

## Chapter 54

# Open Judiciary in a Closed Society: A Paradox in China?

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### ABSTRACT

*This chapter examines the open government initiative and the application of open government principles to the court system in China in order to illustrate what “open judiciary”—and, ultimately, an “open state”—looks like in a relatively closed society. The authors present a comprehensive background of China’s open government initiative and related court reform efforts, along with critical analysis of trends in “Guiding Cases” (“GCs”), de facto binding precedents released by the Supreme People’s Court (SPC) of China, and subsequent cases (“SCs”) that cite GCs. Drawing on these theoretical and empirical studies, the authors discuss the prospects of leveraging China’s open government and open judiciary efforts to develop an open state in the country and identify key factors for promoting open judiciary in other closed societies around the world.*

### INTRODUCTION

In January 2009, U.S. President Barack Obama issued the *Memorandum on Transparency and Open Government* (“Open Government Memorandum”) to announce his administration’s commitment to “creating an unprecedented level of openness in Government” by “establish[ing] a system of transparency, public participation, and collaboration”. The president elaborated on this commitment, stating that “[o]penness will strengthen democracy [in the United States] and promote efficiency and effectiveness in Government”.

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According to the memorandum, government should be transparent because “[t]ransparency promotes accountability and provides information for citizens about what their Government is doing”. Government should be participatory because “[p]ublic engagement enhances the Government’s effectiveness and improves the quality of its decisions” and, therefore, “[e]xecutive departments and agencies should offer Americans increased opportunities to participate in policymaking and to provide their Government with the benefits of their collective expertise and information”. Government should also be collaborative because “[c]ollaboration actively engages Americans in the work of their Government” and, therefore, “[e]xecutive departments and agencies should use innovative tools, methods, and systems to cooperate among themselves, across all levels of Government, and with non-profit organizations, businesses, and individuals in the private sector” (*Open Government Memorandum*, 2009).

In response to this memorandum, the *Open Government Directive* (2009) was issued later in the same year to direct U.S. executive departments and agencies and set deadlines for them to take certain actions in accordance with the principles of transparency, participation, and collaboration set forth in President Obama’s memorandum. To achieve this goal, the *Open Government Directive* specifically requires executive departments and agencies to publish government information online, improve the quality of government information, create and institutionalize a culture of open government, and create an enabling policy framework for open government.

As discussed in other chapters of this book, these efforts to promote open government in the United States have popularized the open government concept—a concept that can be dated to 1957 (Chapman & Hunt, 2006; Parks, 1957)—and have inspired many other countries. This chapter aims to discuss whether the People’s Republic of China (“China”) has also been inspired to embrace the open government concept, and, if so, whether China has extended the principles of transparency, participation, and collaboration to the court system so as to achieve “open judiciary”, a term used in this chapter to express a broader concept that applies the principles of transparency, participation, and collaboration to the judiciary (Jiménez-Gómez, 2014) as distinct from the narrower, procedurally- and common law-focused concept of “open justice” (Conley, Datta, Nissenbaum, & Sharma 2012).

To this end, the authors first draw on key literature and official documents to show the extent that open government has taken root in China and analyze whether this also leads to the emergence of open judiciary in the country. Following discussion concluding that some form of open judiciary has indeed emerged in China, the authors then present a two-pronged evaluation of open judiciary in China by examining (1) the degree to which the principles of transparency, participation, and collaboration have become explicit objectives of China’s court reform, as evidenced by recent court reform plans and implementation measures, and (2) the degree to which these principles have been followed in practice, as evidenced by trends in a groundbreaking system that the Supreme People’s Court (“SPC”) of China established in 2010, under which certain court judgments are released as Guiding Cases (“GCs”), *de facto* binding precedents. Based on this evaluation, the authors offer recommendations for addressing the limitations and challenges noted so as to help China achieve open judiciary more effectively. The authors also offer insights about the prospect of leveraging China’s open government and open judiciary efforts to develop an open state in a relatively closed society. Based on China’s experience in bringing the principles of transparency, participation, and collaboration to the judiciary, the authors conclude by attempting to identify key factors for promoting open judiciary in other closed societies in the world.

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