

Media Law in China: A Comparative Analysis of Defamation Law in China and the United States

Goals and Overview of the Project

The purpose of this curriculum project is to provide material for educators who wish to increase student awareness of China's media and its unique development within a communist political system that is transitioning to a market economy. It will also provide students with an appreciation of the complexity of the relationship between the media and legal systems of China through an analysis of a major area of media law, defamation.

Along with providing educators with a means to assist students in an understanding of some key social institutions in China, this project will provide useful material to classes that are examining China's involvement in international affairs. As China becomes a growing economic force in the world, it has demonstrated an increased interest in using the media to influence world opinion. The recent attempt by a Chinese media group to purchase *Newsweek* magazine in the United States and the expansion of media resources such as China Central Television (CCTV) to a global audience, provide examples of the nation's interest in presenting its perspective to a worldwide audience. In trying to predict how China may approach international media, it will be important to examine the media within its own borders.

This project is divided into four units that focus on different aspects of China's media and legal system, culminating with an evaluation of a specific component of that law. Each unit is identified and described below.

I. China's philosophy of the media's role in society

This unit will highlight the important role that the media serves in a communist country such as China. Special attention is given to China's attempt to integrate a market economy into a communist political system and the impact that has had on its philosophy toward the media.

II. Structure and function of Chinese media system in a market-based economy

This unit will focus on how the relationship between the media and the government has evolved as China has moved toward a market economy. Special attention will be given to how the structure of the media industry has been impacted by changes in the economy.

III. Structure and function of the Chinese legal system as it pertains to the media

In order to fully understand how media laws are applied in China, it will be important to understand key components of the Chinese legal system. This unit will include an overview of the Chinese Constitution and distinctions between how it is applied in China in comparison to the application of Constitution in the United States. It will also examine how the perception of the law's purpose in society is distinct between the two nations. Finally, it will provide a basic overview of the judiciary in China in terms of its structure and operation.

IV. Comparative analysis of defamation between China and United States.

The final unit will present a comparative analysis between China and the United States concerning a specific area of media law, defamation. This will provide students with an opportunity to examine how the elements discussed in the three previous units have influenced the activities of the media in China. There are three key reasons for the selection of defamation as the law of interest. First, it is one of the most important areas of media law worldwide because of its connection to the concept of free speech and a free press. Second, it is the first civil law (as distinct from criminal law) that is connected to the media in China since government reforms began in 1978. Third, it provides unique insight into China's philosophy toward the media.

In each of these units, information will be provided so that students will have a basic understanding of the key elements connected with each topic. This will include direct quotes from resources that educators can use to spark discussion. Each unit will then conclude with suggested questions and exercises that can be applied in either a group discussion or individual activity in order to stimulate students to think about what each unit brings to their understanding of China, both in the narrow sense of media law and in a broader sense of the larger issues facing China.

I. China's philosophy of the media's role in society

In this unit, students should begin with an understanding of the perceived role of the media in a Marxist-Leninist state. The following sources provide some succinct comments on this philosophy. In most Western democracies, the media are seen as performing the function of monitoring and evaluating the activities of government. Terms describing this function include “watchdog” or “the fourth estate”. In China, the role is perceived much differently.

“Party principle”

The media, like other social institutions, are expected to follow the directives of the “Party Principle”. According to this principle, “The news media are . . . not merely subject to Party control, but also have a positive duty to serve as the voice of the Party” (Keller, 2003, p. 89). Zhao (1998) describes the “Party principle” as follows:

A typical journalism textbook describes it as comprising three basic components: that the news media must accept the Party's guiding ideology as its own; that they must propagate the Party's programs, policies and directives; and that they must accept the Party's leadership and stick to the Party's organizational principles and press policies. (p. 19)

After establishing the concept of the “Party principle”, students should be directed to examine what makes China's experience unique among communist countries. Specifically, students should consider the implications of attempting to meet these requirements for serving the Party while the economy of China has moved rapidly to a free market system. In describing the distinctive nature of China's economic system, Donald and Keane (2002) state the following:

The regime, in attempting to differentiate its social and economic reforms from those of post-Communist regimes in Central Europe, has settled on ‘socialist commodity economy’, along with the one-size-fits-all epithet, ‘socialism with Chinese characteristics’. (p. 5)

