alone: A New Report on the State of the Workers’ Movement in China”, pp.10-11 <http://www.clb.org.hk/en/node/100507> accessed 11 September 2009 (hereinafter CLB, “Going it Alone”).

76. Article 3 of the Employment Promotion Law. See also Pagnattaro, *op. cit.*, note 70, pp.370-72.

77. This provision is further supplemented by Article 19 of the Regulations on Employment Service and Employment Management, issued by the Ministry of Labour and Social Security on 30 October 2007, came into force on 1 January 2008. Article 68 provides the penalty for breaching Article 19: “If employing units violate the provisions of Clause 2 of Article 19 in hiring labourers that the state laws and administrative regulations and the State Council’s health administrative departments prohibit, i.e., carriers of hepatitis B pathogen, the labour security administrative departments would order a reformation, and impose a fine within 1,000 Yuan; the parties should bear the liability of damage caused.” Employment Promotion Law, *ibid.*

78. Article 29 of the Employment Promotion Law.

79. Article 27 of the Employment Promotion Law. This provision further reads: ‘When an employing unit recruits persons, it shall not refuse to employ women or raise recruitment standards for females by using gender as an excuse, except where the types of work or posts are not suitable for women as prescribed by the State.’ *Ibid.*

80. CECC, *Annual Report*, *op. cit.*, note 70, p.45.

urban workers do. No discriminating restrictions may be placed on the rural workers who go to cities for employment.” Finally, the new law confers on workers a right to seek legal remedy for discrimination before the courts: “In the event of any employment discrimination in violation of the provisions of this Law, the relevant worker(s) shall be entitled to initiate legal proceedings in the people’s court.”⁸¹

The Labour Dispute Mediation and Arbitration Law, on the other hand, seeks to promote the resolution of labour disputes through mediation and arbitration in “an impartial and timely manner”.⁸² The underlying rationale of the law (to encourage the resolution of disputes without going to the courts)⁸³ might turn out to be problematic because the focus might shift to the promotion of harmonious labour relations rather than to the vindication of workers’ rights.

Despite these seemingly robust laws,⁸⁴ it is suggested that workers in China do not enjoy many vital labour rights: “China’s laws, regulations, and governing practices continue to deny workers fundamental rights, including, but not limited to, the right to organise into independent unions.”⁸⁵ Implementation of laws is a real problem.⁸⁶ Workers also do not generally have the support of a robust organisation or independent trade union to safeguard their labour rights.⁸⁷ The All-China Federation of Trade Unions (ACFTU) is China’s only legalised trade union,⁸⁸ and workers “who try to establish independent associations or organise demonstrations continue to risk arrest and imprisonment.”⁸⁹

In view of these limitations and in the absence of hope for justice from the courts, workers in recent times had no option but to take recourse to strikes,

81. Article 62 of the Employment Promotion Law.

82. Article 1 of the Labour Dispute Mediation and Arbitration Law.

83. CECC, *Annual Report*, *op. cit.*, note 70, p.44.

84. Santoro notes: “... the new Labour Contract Law ... [provides] at least on paper, workers protections that exceed those in the United States and even rival those in the labour-friendly European Union.” Santoro, *op. cit.*, note 75, p.21.

85. CECC, *Annual Report*, *op. cit.*, note 70, p.9.

86. Su and He note that “there is a vivid contrast between [the ideals of these laws] and the impoverished reality of their enforcement.” Yang Su & Xin He, ‘Street as Courtroom: State Accommodation of Labour Protest in China’, in *Law & Society Review* (forthcoming), Volume 44:1, 2010. See also Li, *op. cit.*, note 70, pp.1100-04; Zheng, *op. cit.*, note 70, pp.601-612.

87. Interview with Judge No. 1, on 14 September 2009; CECC, *Annual Report*, *op. cit.*, note 70, p.41. See also Qiu Yang, “ILO Fundamental Conventions and Chinese Labour Law: From a Comparative Perspective”, in *Chinese Law & Policy Review*, Volume 2, 2006, 18, pp.23-28.

88. Article 2 of the Trade Union Law, Adopted on 3 April 1992 at the 5th Session of the 7th National People’s Congress. Article 4 further provides that the ACFTU shall respect the leadership of the CPC. Santoro observes: “... the ACFTU sees as its primary role being loyal to the Communist Party and helping the party maintain civil stability; advancing workers interests is secondary and only within its broader mandate.” Santoro, *op. cit.*, note 75, p.22 (emphasis added), and also p.40.

89. CECC, *Annual Report*, *op. cit.*, note 70, p.41.

public protests and demonstrations.⁹⁰ In some instances, the government and/or the Communist Party of China (CPC) has tried to diffuse the violent situation by brokering a deal between workers and the concerned company. Against this background, it is now suggested that the government should actively support collective bargaining as a means to prevent labour disputes.⁹¹

1.4 Companies Law

In the year 2005, China enacted a new Companies Law, which came into force on 1 January 2006.⁹² Article 5 of the Law imposes wide ranging duties on companies in the following terms: “In its operational activities, a company shall abide by laws and administrative regulations, observe social morals and commercial ethics, persist in honesty and good faith, accept supervision by the government and the public, and assume social responsibility.”

These general expectations are further buttressed by specific provisions. For instance, Article 17 requires companies to “protect the lawful rights and interests of their staff and workers, sign labour contracts with them according to law, participate in social insurance, and improve occupational protection so as to achieve safety in production.” Companies should also “provide the trade union of the company with the conditions necessary for carrying out its activities.”

A provision of the Companies Law that could be especially useful is Article 20. It provides:

“The shareholder of a company shall observe laws, administrative regulations and the company’s articles of association, exercise the rights of a shareholder according to law, and shall not abuse his rights to damage the interests of the company or other shareholders; and he shall not abuse the independent status of the company as a legal person or the limited liability of shareholders to damage the interests of the creditors of the company.”

More importantly, Article 20 goes on and contemplates the possibility of the shareholders of a company paying compensation: “Where the shareholder of a company abuses the rights of shareholders and thus causes losses to the

90. “China’s workers are taking to the streets in ever increasing numbers. Angered by management abuses, and emboldened by the passage of new labour legislation, they are staging strikes, roadblocks and protests to demand the payment of wages in arrears, better working conditions and even the right to set up their own trade union branches.” CLB, “Going it Alone”, *op. cit.*, note 75. See also Su & He, *op. cit.*, note 86.

91. Robin Munro, “Collective Bargaining: A Systematic Approach to Improving Workers’ Rights”, paper presented at the *Workshop on Business, Human Rights and Access to Justice in China*, held at City University of Hong Kong on 5-6 March 2010.

92. The Companies Law of the People’s Republic of China, revised and adopted at the 18th Meeting of the Standing Committee of the 10th National People’s Congress of the People’s Republic of China on 27 October 2005. The Law came into force on 1 January 2006 (hereinafter Companies Law).

company or other shareholders, he shall be liable for compensation according to law.”

1.5 Food Safety Law

The new Food Safety Law (FSL), which was introduced as a direct response to the scandal concerning the sale of melamine-contaminated milk products, came into force on 1st June 2009.⁹³ The FSL – which was “enacted to ensure the food safety and guarantee the safety of the lives and health of the general public”⁹⁴ – applies, among others, to food production and processing, production and use of food additives, and the production and business operation of packing materials.⁹⁵ The food safety standards will be available to public free of charge⁹⁶ and the media is obligated to “publicise food safety laws, regulations, standards and knowledge for the public good and, through public opinions, supervise violations of this Law.”⁹⁷ More importantly, the FSL provides that “any entity or individual shall be entitled to report any violation of this Law which is committed during the food production and business operation process, [and] get food safety information from relevant departments.”⁹⁸

The FSL is categorical in laying down that “no food safety supervision and administrative department shall exempt any food from inspection”⁹⁹ and prescribes severe penalties for violation of its provisions.¹⁰⁰ Of particular importance for victims could be the provision requiring the violator to pay compensation to the consumer for causing damage to person or property.¹⁰¹ In addition to paying compensation, the violator is also liable to pay fine, but if the violator has insufficient resources to pay both compensation and fine, compensation must be paid first.¹⁰² This provision, thus, accords the payment of reparation (which might also be punitive in

93. The Food Safety Law of the People’s Republic of China, adopted at the 7th Session of the Standing Committee of the 11th National People’s Congress of the People’s Republic of China on 28 February 2009 (hereinafter Food Safety Law).

94. Article 1 of the Food Safety Law.

95. *Ibid.*, Article 2.

96. *Ibid.*, Article 26.

97. *Ibid.*, Article 8.

98. *Ibid.*, Article 10.

99. *Ibid.*, Article 60.

100. *Ibid.*, Articles 84-98.

101. Article 96 provides: “A violator of this Law who causes personal, property or other damages shall bear the compensation liability. Besides claiming damages, a consumer may require the producer, who produces food which does not conform to the food safety standards, or the seller who knowingly sells food which does not conform to the food safety standards, to pay 10 times the money paid.” *Ibid.*

102. “A violator of this Law shall bear the civil compensation liability and pay the fine or pecuniary penalty. If its [his] property is insufficient to cover all the payment at the same time, it (he) shall first bear the civil compensation liability.” *Ibid.*, Article 97.

appropriate cases) to victims a higher priority than the payment of a fine to the government.

Another provision with direct relevance to corporations is Article 25, which reads: “In the absence of national food standards or local standards for the food produced by an enterprise, *the enterprise shall formulate enterprise standards* as the basis for organising the production thereof.”¹⁰³ So, corporations operating in China would have no excuse to say that the safety standards did not exist in a particular food production area.

The efficacy of this law is yet to be tested. But it undoubtedly makes some useful provisions which victims of corporate human rights abuses should be able to invoke in future.

1.6 Mines Safety and Production Safety Laws

As we will see in Part 3, thousands of workers die in coal mine accidents in China every year. On many occasions, the accidents are caused by negligence or poor safety conditions, and victims’ families struggle to seek compensation.

Two statutes are directly relevant in this context: the Law on Safety in Mines,¹⁰⁴ and the Production Safety Law (PSL).¹⁰⁵ As the title would suggest, the Law on Mines Safety was enacted to “ensuring safety in production in mines, preventing accidents and protecting personal safety of workers and staff at mines and promoting the development of mining industry.”¹⁰⁶ The Law requires mining enterprises to “possess facilities that ensure safety in production, establish and perfect the system of safety management, take effective measures to improve the working conditions for workers and staff and strengthen the work of safety control in mines in order to ensure safe production.”¹⁰⁷ Moreover, the “safety facilities in mine construction projects must be designed, constructed and put into operation and use at the same time with the principal parts of the projects.”¹⁰⁸

The Mines Safety Law also lays down detailed parameters of safety expected in different aspects,¹⁰⁹ and specifies the safety measures that mining enterprises must take.¹¹⁰ It is significant that the Law makes managers of mines personally

103. Emphasis added.

104. Law of the Peoples Republic of China on Safety in Mines, adopted at 28th Meeting of the Standing Committee of the 7th National People’s Congress on 7 November 1992 (hereinafter Mines Safety Law).

105. The Production Safety Law of the People’s Republic of China, adopted at the 28th meeting of the Standing Committee of the Ninth People’s Congress on 29 June 2002 (hereinafter Production Safety Law).

106. Article 1 of the Mines Safety Law.

107. *Ibid.*, Article 3.

108. *Ibid.*, Article 7.

109. *Ibid.*, Article s 8-19.

110. *Ibid.*, Articles 20-21, 26-27 and 30.

responsible for safety.¹¹¹ Various penalties such as rectification, fine, suspension of production and licence cancellation are specified to deal with violation of safety regulations.¹¹² Finally, the Law also contemplates criminal liability for a person in charge of the mining enterprise in case of a breach of its provisions.¹¹³

The PSL aims, among other objectives, at “strengthening the supervision and administration of production safety, preventing and reducing safety accidents, [and] defending the safety of life and property of the masses.”¹¹⁴ Article 5 provides that the “major person-in-charge of the production and business operation entities shall take charge of the overall work of the production safety of the entity concerned.” The implications of using the term ‘major’ are not clear, but it seems that the law seeks to pinpoint the responsibility on one person if anything goes wrong. From the victims’ point of view, this provision would be useful because otherwise often it is not easy to ascertain who was in charge of the business entity at the time of accident.

The PSL also contains a provision about the payment of compensation to the victims of a production safety accident. Article 95 provides:

“If personal casualties or property losses have been caused to other people by any production safety accident of any production and business operation entity, the entity shall be responsible for making compensations. If the entity refuses to make compensations or the persons-in-charge escape and hide, the compensation shall be enforced by the people’s court according to law.”¹¹⁵

This provision again is significant in that it obligates the ‘entity’ – and not a person – to pay compensation to victims and gives express power to the court to deal with situations where that entity refuses to pay compensation.

1.7 Criminal Law

As the Criminal Law is applicable to “anyone”,¹¹⁶ corporations are within its purview. This is made explicit by Article 30, which reads: “Any company, enterprise, institution, State organ, or organization that commits an act that endangers soci-

111. “Managers of mines shall be responsible for the safe production in their respective enterprises.” *Ibid.*, Article 20.

112. *Ibid.*, Articles 40-45.

113. ‘Any responsible person of a mining enterprise who gives command in violation of regulations and compels workers to carry out operations at risks, thus causing accidents involving serious casualties, shall be investigated for criminal responsibilities in accordance with the provisions of Article 114 of the Criminal Law.’ *Ibid.*, Article 46.

114. Production Safety Law, Article 1.

115. Emphasis added.

116. ‘This Law shall be applicable to anyone who commits a crime within the territory and territorial waters and space of the People’s Republic of China’ Criminal Law of the People’s Republic of China, adopted

ety, which is prescribed by law as a crime committed by a unit, shall bear criminal responsibility.” As far as the punishment is concerned, the Law provides that whereas the company will be subject to fine, “the persons who are directly in charge and the other persons who are directly responsible for the crime shall be given criminal punishment.”¹¹⁷

The wording of Article 30 seems to suggest that corporations may not be prosecuted for all types of crimes but only those crimes that are prescribed to be committed by a unit. For instance, Article 150 provides that a unit might be liable for crimes enumerated in Articles 140 to 148, that is, crimes of producing and marketing fake or substandard commodities. There are also several provisions that are directed at corrupt practices by company officials and employees.¹¹⁸ Article 387, on the other hand, captures corporate bribery: “State organs, state-owned companies, enterprises, institutions, and people’s organizations which exact or illegally accept articles of property from other people and try to obtain gain for other people shall be sentenced to a fine if the circumstances are serious.”

Certain provisions of the Criminal Law make the “personnel who are directly responsible” criminally liable for breach of safety regulations resulting in major accidents involving deaths or injury.¹¹⁹ One can also find detailed provisions punishing a wide range of activities harmful to the environment: solid/radioactive waste to illegal logging of forest, illegal mining, and illegal hunting of rare or endangered wild animals.¹²⁰ Article 346 lays down clearly that even companies could be convicted for committing these offences: “If a unit commits the crimes stipulated in Article 338 to 345, the unit will be sentenced to a fine, while the leading person with direct responsibility and other personnel directly responsible for such violations are to be punished in accordance with the stipulations of related articles.”

The Criminal Law is applicable to all crimes committed within the territory of China and aboard a ship or aircraft of China.¹²¹ It has a limited extraterritorial operation in that the Law applies to PRC ‘citizens’ who commit the crimes outside the territory of the PRC, provided that the crime is one for which this law stipulates a sentence of three or more years of imprisonment.¹²² This provision raises a possibility that

at the 2nd Session of the 5th National People’s Congress on 1 July 1979, Article 6 (hereinafter Criminal Law).

117. Criminal Law, Article 31.

118. *Ibid.*, Article s 163-169.

119. *Ibid.*, Article s 135, 137-138.

120. *Ibid.*, Article s 338-345.

121. *Ibid.*, Article 6.

122. *Ibid.*, Article 7.

it may be invoked against directors or managers of Chinese companies operating overseas and indulging in serious labour/human rights violations.¹²³

Considering that the Criminal Law has used the term ‘citizen’ – as opposed to ‘person’ – it might not apply to situations where a crime is committed outside China by the overseas subsidiary of a Chinese corporation.¹²⁴ One may though try to bring a case within the scope of Article 6 by pleading that at least part of the alleged criminal act or consequence, in a corporate group situation, took place within the PRC territory, so as to make the Criminal Law applicable against the corporate unit or concerned directors/company officials. Another relevant provision is Article 339, which provides that those “who dump, store or process solid waste from abroad in the country in violation of state regulations” commits an offence. These provisions have a potential, albeit limited, to foreign companies or foreign subsidiaries of Chinese companies.

1.8 General Principles of the Civil Law and Tort Law

General Principles of the Civil Law (Civil Law) also contain several provisions that could be useful for victims in pursuing corporations in cases of human rights violations. Article 5, for example, provides that no *organisation* can violate “lawful civil rights and interests of citizens”. It further provides that a legal person such as a corporation shall have “civil obligations”.¹²⁵ These provisions become potent in view of other provisions such as Article 95 (guaranteeing citizens’ rights to life and health), or Article 124 (protection against environmental pollution).¹²⁶ Furthermore, a company that manufacturers or sells a substandard product causing damage to property or physical injury will attract civil liability.¹²⁷

If the law so specifies, then civil liability could arise even in the absence of fault on the part of wrongdoer.¹²⁸ The Civil Law also contemplates the possibility of joint liability in that Article 130 provides: “If two or more persons jointly infringe upon another person’s rights and cause him damages, they shall bear joint liability.” More importantly, Article 134 enumerates a wide range of remedies available for breach of civil rights, e.g., cessation of infringements; compensation for losses;

123. See, e.g., Rights and Accountability in Development (RAID), *Chinese Mining Operations in Katanga Democratic Republic of the Congo*, RAID, 2009.

124. Oxford Pro Bono Publico, *op. cit.*, note 4, p.195.

125. Article 36 of the Civil Law. Article 43 contains a similar provision for an ‘enterprise’: “An enterprise as legal person shall bear civil liability for the operational activities of its legal representatives and other personnel.”

126. Article 124 reads: “Any person who pollutes the environment and causes damages to others in violation of State provisions for environmental protection and the prevention of pollution shall bear civil liability in accordance with the law.”

127. Article 122 of the Civil Law.

128. “Civil liability shall still be borne even in the absence of fault, if the law so stipulates.” *Ibid.*, Article 106.

payment of breach of contract damages; elimination of ill effects; and extension of apology.

Here it may also be useful to note the scope of the newly enacted Tort Law,¹²⁹ which came into force on 1 July 2010. The potential of this law in protecting various human rights is manifestly clear from Article 2, which reads:

*“Those who infringe upon civil rights and interests shall be subject to the tort liability according to this Law. ‘Civil rights and interests’ used in this Law shall include the right to life, the right to health, the right to name, the right to reputation, the right to honor, right to self image, right of privacy, marital autonomy, guardianship, ownership, usufruct, security interest, copyright, patent right, exclusive right to use a trademark, right to discovery, equities, right of succession, and other personal and property rights and interests.”*¹³⁰

The tort liability created by this law is in addition to criminal or administrative liability that a tortfeasor may entail; in fact, if the tortfeasor has insufficient funds, the obligation to satisfy the tort liability is given precedence over any criminal/administrative liability for the same conduct.¹³¹ The Tort Law recognises both joint and several liability of tortfeasors¹³² and contemplates a variety of remedies and compensatory reliefs.¹³³

Two chapters of this law may be particularly useful in the context of corporations: Chapter V dealing with Product Liability, and Chapter VIII related to Liability for Environmental Pollution. In product liability cases, the law makes the manufacture and/or seller of a defective product liable.¹³⁴ Article 43 lays down another victim-friendly rule in the following terms: “Where any harm is caused by a defective product, the victim may require compensation to be made by the manufacturer of the product or the seller of the product.”

Regarding the environmental pollution, two provisions are noteworthy. First, Article 66 shifts the burden of proof to polluters to establish their innocence.¹³⁵ Second, the law provides that if “any harm is caused by environmental pollution for the fault of a third party, the victim may require a compensation from either

129. The Tort Law of the People’s Republic of China, adopted at the 12th session of the Standing Committee of the 11th National People’s Congress on 26 December 2009 (hereinafter Tort Law).

130. Emphasis added.

131. Tort Law, Article 4.

132. *Ibid.*, Article 11.

133. *Ibid.*, Articles 15-23.

134. *Ibid.*, Articles 41 and 42.

135. “Where any dispute arises over an environmental pollution, the polluter shall assume the burden to prove that it should not be liable or its liability could be mitigated under certain circumstances as provided for by law or to prove that there is no causation between its conduct and the harm.” *Ibid.*, Article 66.

the polluter or the third party.”¹³⁶ This provision should be of great help for victims in cases that involve a parent company and its subsidiaries, or a company and its suppliers.

The Tort Law also has a Chapter on Liability for Ultrahazardous Activity. The law creates strict liability for harms caused by ultrahazardous activities and recognises only a few defences such as war, *force majeure*, and victim’s consent.¹³⁷

1.9 Environmental Laws

China has a sizable corpus of laws dealing with environmental pollution – from a general Environmental Protection Law to specialised laws such as the Law on the Prevention and Control of Water Pollution, the Law on the Prevention and Control of Atmospheric Pollution, the Law on the Promotion of Clean Production, the Law on Energy Conservation, and the Law on the Prevention and Control of Noise Pollution.¹³⁸ Although the efficacy of the environmental laws has been a matter of concern,¹³⁹ there is no doubt that in recent years, the Chinese government has devoted more attention to the preservation of environment as part of its sustainable (or scientific) development agenda.¹⁴⁰ The government policy is underpinned by three principles.¹⁴¹ First, ‘equal emphasis’ should be placed on economic growth and environmental protection. Second, rather than giving economic development any priority over environmental protection, ‘synchronization’ should be achieved between the two. Third is “the transformation from mainly employing administrative methods to protect the environment into comprehensive application of legal, economic, technical and necessary administrative methods to address environmental problems.”

Most of these laws impose direct obligations on companies to conduct business in a way to minimise negative impact on the environment.¹⁴² For example, Article 6 of the Environmental Protection Law provides: “All units and individuals shall have the obligation to protect the environment and shall have the right to

136. *Ibid.*, Article 68.

137. *Ibid.*, Articles 70-74.

138. OECD, *Environmental Compliance and Enforcement in China: An Assessment of Current and Ways Forward*, (December 2006), <http://www.oecd.org/dataoecd/33/5/37867511.pdf> accessed 30 April 2010, pp. 18-20.

139. See, for example, Stefanie Beyer, “Environmental Law and Policy in the People’s Republic of China”, in *Chinese Journal of International Law, Volume 5, 2006*, 185. See also the special issue of the *Vermont Journal of Environmental Law*, Vol 8:2, 2007.

140. State Council Information Office, *White Paper on Environmental Protection in China (1996-2005)*, <http://www.china.org.cn/english/2006/jun/170355.htm> accessed 27 February 2010.

141. *The National Eleventh Five-year Plan for Environmental Protection (2006-2010)*, II Philosophy, Basic Principle and Plan Objectives, http://english.mep.gov.cn/Plans_Reports/11th_five_year_plan/200803/t20080305_119001.htm accessed 27 February 2010.

142. “Enterprises shall give priority to the adoption of clean production techniques that are instrumental to high efficient use of energy and to reducing the discharge of pollutants so as to decrease the generation of atmospheric pollutants.” Article 19 of the Air Pollution Law.

report on or file charges against units or individuals that cause pollution or damage to the environment.”¹⁴³ A similar objective is found in Article 20 of the Clean Production Law: “Enterprises should package the products in a reasonable manner to reduce the overuse of packaging materials and reduce the generation of packaging wastes.”

The PRC environmental regulatory framework puts in place various preventive measures as well as coercive sanctions to deter companies from causing pollution.¹⁴⁴ In addition to “sticks”, there are “carrots” (incentives) for companies. Article 8 of the Environmental Protection Law, for instance, sets down: “The people’s government shall give awards to units and individuals that have made outstanding achievements in protecting and improving the environment.”¹⁴⁵ Similarly, the Clean Production Law enshrines the idea of fiscal (dis)incentives.¹⁴⁶

It is also noteworthy that the environmental impact assessment is now an integral part of approving development plans. The Water Pollution Law is illustrative of this trend: “The building, renovation and enlargement of construction projects directly or indirectly discharging pollutants to waters and other water establishments shall be subject to environmental impact assessment.”¹⁴⁷

An important feature of environmental laws is the express recognition of representative standing and joint legal action, something that is not encouraged generally. Article 88 of the Water Pollution Law provides: “If the number of parties whose legitimate rights and interests are damaged in a water pollution accident is relatively huge, these parties may select a representative to file a joint action.” Moreover, lawyers are encouraged by the state to provide legal assistance to victims of lawsuits on damage of water pollution accidents.¹⁴⁸

As compared to other areas, in environmental pollution cases, victims have had relatively more success against companies. For instance, out of a total of 135 cases in which the aid was provided by the Centre for Legal Assistance to Pollution Victims (CLAPV) between November 1999 and October 2009, 70 cases have been resolved.¹⁴⁹ Of these 70 cases, the CLAPV won 32 cases and lost 26 cases. Just to illustrate, in *1721 People v Rongping Chemical Plant*, the Fujian Province High

143. A similar provision is contained in Article 10 of the Water Pollution Law.

144. “If an enterprise or institution has caused severe environmental pollution, it shall be required to eliminate and control the pollution within a certain period of time.” Article 29 of the Environmental Protection Law.

