

China, Democracy, and Law

A Historical and Contemporary Approach

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CHAPTER SIXTEEN

THE RENAISSANCE OF THE LEGAL PROFESSION IN CHINA

Jean-Pierre Cabestan, Li Qinglan, Sun Ping, Yves Dolais

The legal profession in China has undergone a veritable renaissance over the last thirty years. Fostered by Deng Xiaoping's 1978 policy of reform and opening up, this renaissance is part of a vast enterprise of rehabilitating law, and, more particularly since 1997, of instituting a "socialist rule of law."

The issue of the legal profession is not only of first importance; it is particularly sensitive because of the political framework—a single-party system—in which it develops. While the Chinese government has accomplished an impressive amount of legislative work since 1979, establishing what one of us has called a "state of laws,"¹ educating legal professionals—judges, prosecutors and lawyers—and redefining their functions has constituted a more complex task.

This chapter's working hypothesis is that while a major effort was made to improve the level of education and specialization of legal professionals, and while this effort has begun to bear fruit, numerous political, institutional, economic and cultural obstacles stand in the way of fully developing these professionals' powers, and consequently their independence, which are thus much more limited than in developed democracies. Such limits naturally affect judges and prosecutors more directly than lawyers, who have acquired a greater margin of maneuver over the last few years. While this constitutes a sign of other positive changes to come, reinforcing judicial and prosecutorial independence presupposes systemic reforms that seem to be beyond reach today.

The Legal Profession Makes a Comeback

The founding of the People's Republic of China in 1949 represented a great leap backwards for the legal profession. The European-inspired codes that

¹ Jean-Pierre Cabestan, "Un État de lois sans État de droit," *Revue Tiers Monde*, vol. 37, no. 147 (special issue, "Chine") (1996), pp. 649–668.

the Republican government had established in the 1920s and 1930s were abolished and the Republic of China's judicial institutions were dismantled. In the 1950s, the new communist state pretended to adopt the Soviet legal and judicial system, but at the end of the decade, Mao Zedong and the majority of Chinese leaders showed almost no interest whatsoever in law, formal justice or the legal professions. The codes then being prepared were never published, and as soon as 1959, when the Ministry of Justice was abolished, lawyers became progressively marginalized. The Cultural Revolution (1966–1976) merely accentuated this trend: prosecutors disappeared at the beginning of this tormented era and their functions were transferred to the already all-powerful Ministry of Public Security. Though judges remained in office during this period, they decided primarily criminal cases, while civil and economic disputes were most often resolved administratively or through mediation mechanisms controlled by the Communist Party.

Things thus did not look particularly bright for the profession when Mao died. The first reform, accomplished at the time of the promulgation of a new Constitution in March 1978, was to reestablish procuratorates (prosecutors' offices); but promoting "socialist legality" was not yet a priority. The turning point came at the end of the same year, with the victory of Deng Xiaoping and his supporters over the neo-Maoists gathered around Hua Guofeng. Deng asked Peng Zhen, who had become vice president of the National People's Congress (NPC) and president of its law commission, to lay the foundations for a new legal system. In July 1979, two organic laws entered into force defining the jurisdiction of the courts and prosecutors. The same year, the Ministry of Justice was reestablished and the profession of attorney, supervised by this ministry, reappeared.

For a number of years, however, since there were no skilled professionals, former police officers and freshly demobilized officers of the People's Liberation Army were named as judges and prosecutors, and only a minority of attorneys had any university training in law. While such recruitment bases have not yet disappeared, they have been progressively replaced, especially since the late 1990s, by promoting a new generation of legal professionals who are better trained and better able to meet the country's needs. In other words, in China, the legal profession has undergone a progressive, recent, but as yet unfinished renaissance. In 1979, however, legal professionals were not given the same powers as their western counterparts: judges rendered decisions made elsewhere; prosecutors followed the Ministry of Public Security's instructions; and attorneys pled more in the name of society (actually the party) than in the name of their

clients. While this is no longer true today, the legacy of these practices is still felt. More than with respect to legal professionals themselves, there is still much work to be done in this more structural area, and obstacles are numerous.

Massive Efforts to Train Judicial Personnel

Efforts to train judicial personnel were stimulated by a genuine desire for reform and by the rapid heightening of expectations of society and of foreign economic partners with respect to justice in China. Fostered by the multiplication of laws and by legal propaganda, these expectations produced a rapid increase in judicial decisions, from two million in 1987 to 4.5 million in 1995, 5.7 million in 2003 and 8.1 million in 2006. Decisions in civil cases (4.8 million in 2003, 4.38 million in 2006), particularly concerning family issues (1.3 million in 2003, 1.56 million in 2006), continue to dominate (see the Appendix at the end of this chapter). However, an increasing number of decisions involve disputes related to economic matters (debts or contracts), while judgments qualified as “economic” have increased exponentially (3.06 million in 2006, 630,000 in 2003, versus 370,000 in 1987). At the same time, administrative disputes resolved by the courts have become less exceptional (115,000 in 2003, up from barely 50,000 in 1995) but have stagnated (95,000 in 2006). Criminal cases have also increased (735,000 in 2003 and 701,000 in 2006, compared to 290,000 in 1987) as social controls exercised by units of production (*danwei*) are relaxed and so-called administrative sanctions imposed directly by the Ministry of Public Security show a relative decline.²

Such development of the courts’ activities was one of the principal reasons for expanding the legal profession and making it a specialty. In 2004, there were 180,000 judges (as opposed to 70,000 in 1988), 30,000 of which were senior judges assigned to the roughly 3,500 jurisdictions throughout the country. The same year, there were approximately 130,000 attorneys (up from 41,000 in 1990). The number of attorneys continues to rise (153,846 in 2006, 31,957 of whom were attorneys’ assistants). Moreover, a

² See *Supreme People’s Court Activity Report*, March 2004, and various earlier reports. On judgments by administrative chambers, see Pei Minxin, “Citizens v. Mandarins: Administrative Litigation in China,” *The China Quarterly*, no. 152 (1997), pp. 832–862.

greater number of these legal professionals were trained abroad, particularly in the United States and Europe.

These figures are nonetheless very low for a country with as large a population as China: one judge per 7,000 inhabitants and one attorney per 11,000 are much lower ratios than in France (36,000 attorneys, or more than 6 per 10,000 inhabitants) and the United States, of course, but also in countries such as India, which boasts the second largest contingent of lawyers in the world (500,000). In addition, these figures are below the initially announced objectives, which were to have 150,000 attorneys in 2000 and 300,000 in 2010.³ More realistically, the Ministry of Justice's 2002–2006 Five-Year Plan correctly estimated there would be approximately 155,000 attorneys in 2006.

Moreover, these attorneys are distributed very unevenly throughout the territory, a problem that already existed during the era of the Nanjing government in the 1930s. The majority exercise their profession in the coastal zones and cities, where most of the solvent clients live. The other preoccupying imbalance is the ratio of judges to attorneys, which reveals the residual weakness of defense rights. For example, in 2001, Chinese lawyers were involved in only 27% of all legal proceedings (versus 18% in 1996). And though they took part in 54% of criminal trials that year (39% in 1996) and 43% of administrative trials (33% in 1997), they were absent from more than four-fifths of civil judgments (19%, compared to 12% in 1996) and two-thirds of economic judgments (35%, versus 24% in 1996).⁴ In addition, the number of judgments rendered each year in China is much lower than in countries such as India (fewer than six million, versus twenty-two million).

Despite the efforts made, these figures also reflect a serious problem with training, particularly of judges and prosecutors. In 2003, only 40% of judges had a *benke* (four-year) university degree, versus 20% in 1998 (see the Appendix),⁵ and only half of all attorneys had such a degree. Significant progress has been made since then: 51.6% of judges in July 2005 (90,000) and 80% of judges in 2008 (152,000) had obtained at least

³ *China Daily*, January 13, 1996, p. 1.

⁴ *Zhongguo tongji nianjian 2002* (Statistical Yearbook of China) (Beijing: Zhongguo tongji chubanshe, 2002), pp. 791, 802. These percentages were calculated by dividing the number of trials (*susong*) in which an attorney acted as a representative (*daili*) by the number of judicial proceedings.

