

An Introduction to the Legal Profession in China in the Year 2008

Gerard J. Clark¹

I. INTRODUCTION

The accession of Deng Xiaoping to leadership in China after the death of Mao Zedong in 1978 provided the impetus for the revival of China's legal system. That commitment to build a rule of law has contributed to China's current phenomenal growth. More recently, China's entry into the World Trade Organization required a commitment to transparency in the lawmaking process, procedures for challenging administrative action, and judicial independence.² This article will attempt to assess the progress of a part of that project: the creation, virtually from scratch, of a trained legal profession over the past thirty years.

II. THE COURTS

The Western notion of enforcing one's legal rights through litigation does not sit well with the Chinese. Not only is the concept of a legal right a foreign concept, but the pursuit of self-interest through adverse litigation is at odds with the paramount virtue of social harmony.³ It is difficult for the average

1. Professor of Law, Suffolk University Law School. Visiting Lecturer in Law, Tsinghua University School of Law, Beijing, China. The author wishes to express his gratitude to Dean Wang Chenguang and the students, staff, and faculty at Tsinghua who generously lent their assistance to the author; former Suffolk University Law School Dean Robert Smith and Associate Deans Bernard Keenan and Marc Perlin for their support and encouragement; the staff of the U.S. Embassy in Beijing and the Consulate in Guangzhou; and the staff at the Council for the International Exchange of Scholars who lent their assistance as well. The author was the recipient of a Fulbright Award to lecture on American Constitutional Law and the American Legal Profession during the 2007 spring semester at Tsinghua Law School. During this period, the author conducted the study that resulted in this article. The author's understanding of the Chinese language is rudimentary at best. He was limited to either English language sources or contemporaneous translations of Chinese sources by nonprofessional translators. The author also conducted about thirty hours of interviews with students, law professors, lawyers, and others, whose identity will not be disclosed. One always approaches the comparative law endeavor with humility in recognition of the fact that a truly adequate description of the Chinese legal profession would take a lifetime of study.

2. See Margaret Y.K. Woo & Yaxin Wang, *Civil Justice in China: An Empirical Study of Courts in Three Provinces*, 53 AM. J. COMP. L. 911, 911-12 (2005) (discussing differences within Chinese legal system from province to province). Since 1978, China has made substantial strides in formalizing its civil justice system. China's twenty-five year program of legal construction picked up even greater speed as China, a country that has traditionally eschewed legal formality, entered the World Trade Organization, "whose membership is contingent on: greater transparency in the lawmaking process, more effective and formal procedure for challenging administrative action, and greater judicial independence." See *id.*

3. See ALBERT H.Y. CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF

Chinese person to conceive of a court as other than a place where bad people go or where bad things happen to people at the hands of government. The top-down view of law as an instrument of government with citizens as the objects of legal regulation remains influential in China today. Courts generally do not welcome litigation and often try to discourage it. Far more than in many other systems, the Chinese legal system is willing to forgo the enforcement of rights when other pressing values seem to be at stake, to the point where it might be more accurate to say that the system recognizes *interests* more than *rights*.⁴

Indeed, quite recently, Luo Gan, a member of the governing nine-man Politburo Standing Committee of the Communist Party and the country's most powerful judicial official, said in an address that "judicial officials had the responsibility to prevent infiltration that might threaten national security."⁵ To paraphrase his ideas, "[e]nemy forces' are seeking to use China's legal system to Westernize and divide the country, and the Communist Party must fend them off by maintaining its dominance over lawyers, judges and prosecutors."⁶ "There is no question about where legal departments should stand," Luo said, "[t]he correct political stand is where the party stands."⁷

The very idea of what the law is may be less clear in China than in the West. The Chinese court system resembles the civil-law model more than the common-law model and thus the judge is more a follower of the law than a custodian of it.⁸ Further the weight courts give to edicts, policy documents, and exhortations of the Chinese Communist Party (CPC) and the orders, directions, and instructions of senior officials may confront the judge with a quagmire of competing claims for legitimacy.⁹

The distinction between law and policy or perhaps law and politics is not

CHINA 164 (2004).