145. Article 9 of the Air Pollution Law states: “The State encourages and supports the development of environmental protection industries.”

146. “The State Council shall formulate fiscal and tax policies conducive to the implementation of cleaner production.” Article 9 of the Clean Production Law.

147. Article 17 of the Water Pollution Law.

148. Article 88 of the Water Pollution Law.

149. Wang Canfa, “The Role of Environmental Litigation in Protecting Environmental Rights and Improving Environment”, paper presented at the *Workshop on Business, Human Rights and Access to Justice in China*, held at City University of Hong Kong on 5-6 March 2010.

People's Court awarded plaintiffs 684,000 Yuan for damage caused to their crops by the chemicals emanating from the plant.¹⁵⁰ Similarly, in *97 Households of Dong Hai Country, Jiangsu Province v Two factories in Shangdong Province*, about 5.6 million Yuen were awarded to farmers whose fish in the reservoir were killed by the pollutants flowing from the two factories.¹⁵¹

150. Wang Canfa, *ibid.*; Alex Wang, "The Role of Law in Environmental Protection in China: Recent Developments", in *Vermont Journal of Environmental Law*, Volume 8:2, 2007, 195, 212-14.

151. Wang Canfa, *ibid.*

2. Legal Remedies for Corporate Human Rights Abuses

This section of the report deals with the legal remedies that are available to victims of corporate human rights abuses in China. However, before reviewing these remedies, a brief introduction of the PRC's judicial system and its key actors is offered.

2.1 Judicial System and its Key Actors

Article 123 of the Constitution provides that the people's courts "are the judicial organs of the state."¹⁵² They "shall, in accordance with the law, exercise judicial power independently and are not subject to interference by administrative organs, public organizations or individuals."¹⁵³ The entire court system is based on the principle of "four levels of courts and at most two trials to conclude a case (one trial at first instance, one trial on appeal)."¹⁵⁴ The four levels of courts are: basic people's courts at county levels, the intermediate courts in cities, the high people's courts at the province level, and the Supreme People's Court.¹⁵⁵ The Supreme People's Court is declared to be "the highest judicial organ".¹⁵⁶ It "supervises the administration of justice by the local people's courts at various levels."¹⁵⁷

Each court is divided into specialised divisions to deal with different types of cases (such as civil, criminal, economic or administrative) or perform different functions, e.g., handling petitions or enforcement of judgments.¹⁵⁸ In addition, adjudicative committees are established in each court to share judicial experience and "to discuss important or difficult cases".¹⁵⁹ Whereas most of the civil and criminal cases are heard by basic people's courts, the intermediate people's courts hear appeals from basic people's courts and also deal with important civil cases as well as seri-

152. Article 1 of the Organic Law of the People's Courts (OLPC) also states: 'The people's courts of the People's Republic of China are the judicial organs of the state.' Organic Law of the People's Courts of the People's Republic of China, adopted at the 2nd Session of the 5th National People's Congress on 1 July 1979 (revised in 2006).

153. Article 126 of the PRC Constitution. See also Article 4 of the OLPC.

154. Chen, *op. cit.*, note 4, p.137. Article 12 of the OLPC provides: "In the administration of justice, *the people's courts adopt the system whereby the second instance is the last instance*. From a judgment or orders of first instance of a local people's court, a party may bring an appeal to the people's court at the next higher level in accordance with the procedure prescribed by law, Judgments and orders of first instance of the local people's courts at various levels become legally effective judgments and orders if, within the period for appeal, none of the parties has appealed" (emphasis added).

155. Chen, *ibid.*, pp.137-38. See also Article 2 of the OLPC.

156. Article 127 of the PRC Constitution.

157. Article 30 of the OLPC.

158. Chen, *op. cit.*, note 4, p.138.

159. Article 11 of the OLPC.

ous criminal cases.¹⁶⁰ The high people's courts, on the other hand, hear appeals from the intermediate courts¹⁶¹ and "try first instance cases which are considered important cases at the provincial level."¹⁶² The Supreme People's Court has both original and appellate jurisdiction.¹⁶³ It also "gives interpretation on questions concerning specific application of laws and decrees in judicial proceeding."¹⁶⁴

In terms of actors that play a key role in operating the judicial system, the role of judges and adjudicative committees has already been noted. Unlike the position in a common law system, judges in China play an active role in carrying out investigations and collecting evidence.¹⁶⁵ The CPC also exercises some direct leverage, especially in sensitive cases, through Political-Legal Committees at various levels. As noted in more detail in Part 3, the Chinese legal system does not recognise the separation of powers or independence of judiciary in the traditional sense or in practice. Various organs of the government, therefore, work with judges and court officials purportedly to ensure proper implementation of law. In fact, judges "are inclined to see themselves as part of the government, their interests aligned with the CCP and the state."¹⁶⁶

Another important and peculiar institution that deserves mention is the people's procuratorate. Article 129 of the PRC Constitution states that the people's procuratorates are "State organs for legal supervision".¹⁶⁷ There are procuratorates at four levels: grassroots, intermediate, higher, and supreme level.¹⁶⁸ The procuratorates perform multiple types of functions.¹⁶⁹ For example, the Supreme People's Procuratorate conducts prosecutions in serious criminal cases; investigates specialized cases such as embezzlement, bribery, "offence(s) against the democratic rights of citizens", and negligence of public duty; lodges protests with the Supreme People's Court against allegedly mistaken verdicts and decisions made by people's courts at various levels; and handles charges, appeals and reports made by citizens.¹⁷⁰

160. Chen, *op. cit.*, note 4, p.139. See also Articles 21 and 25 of the OLPC.

161. Article 28 of the OLPC.

162. Chen, *op. cit.*, note 4, p.139.

163. Article 32 of the OLPC.

164. *Ibid.*, Article 33.

165. Chen, *op. cit.*, note 4, pp.147-48.

166. Lawyers Committee for Human Rights (LCHR), *Lawyers in China – Obstacles to Independence and the Defence of Rights*, LCHR, New York, 1998, p.9.

167. Article 129 of the PRC Constitution.

168. "The State Prosecution Organ", http://www.china.org.cn/english/features/state_structure/64414.htm accessed 25 February 2010.

169. Article 6 of the Public Procurators Law of the People's Republic of China (adopted at the 12th Meeting of the Standing Committee of the 8th National People's Congress on 28 February 1995, became effective on 1 July 1995). See also Chen, *op. cit.*, note 4, pp.160-61.

170. "Major Functions of the SPP", http://www.china.org.cn/english/features/state_structure/65033.htm accessed 26 February 2010.

Similar to most of the other legal systems, lawyers now¹⁷¹ are an integral part of the judicial system in China in that they provide various kinds of legal services to people and also offer legal aid. The 1996 Law on Lawyers marked a significant milestone in improving the professional competence¹⁷² and independence of lawyers in China. But as noted later in this report, the legal profession in China still has a far way to go in establishing its autonomy.¹⁷³ For instance, the Chinese government may still exercise undue control of lawyers through its capacity to deny them a practising certificate.¹⁷⁴

2.2 Legal Remedies

2.2.1 Civil Suits

In almost all jurisdictions (both common and civil law), if victims have any grievance against corporations, they would have a right to approach the courts or file a complaint with other administrative bodies such as a tribunal or ombudsman. In China, people may approach, at least in theory, the courts to redress their violations of human/labour rights under relevant laws, some of which have been briefly reviewed in the previous section. In some cases, the courts have given judgments enforcing the human or labour rights of people. For instance, against the background of wide-spread discrimination allegedly practiced by corporations against people with hepatitis B,¹⁷⁵ a Beijing District Court in May 2008 ordered a technology firm to pay a job applicant 20,000 Yuan after it withdrew the offer because he had hepatitis B.¹⁷⁶ The compensation was awarded under the newly enacted Employment Promotion Law.¹⁷⁷

171. Until the late 1980s, lawyers in China were not allowed to have private practice. Chen, *op. cit.*, note 4, pp.166-67.

172. To get a license, lawyers have to pass a national judicial examination and complete a full year's internship at a law firm. Article 5 of the Law of the People's Republic of China on Lawyers, adopted at the 19th Session of the Standing Committee of the 8th National People's Congress on 15 May 1996 (hereinafter Lawyers' Law).

173. See Randy Peerenboom, "Competing Conceptions of Rule of Law in China" in Peerenboom (ed), *op. cit.*, note 20, p.129; and generally LCHR, *Lawyers in China*, *op. cit.*, note 166.

174. Articles 7-9 of the Lawyers' Law.

175. A survey done by a Beijing NGO concluded: "At least 84 percent of the sampled multinationals in China require job applicants to take compulsory HB tests and provide the results to their prospective employers ... About 44 percent of the multinationals said that they refuse applicants who are HB positive, while only 5 percent of the firms do not require applicants to take the medical test." "Discrimination against Hepatitis B Carriers Rising – Survey", in *The China Daily*, 5 March 2009, http://www.chinadaily.com.cn/china/2009-03/05/content_7542374.htm accessed 20 October 2009.

176. China Labour Bulletin, "China's First Successfully Litigated Hepatitis B Employment Discrimination Case", <http://www.china-labour.org.hk/en/node/100542> accessed 29 October 2009; Staff Reporter, "Hepatitis B Tests To Cease, Health Official Says", in *South China Morning Post*, 12 October 2009, A5. Before the success in this 2008 case, several cases concerning hepatitis-related discrimination were filed, but the victims could not secure compensation. See Kellogg, "Constitutionalism with Chinese Characteristics", *op. cit.*, note 16, pp.234-44.

177. The Employment Promotion Law of the People's Republic of China, adopted at the 29th session of the Standing Committee of the 10th National People's Congress on 30 August 2007, came into effect on 1

Similarly, a court ordered a company official to pay a woman 3,000 Yuan for sexual harassment.¹⁷⁸ It is, however, interesting to note that when this woman asked for an apology from the company official, she was fired on the recommendation of the company's trade union,¹⁷⁹ a body that should have fought for her rights.

The Tort Law, which came into force on 1 July 2010, is likely to prove a fertile ground of civil suits against corporations. More extensive use of environmental legislation is also likely in the future as public awareness about environmental issues is growing and even the Chinese government is becoming more concerned about achieving sustainable development.

2.2.2 Letters and Petitions

In addition to pursuing civil remedies before courts, people also have a right to submit petitions not only to the administrative offices of the government but also to the courts. Professor Chen notes that “a particularly interesting feature of the Chinese court system is that courts accept as part of their work the task of dealing with visits and letters from people who have complaints and petitions to bring to court.”¹⁸⁰ The basis of this petitioning system – “a modern version of an imperial tradition”¹⁸¹ – is probably Article 41 of the PRC Constitution, which provides: “Citizens have the right to make to relevant State organs complaints or charges against, or exposures of, any State organ or functionary for violation of law or dereliction of duty.”¹⁸²

Considering the extensive use of this practice, it is, in fact, suggested that “the ‘petition (*Xinfang*) system’ has been ... the only method by which ordinary Chinese citizens could seek redress for their grievances.”¹⁸³ Scholars also see letters and petitions as an important element of “social governance” and as a sign of participation in “the democratic political system”.¹⁸⁴

January 2008. Article 25 provides that “The people’s governments at all levels shall create a fair employment environment to eliminate discriminatory employment practices”. Article 30 further provides: “No employment unit, when recruiting employees, shall refuse to employ a job candidate on the basis that he/she is a carrier of any infectious pathogen.”

178. Qiu Quanlin, “Sexual Harassment Victim Wins, Loses Job”, in *The China Daily*, 23 December 2009, http://www.chinadaily.com.cn/china/2009-12/23/content_9216698.htm accessed 7 January 2010.

179. *Ibid.*

180. Chen, *op. cit.*, note 4, p.146. Courts have a reception and/or petitions division to deal with people’s complaints and petitions. *Ibid.*

181. Human Rights Watch (HRW), *An Alleyway in Hell: China’s Abusive ‘Black Jails’*, HRW, New York, November 2009, p.7.

182. See Xiaoping Chen, “The Difficult Road for Rights Advocacy: An Unpredictable Future for the Development of the Rule of Law in China”, in *Transnational Law & Contemporary Problems*, Volume 16, 2006, 221, pp.231-32.

183. China Labour Bulletin, *Public Interest Litigation in China: A New Force for Social Justice*, 10 October 2007, p.3 (hereinafter CLB, *PIL in China*).

184. Xiaotian Tang, “Reforms in the Petition Letter and Visit System of China and Construction of a Harmonious Society”, in *Frontiers of Law in China*, Volume 5:1, 2010, 77, p.79.

Although the petition system is primarily aimed at addressing varied kinds of abuses of power by government officials, it could be invoked even against corporations, especially in those cases where the government departments/officials are acting in concert with private companies or corporate abuses are the direct result of non-application and non-enforcement of legal norms.

In 2005, the State Council issued the amended Regulations on Complaint Letters and Visits, which seek “to protect the petitioner’s legitimate rights and interests”¹⁸⁵ The amended Regulations made some positive improvements over the 1996 Regulations,¹⁸⁶ e.g., by imposing legal sanctions on those government officials who had not satisfactorily performed their duties of handling petitions.¹⁸⁷ At the same time, the 2005 amendment tried to limit the scope, nature, and flow of petitions.¹⁸⁸ For example, the petitioners are now required to “abide by laws and regulations”, not “harm national, social and collective interests and the legitimate rights of other citizens”, and “safeguard social order and public order”.¹⁸⁹ The number of representatives for joint/mass petitions is also limited to five.¹⁹⁰ These measures are seemingly introduced to curtail “the massive flood of letters and visits”.¹⁹¹ Proposals to put further restrictions on petitioners, including a jail sentence for 15 years in certain cases, have been advanced.¹⁹²

How effective is the petitioning system? It seems that the system does not often achieve the goal of securing justice for people.¹⁹³ More and more people now tend to go to Beijing for their petitions,¹⁹⁴ an indication that the decentralised mechanism of redressing people’s grievances is not working. Local governments frequently try to intercept and harass petitioners from reaching Beijing,¹⁹⁵ an

185. Regulations on Complaint Letters and Visits, issued on 10 January 2005, came into force on 1 May 2005.

186. Regulations Concerning Letters of Petitions, issued on 28 October 1995, came into force on 1 January 1996, <http://www.asianlii.org/cn/legis/cen/laws/rclop433/> accessed 16 November 2009.

187. Peerenboom & Xin, *op. cit.*, note 48, p.40.

188. See Xiaoping Chen, *op. cit.*, note 182, pp.232-35.

189. Article 20 of the Regulations on Complaint Letters and Visits, *op. cit.*, note 185. See also Tang, *op. cit.*, note 184, 88.

190. *Ibid.*, Article 18.

191. Su Zhiyong, “New Regulations for Letters of Petition” in Li Lin et al (chief eds.), *The China Legal Development Yearbook, Vol 1*, Brill, Leiden, 2008, p.289.

192. Josephine Ma, “NPC Deputy Calls for Petitioners to be Jailed for 15 Years”, in *South China Morning Post*, 12 March 2010, A4.

193. “Although million of ordinary citizens still seek redress through the *xinfang* system each year (18.6 million in 2004 alone), a recent survey showed that only three in ten thousand petitions result in some form of resolution.” *Ibid.* See also HRW, *An Alleyway in Hell*, *op. cit.*, note 181, pp.7-11; Zhiyong, *op. cit.*, note 191, p.293.

194. Interview with Dr Zhu, *op. cit.*, note 16.

195. HRW, *An Alleyway in Hell*, *op. cit.*, note 181, pp.9-10. “Local government officials often employ those agents, plainclothes thugs commonly known as retrievers, or *jiefang ren yuan*, to locate and abduct petitioners in Beijing and other cities.” *Ibid.*, p.14.

activity carried out by specialised interception companies as a thriving business.¹⁹⁶ People who bring complaints and petitions to Beijing on sensitive matters or during politically sensitive times might be sent to informal detention centres (known as ‘black jails’),¹⁹⁷ where they may experience physical violence or other ill-treatment.¹⁹⁸

Recently, the Shenzhen government has apparently tried to institutionalise the above practices aimed at controlling the scope and number of petitions: it introduced new regulations aimed at curbing what is termed as ‘abnormal’ or ‘improper’ petitions.¹⁹⁹ Instances of such petitions include travelling to Beijing to petition in sensitive political areas, protesting in the city centre without official approval, and chanting slogans and distributing printed materials during a protest.²⁰⁰ People who make frequent abnormal petitions could be detained or even sent to a labour camp.²⁰¹ It is pointed out that the Shenzhen proposal “extensively enlarged the scope of the illegal ways of petitioning that had been stipulated by the State Regulations on Petitions” and that “instead of reducing the number of petitions, these rules are being framed to stop people from venting their grievances against any likely malpractices by civil servants.”²⁰² Against this background, it is difficult to conceive how the petitioning system could offer an effective remedy in cases of corporate human rights abuses.

2.2.3 Public Interest Litigation

It would not be incorrect to say that Public Interest Litigation (PIL), as the concept is generally understood,²⁰³ has “no specific constitutional or procedural basis” in

196. Minnie Chan, “Intercepting Petitioners is a Thriving Business”, in *South China Morning Post* 3 April 2010, A4.

197. HRW, *An Alleyway in Hell*, *op. cit.*, note 181; Reuters, “Rights Group Calls for End to “Black Jails” on Eve of Obama Visit”, in *South China Morning Post*, 13 November 2009, A6. The HRW Report sums up: “These facilities ... are created and used primarily by local and provincial officials to detain petitioners who come to Beijing and provincial capitals seeking redress for complaints that are not resolved at lower levels of government.” HRW, *An Alleyway in Hell*, *op. cit.*, note 181, p.2.

198. In one instance, a female petitioner was raped by the security guard of one such black jail. Verna Yu, “Victim Angered by Lenient sentence for “Black Jail” Rapist”, in *South China Morning Post*, 12 December 2009, A6.

199. He Hufeng, “Shenzhen Petitioners may be Sent to Labour Camps”, in *South China Morning Post* 12 November 2009, A7.

200. *Ibid.*

201. *Ibid.*

202. “Self-defeating Regulation”, in *The China Daily*, 14 November 2009, <http://www.chinadaily.com.cn/cndy/2009-11/14/content_8970863.htm> accessed 15 November 2009.

203. Although there is no universally acceptable definition of PIL, it generally refers to litigation aimed at espousing a public cause rather than the interest of one individual. PIL differs from traditional litigation not only in substance but also form, procedure and available remedies. In most of the cases, PIL seeks to trigger a social change or protect the interests of disadvantaged sections of society. See Surya Deva, “Public Interest Litigation in India: A Critical Review”, in *Civil Justice Quarterly*, Volume 28, 2009, pp.19-40; Po Jen Yap & Holning Lau (ed.), *Public Interest Litigation in Asia*, Routledge, London, 2010.

China.²⁰⁴ As pointed out above, a more liberalised standing requirement in environmental legislation is an exception to that position. The general legal framework is not conducive to PIL.²⁰⁵ Article 108 of the Civil Procedure Code sets the following conditions in order to file a suit:

- (1) the plaintiff must be a citizen, legal person or any other organisation that has a *direct interest in the case*;
- (2) there must be a definite defendant;
- (3) there must be *specific claim* or claims, facts, and cause or causes for the suit; and
- (4) the suit must be within the scope of acceptance for civil actions by the people's courts and under the jurisdiction of the people's court where the suit is entertained.²⁰⁶

The requirement of this provision that the plaintiff should have a “direct interest” in the case and that there must be a “specific claim” is unlikely to be satisfied easily in many PIL cases. Scholars refer to Article 15 as an alternative basis for filing PIL.²⁰⁷ Article 15 provides: “Where an act has infringed upon the civil rights and interests of the State, a collective organization or an individual, any State organ, public organization, enterprise or institution may support the injured unit or individual to bring an action in a people's court.” On a plain reading of this provision, it is clear that such hope of bringing a successful action might be misplaced. To begin with, there must be an infringement of the civil rights and interests “of the state”. But could this condition be satisfied in a country like China? In fact, in many instances, the societal interests sought to be advanced by PIL would come in conflict with perceived state interests.²⁰⁸ Moreover, outside parties are only allowed to “support” the injured party to file a suit rather than file a case on their own in a representative capacity.

Despite these apparent limitations, several cases have been filed by individuals or civil society entities against government departments or companies. In some cases, scholars also submitted written proposals on matters of public interest to

204. CLB, *PIL in China, op. cit.*, note 183, pp.4, 9.

205. Lack of NGOs and free media also work against the evolution of PIL jurisprudence.

206. Civil Procedure Law of the People's Republic of China (Adopted at the Fourth Session of the Seventh National People's Congress and Promulgated by Order No. 44 of the President of the People's Republic of China on 9 April 1991) (emphasis added).

207. Lin Feng & Wang Peter, “The Issue of Standing in Environmental Public Interest Litigation in China”, paper presented at the *Workshop on Business, Human Rights and Access to Justice in China*, held at City University of Hong Kong on 5-6 March 2010.

208. For example, a PIL to seek the enforcement of freedom of speech and expression, a constitutional guarantee, will come against the government's perceived desire to maintain secrecy in governance. Similarly, a demand for better wages for factory workers might not be consistent with stated government policies to enhance export of goods manufactured in such factories at an internationally competitive price.

the NPC's Standing Committee.²⁰⁹ One main point of difference between these cases and the PIL cases filed in other jurisdictions is that in the latter case, the litigation was representative in nature and not always concerned with rights violations. Despite this significant difference, academics, lawyers and commentators have referred to these cases in China as PIL cases. This might have happened for at least two reasons. First, such cases related to an issue that affected the society or a societal group at large, e.g., discrimination at workplace. Second, the litigation was not primarily motivated by seeking significant monetary compensation or personal satisfaction of victory, but highlighting a wider public issue or problem.²¹⁰

2.2.4 Criminal Process

As noted above, corporations as well as their officials may be prosecuted for certain criminal conduct in China. Article 31 of the Criminal Law makes this explicit: "A unit responsible for a criminal act shall be fined. The person in charge and other personnel who are directly responsible shall also bear criminal responsibility." Although this law contains no provision about cancellation of a company license for indulging in a criminal activity, it is possible to confiscate the property of a company.²¹¹

The Criminal Law also contemplates the possibility of joint liability (intentional crimes committed by two or more persons), and group liability (three or more people committing a crime as part of a syndicate) with different levels of punishment for a principal offender and an accomplice.²¹² These provisions might be useful in those cases where several directors or other corporate officials act in concert to commit certain serious crimes. The real difficulty, however, is to prove such charges, because it is not easy, for example, to gain access to internal corporate documents.

It also seems that "individuals in charge of a unit or individuals who are directly involved in a crime committed for the benefit of a unit may still be held criminally liable even if the crime is one that is not stipulated as a crime that can be committed by a unit."²¹³

209. See, for a summary of many such cases, "China's System of Harmonious "Rule of Law"" in Li Lin (ed), *The China Legal Development Yearbook, Vol 2*, Brill, Leiden, 2008, 3, pp.18-22.

210. One may draw an analogy from a recent decision of a Shanghai rights activist, Feng Zhenghu, to sue immigration authorities for repeatedly refusing to let him enter China over an eight-month period. Mr Feng said: "I want to confirm that the immigration authorities were acting illegally... Everyone knows this was not lawful, but it needs to be tested in court. Once that has been established it won't happen again." Will Clem, "Activist Stranded in Airport for Three Months Files Suit", in *South China Morning Post*, 24 February 2010, A6.

211. Article 34 of the Criminal Law.

212. Articles 25-29 of the Criminal Law.

213. Oxford Pro Bono Publico, *op. cit.*, note 4, p.196.

If the criminal act results in economic loss, the court may sentence the wrongdoer to pay compensation to the victims.²¹⁴ Although it is not clear from the provisions of the Criminal Law if such compensation will come out of the fine imposed or in addition to the fine, it is stipulated that if the property is not enough to pay both fine and compensation, the compensation to victims should be paid first.²¹⁵

214. Article 36 of the Criminal Law.

215. Article 36 of the Criminal Law.

3. Obstacles to Accessing Justice

Victims of corporate human rights abuses face serious obstacles in seeking justice all over the world. A review of literature, judicial decisions and case studies in several jurisdictions reveals that victims face several obstacles in holding corporations accountable for such abuses. Included among these obstacles may be that human rights responsibilities are not identified with precision in law; there are a large number of poor victims; there is limited or no availability of a “class action” procedure; and corporations hold substantial economic leverage. It is also well-documented how parent corporations have misused the twin principles of limited liability and separate personality to evade their liability for human rights abuses by their subsidiaries.²¹⁶ Furthermore, as cases pursued in various jurisdictions indicate, corporations have invoked the doctrine of *forum non conveniens* as a shield to delay or avoid responsibility for human rights abuses.²¹⁷ Last but not least, conceptual and institutional hurdles arise when corporations act in concert with (or support of) states, state organs and public sector corporations.²¹⁸

China is not much different from rest of the world when it comes to obstacles that victims face in make corporations accountable for human rights abuses. However, in China, victims experience ‘additional’ or ‘special’ hardships. This section will examine such China-specific obstacles, which are further divided into two parts: systematic obstacles and corporate-specific obstacles.

