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A Tale of Two Cities – The Legal Profession in China

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A Tale of Two Cities – The Legal Profession in China

By Chen Youxi*

This paper will analyse the current situation of the legal profession in China, the difficulties faced by lawyers, and the prospects for improvement.

It will argue that, while the legal profession in China is acquiring increasing importance and strength – with the number of lawyers now exceeding 230,000 (as opposed to only over 2,000 less than 30 years ago) – the independence of lawyers remains an aspiration more than a reality; depending on their area of practice, lawyers can suffer great constraints in what they can realistically achieve and in the exercise of their rights. This is gradually leading to a bifurcation within the system: between lawyers dealing mostly with civil and commercial matters who benefit from both an increasing ability to exercise their rights and from growing financial rewards; and lawyers who deal with more sensitive administrative and criminal cases, who face often insurmountable challenges, and as a consequence, tend to be much less successful financially and enjoy a much lower status within the legal profession as a whole.

In other words, while legal practitioners may be part of the same bar association and work within the same city, they are actually living and working in two separate and different worlds, depending on the nature of their practice. The outcome is that the brightest and more capable lawyers often tend to refrain from handling precisely those types of cases where a lawyer can make a difference in the protection of fundamental rights.

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Background

During the 1930s, in the part of China that was under control of the Chinese Communist Party, the birth of the legal defence system can be traced back to the period of the so-called 'revolutionary bases'. In 1932, a legal defence system had already been created inside the base areas in accordance with the Interim Organizations and Regulations of the Judges Department, enacted by the Central Executive Committee of the Chinese Soviet Republic. These rules stated that, with the approval of a court, the defendant could appoint a representative to defend them during the trial in order to protect all relevant interests.

Following the establishment of the People's Republic of China (PRC) in 1949, the existing legal profession suffered several significant setbacks. With the abolition of legal systems adopted by the former Nationalist government based on the so-called 'Six Codes', many members of the legal profession were listed as 'reactionary' and were purged. The legal profession almost vanished.

In particular, in December 1950, the Ministry of Justice (MoJ) issued the 'Circular Concerning Banning "Evil-Minded Lawyers" and Pettifoggers', which explicitly outlawed bar associations and other 'lawyering' activities existing during the period of the Nationalist government. As a consequence, defendants in criminal trials were tried through the 'revolutionary mass' method without any legal defence.

The very existence of lawyers was not recognised until the enactment of the first Constitution of the People's Republic of China in 1954, which stated clearly under Article 76 that 'cases which are heard by the courts should be open to the public except for some special situations stated by the law, and the accused has the right to defence'.

In 1956, the MoJ issued the first 'Report on Instructions Concerning the Establishment of Lawyers', creating the first professional lawyer system since the foundation of the People's Republic. The Chinese government cultivated its own lawyers to serve in this new regime; most of them were students who returned from the Soviet Union and those who had received a legal education during the period of the Nationalist government. However, the 'Anti-Rightist' campaign – initiated in 1957 by Mao Zedong – again identified nearly half of the 2,000 plus lawyers existing at that time as 'rightists' and, therefore, subjects of persecution.

During the Cultural Revolution (1966–1976) – which led to a period of almost total lawlessness in the administration of justice – law faculties were closed, lawyer qualification exams were suspended, and law firms and bar associations practically ceased to exist.

Following Mao's death in 1976, the trial of the Gang of Four[1] and the ascent to power of Deng Xiaoping, China adopted a new Criminal Procedure Law of the People's Republic of China (the 'Criminal Procedure Law') re-affirming the right to defence of the accused, leading to the rebirth of the legal profession. The right to defence was subsequently recognised also in the new Constitution adopted in 1982.

In particular, the Criminal Procedure Law enacted in 1979 provided that the accused can seek legal help from the beginning of the investigation and that, when the case is heard, the accused not only had the right to defend the charges (meaning that they can argue the case personally), but also the right to apply for the collection of evidence and for further investigations. The accused also had the right to make a final statement and appeal during the trial and to appoint a legal defender who could be a lawyer, or a civilian who is recommended by the accused's work unit (or the mass organisation he belonged to), or as permitted by the court, or a close relative or custodian of the accused. The responsibility of the defender was to offer materials and arguments based on the facts and law, which can prove the accused not guilty or can reduce or avoid criminal liability, and to protect the legitimate rights and interests of the accused. The lawyer was permitted to consult the materials relevant to the case, and to meet and communicate with the accused in writing. All of this could be done also by other defenders with the permission of the court. The law also provided that in cases where there was a public prosecutor, if the accused did not appoint a defender, the court could appoint one. During the trial, if the accused believed that the defender could not protect his or her legitimate rights, the legal defender could be dismissed and another appointed.

In 1980, China adopted the Interim Regulations on Lawyers of the People's Republic of China (the 'Interim Regulations'), followed in 1981 and 1986 by other regulations issued by the Supreme People's Court,[2] the Supreme People's Procuratorate,[3] and the Ministry of Public Security. For over a decade, this legislation formed the backbone of the legal framework regulating the establishment of law firms and the participation of lawyers in court proceedings. Following the reopening of law faculties at the beginning of the 1980s, the first lawyer qualification exams were held in 1986, the same year when the All China Lawyers Association (ACLA) was founded. One could justifiably say, therefore, that the legal profession in the 'new' China (ie, the China emerging from Mao's totalitarian period) is barely 30 years old.

Under the 1980 Interim Regulations, lawyers were defined as 'workers of the state' who 'represented the state' and 'protected the interests of the state'. In other words, lawyers were seen as civil servants; they were salaried by the state and therefore were not free professionals. Lawyers were seen as a component of the overall administration of justice and were expected to assist in the enforcement of laws and regulations, and to uphold the socialist cause.[4] Accordingly, virtually all law firms and legal advisory offices created in the decade following the reopening of law faculties were in one way or another affiliated to government departments or entities.