4. See *id.* at 166-67 (noting socialist view that state, collective, and individual interests consistent).

5. See Joseph Kahn, *Chinese Official Warns Against Independence of Courts*, N.Y. TIMES, Feb. 3, 2007, at A5 (relating Luo Gan's statements).

6. *Id.*

7. *Id.*

8. Under the civil-law system, the judge follows the law rather than keeps custody of it. Japan introduced the civil-law system in China. The Japanese civil-law system was itself adapted from the German Civil Code. See Daniel Berkowitz, Katherine Pistor & Jean-Francois Richard, *The Transplant Effect*, 51 AM. J. COMP. L. 163, 189 n.68 (2003) (noting convergence of Western law in Asia).

9. See CHEN, *supra* note 3, at 90 (explaining Chinese Communist Party's state control). The Chinese Communist Party (CPC) leads an essentially single-party state. *Id.* The leadership operates through the nomenclature system. This system dictates that only a CPC member or approved person may fill certain key governmental and societal positions. *Id.* A government position may also include a parallel position in the CPC. More recently, the CPC has attempted to reform itself by desisting from making pronouncements that have the force of law, instead allowing the duly constituted levels of government to promulgate the laws. See *id.*; see also RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW 223-26 (2002). Party membership is by application, requiring a six-month investigation of the candidate, which includes an application and the submission of a written statement. Only 5 percent of the population are CPC members. Most of my student-members joined when they came to the university because they thought it would enhance employment or societal opportunities. They attend a meeting twice per month, which seemed more social than ideological. Members may attend a camp for a week or two in the summer, where ideology is presented.

always clear.¹⁰ Professor Albert H.Y. Chen cites H.L.A. Hart's concept of the "internal aspect of the rules," wherein decision-makers must adopt an internal point of view toward a rule.¹¹ Once "they accept [the rule] as official, as legitimate, as binding upon them," they will be motivated to reach a result consistent with the intentions of the law's framers.¹² Confusion about the legitimacy of the law will undercut the required commitment.¹³

In 1978, however, in recognition of the realities of the modern world, the National People's Congress established a unitary national judiciary for all of China. There are four levels of courts in China: the Supreme People's Court, the Higher Level People's Courts at the provincial level, and the Intermediate Level and Basic Level People's Courts at the more local level.¹⁴ These courts employ approximately 200,000 judges.¹⁵ Each level of court is essentially responsible to local political power at the same level, a responsibility reinforced by local control over court staffing and finances. By way of contrast, the Supreme People's Procurancy, also known as the procuratorate or the prosecutor's office, has jurisdiction over the lower-level offices.

Although there is no lack of authority for the requirement of independence in the Constitution and in Judicial Codes, a lack of judicial independence may

10. There are several notable differences between the American and Chinese Constitutions. The first is the Chinese Constitution's commitment to an ideology. The preamble addresses the task for the future and states "[u]nder the leadership of the Communist Party of China and the guidance of Marxism-Leninism and Mao Zedong [T]hought . . . the Chinese people of all nationalities will continue to adhere to the people's democratic dictatorship and the socialist road." XIAN FA pmbl. (1993) (P.R.C.), available at <http://lawinfochina.com/law/display.asp?db=1&id=3437>. This appears to commit the nation's 1.3 billion people to an economic policy, a political system, a philosophy, and a view of history established by three individuals who lived in the nineteenth and twentieth centuries and responded to the unique historical and political situations of their times. One can imagine endless debates about the quoted language's meaning. Query whether the economic policy of 2007 complies with the views of any of these three individuals. On the other hand, preambles often invoke fundamental principles and are, perhaps, not intended as binding as the actual articles. Second, the Constitution states that the government it creates follows the leadership of the Communist Party. *See id.* The statement was undeniably true when written and remains true today: China is essentially a single-party state. Within the Party, there are presumably policy differences and debates that may or may not be publicly known. One purpose of a constitution is to establish a blueprint for government that clarifies the organizational relationships in the various offices of government. Clearly all must follow established law. How does Party leadership fit into this mix? Laws are binding on all to whom they apply because they were enacted by an appropriate governmental agency following legally appropriate procedures. Party leadership, on the other hand, may take a variety of forms and is not binding. Therefore, its inclusion in the Constitution blurs the distinction between politics and law that is necessary for governance by the rule of law. Should courts ignore or seek to make use of a pronouncement by the Communist Party stating, for instance, that corrupt government officials are "capitalist roaders" who should face long incarcerations? *See id.*

11. *See* CHEN, *supra* note 3, at 95 (describing Hart's theory); *see also* H.L.A. HART, *THE CONCEPT OF LAW* 55 (1961).

