



ASIA-PACIFIC

The Case of Stern Hu: Perspectives on China's 'Rule of Law'

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Over the last six months, Australia has been undergoing a sharp learning curve in its relations with China. This has come about courtesy of China's detention on 5 July 2009 of Rio Tinto executive, former Chinese national, and now Australian citizen, Stern Hu, together with his three colleagues, Liu Caikui, Ge Minqiang and Wang Yong, all Chinese nationals. Aside from the shock the Hu case has represented to most Australians — accustomed since the 1980s to viewing China as a relatively benign presence in our region — the main lesson has been that China's version of the rule of law is quite different from Australia's and that that version may also, in times of stress, impact on our own society. Such a realisation may well underlie attitudinal changes identified in the Lowy Institute's 2009 survey of public policy and foreign policy. Whereas in 2006 only 25 percent of Australians saw the development of China as a world power as a critical threat to Australia's vital interests, by 2009, 40 per cent now viewed it as such.¹

The first and most important part of this unwelcome lesson has been that China's is not so much a rule of law as a rule by law. In its primary function of supporting the state apparatus, China has failed to internalise the other side of the rule of law: those human rights principles familiar to liberal democracies, if not always perfectly implemented by them. These are principles such as the separation of powers, judicial independence, equality before the law, due process rights, the presumption of innocence, and the rights to freedom of speech, press, assembly and association. Because of its principal role as a handmaiden of the state, law in China is peculiarly dependent on the prevailing political and economic situation and, ultimately, on the whim of the state.

It follows that the second part of the lesson has been the selective nature of China's rule by law. The problem of corruption, which in turn arises from the lack of a rule of law and of political rights, is now endemic to Chinese business.² Therefore, it is impossible for the Chinese state to tackle corruption all at once. Corruption is only picked off selectively in areas where it appears most harmful to state interests at any one time and as the political and economic situation demands. The choice of Stern Hu as the initial target in the current anti-corruption campaign represented a new and riskier strategy for China, in that, rather than initially targeting a local corrupt official or businessman, it first targeted a foreigner. In detaining Hu, China was not just taking on an overseas Chinese individual or foreign company, it was 'killing a chicken

to scare the monkey'. Where the detention was understood overseas primarily as a desire to punish Rio Tinto and warn other foreign resources companies at a sensitive time in iron ore negotiations, with the passage of time it became clear that 'the monkey' China was targeting was also a domestic one. The arrest of Hu proved to be just the opening bell in a fight against corruption in China's entire steel industry, aimed not just at punishing those Chinese nationals supplying information to foreign iron ore companies, but at bringing to heel the many Chinese companies seen as responsible for raising iron ore prices by simply competing in the open market against each other. Thus, a senior Chinese official at Shougang steel in Beijing has also been detained, and many other Chinese steel officials investigated.

Given its close alignment with politics, the third characteristic of Chinese law is its combination of arbitrariness and flexibility. Since the initial detention of Hu and his colleagues, the case has changed radically in nature. Initially, the four were detained under state secrecy laws. By holding them under the highly flexible category of a suspicion of receiving state secrets, the Chinese state released itself from many of the normal constraints imposed by its Criminal Law and Criminal Procedure Law ('CPL'), which help regulate how long it can detain a suspect without charge and without access to a lawyer. Instead it exposed Hu and his colleagues to the deliberate ambiguity and vagaries of the State Security Law. Even under Article 96 of the CPL, with respect to cases involving state secrets, the criminal suspect has no right to hire a lawyer, but must seek permission to do so from 'the investigating organ'.

In detaining the Rio employees, China was not only taking on four individuals, but also sending a message to the entire community of overseas Chinese businessmen, a multinational resources corporation, potentially a whole host of other foreign resources companies, and a nation which had been one of its most stable resource suppliers. These were very big stakes for China. With the passage of time, China's leaders may well have regretted the decision to detain Hu, or at least the political way the detention was officially handled. The official denial on 14 July that President Hu Jintao backed this action was one small indicator of that possibility, as was China's removal on 10 August of an inflammatory article posted on a national security website charging that Rio's deceit had cost China US\$100 billion in losses over six years.³

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4. Statement of China's Supreme People's Procuratorate, cited in John Garnaut, 'Rio 'Spy' Case: Stern Hu Officially Charged', *The Age* (Melbourne), 12 August 2009.