⁵ According to other sources, in 2001, only 10% of judges had received university training. See *Wenhuibao* (Shanghai), cited by *South China Morning Post*, January 2, 2002, p. 4.

a *benke* university degree. However, a high percentage of judges (49%) were recruited first and obtained their degrees later through continuing education, which is reputed to be of lower quality.⁶

Apparently, the best jurists prefer to become attorneys, because the possibilities for earning a decent salary are greater than for judges or prosecutors, who are poorly paid despite the salary reevaluations of the last few years.⁷ The difference in income—from one to ten, on average—increases problems of corruption. In addition, wanting above all to work in foreign firms or become corporate legal counsel, Chinese lawyers are reticent to take criminal cases. This desertion led the Ministry of Justice and its local departments to establish a system of quotas and fines to require attorneys to take a minimum number of such cases.⁸

While Beijing and the major cities are now home to a large number of qualified judges and attorneys, this is far from being the case in all of the 3,500 jurisdictions and roughly 13,000 legal firms in the country. This is the reason why, for example, not all decisions are published: many of them are not even written down, or their written version is extremely summary and contains very little legal reasoning; in short, they do not meet the quality standards set by the Supreme People's Court. Thus, when cases concern only Chinese parties—and despite commitments to the World Trade Organization (WTO)—the principle of public judgments will likely be ignored for quite some time to come.⁹

Chinese judicial authorities are conscious of these problems, which they in fact no longer hide from foreign observers (this is something new) and since 2001 they have adopted a certain number of measures designed to improve the quality of judges and prosecutors more quickly. In July 2001, the Ministry of Justice instituted a single competitive examination

⁶ See Du Diao Han Jiang Xue, "Studies on the Training of Chinese Judges," published July 20, 2009 on his blog, <http://gk1984123.fyfz.cn/blog/gk1984123/index.aspx?blogid=498512>. It appears that of the 190,000 judges in 2008, roughly 31% had a *benke* when they were recruited, 20% had less university training and 49% had no university training at all.

⁷ In 2002, a judge exercising in a municipal court in a less developed province earned approximately 600 yuan (67€) per month; a superior court judge in Beijing earned some 2,000 yuan (222€) per month; and a judge assigned to a coastal region might earn up to 7,000 yuan (778€) per month. See *South China Morning Post*, March 13, 2002, p. 8. In large cities and coastal zones, attorneys earned from approximately 6,000 to 20,000 yuan (667€ to 2,222€) per month.

⁸ See Li Yuwen, "Lawyers in China: A 'flourishing' profession in a rapidly changing society?" *China Perspectives*, no. 27 (2000), pp. 20–34. See also *Lawyers in China: Obstacles to Independence and the Defense of Rights* (New York: Lawyers Committee for Human Rights, 1998).

⁹ See Leila Choukroune, chapter 15 above.

for magistrates and attorneys, extending to magistrates the selection criteria that had been used for a certain number of years to recruit attorneys (see below). The government hoped this reform would raise the level of qualification of judges and prosecutors, on the one hand, and of attorneys, on the other. It also hoped to improve the image and career of magistrates, and thus attract more law students to this profession. In January 2002, the Law on Judges was thus amended and new, more attractive promotion rules were introduced.¹⁰ Some 360,000 candidates took the first competitive examination in March 2002, but only 20,000 passed (6.68%). Since 2002, the number of candidates has increased continuously (249,000 in 2007 and 370,000 in 2008), and the pass rate has also increased spectacularly (28% in 2008).¹¹ It is not known, however, how many of those who have passed the examination have chosen careers as judges or prosecutors. As long as the pay of judges is not radically reevaluated, the freedom of choice makes it reasonable to assume they will continue to prefer to become attorneys.

Reforming the Courts and Procuratorates

The reforms of the courts and procuratorates modified the status of both judges and prosecutors.

Reforming the Status of Judges

Election and Nomination

The new Law on Judges, which entered into force on February 28, 1995, did not change the formal procedures for electing and nominating judges. The president of the Supreme People's Court thus continues to be elected (and may be recalled) by the NPC for five years, and may be reelected only once. On the president's proposal, the NPC's Standing Committee then names and recalls the vice presidents, judges and members of the

¹⁰ Apart from the superior court judges mentioned above, forty-one judges of the Supreme Court and the superior provincial courts obtained the title "grand justice" (*dafaguan*), which is the same as the one used on Taiwan to designate members of the Judicial Yuan (*sifayuan*). See *Xinbao*, March 23, 2002, p. 15; *China Daily*, March 22 and March 23, 2002, p. 1.

¹¹ 8.75% in 2003, 11.22% in 2004, 14.39% in 2005, 17% in 2006, and 20% in 2007.

Judicial Committee of the Supreme People's Court, and the president of the Military Tribunal.

The presidents of the local tribunals at the various levels are elected and may be removed from office by the people's assemblies at the same level, and their terms are the same length as the term of the corresponding people's assembly. These tribunals' vice presidents, members of judicial committees, chamber presidents and vice presidents, and judges are named and recalled by the standing committees of the corresponding people's assemblies according to the proposals of the presidents of the tribunals concerned (Organic Law of the People's Courts, art. 35). The presidents of people's tribunals nominate and recall the assistant judges of their respective tribunals.

Requirements

The Organic Law of the People's Courts of September 28, 1954 and the same law of July 1, 1979 contained the same provisions: "Citizens who have the right to vote and to stand for election and have reached to age of 23 are eligible to be elected presidents of people's courts or appointed vice-presidents of people's courts, chief judges or associate chief judges of divisions, judges or assistant judges; but persons who have ever been deprived of political rights are excluded" (art. 34). In other words, the law required no legal training. Since then, access to the profession of judge has been subordinated to conditions of morality, university degrees and professional experience. The same law also organizes judicial careers.

The Law on Judges and the Law on Prosecutors were adopted on February 28, 1995 and modified on June 30, 2001, and the May 15, 1996 Law on Attorneys was modified on December 29, 2001, then again on October 28, 2007. Revising these three laws enabled a single national competitive examination to be instituted to recruit judges, prosecutors and attorneys, as discussed above. The examination is designed jointly by the Ministry of Justice, the Supreme Court and the Supreme People's Procuratorate, and administered by the Ministry of Justice.

Previously, each institution held a separate recruitment examination. The examinations for judges and prosecutors were in fact easier than the nationally-organized Ministry of Justice examination for attorneys. Thus, before the laws on judges and prosecutors were revised, candidates for these functions had to satisfy the following conditions [art. 9(1)(1 to 6)]: be a Chinese citizen; be at least twenty-three years old; promise to respect the Constitution of the People's Republic of China; possess the required political, professional and moral qualities; be physically able; and have

(a) a degree from a law school (a three-year *dazhuan*) or another university establishment (same), as well as solid knowledge of the law and two years of practical experience, or (b) a four-year (*benke*) degree and have one year of practical experience, or (c) a master's degree or a doctorate in law.

In the revised law of June 30, 2001, the first five paragraphs were left unchanged, but the sixth was modified on a certain number of points.¹² While judges and prosecutors are still not required to have a law degree, they are now subject to stricter educational requirements: previously, a *dazhuan* sufficed; today a *benke* is required.¹³ In addition, candidates must now be able to prove experience in the legal field, and candidates for intermediate or senior judicial and prosecutorial positions must have more experience. Moreover, candidates with master's degrees or doctorates in law must also have at least one or two years of legal experience, whereas no such experience was previously required. Candidates for the posts of president or vice president of a court (as well as for prosecutor general or deputy prosecutor general) must fulfill the new requirements for becoming a judge or prosecutor. In short, the new rules should contribute to putting an end to nominating local judges and prosecutors who are either incompetent or totally unschooled in law.

Reforming the Prosecutorial Function and Status

Even in Europe, the status and function of prosecutors raises numerous issues. The prosecutor's legal nature is in fact difficult to determine. In France, for example, prosecutors are magistrates, but unlike judges, they report to the executive and may receive instructions from the Ministry of Justice. In criminal trials, Chinese prosecutors have particularly broad powers: they investigate offenses committed by state officials, decide to

¹² One must now hold a *benke* (four-year degree) from a university law school (or a university degree in another discipline if one can prove solid knowledge of the law), and have two years of practical legal experience. Candidates holding a master's or a doctorate in law (or in another discipline, but with solid legal knowledge) must have one year of practical legal experience. To become a superior or supreme court judge (or a prosecutor at the level of a province, an autonomous region or a municipality under the direct authority of the central government or the Supreme Procuratorate), candidates must have three years of practical legal experience. Candidates holding a master's or a doctorate in law (or in another discipline, but with solid legal knowledge) must have one year of practical legal experience.

¹³ In some regions where this new rule seems difficult to apply, a two-year degree is still temporarily accepted.

prosecute or not and begin prosecution, review the legality of the police's acts and charges, and present evidence to the court of law to prove the offense or crime. At the same time, they can review the legality of the court's activities and the proper functioning of other institutions, and supervise the execution of judgments. They also intervene in civil and administrative trials.

Because of their broad powers, prosecutors depend heavily on the government. To evaluate the effect of the reforms it is therefore necessary, first, to measure the degree of political influence on the prosecutors' activities, and then to examine both the professionalization of the prosecutorial function and the redistribution of powers between the prosecutor and private parties. After attempting this, we will deal briefly with the resistance that is encountered by the judicialization process entailed by the reform of the prosecutorial function.

Political Influence

Political influence is revealed in the status afforded prosecutors; however, one must also examine in more detail their powers in the extremely sensitive area of criminal procedure.

There is a very close relationship between prosecutors and the Chinese Communist Party (CCP): like other state institutions (beginning with the courts), procuratorates are subject to the party's leadership. As already mentioned, the relationship between procuratorates and people's assemblies is also important: like courts and governmental bodies, they are subordinate to the people's assemblies. In addition, while they are supposed to be independent of the executive, the reality is quite different.