12. *See* CHEN, *supra* note 3, at 95 (discussing procedure by which officials adopt internal point of view of rule).

13. *See* PEERENBOOM, *supra* note 9, at 240 (noting confusion in legislative process).

14. *See* Law Info China, *Legal System of China*, <http://www.lawinfochina.com/Legal/index.asp> (last visited May 7, 2008).

15. Benjamin L. Liebman, *Watchdog or Demagogue? The Media in the Chinese Legal System*, 105 COLUM. L. REV. 1, 8 (2005).

be the most serious obstacle for the rule of law in China today.¹⁶ The courts, as offices or bureaucracies, maintain a status equal to the other ministries and commissions for the town or province. As employees of a quasi-executive branch, judges maintain no greater job security than any other governmental appointee. Similar to those appointees, the government selects a judge because he or she is favored by the State, Provincial or Municipal Council or the State, Provincial, or Municipal Communist Party leadership, depending on who is calling the shots at that particular time. Further, the Supreme People's Court has no administrative authority over lower courts and indeed may lack appellate jurisdiction. The local government budget accounts for operating expenses, including judges' salaries.¹⁷ At any time, the legislature can replace or remove those judges serving in a court that corresponds with the level of that particular legislature.¹⁸ The local government and the party can easily express its opinion in matters before a court.¹⁹ The internal managerial system of the people's courts discourage independence.²⁰ Reports of corruption in Chinese courts are still widespread.²¹ Personal relationships or "back-door" connections play significant roles in Chinese society. In the adjudication of cases, lawyers can cultivate easy access to the presiding judge.²²

Many judges also lack professional qualifications. Among the presidents and vice-presidents of the people's courts, only 19.1% received a bachelor's degree or higher, while this ratio is down to 15.4% among judges in the lowest

16. China's constitution and law recognize judicial independence. The 1954 Constitution required the people's courts to adjudicate cases independently and abide by law. Article 126 of the current constitution, adopted in 1982 and amended in 1999, further provides that the people's courts shall exercise judicial power independently according to law and free of any interference by administrative agencies, social organizations, or individuals. "Similar provisions are also embodied in the 1979 Organic Law of the People's Courts (as amended 1983), the 1995 Law of Judges (as amended 2001), as well as the CPL." See Mo Zhang, *International Civil Litigation in China: A Practical Analysis of the Chinese Judicial System*, 25 B.C. INT'L & COMP. L. REV. 59, 92-93 (2002).

17. See *id.* at 94.

18. See *id.* (noting Chinese judges lack life terms).

19. See *id.*

20. See Zhang, *supra* note 16, at 94 (discussing shortfalls of China's court management system).

The president of each court is both the chief judge and the chief executive. The president has the power to influence the promotion and demotion of any particular judge in the court, and to supervise all judges through a reporting system. In most cases, the local people's court president is a political appointee by the local government. In addition, though cases are tried by a collegial panel, the panel's decision is subject to review by the trial committee consisting of the president, vice presidents, and division directors. Thus, the ability of the judge or collegial panel to reach an independent decision on a case is considerably limited.

Id.

21. The oft-used Chinese word is *guanxi* and may include influence built upon long relationships or out-and-out bribery. See Frederik Balfour, *You Say Guanxi, I Say Schmoozing*, BUS. WK., Nov. 19, 2007, http://www.businessweek.com/magazine/content/07_47/b4059066.htm (describing Chinese business environment).