5. Cui Qingxin, 'Rio Tinto Arrest Exposes Multinationals' Lack of Legal Responsibility', Xinhua Newsagency, 14 August 2009.

6. Carol Chan and Ng Tze Wei, 'State Secrets Allegation in Rio Case Dropped', *South China Morning Post*, 13 August 2009.

7. Ann Kent, *Beyond Compliance: China, International Organizations and Global Security* (2007).

Whatever the reason, in formally arresting Hu and his colleagues on 11 August, China redefined its initial allegations against the four men from a state secrets category to a commercial criminal one. The four were now alleged to have 'obtained commercial secrets of China's steel and iron industry through improper means, which had violated the country's Criminal Law'.⁴ This change meant that the responsible prosecuting organ was now no longer the State Security Ministry but China's Supreme People's Procuratorate. It also meant that the suspects would face sentence terms ranging from 15 days to seven years, in comparison to execution, the severest punishment for the crime of state secret theft.⁵ Although the terms of the arrests meant that the authorities could continue to make further investigations, the altered charges also allowed China greater flexibility in handling the case. As Li Mingjiang of the S. Rajaratnam School of International Studies in Singapore tellingly pointed out, 'Stealing state secrets comes with a punishment much too harsh for China to take a step back should it want to compromise with Australia'.⁶

The fourth, and for the international community, the most searing part of the recent Chinese lesson has been that the lack of a genuine rule of law in China not only affects the human rights of China's citizens, but also, in times of stress, may impact on the human rights of members of the international community. It is not the first time Australia has been confronted with such a lesson. Some eighteen months ago, Canberra was treated to a most bizarre spectacle with the basic rights of demonstration, association and assembly being overturned for a day when crowds of Chinese students were bussed in from all over Australia to 'protect' the

passage of the Olympic flame. However, this brief incident, although repeated elsewhere in the Asian region, was soon forgotten in Australia.

By contrast, the Hu case, in all its permutations and combinations, has had a more lasting impact. Since it assumed its rightful position in the United Nations in 1971, China has been learning the rules of international citizenship. It has been complying, to various degrees, with international treaties in all areas of activity, and has become a successful player in international affairs, while at the same time growing enormously in wealth and power. To some extent this learning has been instrumental, but in many instances there appears to have been a genuine internalisation of international norms.⁷ However, the lack of a genuine rule of law within China remains an enduring obstacle to China's implementation and internalisation of a greater range of international norms. Critically, for the purposes of this article, the law's failure to guarantee its citizens human rights also restricts the avenues in which national stresses may be regulated, accommodated and modified within the state structure itself. Equally, the lack of political rights disempowers the Chinese citizen who, in times of political, economic or social stress, has either to internalise intense frustration or give vent to it in illegal ways.

These shortcomings in China's legal and political order help explain the PRC's decision in this case to first detain a foreign national, Stern Hu, rather than a local company executive. Since the Chinese state is ill equipped to regulate domestic pressures within its own institutions, in times of stress the immediate instinct of its more conservative leaders is to project them outside its borders, whether in

acts of nationalism, chauvinism, or sheer, tough-minded bullying. While such tactics are abhorred by many Chinese officials, conditions of stress tend to give conservative leaders the upper hand. Such external manifestations of Chinese frustration are, at least in the short term, able to restore a degree of internal unity and stability, so that some normalcy then returns to China's international dealings. But until that happens, the international community has to keep its nerve and put up a unified, determined and diplomatic resistance.

Currently, China is a state under particular stress, as it was even before the emergence of the global financial crisis ('GFC'). It is impelled to maintain astonishing rates of economic growth in order to forestall the social chaos which might otherwise eventuate in the absence of political and social reforms. With the onset of the GFC, and China's increasingly frantic, often frustrated, search for cheap mineral resources to fuel continuing growth, those stresses have skyrocketed. In particular, frustrations over the collapsed deal between Chinalco and Rio Tinto, and the vagaries of iron ore prices over the last few years, have focussed Chinese attention. In addition, in 2009 a series of highly symbolic anniversaries for China and its autonomous regions has attracted both international and domestic attention to the way China is governed.