A number of authorities on Chinese society have attempted to produce a term that adequately describes China's unique mix of commercialism and communism. Here are three such terms:

Authoritarian Capitalism

Hachten (2010) uses the term “Authoritarian Capitalism” to represent a system that has evolved from Mao's totalitarian socialist state to one that, “. . . is a more cynical, stable, and nimble bureaucracy, one that values self preservation above all else and relies on an often corrupt and predatory form of capitalism to survive”. (p. 23)

Authoritarian Liberalism

Donald and Keane (2002) describe this system by the term “Authoritarian Liberalism”, which “combines the rational calculation demanded by the operation of the capitalist economy within the authoritarian shell of the state” (p. 5). They go on to state that China’s leaders have looked at Singapore and Malaysia as examples for media system management that represent such a system.

Networked Authoritarianism

In dealing more specifically with the Chinese government’s approach toward managing Internet communications within the country, Mackinnon (2010) has used the term “Networked Authoritarianism”.

Compared to classic authoritarianism, networked authoritarianism permits . . . a lot more give-and-take between government and citizens than in a pre-Internet authoritarian state. While one party remains in control, a wide range of conversations about the country’s problems rage on websites and social networking services. . . As a result, the average person with Internet or mobile access has a much greater sense of freedom - and may even feel like they have the ability to speak and be heard - in ways that were not possible under classic authoritarianism. It also makes most people a lot less likely to join a movement calling for radical political change. In many ways, the regime actually uses the Internet not only to extend its control but also to enhance its legitimacy.

Media support for this system

Once students understand the duality presented by the Chinese political and economic systems, the next point to establish is the media’s role in supporting this dual system. One of the ways the Central Party can achieve this result is by having the media focus on issues involving specific individuals in local offices of government.

This approach serves two purposes for the government. First, it takes attention away from the Party as a whole. Second, as Keller(2003) points out, “It is . . . a useful way for the central government authorities to embarrass or intimidate local officials who are impeding central government measures or investigations” (p. 92). He (2004) adds, “journalists can help the top leadership understand what is really going on so these problems [with low-level officials] can be dealt with effectively” (p. 12). Liebman (2005) takes this a step further by stating the following:

The Chinese media at times come closer to playing the role of an official (albeit often sensational) ombudsman than playing the role of a media watchdog. The media’s position within the Party-state also means that they come into direct institutional conflict with other government actors

much more than their Western counterparts because often they are competing with other institutions to influence the views of Party-state leaders (p. 8)

The last point to make in this unit is the reaction that many outside observers have had in response to the effectiveness of this system so far. The apparent success of two seemingly inconsistent media roles has surprised many observers in the West. The following quote sums up this perspective:

The West has assumed that capitalism must lead to democracy, that free markets inevitably result in free societies. But by embracing market reforms while continuing to restrict political freedom, China's Communist leaders have presided over an economic revolution without surrendering power. Prosperity allowed the government to reinvent itself, to win friends and buy allies, and to forestall demands for democratic change. It was a remarkable feat, all the more so because the regime had inflicted so much misery on the nation over the past half century. (Pan, 2008, p. xiv)

The media can be seen as playing a crucial role in achieving the goals of this strategy by providing the government with the means to frame key issues in a way that promotes economic development and minimizes political dissent.

Questions and Exercises for Unit I

1. Question: From the perspective of the Chinese government, what are some specific ways to maintain the dual role the media plays in monitoring and reporting on events and activities that involve the Chinese government while serving the interests of the Chinese Communist Party?

[Students should be able to think of ways that the media can help inform the government of the activities of government officials at local levels.]

2. Question: Based on Liebman’s quote about the media’s role in China, what are some specific ways the “ombudsman” role differs from the “watchdog” role?

[Students should be able to recognize the difference between serving the government versus being an independent monitor of the government. Students should identify possible limitations on what the media can report about the government in the ombudsman role.]

3. Exercise: Present students with the concept of “Networked Authoritarianism” according to McKinnon. Select a topic that would be particularly sensitive to the Chinese government. Some possible topics include:

1. Taiwan and/or Tibetan independence
2. Government response to SARS epidemic
3. Government handling of 2008 Sichuan Earthquake
4. Chinese dissident who won 2010 Nobel Peace Prize

Instruct students to create a policy for controlling content that would be consistent with the “Party principle” while providing Chinese citizens with a sense of free speech over the Internet.

