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978-1-316-63904-7 — Justice
Edited by Flora Sapio , Susan Trevaskes , Sarah Biddulph , Elisa Nesossi
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The Expression of Justice in China

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Claims about a strident pursuit of justice weave through all of China's modern history. The intellectual, political and social ferment that exploded on to China's political stage on 4 May 1919 was motivated by a common will among the intellectual and political class to find a proper place for China among the family of nations. Pursuit of justice underpinned this movement, as it did the establishment of the Republic of China (ROC) eight years earlier. Communism was cultivated in China in the 1920s replete with a political vocabulary that was indebted to liberal and democratic political philosophies as much as it was to communist ideology. Here too, it was the ideal of attaining justice for the populace that prompted popular reaction to the inequalities, corruption and violence endemic in the ROC from the 1920s to the 1940s. This quest drove the civil war and the foundation of the People's Republic of China (PRC) in 1949. Over the course of the revolutionary era in the 1930s and 1940s, ideas put forward by some leading theorists and activists of the Chinese Communist Party advocating for a more democratic-liberal socialism were suppressed and eventually wiped out, while Maoist discourse became progressively privileged.

The launch of successive waves of ideological reform during the years before establishment of the PRC obeyed a certain political logic that forced some notions of justice out of the political picture while privileging others. And after the PRC's establishment in 1949, efforts to achieve what Party leaders articulated as a just society drove the mass campaigns that were launched in the 1950s and 1960s with varying fortunes. From 1949 to 1976, Maoist ideology imposed itself as the alternative to an indigenous and traditional moral code. But the demise of Maoism in the late 1970s unveiled a moral abyss that threatened to swallow the nation. The promises of the Four Modernisations, the adoption of repressive social control strategies to contain crime and spiritual pollution, and the formulation of twenty-first-century political

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agendas such as Harmonious Society and the China Dream have done very little to fill this moral void, or to offer a credible explanation for the idea of justice in modern China.

With this underlay of historical antecedents, how are dominant notions of justice conceived and sustained in China today? Here, we are not seeking to address a philosophical issue. The main question pursued in this book is not *what* constitutes justice in relation to contemporary Chinese moral philosophy or political philosophy *strictu sensu*, but *how* certain ideas about justice have come to be dominant in Chinese society and rendered more powerful and legitimate than others. This focus on the interrogative 'how' also incorporates a second and equally important question about how even the most powerful political ideas about justice can be challenged in an environment that does not favour, indeed actively rejects, political pluralism. In short, our aim in this book is to investigate the *processes* and *frameworks* through which certain ideas about justice have come to the political and social forefront in China today, and to explain how these ideas are articulated through spoken performances and written expressions.

Justice, like 'rule of law' and 'human rights', is a complex concept to analyse in any system. In examining China's legal system, such analysis is complicated further by the way scholars outside China choose, mindfully or unwittingly, to perceive the relationship between justice and state power. Over the past three decades, in subtle and sometimes unconscious ways, observers of Chinese law who are grounded in Western legal understandings have tended to limit how they conceive and therefore discuss law and justice in China.

When examining civil, administrative or criminal justice in China, observers from Western contexts who have such liberal understandings are often inclined to perceive these systems in terms of what they construe these systems are not (i.e., not a liberal system), using their familiar liberal concepts for analysis. Approaching justice as an object of study therefore involves a set of potential perception-based traps and snags that need to be avoided if we are to better understand the machinations of justice in China. We may inadvertently limit analysis of civil, administrative or criminal justice to questions shaped around an idealised notion of rule of law. Or for analysis we may adopt various rule of law models that can range from thin rule of law (Peerenboom 2002) to Weberian conceptions of rational institutionalisation. Or we may focus on law or justice via reference to themes such as human rights or Communist Party interference in the legal system. Whether analysis is

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informed by liberal values or focuses on models of rule of law, for better or worse, the broader political spectrum is often obscured, and so too is the picture of justice presented.