The CCP's leading role is a fundamental constitutional principle. Generally speaking, the party fulfills this role in three ways. First, it provides ideological, political and organizational leadership through its organizations, in particular its grassroots cells, and establishes a party leadership group in every state institution. More specifically, this party leadership is exercised over prosecutors (and courts) through two CCP commissions. At each administrative level, the CCP's political and judicial commission directs and coordinates the activities of the police, the court, the procuratorate, and the Ministry of Justice office.¹⁴ The CCP's disciplinary

¹⁴ For example, in the case of *Li Huawei*, suspected of having killed his wife in October 1986, since the Yingkou (Liaoning province) prosecutor hesitated to prosecute Li for evidentiary reasons, the CCP's Yingkou political and judicial commission called a meeting of

commission also exerts significant influence, particularly with respect to corruption cases.¹⁵ criminal prosecution (rather than simple disciplinary measures) of a party member is theoretically undertaken only with the party's agreement; if prosecution has already begun, the court will duly take the party's opinion into account.¹⁶ There is thus a "two-track" system of justice: one for party members and another for simple citizens.

Second, the party exercises its leadership by managing the careers of cadres, including judges. Thus, it suggests and decides on the most important nominations, even though judges are officially elected or named by the people's assemblies:¹⁷ in a general way, the people's assemblies still are mere "rubber-stamp" institutions, though they are showing a greater desire to consolidate their powers.

Thirdly, the party's policies constitute the core of socialist law, and legislation serves merely to implement these policies. Law therefore remains highly politicized. Of course, the party should act within the limits of its jurisdiction as defined by the law; but regulating these limits too closely would be equivalent to dispossessing the party of its leadership role. Resistance on its part is therefore not surprising.

The Chinese system is based on the theory of the state's complete power: all the state's powers belong to the people. As mentioned above, like administrative agents, judges and prosecutors are formally elected, named and recalled by the people's assemblies, to which they are subordinate and must submit activity reports. What, then, is the power exercised by the people's assemblies over prosecutors? While interventions

the head of the public security office, the prosecutor general and the president of the court to reach a decision. See www.legaldaily.com.cn (April 21, 2001).

¹⁵ As illustrated by the case of *Cheng Kejie*, in which a vice president of the NPC's Standing Committee was accused of corruption. The party's Central Disciplinary Commission was omnipresent, investigating for eight months (from January to July 1999) before transmitting the file to the Beijing procuratorate, and publicizing its conclusions establishing the facts of corruption in a press conference. It "advised" the party's Central Committee to expel Cheng, the NPC to remove him from his functions, and the Beijing prosecutor to criminally investigate him. Cheng was sentenced to death on July 31, 2000 by the first intermediate court of Beijing. See *Zhongguo falü nianjian, 2002 nian* (Legal Yearbook of China, 2002) (Beijing: Falü chubanshe), p. 936.

¹⁶ See Guo Daohui, "Shixing sifa duli yu ezhi sifa fubai" (Judicial Independence and the Struggle Against Judicial Corruption), *Susong faxue, sifa zhidu*, 1999, no. 4, p. 67.

¹⁷ See Wang Hongjun, "Shilun baozhang jiancha jiguan dulixing shijian chaquan" (Independence in Exercising Prosecutorial Powers), in *Jiancha luncong* (Beijing: Falü chubanshe, 2000), vol. 1, p. 160.

in particular cases cannot be excluded,¹⁸ and while a draft law actually provides for strengthening the control exerted by the assemblies at a time when they are evidencing greater and greater suspicion of prosecutors and courts, their power over judicial organs nonetheless seems generally weak.

Courts and procuratorates are in fact dependent on local governments, which manage their personnel and budgets. They are therefore subject not only to a vertical hierarchy, but also to the horizontal authority of the CCP committee, the people's assembly and the government of their circumscription. In practice, some local leaders give instructions on how to handle specific cases to protect the financial interests of their circumscription. Judges and prosecutors, who are also implicated in local affairs, naturally obey such horizontal directions and cannot easily resist interference, as this quite often would be tantamount to putting their careers in jeopardy. Contrary to the principle of the unity of socialist legality and of judicial independence, such "local protectionism" explains judicial localism (*difangzhuyi*), which becomes most evident when judgments are executed.

Prosecutorial Powers

It is important to understand the relationship between prosecutors and the police, on the one hand, and the courts on the other. Judicial guarantee requires that prosecutors check the police and the courts check prosecutors. In China, however, prosecutors cannot effectively check the police, but they are able to check the courts. In addition, while the separation of powers and controlling the hierarchy of norms are inseparable from the concept of the rule of law, the confusion of legislative and executive powers in China leads to normative disorder, and this is not without consequences on prosecutorial powers.

Though prosecutors should review the legality of police activities, in most cases in China the police manipulate investigations at their own discretion. Police custody, house arrest, probation, searches and seizures are decided upon and executed without prosecutorial (or judicial) review. Only preventive detention must be approved by the prosecutor, who is thus in a position to place a check on both its use in principle and its

¹⁸ See Chen Ruihong, "Sifa yu minzhu: Zhongguo sifa minzhuhua ji qi pipan" (The Judicial System and Democracy: a Critique of Democratizing the Judicial System), *Susong faxue, sifa zhidu*, 1990, no. 12, p. 71.

duration. In sum, the prosecutor exercises an ineffective check on police power insofar as he has only limited means to do so, and the scope of his review is limited.¹⁹

During the preparatory stage of a trial, defendants cannot challenge the validity of constraints placed on them before an independent and impartial tribunal: they can only seek recourse by moving up the chain of command within the police or the procuratorate. Restrictive measures may therefore be abused.

However, the trial itself has undoubtedly been affected by the 1996 reform of the criminal procedure law, which is illustrative of the Chinese congress's efforts to guarantee a fair trial, particularly by reinforcing judicial independence and impartiality, as well as the balance between parties. Preliminary review before trial has been reformed to avoid prejudice; prosecution and judgment are more clearly separated; a better balance of powers has been achieved between the prosecutor and private parties; judicial neutrality is better guaranteed to the extent the procedure has been made more adversarial; the prosecutor and the parties now play the essential roles in administering proof; and the judge may now decide whether to submit serious or complex affairs to the judicial committee or judge them himself.

Normative Disorder and the Confusion of Powers

In practice, the concept of a "code" (*fadian*) does not really exist in the PRC. While in other countries one commonly refers to general texts as "codes," such as the Criminal Code or the Code of Criminal Procedure, the Chinese term *fa* translates merely the idea of a "law." The NPC's working method has consisted above all in adopting brief, vague laws: they contain only general rules followed by regulations issued by the bodies responsible for applying the law in question. The method of production for such application texts raises the issue of the confusion of the legislative, judicial and executive branches of power, as well as of the confusion of central and local powers. Sectional administrations and local circum-scriptions occasionally take advantage of this confusion to protect their own interests, which sometimes conflict with the rules promulgated by the central government.²⁰

¹⁹ See Chen Weidong and Liu Jihua, "Shei you quanli daibu ni?" (Who Has the Power to Arrest You?), *Susong faxue, sifa zhidu*, 2000, no. 12, p. 80.

²⁰ See Xu Zhiqun, "Lun wanshan difang xingfagui, guizhang de lifa jiandu jizhi" (Comments and Proposals on Reinforcing the Review of Local Regulations), *Falixue, fashixue*, 1999, no. 8, p. 29.

Application texts also raise the issue of the accessibility of norms, because they are not all published. Moreover, while they bring necessary precision and fill certain gaps in the law, they also contribute to the dispersion and fragmentation of the sources of criminal procedure, which leads to inconsistency and even contradictions,²¹ all the more so since their compliance with the law is not checked.

More generally, the compliance of inferior norms with superior norms is by no means guaranteed, even though such review of the hierarchy of norms exists in theory. According to the Constitution, the NPC can in fact check the constitutionality of a law promulgated by its Standing Committee (art. 62): as the “highest organ of state power,” it is still virtually a constituent assembly, but in reality it merely reviews the constitutionality of the laws adopted by itself.²² The NPC’s Standing Committee has the power to check the conformity with the law of the central government’s administrative regulations and local legislative regulations;²³ and the State Council is responsible for reviewing regulations adopted by administrations at various levels for conformity with national administrative regulations (art. 89). In practice, however, such review rarely occurs. Incidentally, the hierarchy of norms does not result from the Constitution of 1982, but appears in the 2001 Law on Legislation, though the issue remains limited to a circle of experts.²⁴

The Law on Administrative Litigation Procedure promulgated in 1989 gives citizens some recourse against state administrative agents, and the 1996 Law on Administrative Sanctions as well as the 2002 Law on Administrative Reconsideration complement the provisions relating to reconsideration (review to prevent or correct illegal or improper administrative acts) and judicial recourse. But while the courts may annul a “concrete decision” of the administration they deem illegal, they cannot invalidate regulations that are contrary to the law. To be sure, judicial recourse against an administrative agent or body constitutes a step towards judicialization,

²¹ See Lu Qinzong, “Guanyu woguo jiancha jiguan de sifa jieshiquan de tantao” (Analysis of the Chinese Prosecutor’s Power to Interpret the Law), *Susong faxue, sifa zhidu*, 1998, no. 11, p. 82.

