

# Sending the Law Up the Mountains— Reading the Film *Mabei shang de fating* as a Text on Chinese Judicial Culture

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## 1 Introduction

An elderly judge trained and experienced under the socialist system of itinerant people's tribunals, a female clerk from the Moso minority with a cultural background deeply rooted in her people's traditions, and a young graduate from a law faculty just appointed to work in the basic level judiciary, going on a journey together to bring justice to the remote villages of Yunnan province's northwestern mountainous areas. These three protagonists of Liu Jie's 劉杰 (b1968) movie *Mabei shang de fating* 馬背上的法庭 (Courthouse on the Horseback; 2003)<sup>1</sup> seem to incorporate the three layers of Chinese legal culture in the 20th

1 Liu Jie, the cinematographer turned director, purportedly was inspired to create this film by the coverage of the situation of basic level judges in the weekly newspaper *Nanfang zhoumo* 南方週末 (Southern Weekly). See Cuocuocuo 錯錯錯 (pseudon.), »“Mabei shang de fating” wenming bianyuan didai falü yu xiangsu de pengzhuang« 《馬背上的法庭》：文明邊緣地帶法律與鄉俗的碰撞 “马背上的法庭”：文明边缘地带法律与乡俗的碰撞 [»Courthouse on a Horseback«: Law at the Margins of Civilization and Its Clashes with Rural Custom], *Dianying pinglun ku* 電影評論庫 Nov 8, 2011 <[www.movku.com/2006/11/1043.html](http://www.movku.com/2006/11/1043.html)> (last retrieval July 18, 2012).

century: socialism, tradition and (Western) modernity. The film plot can be read as a symbolic account of the attempt at bringing these three elements together for the sake of a new ‘socialist rule of law with Chinese characteristics’ (*Zhongguo tese shehuizhuyi fazhi* 中國特色社會主義法治) which was officially proclaimed the new paradigm of legal development in the People’s Republic of China on the eve of the new millennium.

The film conveys a skeptical view on this slogan aiming at an integrative solution that should put an end to the dichotomic approaches of traditional *vs* modern, Chinese *vs* Western, and socialist *vs* capitalist law. It does so mostly without openly taking sides in these controversies that have dominated the Chinese discourse on legal reform, its past, future and present, since the late 19th and early 20th centuries, and then again since the beginning of reform and opening in the nineteen eighties. Nevertheless, the film, intentionally or not, contains some very strong statements on one of the crucial issues of the ongoing debate which is the status of the legal profession and its place in Chinese society today.

In the following, a summary of the storyline of the film is given, as well as a short introduction to some of the major trends within the discourse on legal and judicial culture in the PRC as related to the problematic encounter between traditional and Western concepts and the impact the unresolved questions in this context do have on the judge as the personification of justice, as it is provided by the legal system. In a third step the most representative and compelling sequences of *Courthouse on the Horseback* are analyzed using the argumentative framework deduced from the previously shown lines of argumentation. Finally, the film and its ending are interpreted as an allusion to the difficulties of implementing a judicial system aimed at serving three conceptualizations of law—modern, traditional and socialist—as well as their respective needs and expectations, all at the same time.

## 2 *The Movie and the Story It Tells*

The film *Courthouse on the Horseback* directed by Liu Jie, belonging to the so called sixth generation of Chinese filmmakers, came out in the PRC in 2003 and won the Best Feature Film Award in the Horizon Section in the Venice International Film Festival in 2006. Using amateur actors except for one of the leading actors and featuring other characteristics of a documentary, it tells the story of the life of judges working according to the principles of a grassroots judiciary developed by the CCP cadre Ma Xiwu 馬錫五 (1899–1962) in the 1940s

and reactivated in the dawn of legal reforms in the PRC after the end of the Mao era.<sup>2</sup> Trials were held on the spot, i. e. in the villages, by People's Tribunals consisting of one judge and one clerk. In the original form of the Ma Xiwu system the authority of the state did not have to be represented by the courthouse building, but by the national coat of arms that the members of itinerant tribunals carried with them on each of their journeys through China's countryside.

This is how the story of Courthouse on the Horseback begins, when Judge Feng 馮, a man in his fifties, Clerk Yang 楊, a woman from one of Yunnan's numerous minorities, and A Luo 阿洛, a young university graduate, pack the *guobui* 國徽 ('national coat of arms'), other court requisites and a television set on the back of an old horse that has served as the means of transportation for Judge Feng's tribunal for years. The reason for their traveling in a team of three is that Clerk Yang has been forced to resign due to reforms requiring a level of education that she does not possess, and A Luo is supposed to take over from her.<sup>3</sup> In order to arrive at the various villages within their jurisdiction they have to surmount long distances and steep ascents on unsecured gravel roads and tracks displaying the backwardness of those remote rural areas in China. They live in rooms provided to them by the village community, the tribunals are held in open spaces within the village.