216. “[S]trong empirical evidence indicates that increasing exposure to tort liability has led to the widespread reorganization of business firms to exploit limited liability to evade damage claims.” Henry Hansmann & Reinier Kraakman, “Toward Unlimited Shareholder Liability for Corporate Torts”, in *Yale Law Journal*, in Volume 100, 1990, 1879, p.1891. See also Richard S Farmer, “Parent Corporation Responsibility for the Environmental Liabilities of the Subsidiary: A Search for the Appropriate Standard”, in *Iowa Journal of Corporation Law*, Volume 19, 1994, 769; Blumberg, “Asserting Human Rights”, *op. cit.*, note 1; Deva, “Overcoming Hurdles”, *op. cit.*, note 1; Lawrence E Mitchell, *Corporate Irresponsibility: America’s Newest Export*, Yale University Press, New Haven, 2001, p.53.

217. “A procedural impediment to the alien plaintiff’s suit is the doctrine of *forum non conveniens* which, considering the extraterritorial nature of the litigation, the corporate defendant is sure to invoke.” David I. Becker, “A Call for the Codification of the Unocal Doctrine”, in *Cornell International Law Journal*, Volume 32, 1998, 183, p.195, and generally pp.195-97. See also Blumberg, “Asserting Human Rights”, note 1, pp.503, 516-22; Gregory G A Tzeutschler, “Corporate Violator: The Alien Tort Liability of Transnational Corporations for Human Rights Abuses Abroad”, in *Columbia Human Rights Law Review*, Volume 30, 1999, 359, pp.396-99. See also Sarah Joseph, *Corporations and Transnational Human Rights Litigation*, Hart Publishing, Oxford, 2004, pp.87-99; Jennifer A Zerk, *Multinational and Corporate Social Responsibility: Limitations and Opportunities in International Law*, Cambridge University Press, Cambridge, 2006, pp.120-27.

218. These hurdles remain despite several courts decisions and research studies that have sought to clarify the scope of corporate complicity. See, for example, *Presbyterian Church of Sudan v Talisman Energy* 244 F Supp. 2d 289 (SDNY, 2003); *Doe v Unocal* 2002 US App LEXIS 19263 (9th Cir., 2002); Anita Ramasastry & Robert C Thompson (FAFO), *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law – A Survey of Sixteen Countries*, 2006; International Commission of Jurists, *Corporate Complicity and Legal Accountability – Report of the Expert Legal Panel on Corporate Complicity in International Crimes*, Volumes 1-3, ICJ, Geneva, 2008; Report of UN Secretary-General’s Special Representative on the issue of human rights and transnational corporations and other business enterprises, *Clarifying the Concepts of “Sphere of Influence” and “Complicity”*, A/HRC/8/16, 15 May 2008.

3.1 Systematic Obstacles

China is a developing country with an aspiration to achieve economic development through socialist free market economy.²¹⁹ As highlighted by the UN Special Representative on Human Rights and Transnational Corporation and Other Business Enterprises, Professor Ruggie, developing economies with multiple governance gaps are more prone to corporate human rights abuses.²²⁰ The fact that China does not have an independent judiciary armed with a power of judicial review makes the victims' quest to secure justice more difficult. Some of these systematic obstacles are reviewed below.

3.1.1 Law on Paper versus Law in Reality

The 'law' in the PRC still does not possess an "independent binding power".²²¹ Moreover, as discussed in Part II, there are ample provisions in the PRC Constitution recognising a wide range of human rights of people. But in practice, there exists an "extensive denial" of these freedoms,²²² and laws "are not even complied by administrative organs and officials themselves."²²³ The CPC, which "controls the operations of official law enforcement at every level of the government,"²²⁴ remains outside the reach of law.²²⁵ Although the CPC is formally subject to the constraints of the Constitution, "it is essentially above the law as 'representing' the supreme will of the people."²²⁶ Consequently, despite the

219. For an understanding of the models of socialist constitutionalism and a free market ideology with 'Chinese characteristics' adopted by China, see Surya Deva, "Does the Right to Property Create a Constitutional tension in Socialist Constitutions: An Analysis with Reference to India and China", in *NUJS Law Review, Volume 1:4, 2008, p.583*.

220. Commission on Human Rights, *Interim Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, E/CN.4/2006/97, 22 February 2006, paras. 27-30.

221. Sharron Gu, *Law and Politics in Modern China – Under the Law, the Law, and Above the Law*, Cambria Press, New York, 2009, p.231.

222. Jerome A Cohen, *Written Statement before Congressional-Executive Commission on China – Human Rights and the Rule of Law in China*, 20 September 2006, <http://www.cecc.gov/pages/hearings/2006/20060920/cohen.php> accessed 11 September 2009 (hereinafter Cohen, *Rule of Law in China*).

223. Chen, *op. cit.*, note 4, p.116.

224. Human Rights Law Foundation, "The Persecution of Falun Gong Practitioners in China", 10 August 2009, p.3.

225. "... the Communist Party remains in ultimate control. More significantly, the Party and its leadership remain outside the reach of the law. ... The government bureaucracy—including the courts and other legal institutions—are dominated by the Communist Party appointees at every level, despite some autonomy for independent actors to develop the rule of law." Professor Feinerman, as quoted in Gary Feuerberg, "China's Human Rights Lawyers Face Major Obstacles", in *The Epoch Times*, 15 July 2009, <http://www.theepochtimes.com/nz/content/view/19643/> accessed 11 September 2009.

226. Ghai, *op. cit.*, note 25, p.92. Lin also notes that "there may exist a paradox between the authority of the Constitution and the supremacy" of the National People's Congress. Lin, *op. cit.*, note 11, p.17.

amendment of the Constitution in 1999 to enshrine the rule of law guarantee,²²⁷ the country is still governed more by the CPC than by the rule of law.

There are other reasons why law enforcement is an area of concern in China generally.²²⁸ For one, the institutions that support enforcement – such as courts, the legal profession, and bureaucracy – are undeveloped, non-independent or corrupt. Another reason is that law often gives way to the policies of the state and/or the CPC. Professor Albert Chen notes: “Sometimes policies are implemented without any legal basis, and sometimes existing laws are put aside, ignored or bent when new policies supersede those upon which the laws were based.”²²⁹ So, the enforcement of human rights against a corporate actor through courts orders or petitions to government departments might not be possible in those cases where, for example, vindication of rights could arguably “scare” potential foreign investors.

3.1.2 Interference of CPC

The CPC is omnipresent and pervasive in China. Judges, corporate executives, government officers, lawyers, and most other people in positions of power are members of the CPC. It is the CPC that decides how judges should handle cases against corporations. Even if many judges generally tend to be sympathetic to workers, in cases involving big corporations with reach to higher officials, their discretion to decide cases is controlled by the CPC.²³⁰ Xin He aptly notes: “when superior political powers such as the Communist Party and the government do not want the courts be involved in the dispute resolution process for political reasons, then the courts have little room to disobey.”²³¹

In order to maintain its control over power, various measures have been put in place by the CPC. Inconvenient issues, for example, are kept outside the discussion board by controlling the content of and access to the Internet,²³² and education at school and college level is used as a tool to instil pro-CPC “pre-

227. “The People’s Republic of China governs the country according to law and makes it a socialist country under rule of law.” Article 13 of the Amendment to the PRC Constitution Adopted at the Second Session of the Ninth National People’s Congress and promulgated for implementation by the Announcement of the National People’s Congress on 15 March 1999.

228. See Chen, *op. cit.*, note 4, pp.116-18.

229. Chen, *ibid.*, p.117.

230. Interview with Judge No. 1, on 14 September 2009.

231. Xin He, “Why Did They not Take on the Disputes? Law, Power and Politics in the Decision-making of Chinese Courts”, in *International Journal of Law in Context*, Volume 3, 2007, 203, p.204 (hereinafter He, “Why Did They not Take on the Disputes”).

232. “Issues inconvenient for the party are more often than not absent from public discussion. The 40,000 people paid to monitor the internet, the website blocks and filters and keyword lists that keep topics out of emails, blogs and chatrooms mean a lack of knowledge or even ignorance about all manner of matters.” Editorial, “Beijing, Take Down that Great Firewall”, in *South China Morning Post*, 11 November 2009, A14.

dominant” ideology.²³³ As one Chinese scholar points out, “issues like ‘separation of powers’ and ‘multi-party elections’ are still within the ‘forbidden zone’ of” the official discourse.²³⁴

Most commentators are of the view that there is not much hope for a substantial change in respect of the current authority exercised by the CPC – the focus being on developing democracy within party rather than moving towards a truly multi-party system.²³⁵ One proposal that is being currently discussed by the Standing Committee of the NPC is to give rural residents greater representation in country-level congresses by amending the existing law that counts four peasants to one urban resident in deciding the number of representatives they elect to local congresses.²³⁶ But even such positive proposals might not achieve much if voters do not have more than one candidate to choose from.

So, it would be a challenge to control the CPC within the current constitutional framework,²³⁷ a problem faced, in fact, by all communist constitutions. Professor Ghai observes: “However, no communist constitution has moderated the extra-constitutional status of the Communist Party, its leading role, or the absence of its legal accountability, a factor that has constituted an important contradiction in constitutions claiming to be moving towards greater democracy and legality.”²³⁸

3.1.3 Shackles on freedom of expression and the Internet

The general intolerance of the Chinese government, including its policy of criminalisation of what is protected as freedom of expression under international standards and in many other jurisdictions, also serves as an obstacle for victims in that they might not be able to employ social pressures and “cyber-activism” to put pressure on corporations.²³⁹ Amnesty International in one recent submission notes: “Individual Chinese writers, journalists, and human rights defenders continue to be arrested and sentenced to prison terms for their writings and posting

233. Interview with Judge No. 3, on 9 November 2009.

234. Albert Chen, “Legal Thought and Legal Development in the People’s Republic of China 1949-2008”, SSRN Working Paper, p.38, <<http://ssrn.com/abstract=1369782>> accessed 20 November 2009 (hereinafter Chen, “Legal Thought”).

235. Interview with Dr Zhu, note 16. See also Supreme People’s Court of the People’s Republic of China, “Focus News – Communist Party of China chief stresses inner-party democracy”, 30 June 2009, <<http://en.chinacourt.org/public/detail.php?id=4465>> accessed 20 November 2009.

236. Al Guo, “Draft Amendment Aims for Electorate Balance”, in *South China Morning Post*, 28 October 2009, A4.

237. “One of the main theoretical and practical issues in establishing rule of law has been to reconcile the leading role of the Party with the basic rule of law principle of the supremacy of law.” Randy Peerenboom, “Competing Conceptions of Rule of Law in China” in Peerenboom (ed), *op. cit.*, note 20, pp.113, 116.

238. Ghai, *op. cit.*, note 25, p.85.

239. “The Chinese government’s and Communist Party’s intolerance of citizen activism increased, as did the suppression by authorities of information on matters of public concern.” Congressional-Executive Commission on China, *Annual Report 2008*, p.3, http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_house_hearings&docid=f:45233.pdf accessed 11 September 2009.

of articles on the Internet. Access to the Internet continues to be closely monitored and censored.”²⁴⁰ This situation has recently led to the Google decision to shut down its China (google.cn) search services.²⁴¹ Furthermore, the institutionalised internet censorship practised by the Chinese government,²⁴² sometimes justified on the grounds of national security,²⁴³ does not allow much space, especially in sensitive matters, to victims and NGOs to continue their advocacy even outside state institutions. Journalists have been beaten, detained and prosecuted purportedly for taking bribes²⁴⁴ – thus creating a coercive environment not conducive for independent reporting.²⁴⁵

The recent trial and conviction of Liu Xiaobo, a co-author of Charter 08,²⁴⁶ for the crime of “inciting subversion of state power” is a case in point.²⁴⁷ The court sentenced him to a term of imprisonment of eleven years and a deprivation of political rights for two years essentially for publicly criticising the CPC’s excessive authority and the one-party rule. The Chinese Foreign Ministry criticised statements/appeals issued by foreign diplomatic officials for Liu’s release as interference in its internal affairs and judicial sovereignty.²⁴⁸ This case again illustrates a low level of tolerance shown by the Chinese government to express dissenting or different opinions.

3.1.4 Constraints on Lawyers

Unlike many common law jurisdictions, the legal profession in China is not independent or autonomous. Although the Lawyers’ Law²⁴⁹ has tried to separate the

240. Amnesty International, *People’s Republic Of China – Submission To The UN Universal Periodic Review*, AI Index: ASA 17/097/2008, September 2008, p.6.

241. Bien Perez, “Google Draws Fire as it Quits Mainland”, in *South China Morning Post*, 24 March 2010, A4.

242. See, e.g., Amnesty International, *Undermining Freedom of Expression in China: The Role of Yahoo!, Microsoft and Google*, AI Index: POL 30/026/2006, June 2006; Human Rights Watch, “*Race to the Bottom*”: *Corporate Complicity in Chinese Internet Censorship*, August 2006; Surya Deva, “*Corporate Complicity in Internet Censorship in China: Who Cares for the Global Compact or the Global Online Freedom Act?*”, in *George Washington International Law Review*, Volume 39, 2007, 255.

243. Will Clem, “Citing National Security, Officials Urge More Controls on Internet”, in *South China Morning Post*, 23 February 2010, A6.

244. Associate Press, “Report Details Threats to Mainland Journalists”, in *South China Morning Post*, 13 November 2009, A7.

245. It was reported that even the US President Obama faced censorship during his November 2009 China visit: “Obama’s recently concluded three-day China visit was the subject of unprecedented censorship that underscored the increasingly controlled media environment.” Raymond Li, “*Censor Suspected in Missing Obama Exclusive*”, in *South China Morning Post*, 20 November 2009, A1.

246. The ‘Charter 08’ refers to a call made by a group of Chinese writers, intellectuals, lawyers, and journalists demanding legal reforms, democracy and a better protection of human rights. Human Rights in China, ‘*Charter 08*’, http://www.hrchina.org/public/contents/press?revision_id=89851&item_id=8571 accessed 25 June 2010.

247. *Liu Xiaobo case, op. cit.*, note 22.

248. <http://www.fmprc.gov.cn/eng/xwfw/s2510/t648102.htm> accessed 26 February 2010.

249. Adopted at the 19th Session of the Standing Committee of the 8th National People’s Congress on 15 May 1996.

legal profession from direct government administration,²⁵⁰ there are still several provisions in this law which could be and have been used by the government to control how lawyers practice and which clients they represent.²⁵¹ For instance, Article 3(3) provides that in “practicing law, a lawyer must accept *the supervision of the state*, public and client.”²⁵² The Lawyers’ Law empowers the justice administrative authorities to “supervise and provide guidance for lawyers, law firms and lawyers’ associations in accordance with this Law.”²⁵³ The concerned justice administrative authorities – which “shall conduct the *daily supervision and management of the practice of law by lawyers and law firms*”²⁵⁴ – also have extensive powers to impose a range of penalties on lawyers, including the suspension or revocation of their licenses.²⁵⁵

Lawyers who try to pursue sensitive issues or cases against powerful bodies with connection with the government or the CPC typically face retaliation.²⁵⁶ Such lawyers might be threatened that they will be charged with a serious offence, intimidated physically, arrested or beaten.²⁵⁷ Two rights lawyers – including Jiang Tainyoung “who advised parents of children who died in collapsed schools in the Sichuan earthquake” – were detained for seeking to meet the US President Obama during his November 2009 China visit.²⁵⁸ “The most recent method of intimidation is the denial of a license to practice.”²⁵⁹ Professor Jerome Cohen notes: “Even civil cases involving land transactions, environmental controversies, collective labour disputes and compensation for tainted milk and earthquake vic-

250. Fu Hualing & Richard Cullen, “The Development of Public Interest Litigation in China”, paper presented at the *Conference on Public Interest Litigation in Asia*, organised by the Centre of Comparative & Public Law, Faculty of Law, University of Hong Kong, on 14 August 2009, p 4. See also Article 1 of the Lawyers’ Law, which states: “This Law has been made to improve the lawyer system, standardize the practicing conduct of lawyers, safeguard the legal practice of law by lawyers, and discharge the functions of lawyers in the building of a socialist legal system.” *Ibid.*, note 249.

251. LCHR, *Lawyers in China*, *op. cit.*, note 166, pp.91-96.

252. Lawyers’ Law, *op. cit.*, note 249 (emphasis added).

253. *Ibid.*, Article 4.

254. *Ibid.*, Article 52 (emphasis added).

255. *Ibid.*, Articles 7-9, 47-51.

256. See Gerard J Clarke, “An Introduction to the Legal Profession in China in the Year 2008”, in *Suffolk University Law Review*, Volume 41, 2007, 833, p.839; Peerenboom & He, *op. cit.*, note 48, p.43; Xiaoping Chen, *op. cit.*, note 181, pp.235-38.

257. See Feuerberg, *op. cit.*, note 225. “China’s Human Rights Lawyers Face Major Obstacles”, in *The Epoch Times*, 15 July 2009, <http://www.theepochtimes.com/n2/content/view/19643/> accessed 11 September 2009. “During the past year police or their hired thugs have often beaten lawyers for controversial defendants in order to prevent the lawyers’ access to their clients or to the courts. The courageous human rights lawyer Gao Zhisheng was deprived of his license to practice law and is now being detained for unspecified “criminal activities”. His law firm has been suspended from practice for one year.” Cohen, *Rule of Law in China*, *op. cit.*, note 221.

258. Ng Tze-wei, “Police Detain Lawyers who Sought to Meet Obama”, in *South China Morning Post*, 21 November 2009, A4.

259. Feuerberg, *op. cit.*, note 225; Ng Tze-wei, “Rights Lawyers Worry about License Renewal”, in *South China Morning Post*, 28 May 2009; “Human Rights Lawyers in Limbo as Annual Registration Denied”, in *South China Morning Post*, 1 June 2009, A8.

tims are off limits or controlled.”²⁶⁰ In some cases, human rights lawyers might be detained even for reasons unrelated to taking up a case, e.g., for wearing a t-shirt with the slogan “one-party dictatorship is a disaster”.²⁶¹

Such systematic abuses of lawyers may be interpreted as a positive sign, a sign that lawyers are playing a proactive role and standing up to injustice being done to their clients.²⁶² Nevertheless, this state of affairs is not conducive to allowing lawyers to serve as human rights defenders. Lawyers in China are hampered from providing effective legal assistance to the victims of corporate human rights abuses, especially in those cases which are considered sensitive by the government/CPC or which involve big corporations with official connections. Many lawyers might, in fact, be reluctant to take on such cases because of the “fear of being branded by the authorities as a ‘trouble maker’”.²⁶³

3.1.5 Lack of an Independent Judiciary

The PRC Constitution provides: “The people’s courts exercise judicial power *independently*, in accordance with the provisions of law, and not subject to interference by any administrative organ, public organisation or individual.”²⁶⁴ Despite such a clear provision, there is a broad consensus that the judiciary in China is not independent,²⁶⁵ a fact not denied even by Chinese judges in private.²⁶⁶ The PRC judiciary is regarded by one commentator as “buffeted by political and other external pressures”.²⁶⁷ Another scholar observes: “the party-state has direct or indirect control of the courts: judges are still on the payroll of local governments, their professionalism is limited, and the influence of local protectionism on the courts is strong. The courts are thus little more than a loyal subordinate of the

260. Jerome Cohen, “Rough Justice”, in *South China Morning Post*, 9 July 2009, A13.

261. Staff Reporter, “Rights Lawyer Held for Four Hours Over T-shirt”, in *South China Morning Post*, 12 October 2009, A4.

262. Professor Fu argues that these “abuses are in some ways signals of (or result of) the progress that is being made in establishing China’s legal system. Lawyers are intimidated and prosecuted because lawyers have become more proactive, aggressive and innovative in defending the rights of their clients and of their own, posing serious legal challenges that prosecution has never encountered before.” Fu Hualing, “When Lawyers are Prosecuted – The Struggle of a Profession in Transition” http://papers.ssrn.com/sol3/papers.cfm?abstract_id=956500, p.2.

263. CLB, *PIL in China*, *op. cit.*, note 183, p.9. Lawyers feel pressure for not taking sensitive cases. Interview with Dr Zhu, *op. cit.*, note 16.

264. Article 126 of the PRC Constitution (emphasis added). Article 6 of the Civil Procedure law also has a similar provision: “The people’s courts shall try civil cases independently in accordance with the law, and shall be subject to no interference by any administrative organ, public organisation or individual.” See also Article 4 of the OLPC.

265. Pierre Landry, “The Institutional Diffusion of Courts in China: Evidence from Survey Data” in Tom Ginsburg & Tamir Moustafa (eds.), *Rule by Law: The Politics of Courts in Authoritarian Regimes*, CUP, Cambridge, 2008, pp.207, 209; LCHR, *Lawyers in China*, *op. cit.*, note 166, pp.1-9.

266. Interview with Judge No 3.

267. Nicholas Calcina Howson, “Judicial Independence and the Company Law in the Shanghai Courts” in Randall Peerenboom (ed.), *Judicial Independence in China: Lessons for Global Rule of Law Promotion*, Cambridge University Press, Cambridge, 2009, pp.134, 135.

party-state that carefully carries out assigned tasks; they have no will or capacity to resist the party-state's interference."²⁶⁸

Judges are elected and subject to recall by the NPC or local people's congress.²⁶⁹ Judges "maintain no greater job security than any other governmental appointee."²⁷⁰ Moreover, the NPC supervises the courts' work by requiring them to submit annual reports, and the NPC deputies may also submit questions and queries to the courts.²⁷¹ The Political-Legal Committees – which consist of officials from government departments, procuracies and local party committees – also abridge the judicial independence in that they usually decide major complex cases.²⁷² The courts have been characterized as "timid and compliant";²⁷³ they tend to support the policy of local governments when deciding cases.²⁷⁴ The system of each court having its adjudication committee – consisting of senior people in charge of judicial administration – further undermines the independence of the courts, because judges are bound to follow the direction of such committees.²⁷⁵

The recent Regulation on Disciplinary Actions against Staff Members of the People's Courts may further undermine the independence of judges.²⁷⁶ The Regulation conceives the possibility of various kinds of disciplinary actions such as warning, recording a demerit, demotion, removal from office, and discharge from public employment. Even the grounds of taking a disciplinary action are overbroad and vague. A judge may be disciplined, for instance, if she or he is

268. He, "Why Did They not Take on the Disputes", *op. cit.*, note 231, p.203. See also Stanley Lubman, "Bird in a Cage: Chinese Law Reform after Twenty Years", in *Northwestern Journal of International Law & Business*, Volume 20, 2000, 383, pp.394-96; Qing-Yun Jiang, "Court Delay in Developing Countries with Special References to China", in *German Working Papers in Law and Economics*, Paper 36, 2004.

269. Ji, *op. cit.*, note 46, p.2. "According to the principle of popular sovereignty and the constitutional laws, people's courts at various levels are responsible and accountable to the people's congress and its standing committee at the same level." *Ibid.*, p.11. See also Chen, "Legal Thought", *op. cit.*, note 234, p.41.

270. Clarke, *op. cit.*, note 256, p.836.

271. Chen, *op. cit.*, note 4, p.134. Article 17 of the OLPC reads: "The Supreme People's Court is responsible to and reports on its work to the National People's Congress and its Standing Committee. Local people's courts are responsible to and report on their work to the local people's congresses at corresponding levels and their standing committees. The judicial work of people's courts at lower levels is subject to supervision by people's courts at higher levels."

272. See He, "Why Did They not Take on the Disputes", *op. cit.*, note 231, pp.208-09. In some instances, the courts have used these Political-Legal Committees to resist the party pressure. *Ibid.*, p.221 and generally.

273. Fu & Cullen, *op. cit.*, note 250, p.6. "... in China the courts are treated as agencies on a par with other agencies of the government and ... judges show great deference to the decisions of other government agencies." Santoro, *op. cit.*, note 75, p.104.

274. Interview with Dr Zhu, note 16. Howson notes that the "courts act without independence when they implement state or party policy in contravention of what the law provides." Howson, *op. cit.*, note 267, p.138.

275. Ji, *op. cit.*, note 46, pp.3-4.

276. No. 61 [2009] of the Supreme People's Court, 26 January 2010, <http://o-www.lawinfochina.com.lib.cityu.edu.hk/Law/Display.asp?id=7906> accessed 26 February 2010. Some provisions, however, do try to safeguard judges. Article 3, for example, reads: "The staff members of the people's courts shall be protected by law when performing their duties according to law, and shall not be subject to any disciplinary action without a statutory cause or without undergoing statutory procedures."

determined to have smeared the reputation of the state with words, or participates in such activities as assembling, procession and demonstration that aims to go against the state; joins in any illegal organization, or attends any strike; violates any ethical or religious policies of the state; illegally leaves the country, or stays overseas in violation of the relevant provisions and refuses to return; or commits any other act in violation of political disciplines.²⁷⁷ Judges may also be disciplined for refusing to accept a case that should be accepted or illegally accepting a case that should be refused²⁷⁸ and for breaching administrative orders or even social morals.²⁷⁹ It is very likely that such an extensive disciplinary power would further discourage judges from acting independently.