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1 The Gang of Four comprised Mao's wife and three other Communist Party officials who, after Mao's death, were accused of 'anti-Party' activities and of being responsible for the worst excesses during the Cultural Revolution. In 1981, they were tried and convicted in what many believe was a politically motivated trial to eliminate the most conservative figures within the Party and strengthen the path to the 'reform and opening' policy.

2 This is the highest-level court in China. It functions as court of appeal for cases heard by provincial level courts and provides interpretation of laws and regulations.

3 The Supreme People's Procuratorate is the highest level prosecutorial authority.

4 As noted below, to a large extent lawyers are still seen as performing this 'auxiliary' role in the administration of justice and are expected to protect the interest of the state and of the Chinese Communist Party.

At the end of the 1980s the first foreign law firms also started flocking into China, initially in the form of consulting companies, working on non-litigation matters and not allowed to appear in court. However, foreign law firms quickly achieved an almost total monopoly on commercial and corporate legal advice given to the large number of foreign investors entering the country. In 1992, the MoJ issued rules restricting the scope of the foreign firms' activities: while still able to hire locally qualified lawyers and law students, they were restricted to practising the law of their home countries and dealing with non-litigation matters concerning enterprises from their own countries. In other words, they could not practise local law even if they employed locally-qualified lawyers. This situation has not changed. At the same time, foreign firms have contributed actively to the training of a new generation of PRC commercial and corporate lawyers, some of whom left these foreign firms to set up their own firms.

At the beginning of the 1990s, as part of the overall economic liberalisation and reform, the first firms organised along the lines of the private partnership model were established. Many state-owned law firms started to convert into partnerships using a personal partnership model where partners assume unlimited joint and several liability, as well as into corporate-style partnerships. Junhe Law Offices (now one of the largest in China) was founded in 1989; and King & Wood,[5] another prominent firm which recently merged with an Australian firm, was founded in 1993. During the same period, the first firms registered under the name of an individual lawyer also were founded.

Since 2008, with the amendment of the Lawyers Law of the People's Republic of China (the 'Lawyers Law'), over 90 per cent of the law firms in the country are organised under the personal partnership model and named after the partners; although some state-owned law firms still remain in some remote and less-developed areas. In addition, all corporate-style partnerships had to be reorganised in terms of the personal partnership model. Meanwhile, legal aid centres – funded by the state – have been set up under the local justice bureaus, aiming to help the needy. Some of the big law firms, such as Dacheng, King & Wood Mallesons, AllBright, and Jingheng, now employ thousands of lawyers, and they have specific divisions of professional practice. However, PRC lawyers who practise in medium–small law firms tend to be 'generalists' and undertake litigation (often both civil and criminal) as well as commercial and corporate work.[6]

In the past few years, however, the largest firms (especially those with a large nation-wide network) have focused mainly on commercial/corporate work and related commercial/civil litigation, for two principal reasons: first, because these remain the most profitable practices; and secondly, because (as will be further explained later) criminal cases and administrative litigation cases to a large extent remain less rewarding financially and are more risky from a professional point of view, and thus they fail to appeal to many successful and capable lawyers.

The Lawyers Law

The development of private firms and the increasing role played by lawyers in the legal system in the 1990s led to the adoption in 1996 of the new 'Lawyers Law'. This law (further amended in 2007) is recognised as the real first 'code' regulating lawyers in the 'new China'.

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5 Now known as King & Wood Mallesons.

6 For the much of the 1990s, the legal system was not very sophisticated and it was possible for a legal practitioner to master several types of practice. For instance, China – which is a civil law system – did not have a law governing the formation and operation of companies until 1993, nor did it have a comprehensive 'Contract Law' until 1999, and it still does not have a formal civil code.

Under the Lawyers Law, a lawyer is defined as 'a practitioner who has duly obtained the lawyer's practising certificate according to the law and who, by way of accepting an appointment or through designation, provides legal services to a concerned party' – a very different definition from the previous one of 'worker of the state'. The Lawyers Law also states that, in their practise, lawyers must not only 'abide by the Constitution and the law, and adhere to the ethics of the legal profession and practise discipline', but also that they 'shall be subject to the monitoring by the state, the public and the concerned party'. Nevertheless, Article 3(4) of the Lawyers Law states very clearly that 'a lawyer practicing in accordance with the law shall be protected by the law and no organisation or individual may infringe upon his/her lawful rights and interests'.

In order to qualify as a lawyer, an individual must 'uphold the Constitution' and pass the state judicial examination (since 2002, China holds a 'unified bar exam' every year which opens the way to all legal professions). The individual is also required to have completed a full year's training in a law firm, and similarly to requirements found in other jurisdictions, is to '[be] of good conduct'.

The practising certificate allows the lawyer to practise nationwide, that is, it is not subject to any territorial limitation. More importantly, however, lawyers cannot practise 'solo' and must work only through duly established law firms. In addition, they cannot work for more than one firm. In other words, the practising certificate cannot be used by a lawyer unless they are registered as a practitioner with a law firm. Any appointment needs to be accepted by the firm as a whole and fees must be collected by the firm.

At the same time, the state evaluates and manages lawyers through the annual renewal system and, in addition, requests that lawyers to become members of the local bar so that they become subject to bar regulations.

Once registered as a lawyer, the individual is subject to a yearly renewal system for their practising certificate. The practising certificate may be revoked or cancelled if it was procured through improper means (fraud or bribery), or if the applicant did not meet the conditions for being issued a licence. The assessment to determine whether an individual meets the requirements to be registered as a lawyer or to have their license renewed falls within the powers of the local bureau of justice, rather than the bar association. This peculiar feature of the lawyer licensing system still remains today under the revised 2008 Lawyers Law, although in other respects (such as the procedural rights of lawyers in criminal trials), the 2008 amendments have improved – at least on paper – the situation of lawyers.