The first case they have to try is one of a family dispute that can only be solved thanks to the combined mediation skills of Clerk Yang and the rigour of Judge Feng. When the latter interferes in the controversy about a vagrant pig that by accident has unearthed the bones of another family's ancestors he is criticized by young A Luo who, out of his understanding of law and the legal profession as acquired at the university, does not see this as a legal problem and thinks the authority of the judge might be diminished by taking action in this case.<sup>4</sup> In the second village that is the home village of Clerk Yang, the horse is stolen together with the national coat of arms that A Luo has forgotten to safely store indoors upon their arrival, much to the dismay of Judge Feng who now for his part blames A Luo of depriving the tribunal of its (state) authority. Shortly

2 Stephanie Balme, »Local Courts in Western China«, in *Judicial Independence in China: Lessons for Global Rule of Law Promotion*, ed. by Randall Perrenboom (Cambridge, England: Cambridge University Press, 2010), 167–168.

3 For a short survey of judicial reform in the PRC see Chen Jianfu, *Chinese Law: Context and Transformation* (Leiden/Boston: Martinus Nijhoff Publishers, 2008), 150–155.

4 In A Luo's eyes, the problem is aggravated by the fact that a certain point Judge Feng actually drags the pig to its owner's house with his own hands which in A Luo's understanding ridicules the image of the judiciary.

afterwards, the coat of arms is found dumped in a swamp near the village from where it is retrieved by Judge Feng at the risk of his life and with the help of some of the villagers. The horse reappears later at the instigation of the female village eldest who thereby displays a much higher degree of authority over the rural community than the judge and the tribunal.

The story line escalates in the third village in which A Luo, himself being born in this village of the Yi 彝 minority, gets married to a local girl. When the wedding is disturbed by neighbours claiming that the goat roast served at the banquet was stolen from their flock, Judge Feng refers to the Village Contract in order to settle the dispute. A Luo's father-in-law who suddenly finds himself as the defendant in a case of theft, refuses to admit his fault and gets angry at the tribunal. He takes back his word to give his daughter to A Luo as the latter is to become part of the tribunal. The young law graduate is not ready to accept this decision, but insists on the fact that the registration of their marriage has been signed and on his lawful rights as a husband. When his father-in-law tells the bride she is to go inside and not allowed to see A Luo anymore, the newly-weds leave the village overnight without paternal consent. This puts Judge Feng in an awkward position and causes a painful inner conflict as he is torn between his belief in the authority of the law represented by himself as the marriage registrar on the one side, and his respect for the traditional authority of the family head on the other. When he and Clerk Yang meet A Luo and his wife again after returning to Clerk Yang's home village, the rift between the old Feng and young A Luo that has been showing at various points of their journey cannot be overcome anymore, instead of Clerk Yang's efforts to reconcile their standpoints. She is desperate at seeing A Luo abandoning his career, the tribunal team and Judge Feng as he was meant to take her place exactly at this moment when she has to quit the tribunal and stay behind in her village. A Luo decides not to join Judge Feng when he leaves to complete the tribunal's journey. On his way back down to the valley, the elder judge falls down over a precipice, despite Auntie Yang's admonitions not to sleep on the road when travelling alone, exactly at the spot where a former colleague and friend of his had had an accident years ago, sacrificing his life for the cause of basic level justice for China's countryside.

### 3 *The Person of the Judge in the Discourse on Chinese Legal and Judicial Culture in the PRC*

The term 'legal culture' (*falü wenhua* 法律文化) appeared in the PRC in the middle of the 1980s at the height of a phenomenon called the 'culture fever'

(*wenhua re* 文化熱) mainly manifest at the intellectual discourse level.<sup>5</sup> While in the 1980s many of the new generation of scholars concerned with the problems of China's legal development shared a critical view on its historical legacy, the debate took a turn towards a more positive evaluation of China's own legal tradition or indigenous legal culture in the 1990s, becoming a discourse line that developed on a different level or even as countercurrent to the main line of juridical argumentation in the PRC that continued to orient itself towards the Western concept of a legal system and the rule of law. The fact that some scholars tried to distance themselves from the culturalist approach by avoiding the respective terminology does not mean that they were not interested in the historical, social and political context of law as originally addressed by the discourse on legal culture any more.<sup>6</sup> In this sense, the following short insight into the Chinese discussion on the implementation of foreign legal principles and structures with the rule of law as their most prominent guideline is not limited to the 'legal culture' discourse in the narrow sense, but tries to take into account the broader scope of argumentation on the factors having an impact on the judiciary as a profession and as a key element of legal reform.