[Students should demonstrate an understanding of how free speech can be limited in ways that are not obvious, especially in a society that is used to very explicit limits to free speech being placed on the media. For example, the policies that students develop should focus on restricting speech that is critical of the Party and the government as a whole in the interest of social stability. Information that points out the shortcomings of “individuals” is emphasized instead.]

References for Unit I

- Donald, SH. & Keane, M. (2002). Media in China: New convergences, new approaches. In S. Hemelryk Donald, M. Keane & Yin, H. (Eds.), Media in China, consumption, content and crisis (pp. 3-27). New York: RoutledgeCurzon.
- Hachten, W. A. (2010). Development and theory of the new media. In J. F. Scotton & W. A. Hachten (Eds.) New media for a new China (pp. 19-27). Chichester: Wiley-Blackwell.
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- Keller, P. (2003). Privilege and punishment: Press governance in China. Yeshiva University Cardozo Arts & Entertainment Journal, 21, 87-138.
- Liebman, B. L. (2005). Watchdog or demagogue? The media in the Chinese Legal System. Columbia Law Review, 105, 1-157.
- MacKinnon (2010, June 15). China's Internet white paper: Networked authoritarianism in action. Retrieved from <http://rconversation.blogs.com/rconversation/2010/06/chinas-internet-white-paper-networked-authoritarianism.html>
- Pan, P. P. (2008). Out of Mao's shadow: The struggle for the soul of a new China. New York: Simon and Schuster.
- Zhao, Y. (1998). Media, market, and democracy in China: Between the Party line and bottom line. Urbana: University of Illinois Press.

II. Structure and function of Chinese media system in a market-based economy

This unit is designed to provide a more detailed look at the activities and structure of the media in China. The first point involves the ownership structure of the Chinese media.

Even as the economy has transitioned from a centrally-planned to a market-oriented system, the Chinese government has insisted on maintaining control of the media including ownership. Current regulations forbid private-ownership. Some media outlets do receive some financial support from private entities through arrangements such as business sponsorships, but these deals must be concealed (He, 2004).

The primary source of media oversight in China is the Central Propaganda Department, which is under central Party control and is responsible for formulating and implementing media policies for the entire country. It also oversees the activities of two major media outlets located in Beijing, *Renmin Ribao* (People's Daily) and China Central Television (CCTV). These activities are mirrored by Propaganda Bureaus in provinces and major urban areas throughout the country (Keller, 2003).

Media Regulatory Controls

The Chinese government exerts control over the media by monitoring both production and distribution activities. Keller (2003) provides details of how this control is exerted:

Each publication unit must be approved by relevant press and publications authorities before it can lawfully operate. Any person or organization that publishes a newspaper, magazine, newsletter or book, without formal approval as a publication unit, or without acquiring other exceptional authorization, is therefore guilty of an act of "illegal publication." (p. 111)

Also, publication units are not allowed to transfer rights to other entities and any foreign investment in Chinese media must be done through a joint venture in which the Chinese party has total control over editorial content.

One example of the Central Propaganda Department's method for controlling the media is through the rule known as "Three Meetings, Three Nods of the Head". According to this rule, when a news organization wishes to put out a story that is critical of any government or Party official, "... the reporter, the target of criticism and the target's superior all have to meet prior to publication, and the target and his superior both have to sign authorization certifying that the article can be published" (He, 2004, p. 22).

Press Groups

An important example for demonstrating how the Chinese government has responded in the past to the growing independence of the press is through restructuring the news media. 1996 saw the nationwide formation of the first press groups, designed to consolidate the print media around a principal Party publication in a specific province or metropolitan area. According to Keller (2003),

The press group model provides a more flexible structure for the operation of commercial press organizations. In this structure, managers can keep sensitive editorial functions under close control while aggressively developing the commercial potential of advertising and distribution services and investing in other business opportunities (p. 94).

It should be stressed to students that part of the necessity for this restructuring of the press was due to the impact that a market economy was having on the media, both in terms of how it functioned as a business and the content it presented to the public. China's movement to a more decentralized economy had a substantial impact on the budget of the national government. With a significant loss of revenue, the government was forced to reduce or eliminate subsidies to state institutions, including the state-owned media.