Under the 2008 Lawyers Law, lawyers have a duty to 'safeguard the legal rights and interests of their clients'. When acting as defence counsel, they are given broad rights to present materials and evidence, and to review, extract and copy files related to the case even when the case materials are still under review by the prosecutor. As aforementioned, administratively, the Lawyers Law entrusts the MoJ, and, in particular, the local department of justice at city level, with the responsibility of administering the lawyers' licensing system, assessing the qualifications of lawyers, and taking disciplinary actions against them. On the other hand, the local bar associations are given the more limited role of representing the profession as a whole, carrying out training activities and handling professional liability insurance matters. Bar associations are also empowered to issue fines and penalties if the lawyers within their jurisdiction breach the local bar association's own rules.

In addition to exercising control over the lawyers, the judicial bureaus also exercise broader control over law firms by requiring them to submit an annual practice report and the results of the assessment of their lawyers' practise. Law firms are required to submit a brief description of the main cases handled and describe any specific issues encountered during their practise in the previous year. In addition, law firms are subject to the annual registration renewal system. These features of the Lawyers Law allow the executive branch substantial control over the legal profession.

The Lawyers Law also contains provisions for the establishment of a legal aid system, allowing individuals free support from a qualified lawyer in cases related to family support, work-related injuries, criminal actions, state compensation claims, or payment of pensions from deceased persons. Each law firm in China is required to allocate a number of days each year to discharging assignments coming through the legal aid system, and lawyers can get allowances from the state for taking over these cases. Views differ in the legal community on whether legal aid centres have been effective in increasing access to justice.[7]

Challenges facing the legal profession

The challenges faced by lawyers in China can be roughly divided into two broad categories. The first category includes challenges facing any lawyer practising in China and applies to civil, commercial, administrative and criminal lawyers. The second includes those challenges particularly faced by lawyers who represent certain categories of cases – mainly criminal and administrative cases.

Category 1

1. Constraints faced due to the structure of the judicial system

Various Chinese scholars have noted that, as designed, the PRC judicial system does not ensure the independence of judges. This extends both to 'internal' independence (ie, the ability of the judges to exercise their functions without influence from superiors or from higher-level courts), and 'external independence', that is, the ability of the judge and of the court as a whole to make decisions without undue influence from external bodies.

Since 2002, the Judges Law of the People's Republic of China has made significant progress in 'professionalising' its judges. For instance, all candidates are now required to pass the unified qualification exam and to have a law degree – a requirement that did not exist before the 2002 reform; and there are timid movements towards reform of the funding system of the courts. However, there are significant roadblocks remaining on the path to independence. For instance, under the Organic Law of the People's Courts of the People's Republic of China, the adjudication of 'significant, difficult or complex' [*sic*] cases is taken away from the trial judge and given to an 'adjudication committee' presided over by the court's President and composed of judges who typically are more senior than the one who heard the case. The adjudication committee decides on criminal, civil and administrative cases.

7 Fu Hualing, for instance, notes that legal aid centres still face difficulties in persuading courts to waive court fees even for cases that qualify for such a waiver, and that lawyers working for legal aid centres encounter more difficulties than privately-hired defence counsel when collecting evidence in favour of defendants. At the same time, legal aid centres are recognised as contributing to an increased awareness of the importance of the law, ruling a country according to law and increasing 'rights consciousness' (see Fu Hualing, 'Access to Justice and Constitutionalism in China', in *Building Constitutionalism in China* by Stephanie Balme and Michael W Dowdle (Palgrave Macmillan, 2009)).

While the stated intent of the legislator in designing this system was to ensure that young judges could benefit from the opinion of more senior and experienced ones, especially when facing complex or sensitive cases, the system has several obvious setbacks. First, the judges comprising the adjudication committee receive only a written report of the case prepared by the presiding judge of the hearing, and therefore, they do not benefit from the actual experience of the trial, the exchanges between litigants, or the arguments made by the defence and the prosecution. Secondly, due to the special role played by the President of the Court (who often sits also on the political and legal committee within the local party's commission)[8] and the importance of their opinion in deciding the case, the adjudication committee can become a vehicle through which local political influence is exercised on the outcome of the case. In these circumstances, the arguments and counterarguments made by the lawyers (especially the defence team in criminal trials or the plaintiff's counsel in an administrative case where the local government is being sued) may lose relevance when the final decision is made. All of the above is largely criticised by many Chinese academics and practitioners as a situation in which: a case may have been heard but it doesn't have a verdict; or, a case has had a verdict but it didn't have a trial.

In addition, due to the fact that administrative precincts almost invariably coincide with judicial precincts, the local people's congress appoint all judges working in the courts within the same precincts. Courts rely almost entirely on the local government for their funding, personnel and resources. This creates additional difficulties for lawyers arguing a case in which local interests are at stake, or a case deemed politically 'sensitive' from the perspective of the local government or the local party's organisation, which – as explained – oversees the overall administration of justice at local level through the political and legal committee.

Finally, lower courts often seek 'guidance' on difficult or sensitive cases from upper level courts, sometimes in order to exclude their own responsibility and keep in good terms with upper-level political authorities. This is called 'report to the authority in advance'. In this manner, there can be a discussion which transcends the trial judge on whether an accused is guilty or not and on what the penalty should be, leading to the involvement of the upper level court in a case that has not yet been appealed. One of the reasons why lower court judges seek the opinion of, and support of higher level courts in their decision, is that judges are rewarded financially as well as career-wise based on a complex 'points' system, with points taken away for the judge whose rulings are overturned on appeal. As a result, a great majority of judgments – especially those in criminal cases – are confirmed on appeal. It becomes more difficult to get judicial remedies during the appeal phase if the appeal judge has been involved in earlier discussions and decisions about the case when it was being examined by the lower court. Decisions on important cases that gained the attention of government authorities and society are most likely to be upheld on appeal.