As indicated above, right from the beginning of China's legal reforms, those in charge of or concerned with law as one of the most crucial fields of China's transformation in the late 20th century were confronted with the question of whether to conform with Western and international standards without any reservations, or to adapt them to the Chinese situation with all its problems and requirements. In the first decade of the reform period it was a common understanding that the deficits of the Maoist era with its marginalization of law, culminating in a state of lawlessness during the Cultural Revolution, had to be overcome. The traditional conceptualization of law that was in part held responsible for what had happened in the recent past, was criticized for its lack of differentiation between the legal and the political sphere (*zhengfa* 政法), and between law and morals (*lifa* 禮法) as a historical consequence of the amalgamation of Confucianism and Legalism resulting in a precedence of politics over law and a clear priority given to the Confucian moral canon.

5 Agnes S. Schick-Chen, *Der Diskurs zur chinesischen Rechtskultur in der Volksrepublik China* [The Discourse on Chinese Legal Culture in the PRC] (Frankfurt a. M. [etc.]: Peter Lang 2009), 40 and 99.

6 [Zhu] Suli 朱蘇力, *Fazhi ji qi bentu ziyuan (xiuding ban)* 法治及其本土資源 (修訂版) [Rule of/by Law and Its Native Resources (Revised Edition)] (Beijing: Zhongguo zhengfa daxue chubanshe, 2004); Schick-Chen, *Der Diskurs zur chinesischen Rechtskultur*, 172–174.

In the 1990s, the mainstream legal discourse continued to be critical of China's legal traditions and to call for a stronger adaptation to an internationally accorded law regime, but at the same time the consciousness and acceptance of the particularity of China's legal reality and the historic foundations of its characteristics gained momentum in another, rather interdisciplinary discourse on law and its status and workings within Chinese society, most prominently represented by Zhu Suli 朱蘇力 (b1955), (vice-) dean of the Faculty of Law of Beijing University and by his book *Fazhi ji qi bentu ziyuan* in 1996. Defending himself against the accusation of dismissing legal modernization and exchange of experiences with legal scholars and professionals elsewhere that followed the publication of this book,<sup>7</sup> Zhu Shuli still keeps pointing to the necessity of evaluating newly introduced ideas and concepts on the basis of their practicability in the Chinese setting and especially against the background of the social, political and economic situation of the Chinese countryside. The common ground between him, those who openly expressed their skepticism against a Westernization of the legal system, and those who claimed that the legacy of China's legal past was hampering modernization and internationalization, seemed to be the incompatibility of the Chinese and the Western model.

Nevertheless, big parts of the academic and public discourses followed the political realignment of the late 1990s that favoured a strategy simultaneously incorporating Western legislative expertise, Chinese aspects of legal practice and a reinforcement of the socialist element as an answer to a growing need for law as both an outlet for and instrument against protest and social unrest resulting from the repercussions of reform. The 'socialist rule of law with Chinese characteristics' became something like a credo for the discussion on a new Chinese legal culture, but did not provide substantial mechanisms of implementation. In his book *Sending Law to the Countryside: A Study on China's Basic Level Judicial System*,<sup>8</sup> Zhu Suli exemplifies that it is the people's courts and tribunals at the basic level where the question of implementation becomes most acute and relevant. He does so without directly addressing the role of the party, an approach that won him sharp criticism from foreign and Chinese legal scholars concerned with the issue of judicial independence in

7 Frank Upham, »Who Will Find the Defendant if He Stays with His Sheep? Justice in Rural China«, in *The Citizen and the Chinese State*, ed. by Perry Keller (Farnham: Ashgate, 2011. The Library of Essays on Chinese Law), 169–212.

8 [Zhu] Suli, *Song fa xiaxiang: Zhongguo jiceng sifa zhidu yanjiu* 送法下鄉：中國幾層司法制度研究 [Sending Law to the Countryside: A Study on China's Basic Level Judicial System] (Beijing: Zhongguo zhengfa daxue chubanshe, 2000).

China, but is not uncommon in texts adopting a social or cultural perspective when discussing the development of the judiciary in the PRC.