The result internally has been heightened tensions in many different areas and increased crackdowns on dissent. Thus, within the last year, we have seen the arrest and subsequent imprisonment of well-known dissident intellectuals, such as Liu Xiaobo, who had signed Charter 08, a petition for improved human rights. We have also seen a more than doubling of arrests and indictments for crimes of 'endangering state security' ('ESS') in 2008, thus quadrupling, according to the *Duihua* Human Rights Journal, the numbers over a three year-period. Inevitably, as a result of the GFC, issues of economic security have increasingly fallen under this rubric. Finally, the brutal suppression of a peaceful demonstration by Uighurs calling for justice for their people in Urumchi, Xinjiang, from 4 July 2009, which resulted in at least 184 people dead, over 1000 injured and hundreds arrested, revived painful memories of the 1989 Tiananmen Square massacre.

Internationally, by contrast, leadership frustrations have focussed primarily on the area of economic security and the search for international scapegoats. Whether or not he actually received, or sought, under-the-table intelligence about China's bottom line in iron ore negotiations, Stern Hu was not the first former Chinese national or overseas Chinese businessman to have been detained in China on suspicion of receiving state secrets. Former Chinese nationals are vulnerable to the unspoken charge of betraying the motherland. They are also more effective businessmen than their Anglo-Celtic counterparts, being attuned to the realities of business in China, and its attendant corruption. Examples of those arrested include Xiu Yichun, a key manager of Royal Dutch Shell, and US citizens Fong Fuming, Dong Wei and Li Shaomin (ex-AT&T). It is instructive that, although Xiu Yichun was held for a year

on state secrets charges, Royal Dutch Shell managed to win back her freedom by using her detention to delay further negotiations with China.⁸

Whether or not Rio Tinto has decided to follow Shell's example in its handling of the Hu case is as yet unclear. So far, the signals have been ambiguous. On the one hand, Chief Executive Tom Albanese has been promising the Chinese government that Rio will respect China's legal process and has observed that the Stern Hu case provides an important reason to 'get closer to China'. On the other hand, the head of Rio's Iron Ore Division, Sam Walsh, has insisted that Hu has done nothing wrong; on 5 September he announced that Rio had for the time being suspended its negotiations with China since, he said, 'remember that we have our negotiators detained'.⁹ Perhaps these are not conflicting positions within Rio but merely part of the same 'strategic ambiguity' which saw the Australian government withdraw its Ambassador from Beijing while denying that the withdrawal had anything to do with the Stern Hu case or with deteriorating Australia-China relations. Ambiguity also marked Prime Minister Rudd's statement in talks with Chinese Premier Wen Jiabao at the ASEAN summit in late October that the Stern Hu matter is 'a continual matter of concern to Australia', while overall relations with Beijing were 'strong and in good shape'.¹⁰

If all three cases are reflections of calculated strategic ambiguity, rather than simply an effort to compartmentalise the Stern Hu issue, then one can only conclude that the Australian government and Rio are learning fast, and precisely from that past master of strategic ambiguity, the Chinese government. While continuing to evince due respect for China's legal process, as is proper, international policy makers do well, — given the selective, arbitrary and political nature of China's rule by law — to also respond to the Hu case with a few politely-worded but strategically targeted signals. The alternatives, blustering threats or weak-kneed pandering, are not to be recommended. They could ensure that decision-makers in China will drag this case out into the abyss of endless international bickering and domestic court cases, only to end up with a conviction and, following some years of imprisonment, a sudden release of Stern Hu without any further explanation. Already Chinese authorities have extended the Stern Hu investigations until mid-November and two more extensions of two months each may yet be allowed.¹¹ The Stern Hu case must be moved to the forefront of the Australian government's attention, because it is not the first example of the deleterious impact of China's legal system on Australia, and it will not be the last. The critical irritant remains the essential incompatibility between China's rule by law and Australia's own rule of law. Australia needs to ensure that, at least for our own country, the best rule wins.

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8. I am obliged to John Kamm for his observations.

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