8 These legal and political committees (Zhengfa Wei) are part of the 'parallel' party structure that can be found at virtually every level of government in China. They are in charge of 'coordinating' and supervising the work of the public security department, the people's procuratorate (ie, the office of the prosecutor), the people's courts and the judicial department within the administrative precinct. Although there is no legal requirement that courts implement decisions taken by the Zhengfa Wei, it would be politically difficult for a judge to disregard the opinion of such a powerful body.

2. Case filing system

Another stumbling block for lawyers is the ability to get their case heard, due to the existence of the 'filing division' in each people's court. In China, the courts adopt an examination and approval system before they accept a case for hearing, which is different from the registration system in place in many other countries. As a result, the court can refuse to hear a case even when there are substantive rights at stake.

The case-filing division works as a de facto 'filter' for lawsuits. It is separate from the trial division and gives judges substantial discretion in accepting or rejecting cases without affording any access or accountability to the public. Although it plays many other functions (eg, it can avoid the irrational misuse of litigation rights), some have noted that the case filing divisions may constitute an obstruction to the administration of justice because it may deprive plaintiffs of their right to procedural and substantive due process.[9] This happens often in cases deemed as being 'politically sensitive', and also cases where a government department or an administration is named as defendant, as well as in 'collective actions' (ie, actions with multiple plaintiffs) or mass tort cases. The lack of clear and uniform guidance under national law or Supreme People's Court interpretations about what types of cases can be filed creates additional difficulties when courts have joined with the government to produce documents stating that certain kinds of cases cannot be heard, as happened in the nationalisation of coal mines in Shanxi. In other cases, courts have refused to accept cases, effectively granting legal protection to local dominant players.[10]

Speaking to litigators in China, one of the most frequently heard complaints is the inability to file a lawsuit due to the decision taken by the filing division. There seem to be few avenues for lawyers to circumvent the decision of the filing division and have their case heard. This remains particularly true for administrative litigation cases.

3. Lack of administrative autonomy for lawyers

As aforementioned, lawyers, law firms and bar associations are subject to the administration and supervision of the local judicial bureau. Although the Chair and the Vice-Chair of the ACLA – as well as the vast majority of the local bar associations – are legal practitioners, the judicial bureau maintains substantial control over the process of selecting the bar associations' leadership through various means, as evidenced by the recent *Beijing Bar Association* case.[11] An experiment in Shenzhen and Guangzhou (two of the most 'liberal' cities in China) in which lawyers could freely elect their own representatives in the bar association was later suspended. The local bureau of justice is also able to exercise substantial control over lawyers and law firms through the annual reporting and registration renewal system. Although denial of renewal or withdrawal of a licence for a law firm or lawyer constitute exceptions rather than the rule, they play an important deterrent role for any law firm wishing to maintain a 'good relationship' with the local justice bureau (on which it relies

9 See 'Justice Without Judges: the Case Filing Division in the PRC' by Nanping Liu and Michelle Liu, UC Davis Journal of International Law & Policy, 2011.

10 An example is the case handled by one of the authors in which the descendants of the Ming Dynasty Cellar sued the Yibin City government (Sichuan province) and Wuliangye Group (a large state-owned company). After numerous attempts, the local courts refused to hear the case, which can only be filed in Yibin, since it is real estate-related and the property in question is located in Yibin municipality.

11 In 2009, an attempt by a group of Beijing lawyers to run as candidates for the local bar association elections was thwarted through the intervention of the local bureau of justice, which insisted that candidates for the leadership positions should have been 'blessed' by the bureau itself.

for the ability to continue operating) as well as with the bar association itself. Moreover, the need to verify whether an application meets the 'good conduct' requirement under the Lawyers Law can also involve a review of the applicant's political views and compliance with state-endorsed policies such as the one-child policy. More recently, the MoJ has circulated a notice reminding all local bar associations to require lawyers who intend to apply for or renew a practising certificate to swear allegiance not only to the Constitution and to the law, but also to the party. The consequence of a failure to take the oath according to the requirements are unclear. In practice, however, many local bar associations are not enforcing this requirement.

The MoJ and its local counterparts conduct periodical 'campaigns' against 'unethical' behaviour in the legal profession (ie, behaviour which violates the laws and regulations related to a lawyer's professional conduct) – which may affect hundreds of lawyers. For instance, in one particular campaign, in 2004, by the MoJ and the ACLA against unethical behaviour in the legal profession, several hundred lawyers were punished; some of them were also punished for offences such as bribing judges and falsifying evidence. Occasionally, however, local bureaus of justice have also punished lawyers for behaviour that was not clearly sanctioned under the law.[12] In recent years, the power to impose certain sanctions on lawyers has progressively shifted towards the bar associations, but the MoJ and its local counterparts retain the power to suspend the license or deny renewal, which is seen as the most serious sanction.

Both the bar associations and the MoJ can also issue instructions to lawyers on how to handle specific types of cases, especially those defined 'sensitive' or 'important'. For instance, in May 2006 the ACLA issued a formal 'Guiding Opinion' to all bar associations and law firms in China on accepting and handling collective cases (such as mass tort cases) and cases of 'great social significance' – such as appropriation, environment pollution and rights protection. In particular, the ACLA recommended that local lawyers associations should 'aid, guide and supervise' lawyers in handling such cases and that caution shall be placed in briefing the media, especially foreign media.[13] More recently, in the aftermath of the deadly accident involving a high-speed train near Wenzhou in 2011, the Wenzhou City Bar Association circulated a notice suggesting that lawyers not represent tort cases related to the incident, warning them to pay attention to the 'overall situation' and their own safety. Many practitioners also have reported that justice bureaus and bar associations at local level have issued written instructions prohibiting defence lawyers in charge of cases concerning political crimes or religious matters to adopt a 'not-guilty' defence strategy (ie, the lawyer cannot argue that his client didn't commit the crime), and that they should report to the local judicial bureaus ahead of taking over the case. In some circumstances, lawyers pursuing proactive defence strategies can be expelled from the court and recalled by the bureau that licensed them and therefore not be allowed to continue representing the defendant. This has happened for instance in the *Li Zhuang* case, the *Beihai* case and *Xiaohe* case in Guiyang (described below).