Although the Constitution vests the adjudicative power in the people's courts,²⁸⁰ judges lack real power to interpret laws²⁸¹ or exercise the power of judicial review.²⁸² Courts are under pressure not to accept sensitive cases, even if these are commercial cases.²⁸³ When courts hear a major or important case affecting the local society, they are required to "invite deputies to the local people's congress ... [as] a visitor at the trial, and heed their opinions".²⁸⁴ The Supreme People's Court itself might order the lower courts to help the local government in maintaining social stability – a clear sign of submissiveness to the executive.²⁸⁵ Finally, the Chinese courts suffer from the 'local protectionism' phenomenon; courts favour local parties in disputes because they depend on local parties for funds and other support.²⁸⁶ This will have a direct relevance for victims of corporate human rights abuses because "local enterprises are still the main source of revenue for the local government and the court."²⁸⁷

277. *Ibid.*, Articles 22-24, 26 and 28.

278. *Ibid.*, Article 29.

279. *Ibid.*, Article 5 91-106.

280. Article 123 of the PRC Constitution.

281. "The Supreme Judicial Court and the entire judicial branch have no independent power to interpret the meaning of Chinese law." Santoro, *op. cit.*, note 75, p.103.

282. Some Chinese scholars suggest that the PRC Constitution does not confer a monopoly to interpret the Constitution on the NPC or its Standing Committee. See Kellogg, "Constitutionalism with Chinese Characteristics", *op. cit.*, note 16, pp.226-28.

283. "... many cases are simply not accepted due to public or internal bureaucratic direction or precisely because of the case's political coloration, or (ii) even if initially accepted, such cases are not subject to adjudication (or not reported as such) again for fear of bumping up against extralegal power." Howson, *op. cit.*, note 267, p.138, and also pp.145-48.

284. Ji, *op. cit.*, note 46, p.11. Judges consult party while dealing with sensitive cases. Interview with Judge No. 3.

285. Choi Chi-yuk, "Courts Told to Create Warning System to help Prevent Protests", in *South China Morning Post*, 10 June 2009, A4.

286. Chen, *op. cit.*, note 4, p.153; Lubman, *op. cit.*, note 268, pp.395-96. Clarke notes: "Each level of court is essentially responsible to local political power at the same level, a responsibility reinforced by local control over court staffing and finances." Clarke, *op. cit.*, note 256, p.835.

287. Xin He, "Court Finance and Court Responses to Judicial Reforms: A Tale of Two Chinese Courts", in *Law & Policy*, Volume 31, 2009, 463, p.464.

The cumulative effect of these factors is that judges in practice will favour the commercial interest of companies.²⁸⁸ Nonetheless, many within the Chinese government and the Supreme People's Court seem to be aware of the need to reform the judicial system and have proposed various steps. Following the example of some local courts, the Supreme people's Court has announced that will post its judicial verdicts on a website to enhance transparency.²⁸⁹ Measures are also being introduced to enhance the professional "competence of judges",²⁹⁰ and provide central funding to local courts so as to break their dependency on local governments.²⁹¹

It is, however, too early to assess the extent to which the proposed judicial reforms would improve the independence enjoyed by the courts.²⁹² For example, central funding for courts might not in itself make much difference if other features required for judicial independence (such as the appointment and removal of judges) are not introduced.²⁹³

3.1.6 Undeveloped PIL

Although scholars and commentators do write about the rise of PIL in China,²⁹⁴ the concept of PIL²⁹⁵ is not well entrenched in China and its legal system.²⁹⁶ As noted above, there is no explicit constitutional or statutory basis of PIL in China.²⁹⁷ Article 108 of the Civil Procedure Code seemingly runs against the idea of representative litigation by people having no direct interest in a case, pursuing cases for the collective benefit of the society as such, or filing cases about hypothetical-upcoming situations. It is also doubtful, as explained earlier, if Article 15 of this Code does or could provide a sound basis for PIL.

288. Santoro, *op. cit.*, note 75, p.104.

289. Supreme People's Court of the People's Republic of China, "Judicial News – China plans to improve judicial transparency by posting verdicts online", <<http://en.chinacourt.org/public/detail.php?id=4431>> accessed 13 October 2009. However, Jiang Huiling, vice director of the Supreme Court's reform office, pointed out that not all verdicts will be posted and that a balance will be struck between ensuring the public's right to know and keeping classified files a secret. *Ibid.*

290. The President of the Supreme People's Court, Wang Shengjun, cited this as work in progress in a report presented at the 2nd Session of the 11th National People's Congress. Supreme People's Court of the People's Republic of China, "Judicial News – Highlights of work report on Supreme People's Court", <<http://en.chinacourt.org/public/detail.php?id=4424>> accessed 13 October 2009 (hereinafter Report by President Wang).

291. Kellogg, *op. cit.*, note 50, p.6.

292. "Judicial Reform Plan Fails to Impress Critics", in *South China Morning Post*, 27 March 2009, A7.

293. Interview with Dr Zhu, *op. cit.*, note 16. A High People's Court judge was of the view that the central government (rather than the local governments) should have the power to appoint and remove judges. Interview with Judge No. 3.

294. Fu & Cullen, *op. cit.*, note 250; CLB, *PIL in China, op. cit.*, note 183.

295. See note 203.

296. A Chinese constitutional law scholar noted that if we apply the US standards of PIL, there is no PIL in China. Interview with Dr Zhu, *op. cit.*, note 16.

297. CLB, *PIL in China, op. cit.*, note 183, 4, p.9.

What are interpreted as PIL cases in China are usually cases filed by private individuals seeking redress against a government organ or a corporation.²⁹⁸ These apparently private interest cases are labelled as PIL because such cases also involve a general interest which affects the society at large, e.g., racial/gender discrimination, right to education, protection of consumer rights, or discrimination based on age.²⁹⁹ But if the plaintiff has no direct interest in the case, the court will not entertain such suits.³⁰⁰ Therefore, strictly speaking it would be inaccurate to suggest that PIL in China is similar to that existing in other common law jurisdictions such as the US, Australia and India.³⁰¹ Lu rightly notes:

*“There is disagreement as to whether some of these cases can be called PIL, but at least they have been considered by some legal scholars as PIL lawsuits. In these lawsuits, the plaintiffs appeared to be motivated essentially by the desire to protect their private interests instead of a concern for public interest, but their lawsuits benefited other people as well, and therefore had ‘public interest’ effects.”*³⁰²

Therefore, what is happening in China is more like ‘academic’ or ‘activist’ PIL rather than a ‘real’ or ‘legal’ PIL – it is the academics or activist NGOs which are giving many of these cases a label of PIL to push the boundaries of Chinese law, gain media publicity, and further rights lawyering.³⁰³

Since “Chinese law does not formally allow representative litigation,”³⁰⁴ cases on politically sensitive issues are not permitted.³⁰⁵ In fact, many lawyers might not be willing to take politically sensitive PIL cases.³⁰⁶ Moreover, even if plaintiffs succeed

298. Discussion with Professor Fu Hualing, Faculty of Law, University of Hong Kong, 14 August 2009.

299. CLB, *PIL in China*, *op. cit.*, note 183, pp.4-8; Fu & Cullen, *op. cit.*, note 250, p.8; Yiyi Lu, *Public Interest Litigation and Political Activism in China*, Rights & Democracy, 2008, pp.11-13.

300. Lin Lihong, “Public Interest Litigation in China during the Transition Period”, paper presented at the *Workshop on Business, Human Rights and Access to Justice in China*, held at City University of Hong Kong on 5-6 March 2010.

301. See C D Cunningham, “Public Interest Litigation in Indian Supreme Court: A Study in the Light of the American Experience”, in *Journal of Indian Law Institute*, Volume 29, 1987, 494; Christine M Forster & Vedna Jivan, “Public Interest Litigation and Human Rights Implementation: The Indian and Australian Experience”, in *Asian Journal of Comparative Law*, Volume 3:1, 2008, 143; Surya Deva, “Public Interest Litigation in India: A Critical Review”, in *Civil Justice Quarterly*, Volume 28, 2009, pp.19-40.

302. Lu, *op. cit.*, note 299, pp.9-10 (emphasis added).

303. Recently, China Mobile agreed to pay 1,000 yuan to a subscriber, a Beijing lawyer, to settle out of court a suit alleging price discrimination and abuse of dominant market position. Bien Perez, “China Mobile Settles Monopoly Case”, in *South China Morning Post*, 28 October 2009, B2. It is possible that such a case might be interpreted as a PIL case, because other similarly placed subscribers might benefit from this ruling. The above news report already noted that the Beijing lawyer “may have opened the floodgates to greater consumer activism on the mainland.”

304. Fu & Cullen, *op. cit.*, note 250, p.10.

305. Fu & Cullen, *op. cit.*, note 250, p.24. “Since 2003, unfortunately, more constraints have been placed on legal activism and PIL.” *Ibid.*, p.25.

306. CLB, *PIL in China*, *op. cit.*, note 183, p.9.

in securing justice in a PIL case, it has no significant precedent value for other similar cases or courts.³⁰⁷ In other words, cases by private individuals or lawyers are selectively admitted and tolerated by the Chinese government as a *governance tool*. For instance, since the government wants to discourage environmental pollution by factories,³⁰⁸ it may tolerate PIL cases against the polluting corporations. On the other hand, civil suits seeking compensation from corporations for selling melamine-contaminated milk products were not allowed because such cases might harm the government's goal of establishing what it considers to be a 'harmonious' society.

Despite the above limitations, the PIL jurisprudence in China is not without any value. PIL cases, even if unsuccessful, generate public interest and discussions on important issues.³⁰⁹ Successful PIL cases, on the other hand, may be used by lawyers to convince judges to accept a given lawsuit.³¹⁰ On balance, however, there is no doubt that PIL in China is like an unborn baby – even if this baby is born,³¹¹ it will face many serious challenges.

3.1.7 Peoples' Awareness of their Rights and Inclination for Out of Court Settlement

Apart from the fears inherent in standing up for common good such as protection of human rights or the environment, many people tend not be aware of their rights³¹² or they might be more concerned about immediate livelihood issues rather than human rights or sustainable development.³¹³ Many workers, for instance, might feel content with an arbitration process to settle their disputes with companies, as they might not know the option and the right to approach the courts for securing justice.³¹⁴ On occasions, they might approach the courts after a long time, without realising that redress to legal injuries is subject to a limitation period.³¹⁵

307. Fu & Cullen, *op. cit.*, note 250, p.13.

308. Stephen Chen, "Expansion of Power firms banned after dam Violations" and "Penalties Show "New Attitude" on Green Issues", in *South China Morning Post*, 12 June 2009, A6.

309. Fu & Cullen, *op. cit.*, note 250, p.20.

310. Fu & Cullen, *op. cit.*, note 250, p.13.

311. A judge of the High People's Court expressed the possibility of PIL emerging in future. Interview with Judge No. 2, on 9 November 2009.

312. "Currently, Chinese citizens' awareness of rights is still at a preliminary stage." Tang, *op. cit.*, note 184, 80.

313. "Only about 10 percent of Chinese citizens reported being very concerned about the environment and product safety, whereas nearly half very concerned about inequality and corruption and over 70 percent about inflation." Santoro, *op. cit.*, note 75, p.5 (quoting a 2008 research study by Pew Research Centre).

314. Interview with Judge No. 1, on 14 September 2009.

315. *Ibid.*

It is often suggested that Chinese people generally prefer to settle cases outside court, that is, through mediation.³¹⁶ Although the number of cases decided by the courts is on the rise,³¹⁷ courts generally encourage people to rely more on mediation.³¹⁸ The CPC also does not want people to employ judicial system to plead socially controversial or politically sensitive cases.³¹⁹ Another major reason for people feeling comfortable with mediation could be that in view of judicial corruption and lack of judicial independence, people do not feel confident that they could secure justice through courts.³²⁰ Nevertheless, It is also suggested that the ‘low faith’ of people in the courts encourages them to reach a compromise rather litigate for the vindication of one’s rights.³²¹

3.1.8 Pervasive Corruption

Corruption in China is pervasive.³²² The practice of bribe-taking by the government officials (including judges) as well as their prosecution is not uncommon,³²³ the most prominent and recent example being life imprisonment awarded to a former vice-president of the Supreme People’s Court.³²⁴ Consequently, there seems to be a widespread sentiment with China that government officials are corrupt.³²⁵

316. “The Western notion of enforcing one’s legal rights through litigation does not sit well with the Chinese.” Clarke, *op. cit.*, note 256, p.833.

317. In 2008, the “Chinese courts handled 10.71 million cases of various types, up 10.91 percent. Of these, there were 286,221 labour dispute cases, up 93.93 percent.” Report by President Wang, *op. cit.*, note 290. But see Xin He, “The Recent Decline in the Economic Caseload in Chinese Courts: Exploration of a Surprising Puzzle”, in *The China Quarterly*, Volume 190, 2007, 352 (hereinafter He, “Exploration of a Surprising Puzzle”).

318. For instance, in 2008, the “Chinese courts concluded 3.17 million civil cases through mediation, accounting for 58.86 percent of total civil cases.” Report by President Wang, *op. cit.*, note 290. Lubman offers an interesting explanation for judges encouraging settlement of disputes through mediation: “Judges often prefer to resolve cases by mediation because they are unsure of their legal competence and fear being reversed by a higher court.” Lubman, *op. cit.*, note 268, p.397.

319. Chen, “Legal Thought”, *op. cit.*, note 234, pp.41-42.

320. Guo, *op. cit.*, note 16, pp.177-78. After reviewing the economic caseload of two trial courts in Hunan and Guangdong provinces, He concludes that the ‘court dysfunction’ is one of variables for decline in courts’ caseload. He, “Exploration of a Surprising Puzzle”, *op. cit.*, note 317, p.373.

321. Interview with Dr Zhu, *op. cit.*, note 16. However, empirical research indicates that Chinese people may trust their courts quite a lot. Landry, *op. cit.*, note 265, pp.212-13.

322. In 2008, China was ranked at 72 in the corruption index of 180 countries. Transparency International, “Corruption Perceptions Index 2008”, <http://www.transparency.org/policy_research/surveys_indices/cpi/2008> accessed 10 September 2009.

323. See Minnie Chan, “Former Court Officials face Bribery Charges”, in *South China Morning Post*, 18 September 2009, A5. “A number of ministerial-level or higher Chinese officials have fallen to “serious corruption” charges in the last five years, including the former director of the National Bureau of Statistics Qiu Xiaohua, the former food and drug administration head Zheng Xiaoyu, and former Party head of Shanghai Chen Liangyu.” Supreme People’s Court of the People’s Republic of China, “Focus News – China working on new five-year plan to improve anti-corruption system”, <<http://en.chinacourt.org/public/detail.php?id=4250>> accessed 13 October 2009.

324. Ivan Zhai, “Top Judge Gets Life in prison for Corruption”, in *South China Morning Post*, 20 January 2010, A5.

325. Interview with Judge No. 2, on 9 November 2009.

Also well-known is the fact that many corporations try to secure their economic interests by paying bribes to government and CPC officials.³²⁶ Through government/CPC officials, companies might also be able to influence judges. Foreign companies might follow corrupt practices because they do not have confidence in the fairness of the Chinese legal system and are also afraid of retaliation.³²⁷

In the absence of checks that are available elsewhere (e.g., free media, independent courts, anti-corruption tribunals, multi-party system), it is only the CPC's top leadership that is in a position to take concrete steps to weed out corruption. In fact, the CPC's Central Committee is currently considering introducing a new regulation that would require party cadres to declare their family assets.³²⁸ Furthermore, the National Bureau of Corruption Prevention has been recently established;³²⁹ a new 24-hour confidential anti-corruption hotline has been made available to encourage whistleblowers to report instances of corruption by government and party officials;³³⁰ information is now being shared between various government agencies to stop corrupt officials from fleeing abroad;³³¹ and prosecutors have been provided resources to pursue corruption cases vigorously.³³² Wang Shengjun, President of the Supreme People's Court, has also announced an initiative to "improve education of work ethics" for judges as a way to weed out judicial corruption, which has undermined the credibility of the court system.³³³

These steps might make some difference in the future, but the current picture is not very promising yet. The Internet is, nevertheless, becoming an effective tool to expose and fight against corruption.³³⁴ China's anti-corruption chief He Guoqiang has recently "urged authorities to utilise the public's online comments and postings in the country's ongoing attempt to fight corruption."³³⁵ This marks a shift in the current government policy on the use of information critical of government/CPC officials posted on the Internet.

326. Santoro, *op. cit.*, note 75, pp.115-19; Interview with Judge No. 1, on 14 September 2009.

327. Santoro, *op. cit.*, note 75, p.113.

328. Cary Huang, "Party Faces Decision on Graft", in *South China Morning Post*, 15 September 2009, A1.

329. Supreme People's Court of the People's Republic of China, "Focus News – China working on new five-year plan to improve anti-corruption system", <<http://en.chinacourt.org/public/detail.php?id=4250>> accessed 13 October 2009.

330. Supreme People's Court of the People's Republic of China, "Judicial News – Whistleblowers flood China's anti-corruption hotline", <<http://en.chinacourt.org/public/detail.php?id=4469>> accessed 13 October 2009.

331. Kristine Kwok, "Agencies to Share More Information to Catch Corrupt Officials", in *South China Morning Post*, 11 January 2010, A4.

332. Supreme People's Court of the People's Republic of China, "Judicial News – Prosecutors intensify fight against corruption", <<http://en.chinacourt.org/public/detail.php?id=4126>> accessed 13 October 2009.

333. Supreme People's Court of the People's Republic of China, "Judicial News – China strives to weed out judicial corruption", <<http://en.chinacourt.org/public/detail.php?id=4250>> accessed 13 October 2009.

334. Interview with Dr Zhu, *op. cit.*, note 16.

335. Xie Yu, "Net's Role in Fighting Corruption Praised", http://www.lawinfochina.com/News/News_Detail.asp?id=7814 accessed 20 November 2009.

3.1.9 Weak Implementation and Enforcement of Laws/Judgments

Like many other developing countries, the problems that victims of corporate human abuses face in China relate to weak implementation and enforcement of laws. It has been observed that the “lack of effective and meaningful law enforcement is a chronic problem in China.”³³⁶ Santoro observes:

*“There are local minimum-wage laws in China and laws that limit the amount of over-time that workers can be required to work. There are even laws that protect workers health and safety. Minimum legal standards do exist, at least in theory. The problem in China is that these laws are not enforced.”*³³⁷

There are various reasons for a weak implementation and enforcement of laws. These include pervasive corruption, undeveloped legal system, lack of free media, limited awareness of one’s rights, and the desire to create an investment-friendly business environment.³³⁸

In addition to weak implementation of laws, victims are also likely to struggle in enforcing judgments against corporations,³³⁹ especially if judgments are obtained outside China.³⁴⁰ Although courts have the power to enforce their judgment and orders,³⁴¹ the enforcement of court orders is a common problem in China for a number of reasons.³⁴² Zhou Yongkang, a senior Chinese government official, recently admitted that: “Verdicts of compensation given by the people’s courts across the country are often difficult to be executed since the parties involved in the lawsuits have either little assets or connections with high-ranking officials.”³⁴³

336. Zheng, *op. cit.*, note 70, p.601.

337. Santoro, *op. cit.*, note 75, p.27 (emphasis added).

338. Interview Judge No. 1, on 14 September 2009; Santoro, *op. cit.*, note 75, p.27. In relation to the weak implementation of labour laws, Nicholas notes: “There are labour regulations present in China, but the concern the Chinese government has for economic development creates an atmosphere where enforcement of lawful labour conditions is not a priority.” Dana C Nicholas, “China’s Labour Enforcement Crisis: International Intervention and Corporate Social Responsibility”, in *St. Mary’s Law Review on Minority Issues*, Volume 11, 2009, 155, p.156.

339. Professor Wang Canfa, the Director of the CLAPV, conceded that it is still very difficult to win a case and enforce court decisions in the area of environmental pollution. Wang Canfa, *op. cit.*, note 149.

340. Interview with Judge No 3. See also Donald Clarke, “The Enforcement of the United States Court Judgments in China: A Research Note”, in *Legal Studies Research Paper No. 236*, 27 May 2004, <http://ssrn.com/abstract=943922> accessed 21 November 2009. Articles 267 and 268 of the Civil Procedure Law deal with enforcement of foreign judgments. Clarke sums up the position as follows: “Chinese law requires that there exist a treaty or reciprocity between the foreign state and China in order for a foreign judgment to be enforced.” *Ibid.*, p.2.

341. Under Article 102 of the Civil Procedure Law, the courts have a power to impose fine or detain a person for “refusing to carry out legally effective judgments or orders of the people’s court.”

342. See Jiang, *op. cit.*, note 268, pp.6-7.

343. Supreme People’s Court of the People’s Republic of China, “Judicial News – Senior official calls for resolution of long-delayed lawsuits”, <http://en.chinacourt.org/public/detail.php?id=4557> accessed 13 October 2009.

Other factors that work against the enforcement efficacy are disappearance of firms or corporations from a city, creating a limited company, transferring assets in advance, and interference of government/party officials in the legal process.³⁴⁴

It also seems that the government gives priority to selectively enforcing only certain kinds of judgments. So it might not be feasible to enforce all types of human rights-related judgments with an equal ease. Zhou, for example, observed that “law enforcement departments should especially protect the legitimate rights and interests of those who should get compensations in land acquisition and traffic accidents and for arrears of wages”.³⁴⁵

3.1.10 Court Delays

Unlike certain common law jurisdictions, it seems that litigants do not generally experience much delay in settlement of cases. Courts normally follow a time-table and most of the “simple cases”³⁴⁶ are settled within three to six months.³⁴⁷ A system in which the judgment of the second instance is taken as final also helps in cutting down delays in judicial process.³⁴⁸ Against this background, victims of corporate human rights abuses in China might not generally find delay as a hindrance to seeking justice. There are of course exceptions. For instance, Professor Wang, the Director of the CLAPV, points out the long delays (over ten year in some cases) that the Centre has experienced in litigating environmental cases.³⁴⁹

The delay of a different nature may pose a real obstacle: delay in admitting cases. If the cases are politically sensitive or involve powerful defendants with connections to the government/CPC officials, the courts may neither reject nor admit

344. Interview with Judge No 3. See also Xin He, “Enforcing Courts Judgments in the Pearl River Delta of China”, in *American Journal of Comparative Law*, Volume 57, 2009, 419, pp.440-41 (hereinafter He, “Enforcing Courts Judgments”). He also points out that “the quality of the staff in the enforcement bureau has remained the poorest among the divisions of the courts”. *Ibid.*, p.440.

345. Supreme People’s Court of the People’s Republic of China, “Judicial News – Senior official calls for resolution of long-delayed lawsuits”, <<http://en.chinacourt.org/public/detail.php?id=4557>> accessed 13 October 2009. He notes that the enforcement of administrative or tortious judgments might invite more ‘resistance’ than commercial judgments. He, “Enforcing Courts Judgments”, *op. cit.*, note 341, p.450.

346. Simple cases are those cases “in which the facts are evident, the rights and obligations clear and the disputes trivial in character”. Article 142 of the Civil Procedure Law. Article 146 provides a three-month time frame to decide simple cases: “The people’s court trying a case in which summary procedure is followed shall conclude the case within three months after placing the case on the docket.” In other cases, the case should be concluded in ‘six months’. *Ibid.*, Article 135.

347. Interview with Judge No 2 and Judge No 3. See also He, “Enforcing Courts Judgments”, *op. cit.*, note 344, pp.442-33.

348. Jiang though points out the parties do sometimes use the retrial procedure under the Civil Procedure Law to avoid the finality of judgments delivered by the appellate courts. Jiang, *op. cit.*, note 268, p.8. Article 178 of the Civil Procedure Law provides that “If a party to an action considers that there is error in a legally effective judgment or written order, he may apply to the people’s court which originally tried the case or to a people’s court at the next higher level for a retrial.”

349. Wang Canfa, *op. cit.*, note 149.

a petition for long time.³⁵⁰ The court registry might just let such lawsuits die on their own.

3.1.11 Limited Legal Aid

In 2003, China introduced the Legal Aid Regulations.³⁵¹ The Regulations declare that it is the responsibility of government – primarily of the local governments at county and province levels – to provide legal aid.³⁵² Economic difficulty is the main consideration that triggers entitlement for legal aid. The Regulations specify the circumstances in which legal aid may be sought by people in both civil and criminal litigation.³⁵³ Article 10 provides, among others, that legal aid could be claimed for “requesting for the payment of labour remunerations” and “claiming civil rights”.