22. See Zhang, *supra* note 16, at 94.

courts.²³ Professor Mo Zhang observes that many of those who have received a college degree have not graduated from law school, and of the few who have received a law degree, a substantial number did so through continuing education.²⁴ In local people's courts there are few law school graduates and most judges are military veterans.²⁵ Although the Law of Judges was enacted to help improve judicial quality, the law stops short of requiring a law degree or even college education for judges appointed before the law took effect on July 1, 1995.²⁶ While efforts to upgrade the quality of the judiciary have been especially successful in major cities and commercial centers, the seemingly deficient educational level of judges contributes to their low status in the hierarchy of power.²⁷

Localism may also bias the courts.²⁸ When courts are asked to enforce foreign judgments, including arbitral awards against local industries or businesses, local access may affect results. Similarly, judgments against a state-operated enterprise may encounter interference from the government.²⁹

III. THE LEGAL PROFESSION

One challenge to the development of a legal profession is the successful tracing of the profession's growth from the ages of the various dynasties. Persons of influence and persons with skills for assisting emperors in the administration of the various empires emerged throughout the ages, serving as intermediaries between the emperor and the people.³⁰ The emperor or his designee resolved disputes among people in an ad hoc fashion.

After the fall of the Qing dynasty, a small legal profession emerged in 1912 with the promulgation of the Provisional Regulations on Lawyers, specifying the responsibilities, training, and qualifications of lawyers.³¹ By 1935, there

23. See Zhang, *supra* note 16 at, 94-95 (describing quality of Chinese judges as poor).

24. Zhang, *supra* note 16, at 94-95.

25. Zhang, *supra* note 16, at 95.

26. Zhang, *supra* note 16, at 94.

27. See Donald C. Clarke, *China's Legal System and the WTO: Prospects for Compliance*, 2 WASH. U. GLOBAL STUD. L. REV. 97, 97-118 (2003).

28. See *id.* at 107 (noting local protectionism's impact on Chinese courts).

29. See Zhang, *supra* note 16, at 92. For example,

when recognition and enforcement of foreign arbitral awards are requested, lower Chinese courts often arbitrarily decide to set aside the awards. In order to curb this practice, the Supreme People's Court established a pre-reporting system under which a decision on whether an arbitral award is to be recognized and enforced shall be reported to the Supreme People's Court for review. No decision shall be made before the Supreme People's Court review is complete.

Id.

30. CHEN, *supra* note 3, at 164 (describing toward litigation tricksters and pen-knife men).

31. PEERENBOOM, *supra* note 9, at 345.

were 10,000 lawyers in China.³²

The small lawyer class that developed during the republic was essentially abolished in 1949 with the accession of Mao Zedong to power. Another small legal profession emerged in the 1950s but was brutally suppressed during the Cultural Revolution of the 1960s.³³ Finally, after Mao's death and the succession of Deng Xiaoping, the development of a legal profession became possible when Deng declared that lawyers were essential to his proposed economic reform. In 1979, the Ministry of Justice was reconstituted; it, along with the justice bureaus, both operating through provincial or local offices, managed and supervised the creation of a system of lawyers, notaries, and people's mediation committees; labor re-education programs; prisons; and legal education.³⁴ Also in 1979, the National People's Congress enacted the Provisional Regulations of the PRC on Lawyers.³⁵ Those lawyers, however, were employed by the state and worked in state-owned law advisory offices, which advised the government, social groups, people's communes, and