12 See 'When Lawyers are Prosecuted: The Struggle of a Profession in Transition' by Fu Hualing, University of Hong Kong, Faculty of Law, 2006, p 8.
13 *Ibid*, see generally.

Category 2

1. Constraints faced by criminal lawyers

Criminal defence lawyers are probably the category subject to the most significant constraints. First, there remains a gap between the rights given to defence lawyers under the law and the rights they are actually able to enjoy. Secondly, there continues to be inconsistencies between the Criminal Procedure Law and the Lawyers Law, which are detrimental to these lawyers. The new Criminal Procedure Law, due to come into effect in on 1 January 2013, attempts to address the problem to a limited extent; however, whether the conflict can be resolved remains to be seen.

In particular, under the Lawyers Law, a lawyer has the right to meet the suspect (during investigations) or the defendant (during the trial) and to be informed of matters pertaining to the case simply on the strength of what are often referred to as 'three certificates' (the lawyer's licence, a letter of engagement from the client and, importantly, a letter from a law firm confirming that the lawyer is employed there).

In practise, however, since most of the criminal investigations are conducted while the suspect is detained in a lock-up facility for prisoners awaiting trial, the prosecutor and the police enjoy substantial room to manoeuvre throughout the investigation process; this may include not allowing the suspect to meet with a lawyer if they feel that it may interfere with their investigations. The difficulty in meeting clients also stems from the fact that legal advisers are not necessarily notified by the police that their client has been detained or about the location of the detention facility. Recent changes to the Criminal Procedure Law require the police to notify the family of the suspect in most cases (however, still with important exceptions as we will see below). It is hoped that this will also result in the defence counsel being properly and timely notified. Overall, the consent of the public security bureau for a lawyer to meet his client is required de facto in most cases, whereas under the law such approval should only be required in important, complicated cases and cases concerning state secrets. In this respect, the Criminal Procedure Law, even in its new formulation, does not provide lawyers with any meaningful legal remedy against a recalcitrant public security bureau. Even when meetings are allowed, they are often monitored by the police, in contradiction with the Lawyers Law provision that meeting with the suspect or defendant shall not be subject to monitoring. As a result, it is difficult for the lawyer to provide legal advice or coordinate a legal strategy during these meetings. Again, the Criminal Procedure Law does not offer any legal remedy (in the form of penalties or ability to seek legal redress against public security officials) if monitoring occurs. In addition, there is also no clear prohibition for monitoring of the meeting by video camera.

Another difficulty lies in getting access to the case materials. Again, this is in conflict with the right, recognised under the Lawyers Law, to review, take notes of and copies of litigation documents relating to the case and case materials, even if this right is granted only from the time the decision to prosecute has been made and from the date the people's court accepts the case. The prosecutorial authorities also exercise much discretion on the extent of disclosure actually permitted in the pre-trial stage, giving the defence lawyers less ammunitions to defend their case.[14] Even the evidence

14 The significant discrepancy between the rights recognised to defence lawyers 'in the books' and in practise is discussed in detail, for instance, in *Criminal Justice in China: An Empirical Inquiry*, by Mike McConville et al, who over a course of two years interviewed prosecutors, judges and lawyers throughout China as well as attending to various trials. Mike McConville, *Criminal Justice in China: an Empirical Inquiry* (Edward Elgar Publishing Inc, 2001) (hereinafter 'McConville').

that is disclosed prior to the trial is often provided only in the form of a written statement by the prosecution; the defence team has no access to the source of the statements.

As a result, only lawyers who are able to 'befriend' the police or with good 'connections' to the police or the prosecutorial authorities have a better chance of accessing case documents and meeting suspects. Of course, this may result in the lawyer being better able to defend their client, but it can also lead to situations where – in order not to compromise this preferential relationship – the lawyer would refuse to take over particularly 'sensitive' cases or cases where local interests are at stake.

Overall, the role of defence lawyers at pre-trial stage is essentially a passive one. There is little they can do before the case goes to trial.

Another area where lawyers encounter significant difficulties is the collection of evidence and witnesses' testimonies. Under the Lawyers Law, a lawyer may as required by the case apply to the prosecutor or the court for the collection and handing over of evidence; or the lawyer may investigate the case and gather evidence themselves. In this situation, under the law, a lawyer can investigate circumstances related to the legal matter they have undertaken from the relevant work units (ie, companies, legal entities, etc) or individuals, and can do so simply on the strength of the practising certificate and proof of employment by a law firm.

The reality, however, seems to be different. The collection of evidence remains one of the most difficult (and potentially dangerous) aspects of the defence counsel's work. This is due to two main reasons. First, the police and the prosecutors tend to consider the collection of evidence by lawyers more as a 'nuisance' than as a statutory right of the lawyer, and therefore might create obstacles. Secondly, and more importantly, the lawyer's right to collect evidence and testimonies is subject to the important limitations set out under Article 42 of the Criminal Procedure Law and Articles 306 and 307 of the Criminal Code of the People's Republic of China (the 'Criminal Code').

Article 306 (often called 'the big stick') punishes severely the forging or destruction of evidence by a 'legal defender'.[15] It also punishes a legal defender for 'helping others' to destroy or forge evidence and if he or she 'coerces the witness or entices him into changing his testimony in defiance of the facts', provided that 'where a witness's testimony or other evidence provided, shown or quoted by a defender is inconsistent with the facts, but if not forged intentionally, it shall not be regarded as forgery of evidence'.

Article 307 punishes anyone who by violence, threat or bribery (or other means), obstructs a witness from giving testimony, but also anyone who 'instigates another person to give false testimony'. Article 40(6) of the Lawyers Law also prohibits a lawyer from 'deliberately providing false evidence or threatening or inducing another to provide false evidence'.