These approaches tend to explain the hand of politics in the realm of Chinese justice in terms of a developmental trajectory that reduces justice operations to, or explains them away as, the outcome of the progression towards or retreat from some mode of rule of law (socialist or thin); as either 'advancement' of law (towards a thin 'rule of law') or temporary 'regression' into politics (a return to dominant Party politics and communist ideology). Such foci can inadvertently conceal key elements and political dynamics at work in the justice system as a whole, and can miss the wider political picture. An alternative approach is to see politics not as 'interfering' more or less in the justice system, but encompassing a range of social relations and processes much wider than liberal understandings usually perceive, including, but not restricted to, issues relating to Party dominance of the system.

A second and related tendency is to ignore the processes through which legal institutions develop their legitimacy and sustain their authority in a way that enables them to make certain claims about what is 'just'. This tendency was explored three decades ago, for instance, by John Brigham, in his influential study of the development of the authority of the Supreme Court in the United States, titled *The Cult of the Court*. He critiqued the conventional history of the Supreme Court, which relied on political explanations as the basis of its authority. This conventional understanding of authority assumed a polarity between law and politics. It assumed that authority was something 'given' or bestowed on the Court rather than something constantly in a process of being constituted and sustained (Brigham 1987).

Brigham's alternative was to place social action – the actions of social actors including judges and lawyers, appellants and so forth – at the centre of the Court's capacity to build authority. This approach saw the deeds and doings of social actors as central to how the Court continues to develop and sustain its authority: 'Because institutions give action authority', he argued, it is necessary for researchers to think about how authority *works*, that is, how authority is developed and constituted through practice, rather than merely 'given' (Brigham 1987: 3). For him, the authoritative significance of the Court revolves around the tight connection between institutional practices and discourses and the ideological frameworks of action that constitute the court as a legitimate political institution (Brigham 1987: 3). The practices of the Court are

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forms of social action that develop authority through the significance they are accorded in the community in which they operate (Brigham 1987: 24).

Brigham's work is based on the idea of law as an ideological and constitutive phenomenon, which has been one of the most influential concepts in the general field of socio-legal studies in the last three decades. This idea comes from a tradition of socio-legal studies that prioritises the interrogative 'how'. Stuart Henry's work similarly illustrates the trend away from conventional realist and structuralist approaches to law that began in the 1980s in socio-legal studies. In his book *Private Justice*, Henry (1983) questioned conventional structuralist models of law as sufficient explanatory devices, arguing that such models of law created by structuralist theorising fail to capture the relationship between structure and agency that is crucial to understanding the operation and development of law and justice. He maintained that in attempting to achieve a comprehensive understanding of law, many studies failed to adequately explain the ideological process where 'some forms of law are rendered dominant while others are suppressed' (Henry 1983: 30). Henry suggested that conventional sociological analyses, while stressing the political and social structures that support particular forms of law, fail to explain the processes through which law is created as an 'object-like entity' (Henry 1983: 42): '[T]he crucial issue is not to seek an explanation which takes for granted the objective reality of the products of action and belief, but to delve beneath the paraphernalia of doings to expose the process of its construction and reconstruction' (Henry 1983: 24).

To trace the processes through which law is created as an object-like reality, Henry suggested we need to look into the ways that people interact with each other, since these 'construct and reconstruct the manifest appearance of law' (Henry 1983: 68). In short, rather than envisaging law as a series of ideal types or analytical models, Henry urged that we give precedence to studying the processes and mechanisms through which representations of law and justice are socially constructed.

In applying these observations to China, we come to see that there are limitations to studies that focus on rights and injustices through a subjective conceptual prism of what 'ought to exist' (i.e., for many western scholars, a liberal state rather than an authoritarian state). That kind of understanding can fail to fully appreciate how certain political ideas endure and indeed the role of the researcher in creating knowledge and cultivating understandings that contribute to this endurance. An alternative approach is to look at how justice-related practices (trials,

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civil mediation programs, policing operations and so forth) help to articulate a version of justice that upholds and strengthens Communist party-state power. It is important to understand how these practices construct and reconstruct the manifest appearance of justice since these practices are precisely the key means of building and sustaining the party-state's politico-legal authority.