²² See Wang Limin, “Yetan yi fa zhi guo” (Comments on Government by Law), *Falixue, fashixue*, 1999, no. 6, p. 25.

²³ The Standing Committee is also responsible for supervising the Constitution’s application and interpretation. The Supreme Court decision of August 13, 2001 sparked lively debate over constitutional review, but there is still no such review in the strict sense in China. See above, chapter 14, at note 57.

²⁴ See Li Buyun, “Shishi yi fa zhi guo zhanlüe lungang” (On the Strategy for Realizing the Principle of Government by Law), *Falixue, fashixue*, 2000, no. 7, p. 35.

to the extent the relationship between the administration and citizens is no longer considered a “father to son”²⁵ relationship. Indeed, administrative disputes in the courts have increased continuously, even though such cases still account for only a small percentage of all cases (see Appendix), due to resistance within the bureaucracy, which is more accustomed to obeying the CCP than to seeing its powers limited by the courts, and consequently, to the relatively late development of administrative law as an autonomous branch of law.

Judicialization

Contrary to the still very politicized, and even political, nature of law in China, efforts towards “judicialization” have been made. Such efforts concern, in particular, the status of prosecutors and their powers in criminal procedure, especially as compared to defense rights, which are still weak.

Professionalization of Prosecutors

Successive reforms have sought to constitute a genuine judicial corps. Before the entry into force of the 1995 laws on judges and prosecutors, neither judges nor prosecutors were justice “professionals,” and they had no particular status. Prosecutors were considered ordinary civil servants, and their careers—nomination, promotion, sanction and recall—were managed the same way. Like administrative cadres, members of the procuratorates all had administrative rank, even though the Organic Law of the People’s Procuratorates designated them as “prosecutor” (procurator), “deputy prosecutor,” and “clerk.”

The 1995 laws divide prosecutors and judges into twelve grades. Access to the profession of judge and prosecutor is now subject to conditions of morality, degrees and professional experience, and a specific ethic—a sign of their professionalization—has begun to emerge. Yet the low level of professional competence continues to be an issue. As mentioned above, this is because former military personnel and civil servants without legal training still can become judges and prosecutors. Nonetheless, as we also saw, both 1995 laws were modified in 2001 such that the requirements are

²⁵ Tao Kaiyuan, “Zhongguo falü jieshi zhidu xianzhuang zhi poxi” (Analysis of the Current State of the System for Interpreting the Law), *Falixue, fashixue*, 2000, no. 1, p. 24.

now stricter for becoming a judge or prosecutor, particularly for presidents of courts and prosecutors-general.

Balancing Powers between Prosecution and Defense

It cannot be emphasized enough that the prosecution's check on the court gives it a kind of superiority over both the court and the defendant. From this perspective, the court's independence and impartiality, the separation of judgment from prosecution, and the "equality of arms" may seem quite weak.

However, the rights of the accused have been strengthened by the criminal procedure reform of 1996, which affirmed the principle of the presumption of innocence, provided for earlier intervention by an attorney in the investigation phase, and increased the procedure's adversarial nature. Still, it will take more than this until the rights of private parties, which are still quite limited, are sufficient to build efficient resistance against the risk of prosecutorial abuse.

Defense rights are in fact subject to numerous restrictions. For example, investigators can listen to conversations between the defendant and his or her lawyer. Such limitations are even stronger when the investigation concerns "state secrets"—a notion that is poorly defined in Chinese law. During the investigation phase, attorneys have no right whatsoever to see the case file, to be present during police questioning, to communicate with the suspect, or to undertake their own investigation. Moreover, in actual fact the defense has only a weak influence over the issue of the case.²⁶ Court leaders and the judicial committee usually make decisions before a trial. Thus, whether the trial is held before a panel of judges or only one judge, judicial autonomy is only relative. Finally, the rate of presence of lawyers during criminal trials is still fairly low (currently between 20 and 40%, as shown in the Appendix).

There is also a problem of torture. The Code of Criminal Procedure strictly prohibits such practices to obtain confessions as well as the use of illegal means to gather evidence (art. 43), but there is no precise rule concerning the exclusion of illegally obtained evidence. This loophole has however been plugged by various application texts, which means that greater importance is now afforded procedure itself. This is a considerable

²⁶ For example, in *Zhang Jun et al.*, most of the defendants had hired two lawyers, but at trial, the judge allowed only one of each defendant's lawyers to speak and even cut them off. See *Zhongguo falü nianjian*, 2002, p. 953.

advance inasmuch as the Chinese legal tradition concentrated on substantive law and neglected procedural law to a large extent. But for cases in which the police investigate, the prosecution has no way to stay informed of possible acts of torture. In addition, even when an act of torture comes to light, only the most serious cases are prosecuted, and judges pronounce criminal sanctions only very rarely.²⁷

Moreover, the policy in criminal cases of “clemency for those who confess and severity for those who are recalcitrant” raises the important issue of the right to silence. The new code of Criminal Procedure does not recognize the right to silence: suspects must answer the questions asked by the investigator (art. 93) or be considered “recalcitrant” and severely punished.²⁸ In practice, the requirement to respond encourages relentless pursuit of a confession. It is not surprising that in such a context, confessions made under torture during the investigation are still common.

Resistance to Judicialization

Resistance to judicialization remains strong. Checking the prosecution should consist above all in supervising administrative power, but the administration is able to escape such supervision in numerous ways, including, as we shall see, extra-judicial measures of constraint, administrative detention, and substituting disciplinary sanctions for criminal sanctions in cases of abuse. In addition, the prosecution tends to apply the law in a repressive spirit, to the detriment of the protection of defense rights.

During a disciplinary investigation, the administrative body responsible for ensuring the discipline of civil servants or, if necessary, the party’s Disciplinary Commission, can order the person concerned to appear to explain her or himself at a specific time in a specific place. Since no time limit is provided, these two bodies in fact often deprive people of their liberty for an indefinite period, which is contrary to fundamental principles, in particular the principle of legality, considering especially that such extra-judicial constraints escape prosecutorial supervision.

²⁷ See *Du Peiwu*. A police officer at the time, Du Peiwu was suspected of having killed two other officers on April 22, 1998. Though torture was proven to have been used to obtain a confession, the two officers responsible for it were sentenced to only a suspended one-year prison term and eighteen months in prison, suspended with two years of probation, respectively (www.epochtimes.com, July 20, 2001).

²⁸ Thus in *Liu Tingwei*, the defendant remained silent during the investigation against him for murder and was quickly sentenced to death by the intermediate court of Chongqing. See www.chinacourt.org (July 18, 2003).

Chinese criminal law covers only serious offenses called *fanzui* (corresponding to crimes and misdemeanors in the French Criminal Code, for example). Minor offenses are considered administrative infractions and are subject to administrative sanctions only. Two administrative detention measures warrant particular attention due to their absence, in fact and in law, of prosecutorial supervision: detention for reeducation through labor (*laodong jiaoyang*) and detention for investigation purposes (*shourong shencha*).

Reeducation through labor is a coercive administrative measure. Officially, such measures are decided by reeducation-through-labor management committees within local governments; but in practice, the police generally make the decision. The maximum length of this type of detention is three years, but it can be extended to four. Loss of liberty in this case is not ordered by a court, and defense rights are further weakened by the lack of prosecutorial supervision. Moreover, the texts are very vague, giving the administrative authorities great latitude, and the rules promulgated by different administrative authorities often contradict each other, either from one text to the other or from one region to the other.

Detention for investigative purposes is an administrative measure used by the police to protect social order. It generally lasts two months, but may be longer when the investigation concerns a person with no name, address, or avowed identity, as it is calculated only from the moment the person's identity is established. Before 1996, there was no prosecutorial supervision of such detention, which led to frequent abuses; but the 1996 reform of criminal procedure incorporated this type of detention into the criminal law, which has undeniably contributed to judicializing detention measures ordered by administrative authorities.²⁹

In addition, these two types of administrative detention were originally established by simple administrative regulations. By providing that measures involving a deprivation of liberty must be provided for by statute, the 1996 law on administrative sanctions thus raised doubts as to their validity. Despite this contradiction, these questionable rules remain in force. Moreover, when an administrative or CCP cadre violates an administrative or party disciplinary rule and simultaneously commits a criminal offense, the supervisory body or the party's Disciplinary Commission may simply order a disciplinary sanction. While such sanctions may include

²⁹ See Ma Junju and Nie Dezong, "Dangqian woguo sifa zhidu cunzai de wenti ji gajin duice" (Current Problems with the Chinese Judicial System and Proposals for Improvement), *Susong faxue, sifa zhidu*, 1999, no. 2, p. 64.

removing the person from office, such people escape the criminal justice system. As already mentioned, there is in effect a “two-track” system.

Repressive Application of the Law

It is not enough that the Constitution or the law proclaims fundamental principles of human rights for these to be effectively respected: human rights are protected only on paper if the law is not applied. While the Code expressly provides that the prosecution must investigate both for and against the defendant, in practice, prosecutors tend to concentrate on inculpatory evidence and do not mention exculpatory elements to the accused, and may even hinder the production of such evidence at trial.³⁰

Moreover, the bodies responsible for the investigation systematically use the most restrictive measures of constraint and prolong detention as long as possible. Exceptional delays are requested abusively, without satisfying the legal requirements justifying them; and although the prosecution does possess the right to appeal or make an extraordinary plea, it generally uses it to *increase* the defendant’s penalty. The very high rate of approval of preventive detention illustrates the repressive application of the law by prosecutors (see the Appendix).