These provisions seem, on the face of it, to be just and fair. It is common for legal systems to punish the intentional destruction or forgery of evidence or the inducement to give false testimony; but the crucial fact is that these provisions have been misused in China, to the point of becoming prejudicial to the defence counsel's ability to build and argue a case.

15 Under the Criminal Procedural Law, defendants are not required to be represented by a lawyer, except in death penalty cases. According to some estimates, in some 70 per cent of the criminal cases that reach the trial stage, the defendant did not hire a lawyer. However, it is also possible for other people (ie, non-qualified lawyers) to act for the defendant in a trial. That is why the Criminal Code refers more broadly to the 'legal defender', rather than 'defence counsel'.

In a typical case a defendant or witness will give a different statement during trial from that given in police interrogations. If the defence lawyer had access to the witness or defendant prior to trial, the lawyer is at risk of being charged under Article 306, which can lead to administrative punishment, disbarment or, in the most serious cases, imprisonment.

While Article 306 states that a lawyer should not be punished solely on the basis of testimony that does not match the facts so long as it was not 'forged intentionally', in reality Article 306 continues to be a deterrent to proactive defence work. For fear of being prosecuted under Article 306, many defenders avoid collecting any evidence on their own, and thus focus merely on challenging the evidence provided by the prosecutor.

Criminal trials in China mostly use written testimonies given by the witness to the police, while the witness typically does not appear in court for cross-examination. It has been alleged that there are cases in which witnesses may have been coaxed or forced into giving testimony; or where the police have used 'tainted witnesses' – that is, witnesses who accuse others of a crime in exchange for their own freedom or a more lenient treatment. When a lawyer asks these witnesses to confirm their testimony in court, frequently the court and the prosecutor will refuse to summon the witness, using various excuses. Worse, the police may encourage the witness to avoid contact and not cooperate with the defence counsel.

Therefore, the presence of written testimonies may become a trap for the lawyer. Many lawyers face significant obstacles when they look for witnesses and collect evidence from them. Given the substantial powers of the public security authorities, a witness may be less inclined to testify in a manner other than that suggested by the investigators. In these cases, the lawyer is often 'hamstrung' due to the risk of prosecution under Article 306 of the Criminal Code. This situation is bound to improve somewhat under the amended Criminal Procedure Law, which provides that the investigations over a lawyer's alleged breach of Article 306 shall be conducted by a public security bureau other than the one in charge of the criminal case itself; however, there are still no changes to Article 306 and other provisions that allow lawyers to be prosecuted.

In addition, lawyers' limited ability to visit and advise their clients during the investigation phase, coupled with the considerable powers to interrogate given to the police, can render confessions obtained in the investigation stage highly questionable, especially if the suspect is part of a vulnerable group (for instance the very young or very old, or people with low tolerance for psychological pressure).[16]

Therefore, the defence lawyer may be in the difficult position of knowing that while some of these confessions may be suspect, producing a witness statement that differs from what was said to the police or the prosecutor may mean that the lawyer is held liable under Article 306.[17] An example of Article 306 being used to deter lawyers from conducting an active defence is the initiative taken by the MoJ since 2010 asking bar associations across the country to initiate 'warning programmes' in order to avoid a repeat of the Chongqing incident, during which Li Zhuang, a top criminal defence lawyer, was disbarred and imprisoned for a year-and-a-half for allegedly having advised his client (a local mafia boss) to challenge prosecution evidence.[18] After he was released from prison, he declared he was forced

16 See 'McConville', p 172.
17 See McConville pp 182–183, as well as 'Walking on Thin Ice', a report by Human Rights Watch, April 2008.
18 Li Zhuang was sentenced to two years' jail for 'fabricating evidence and obstructing defence evidence'.

by the special investigating group – formed by the police, prosecutor and the court – to plead guilty in exchange for a more lenient treatment, which should have excluded imprisonment.

It is extremely hard for the defence lawyer to explore the circumstances that have led to the defendant's confession, on which the prosecution most often relies in criminal trials in China. In a recent case which attracted widespread attention, four lawyers in Beihai (Guangxi province) were detained in the summer of 2011 after they produced evidence that contradicted that of the prosecution in a case concerning a gang-related murder which occurred a year earlier. During the trial, they asked three witnesses to testify in court. These three female witnesses testified that the defendants were with them at the time of the murder and therefore could not have committed the crime, which contradicted the evidence offered by the prosecution. The four lawyers were arrested; one of the accusations was that they had been 'tampering with witnesses'. The case attracted significant criticism from the legal profession as a whole and a team of lawyers defended their fellow colleagues. As a result, three of them were released (one on bail from detention and two from house arrest). However, after nine months of detention, one of them still remains under residential surveillance at a 'designated location' – an apartment specially assigned for the task where, apparently, four guards stay with him. It is reported that even his family is prevented from meeting with him, even though this right is recognised by the law.[19]

The right to present witnesses is weighted against defence lawyers when compared to the prosecution and the judge: while witnesses have a duty to cooperate if questioned by the prosecution or the police, they do not have such duty if they are questioned by the lawyer. In addition, although the Criminal Procedure Law states that a witness is obliged to attend court, it restricts the potency of the testimony because this regulation encourages the prosecutor not to put the witness in direct confrontation with the defendant and the lawyer. To improve the current situation, the newly amended law reinforces the regulations about the presence of the witness in court: witnesses are now under duty to provide oral testimony, but only if the content of their written testimony is questioned and their testimony is essential to reach a decision on conviction of the suspect. Even in those cases, however, the decision of whether to summon a witness remains with the court. In the absence of an effective (and 'safe') means to collect and challenge evidence provided by the prosecution, to access the case files, and to have an opportunity to advise their client and structure a defence strategy in the pre-trial stage, the defence lawyer's role tends to remain 'passive' during the entire process and is focused essentially on attempts to mitigate the penalty imposed on his or her clients.