In the discourse explicitly concerned with Chinese legal culture, the question of jurisdiction in many cases is focused on the person of the judge and does not say much about justice as an institution. At the core of the evaluation of the character and attitude of the judge as the distinctive element of China's judicial history, the myth of the wise, upright and impartial Judge Bao 包拯 (999–1062) is used as one of the most striking arguments for a positive legacy of China's legal history.<sup>9</sup> The accounts of his life are an integral part of Chinese cultural and literary memory and stand for the tradition of a personal union of judge and magistrate in charge of both administration and jurisdiction on behalf of the emperor. While this legacy on the one hand opposes the modern idea of a separation of powers, the stories in which Judge Bao rather refers to his own knowledge and sense of justice than to the imperial decrees—despite various forms of interference from higher ranks of officialdom—often seem to display a sense of independence and incorruptibility that could equally be understood as a role model in times of judicial corruption and the advisory or supervisory institution of the Adjudication Committees set up at all people's court levels.<sup>10</sup> Another quality that is attributed to the traditional judge is his ability not only to render a judgment from above, but also to mediate a conflict, in order to spare those involved the negative image of a court verdict. It does not come as a surprise that the advantages of this traditional way of resolving a conflict that had also been maintained throughout the Mao era<sup>11</sup> is re-activated and accentuated where the quest for harmony becomes an obvious concern in times of social discontent and unrest.

9 Schick-Chen, *Diskurs zur chinesischen Rechtskultur*, 117.

10 For the problem of judicial corruption see Ling Li, »Corruption in China's Courts«, in *Judicial Independence in China: Lessons for Global Rule of Law Promotion*, ed. by Randall Peerenboom, (Cambridge, England; New York: Cambridge University Press, 2010), 196–220. For the issue of the Adjudication Committees see Xin Frank He, »China and its Adjudication Committees« <<http://www.eastasiaforum.org/2011/12/03/china-and-its-adjudication-committees>> (last retrieval July 25, 2012).

11 Stanley B. Lubman, *Bird in a Cage: Legal Reform in China after Mao* (Stanford, CA: Stanford University Press, 1999), 40–70.

4 *The Dilemma of the Legal Profession in »Courthouse on the Horseback«:  
Image and Identity of the Judge  
Torn Between the Quest for Professionalization and Social Acceptance*

*A Luo*

The *quasi* 'clash of judicial civilizations' becomes most poignant in the character of the young law school graduate A Luo who is supposed to take over from Clerk Yang as she has to resign because of her lack in education. When he reproaches Judge Feng of ridiculing the image of the judicial profession by the way he handles problems like the pig 'defiling' another family's tomb, he appears completely detached from its own social background. This detachment at first seems to be limited to his professional life, as he is not keeping aloof of the village people otherwise. This becomes most visible when he is so absorbed in showing the young women and children the TV-set he has brought as his marriage portion, that he forgets to take the national coat of arms into the house, resulting in its getting stolen together with the horse. Only when he gets married and refuses to accept the traditional patriarchic rules of his own people by insisting on his and his wife's rights as a couple married according to the marriage law of the PRC which means an elevation of the legal authority over that of his father in law and village customs, his high esteem for the law and its institutions begins to leave its mark on his personal life in a substantive manner.

*Clerk Yang*

Contrary to A Luo's relying on the set of rules he has acquired at an institution of higher—and therefore, in his view, more authoritative—education, Clerk Yang, or Auntie Yang as she is called by colleagues and villagers, pointing to a rather familiar form of interaction, refers to her own experience for guidance in really problematic cases. The authority she turns to when the tribunal itself is involved in the case of the stolen horse and national coat of arms, is the village eldest she has known as the source of right answers ever since her childhood days, a woman according to the matriarchic culture of her minority. She does not refrain from even following her to the Buddhist temple as required by their common religion. When Judge Feng is still annoyed about the theft of the horse, even after its being restored to them, and threatens to call the police in order to find out about the culprit, Clerk Yang listens carefully to the village eldest's argument that the thief does not need legal punishment after the village community has already found a way of handling this disciplinary problem. At this point she is obviously concerned with the intrusion of law and order in her community,

and does not trust the law to bring more justice to case than has been done already. Both she and Judge Feng seem to prefer mediation to a court's ruling, but their ways of approaching the conflicting parties is still different.

### *Judge Feng*

It is the episode of the stolen horse and national coat of arms in which Judge Feng's identification with the system he works in becomes most obvious. His distress at the loss of the coat of arms seems to indicate that he feels unable to dispense justice without state authority and discretionary power represented by the coat of arms at the site of adjudication. He is ready to risk his life in order to retrieve this symbol from the swamp. In a way, his infatuation with this source of legitimization and identification is not far from the quasi-religious argument Clerk Yang uses to convince the village youths to help him save the emblem explaining that it was something like an icon of justice to the tribunal. When the villagers finally celebrate the rescue of the emblem in a rather archaic form reminding of religious worship, Judge Feng does not intervene with this irrational approach that somehow seems to mirror his own relief and joy at seeing the ikon re-elevated to its rightful place above the crowd.