Apart from the fact that legal aid in China is in a stage of infancy,³⁵⁴ at least five other problems are visible. First, the scope of legal aid under the existing Regulations is limited. It is clear that legal aid may be claimed for recovering wages from an employer, but it is not clear if it may also be sought for seeking relief against, say, discrimination or environmental pollution. Second, local governments do not possess enough resources to cater to a large pool of poor litigants.³⁵⁵ Consequently, legal aid centres have no option but to rely on NGOs and private pro bono representations.³⁵⁶ The Ministry of Justice recently announced that it “will set up more legal aid centres in collaboration with government and non-government organisations so as to help the poor to resolve their problems.”³⁵⁷ Third, despite the court proceedings in China being considered largely inexpensive in terms of court fees,³⁵⁸ poor migrant workers struggle to make use of even this

350. See Fei, *op. cit.*, note 414.

351. Regulations on Legal Aid, adopted at the 15th executive meeting of the State Council on 16 July 2003.

352. *Ibid.*, Article 3. It is interesting that the general public is encouraged by the state to provide donations, and social organisations are encouraged to provide legal aid service. *Ibid.*, Articles 7-8.

353. *Ibid.*, Articles 10-13.

354. Chen, *op. cit.*, note 4, p.185.

355. The government is though now spending more money on legal aid. It is reported that in 2008 the “legal-aid spending at various government levels rose 30 percent year-on-year over the past five years and hit 670 million yuan”. Supreme People’s Court of the People’s Republic of China, “Judicial News – Senior Party official: Poor people need better legal aid services”, <http://en.chinacourt.org/public/detail.php?id=4457> accessed 13 October 2009.

356. It is interesting to note that the general public is encouraged by the state to provide donations, and social organisations are encouraged to provide legal aid services. Articles 7-8 of the Regulations on Legal Aid. See also “More legal aid lawyers to help China’s migrant workers”, in *People’s Daily*, 13 October 2009, <<http://english.peopledaily.com.cn/90001/90776/90882/6782356.html>> accessed 20 November 2009.

357. Supreme People’s Court of the People’s Republic of China, “Judicial News – Senior Party official: Poor people need better legal aid services”, <<http://en.chinacourt.org/public/detail.php?id=4457>> accessed 13 October 2009.

358. Interview with Judge No. 2. See also Measures for the Payment of Litigation Costs, adopted at the 159th executive meeting of the State Council on 8 December 2006, came into force on 1 April 2007.

relatively inexpensive legal process in the absence of legal aid.³⁵⁹ Fourth, NGOs and research centres that provide legal aid and represent victims in sensitive cases face the prospect of being shut down or allegedly framed for breaching some laws. For instance, the office of Gongmeng (Open Constitution Initiative), which represented victims of melamine milk scandal, was shut down.³⁶⁰ Fifth, the legal aid system does not seemingly respect the autonomy and independence of lawyers in that they are compelled to provide legal aid by the government.³⁶¹ In sensitive human rights, the government may be selective in appointing “pro-party” lawyers to provide legal aid.³⁶²

In summary, it could be said that the victims of corporate human rights abuses face multiple hurdles in China in seeking justice. It is fitting to cite the rare frank conclusion noted in the *White Paper on Rule of Law* issued by the PRC government:

*“China’s legal construction is still facing some problems: The development of democracy and the rule of law still falls short of the needs of economic and social development; the legal framework shows certain characteristics of the current stage and calls for further improvement; in some regions and departments, laws are not observed, or strictly enforced, violators are not brought to justice; local protectionism, departmental protectionism and difficulties in law enforcement occur from time to time; some government functionaries take bribes and bend the law, abuse their power when executing the law, abuse their authority to override the law, and substitute their words for the law, thus bringing damage to the socialist rule of law; and the task still remains onerous to strengthen education in the rule of law, and enhance the awareness of law and the concept of the rule of law among the public.”*³⁶³

3.2 Corporate-Specific Obstacles

In addition to the abovementioned systematic obstacles, the victims of human rights violations by corporations face some peculiar hardships that make the goal of achieving justice more difficult.

359. “The main barrier to legal redress, however, remains the high cost of legal action. The average cost of a labour lawsuit in China is about 4,000 yuan, or three to four months’ wages for a factory worker.” Geoffrey Crothall, “China’s Workers Need Legal Aid.”, <http://www.guardian.co.uk/commentisfree/2009/may/21/china-crossroads-workers-legal-aid> accessed 20 November 2009.

360. Tania Branigan, “China officials shut legal aid centre”, <http://www.guardian.co.uk/world/2009/jul/18/china-shuts-legal-aid-centre> accessed 20 November 2009.

361. Lan Zhixue, “Judicial Independence and Lawyers”, paper presented at the *Workshop on Business, Human Rights and Access to Justice in China*, held at City University of Hong Kong on 5-6 March 2010; Chen, *op. cit.*, note 4, pp. 182, 184.

362. *Ibid.*

363. State Council Information Office, *China’s Efforts and Achievements in Promoting the Rule of Law*, White Paper, February 2008, Conclusion, http://www.china.org.cn/government/news/2008-02/28/content_11025486_11.htm accessed 20 November 2009.

3.2.1 Limited Scope of Veil Piercing

The Chinese Companies Law allows companies to invest in other enterprises, without accepting joint and several liability for the debts of the enterprises in which it invests.³⁶⁴ In other words, the well-known principles of separate personality and limited liability are expressly applied to a corporate group situation. At the same time, the Companies Law, after the 2005 amendment, provides a statutory basis for lifting of the corporate veil³⁶⁵ unlike in certain common law jurisdictions where it remains a matter of judicial discretion. Article 20 reads:

“The shareholders of a company shall comply with the laws, administrative regulations and articles of association, and shall exercise the shareholders’ rights according to law. None of them may injure any of the interests of the company or of other shareholders by abusing the shareholders’ rights, or injure the interests of any creditor of the company by abusing the independent status of legal person or the shareholders’ limited liabilities. ...

Where any of the shareholders of a company evades the payment of its debts by abusing the independent status of legal person or the shareholders’ limited liabilities, and thus seriously damages the interests of any creditor, it shall bear joint liabilities for the debts of the company.”³⁶⁶

This provision lists the grounds on which the corporate veil may be lifted by the courts.³⁶⁷ It is noteworthy that Article 20 also contemplates the possibility of awarding compensation in case shareholders of a company cause any loss to the company or to the other shareholders.³⁶⁸

On a plain reading, it may seem that this provision should be of great help, at least in theory, to the victims of corporate human rights abuses when the shareholder is a company with deep pockets. But in practice, the situation plays out differently for a number of reasons. First, it will not be easy to establish that the parent

364. “A company may invest in other enterprises; however, it shall not become the investor that assumes joint and several liability for the debts of the enterprises in which it invests, except where otherwise provided for by law.” Companies Law, *op. cit.*, note 92, Article 15.

365. Peter Koh, *Major Issues in Company Law: With PRC Chinese and English Comparative Law Notes*, Sweet & Maxwell, Singapore, 2009, pp.88-92; Mark Wu, “Piercing China’s Corporate Veil: Open Questions from the Company Law”, in *Yale Law Journal*, Volume 117, 2007, 329; Gu Minkang, *Understanding Chinese Company Law*, Hong Kong University Press, Hong Kong, 2006, p.334.

366. Article 64 of the Companies Law, *op. cit.*, note 364. It further provides a special veil piercing provision related to single-shareholders companies. It reads: “If the shareholder of a one-person limited liability company is unable to prove that the property of the one-person limited liability company is independent from his own property, he shall bear joint liabilities for the debts of the company.”

367. Koh, *op. cit.*, note 365, p.90. “Article 20 establishes a basic structure for lifting the corporate veil.” *Ibid.*, p.92.

368. “Where any of the shareholders of a company causes any loss to the company or to other shareholders by abusing the shareholders’ rights, it shall be subject to compensation.” Article 20(2) of the Companies Law.

company, as a shareholder of its subsidiary, has caused any loss to the (subsidiary) company by indulging in human rights abuses. If the abuses are serious as well as extensive and receive public condemnation, it would be easier to make this argument and prove that loss to the company was caused.³⁶⁹

The second problem that victims of corporate human rights abuses might face relates to the intended scope of Article 20. The primary focus of Article 20 is seemingly to safeguard creditors' interests, say, against corporate frauds or misfeasance and insolvency.³⁷⁰ One commentator, in fact, was of the view that cases of public wrongs such as violation of labour/human rights are likely to be dealt with under labour or administrative laws rather than under company law.³⁷¹ It is, therefore, not clear if the courts could or would employ this provision to hold a parent company liable for human rights violations by its subsidiary. Wu argues:

*“The new law explicitly discusses only the rights of creditors. Although bankruptcies are an important context in which veil piercing is invoked, they are, by no means, the only ones. China’s courts are bound to face demands to pierce the corporate veil in non-creditor situations in the coming years. Environmental class action lawsuits are on the rise, as China confronts major environmental problems. In addition, with increased worries about product safety, Chinese consumers are likely to seek greater enforcement of consumer protection laws. A narrow textualist interpretation of the new Company Law suggests that the Company Law’s veil piercing provisions may not cover all such litigation.”*³⁷²

Third, as pointed out by a leading expert on Chinese company law, the courts are likely to treat state-owned enterprises differently from private companies.³⁷³ In other words, the chances of getting relief might be higher if the defendant is a private company, because the courts might have to strike a balance between the government's policy and victims' rights if the defendant was a state-owned enterprise.³⁷⁴

369. It is plausible to make this argument, for example, in the case of Sanlu and other Chinese companies selling melamine-contaminated milk and/or baby products.

370. In addition to the express language of Article 20, the commentators also explain the scope of this provision only with reference to creditors. Gu, *op. cit.*, note 365, p.334. Even the judicial practice seems to support this view. A creditor was able to pierce the veil in Shanghai No.2 Intermediate People's Court, (No.4 Civil Division), 2007, *Shanghai Huaxin Electric Wire and Cable Company v. China Tietong Group Company* (upheld by the Shanghai High Court), as quoted in Howson, *op. cit.*, note 267, pp.139-40.

371. Interview with Gu Minkang, Associate Professor, School of Law, City University of Hong Kong, on 17 November 2009. Professor Gu pointed out that if necessary, the parent company could be held liable as a person/authority 'responsible' or 'in charge of' of public wrongs under relevant laws.

372. Wu, *op. cit.*, note 365, pp.334-35 (footnotes omitted).

373. Interview with Gu, *op. cit.*, note 371.

374. For example, a Chinese court might be “unable to act independently in enforcing that liability if the controlling shareholder is a powerful instrument of the state, party, or military.” Howson, *op. cit.*, note 267, p.138.

Fourth, in China, even companies were not free from the control of CPC, in particular when it came to important decisions.³⁷⁵ This position is not totally reversed by the 2005 Companies Law,³⁷⁶ and a close connection between companies, CPC and the government still exists.³⁷⁷ This issue has a direct relation to the extent to which victims may seek effective remedy against companies for violation of human rights, because the government agencies may seek to protect companies rather than victims in cases that might be politically or economically sensitive.³⁷⁸

3.2.2 Limited Class Action

The number of victims in most of the cases related to human rights abuses by corporations is large. Private litigation, thus, becomes an inefficient mechanism to secure justice for a big pool of victims. Class action litigation might be a viable solution, and this type of legal action is expressly recognised under the Chinese law as ‘joint action’. Article 53 of the Civil Procedure Law lays down: “When one party or both parties consist of two or more than two persons, their object of action being the same or of the same category and the people’s court considers that, with the consent of the parties, the action can be tried combined, it is a joint action.” The law allows people to pursue litigation through elected representatives if the number of persons filing a joint action is large.³⁷⁹ If a party comprises a “large but uncertain” number of persons, the court “may issue a public notice, stating the particulars and claims of the case and informing those entitled to participate in the action to register their rights with the people’s court within a fixed period of time.”³⁸⁰

In the past, there have been a few instances when class action suits were entertained by the Chinese courts.³⁸¹ But those cases related to non-controversial rights such as non-payment of wages or environmental pollution, and it is doubtful as to whether the courts would admit and the government would tolerate class action suits to enforce a variety of human and labour rights.³⁸² For instance, lawyers

375. Gu, *op. cit.*, note 365, pp.204-05, pp.313-14.

376. “The Chinese Communist Party may, according to the Constitution of the Chinese Communist Party, establish its branches in companies to carry out activities of the Chinese Communist Party. The company shall provide necessary conditions to facilitate the activities of the Party.” Article 19 of the Companies Law, *op. cit.*, note 91.

377. Government or party officials own shares in private companies, which see this as a means of protecting the interest of companies. Interview with Judge No. 1, on 14 September 2009.

378. Even outside the human rights context, it is noted that “corporate lawsuits involving state- or party-backed firms, even corporatized, are almost nonexistent”. Howson, *op. cit.*, note 267, p.139. In some corporate/contract cases, the courts have though ruled against firm with political connections. *Ibid.*, pp.139-40.

379. Article 54 of the Civil Procedure Law.

380. *Ibid.*, Article 55.

381. Zheng, *op. cit.*, note 70, p.612.

382. Liu points out that “in reality, Chinese courts are extremely reluctant to allow cases to proceed with a large group of plaintiffs.” Titi M Liu, “Transmission of Public Interest Law: A Chinese Case Study”, in *UCLA Journal of International Law & Foreign Affairs*, 2008, 263, p.286. The guidelines issued by the Al-China

recently sought to institute a class action suit against Sanlu and other Chinese companies to seek compensation for the deaths or illness of many children who consumed melamine-contaminated milk products.³⁸³ In many other jurisdictions, this situation would have been a perfect case for class action, but these attempts did not succeed in China.³⁸⁴

3.2.3 Corporations have Means to Avoid Compliance with Laws and Court Orders

It also seems that corporations operating in China may employ numerous means to bypass laws or avoid compliance with court orders. For example, although Chinese courts have the power to order a corporation to produce relevant documents or pay compensation, the corporation might contend that they do not have any such documents or money to pay compensation – any search of the corporate office or bank account also proves futile.³⁸⁵ Some corporations also devote resources to train their managers as to how to deceive auditors/inspectors and convince them to believe that labour rights are being complied with.³⁸⁶ Moreover, it is felt that victims are in a disadvantaged position while litigating against companies in view of unequal resources.³⁸⁷

3.2.4 Power Dynamics

Local governments might work in concert with private developers, for example, in acquisition of land,³⁸⁸ or favour developers in their disputes with land owners.³⁸⁹ Activists who try to conduct self-investigation or pursue cases against powerful corporations might face retaliatory action from the government. This is what happened to the rights activists who tried to expose the corruption in the construction of schools that collapsed in the Sichuan earthquake in May 2008.³⁹⁰ The general

Lawyers Association also seem to discourage lawyers from taking class action cases. Wang, *op. cit.*, note 150, 218.

383. Edward Wong, “Families File Suit in Chinese Tainted Milk Scandal”, in *The New York Times*, 20 January 2009, <http://www.nytimes.com/2009/01/21/world/asia/21milk.html>.

384. See discussion in Part IV.C.3 below.

385. Interview with Judge No. 1, on 14 September 2009. Chen also acknowledges that a high number of courts’ judgments in civil and commercial cases are not enforced. Chen, *op. cit.*, note 4, p.158.

386. See Santoro, *op. cit.*, note 75, p.31.

387. Chen Mingyu, “Protecting Human Rights through Mediation: The Role of NGOs in Mediation of Labour Disputes”, paper presented at the *Workshop on Business, Human Rights and Access to Justice in China*, held at City University of Hong Kong on 5-6 March 2010.

388. Interview with Dr Zhu, *op. cit.*, note 16.

389. Gu Minkang, “Right to Private Property amidst Land Acquisition for Economic Development”, paper presented at the *Workshop on Business, Human Rights and Access to Justice in China*, held at City University of Hong Kong on 5-6 March 2010.

390. “On August 5 and August 12, 2009, courts in Chengdu city, Sichuan province, held separate trials in the cases of Tan Zuoren and Huang Qi, both of whom sought to help parents of children who died in school collapses following the May 2008 Sichuan earthquake. Although officials originally pledged to investigate

public tends to be quite fearful of the consequences when it comes to standing up for their rights.

In some cases, it seems that corporate developers enjoy so much clout that they are willing to defy orders of even a city government. For instance, a property developer Hua Xia resorted to illegal means and violence, in defiance of the order of Benxi government, to evict residents who did not accept the compensation offer in lieu of transferring their private property.³⁹¹ The only positive outcome of this case was that the Benxi court accepted the self-defence argument of Zhang Jian, who resisted the efforts of people sent by the developer to forcefully evict him.³⁹²

3.3 Obstacles examined through Case Studies

This section will provide an analysis of the obstacles that the victims in five case studies experienced in making the concerned corporations accountable for their human rights violations. This should offer a better picture of how legal remedies available on paper translate into reality.

3.3.1 Yahoo!

“Yahoo! was one of the first foreign Internet companies to enter the Chinese market in 1999.”³⁹³ It also allegedly took the lead in bowing under the pressure of Chinese government and cooperating with the government in achieving censorship. Yahoo! China, to begin with, facilitated Internet censorship by maintaining “a list of thousands of words, phrases and web addresses to be filtered out of search results.”³⁹⁴ Beginning with 2003, Yahoo!, or its subsidiaries such as Yahoo! China and Yahoo! (Holdings) Hong Kong, provided electronic details of and information about “cyber-dissidents” to the Chinese authorities which lead to the

the collapses, they instead suppressed attempts by parents to seek redress and blocked media and citizens from independently investigating the role played by shoddy construction. Tan organised an independent investigation into the cause of the collapses, while Huang publicized the parents’ demands on his human rights Web site. Officials charged Huang and Tan with endangering national security, Huang for possessing state secrets and Tan for various activities including writing about and commemorating the 1989 Tiananmen protests.” CECC, “Chengdu Courts Hold Trials of Earthquake Activists”, <<http://www.cecc.gov/pages/virtualAcad/index.php?id=128566>> accessed 11 September 2009.

391. Mark O’Neill, “One Man’s Freedom is Hope for Homeowners”, in *South China Morning Post*, 31 October 2009, A12.

392. *Ibid.*

393. Amnesty International, *Undermining Freedom of Expression in China: The Role of Yahoo!, Microsoft and Google*, July 2006, p.18 http://www.amnestyusa.org/business/Undermining_Freedom_of_Expression_in_China.pdf accessed 30 September 2009.

394. Human Rights Watch, “Race to the Bottom: Corporate Complicity in Chinese Internet Censorship”, August 2006, p.31 <http://www.hrw.org/reports/2006/chinao806/chinao806webwcover.pdf> accessed 30 September 2009.

incarceration of some of them.³⁹⁵ Yahoo!, therefore, “assisted the suppression of dissent with severe consequences for those affected.”³⁹⁶

In October 2005, Yahoo! merged Yahoo! China with Alibaba.com, a Chinese company. Under this agreement, “Alibaba.com owns and operates Yahoo! China, with exclusive rights to the use of the Yahoo brand and technologies in China”.³⁹⁷ One important benefit of this partnership was that Yahoo! could do business in China without owning any responsibility, including for complicity in Internet censorship.³⁹⁸

In providing personal information about its users to the Chinese government,³⁹⁹ it is argued that Yahoo! infringed (or assisted in the infringement of) several human rights such as the freedom of expression; the right to privacy and personal liberty; right to seek, receive and impart information; freedom of the press; right to communication; and the right to protest.

Based on the personal information provided by Yahoo!, several dissidents were convicted by the Chinese courts for serious crimes. For instance, in 2005, the Changsha Intermediate People’s Court of Hunan Province sentenced Shi Tao “to 10 years imprisonment with two years subsequent deprivation of political rights for committing the crime of illegally providing state secrets to foreign entities.”⁴⁰⁰ The conviction/sentence was served pursuant to Article 111, read with Articles 55 and 56, of the Criminal Law of the PRC. The court held a closed trial, probably because the case purportedly related to state secrets. It was alleged that Shi Tao emailed the summary of a state secret document – “A Notice Regarding Current Stabilising Work” issued by the Central Committee of the Communist Party of China (CPC) – to a foreign person. The court rejected the defence of Shi Tao that the “criminal act of providing state secrets to foreign entities did not involve especially serious circumstances”, as the State Secrecy Bureau verified the document to be top-secret level state secrets. It is noteworthy that the government could

395. “Yahoo ‘Helped Jail China Writer’”, <<http://news.bbc.co.uk/2/hi/asia-pacific/4221538.stm>> accessed 20 August, 2006; Human Rights Watch, *ibid.*, pp.31-36, 107-113.

396. Amnesty International, *op. cit.*, note 393, p.6. See also Denae Thomas, “Xiaoning v Yahoo! Inc’s Invocation of the Alien Tort Statute: An Important Issue but an Improper Vehicle”, in *Vanderbilt Journal of Entertainment & Technology Law*, Volume 11, 2008, p.211.

397. Alibaba.com, Company Overview, available at <http://www.alibaba.com/aboutalibaba/index.html> accessed 17 September, 2006.

398. While defending the role of Yahoo! before a Joint Hearing of the Sub-Committee on Africa, Global Human Rights and International Operations and the Sub-Committee on Asia and the Pacific, Michael Callahan, the Senior Vice President of Yahoo! observed: “It is very important to note that Alibaba.com is the owner of the Yahoo! China businesses, and that as a strategic partner and investor, Yahoo!, which holds one of the four Alibaba.com board seats, does not have day-to-day operational control over the Yahoo! China division of Alibaba.com.”

399. Yahoo! provided this information in pursuance of a notice issued (on 23 April 2002 and 14 August 2002) by the Beijing State Security Bureau under Article 45 of the Criminal Procedure Law of the PRC. [2002] BJ State Sec. Ev. Coll. No. 6. and No. 11.

400. Changsha Intermediate Criminal Division One, First Trial Case No. 29, 2005, *Shi Tao* case.

track Shi Tao on the basis of a telephone number, Internet protocol (IP) address and office address provided by Yahoo!.

In another case, the Beijing No. 1 Intermediate People's Court convicted Wang Xiaoning for inciting subversion under Articles 105(2) and 106 of the Criminal Law.⁴⁰¹ Xiaoning wrote several online articles to promote his thoughts on democracy and criticise the existing political/social system. The government authorities again could identify him based on the personal information provided by Yahoo!.

Family members of cyber-dissidents and NGOs first sent petitions to the Supreme People's Court, but without much success. A complaint against Yahoo! was also filed before the Hong Kong Privacy Commissioner, apparently because the personal information to the Chinese government was provided by the Hong Kong subsidiary of Yahoo!.⁴⁰² But the Privacy Commissioner dismissed the complaint on the ground that the IP address *per se* was not "personal data" and that Yahoo! HK was not a "data user" within the definition of the Hong Kong Privacy Ordinance.⁴⁰³ Finally, the World Organisation for Human Rights filed a lawsuit against Yahoo! Inc, alleging that Yahoo! should be held liable under the Alien Tort Claims Act (ATCA) for the imprisonment of dissidents.⁴⁰⁴ In November 2007, Yahoo! settled the lawsuit for an undisclosed amount.⁴⁰⁵ The settlement included a commitment by Yahoo! to pay the families' legal bills and to create a human rights fund to provide support to other political dissidents and their families.

The fact that the Chinese courts did not entertain the case against Yahoo! for indulging in human rights abuses is not surprising, because courts do not generally accept sensitive cases, especially if the defendants are big companies with connections with CPC/government officials. In fact, even if the case had been accepted, there would not be much chance for remedies for the victims in the face of corruption, lack of independent courts, and inability to reach the US-based parent corporation.

Although the Hong Kong Privacy Commissioner conducted an investigation into the complaint of alleged disclosure of personal data, it rejected the complaint. The Commissioner concluded that neither the Internet protocol (IP) address *per*

401. Based on Based on an English translation of the judgment against *Wang Xiaoning* provided by Mr Calvin Chun-ngai Ho. See also Khurram Nasir Gore, "Xiaoning v. Yahoo!: Piercing the Great Firewall, Corporate Responsibility, and the Alien Tort Claims Act" in *Temple Journal of Science, Technology & Environmental Law*, Volume 27, 2008, 97.

402. Surya Deva, "'Yahoo! for Good' and the Right to Privacy of Internet Users: A Critique", in *Journal of Internet Law*, Volume 11:9, 2008, 3.

403. Office of the Privacy Commissioner for Personal Data, Hong Kong, "The Disclosure of Email Subscriber's Personal Data by Email Service Provider to PRC Law Enforcement Agency", R07-3619 (14 March 2007) paras 8.3 to 8.14 and 8.18 to 8.26, http://www.pcpd.org.hk/english/publications/files/Yahoo_e.pdf accessed 20 September 2009.

404. Thomas, *op. cit.*, note 396.

405. *Wang Xiaoning v. Yahoo! Inc.*, No. C07-02151 CW/JCS (N.D. Cal. Nov. 13, 2007)

se was “personal data” nor was Yahoo! HK a “data user” within the definition of the Hong Kong Privacy Ordinance.⁴⁰⁶ In addition, the alleged disclosure of information took place in mainland China, that is, outside the territorial jurisdiction of Hong Kong.⁴⁰⁷ So, as compared to China, the obstacles in Hong Kong related to the restricted scope of the data privacy law.