Commercialization of the Media

The next point in this unit is an overview of the economic transition that most of the Chinese media have experienced moving from state support to market support. It will be important to stress the conflicting priorities that this presents to the media as it deals with both political and economic pressures.

At the same time that the government was losing revenue, the individual wealth of many Chinese citizens was increasing. This trend, according to Zhao, produced two effects that led to changes in the economic structure of the media.

The government's increasing inability to invest in the media has been compounded by a second development: the public's growing demand for more media services. With increasing prosperity, people have more money to spend on culture and entertainment (1998, p. 53).

In 1981, the Central Party lifted its ban on advertising in order to generate revenue. Regulations still existed that forced certain state institutions to subsidize specific state publications through a quota of subscriptions. However, as these subsidies were reduced, the media began to concentrate on commercialized financing. This created a unique "dual role" for the media in China. As Zhao describes it,

The media were . . . in a paradoxical situation of both remaining the same and being changed. Although the Party had gone a long way toward yielding control of the economy to the market, it had not yielded political control or changed the pattern of political communication (1998, p. 48).

Ke (2010) defines the newspaper industry in China as a “dual-track system”, one that must generate revenue primarily through advertising while providing the main resource of the nation’s propaganda efforts. This apparently contradictory system, from the viewpoint of the West, encourages the media to grow and generate revenue with the understanding that government can exercise control whenever it wants. In illustrating China’s media model, Ke uses the phrase “Chinese characteristics”, which is defined as a “. . . vague but popular term used to explain what is beyond clear definition, at least to date (2010, p. 51).

Implications of the Model

One of the consequences of this type of media system that should be addressed with students is the significant change in the overall content of the Chinese media that has resulted from this transition, especially the print media. More and more, entertainment has replaced politically-oriented content. “As of 2005, these soft-content newspapers held about 80 percent of the readership market in China” (Zhao, 2010, p. 51). This development, according to some observers, is not entirely bad for the government. If the public is more interested in content that is entertainment or public services based, it may be less inclined to concentrate on news that reflects poorly on the government and its policies (He, 2004).

Another consequence of moving to an advertising-based revenue stream is that the media may be less critical of businesses that are potential advertisers. As a result, the news media is placed in a position where it provides critical analysis of neither the government nor business.

A third consequence of note is the practice in China of what is called “black journalism”. This “business model” uses a strategy of having journalists extort money from businesses and government officials to not report a story. Epstein describes the practice as follows:

Thousands of newspapers and magazines have opened for business in the last 15 years. Virtually all must support themselves financially without help from the government, and that means everything is for sale, from the front page to the back, and that poorly paid journalists are allowed to leverage their positions for additional income. News outlets sometimes establish “bureaus” in far-flung cities not to collect news but to collect income. (2008, p. 2)

Questions and exercises for Unit II

1. Question: What are specific ways that commercialization conflicts with the media's role in the political system of China?

[Students should be able to describe the problems with trying to attract an audience while maintaining a good relationship with the government. This would include recognizing increased audience expectations for investigative reporting as the number of media consumers in the country also increases.]

2. Exercise: Have students perform the role of a Chinese newspaper editor. In this position, have students do the following:

A. Identify some storylines that attempt to meet the goal of attracting as large an audience as possible (and therefore attract advertisers).

B. For each storyline, have students identify the political ramifications that each story presents and indicate how the story might need to be altered.

[For part A, students can think of a number of news story topics that are designed to attract as large an audience as possible (scandals, corruption, entertainment, etc.).

For part B, students should be able to distinguish those types of stories that would be acceptable to the government (such as entertainment). Alteration of stories should include deflecting attention away from the national government and the Chinese Communist Party as a whole]

Resources for Unit II

Epstein, G. A. (2008, July 21). Dark Journalism. Retrieved from <http://www.forbes.com/forbes/2008/0721/038.html>

Guo, K. (2010). Newspapers: Changing roles. In J. F. Scotton & W. A. Hachten (Eds.) *New media for a new China*(pp. 43-60). Chichester: Wiley-Blackwell.

He, Q.. (2004). Media control in China: Walking the tightrope. China Rights Forum, 4, 11-28.

Keller, P. (2003). Privilege and punishment: Press governance in China. Yeshiva University Cardozo Arts & Entertainment Journal, 21, 87-138.