In his report to the 15th CCP Congress in 1997, Jiang Zemin associated the reform of the political system as well as democracy and legality with the protection of human rights for the first time ever. Can such declarations be interpreted as meaning that the concept of a country “governed by law” now includes the protection of human rights? It is difficult to provide a clear answer.³¹

On the one hand, it is a fact that China’s long-term goal is to institute the rule of law. The incomplete realization of this goal can be explained by various factors, but the main reason is no doubt the persistent imbalance of powers between the state and individuals, as well as the individual’s place in Chinese society. On the other hand, the rules provided by the law have not really become standards for citizens’ conduct. Perhaps tradition does not foster respect for the law; or perhaps the two systems interfere with each other, creating disturbances. Such discrepancies cer-

³⁰ In *Du Peiwu* (see note 27), the prosecutor assigned to the prison had taken four photographs of Du Peiwu’s injuries, showing he had been subjected to torture, but did not produce them at trial.

³¹ See Li Buyun and Zhang Zhiming, “Kua shiji de mubiao: yi fa zhi guo, jianshe shehui-zhuyi fazhi guojia” (The Goal of the Beginning of the Next Century: Government by Law and the Institution of a Socialist Rule of Law), *Falixue, fashixue*, no. 2, 1998, p. 11.

tainly would be worth investigating more deeply. Finally, building the rule of law is done under the guidance of the Chinese Communist Party. The process, which is under both internal and external pressure, particularly in the economic area, is about to enter a new stage of reform of the political system. One day or another, the party's role as leader may therefore be called into question as an obstacle to instituting the rule of law. One may wonder if the CCP will be sufficiently motivated to restrict its own powers—that is, if it will have both the courage and the means.

Reforming the Profession of Attorney

As we saw, efforts to rehabilitate the law since 1979 have fostered the reappearance and progressive consolidation of the profession of attorney. This process results primarily from the following three steps:

- The profession was reestablished by an interim regulation on attorneys promulgated by the NPC's Standing Committee on August 26, 1980;
- Its development was encouraged by the May 15, 1996 Law on Attorneys (revised on December 29, 2002 and amended on October 28, 2007);
- Attorneys were given greater powers by the Code of Administrative Litigation Procedure of April 4, 1989, the law on administrative sanctions of March 27, 1996, the New Code of Criminal Procedure of March 17, 1996, and the administrative reconsideration law of April 29, 1999.

Resistance to consolidating the profession of attorney nonetheless remains strong—an illustration of the still highly politicized nature of Chinese justice. Let us illustrate this two-fold movement below, beginning with the progress made by the rule of law.

Improving the Status of Attorneys

The improved status of attorneys is illustrated by both the organization of the profession and the powers granted attorneys during proceedings.

Organization of the Profession

According to the interim regulation on attorneys of August 26, 1980, attorneys are legal servants “of the state.” Sixteen years later, the 1996 Law on Attorneys redefined them as legal workers “in the service of society,” which undeniably constitutes an important change.

Until 2008, there were three types of law firms, which had a state, collective, or individual nature respectively: they were the firms with state investment, the cooperative firms, and the partnerships. The proportion between the state type of firm and western-style partnerships has reversed over the last decade: in late 1997, there were 8,384 law firms in China, 65.8% of which were firms with state investment, 12.1% were cooperative, and 22.1% were partnerships.³² Statistics from late June 2002 indicate that China had roughly 10,000 law firms, 6,300 of which were partnerships, 1,500 were cooperatives and 2,200 were firms with state investment, 700 of which were in the process of being transformed into partnerships. Partnerships thus now clearly constitute the majority.³³ In 2007, there were more than 13,000 law firms, more than 70% of which (more than 9,200 firms) were partnerships.³⁴ On June 1, 2008, the establishment of branches of law firms of more than twenty lawyers became possible, and opening an individual office was authorized for the first time.³⁵

One of the problems yet to be resolved is to ensure attorneys have adequate legal training. As already discussed, a single national competitive examination was instituted in late 2001 for attorneys, prosecutors and judges. While candidates must have completed at least four years of advanced studies (though not necessarily in the area of law), in 2002 close to half of practicing attorneys (48.1%) had received no more than three years of training, while those holding a *benke* (four-year) degree (34.8%), a Master's degree (4.8%) or a doctorate (0.3%) were still in the minority.³⁶ The government's goal for the end of 2006 was for all attorneys at least forty-five years old to hold at least a *benke* degree, and for the number of attorneys holding a Master's degree to be quadrupled.³⁷

In view of its entry into the WTO, China had made commitments respecting the opening up of its legal services. This essentially meant that during the first year following actual entry into the WTO, restrictions on

³² See Zeng Xianyi and Chen Weidong, *Zhongguo lüshi xue* (Studies on Attorneys in China) (Beijing: Zhongguo renmin daxue chubanshe, 2000), pp. 153–155.

³³ See Liu Guiming, "Zhongguo lüshiye mianlin shi da wenti" (Ten Problems Facing the Profession of Attorney in China), *Zhongguo lüshi*, 2002, no. 11, and www.acla.org.cn, November 19, 2002.

³⁴ See http://news.xinhuanet.com/newscenter/2007-10/28/content_6966420.htm.

³⁵ See the amendment of the law on attorneys adopted October 28, 2007 by the Standing Committee of the NPC.

³⁶ See "China's Entry into the WTO and the Profession of Attorney in China: Interview with the Minister of Justice, Zhang Fuceng," *Xuexi shibao*, no. 127, March 25, 2002.

³⁷ See "Ministry of Justice Five-Year Plan (2002–2006) for Developing the Profession of Attorney in China," *Zhongguo lüshi*, 2002, no. 9, www.acla.org.cn, August 12, 2002.

the number and location of offices representing foreign firms would be lifted, and such firms would be enabled to directly establish long-term cooperation with Chinese firms by concluding representation contracts to treat legal matters. By October 2002, ninety-six foreign firms had opened a representative office in China, and in January 2003, eleven foreign firms were authorized to open a second office. In 2008, there were 143 foreign firms having representative offices in China, among which thirty-two have opened a second office, and two have opened a third.

Though still very limited, this opening up should eventually encourage Chinese firms to reform their management and operations in order to adapt to international practices. Thus, Chinese firms now tend to combine and specialize, and some large firms are trying to operate on the international level, either alone, by specializing in a particular area of law, or by cooperating with American or European firms.

Another consequence of China's entry into the WTO was the inclusion in the Ministry of Justice's Five-Year Plan 2002–2006 of a program entitled "government lawyers," with the view of assisting the administration at various levels of decision making, helping improve the administration's quality, and promoting the principle of "government by law." This program was first begun on a trial basis in Guangdong province. The attorneys in question work only for the government, they are granted the status of civil servant and are paid by the state. Similarly, business lawyers have appeared, handling the internal legal affairs of both state and private companies. Various studies are still underway to integrate these new variations and reform the Law on Attorneys.

Procedural Powers Granted Attorneys

Two particularly sensitive areas must be mentioned here: criminal procedure, and administrative procedure.

As far as criminal procedure is concerned, the first thing to note is the new place granted the victim following the 1996 reform of the Code of Criminal Procedure. The victim can not only seek to have the procuratorate start prosecuting the accused, she or he may also directly file a complaint with the court in the event the procuratorate decides not to prosecute. In addition, the Code gives victims the role of a party in the criminal trial, which was not the case previously. Victims are thus in a stronger position, including at trial. They may also appeal against the court's decision. Such changes increase the opportunities for victims' attorneys to represent them during the different stages of the procedure.

But the attorney's essential role is to defend the accused. Because the new Code of Criminal Procedure introduced the principle of the presumption of innocence, attorneys now intervene in the investigation phase to assist the suspect,³⁸ and they may intervene as defense attorney during the examination undertaken by the procuratorate to determine whether or not to prosecute. This is also an important change, because before the reform attorneys had no right to intervene during that phase, and suspects thus received no assistance from a defense attorney until the judgment phase; that is, seven days (sometimes only three) before trial at the earliest. Finally, the judgment phase is now more oral and adversarial than it was before, which should thus reduce the file's influence on the judge before trial, as well as the risks of a judgment decided beforehand.³⁹

The New Code of Criminal Procedure also instituted a new trial method, which combines the inquisitory and accusatory models. The attorney's function is thus reinforced in challenging evidence and in debates with the prosecution. Overall, though the administrative authority and the public security bodies still have significant punitive powers—fines, deprivation of liberty for up to fifteen days, restriction of liberty for up to four years—recent texts tend to strengthen judicial guarantees.