Not surprisingly, the rate of acquittals in China in criminal trials (including in the appeal phase) is rather low. There are no published statistics in this respect, but legal practitioners in China put the number at roughly 3 per cent of all trials.[20] Only some important and widely-attended cases represented by famous lawyers are more likely to lead to a complete acquittal.

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19 Some believe that the residential surveillance regime Yang is being subject to (outside of his home and in an unspecified location) is the first case handled under Article 73 of the Criminal Procedure Law, which allows the police to detain suspects at designated locations – without informing the family – in cases related to crimes of endangering national security, or leaking state secrets, or terrorism. See, for instance, *Southern Weekend* (Nan Fang Zhou Mo), 29 March 2012 'The New Experiment in Beihai', A6.

20 By way of comparison, according to a 2005 study, the conviction rate in Japan was close to 99 per cent, while in the US it varied between 85 and 87 per cent depending on whether state prosecutors or federal prosecutors are involved, see **www.rasmusen.org/papers/overheads/prosecutors-overheads.pdf**.

2. Challenges facing administrative litigation lawyers

In 1990, China established its own administrative litigation system aiming to place the administrative actions of the government under judicial scrutiny. This system greatly contributed to the establishment of the rule of law in the country and has given lawyers the opportunity to challenge directly any illegal behaviour by the administration. The Administrative Procedure Law of the People's Republic of China (the 'Administrative Procedure Law') initiated a new era for lawyers in China.

However, the current situation does not live up to the hopes held for the legislation. First, the number of the cases that are heard is very low. According to statistics published by the Supreme People's Court, after a surge of cases in the first ten years after the adoption the law, the number of administrative litigation cases accepted and heard by the court has been stagnant for the last decade. Secondly, the rate of the success in the cases filed is quite low; some reports put it at around 30 per cent.[21] Although the system itself looks effective, individuals in China are unlikely to challenge the government in court. Most of the cases brought have adequate grounds and are quite reasonable, but the success rate is nevertheless low. One of the main reasons is that nearly half of the cases end with the plaintiff withdrawing the lawsuit. There are various reasons behind this decision: some plaintiffs may respond to an offer by the government to make remedy to the plaintiff spontaneously; others may be responding to pressure or fear of appealing against a decision taken by a government authority.

In addition, lawyers conducting administrative cases find it difficult to get the understanding of the government; rather, the government regards them as troublemakers who incite the plaintiff to litigate. Many cases are rejected by the case filing division and therefore never get to trial. Courts are also reluctant to hear these cases and therefore procrastinate in making their decision whether to hear them where the local government, the police, tax bureau, land administration authorities, and other powerful administrative organisations are involved.[22] In mass tort cases involving thousands of plaintiffs suing government administrations or state-owned entities, lawyers may be ordered by the local government and the judicial bureau not to get involved, thereby further reducing access to justice for prospective plaintiffs.[23]

Another problem for lawyers involved in administrative litigation cases is the collection of evidence. The Administrative Litigation Law states that the burden of proof lies with the government; however, the government may be tempted to hide evidence that would be harmful to itself. More importantly, when the lawyer collects evidence from the files of the defendant, the government department typically creates obstacles for the lawyer. To improve this situation, in 2008 the State Council adopted measures regulating the disclosure of government information, which allow lawyers to sue the administration that does not open its information to the public. There are no official statistics as to the rate of success by plaintiffs in these types of cases. In general, practice indicates that many local

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21 See Qu Li Qiu, 'Xunqiu Sifa Duli: Zhongguo Minggao Guang Shengsu Lv Jiedu' ('Seeking an Independent Administration of Justice: an analysis of the success rate when civilians sue the government in China'), *Xinmin Weekly*, 4 April 2004.

22 One case that attracted wide-spread attention in the media is the 'oil wells' case of 2005 in Shaanxi Province. In June that year, Zhu Jiuhu, a lawyer representing several claimants, attempted to file several lawsuits against the local municipality in the Shaanxi provincial court in connection with the expropriation of oil wells and was reportedly detained by the local public security authorities in his hotel before he could file the case.

23 During the famous melamine milk poisoning case in 2008, which affected thousands of children, local courts refused to accept collective actions against the company Sanlu, which had sold milk powder tainted with harmful chemicals. Therefore, many prospective plaintiffs had to accept the government-proposed compensation plan. Similarly, no collective actions were entertained during the disastrous 2005 benzene spill in Jilin Province involving PetroChina, a large government-owned petrochemical company.

governments would prefer to become defendants in trials under the 2008 measures rather than voluntarily open their archives.

Another obstacle for lawyers willing to take administrative cases is that, while the PRC State Compensation Law provides that the government should compensate the individuals or entities for the losses caused by illegal administrative actions, the funds allocated for state compensation under the national budget have rarely been used. Only a few of those (already a limited number) who successfully win administrative cases receive compensation and are therefore able to pay for their legal advisor. As a result, lawyers in China will not take administrative litigation cases, because the disadvantages far outweigh any benefit that may be derived from these lawsuits, especially as the case may pit a lawyer against the government, making his or her own survival in the current political environment more difficult.

3. The 'rights protection' movement

The analysis of the situation of lawyers in China would not be complete without describing another category of lawyers who, although representing a very small minority, have been making 'headlines', especially in the West.

'Weiquan' lawyers (literally meaning 'rights protection' lawyers) is a term used to identify a group of practitioners who have developed profiles as 'human rights', or 'public interest', lawyers (or activists) who advocate interests larger than those of the clients who have retained their legal services.[24] This category may also include people with legal education but no lawyer licence.

Weiquan lawyers tend to work mainly out of big cities, especially the capital Beijing. Due to the restrictions on solo practice, they tend to attach themselves to partnerships, sometimes switching from one to another, always looking for a law firm that is amenable to have them on their payroll. Some also hold academic positions, with the consequent financial stability which allows them to engage in 'weiquan' work.