Zhao, Y. (1998). Media, market, and democracy in China: Between the Party line and bottom line. Urbana: University of Illinois Press.

III. Structure and function of the Chinese legal system as it pertains to the media

Any comparative analysis of media law in China and the United States must include an overview of the Chinese legal system as it relates to media law. This needs to include not only a description of the structure of China's legal system, but more importantly, how each component in the system functions.

Chinese Constitution

A good starting point for an analysis of the Chinese legal system is its Constitution. Analyzing the Chinese Constitution provides an opportunity to point out the fundamental differences in how law is perceived and applied in China versus the United States. Students will probably assume that the document functions in the same way that it does in the United States, leading to the conclusion that the Chinese media enjoy the same rights as the U.S. media based on some of its language. For example, Article 34 of the *Chinese Constitution states the following:

Citizens of the People's Republic of China enjoy freedom of speech, of the press, of assembly, of association, of procession and of demonstration.

An analysis of how the constitution has been applied in China reveals a document that has functioned in a way very different from the U.S. Constitution. In summarizing the effectiveness of the Chinese Constitution, Jones states, "The constitution seems to bear no relation to the actual government of China. Citizens enjoy neither civil nor economic rights" (1985, p. 710). In order to understand how the constitution could be so ineffective, it is important to examine the philosophy toward law in general in Communist China and the structure and function of the Chinese judiciary.

Chinese Philosophy towards the Law

To understand how laws function in China it is necessary to see what role they are perceived to play in a communist system. Wing-hung Lo (1996) provides the following:

Law in a socialist society was held to be the instrument of the state for the elimination of all capitalist residues, for the defense and the development of a socialist economy, and ultimately for the realization of communism. . . Socialist theory, therefore, was positivistic, seeing law as being laid down by the state and geared to serve the interests of the state until communism saw the state transcended. (p. 471)

* An English copy of the Chinese Constitution can be accessed at the following web address: <http://english.peopledaily.com.cn/constitution/constitution.html>

Therefore, the role of law is different in China from that of Western democracies. The law is meant to serve the needs of the government. It does not control or limit the activities of the government. As Jones (1985) states, "Policy in China *is* law. It does not merely influence law" (p. 713). Therefore, "...the term "constitution" has a different meaning [in China]from the one normally associated with it in West societies. The constitution is not written for the ages. It is a statement of current policy. When the policy changes, the law ipso facto changes" (Jones, 1985, p. 713). Therefore, the idea that the constitution is the supreme law of the land does not resonate in China as it does in democracies like the United States.

Chinese Court System

In understanding how the constitution is applied in China, it is also important to examine the key characteristics of the nation's court system. In the United States, it is clear that the courts have a special role in both interpreting and upholding the constitution. The appellate courts of the United States, extending all the way to the U.S. Supreme Court, are charged with this responsibility. This role is considered so important that the U.S. government has positioned the judiciary in such a way that it remains independent from both the legislative and executive branches.

This description of the judiciary, in relation to the other branches of government, does not apply to China. Here it is the congresses, ranging from the National People's Congress (NPC) to provincial and local congresses that select judges and members of the court system at the various levels of government. At the national level, the NPC enacts legislation, elects the President (head of state) and the Premier (head of the government) and, appoints the top officials of the courts. While the NPC is given these responsibilities, it is the Chinese Communist Party that is in control (Jones, 1985).

Within the judiciary, the top court is the Supreme People's Court (SPC). Below it are approximately thirty Higher Level People's Courts (HLPC), which include provincial, autonomous region (e.g. Tibet) and centrally-administered city (e.g. Beijing) courts. Below these are approximately 390 Intermediate Level People's Courts(ILPC). Finally, there are some 3,000 Basic Level People's Courts (BLPC) that exist at the county level (Clarke, 1996). Clarke goes on to describe the relationship of the courts to the government by the following:

Unlike federal judges in the United States, Chinese judges have no security of tenure and below the SPC are not appointed by the central government. Hence, BLPC judges are beholden to the county-level government, HLPC judges are beholden to the provincial level government, and SPC judges are beholden to the central government. (p. 296)

The Chinese legal system is also distinct from the U.S. system in that each court has an Adjudication Committee, which has the highest level of authority for decision-

making within the court. In fact, the committee can direct a judge to enter a particular verdict in an individual case (Clarke, 1996). This provides another means for the government (and the Party) to control court decisions. Several observers of the courts in China have been critical of the lack of legal training that many judges receive. In the past, several appointed judges were former military officials with a limited legal education ("Falling Short", 2007; Clarke, 1996).