The studies presented in this volume explore the mechanisms that enable and sustain certain systems of justice or rule of law. The authors maintain that in a way similar to Henry's analytical approach introduced above, the processes and mechanisms through which discourses and ideologies about justice in China are constructed as an object-like reality require critical appraisal. As observers, we need to critically appreciate the public construction and reconstruction of these discourses and ideologies through concrete judicial practices, policies and rhetoric. The chapters of this volume therefore seek to understand and explain the practices and processes that have come to dominate the polity in China since these have created political space for state actors to promote certain notions of justice and to claim these as representing dominant societal or socialist values. Justice operations and processes are conduits through which the party-state animates certain attributes that it attaches to particular notions of justice in ways that enable authorities to claim that these notions reflect the dominant social attributes of justice. Such practices sustain the dominance of, or even extend, the pre-determined notions of justice, while suppressing or rendering obsolete other counter-posing notions. Here we see that far from an abstract concept, justice is at heart the product of a deliberate process that derives legal, political and social significance through social action. It is expressed through particular legal, social and political structures and processes that constitute, validate and sustain the power of some individuals or groups while limiting the power of others.

Because they ask 'how', the authors in this volume focus on the words and actions used to sustain the rationales of governance that drive the justice system in China today. Overall, in focusing on the performance of justice we are attempting to shift the analytical spotlight to the mechanisms through which certain notions of justice have been rendered legitimate or dominant in China and how others have been or are being suppressed or dismissed. The studies in this volume are informed by a variety of scholarly traditions, and only some self-consciously take up the constitutive approach to law and justice described briefly above. But while they may view the performance of

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justice in different ways and observe different performances of justice, these studies share a particular 'attitude'. They acknowledge text, language, spectacle and performance as crucial to how justice is understood and practiced in China. Some of the studies here focus on language and performance expressing the political and legal values that constitute the party-state sponsored glue that binds the Chinese justice system. The legal text is one place where the state's vision of justice is articulated and propagated. Spectacles of protest, punishment and retribution are some of the most poignant performances of sometimes incommensurate visions of justice. Other studies examine the language and performance of justice that helps to promote contesting values articulated by people who challenge prevailing party-state orthodoxy or party-state decisions that they claim are unjust. More often than not, these contesting views are expressed partly in language with origins in what is now seen as China's traditional value system.

Beyond their authors' shared attitude, the studies in this volume to some extent also reflect two main assumptions the book's editors share about how justice is communicated and performed through word and deed, assumptions that in many respects are novel to the field. Below we outline these two main assumptions that underpin the studies in this volume. One is that justice practices are not only instrumental but also performative. The other is that certain politico-legal discourses operating in China frame how justice is articulated by both the party-state and the people who challenge what is expressed as the dominant party-state worldview.

The Instrumental and Performative Nature of Justice

Operations and processes to administer justice in China are highly instrumental in both nature and purpose. To ensure the party-state achieves its desired outcomes, the instrumental concept of justice that it sponsors pervades every dimension of the PRC legal system. Activities such as law-making, law-enforcement, and adjudication and sentencing are the three most obvious dimensions of the PRC legal system, but another dimension that is extremely important is not easily visible. It is the dynamics within and across these three dimensions that the wider socio-legal field calls expressive or performative justice. This is where and how politico-legal concepts, not just the concept of justice, embed solidly in all other areas of the legal system.