The Administrative Procedure Law of April 4, 1989 had already given Chinese judges the power to review administrative acts. The Law on Administrative Sanctions of March 17, 1996 introduced, at least in theory, the right to a fair trial, defense rights, and the right to appeal, and it gives parties the right to have an attorney to represent them and defend their rights, to ask for review, and to start administrative proceedings in a people's court. The 1999 Administrative Reconsideration Law then provided complementary rules on administrative appeals, above all in cases of administrative sanctions. And on July 25, 2002, the Supreme People's Court promulgated a set of "judicial rules relating to certain problems concerning evidence in administrative trials" (*zuigao renmin fayuan guanyu xingzheng susong zhengju ruogan wenti de guiding*). These rules explicitly provide for presenting and challenging evidence and impose certain obligations on the administration, thereby reinforcing citizens' rights.

³⁸ During this phase, however, attorneys have none of the rights of a defense attorney, such as the right of access to the case file, the right to investigate, and the right to request evidence be seized.

³⁹ Chen Guangzhong, "Perspectives for Reforming Chinese Criminal Procedure Law," *Zhongguo lishi*, 1994, no. 4, p. 795.

Political Resistance

There is still strong political resistance to such progress, however, both with respect to the profession of attorney itself and the implementation of procedural rules.

Attorney: A Profession of Limited Autonomy

As explained below, politics directly influence the government's role in managing the profession of attorney, and indirectly affect the risks attorneys run.

When the profession of attorney was reestablished in 1980, the Ministry of Justice and its local branches were omnipresent in its management. To be sure, professional bar associations were established in 1986 to contribute to managing the profession and gave it a certain amount of autonomy.⁴⁰ But the 1996 Law on Attorneys officially established a regime of joint management by Ministry of Justice offices and bar associations. The law does not clearly set out how tasks are to be shared, and since the Ministry of Justice has a right of preliminary review over all important measures and decisions to be taken by such associations' general assemblies, the professional council, and the associations' presidents,⁴¹ their autonomy remains limited.

In practice, some provincial bar associations are headquartered in the Ministry of Justice's provincial office, and the professional council's personnel includes Ministry of Justice functionaries: this is called "the same team working under two nameplates." But to function properly, the joint management regime would require just the opposite: a clear separation of both personnel and tasks between the ministry and the associations—a separation that was in theory provided for in the ministry's 2002–2006 five-year plan.

The Ministry of Justice at least clarified the sharing of tasks when it reasserted before the 5th national convention of Chinese lawyers in May 2002 that the ministry's offices would continue to control access to the profession and set regulations concerning its exercise, supervise bar associations and the profession in general, and would also ensure coordination between the profession and the "competent authorities." For their

⁴⁰ The All China Lawyers Association (*Zhonghua lishi xiehui*) held its first convention in July 1986.

⁴¹ See Duan Zhengkun, "Jinyibu wanshan liangjitehe guanli tizhi" (Continuing to Improve the Joint Management System), *Zhongguo lishi*, 2002, no. 4.

part, the associations were assigned the tasks of establishing professional standards, training lawyers, handling the daily management of the profession and law firms, imposing disciplinary sanctions in the event ethical rules are violated, protecting attorneys' rights, and organizing international exchanges.⁴²

But there is also the issue, disturbing for the profession, of the risks defense attorneys run, mainly in criminal cases, as there has in fact been an increase in practices that violate their rights. For example, they are exposed to detention or illegal arrest, being chased from court, or being subjected to degrading treatment by judges or the adverse party.⁴³ Such abuse has been reported in a large proportion of cases (53%),⁴⁴ and its consequence has been to reduce attorney intervention in criminal cases: attorneys currently intervene in only 30% of criminal cases decided by the courts.⁴⁵

But one of the major reasons for these problems is legal. Unlike in any other country, the Chinese Penal Code, the New Code of Criminal Procedure and the 1996 Law on Attorneys all establish offenses involving attorneys, with penalties of up to seven years imprisonment.⁴⁶ For example, Penal Code article 306 defines the offense of destroying or falsifying evidence in a criminal trial by the defense attorney or his or her representatives. This article has been highly criticized by attorneys, who consider it to have instituted discrimination against the profession and criminalized professional ethics.⁴⁷ In any case, since 1998 committees to protect law-

⁴² See "The Birth of the Law on Attorneys—a Great Celebration for Chinese Lawyers," *Zhongguo lishi*, 1996, no. 7.

⁴³ For example, in March 1995, a lawyer from Hebei province working on an economic dispute was kidnapped and held hostage by the adverse party. Illegally held for 120 days, he was finally released after the local government made several attempts to help him. The same year, an attorney from Shanxi handling a divorce was violently beaten by the adverse party when leaving his office and lost an eye. In Jilin province, another lawyer was beaten in 1995, this time by court personnel after he had formed a different legal opinion concerning a file. He was placed in judicial detention for fifteen days on the pretext that he was obstructing justice. See Tian Wenchang, *Xingshi bianhu xue* (Defense Science in Criminal Cases) (Beijing: Qunzhong chubanshe, 2001), pp. 175–176.

⁴⁴ See All China Lawyers Association, "Report on Protecting Lawyers' Rights," May 14, 2002 (www.acla.org.cn).

⁴⁵ See Tian Wenchang, "Minutes of the Roundtable on Criminal Defense Following the New Penal Code's Entry into Force," *Zhongguo lishi*, 1999, no. 1, p. 24.

⁴⁶ See Zhu Hongchao, "Protecting Attorneys is a Long and Exacting Task," *Zhongguo lishi*, 1998, no. 9, p. 7.

⁴⁷ See Chen Ruihua, "Lishi weizheng zui: cun yu fei?" (The Offense of Falsifying Evidence by an Attorney: Should it be Kept or Eliminated?), http://article.chinalawinfo.com/article/user/article_display.asp?ArticleID=914. In a 1996 case in Hunan, the lawyer Liu Zhengqing, attorney for the defense in a criminal corruption case who tried to prove

yers' rights have been created within national and local bar associations. Between 1999 and 2001, the national bar association thus received requests to protect 79 lawyers, which was in fact a drop from 1997 and 1998.⁴⁸

Implementing Procedural Rules

Of concern here are the two particularly sensitive areas of criminal and administrative proceedings.

In criminal trials, attorneys are faced with two major problems. First, while the New Code of Criminal Procedure provides for an interview between the accused and his or her attorney, the first application texts, drafted by the Supreme People's Procuratorate and the Ministry of Public Security, are restrictively interpreted to enable repressive institutions to decide at their discretion on the date, place, number and length of any attorney-client meetings,⁴⁹ which in some cases are limited to thirty minutes. In addition, some investigative bodies wanted to broaden the scope of the concept of state secrets and use it as a basis to refuse such meetings. Above all, in cases investigated directly by the prosecution, attorney-client meetings are almost always impossible, the prosecution alleging the "special" nature of the economic crimes committed, or "state secrets," or "internal prosecutorial measures."⁵⁰

his client's innocence on appeal, was accused by the prosecution of suborning witnesses after one of the witnesses made different statements than he had on first instance. Liu was arrested in November 1997, and after numerous investigations the prosecution finally withdrew its accusation in May 1998 and he was released. In the 1998 case *Zhang Yaoxi*, in Zhejiang, after trying to prove the amount his client stole was less than the court claimed, the defense attorney was accused of the offense provided for by Penal Code art. 306 and the court of first instance sentenced him to one year in prison. The attorney appealed and was found not guilty: the original trial had in fact been disturbed by the fact that the attorney had filed a witness statement that did not comply with the facts initially retained, but the appellate court held there was insufficient proof of a manifest desire to falsify evidence. See Wang Gong, *Zhongguo lüshi she'an shilu* (True Tales of Attorneys Being Accused in China) (Beijing: Qunzhong chubanshe, 2001), p. 105 ff.

⁴⁸ Prosecution of attorneys accused of destroying or falsifying evidence, embezzlement and fraud constitute 27% of the files received by the national bar association. In nine of these cases, the attorney's innocence was recognized; in six the attorneys were released on bail; in two cases a complementary investigation was requested; and in ten, the case was transmitted to the Supreme People's Court, the superior procuratorate, and the Ministry of Justice. In addition, fifty-two files were sent to local associations for investigation. See All China Lawyers Association, "Report on Protecting Lawyers' Rights," May 14, 2002.

⁴⁹ See article 130 of the "Interim Regulations on Applying the New Code of Criminal Procedure by the People's Procuratorates," adopted by the Supreme People's Procuratorate on January 15, 1997; article 11 of the "Ministry of Public Security Provisions on Lawyers' Activities During Criminal Proceedings" of December 20, 1996.

⁵⁰ Tian, *Xingshi bianhu xue*, p. 165.