Laws versus Regulations

In the last point of the unit, students should appreciate the distinction between China and United States in terms of the separation of powers. In the U.S. government, due to the established separation of legislative and executive branches, there are distinct sources of law. The legislature is responsible for establishing statutory law, including criminal law, while the executive branch is responsible for producing administrative regulations through various administrative agencies such as the Federal Communications Commission.

In China, this distinction between sources of law is not as clear in terms of the application of the law. The National People's Congress is responsible for producing statutory laws. The State Council is responsible for producing administrative regulations. In this instance, the distinctions between criminal and administrative law are often blurry (Keller, 2003). In describing this phenomenon, Keller goes on to state, "The lack of a clear distinction between criminal and administrative law also stems from the fragmentation of law-making powers in China" (p. 105). An example of this can be found in examining the law prohibiting the media from divulging state secrets. Both the NPC and State Council have addressed state secrets through criminal laws and administrative rules creating a challenge for members of the media to sort out these laws and regulations in order to know what is legal and what is not. This problem becomes compounded when additional regulations must be considered at both the provincial and local levels (Keller, 2003).

Questions and exercises for Unit III

1. Question: How could the structure and function of the Chinese legal system impact the content produced by the media?

[Students should demonstrate an understanding of the uncertainty that the Chinese legal system may create through the vagueness of its laws and the inconsistency of its judges due to the nature of their appointments and the limited legal training many judges possess. This should lead students to the conclusion that such a legal structure will likely inhibit what the media will report about the government]

2. Exercise: Present students with the Chinese Constitution (link to web site where English version of the Chinese Constitution can be found on resources page). Have students develop a strategy from the position of the Chinese government that would justify not upholding Article 35.

[Some of the strategies that students articulate should include the following:

1. Other articles of the Chinese Constitution that could be used to override Article 35
2. The use of statutes and administrative regulations to indirectly limit the effectiveness of Article 35
3. Control of the courts in how Article 35 is interpreted in specific cases

This should help students in their understanding of the fundamental differences between the legal systems in China and the United States.]

Resources for Unit III

Clarke, D.C. (1996). Power and politics in the Chinese court system: The enforcement of civil judgments. Columbia Journal of Asian Law, 10, 1-92.

Falling Short: As the 2008 Olympics approach, China falters on press freedom. (August, 2007). Committee to Protect Journalists.

(A copy of this report can be accessed at the following web address:
http://www.cpj.org/Briefings/2007/Falling_Short/China/)

Jones, W.C. (1985). The Constitution of the People's Republic of China. Washington University Law Quarterly, 63, 707-735.

Keller, P. (2003). Privilege and punishment: Press governance in China. Yeshiva University Cardozo Arts & Entertainment Journal, 21, 87-138.

Lo, C. (1997). Socialist legal theory in Deng Xiaoping's China. Columbia Journal of Asian Law, 11, 469-486.

IV. Comparative analysis of defamation law between China and United States.

In this final unit students will take a close look at how a particular area of media law, defamation, has been developed and applied in both China and the United States. It will include opportunities to examine how defamation law in China has been impacted by those elements discussed in the other units.

Defamation Law in China

Defamation law was introduced in China as part of the country's first civil law, the General Principles of the Civil Law of the People's Republic of China, in 1987 (Chen & Ang, 2008). The following are highlights of that law:

Article 101 of the General Principles provides that citizens and legal persons have the right to reputation, that respect for the personal dignity of individuals shall be protected, and that insult or slander that harms citizens or legal persons is prohibited. Article 120 provides that in cases in which reputation is harmed, citizens may demand cessation of the tort, restoration of reputation, elimination of defamatory effects, apology and compensation. (Liebman, 2006, p. 40)

The Supreme People's Court (SPC), in a 1993 ruling, found three general circumstances under which defamation can be found:

(1) where the content of news reports is "seriously mistaken" or, in the case of critical news reports, where the "basic content" of such reports is incorrect, and such mistakes or inaccuracies result in harm to reputation, (2) where insulting or slanderous language results in harm to reputation, or (3) where unauthorized revelation of personal details causes harm to reputation. (Liebman, 2006, p. 40)

Soon after its establishment, the use of defamation law as a tool to punish the media increased significantly within the first few years.