3.3.2 Melamine-contaminated Milk Products

“In 2008, high levels of melamine were detected in some infant formula and other liquid and powdered milk products originating from China.”⁴⁰⁸ Baby milk products sold by Sanlu Group, which had been China’s leading seller of milk powder, and several other Chinese companies were reported to have a melamine content exceeding the permissible limit. The milk products were intentionally tainted with melamine⁴⁰⁹ and companies initially tried to cover up.⁴¹⁰ Over 300,000 children were diagnosed with kidney disease and at least six children were killed.⁴¹¹ Fonterra Cooperative Group – a New Zealand based company which had 43 per cent stake in Sanlu Group – had three directors on the seven-member Sanlu board.⁴¹² While the official Chinese investigation report found that Sanlu had lied for eight months, Fonterra Chief Executive Mr. Andrew Ferrier denied knowledge of the revelations.

After the media reported the sale of melamine-contaminated products, a number of class actions were filed across the nation in both lower courts and in the Supreme People’s Court.⁴¹³ Almost all these cases were “delayed, rejected, or ignored by the courts” – the primary reason being that the courts were instructed by higher officials not to admit any suit against Sanlu Group.⁴¹⁴ So, most of these

406. Office of the Privacy Commissioner for Personal Data, Hong Kong, “The Disclosure of Email Subscriber’s Personal Data by Email Service Provider to PRC Law Enforcement Agency”, R07-3619, 14 March 2007, paras 8.3 to 8.14 and 8.18 to 8.26, http://www.pcpd.org.hk/english/publications/files/Yahoo_e.pdf accessed 20 September 2009.

407. Deva, JLL, *op. cit.*, note 402, p.7.

408. WHO, *Toxicological and Health Aspects of Melamine and Cyanuric Acid*, 2009, para. 5.3, http://whqlibdoc.who.int/publications/2009/9789241597951_eng.pdf accessed 15 August 2009

409. Andrew Jacobs, “Chinese Release Increased Numbers in Tainted Milk Scandal”, in *New York Times*, 2 December 2008, <http://www.nytimes.com/2008/12/03/world/asia/03milk.html?ref=asia> accessed 15 August 2009.

410. Josephine Ma, “Sanlu Boss Confesses to Cover-up”, in *South China Morning Post*, 1 January 2009, A1. Later on, even government authorities tried to keep secret food safety concerns about a Shanghai dairy. Associated Press, “Milk Scandal Kept Secret for a Year”, in *South China Morning Post*, 8 January 2010, A7.

411. Hu Yinan and Cui Xiaohuo, “Appeals sought in milk case”, in *China Daily* (Hong Kong Edition), 25 June 2009, P05.

412. Liu Melinda, “Saving Face Goes Sour”, in *Newsweek* (10 June 2008), Volume 152, Issue 14.

413. Wong, *op. cit.*, note 383.

414. Xin Fei, “China Courts Delay Admission of Lawsuits against Sanlu”, in *The Epoch Times*, 6-12 November 2008, A4.

attempts to make Sanlu accountable before the courts failed,⁴¹⁵ as the government's policy was to offer fixed amount of compensation rather than allowing victims to litigate their claims before various courts.⁴¹⁶ It was reported that as of 22 January 2009, the families of 262,662 child victims had received damages and signed a settlement agreement with Sanlu and other corporations, which counts for 90.7 per cent of the sick children.⁴¹⁷ The government also announced that it would continue to provide free treatment to the sick children, and those under three years old who have been discharged from hospital will continue to enjoy free diagnosis, examination and treatment until they are recovered.⁴¹⁸

The Supreme People's Court advised courts around the country to accept lawsuits filed by victims who want to appeal the compensation offer, but only the Xinhua District Court in Shijiazhuang (Hebei's capital city where the now-defunct Sanlu Group was based) has accepted such lawsuits.⁴¹⁹ But it is reported that the victims have not received any relief.⁴²⁰ The Shunyi District People's Court in Beijing also began hearing the civil suit brought by the father of a child who fell ill by consuming tainted milk.⁴²¹ The outcome of this suit is not yet known.

On the other hand, several Sanlu executives and dairy producers have been sentenced to various terms of imprisonment, and, in two instances, regrettably from a human rights perspective, to the death penalty.⁴²² The Higher People's Court of Hebei Province held that Sanlu Group and four other defendants (one director

415. Ng Tze-wei, "Frustration over Lawsuits in Milk Scandal", in *South China Morning Post*, 14 October 2008, A8; Fiona Tam, "Couple First to Accept Sanlu Payout", in *South China Morning Post*, in 17 January 2009, A4. It was reported that one court, Xinhua District Court in Shijiazhuang, accepted a case filed by the parents of a child who got sick after consuming melamine-tainted milk powder. "China court accepts first lawsuit over melamine tainted milk", http://news.xinhuanet.com/english/2009-03/25/content_11072195.htm accessed 22 November 2009.

416. The compensation plan, which is based on the severity of poisoning, offers fixed payments of 200,000 Yuan to the families of babies who died, 30,000 Yuan for infants severely sick, and 2,000 Yuan for other victims.

417. Official Website of Ministry of Health of The People's Republic of China, "Compensating work for victims of Milk Scandal coming to an end, most parents accepted the compensations" (Translation), <http://www.moh.gov.cn/publicfiles/business/htmlfiles/wsb/pmtxwbd/200901/38923.htm> accessed 26 September 2009.

418. Pliny, "China to continue free treatment for tainted milk victims", in *Xinhua News Agency, China View*, 2 January 2009, http://news.xinhuanet.com/english/2009-01/02/content_10590554.htm accessed 26 September 2009.

419. Kristina Koveshnikova, "Appeals sought in milk case", in *The China Daily*, 25 June 2009, http://www.china-daily.com.cn/language_tips/cdaudio/2009-06/25/content_8322649.htm assessed 26 September 2009.

420. Qin Xudong, "Calling for Judicial Reform", in *Caixin Online*, <http://english.caing.com/upload/CALLING%20FOR.pdf>, p.80.

421. Associated Press, "Court Hears First Lawsuit over Milk Scandal", in *South China Morning Post*, 29 November 2009, 6.

422. Zhu Zhe (Beijing) and Cui Xiaohuo (Shijiazhuang), "Two get death in tainted milk case", in *The China Daily*, 23 January 2009, 01 Main Section; John Vause, "Death Sentences in China tainted milk case", in *CNN*, in 23 January 2009, <http://edition.cnn.com/2009/WORLD/asiapcf/01/22/china.tainted.milk/index.html> accessed 26 September 2009.

and two vice Chief Executive Officers) liable for “producing and selling shoddy products”.⁴²³ The court held that the Sanlu Group and the director clearly knew that the milk powder they produced contained melamine and that melamine is harmful to human bodies, but took no action in stopping the production and selling of the milk powder. However, as the evidence was inadequate to prove that the Sanlu Group and other defendants have known on 1 August 2008 that the products contained melamine, they were convicted for ‘producing and selling shoddy products’ rather than for ‘producing and selling of harmful food products’.

The focus of the abovementioned legal proceedings has, however, been on criminal sanction. Civil claims for damages have not been robustly adjudicated, the result being that most of the victims only got about HK\$2,000 under the government compensation scheme.

The contamination of milk products involves intentional corporate conduct. Under such circumstances, one would expect that victims and/or their families would be able to sue such corporations under various laws and thus not only seek compensation but also get a full remedy to vindicate their rights. But, as noted above, this did not happen. Rather, an activist plaintiff was himself charged with disrupting social order⁴²⁴ – another illustration of the obstacles that victims of corporate human rights face in China.

According to Mr. Xu Zhiyong, the founder of Open Constitution Initiative, which was helping families of the victims in the milk scandal to seek compensation from relevant corporations, the Chinese Government put pressure on lawyers, especially those in Hebei Province, not to act for the victims and requested them to “keep a distance” from the victims.⁴²⁵ Consequently, many lawyers rejected the victims’ instructions. Mr Zhiyong and his colleagues were also being arrested and charged with tax evasion as it did not report the donation from Yale Law School for different projects.⁴²⁶ More recently, Zhao Lianhai, the head of an activist group that represented the parents of children who consumed melamine-contaminated milk products, was detained on the eve of the US President Obama’s visit to China.⁴²⁷ All these developments demonstrate the control that the Chinese government and CPC exercise in managing the resolution of disputes between general public and powerful defendants. The underlying aim seemingly is not the protection of people’s rights but just doing enough to check the societal unrest – relieving a

423. Based on an English translation of the judgment against *Sanlu Group and Others* provided by Mr Calvin Chun-ngai Ho.

424. Josephine Ma, “Dream of Court Turns Sour for Milk Activist”, in *South China Morning Post*, 1 April 2010, A5.

425. Ng Tze-wei, “Long wait for victims of tainted milk”, in *South China Morning Post*, 5 December 2008, Edt 7.

426. Raymond Li, “NGO fined heavily for tax breaches”, in *South China Morning Post*, 17 July 2009, Edt 4.

427. Choi Chi-yuk, “Dozens of Dissidents Detained, Families Say”, in *South China Morning Post*, 15 November 2009, A7.

party official from his post for attempting to mask the milk scandal,⁴²⁸ or offering administrative solution to the problem.⁴²⁹ The latter recourse is, in fact, considered appropriate by some on the ground in view of evidentiary problems and/or the involvement of too many victims.⁴³⁰

The courts were also notified internally not to accept such claims pending the central government's order.⁴³¹ This directive was again consistent with the policy of Chinese government to discourage people going to the courts to seek justice,⁴³² if that might harm certain vested interests of the CPC. These policies of the Chinese government also operate as obstacles in that they limit in practice what legal remedies are available to victims in law.

3.3.3 The 2008 Labour Contract Law

China is often called 'the factory of the world'. Nevertheless, under the existing Labour Law, many workers have had no written contract with their employees and therefore, their rights have not been adequately protected in case of disputes as to wages, health benefits or dismissal. The new Labour Contract Law was a welcome step in that it tried to fill in this gap.

It is noteworthy though that in addition to corporations opposing the draft of this law, they also tried to bypass its application in a pro-active manner.⁴³³ Prior to the commencement of the Law on 1 January 2008, some large corporations such as Wal-Mart and Huawei Technologies Co. Ltd. requested the employees to resign voluntarily and then re-employed them by offering a short-term contract.⁴³⁴ Although the scheme was 'voluntary', in practice workers did not have an option. One positive development of this bypassing attempt was that the ACFTU intervened to stop 'mass layoffs' by companies.⁴³⁵

428. Supreme People's Court of the People's Republic of China, "Judicial News – China's top legislature decides to remove milk scandal official from deputy post", <http://en.chinacourt.org/public/detail.php?id=4463> accessed 13 October 2009.

429. For example, a senior Health Ministry official said that "administrative enforcement is a better way to resolve food safety problems than litigation". Ng Tze-wei, "Law Gives Official Food for Thought", in *South China Morning Post*, 2 June 2009, A5.

430. Interview with Judge No 3; Conversation with Professor Randall Peerenboom, on 19 November 2009.

431. This was reported in media, and also confirmed by a judge. Interview with Judge No. 1.

432. But see Fu & Cullen, *op. cit.*, note 250, pp.6-7, 24.

433. CLB, "Going it Alone", *op. cit.*, note 75, p.20.

434. Quan Qiu Mei, "Wal-Mart Shanghai Lay-off Scandal reflects the absence of labour association" (Translation), in *First Economics Daily (Translation)*, 8 November, 2007, <http://finance.sina.com.cn/chanjing/b/20071108/00194149223.shtml> accessed 26 September 2009; IHLO, "Sackings at Wal-Mart: Global restructuring or avoiding the new Contract Law?", <http://www.ihlo.org/LRC/W/101207d.html> accessed 10 September 2009.

435. IHLO, "The new Contract law of China – opportunities and threats", <http://www.ihlo.org/LRC/W/101207.html> accessed 10 September 2009 (hereinafter IHLO, "The new Contract law of China").

The efficacy and real impact of the 2008 Labour Contract Law in protecting workers' rights is yet to be tested. However, it is certain that, like other laws, there would be a gap between rights enumerated under law and in reality. In fact, it is already suggested that the model contracts drafted by local governments are inconsistent with the new law.⁴³⁶ Although labour disputes cases have increased under the new labour laws,⁴³⁷ appropriate adjustments (e.g., staffing) have not been made to deal with additional workload, resulting in delay in resolution of disputes.⁴³⁸

Another relevant aspect is the methods of resolving disputes between workers and companies envisaged by the Labour Law, for example, through mediation, arbitration, consultation, or by instituting legal proceedings according to law.⁴³⁹ It seems that Article 79 of the Labour Law provides a hierarchy in how these methods may be adopted:

“After a labour dispute arises, the parties may apply to the labour dispute mediation committee of their unit for mediation; if the mediation fails and one of the parties requests arbitration, that party may apply to the labour dispute arbitration committee for arbitration. Either party may also directly apply to the labour dispute arbitration committee for arbitration. If any party is not satisfied with the decision of arbitration, the party may bring a lawsuit to the people’s court.”⁴⁴⁰

In other words, workers should normally try mediation and/or arbitration first before approaching the courts. Although there is nothing inherently wrong with this approach, it is likely that in absence of awareness about one's rights, lack of an independent trade union and equal bargaining position, the interest of workers might not be adequately protected through these non-judicial means.

3.3.4 The Sichuan Earthquake

The May 2008 Sichuan earthquake was the deadliest earthquake that has hit China for several decades. The earthquake killed about 70,000 people as per the official estimate. The number of injured and missing people was much higher. Out of those people who were killed, many were school children, as some 9,000 schools in Sichuan Province were damaged by the earthquake.⁴⁴¹

436. IHLO, “The new Contract law of China”, *ibid.*

437. CLB, “Going it Alone”, *op. cit.*, note 75, p.8; Choi, *op. cit.*, note 285.

438. CECC, *op. cit.*, note 70, p.48.

439. Article 77 of the Labour Law.

440. *Ibid.*, Article 79.

441. Amnesty International Canada, “Take Action”, http://www.amnesty.ca/take_action/actions/china_sichuan_earthquake.php accessed 21 June 2009 (hereinafter Amnesty International Canada, “Take Action”). The number of damaged schools was reported to be around 14,000 by a NPC official. Ivan Zhai, “Earthquake damaged 14,000 schools in province”, in *South China Morning Post*, 26 December 2008, A5.

The main reason why so many schools collapsed was poor construction, called the ‘tofu dregs’ construction, of school buildings.⁴⁴² It was reported that “the buildings were not built to be earthquake-resistant, even though building codes had long stipulated that new buildings must be able to withstand quakes.”⁴⁴³ A closer examination of the school rubble revealed that nothing was holding the stacked bricks together; the thin metal bars and mortar could be rubbed off with bare hands.⁴⁴⁴ All these factors point towards the possibility of corruption in the construction process.⁴⁴⁵

What human rights implications did this earthquake have? The earthquake arguably resulted in breach of the right to life and safety by virtue of poor construction done by companies. More human rights violations followed the earthquake, as many parents and relatives of the victims “were subjected to arbitrary detention or unlawful surveillance to prevent them from pursuing legal remedies.”⁴⁴⁶

Parents of children who were killed in the earthquake called for an inquiry into the deaths of their children as a result of the tofu dregs constructions.⁴⁴⁷ But most of their requests were rejected. It was also reported that no case against officials or construction companies had been filed in the mainland courts in more than six months after the earthquake.⁴⁴⁸

In December 2008, a Chinese court dismissed a lawsuit filed by parents of 58 children crushed to death when their school collapsed during the earthquake.⁴⁴⁹ The case might have been dismissed in view of the political sensitivity of allegations of corruption and substandard construction of schools.⁴⁵⁰ In fact, the provincial court in Sichuan province issued a directive to all lower courts to ban the acceptance of cases ‘deemed sensitive,’ which includes cases for compensation for injuries, property damage, and disputes over compensation by insurance companies.⁴⁵¹

Another obstacle that victims’ families face in seeking justice against companies involved in substandard construction is the fear of oppression and retaliation by

442. Amnesty International Canada, “Take Action”, *ibid.*

443. Chloe Lai, “Flattened schools’ builders broke rules; Construction standards ignored in rural areas”, in *South China Morning Post*, 15 May 2008, A4.

444. Joshua Philipp, “Amnesty Reports Rights Violations after Sichuan Earthquake”, in *The Epoch Times*, 6 May 2009, <http://www.theepochtimes.com/n2/content/view/16389/> accessed 26 September 2009.

445. Zhuang Pinghui, “Students pay with their lives for a corrupt building industry”, in *South China Morning Post*, 23 June 2008, A12.

446. Philipp, *op. cit.*, note 444.

447. *Ibid.*

448. Zhai, *op. cit.*, note 441.

449. Gillian Wong & AP, “Chinese Court Rejects Parents’ Earthquake Lawsuit”, in *China Digital Times*, 24 December 2008, <http://chinadigitaltimes.net/2008/12/chinese-court-rejects-parents-earthquake-lawsuit/> accessed 26 September 2009.

450. *Ibid.*

451. See Philipp, *op. cit.*, note 444.

the government officials.⁴⁵² *Even the lawyers representing the victims' families suffered*: the Beijing Municipal Bureau of Justice warned law firms that lawyers employed by them should not participate in these cases.⁴⁵³ The issue of 'tofu dregs' construction was also banned from mainland newspapers a few days after the disaster.⁴⁵⁴ It has also been reported that when inputting 'earthquakes' (*di zheng*) and 'poor construction' (*dou fu zha gong cheng*) on the search engine baidu.com, "the result of the search may not be in accordance with relevant laws, regulations and policies" due to censorship.⁴⁵⁵

3.3.5 Coal Mine Accidents

Thousands of workers die in coal mine accidents in China every year.⁴⁵⁶ For example, 506,000 accidents and 101,480 deaths were reported across the country in the year 2007.⁴⁵⁷ As compared to 2007, the figure came down in 2008, that is, 413,752 accidents (down 18.3 percent from 2007) and 91,172 deaths (down 10.2 percent from 2007).⁴⁵⁸ The causality rate remains alarmingly high. Even the frequency of accidents is much higher as compared to other countries.⁴⁵⁹ An overwhelming majority of those who die in coal mine accidents are "migrant peasants from rural areas, who are among the most vulnerable of the social groups in China."⁴⁶⁰

A report prepared by IHLO notes the following as to the root cause of accidents:

"Most accidents are caused by the extensive lack of even basic safety procedures or equipment. Many are caused by the illegal nature of the mine or shaft itself, some are caused by a lack of training and some are caused or

452. Amnesty International Canada, "Take Action", *op. cit.*, note 441.

453. See Philipp, *op. cit.*, note 444.

454. Klaudia Lee, "Beichuan parents to petition Beijing over 'tofu' schools", in *South China Morning Post*, 9 July 2008.

455. "Sichuan Earthquake Ignite Interview Storm: the Ban of Ministry of Propaganda Abated", <http://news.wenxuecity.com/messages/200806/news-gb2312-618133.html>, 29 June 2009.

456. "China has the world's deadliest mining industry, especially in coal mining." IHLO, "A spate of mine deaths reveals damning evidence of the failure of attempts to reduce 'accidents' and illegal mines", <http://www.ihlo.org/LRC/WC/110908.html> accessed 13 September 2009. See also Mark O'Neill, "Quest for Profit, Shroud of Silence", in *South China Morning Post*, 19 December 2009, A12.

457. Cui Xiaohuo, "Coal mine deaths fall to 14-yr low", in *The China Daily*, 17 January 2009, 02, Main Section.

458. Wang Guanqun, "China's efforts to prevent accidents pay off last year, more work urged", in *www.chinaview.cn*, 2 February 2009, <http://news.xinhuanet.com/english/2009-02/02/content_10751577.htm> accessed 26 September 2009.

459. "In 2003, the average coal miner in China produces 321 tons of coal a year; this is only 2.2 percent of that in the United States and 8.1 percent that of South Africa. The death rate for every 100 tons of coal, however, is 100 times of that of the US and 30 times of the South Africa." Zhao Xiaohui & Jiang Xueli, "Coal mining: Most Deadly Job in China", in *The China Daily*, 13 November 2004, <http://www.chinadaily.com.cn/english/doc/2004-11/13/content_391242.htm> accessed 23 July 2009.

460. Jianjun Tu, "Safety Challenges in China's Coal Mining Industry", Association for Asian Research, 15 March 2006, <http://www.asianresearch.org/articles/2997.html> accessed 12 July 2009.

*exacerbated by management forcing miners to work in unsafe conditions – despite laws to the contrary. Only a handful are actually ‘accidents’. Indeed most would fall squarely into the category of corporate manslaughter, if not downright murder.”*⁴⁶¹

A great majority of the accidents are caused in small unregulated mines, which account for almost 80 per cent of the China’s 16,000 mines.⁴⁶² In view of rampant corruption, the government officials allegedly ignore all relevant rules and regulations while issuing mining licences.⁴⁶³ It is also suggested that the “low price of compensation for the death of a miner gives mine owners little incentive to employ safety practices and mechanisms.”⁴⁶⁴ For safety reasons, the government is now proposing to force small mining companies to transfer mining operations to large state-owned enterprises.⁴⁶⁵ The proposal, as well as the rationale behind it, is being questioned by private mining companies.⁴⁶⁶

As discussed above, China has robust provisions, at least in law under the Mine Safety and Production Safety Laws. These legal provisions are not, however, adequately enforced. One report points out: “Corruption in the industry is rampant and the collusion between officials and mine owners remains huge – especially given the massive shortfall of inspectors and the failure to implement even the most basic of Chinese extensive labour legislation.”⁴⁶⁷ It is also probably profitable for mining companies to pay bribes, fines or damages in cases of accidents rather than invest to comply with safety regulations.

Moreover, there are restrictions on media to report coalmine accidents,⁴⁶⁸ and whatever compensation victims might receive is normally inadequate. Death or injuries in accidents are not seen in terms of violation of workers’ labour/human

461. IHLO, “A spate of mine deaths reveals damning evidence of the failure of attempts to reduce “accidents” and illegal mines”, September 2008, <http://www.ihlo.org/LRC/WC/110908.html> accessed 5 July 2009.

462. Minnie Chan, “Dozens Killed, Many Trapped in Gas Blast at Mine”, in *South China Morning Post*, 22 November 2009, A6.

463. Ren Wei, “Pitted Against the Big Boys”, in *South China Morning Post*, 22 November 2009, A11.

464. “The low price tag placed on human life also made it easy for owners to reach private deals with the families of the deceased miners to remain quiet, allowing for the under- and non-reporting of deaths.” Tu, *op. cit.*, note 460.

465. Wei, *op. cit.*, note 463.

466. *Ibid.*

467. IHLO Report, *op. cit.*, note 456.

468. “... mainland journalists who seek to report accidents without the approval of the local government may face the threat of violence from those hired by the mine owners and, in extreme cases, death.” O’Neill, *op. cit.*, note 456.

rights but as cost of economic development, so managed and redressed at an administrative level.⁴⁶⁹ On occasion, party officials linked to mining accidents are suspended or removed from their posts in order at least to give the impression of justice being done.⁴⁷⁰

469. For instance, even the relatives of mining victims/survivors are closely watched. Choi Chi-yuk, "Relatives Closely Watched during Long Wait", in *South China Morning Post*, 9 April 2010, A4.

470. "China's top legislature decided on Saturday to remove former Party secretary of the coal producing city of Linfen from his post as deputy to the National People's Congress (NPC), the top legislature, due to his involvement [in] last year's mining accident that left 277 dead." Supreme People's Court of the People's Republic of China, "Judicial News – China's top legislature adopts decision to remove mine accident official from deputy post", <<http://en.chinacourt.org/public/detail.php?id=4464>> accessed 13 October 2009.

Conclusions and Recommendations

This report has aimed to highlight the legal remedies that are available to the victims of corporate human rights in China. In addition, it maps the legal and practical obstacles that victims face in availing those remedies. The obstacles are examined with special reference to five case studies.

On the basis of review of relevant literature, available judicial decisions and case studies as well as interviews with selected Chinese judges, lawyers, Chinese law experts and NGOs, it can be concluded that victims in China face a daunting task in making corporations accountable for human rights violations.⁴⁷¹

In brief, the obstacles to access to justice relate to the current Chinese political and legal system. Whereas economic reforms over the last three decades have served to relax the control that the government and the CPC has had in economic affairs, there has been little corresponding liberalisation in the political arena. Nor has the legal system been reformed enough to deal with problems arising from the gap between economic and political reforms. Robust laws have been adopted, but there is a critical deficit in the practical implementation of these laws and of correlative court judgments.