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Justice practices and operations perform an expressive function that can – and usually do – shape social attitudes and acceptance of certain political or social agendas. With this recognition, the idea of expressive justice has been studied in the fields of law and criminology outside China for decades. Yet little has been written about the utility of this conception for exploring Chinese justice. Socio-legal and justice scholars focusing on Western jurisdictions have long argued that legal and judicial institutions create and sustain images of power and authority through the dissemination of ideas and principles that they announce and perform in routine everyday practice. In the criminal justice field, for instance, leading scholars have long recognised the expressive capacity of justice practices as conduits that organise, classify, and construct images and messages about law and authority. David Garland, for instance, argued more than two decades ago that the penal system 'acts as a regulatory social mechanism in two distinct respects: it regulates conduct through the physical medium of social action, but it also regulates meaning, thought, attitude – and hence conduct – through the rather different medium of signification' (Garland 1991: 194–5). Studies in the field of law such as Sarat and Kearns (1993) and Ericson (1996) also argue that law and justice practices have both a routine instrumental role and a performative role. These practices are at once instrumental and expressive; while they function to secure the overall objectives of maintaining social order and regulating social relations in a society, they also perform an expressive function because they operate as mechanisms that shape understandings and values at the popular level (Trevaskes 2003; 2004). As the authors in this book identify, the expressive dimension of law and justice practices pervade the entire Chinese legal system. Performance of these practices in settings where decisions are made transports justice from the realm of legal concepts to the cogs and wheels of the legal system, and through symbolism, to popular understanding beyond. Juridical performances are the pillars that sustain the politico-legal (*zhengfa* 政法) culture of the PRC. They not only serve as the cement that binds law with politics, they literally *enact*, manifest and convey justice, enabling it to be visible to and ultimately accepted by Chinese society.

But it is not only party-state functionaries who perform justice. Those who challenge the party-state's claims to dominance over creation and maintenance of concepts of justice are also performers here through their social action. Some engage in the performance of justice

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through scholarly argument or social media commentary. Others engage in public protest, usually collectively pursuing in public what they perceive is lacking in Chinese society or is owed to them by society or state. People who protest against what they perceive to be injustice often draw from traditional ideas and concepts such as petitioning and other actions to demand that injustice is ceased and remedied. They reference traditional Chinese notions of 'injustice' (*yuan* 冤) that are well-known across Chinese society. Performing acts that draw attention to *yuan* is a way to increase the cogency or legitimacy of their protests. Images of protestors kneeling and begging for justice, or carrying placards adorned with the Chinese character *yuan* are obvious examples.

Discursive Frameworks of Justice

Since 1979, the party-state has advanced the goals of raising the people out of poverty; building a more inclusive society; achieving social harmony, sustainable economic growth and national development centred on the person; as well as achieving and maintaining regional and global hegemony. Each of these goals has been articulated and popularised through a corresponding political programme ranging from late twentieth-century agendas such as the 'Four Modernisations' and Deng Xiaoping's 'Rule of Law', to early twenty-first-century agendas such as 'Harmonious Society', 'Stability Maintenance' and the 'China Dream', and Xi Jinping's more recent 'Rule of Law' agenda. These agendas may differ in focus, but a singular 'red' thread underlies them all: the idea that individuals, society and the nation *ought to be given what they are* due. The thread is 'red' because the party-state is recognised as responsible for arranging this giving.

At different points in the history of the PRC, 'what they are due' has been variously understood in relation to what the Chinese polity and society has lacked: material security, political representation, an unpolluted environment or the respect of other nations. In this context, justice is expressed at its most basic level as a way of giving to each what they are due or giving to each what they deserve. This notion holds not only in Chinese tradition but also in ancient and modern Western thought. Its silence on agency – who/what should identify what/how much is due or deserved – is highly problematic and politically convenient. In China, as a minimum common denominator, this notion lies at the heart of party-state policy agendas, slogans and

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buzzwords. The party-state uses the popular understanding of 'what is due' in articulating its role as provider of justice and protector of society from injustice and inequality in order to give the populace what is perceived as their due. It has sought to fulfil its protective role by striving for the goals of raising the people out of poverty; building a more inclusive society; achieving social harmony and a sustainable economic growth.