... during 1988-1992, courts all over China had handled 2,000 to 3,000 cases involving personal rights, including the right to reputation. In 1993, defamation cases alone totaled 2,922. In 1994, the court handled a total of 3,543 defamation cases. (Chen & Ang, 2008, p. 54)

One explanation for this rise in defamation cases is attributed to the gradual awareness of legal rights among the Chinese population. Chen & Ang discuss how societal changes have led to an increase in defamation cases.

With the market economy process, traditional Chinese society fragmented and was gradually taken over by the market society. Without traditional identity bond and community ties ... other channels for defamation redress

became unavailable or more expensive or simply disappeared. Thus, the court becomes the most convenient forum for such complaints. Furthermore, as people are interacting more among strangers than acquaintances, they do not have to adopt an amicable approach to resolve disputes. (2008, p. 64)

Another reason for the popularity of defamation suits in China can be attributed to the response of local government officials to a more aggressive news media. As mentioned earlier, the central government has used the media to discover corruption and incompetence among low-level officials. In an effort to combat these actions by the media, these officials have used defamation suits as a method for creating a “chilling effect” on the news media’s attempts to report on local government activities. As a side note, the Central party and state officials are not involved in libel suits because of the restrictions on the media that prevent criticism of national leaders or the Party (“Falling Short,” 2007).

***Defamation Law in the United States**

In the United States, the term libel is more commonly used to define defamation. The concept of libel (defamation) law has roots that go back to the colonial period and the trial of John Peter Zenger in 1734. This case is considered the first recorded use of “truth” as a successful defense for a publication that was critical of a government official.

Libel law in the United States is primarily state law, although there is a great deal of consistency in the law across the states. This is due, in part, to the role of the courts (particularly the U.S. Supreme Court) in helping to shape the law at all levels of government so that it remains consistent with the constitution. Through a number of U.S. Supreme Court (and other high-level appellate courts) decisions, the criteria for libel in the United States must include the following for a suit to be successful:

1. The defamatory claim was published (seen by at least a third party)
2. The plaintiff must be clearly identified in the defamatory statement
3. The material is defamatory (reputation was harmed)
4. The material was false
5. The defendant was at fault

Along with these items, there have been some additional stipulations that create variations in the threshold for some of these criteria. One of the most significant of

* There are a number of media law books that provide a good overview of first amendment theories and libel law. One that was especially helpful in this project is Pember, D.R. & Calvert, C. (2011). Mass Media Law (3rd Ed.). New York: McGraw-Hill.

these comes from a U.S. Supreme Court decision in 1964 (*New York Times v. Sullivan*). In this ruling, the Court established “actual malice” as necessary for establishing fault if the plaintiff is defined as a public figure or public official. This greatly increased the burden of proof for plaintiffs in such cases.

Also, in the U.S. courts, the criteria of falsehood can be evaluated on the basis of whether or not the statements in question are defined as opinion. If it is successfully argued that such statements are an opinion, then falsehood is not established. A U.S. Court of Appeals decision in 1984 produced what is called “The *Ollman Test*” for defining opinion. According to this test, there are a number of factors, including the context of the statement (editorial, campaign speech) that the court considers when deciding whether or not a statement is opinion.

Another important element of libel law in the United States is that reputation is considered a personal right and not a property right. This means that the right dies with the individual and therefore, deceased individuals cannot sue for libel through some third party.

While the American media does not have to contend with libel suits brought forth by government officials to the same level as China, the strategy of suing the media in order to create a “chilling effect” on media activities does exist. Such suits known as SLAPP (Strategic Lawsuits Against Public Participation) suits do occur and are most likely to be brought forth by businesses. The interesting aspect of SLAPP suits is that they are made even when plaintiffs know they cannot win. It is the threat that matters. In the United States, media defendants have a legal recourse with the courts called a “Summary Judgment”. In this instance, the judge in the case may recognize the plaintiff’s intention and decide the case without going to trial, significantly reducing the costs to the plaintiff and reducing the significance of the threat.