The legal profession in China has not yet been accorded independence in line with international standards concerning the role of the legal profession. The competence of judges, in particular of lower courts, also remains a matter of some concern. But more worrying is the lack of autonomy enjoyed by the judges in deciding cases, especially politically sensitive ones. Both class action and public interest litigation remain undeveloped, the availability of legal aid is quite limited, and the law concerning the piercing of the corporate veil has not been tested yet in human rights cases. The CPC controls all key decision-making processes and has functioned by and large above the law. Corruption is pervasive, although becoming increasingly exposed through the Internet. Impediments to the exercise of freedom of expression and functioning civil society mean that victims encounter difficulties to securing a remedy even outside the corridors of state power.⁴⁷²

These conclusions should not be taken to imply, however, that these obstacles leave victims without any remedy whatsoever. In fact, past cases show that victims may be able succeed in enforcing human rights against corporations in certain

471. This conclusion diverges somewhat from that reached in a report prepared by Oxford Pro Bono Publico. That report concluded that the “Chinese legal system can largely guarantee that the human rights abuse committed by its corporate citizens overseas can be regulated” and that “there is some, although limited, scope for legal recourse in China against Chinese” transnational corporations”, Oxford Pro Bono Publico, *op. cit.*, note 4, p.191 and p. 207

472. The government, for instance, has recently tightened restrictions on overseas donations to independent NGOs. Verna Yu, “Beijing Tightens Rules on Foreign Funding of NGOs”, in *South China Morning Post*, 12 March 2010, A1.

types of cases. The ability of victims to sue, and succeed against, corporations that impaired human rights will depend, to a large extent, on the following four factors.

- (1) Nature of the human rights concerned: It is quite clear that the courts and government department would generally be more receptive to accepting victims' suits or petitions if the violated human rights were economic in nature (e.g., non-payment of wages) rather than civil and political (e.g., freedom of speech and expression). This distinction – not an iron-cast one – perhaps relates back to how economic reforms in China have not been accompanied, at least to the same extent, with political and legal reforms. In other words, it will probably be easier to enforce those rights that are non-problematic in the sense of being compatible with economic reforms, or rights that do not challenge the political system.⁴⁷³ On the other hand, it would be extremely difficult to seek remedies against corporations if the given human rights are linked to politically sensitive issues.⁴⁷⁴
- (2) Status and position of the defendant corporation: If the defendant corporation is an economically powerful entity, has connections with government officials and/or the CPC or is controlled by a state-owned enterprise, the task of holding such a corporation accountable for human rights abuses will be more difficult.⁴⁷⁵ This is so because since China had not yet fully embraced the rule of law in practice,⁴⁷⁶ and power, position and connections still play an important role under the Chinese legal system.⁴⁷⁷
- (3) Number of victims: The greater the number of victims involved in a particular case, the less will be the chances of courts entertaining human rights cases or awarding relief to victims.⁴⁷⁸ Cases involving a large number of people are considered to have a potential to disturb social harmony or

473. “Discrimination is less politically sensitive, and equality claims are easily understood and generally supported by the public.” Peerenboom & He, *op. cit.*, note 48, p.55.

474. A judge of the High People's Court observed that courts do not normally accept, or consult the party before accepting, a sensitive case. Interview with Judge No. 2, on 9 November 2009.

475. See Clarke, *op. cit.*, note 256 p.837. Xin He also observes: “Local party and government officials are likely to work in favour of the tycoons. *When there are major and significant disputes affecting the interests of large companies, local officials may not even allow a court to take on the dispute: they will straighten everything out using political channels.*” He, “Enforcing Courts Judgments”, *op. cit.*, note 344, p.427 (emphasis added).

476. The 2008 White Paper on the Rule of Law issued by the government also acknowledges that more needs to be done to establish a rule of law society. State Council Information Office, *op. cit.*, note 363.

477. “Personal relationships or “back-door” connections play significant roles in Chinese society.” Clarke, *op. cit.*, note 256, p.836.

478. He cites a 2001 opinion of the Supreme People's Court to “temporarily rejecting disputes of class tort lawsuits caused by misrepresentation in securities trading.” He, “Why Did They not Take on the Disputes”, *op. cit.*, note 231, p.204.

bring political instability.⁴⁷⁹ Such cases are, therefore, likely to be handled at an administrative level.⁴⁸⁰

- (4) Impact of vindication on state policies: As mentioned earlier, policies often supersede laws in China. If the vindication of victims' human rights is likely to conflict with given state/CPC policies, the courts will generally hesitate to rule in victims' favour. For instance, recognising workers' right to establish and join an independent trade union or organise demonstrations in public might be considered undermining state policies of "social harmony" or "stability".⁴⁸¹

What could be done to improve the current situation? There are a variety of practicable measures that might be proposed and taken to improve the prospects of victims of corporate human rights abuses getting justice in China. Although it is unlikely that some of the measures recommended below will be fully introduced in the short term, they are proposed because together they constitute an integral part of a robust legal framework.

Increased and "direct" use of the Constitution: It is important that a clear departure is made from much of the dominant discourse under which the PRC Constitution is considered as irrelevant or a façade on the ground that it is rooted in a communist/socialist ideology. The Constitution contains many key substantive rights and for the protection of these rights, it is critical that affected people are able to employ constitutional rights *directly* not only to challenge illegal actions (of both state and non-state actors) but also to seek remedies for an abridgment of their interests. The onus is clearly on the Chinese government and the courts to bring this change in the current status and role of the PRC Constitution. But in addition, victims and their lawyers should employ constitutional language to formulate their arguments. Although this practice might not have any direct or immediate effect, in the longer run this should compel courts to respond to these arguments, because constitutional provisions could be used as a shield as well. The Constitution should be invoked outside courtrooms too. Petitions to government departments, for instance, should make an explicit use of

479. "Socio-economic cases affect many parties. Because the courts are unlikely to be able to provide adequate relief, they also have a great potential to lead to social disturbances. Local officials, worried about social instability and its affect on their future career prospects, often pressure courts not to accept such cases." Peerenboom & He, *op. cit.*, note 48, p.47. Liu also observes: "The larger the number of aggrieved parties involved, the more concerned the courts get that the plaintiffs may seek to exert social pressure on the courts through non-legal strategies, and that an adverse ruling to the plaintiffs may cause some kind of social unrest." Liu, *op. cit.*, note 382, p.286.

480. "Both government and party officials and the courts have preferred to solve these problems [i.e., socio-economic disputes] through political or administrative channels." Peerenboom & He, *op. cit.*, note 48, p.31.

481. For example, "to safeguard social harmony and stability and cultivate good legal environment for economic and social development" was considered one of the work in progress by the President of the Supreme People's Court. Report by President Wang, *op. cit.*, note 290.

the constitutional provisions. Civil society should also look to spread awareness and the importance of Constitution in day-to-day life of people.

Promoting the rule of law and human rights: Every country has some unique characteristics and China is no different. The universality of human rights was accepted by all states, including China, in Vienna in 1993. There is no turning back from achieving the goal of establishing a society governed by the rule of law, which will also be required if China wants to assert its presence and leadership at the international level. Therefore, the Chinese government should aim to do what needs to be done to promote the rule of law, as acknowledged by the government in the recent *White Paper on the Rule of Law*.⁴⁸² Giving the PRC Constitution the respect it deserves and extending the Constitution to apply directly to matters affecting individuals would obviously help in promoting the rule of law and safeguarding people's rights.

Another specific step that might help in this respect is to establish appropriate institutions with the mandate to address constitutional and human rights issues. China need not implement a Western judicial model. But it should at least consider creating a constitutional court, or similar judicial body, which could, at the minimum, test the constitutionality of regulations and provincial laws and supervise the allocation of power amongst different state organs. In addition, China should establish an independent national human rights institution, one function of which would be to deal with human rights claims, including potentially against corporations.

Striving for judicial independence: It is well known that the courts in China are not independent and that steps should be taken to make them more independent. Steps are necessary to combat both external (i.e., from the CPC) and internal (i.e., from higher courts or adjudicative committees) pressures that courts face in China. Achieving these goals would require a significant change in how judges are currently appointed and removed or disciplined for alleged misbehaviour. The role of the CPC in appointments would have to be diluted, if not eliminated completely. Judges would also be required to be given a security of tenure and a decent pay package so that they could withstand external pressures and resist the bribery temptations.

More transparency is needed in how courts function internally. For example, superior courts should not exercise their general supervisory power to interfere in how individual cases are adjudicated by lower courts. In addition to undermining the independence of those courts, the usefulness of the right to appeal is lost. At the same time, lower courts should learn to exert their powers rather than always looking for guidance from higher courts. It is also appropriate to review the usefulness of adjudicative committees. In order to introduce these reforms, it would be

482. See note 363.

necessary to amend, for instance, the PRC Constitution as well as in the Organic Law of the People's Courts of the People's Republic of China.

Building capacity-cum-competence of judges and independence of lawyers: The shortcomings in the professional competence and legal training of judges, especially of lower courts in relatively poor provinces,⁴⁸³ negatively affects victims' quest to seek justice. The Chinese government has taken some steps in recent times to remedy this situation, but more could and should be done to build the professional capacity of Chinese judges. Providing institutionalised training outside China and exposure to common law courts might help to facilitate the capacity of judges in protecting rights of people. As we have seen, human rights lawyers not only lack a desirable level of independence and autonomy but also face physical violence, indefinite detention and prosecution for taking up sensitive cases. It is, therefore, fundamental that the Lawyers' Law is amended to minimise the chances of abuse of power enjoyed by justice administrative authorities to cancel or suspend the license of lawyers for political reasons.

Creating victim-friendly litigation environment: Experience in China and overseas shows that in many instances, the victims of corporate human rights abuses are poor and relatively unaware of their rights. They generally have limited time, resources and incentives to fight for the vindication of their rights. The number of victims may often be quite large. These special circumstances require that victims are able to avail themselves of the benefits of class action and PIL, have access to legal aid, and are assured to have a speedy resolution of suits.

In China, although the cost of litigation is not overly prohibitive, victims do not have the benefits of a developed system that encourages class action and PIL. The availability of legal aid is also highly limited. It is, therefore, imperative that these problems are addressed by suitably amending the Civil Procedure Law and the Regulations on Legal Aid, so as to make the litigation environment victim-friendly. If representative and class action litigation could be allowed in environmental matters, there is no theoretical reason for disallowing or discouraging the same in other human rights areas. Similarly, there is no sound reason to restrict unreasonably people's rights to petition appropriate government departments and courts if their grievances are not addressed in a timely manner. Hence, the Regulations on Letters and Visits should be revised to strengthen rather than limit people's constitutional rights to petition and any government or CPC official involved in detaining petitioners in 'black jails' should be held accountable.

More freedom and wider role for civil society and trade unions: The judicial reforms necessary may not be implemented in the near future. Alternatively, even if judicial reforms are carried out, the judicial remedies have well-known

483. It is noted that "the quality of the judiciary remains a concern, particularly in basic level courts in poorer regions." Peerenboom & He, *op. cit.*, note 48, p.16.

limitations in dealing with cases of corporate human rights abuses. Therefore, non-judicial means to enforce human rights should be explored, more so in the context of China. Against this background, it is desirable that civil society should continue making concerted efforts to use other informal methods to exert pressure on corporations to make them comply with relevant human rights and environmental obligations. One may already see signs of this happening in the Internet era. For example, thirty-four mainland NGOs recently issued a public appeal to consumers to not buy products made by twenty-one polluting companies.⁴⁸⁴ The Ministry of Environmental Affairs has reportedly praised this campaign.⁴⁸⁵

In addition, it is desirable that there are independent and robust trade unions to help workers in protecting their rights. As noted before, ACFTU hardly fits this role, although it has tried to change this image in recent times, e.g., its campaign in unionising Wal-Mart.⁴⁸⁶ In the recent times, workers who went on strikes in several factories to demand better wages and/or decent working conditions have questioned the fact of trade union officials trying to protect the interests of companies and factory owners rather than workers. In order to not only protect workers' rights but also to avoid future labour unrest and industrial conflicts, the Chinese government should consider amending the Trade Union Law and allowing workers to select truly independent and representative trade unions.

Responsibility of overseas corporations and consumers: Finally, it is important that foreign corporations which survive on Chinese supply chains and overseas customers who look for cheap quality products, should be made to realise their responsibility for how small to medium and big corporations operate (or ought to operate) in China. In many situations, if Chinese corporations are exploiting poor migrant workers or causing pollution, it might be to serve external companies, who should not be allowed to externalise their negative costs. A related question here, therefore, would be the availability of legal avenues at an international level or in other jurisdictions where victims could make foreign parent corporations accountable for human rights abuses committed by their Chinese subsidiaries.

To conclude, it might be difficult to quickly adopt these measures and introduce the accompanying political and legal reforms. Nevertheless, it is important to have the right roadmap for progress. This study has sought to provide some signposts of that roadmap. To what extent China would walk on this roadmap would depend on the vision, courage and political will shown by the CPC's senior leadership. It would also depend on the level of desire shown by the people for such reforms.

484. Shi Jiangtao, "Consumers Urged to Help Rein in "Unruly" Polluters", in *South China Morning Post*, 4 February 2010, A8.

485. *Ibid.*

486. Santoro, *op. cit.*, note 75, pp.40-42.

Bibliography

Cases (PRC and Other Jurisdictions)

1721 *People v Rongping Chemical Plant* (Fujian Provincial High People's Court, 2004).

97 *Households of Dong Hai Country, Jiangsu Province v Two factories in Shangdong Province*.

Adams v Cape Industries plc [1991] 1 All ER 929.

Connelly v RTZ Corp plc [1997] 4 All ER 335 (HL).

Doe v Unocal 2002 US App LEXIS 19263 (9th Cir., 2002).

LIC v Escorts Ltd AIR 1986 SC 1370.

Liu Xiaobo case, Criminal Case No. 3901 (2009).

Lubbe v. Cape plc [2000] 1 WLR 1545 (HL).

M C Mehta v State of Tamil Nadu AIR 1997 SC 699.

Owusu v Jackson [2005] 2 WLR 942.

Presbyterian Church of Sudan v Talisman Energy 244 F Supp. 2d 289 (SDNY, 2003).

Qi Yuling v Chen Xiaoyi and Chen Kezheng (PRC Supreme Court, 2001).

Shanghai Huaxin Electric Wire and Cable Company v. China Tietong Group Company (Shanghai No. 2 Intermediate People's Court (No. 4 Civil Division), 2007

Shi Tao case, Changsha Intermediate Criminal Division One, First Trial Case No. 29 (2005).

Tany Jin v Labour Bureau of Dangtu County, <<http://www.colaw.cn/caselaw/labor.htm>>.

Tata Engineering & Locomotive Co Ltd v State of Bihar AIR 1965 SC 40.

Walkovsky v Carlton 276 NYS 2d 585, 223 NE 2d 6 (1966).

Wallersteiner v Moir [1974] 3 All ER 217.

Wang Xiaoning v Yahoo! Inc., No. C07-02151 CW (N.D. Cal. July 30, 2007).

PRC Statutes and Regulations

- Civil Procedure Law of the People's Republic of China, 1991.
- Constitution of the People's Republic of China, 1982.
- Companies Law of the People's Republic of China, 2006.
- Criminal Law of the People's Republic of China, 1997.
- Energy Conservation Law of the People's Republic of China, 1997.
- Environmental Protection Law of the People's Republic of China, 1989.
- Food Hygiene Law of the People's Republic of China, 1995.
- General Principles of Civil Law of the People's Republic of China, 1986.
- Labour Contract Law of People's Republic of China, 2007.
- Labour Law of the People's Republic of China, 1994.
- Law of the People's Republic of China on Labour-dispute Mediation and Arbitration, 2007.
- Law of the People's Republic of China on the Prevention and Control of Atmospheric Pollution, 1995.
- Law of the People's Republic of China on the Prevention and Control of Environmental Noise Pollution, 1996.
- Law of the People's Republic of China on the Prevention and Control of Water Pollution, 2008.
- Law of the People's Republic of China on the Promotion of Clean Production, 2002.
- Law of the People's Republic of China on Promotion of Employment, 2007.
- Law of the Peoples Republic of China on Safety in Mines, 1992.
- Law of the People's Republic of China on Lawyers, 1996.
- Law on Legislation of the Peoples Republic of China, 2000.
- Measures on the Payment of Litigation Costs, 2006.
- Organic Law of the People's Republic of China, 1983.
- Production Safety Law of the People's Republic of China, 2002.

Provisions on the Gas Control of State-owned Coal Mines, 2005.

Regulation on Disciplinary Actions against Staff Members of the People's Courts, 2010.

Regulations on Employment Service and Employment Management, 2007.

Regulations on Legal Aid, 2003.

Regulations on Letters and Visits, 2005.

Trade Union Law of the People's Republic of China, 1992.

Tort Law of the People's Republic of China, 2009.

Books and Reports

Amnesty International, *Doing Business in China: Human Rights Challenge*, Amnesty International, Berne, 2009.

Amnesty International, *People's Republic Of China – Submission To The UN Universal Periodic Review*, AI Index: ASA 17/097/2008, September 2008.

Amnesty International, *Undermining Freedom of Expression in China: The Role of Yahoo!, Microsoft and Google*, July 2006.

Balmem, Stéphanie & Dowdle, Michael W (eds), *Building Constitutionalism in China*, Palgrave Macmillan, New York, 2009.

Blumberg, Phillip, *The Multinational Challenge to Corporation Law: The Search for a New Corporate Personality*, Oxford University Press, New York, 1993.

Chen, Albert, *An Introduction to Legal System of the People's Republic of China*, LexisNexis, Third Edition, Hong Kong, 2004.

China Labour Bulletin, *Public Interest Litigation in China: A New Force for Social Justice*, 10 October 2007.

Clapham, Andrew, *Human Rights Obligations of Non-State Actors*, Oxford University Press, Oxford, 2006.

Clarke, Donald C (ed), *China's Legal System: New Developments, New Challenges*, Cambridge University Press, New York, 2008.

Commission on Human Rights, *Interim Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, E/CN.4/2006/97, 22 February 2006.

Davies, Paul, *Gower & Davies' Principles of Modern Company Law*, Sweet & Maxwell, Seventh Edition, London, 2003.

Ghai, Yash, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law*, HKU Press, Second Edition, Hong Kong, 1999.

Gu, Minkang, *Understanding Chinese Company Law*, Hong Kong University Press, Hong Kong, 2006.

Gu, Sharron, *Law and Politics in Modern China – Under the Law, the Law, and Above the Law*, Cambria Press, New York, 2009.

Human Rights Law Foundation, *The Persecution of Falun Gong Practitioners in China*, August 2009.

Human Rights Watch, *An Alleyway in Hell: China's Abusive 'Black Jails'*, HRW, New York, November 2009.

Human Rights Watch, *"Race to the Bottom": Corporate Complicity in Chinese Internet Censorship*, Vol. 18 No. 8(C), August 2006.

International Commission of Jurists, *Corporate Complicity and Legal Accountability – Report of the Expert Legal Panel on Corporate Complicity in International Crimes*, Vols. 1-3, ICJ, Geneva, 2008.

Jackson, Vicki & Tushnet, Mark, *Comparative Constitutional Law*, Foundation Press, New York, 1999.

Joseph, Sarah, *Corporations and Transnational Human Rights Litigation*, Hart Publishing, Oxford, 2004.

Koh, Peter Soon Kwang, *Major Issues in Company Law: with PRC Chinese and English comparative law notes*, Sweet & Maxwell, Thoson Reuter, Singapore, 2009.

Lawyers Committee for Human Rights (LCHR), *Lawyers in China – Obstacles to Independence and the Defence of Rights*, LCHR, New York, 1998.

Lin, Feng, *Constitutional Law in China*, Sweet & Maxwell Asia, Hong Kong, 2000.

Li, Lin et al (ed.), *The China Legal Development Yearbook*, Volumes 1 and 2, Brill, Leiden, 2008.

Lu, Yiyi, *Public Interest Litigation and Political Activism in China*, Rights & Democracy, 2008.

Lubman, Stanley B, *Bird in a Cage: Legal Reform in China after Mao*, Stanford University Press, Standford, 1999.

Mitchell, Lawrence E, *Corporate Irresponsibility: America's Newest Export*, Yale University Press, New Haven, 2001.

OECD, *Environmental Compliance and Enforcement in China: An Assessment of Current and Ways Forward*, OECD, Paris, 2006.

Peerenboom, Randall, (ed), *Asian Discourses of Rule of Law*, Routledge, London, 2004.

Peerenboom, Randall, *China's Long March toward Rule of Law*, Cambridge University Press, Cambridge, 2002.

Peerenboom, Randall, *China Modernizes: Threat to the West or Model for the Rest?*, Oxford University Press, Oxford, 2007.

Peerenboom, Randall (ed.), *Judicial Independence in China: Lessons for Global Rule of Law Promotion*, Cambridge University Press, Cambridge, 2009.

Rights and Accountability in Development (RAID), *Chinese Mining Operations in Katanga Democratic Republic of the Congo*, RAID, 2009.

Ramaswamy, Anita & Thompson, Robert C (FAFO), *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law – A Survey of Sixteen Countries*, 2006.

Report of UN Secretary-General's Special Representative on the issue of human rights and transnational corporations and other business enterprises, *Clarifying the Concepts of "Sphere of influence" and "Complicity"*, A/HRC/8/16, 15 May 2008.

Santoro, Michael A, *China 2020: How Western Business Can – and Should – Influence Social and Political Change in the Coming Decade*, Cornell University Press, Ithaca, 2009.

Tomasic, Roman, Bottomley, Stephen & McQueen, Rob, *Corporations Law in Australia*, Second Edition, 2002.

Wang, Lei, *Judicialization of the Constitution in China: Selected Cases*, 2003.

Yap, Po Jen & Lau, Holning (ed.), *Public Interest Litigation in Asia*, Routledge, 2010.

Zerk, Jennifer A, *Multinational and Corporate Social Responsibility: Limitations and Opportunities in International Law*, Cambridge University Press, Cambridge, 2006.

Book Chapters, Conference Papers and Articles

Balme, Stephanie and Pasquino, Pasquale, "Taking Constitution(alism) Seriously? Perspectives of Constitutional Review and Political Changes in China", paper presented at the Conference on *Constitutionalism and Judicial Power in China*, 12-13 December 2006.

Becker, David I, "A Call for the Codification of the Unocal Doctrine", in *Cornell International Law Journal*, Volume 32, 1998, 183.

Beyer, Stefanie, "Environmental Law and Policy in the People's Republic of China", in *Chinese Journal of International Law*, Volume 6, 2005, 185.

Blumberg, Phillip, "Asserting Human Rights against Multinational Corporations under United States Law: Conceptual and Procedural Problems", in *American Journal of Comparative Law*, Volume 50, 2002, 493.

Chen, Albert, "Legal Thought and Legal Development in the People's Republic of China 1949-2008", SSRN Working Paper, <<http://ssrn.com/abstract=1369782>>.

Chen, Mingyu, "Protecting Human Rights through Mediation: The Role of NGOs in Mediation of Labour Disputes", paper presented at the *Workshop on Business, Human Rights and Access to Justice in China*, held at City University of Hong Kong on 5-6 March 2010.

Chen, Xiaoping, "The Difficult Road for Rights Advocacy: An Unpredictable Future for the Development of the Rule of Law in China", in *Transnational Law & Contemporary Problems*, Volume 16, 2006, 221.

Cheverie, John, "United States Court Finds Unocal may be Liable for Aiding and Abetting Human Rights Abuses in Burma" in *Human Rights Brief*, Volume 10, 2002, 6.

Clapham, Andrew & Jerbi, Scott, "Categories of Corporate Complicity in Human Rights Abuses", in *Hastings International & Comparative Law Review*, Volume 24, 2001, 339.

Clarke, Donald, "The Enforcement of the United States Court Judgments in China: A Research Note", in *Legal Studies Research Paper No. 236*, 27 May 2004, <<http://ssrn.com/abstract=943922>>.

Clarke, Gerard J, "An Introduction to the Legal Profession in China in the Year 2008", in *Suffolk University Law Review*, Volume 41, 2007, 833.

Cunningham, C D, "Public Interest Litigation in Indian Supreme Court: A Study in the Light of the American Experience", in *Journal of Indian Law Institute*, Volume 29, 1987, 494.

Denae, Thomas, “*Xiaoning v Yahoo! Inc’s* Invocation of the Alien Tort Statute: an important issue but an improper vehicle”, in *Vand. J.Ent. & Tech. L.*, Volume 11, 2008, 211.

Deva, Surya, ““*Yahoo! for Good*” and the Right to Privacy of Internet Users: A Critique”, in *Journal of Internet Law*, Volume 11:9, 2008, 3.

Deva, Surya, “Corporate Code of Conduct Bill 2000: Overcoming Hurdles in Enforcing Human Rights Obligations Against Overseas Corporate Hands of Local Corporations”, in *Newcastle Law Review*, Volume 8, 2004, 87.

Deva, Surya, “*Corporate Complicity in Internet Censorship in China: Who Cares for the Global Compact or the Global Online Freedom Act?*”, in *George Washington International Law Review*, Volume 39, 2007, 255.

Deva, Surya, “*Does the Right to Property Create a Constitutional tension in Socialist Constitutions: An Analysis with Reference to India and China*”, in *NUJS Law Review*, Volume 1:4, 2008, 583.

Deva, Surya, “*Public Interest Litigation in India: A Critical Review*”, in *Civil Justice Quarterly*, Volume 28, 2009, 19-40.