Some of these problems were resolved with the 1998 adoption of a joint text by the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security, the Ministry of State Security, the Ministry of Justice, and the Legislative Committee of the NPC's Standing Committee. Entitled "Measures relative to certain issues of applying the new Code of Criminal Procedure," this text stipulates that if an attorney wants to meet with a client, the investigative bodies must organize such a meeting within forty-eight hours following the request. However, if the case is serious and concerns organizing or directing crimes related to the mafia, terrorism, smuggling, drugs, corruption or embezzlement, or participation in any such crimes, the authorities have five days to organize the meeting. While the investigative bodies cannot invoke secrets to refuse to grant the attorney a meeting with the suspect, the fact that their personnel is present during meetings with a suspect who is being detained remains a problem. Article 96 of the New Code of Criminal Procedure provides that depending on the circumstances and needs of the case, the personnel responsible for the investigation may be present during attorney-client interviews, and in certain cities it may even make an audiovisual recording of them,⁵¹ which is contrary to point 8 of the "Basic Principles on the Role of Lawyers" adopted at the Eighth United Nations Congress for Crime Prevention and the Treatment of the Offender (held in Havana August 27–September 7, 1990).⁵² In practice, problems related to the frequency, length and place of such interviews have not disappeared, and attorneys frequently encounter obstacles and are subject to complex formalities when they request to see a client in detention. In some regions, for example, the attorney must bring "five different papers" and submit an outline of the proposed interview.⁵³

⁵¹ See Chen Guangzhong, *Xingshi susongfa shishi wenti yanjiu* (Studies of Problems with Applying the Code of Criminal Procedure) (Beijing: Zhongguo fazhi chubanshe, 2000), p. 31.

⁵² Point 8 stipulates that "All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials."

⁵³ The "five papers" are the lawyer's diploma, professional license, power of attorney, a letter of recommendation from his or her firm, and the request for an interview examined and approved by the investigative body. Above all, the request for an interview must be approved by the heads of various levels. A lawyer in Jilin province thus had to wait forty-six days to receive approval for an interview. See Tian, *Xingshi bianhu xue*, pp. 165–166.

The second major difficulty encountered by attorneys in criminal cases is access to the case file. According to article 36 of the New Code of Criminal Procedure, once the procuratorate begins prosecution, attorneys have the right to consult, copy or photocopy the case file (procedural acts or expert witness reports, for example) from the very day when prosecution is initiated by the procuratorate. Article 150 provides that the file the procuratorate transmits to the court to begin prosecution must contain documents and other elements clearly indicating the facts, a list of evidence, a list of witnesses, and photocopies or photographs of the principal pieces of evidence.

However, the “Measures relative to certain issues of applying the New Code of Criminal Procedure” leave the presentation of such evidence rather vague, and subject to the prosecutor’s discretion. Previously, though attorneys could intervene only during a trial, they could consult the entire case file before the trial. The new regime now allows them to intervene during the investigation, but in exchange, they no longer have access to the entire file. In other words, they no longer have access to all the elements on which the charges are based. In fact, the procuratorate frequently does not transmit even the documents stipulated in the “Measures”⁵⁴ and excludes important elements of proof from the file on the pretext they do not constitute principal pieces of evidence.⁵⁵ It is therefore difficult for defense attorneys to learn of all the evidence before trial.

Finally, attorneys have only a limited right to investigate and collect evidence by examining the criminal proceedings begun by the procuratorate. Their investigative powers are very weak compared to those of state bodies, because exercising them depends on the consent of the witnesses and parties to the case, or on the court or the prosecutor: if the suspect is opposed to such an investigation, the attorney cannot investigate; and to gather evidence from victims, defense attorneys must obtain not only the victim’s agreement, but also that of the prosecutor or the court. In effect, it is almost impossible for defense attorneys to gather such evidence.⁵⁶

Administrative proceedings pose almost as many problems for attorneys as criminal proceedings. The state’s violation of their rights is in fact

⁵⁴ For example, in Fujian in 1999, the procuratorate accused a certain Mr. Chen of embezzlement. It transmitted only the list of evidence to the court and did not allow Chen’s attorney to consult the entire file. The attorney’s letter of protest to the procuratorate had no effect. See *id.*, pp. 353–354.

⁵⁵ See Chen, *Xingshi susongfa shishi wenti yanjiu*, p. 41.

⁵⁶ See *Id.*, p. 40.

fairly widespread. Consequently, despite an increasing number of administrative disputes, few lawyers accept such cases because they fear abuses of power and reprisals from local functionaries.⁵⁷ There are also specific problems with measures such as administrative detention for disturbing the peace or reeducation through labor.

Administrative detention for disturbing the peace may last fifteen days, but no text provides for attorney intervention. According to the Law on Administrative Procedure, persons subject to such measures may engage judicial proceedings only after having filed a complaint with upper-level public security authorities, and may benefit from an attorney's assistance only at this stage, when it is already too late.

Reeducation through labor was indirectly called into question in 1996 by the Law on Administrative Sanctions (see above). While this law does not directly mention reeducation through labor, it stipulates that only laws may provide for administrative sanctions restricting personal freedom [art. 9(2)]. No regulatory text provides for placement in a reeducation-through-labor camp, which may last four years. Such measures are thus of dubious legitimacy, especially since they are not ordered by courts and are therefore subject to no procedural guarantees. In any case, persons subject to reeducation through labor have no right to assistance of counsel.

As long as this administrative sanction continues to exist in practice, at the very least, such assistance should be guaranteed. In fact, article 2 of the "Supreme People's Court Opinion on Problems in Applying the Administrative Procedure Code" (1996) provides that citizens subject to reeducation through labor may appeal to a court and be assisted by an attorney; but here again, the attorney's assistance comes late in the procedure, and its effects are necessarily limited because appeal does not suspend execution of the sanction.

The profession of attorney in China may therefore not be compared to a profession that, in the West, is based on several centuries of practice. It has, however, undergone real development since its reestablishment in 1980, and this development marks a certain rapprochement with the West. Changes have been primarily quantitative, as the number of Chinese lawyers continues to increase; but their professionalization has also involved qualitative changes, such as the cooperation, specialization and internationalization of Chinese law firms, which may produce either positive results by ensuring a better guarantee of the rule of law,

⁵⁷ See Zhu, "Protecting Attorneys is a Long and Exacting Task," p. 11.

or pernicious results, such as corporatism or the wheeling and dealing of “law merchants.”⁵⁸

Indeed, the risk of wheeling and dealing has already made itself felt, especially in large and medium-sized cities, or in coastal cities where the economy is more developed and the profession of attorney has become synonymous with prestige and wealth. To constitute a clientele, some attorneys resort to various measures of unfair competition, such as taking advantage of personal relations during a trial, reducing fees below the going rate, or paying commissions to those who bring them cases.⁵⁹ The “Measures Against Unfair Competition in the Profession of Attorney” of February 20, 1995 provide only a vague definition of such practices and an ineffective system of sanctions.

That being said, the risk of such practices must not overshadow the positive effects professionalizing lawyers has had on instituting the rule of law. As mentioned above, bar associations began forming throughout the country in 1986, and every lawyer must be a member of their local bar association as well as of the national association. In addition, over the last decade such associations have begun playing a role in protecting attorneys’ rights by creating committees for this purpose at each level, and have contributed to establishing professional and disciplinary rules. More recently, they obtained the right to wear a professional costume: after judges and prosecutors replaced their uniforms and military-style caps with new outfits, the national bar association received approval from the Ministry of Justice for lawyers to wear robes, which they must wear to trial since January 1, 2003. Inspired by the West, this black robe symbolizes the desire to heighten the dignity of justice and improve the lawyer’s image.

Prospects for Change

Adapting World Trade Organization Rules

As we saw regarding the reform of judicial recruitment and the transformations the profession of attorney has undergone, the requirements

⁵⁸ Yves Dezalay, *Marchands de droit* (Paris: Fayard 1992); *La mondialisation des guerres de palais* (Paris: Seuil, 2002).

⁵⁹ See Deng Xiaoxia, “Dui lüshi hangye buzhengdang jingzheng xingwei de falü sikao” (Legal Thoughts on Problems of Unfair Competition Among Attorneys), www.acla.org.cn, March 5, 2002.

imposed by China's accession to the WTO have acted, and continue to act, as a positive constraint on the Chinese legal system.⁶⁰ But this long-term effort has been accompanied by a shorter-term adaptation effort designed to manage the transition as well as possible—or as with as little damage as possible—while waiting for a new generation of legal professionals to be completely trained.

In early 2002, the Supreme People's Court thus announced the creation of a new special court under its direct supervision to try cases related to the application of WTO rules. And since March 1, 2002, the Supreme Court has restricted the power to hear Sino-foreign (or Sino-Hong Kong) commercial disputes to a limited number of intermediate courts located in large cities and provincial capitals and a handful of lower-level courts, such as the one at Shenzhen, thus returning to the procedure that existed from 1979 to 1991.⁶¹

This prudent decision shows how much China intends to become a good WTO student. But at the same time, it highlights the judicial system's persistent lack of competence. The concentration of the best jurists in these courts risks depriving other jurisdictions, and thus Chinese citizens, of the competence they sorely need. Granted, two hundred judges were selected in 2001 to follow intensive training abroad or in Hong Kong, and by early 2002 one hundred of them had already taken up new posts. Also in 2002, after receiving training at the Law School of the People's University of China in Beijing, 8,500 judges were qualified to decide cases concerning WTO rules. But these figures appear terribly low when compared to the country's size and needs.⁶² Xiao Yang, the president of the Supreme Court, admitted as much quite frankly before the NPC in March 2002, essentially saying that since 80% of legal cases were decided by low-level courts, at least five years would be needed to significantly improve the level of competence of judges and prosecutors.⁶³

And finally, let us not forget that in 2001 mediation committees, of which there are roughly one million, had still resolved close to five million civil disputes (versus nine million in 1987).⁶⁴ These committees, which are

⁶⁰ See above, Leïla Choukroune, chapter 15.