Theory of the First Amendment in the United States

In order to more fully understand the different experiences that the Chinese and U.S. media have when faced with the threat of defamation, it is important to understand a fundamental theory that guides most U.S. courts when considering the media’s position. Judges in the United States often have to consider the competing rights of both parties in civil litigation. Libel cases are no different in that the two rights in conflict are the right of the plaintiff to protect his or her reputation versus the right of the defendant to free speech. According to several legal scholars, most judges in the United States adhere to a theory called the “Preferred Position Balancing Theory” in addressing these competing rights. According to this theory, while each case is evaluated individually, there are certain rights that have greater legal standing than others. First among these are those guaranteed in the First Amendment of the U.S. Constitution, which includes freedom of speech and freedom of the press, Therefore, most courts will place a greater burden of proof on plaintiffs in a libel suit because they need to make the argument as to why a “lesser” right

(reputation) should be given consideration over a “higher” right (free speech). This means that in general, the media will enter a case involving libel in a more favorable position than the plaintiff.

Comparison of Defamation/Libel Law between China and the United States

In making comparisons between China and the United States in regard to defamation, there are some key distinctions to bring out.

1. Falsehood is not always considered a requirement for a defamation suit to be successful in China. In some instances, humiliation is enough of a justification for defamation even if the information that was transmitted is true.
2. China does not recognize the difference between a public and a private figure in terms of defamation law. As mentioned above, the threshold for a public person (which includes public officials) to successfully argue for libel is noticeably higher in the United States. The reasoning for this is that a public figure will normally have more access to the media than a private figure and therefore, he or she will have more opportunity to present his or her side of the story.
3. China does not have the standard of “actual malice” as a criterion for fault in a defamation case. This is important because malice implies intent on the defendant’s part which is much more to prove in court than whether or not the defendant’s reporting was in error. This provides the media more room to make honest mistakes.
4. China does not have a specific definition of opinion that can be used by the media as a defense against a defamation suit. This will reduce the media’s willingness to present opinions on key issues because of the fear of reprisals through defamation suits.
5. China’s Supreme Court has allowed close relatives to bring defamation suits on behalf of individuals who are deceased. This can significantly increase the opportunities for litigation against the media.

Questions and exercises for Unit IV

1. Question: How might the move toward commercialization of the Chinese media have increased the number of defamation suits brought against the media?

[Students should make the connection that achieving the goal of satisfying the public's desire for more sensational and critical news results in more suits being brought forth by those parties that have been the target of such stories]

2. Question: Why would the Chinese media be more susceptible to defamation suits from government officials than the U.S. media?

[Students should identify the following reasons:

1. The unique role the Chinese media have in reporting on local government abuses.
2. The relationship between local government officials and courts where suits are tried.
3. The advantages that plaintiffs are given under Chinese libel law - no malice criteria for example]

3. Exercise: Present the following case scenario to students:

A newspaper publishes a story accusing a high-ranking local government official of receiving bribes from a construction firm in order to pass safety inspections. Later the paper reveals it mistakenly stated that the official took three separate bribes when it is now alleged that only one bribe was made. The newspaper maintains that the main contention of the story is true. In the same edition of the paper that the original story ran, an editorial is run calling the official a "dirty lying snake".

Student activities:

- A. Develop an analysis of how this case will likely be decided if it were to take place in both China and the United States.
- B. Indicate the important distinctions between defamation law in the China and United States that could affect the outcome of this trial.
- C. Identify any other factors relating to the other units discussed that could affect decision in this case.

[Key elements students should bring out in this exercise:

1. Since the plaintiff is a public figure (government official), they would need to demonstrate actual malice in the United States. It could be argued that the factual error was a simple mistake and does not show malice.
2. The editorial statement could be defined as an opinion under the Ollman Test in the United States and therefore ruled as not defamatory because it isn't a falsehood.
3. U.S. courts will generally be more favorable to the defendant due to the Preferred Position Balancing Theory.]

Resources for Unit IV

Chen, X. & Ang, P. (2008). Defamation litigation and the press in China. International Journal of Communications Law and Policy, 12, 53-91.

Falling Short: As the 2008 Olympics approach, China falters on press freedom. (August, 2007). Committee to Protect Journalists .

(A copy of this report can be accessed at the following web address:
http://www.cpj.org/Briefings/2007/Falling_Short/China/)

Liebman, B. L. (2006) Innovation through intimidation: An empirical account of defamation litigation in China. Harvard International Law Journal, 47, 33-177.