In the first part of the film, Judge Feng seems to be well settled in his position defined by the dedication to his job based on a faith in the socialist legal system on the one hand, and the respect for the villagers under his jurisdiction, their way of life and customs, on the other. The balance between these two aspects of his work, nevertheless, gets shaken by the controversy with the bride's father who ignores the law of marriage and is finally shattered by the eclat of A Luo's disobedience and disrespect against his father-in-law. The solution that Judge Feng would have proposed out of his life-long experience as a mediator consists in giving the father in law face by waiting for one or two days until his anger has evaporated, under the precondition that he does not impede the marriage in the end; but this option is discarded by both parties. The escalation of the conflict has two very negative consequences: on the side of the villagers, even the plaintiffs who claim that the goat was stolen from them, finally refuse to turn to the tribunal for a solution out of contempt for its young representative's attitude toward their traditional customs. On the other side, A Luo who does not understand why he is heavily scolded by the elder judge for insisting on his lawful rights as a husband, gives in to his doubts about the career that lays before him and quits the duty that he had just been about to assume. For Judge Feng this means that he has neither been able to safeguard the status of law and its institutions within grassroots society, nor to teach the next generation of the legal profession how to meet this challenge. At the end, the foundations of both

his personal and professional life are badly damaged by this defeat, as well as by the separation from Clerk Yang who has become more than a colleague on their long travels, making good for the family bonds that have been severed long ago. The loss of a tooth in the last night at Clerk Yang's village seems to confirm his feeling of being old and outdated, and his accident can be sensed as a form to quit what had been important to him but is not an option anymore.

### 5 Conclusions

Overall, the quest for more professionalism, claimed as a prerequisite of judicial development by the mainstream legal discourse in China and abroad, causes problems to the identity of all three protagonists of *Courthouse on the Horseback*. Most obviously, it forces Clerk Yang to change from the life of a judicial worker and cadre to that of a retiree and returnee to her home community. She is reluctant to show her feelings about this transfer, but does not really look authentic when she finally changes from her basic level cadre outfit into the traditional outdoor wear of her minority in one of the last scenes of the movie.

As for A Luo, accepting the law as the guiding principle of his life and work estranges him from his own social and cultural background and, ironically, also from his career in a legal system that—at least at the basic level—still has not taken the turn towards this principle yet. He appears to expect an affirmative judgement on his attitude towards law and the judicial profession from Judge Feng as his superior, is obviously affected by the latter's unexpectedly harsh criticism, but finally does not give in to the traditional role model of bending to the senior's opinion and decides to keep to what he has learned from his teachers at university.<sup>12</sup>

Judge Feng's outburst at this behaviour of his young colleague is not so much an expression of anger than of exasperation. His situation in the end turns out to be the most complex one, as he is caught in-between three different legal cultures. In his attempt to pay respect to the socialist ideal he has been serving for so many years, to the villagers he has been living with for so long, as well as to

12 The reaction of his own people shows that the question of how those working in the legal field see themselves is closely linked to the one of how they are seen by those outside the legal world. For other aspects of the issues of image and identity of basic level judges see Stephanie Balme, »Local Courts in Western China«, in *Judicial Independence in China: Lessons for Global Rule of Law Promotion*, ed. by Randall Perrenboom (Cambridge, England: Cambridge University Press, 2010), 154–179.

the legal system he has accepted as the regulatory framework of his daily work, he seems to become unable to perform any of his duties anymore, and his world falls to pieces both in the figurative and the literal sense of the word.

In an article on basic level people's courts and tribunals in the Western parts of China Stephanie Balme writes:

Another famous movie released in 2003 of a traveling law court in far-off Yunnan province, *Courthouse on Horseback*, considered in Western countries one of the best movies on China's judicial system, is actually largely outdated.<sup>13</sup>

However, seeing the story of Judge Feng, Clerk Yang and A Luo in the context of a changing legal culture as described above, one could come to the conclusion that the account of their cumbersome itinerary is not so much the description of a mobile form of adjudication, but rather an allegory to the long and winding road towards a judicial system that will be true to the needs of grassroots society, the demands of a modern legal system—and the expectations of a socialist leadership depending heavily on the fulfillment of both requirements as the foundations of its own legitimacy.

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13 Balme, »Local Courts in Western China«, 167.