The party-state also has other roles in the enactment of 'what is due', beyond providing what (it considers) is due to the people. It is instrumental in identifying and determining this 'due' for the people and in both determining and seeking to obtain its *own* due. What is determined as the party-state's own due – what its leaders identify as party-state prerogative – is the authority to define the scope and means to effectively realise its protective role over society and to create its own narratives to justify the choices it makes in performing this role. For instance, Article 33 of China's Constitution sets out the principle of mutuality of rights and duties, which inscribes the inseparability of the people's rights from their duties prescribed by the Constitution and other laws. As a condition of bestowing rights to citizens, the party-state is due certain duties and obligations from citizens. In this political logic, the party-state is due the right to govern in a socially stable environment. It can therefore justify withholding the rights of people, such as their freedom of expression, when they do not give the party-state its due. That is, the party-state has the faculty to bestow rights on citizens in the first place. The rights around leading a good life are promised by the party-state, and the ability to keep to this promise forms the basis of political legitimacy. The ability to bestow rights entails the possibility to withdraw the rights of citizens when they do not provide the state a socially stable environment in which to govern, such as by creating social disorder or failing to respect the authority of the party-state to dictate who is due what in society. The granting of civil and political rights was never part of the party-state's promise, therefore any accommodation made to allow individuals to express their voice should not be considered as a 'natural' exercise of their rights.

The party-state dominates and jealously guards the political space around which this dominant political logic about justice is based. One way that it does so is by establishing and supporting certain notions of justice through discursive frameworks that help to shape and sustain particular political and legal values. Discourses are an enabling device,

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giving capacity for state functionaries to govern and respond to economic and social change in different ways for different purposes: from responding to threats to state and society, to providing legal frameworks for political oversight of power. Across the three decades of post-Mao China, the rise and fall of key justice operations and processes ranging through diverse practices from anti-crime campaigns to civil mediation have been maintained by legitimating discourses based on political agendas that have their foundations in a number of philosophical traditions, the most dominant being socialism.

Institutions involved in administering justice articulate their roles and responsibilities through key narratives that rationalise political choices in terms of not only the party-state's protective role over society but also what individuals within society deserve as their due. The party-state's current leading criminal justice discourse exemplifies this well. 'Balancing Leniency and Severity' (*kuanyan xiangji* 宽严相济) was introduced into the prevailing Harmonious Society discourse in the mid-2000s and remains dominant today in the Xi Jinping period. It has since been elevated to the status of China's leading and 'foundational' criminal justice policy. Balancing Leniency and Severity encompasses a myriad of criminal justice practice and nowadays is even a practising discourse in prison organisation (Nesossi & Trevaskes 2016). Its premise is: 'When leniency is due, let leniency be given; when severity is called for, let severity be used' (*dangkuan zekuan gaiyan zeyan* 当宽则宽该严则严). This is a commonplace saying with origins in the classics and in imperial codes (Farmer 1995). The saying recurs in legal documents enacted throughout the last six decades, albeit until recently, under the rhetorical auspices of the policy of 'Combining Punishment and Leniency' (Leng and Chiu 1985: 129). This is also the meaning coded in contemporary political speeches by Xi Jinping (Legal Daily 2014). We see that the opening of this saying reaches straight for the familiar legitimising concept of 'what is due' (here latched to the notion of leniency).

Entire political programmes in China seek to legitimise the understanding that the party-state has the authority to determine who in society is to be given their due, what is owed to each person, and how what is owed to them differs according to an individual's status, conduct and other variables. For instance, the Stability Maintenance programme in the Hu Jintao era had as its underlying logic the idea that members of society have an obligation to the state to behave in ways that do not create social instability. Citizens 'owe' the party-state this due since the party-state needs a high degree of stability to successfully fulfil its

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