Some of the cases a weiquan lawyer may represent can seem to be rather ordinary, but the main difference between conventional and weiquan lawyers is motivation, that is, for 'weiquan' lawyers, there are issues of principle which propel them to take on cases. Motivations may vary: to end abuses, to support freedom of association, to protect migrant workers, to increase transparency, etc. Weiquan lawyers are also unique in that they may make greater use of mass media and especially of investigative journalists to raise the profile of their case. While the majority have good intentions, some weiquan lawyers have been criticised by the public as harbouring 'ulterior motives' (such as seeking to acquire notoriety through highlighting socio–political issues).

As they protect the rights and interests of weaker and vulnerable groups in society (people evicted from their homes, religious practitioners, journalists facing censorship, minority shareholders challenging corporations and, not infrequently, other lawyers), weiquan lawyers tend to be seen by the state at best as a nuisance; and at worst, as a threat in cases where the particular group the lawyer is defending has been labelled an 'enemy of the state', or is being accused of other crimes such as

24 See Fu Hualing and Richard Cullen, 'Weiquan' (Rights Protection) Lawyering in an Authoritarian State: Toward Critical Lawyering', 2008, available at **http://dx.doi.org/10.2139/ssrn.1083925,** (hereafter 'Fu Hualing and Richard Cullen'). 'Weiquan' is a term used to identify activities that in the West would more commonly be referred to as 'cause lawyering' or public interest lawyering.

'subversion of state power' or 'revealing state secrets'. In these cases, the weiquan lawyer treads a dangerous path, one where the mere decision of defending such a case, or the opinions expressed in court, may put him or her on the receiving end of sanctions such as disbarment, or failure to renew the licence. For instance, it is much more likely for a 'weiquan' lawyer than a civil or commercial lawyer to fall foul of Article 37(2) of the Lawyers Law which states that a lawyer may be prosecuted for making 'statements jeopardising state security' when the lawyer is dealing with cases such as those concerning freedom of speech or alleged disclosure of state secrets.

Within the group of weiquan lawyers, there are variations,[25] from the most to the least radical. Some have learned to engage in proactive defence without 'crossing the line' into more politically sensitive topics. One problem that seems to plague them all, however, is the financial risk of maintaining their practices if they tend to focus only on weiquan lawyering. Some have learned to strike a balance between conventional cases and rights protection cases, but others have not been able to do so, sometimes because their actions led to disbarment or the closure of their practice, or because clients may see them as being too 'sensitive' to be retained for more lucrative civil and commercial cases. This is especially true for the most critical and radical lawyers who espouse political causes or sensitive cases such as those involving 'evil cults' or famous dissidents and whose aim is often to 'challenge the system head on'.[26]

Attitudes of the great majority of lawyers towards these 'rights' practitioners are mixed. Most tend to ignore them or see the most critical and radical as an 'embarrassment' to the entire profession due to the tactics used and their frequent trespassing into the political realm. Some, however, are ready to express support, especially for the most 'moderate' lawyers and admire their struggle. Bar associations in some cities have also established 'human rights' divisions and some weiquan lawyers join their meetings and discussion groups. However, due to the nature of bar associations, there is often little room for them to advance their causes within the bar.

The future

Notwithstanding the challenges mentioned above, the legal profession in China is growing. By some accounts, China still does not have enough lawyers. In the early period of the opening up and reforming of China, Deng Xiaoping pointed out that there should be room for more than 300,000 lawyers. But given the speed of the legislative process and the fact that the law now penetrates every layer of the society, if every 1,000 people in China should have access to a lawyer, the number of lawyers needed would be 1.4 million. More than 700 law schools around the country have trained nearly 4 million law students in the past 20 years. Many of these, however, have not pursued a career as a lawyer. Nevertheless, compared to as recently as ten years ago, studying law and qualifying as a lawyer is seen as an attractive proposition for young, ambitious Chinese. One of the main attractions of the profession is the possibility of higher financial rewards, especially when compared to other positions to which law graduates may aspire, such as judges, notaries or government employees. The possibility of high financial reward is also what lures many judges to retire from the bench and join the practising profession, a worrying trend since it very often involves the most able judges. As aforementioned, high financial rewards are normally linked to commercial/corporate law

25 Fu Hualing and Richard Cullen (see n 24 above), refer to a 'pyramid' from more to less moderate, p 6.
26 See Fu Hualing and Richard Cullen (see n 24 above), p 16.

practice. Accordingly, those who decide to engage in the less lucrative criminal or administrative law practice tend to do so either from lack of alternatives, or because of a strong belief in the importance of their role. There are, however, those who engage in criminal work because of their past experience as a prosecutor or public security official, which gives them important 'connections' within the system and therefore access to high-profile and more lucrative cases.

Bar associations are also growing stronger economically thanks to the increasing number of fee-paying members and mandatory and rigorously enforced payment of fees. They are therefore becoming more assertive. It is possible that, with time, bar associations may take over some of the functions now performed by the MoJ, an interesting development particularly if lawyers will be able to elect their own representatives at each level through an entirely open and transparent system.

At the same time, some of the signals in recent years seem to point to a different direction, one in which lawyers will continue to be seen as having first and foremost an obligation to serve the interest of the state. Lawyers inevitably live and operate within a certain socio-political context which shapes the vision of their role in society. Thus, a recent directive by the MoJ reminded everyone that lawyers are needed to help the authorities fighting crime; an objective that may conflict with the obligation to safeguard the lawful rights and interests of the suspect or the defendants. These tensions show that the system still has not found viable ways to resolve the conflict between the role of the lawyer depicted in the Lawyers Law and the need to achieve overarching objectives like social stability, fighting crime and protecting the 'socialist legal system'. The answer to whether and in what form these two conflicting needs can be reconciled will set the pace for the development of the legal profession in China in the coming years.

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