Easterbrook, Frank H & Fischel, Daniel R, “Limited Liability and Corporation”, in *University of Chicago Law Review*, Volume 52, 1985, 89.

Farmer, Richard S, “Parent Corporation Responsibility for the Environmental Liabilities of the Subsidiary: A Search for the Appropriate Standard”, in *Iowa Journal of Corporation Law*, Volume 19, 1949, 769.

Foster, Christine M & Jivan, Vedna, “Public Interest Litigation and Human Rights Implementation: The Indian and Australian Experience”, *Asian Journal of Comparative Law*, Volume 3:1, 2008, 143.

Fu, Hualing & Cullen, Richard, “The Development of Public Interest Litigation in China, paper presented at the *Conference on Public Interest Litigation in Asia*, organised by the Centre of Comparative & Public Law, Faculty of Law, University of Hong Kong, on 14 August 2009.

Fu, Hualing, “When Lawyers are Prosecuted – The Struggle of a Profession in Transition” <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=956500>.

Gu, Minkang, “Right to Private Property amidst Land Acquisition for Economic Development”, paper presented at the *Workshop on Business, Human Rights and Access to Justice in China*, held at City University of Hong Kong on 5-6 March 2010.

Gore, Khurram Nasir, “*Xiaoning v. Yahoo!*: Piercing the Great Firewall, Corporate Responsibility, and the Alien Tort Claims Act”, in *Temple Journal of Science, Technology & Environmental Law*, Volume 27, 2008, 97.

Guo, Sanzhuan, "Implementation of Human Rights Treaties by Chinese Courts: Problems and Prospects", in *Chinese Journal of International Law*, Volume 8:1, 2009, 161.

Hansmann, Henry & Kraakman, Reinier, "Toward Unlimited Shareholder Liability for Corporate Torts", in *Yale Law Journal*, Volume 100, 1990, 1879.

He, Weiguo, "Legal Transplantation of "Piercing the Corporate Veil" to China".

He, Xin, "Court Finance and Court Responses to Judicial Reforms: A Tale of Two Chinese Courts", in *Law & Policy*, Volume 31, 2009, 463.

He, Xin, "Enforcing Courts Judgments in the Pearl River Delta of China", in *American Journal of Comparative Law*, Volume 57, 2009, 419.

He, Xin, "The Recent Decline in the Economic Caseload in Chinese Courts: Exploration of a Surprising Puzzle", in *The China Quarterly*, Volume 190, 2007, 352.

He, Xin, "Why Did They not Take on the Disputes? Law, Power and Politics in the Decision-making of Chinese Courts", in *International Journal of Law in Context*, Volume 3, 2007, 203.

Howson, Nicholas Calcina, "Judicial Independence and the Company Law in the Shanghai Courts" in Randall Peerenboom (ed.), *Judicial Independence in China: Lessons for Global Rule of Law Promotion*, Cambridge University Press, Cambridge, 2009.

Jiang, Qing-Yun, "Court Delay in Developing Countries with Special References to China", in *German Working Papers in Law and Economics*, Paper 36, 2004.

Kellog, Thomas, "Constitutionalism with Chinese Characteristics? Constitutional Development and Civil Litigation in China", in *International Journal of Constitutional Law*, Volume 7, 2009, 215.

Kellogg, Thomas, "The Death of Constitutional Litigation in China?", in *China Brief*, Vol IX, Issue 7, 2 April 2009.

Lan, Zhixue, "Judicial Independence and Lawyers", paper presented at the *Workshop on Business, Human Rights and Access to Justice in China*, held at City University of Hong Kong on 5-6 March 2010.

Li, Jing, "China's New Labour Contract Law and Protection of Workers", in *Fordham International Law Journal*, Volume 32, 2009, 1083.

Lin, Feng & Wang, Peter, "The Issue of Standing in Environmental Public Interest Litigation in China", paper presented at the *Workshop on Business, Human Rights and Access to Justice in China*, held at City University of Hong Kong on 5-6 March 2010.

Lin, Lihong, “Public Interest Litigation in China during the Transition Period”, paper presented at the *Workshop on Business, Human Rights and Access to Justice in China*, held at City University of Hong Kong on 5-6 March 2010.

Liu, Titi M, “Transmission of Public Interest Law: A Chinese Case Study”, in *UCLA Journal of International Law & Foreign Affairs*, 2008, 263.

Lubman, Stanley, “Bird in a Cage: Chinese Law Reform after Twenty Years”, in *Northwestern Journal of International Law & Business*, Volume 20, 2002, 383.

Muchlinski, Peter, “Corporations in International Litigation: Problems of Jurisdiction and the United Kingdom Asbestos Cases”, in *International & Comparative Law Quarterly*, Volume 50, 2001, 1.

Munro, Robin, “Collective Bargaining: A Systematic Approach to Improving Workers’ Rights”, paper presented at the *Workshop on Business, Human Rights and Access to Justice in China*, held at City University of Hong Kong on 5-6 March 2010.

Nicholar, Dana C, “China’s Labour Enforcement Crisis: International Intervention and Corporate Social Responsibility”, on *St. Mary’s Law Review on Minority Issues* 155, Volume 11, 2009.

Pagnattaro, Marisa Anne, “Is Labour Really “Cheap” In China? Compliance With Labour and Employment Laws”, in *San Diego International Law Journal*, Volume 10, 2009, 357.

Peerenboom, Randall & He, Xin, “Dispute Resolution in China: Patterns, Causes and Prognosis”, in *East Asia Law Review*, Volume 4, 2009, 1.

Prince, Peter, “Bhopal, Bougainville and Ok Tedi: Why Australian *Forum non Conveniens* Approach is Better”, in *International & Comparatively Law Quarterly*, Volume 47, 1998, 573.

Qiu, Yang, “ILO Fundamental Conventions and Chinese Labour Law: From a Comparative Perspective”, in *Chinese Law & Policy Review*, Volume 2, 2006, 18.

Ramsay, Ian, “Allocating Liability in Corporate Groups: An Australian Perspective”, in *Connecticut Journal of International Law*, Volume 13, 1999, 329.

Su, Yang & He, Xin, “Street as Courtroom: State Accommodation of Labour Protest in China”, in *Law & Society Review*, Volume 44:1, 2010.

Tang, Xiaotian, “Reforms in the Petition Letter and Visit System of China and Construction of a Harmonious Society”, in *Frontiers of Law in China*, Volume 5:1, 2010, 77.

Tzeuschler, Gregory G A, "Corporate Violator: The Alien Tort Liability of Transnational Corporations for Human Rights Abuses Abroad", in *Columbia Human Rights Law Review*, Volume 30, 1999, 359.

Wang, Alex, "The Role of Law in Environmental Protection in China: Recent Developments", in *Vermont Journal of Environmental Law*, Volume 8:2, 2007, 195.

Wang, Canfa, "The Role of Environmental Litigation in Protecting Environmental Rights and Improving Environment", paper presented at the *Workshop on Business, Human Rights and Access to Justice in China*, held at City University of Hong Kong on 5-6 March 2010.

Ward, Halina, "Securing Transnational Corporate Accountability through National Courts: Implications and Policy Options", in *Hastings International & Comparative Law Review*, Volume 24, 2001, 451.

Wu, Mark, "Piercing China's Corporate Veil: Open Questions from the Company Law", in *Yale Law Journal*, Volume 117, 2007, 329.

Zheng, Yin Lily, "It's Not What is on Paper, But What is in Practice: China's New Labour Contract Law and the Enforcement Problem" *Washington University Global Studies Law Review*, Volume 8, 2009, 595.

Newspapers, Magazines and Periodicals

"China's Human Rights Lawyers Face Major Obstacles", in *The Epoch Times*, 15 July 2009, <<http://www.theepochtimes.com/n2/content/view/19643/>> (last visited 11 September 2009).

"Discrimination against Hepatitis B Carriers Rising – Survey", in *The China Daily*, 5 March 2009, <http://www.chinadaily.com.cn/china/2009-03/05/content_7542374.htm> (last visited 20 October 2009).

"Human Rights Lawyers in Limbo as annual Registration Denied", in *South China Morning Post*, 1 June 2009, A8.

"Judicial Reform Plan Fails to Impress Critics", in *South China Morning Post*, 27 March 2009, A7.

"More legal aid lawyers to help China's migrant workers", in *People's Daily*, 13 October 2009, <<http://english.peopledaily.com.cn/90001/90776/90882/6782356.html>> (last visited 20 November 2009).

"Self-defeating Regulation", in *The China Daily*, 14 November 2009, <http://www.chinadaily.com.cn/cndy/2009-11/14/content_8970863.htm> (last visited 15 November 2009).

Associate Press, "Report Details Threats to Mainland Journalists", in *South China Morning Post*, 13 November 2009, A7.

Bien, Perez, "Google Draws Fire as it Quits Mainland", in *South China Morning Post*, 24 March 2010, A4.

Chan, Minnie, "Dozens Killed, Many Trapped in Gas Blast at Mine", in *South China Morning Post*, 22 November 2009, A6.

Chan, Minnie, "Former Court Officials face Bribery Charges", in *South China Morning Post*, 18 September 2009, A5.

Chan, Minnie, "Intercepting Petitioners is a Thriving Business", in *South China Morning Post*, 3 April 2010, A4.

Chen, Stephen, "Expansion of Power firms banned after dam Violations" and "Penalties Show "New Attitude" on Green Issues", in *South China Morning Post*, 12 June 2009, A6.

Choi, Chi-yuk, "Courts Told to Create Warning System to help Prevent Protests", *South China Morning Post*, 10 June 2009, A4.

Choi, Chi-yuk, "Dozens of Dissidents Detained, Families Say", in *The South China Morning Post*, 15 November 2009, 7.

Choi, Chi-yuk, "Relatives Closely Watched during Long Wait", in *South China Morning Post*, 9 April 2010, A4.

Cohen, Jerome A, "Rough Justice", in *South China Morning Post*, 9 July 2009, A13.

Cohen, Jerome A, "Taiwan's Constitutional Court: A Model for Beijing?", in *South China Morning Post*, 29 October 2009, A13.

Cui, Xiaohuo, "Coal mine deaths fall to 14-yr low", in *The China Daily*, 17 January 2009, 02, Main Section.

Editorial, "Beijing, Take Down that Great Firewall", in *South China Morning Post*, 11 November 2009, A14.

Feuerberg, Gary, "China's Human Rights Lawyers Face Major Obstacles", in *The Epoch Times*, 15 July 2009, <<http://www.theepochtimes.com/n2/content/view/19643/>> (last visited 11 September 2009).

Guo, Al, "Draft Amendment Aims for Electorate Balance", in *South China Morning Post*, 28 October 2009, A4.

He, Hufeng, "Shenzhen Petitioners may be Sent to Labour Camps", in *South China Morning Post*, 12 November 2009, A7.

Hu, Yanan and Cui, Xiaohuo, "Appeals sought in milk case", in *China Daily (Hong Kong Edition)*, 25 June 2009, P05.

Huang, Cary, "Party Faces Decision on Graft", in *South China Morning Post*, 15 September 2009, A1.

Jacobs, Andrew, "Chinese Release Increased Numbers in Tainted Milk Scandal", in *New York Times*, 2 December 2008, <<http://www.nytimes.com/2008/12/03/world/asia/03milk.html?ref=asia>> (last visited 15 August 2009).

Josephine Ma, "Sanlu Boss Confesses to Cover-up", in *South China Morning Post*, 1 January 2009, A1.

Koveshnikova, Kristina, "Appeals sought in milk case", in *China Daily*, 25 June 2009, <available at http://www.chinadaily.com.cn/language_tips/cdaudio/2009-06/25/content_8322649.htm>.

Lai, Chloe, "Flattened schools' builders broke rules; Construction standards ignored in rural areas", in *South China Morning Post*, 15 May 2008, A4.

Lee, Klaudia, "Beichuan parents to petition Beijing over 'tofu' schools", *South China Morning Post*, 9 July 2008.

Li, Raymond, "Censor Suspected in Missing Obama Exclusive", in *South China Morning Post*, 20 November 2009, A1.

Li, Raymond, "NGO fined heavily for tax breaches", *South China Morning Post*, 17 July 2009, Edition 4.

Lin, Liyu, "Colliery flooding traps 7 in E China county", in *Window of China*, 9 July 2009, <http://news.xinhuanet.com/english/2009-07/09/content_11679417.htm>.

Liu, Melinda, "Saving Face Goes Sour", in *Newsweek*, Volume 152, Issue 14, 10 June 2008.

Ma, Josephine, "Dream of Court Turns Sour for Milk Activist", in *South China Morning Post*, 1 April 2010, A5.

Ma, Josephine, "NPC Deputy Calls for Petitioners to be Jailed for 15 Years", in *South China Morning Post*, 12 March 2010, A4.

Ng Tze-wei, "Law Gives Official Food for Thought", in *South China Morning Post*, 2 June 2009, A5.

Ng, Tze-wei, "Frustration over Lawsuits in Milk Scandal", in *South China Morning Post*, 14 October 2008, A8.

Ng, Tze-wei, “Long wait for victims of tainted milk”, in *South China Morning Post*, 5 December 2008.

Ng, Tze-wei, “Police Detain Lawyers who Sought to Meet Obama”, in *South China Morning Post*, 21 November 2009, A4.

Ng, Tze-wei, “Rights Lawyers Worry about License Renewal”, in *South China Morning Post*, 28 May 2009.

Ng, Tze-wei, “Long wait for victims of tainted milk”, in *South China Morning Post*, 5 December 2008, Edition 7.

O’Neill, Mark, “One Man’s Freedom is Hope for Homeowners”, in *South China Morning Post*, 31 October 2009, A12.

Perez, Bien, “China Mobile Settles Monopoly Case”, in *South China Morning Post*, 28 October 2009, B2.

Philipp, Joshua, “Amnesty Reports Rights Violations after Sichuan Earthquake”, in *The Epoch Times*, 6 May 2009, <<http://www.theepochtimes.com/n2/content/view/16389/>> (last visited 26 September 2009).

Pliny, “China to continue free treatment for tainted milk victims”, in *Xinhua News Agency, China View*, 2 January 2009, <http://news.xinhuanet.com/english/2009-01/02/content_10590554.htm> (last visited 26 September 2009).

Quan, Qiu Mei, “Wal-Mart Shanghai Lay-off Scandal reflects the absence of labour association” (Translation of 沃尔玛上海裁员风波折射工会缺位), in *First Economics Daily (Translation of 第一經濟日報)*, 8 November, 2007, <<http://finance.sina.com.cn/chanjing/b/20071108/00194149223.shtml>> (last visited 26 September 2009).

Reuters, “Rights Group Calls for End to “Black Jails” on Eve of Obama Visit”, in *The South China Morning Post*, 13 November 2009, A6.

Staff Reporter, “Hepatitis B Tests To Cease, Health Official Says”, in *South China Morning Post*, 12 October 2009, A5.

Staff Reporter, “Rights Lawyer Held for Four Hours Over T-shirt”, in *South China Morning Post*, 12 October 2009, A4.

Tam, Fiona, “Couple First to Accept Sanlu Payout”, in *South China Morning Post*, 17 January 2009, A4.

Vause, John, “Death Sentences in China tainted milk case”, in *CNN*, 23 January 2009, <<http://edition.cnn.com/2009/WORLD/asiapcf/01/22/china.tainted.milk/index.html>>.

Wei, Ren, "Pitted Against the Big Boys", in *South China Morning Post*, 22 November 2009, 11.

Wong, Edward, "Families File Suit in Chinese Tainted Milk Scandal", in *The New York Times*, 20 January 2009, <<http://www.nytimes.com/2009/01/21/world/asia/21milk.html>>.

Wong, Gillian & AP, "Chinese Court Rejects Parents' Earthquake Lawsuit", in *China Digital Times*, 24 December 2008, <<http://chinadigitaltimes.net/2008/12/chinese-court-rejects-parents-earthquake-lawsuit/>> (last visited 26 September 2009).

Xin, Fei, "China Courts Delay Admission of Lawsuits against Sanlu", in *The Epoch Times*, 6-12 November 2008, A4.

Yu, Verna, "Beijing Tightens Rules on Foreign Funding of NGOs", in *South China Morning Post*, 12 March 2010, A1.

Zhai, Ivan, "Earthquake damaged 14,000 schools in province", in *South China Morning Post*, 26 December 2008, A5.

Zhao, Xiaohui & Jiang, Xueli, "Coal mining: Most Deadly Job in China", in *The China Daily*, 13 November 2004, <http://www.chinadaily.com.cn/english/doc/2004-11/13/content_391242.htm> (last visited 23 July 2009).

Zhu, Zhe (Beijing) and Cui, Xiaohuo (Shijizhuang), "Two get death in tainted milk case", in *The China Daily*, 23 January 2009, 01 Main Section.

Zhuang Pinghui, "Students pay with their lives for a corrupt building industry", in *South China Morning Post*, 23 June 2008, A12.

Electronic Recourses

"China court accepts first lawsuit over melamine tainted milk", <http://news.xinhuanet.com/english/2009-03/25/content_11072195.htm> (last visited 22 November 2009).

"Sichuan Earthquake Ignite Interview Storm: the Ban of Ministry of Propaganda Abated", <<http://news.wenxuecity.com/messages/200806/news-gb2312-618133.html>> (last visited 29 June 2009).

"Yahoo 'Helped Jail China Writer'", <<http://news.bbc.co.uk/2/hi/asia-pacific/4221538.stm>> (last visited 20 August, 2006).

Alibaba.com, Company Overview, available at <<http://www.alibaba.com/aboutalibaba/index.html>> (last visited 17 September, 2006).

Amnesty International Canada, 'Take Action', <http://www.amnesty.ca/take_action/actions/china_sichuan_earthquake.php> (last visited 21 June 2009).

Branigan, Tania, “China officials shut legal aid centre”, <<http://www.guardian.co.uk/world/2009/jul/18/china-shuts-legal-aid-centre>> (last visited 20 November 2009).

CECC, “Chengdu Courts Hold Trials of Earthquake Activists”, <<http://www.cecc.gov/pages/virtualAcad/index.php?id128566>> (last visited 11 September 2009).

China Labour Bulletin, “China’s First Successfully Litigated Hepatitis B Employment Discrimination Case” <<http://www.china-labour.org.hk/en/node/100542>> (last visited 29 October 2009).

China Labour Bulletin, “Going it Alone: A New Report on the State of the Workers’ Movement in China”, <<http://www.clb.org.hk/en/node/100507>> (last visited 11 September 2009).

Clarke, Donald, “Supreme People’s Court Withdraws Qi Yuling Interpretation”, in *Chinese Law Prof Blog*, 12 January 2009, <http://lawprofessors.typepad.com/china_law_prof_blog/2009/01/supreme-peoples.html> (last visited 10 November 2009).

Cohen, Jerome A, *Written Statement before Congressional-Executive Commission on China – Human Rights and the Rule of Law in China*, 20 September 2006, <<http://www.cecc.gov/pages/hearings/2006/20060920/cohen.php>> (last visited 11 September 2009).

Congressional-Executive Commission on China, *Annual Report 2008*, <http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_house_hearings&docid=f:45233.pdf>.

Crothall, Geoffrey, “China’s Workers Need Legal Aid”, <<http://www.guardian.co.uk/commentisfree/2009/may/21/china-crossroads-workers-legal-aid>> (last visited 20 November 2009).

Global Labour Strategies, “Behind the Great Wall of China”, <http://laborstrategies.blogs.com/global_labor_strategies/files/behind_the_great_wall_of_china.pdf> (last visited 28 October 2009).

Human Rights Watch, “Race to the Bottom”: Corporate Complicity in Chinese Internet Censorship (August 2006), <<http://www.hrw.org/reports/2006/chinao806/chinao806webwcover.pdf>> (last visited 30 September 2009).

IHLO, “A spate of mine deaths reveals damming evidence of the failure of attempts to reduce ‘accidents’ and illegal mines”, <<http://www.ihlo.org/LRC/WC/110908.html>> (last visited 13 September 2009).

IHLO, “Sackings at Wal-Mart: Global restructuring or avoiding the new Contract Law?”, <<http://www.ihlo.org/LRC/W/101207d.html>> (last visited 10 September 2009).

IHLO, “The new Contract law of China – opportunities and threats”, <<http://www.ihlo.org/LRC/W/101207.html>> last visited 10 September 2009.

Ji, Weidong, “Judicial Reform in China and Its Political Implications”, <<http://www.reds.msh-paris.fr/communication/docs/weidong.pdf>> (last visited 10 November 2009).

Office of the Privacy Commissioner for Personal Data, Hong Kong, “The Disclosure of Email Subscriber’s Personal Data by Email Service Provider to PRC Law Enforcement Agency”, Ro7-3619, 14 March 2007, <http://www.pcpd.org.hk/english/publications/files/Yahoo_e.pdf> (last visited 20 September 2009).

Official Website of Ministry of Health of The People’s Republic of China, “Compensating work for victims of Milk Scandal coming to an end, most parents accepted the compensations” (Translation of 婴幼儿奶粉事件患儿赔偿工作接近尾声 绝大多数患儿家长接受了主动赔偿), <<http://www.moh.gov.cn/publicfiles/business/htmlfiles/wsb/pmtxwbd/200901/38923.htm>> (last visited 26 September 2009).

Oxford Pro Bono Publico, *Obstacles to Justice and Redress for Victims of Corporate Human Rights Abuses* (A Comparative Submission Prepared for Professor John Ruggie, UN Secretary General’s Special Representative on Business and Human Rights), 3 November 2008, <www.reports-and-materials.org/Oxford-Pro-Bono-Publico-submission-to-Ruggie-3-Nov-2008.pdf>.

State Council Information Office, *China’s Efforts and Achievements in Promoting the Rule of Law* (White Paper, February 2008), <http://www.china.org.cn/government/news/2008-02/28/content_11025486_11.htm>.

Supreme People’s Court of the People’s Republic of China, “Focus News – Communist Party of China chief stresses inner-party democracy”, 30 June 2009, <<http://en.chinacourt.org/public/detail.php?id=4465>> (last visited 20 November 2009).

Supreme People’s Court of the People’s Republic of China, “Focus News – China working on new five-year plan to improve anti-corruption system”, <<http://en.chinacourt.org/public/detail.php?id=4250>> (last visited 13 October 2009).

Supreme People’s Court of the People’s Republic of China, “Judicial News – China plans to improve judicial transparency by posting verdicts online”, <<http://en.chinacourt.org/public/detail.php?id=4431>> (last visited 13 October 2009).

Supreme People's Court of the People's Republic of China, "Judicial News – Highlights of work report on Supreme People's Court", <<http://en.chinacourt.org/public/detail.php?id=4424>> (last visited 13 October 2009).

Supreme People's Court of the People's Republic of China, "Judicial News – Whistleblowers flood China's anti-corruption hotline", <<http://en.chinacourt.org/public/detail.php?id=4469>> (last visited 13 October 2009).

Supreme People's Court of the People's Republic of China, "Judicial News – Prosecutors intensify fight against corruption", <<http://en.chinacourt.org/public/detail.php?id=4126>> (last visited 13 October 2009).

Supreme People's Court of the People's Republic of China, "Judicial News – China strives to weed out judicial corruption", <<http://en.chinacourt.org/public/detail.php?id=4250>> (last visited 13 October 2009).

Supreme People's Court of the People's Republic of China, "Judicial News – Senior official calls for resolution of long-delayed lawsuits", <<http://en.chinacourt.org/public/detail.php?id=4557>> (last visited 13 October 2009).

Supreme People's Court of the People's Republic of China, "Judicial News – Senior Party official: Poor people need better legal aid services", <<http://en.chinacourt.org/public/detail.php?id=4457>> (last visited 13 October 2009).

Supreme People's Court of the People's Republic of China, "Judicial News – China's top legislature decides to remove milk scandal official from deputy post", <<http://en.chinacourt.org/public/detail.php?id=4463>> (last visited 13 October 2009).

Supreme People's Court of the People's Republic of China, "Judicial News – China's top legislature adopts decision to remove mine accident official from deputy post", <<http://en.chinacourt.org/public/detail.php?id=4464>> (last visited 13 October 2009).

Transparency International, "Corruption Perceptions Index 2008", <http://www.transparency.org/policy_research/surveys_indices/cpi/2008> (last visited 10 September 2009).

Tu, Jianjun, "Safety Challenges in China's Coal Mining Industry", Association for Asian Research, 15 March 2006, <<http://www.asianresearch.org/articles/2997.html>> (last visited 12 July 2009).

Wang, Guanqun, "China's efforts to prevent accidents pay off last year, more work urged", in *www.chinaview.cn*, 2 February 2009, <http://news.xinhuanet.com/english/2009-02/02/content_10751577.htm> (last visited 26 September 2009).

WHO, *Toxicological and Health Aspects of Melamine and Cyanuric Acid* (2009)
<http://whqlibdoc.who.int/publications/2009/9789241597951_eng.pdf>.

Xie, Yu, "Net's Role in Fighting Corruption Praised", <http://www.lawinfochina.com/News/News_Detail.asp?Id=7814> (last visited 20 November 2009).