⁶¹ See *South China Morning Post*, February 8, 2002, p. 6; *Hong Kong iMail*, February 27, 2002, p. 11; *China Daily*, March 19, 2002, p. 11.

⁶² See *Hong Kong iMail*, March 11, 2002, p. 7.

⁶³ See *South China Morning Post*, March 13, 2002, p. 8; *Wenhuibao* (Hong Kong), March 13, 2002, p. A4.

⁶⁴ See *Zhongguo tongji nianjian 2002*, pp. 791, 793; *Zhongguo tongji nianjian 1995*, pp. 681, 683.

supervised by local governments and village chiefs, continue to exercise a parallel administrative justice which, though reminiscent of the old French system of *justice de paix* inasmuch as it tries to achieve “peace through equity” (*gongping*), is far from being independent.⁶⁵

What Structural Impact?

Undeniably, progressive improvement in the education and legal training of legal professionals weighs, and will weigh more in the future, on the country’s political and administrative structures. The mere increase in the number of judicial decisions makes their systematic review by the Communist party’s political and judicial committees (*zhengfa weiyuanhui*)—which direct and coordinate police and judicial activities at every level, as we have already seen—more and more impossible. This is especially true because of the increasingly specialized and technical nature of the decisions made day after day by judges and prosecutors: the political control exerted by the political and judicial committees can only become more and more symbolic. At the same time, local courts are more and more frequently called on to follow the Supreme People’s Court’s recommendations. The latter’s efforts to interpret and explain laws, as well as its case law (often established on the basis of first-instance or appellate judgments which it sets up as models), thus have increasing influence on lower-level decisions. And above all, the new status granted to attorneys by the 1996 law (revised in 2002) has given them a level of autonomy—even though they continue to be supervised by the Ministry of Justice—that has forced judges and prosecutors to slowly change their behavior and more readily acknowledge the existence of defense rights.

Yet one cannot ignore the not only political, but also economic and financial stakes of every case involving contradictory or conflicting industrial or commercial interests. This is particularly the case with the majority of Sino-foreign disputes. In this respect, one may wonder whether judicial and prosecutorial professionalism will be enough by itself to overcome, or at least progressively reduce, the serious systemic problems facing the judicial institution.

⁶⁵ See *Disputes au village chinois: formes du juste et recompositions locales des espaces normatifs*, ed. Isabelle Thireau and Wang Hansheng (Paris: Éditions de la Maison des Sciences de l’Homme, 2001), pp. 23–26; Isabelle Thireau and Hua Linshan, “Le sens du juste en Chine. En quête d’un nouveau droit du travail,” *Annales, Histoire, Sciences Sociales*, 2001, no. 6, pp. 1283–1312.

These problems have been discussed in what precedes: in addition to interference from the party and its political and judicial committees, which are directly supervised by the party secretary of the administrative circumscription where they are located, local judicial protectionism, and of course corruption, also persist. In many respects, the judicial institution is neither independent nor vertically integrated enough to contend with such “horizontal” pressures. The power with which local party leaders are endowed to coordinate all the administrative institutions, including the procuratorates and courts, still prevails to a large extent over instructions from higher levels in the judicial hierarchy. For example, the fact that judges and prosecutors are paid by local governments (the latter being headed by the party committee’s second in command) places judicial personnel, whatever their professional qualifications, in a delicate position. Despite increasingly severe criticism of this method of organization, it does not seem that it will be changed in the foreseeable future. More than the party membership of the vast majority of judges and prosecutors, their membership in the “local development community” that each district (*xian*) or municipality (*shi*) constitutes restricts their independence and professionalism: they are civil servants, all too often natives of the province in which they exercise their profession, and being poorly paid, they are prey to various horizontal pressures that are difficult to resist, whatever their legal qualification. Attorneys also play this local game, using various means, including the least reputable (such as taking advantage of their relations or *guanxi*, or making bribes), to foster their clients’ interests.

The weight of this environment has paradoxically led the Beijing authorities to maintain, and even reinforce, the political control exerted by the party’s institutions on the judicial system: in China, only party channels can guarantee the implementation of judicial policies and the application of central instructions. As far as the struggle against corruption—including the corruption of judges and prosecutors—is concerned, this means concentrating all power in the hands of the party’s Disciplinary Commission. In other words, for numerous Chinese leaders, any increase in judicial independence will foster local judicial protectionism.

How can the Chinese judicial system break free of this vicious circle? What role can legal professionals play? The overall situation will no doubt remain uneven and with many contrasts. In major cities and in the most developed regions (such as the Guangdong, Jiangsu and Zhejiang), judges and prosecutors working under the watchful eye of not only the central

government but also, and more and more, of attorneys and of China's foreign partners will more readily base their decisions on the law as it is explained by the Supreme Court; but for their colleagues in less developed or more removed regions it will be ever more difficult to follow this model.

Finally, one must not think the decisions, instructions or legal interpretations of Beijing or the Supreme Court are free of all political and economic considerations. As is well known, judgments in favor of major foreign companies such as Walt Disney and Microsoft have been both exemplary and emptied of a large part of their financial implications.⁶⁶ Such "judicial nationalism" may be easier to spot than local judicial protectionism, but it is not necessarily less powerful or resistant.

The renaissance of the legal profession and the training of a new generation of judges, prosecutors and attorneys have been essential factors in modernizing Chinese law—a modernization that will clearly continue to take shape along extremely uneven geographical and administrative lines. Similarly, the transformation of the economy and society has contributed to creating new strengths, and consequently new obstacles, which both the government and the judicial institution will have to take into account. China's internationalization, the globalization of its economy and the external pressure exercised not only by the WTO, but also by all the country's foreign partners, are such as to reduce the gulf between the legal systems and legal professionals in China and the West. Nonetheless, while enlarging the pool of competence is essential, competence alone will not resolve the problems and archaic structures confronting the Chinese legal system. Only true political reform—that is, democratizing the regime—can change the institutional framework in which judges, prosecutors and attorneys evolve and lay the foundations for instituting the rule of law. As everyone knows, such political reform is not on the agenda, despite the desire for change displayed by President Hu Jintao and his associates after they assumed power. In the interim, legal professionals will continue to try, each in their own way, to break through the walls that constrain their independence in making decisions and broaden the powers they gain through their mastery of law.

⁶⁶ The financial damages awarded these companies by the Court were particularly modest—that is, symbolic.

*Appendix**Data*

Evolution of the Number of Administrative Cases Brought before the Courts

| Year | 1990 | 1992 | 1997 | 2001 | 2002 | 2003 | 2004 | 2005 | 2006 | 2007 |
|-----------------|--------|--------|--------|---------|---------|---------|--------|--------|--------|----------------------|
| Number of Cases | 14,929 | 27,125 | 90,561 | 100,921 | 121,008 | 114,896 | 92,192 | 95,707 | 95,052 | Approximately 72,000 |

(Source: Supreme People's Court annual activity reports for 1991, 1993, 1998, 2002–2007)

The number of cases brought between 2003 and 2007 was approximately 470,000.

Percentage of Cases Decided by Courts of First Instance (2005)

| Total Cases | Criminal | Civil | Administrative |
|-------------|----------|-----------|----------------|
| 5,178,838 | 701,379 | 4,382,407 | 95,707 |
| 100% | 13.54% | 84.62% | 1.84% |

(Source: Supreme People's Court annual activity report for 2006)

Percentage of Cases Decided by Courts of First Instance (2003–2007)

| Total Cases | Criminal | Civil | Administrative |
|-------------|-----------|------------|----------------|
| 26,000,000 | 3,385,000 | 22,145,000 | 470,000 |
| 100% | 13.02% | 85.17% | 1.81% |

(Source: Supreme People's Court annual activity report for 2006)

Level of University Education of Judges Serving on Local Courts

| Degree | Higher than a Four-Year Degree | Lower than a Four-Year Degree |
|--------|--------------------------------|-------------------------------|
| 1998 | Approximately 20% | Approximately 80% |
| 2003 | Approximately 41% | Approximately 59% |

(Source: www.news.xinhanet.com, March 11, 2004)

The June 30, 2001 Law on Judges requires judges to have at least a *benke* (four-year) degree.

Presence of Attorneys in Criminal Trials (1998)

| Total Criminal Cases | Cases in which a Private Attorney was Hired | Cases in which an Attorney was Provided (Legal Aid) |
|----------------------|---|---|
| 480,000 100% | 148,623 31% | 29,369 6% |

(Source: Annual Legal Statistics of China, 1999)

Application of the Law

Statistics on Requests for Arrest (Equivalent to Preventive Detention) (2008)

| Total Requests for Arrest | Requests Approved by the Procuratorate | Requests Rejected by the Procuratorate |
|---------------------------|--|--|
| 1,060,398 100% | 952,583 89.83% | 107,815 10.17% |

(Source: Supreme People's Procuratorate of China, annual activity report for 2009)