32. PEERENBOOM, *supra* note 9, at 346.

33. PEERENBOOM, *supra* note 9, at 347.

34. CHEN, *supra* note 3, at 197.

35. PEERENBOOM, *supra* note 9, at 348. Donald Clarke provides an excellent overview of China's legal structure:

The PRC is in form a unitary state; all power flows from the central government, whose seat is in Beijing. Local governments have only such power as the central government chooses to delegate to them. Naturally, it cannot avoid such delegation, and in many cases is unable to supervise effectively the exercise of local government power, leading to substantial de facto autonomy for local governments in some areas of activity As it rejects the notion of vertical separation of powers, the PRC also rejects the notion of horizontal separation of powers between different branches of government A necessary separation of functions is acknowledged, but constitutionally speaking the National People's Congress (in form, a legislature) sits at the apex of China's political power structure . . . [it] has the authority to issue laws binding over all of China . . . and . . . appoint the Premier (the head of the State Council, which might loosely be described as China's cabinet or executive branch) and the Presidents of the Supreme People's Court and the Supreme People's Procuracy (the prosecutorial agency). NPC delegates are not directly elected; they are chosen by the people's congresses below them, at the provincial level. Similarly, provincial people's congress delegates are chosen by people's congresses below them. Only the people's congresses at the lowest level have directly-elected delegates. The day-to-day work of government is carried out by the State Council under the Premier. The State Council is divided into various functional ministries and commissions. This bifurcation between a people's congress on the one hand and a day-to-day government on the other hand is replicated several layers down into local government. In each case, the government organization is responsible not to government organization the next level up, but rather to the people's congress at the same level. Again, this is the formal structure.

In practice, the Communist Party organization at any given level of government has a monopoly on political power. The monopoly . . . does not mean absolute power to do whatever the Party organization wishes. There are always constraints on capacity, whether economic, political, or social.

See Donald C. Clarke, *The Chinese Legal System*, July 4, 2005,

<http://docs.law.gwu.edu/facweb/dclarke/public/ChineseLegalSystem.html> (last visited May 7, 2008).

citizens.³⁶ In carrying out their responsibilities, lawyers were required to promote the socialist legal order and be faithful to the cause of socialism.³⁷

In 1996, a new law on lawyers was enacted. Among other things, the new law encouraged the creation of independent law firms. By 1998, there were 8,946 law firms: 27 percent were independent, 59 percent were state owned and 11 percent were cooperatives.³⁸ By 2002, the number of firms was up to 9,995, with only 23 percent state-owned.³⁹ By 2007, the approximate population of lawyers was at least 120,000,⁴⁰ and likely one-half were part-time.⁴¹ Included in this total are the so-called barefoot lawyers who practice without licenses in rural areas.⁴² Slowly, administrative and regulatory authority over the bar has started to move from the Ministry of Justice to bar associations.⁴³ But, the Ministry still has adequate arbitrary authority to intimidate its licensees.⁴⁴ The administrative organs of the judiciary, operating under the Ministry, have extensive regulatory authority over law firms as well. They ultimately certify individual lawyers, approve the establishment of law firms, and have the power to regulate fees.⁴⁵ Additionally, they regulate and sanction disciplinary cases and can actually intrude into a lawyer's or firm's handling of a controversial matter.⁴⁶ Lawyers often face similar dangers from prosecutors, courts, and the Communist Party at all levels of government.⁴⁷ China also uses a system of notaries similar to the practice in Western Europe, whereby notarization adds official significance to documents, including contracts, wills, deeds, adoptions, and affidavits.⁴⁸

The All-China Lawyers' Association has promulgated a code of professional responsibility, which has been translated into English.⁴⁹ The Legal Aid

36. See PEERENBOOM, *supra* note 9, at 348

37. See PEERENBOOM, *supra* note 9, at 348.

38. See PEERENBOOM, *supra* note 9, at 353; see also CHEN, *supra* note 3, at 173 (discussing cooperative law firm).

39. CHEN, *supra* note 3, at 175.

40. See Yongshun Cai & Songcai Yang, *State Power and Unbalanced Legal Development in China*, 14 J. OF CONTEMPORARY CHINA 117, 117-34 (2005). This is reflected by the increase in the number of law firms and lawyers in China. From 1989 to 2000, the number of law firms increased from 3,653 to 9,541, and the number of lawyers rose from 43,530 to 117,260. YONGSHUN CAI & SONGCAI YANG, *DEBATING POLITICAL REFORM IN CHINA: RULE OF LAW VS. DEMOCRATIZATION* 164 (2006).

41. See PEERENBOOM, *supra* note 9, at 362 (noting 1998 statistic).

42. See PEERENBOOM, *supra* note 9, at 354-55.

43. See PEERENBOOM, *supra* note 9, at 356-58.

44. See PEERENBOOM, *supra* note 9, at 356-58.

45. See CHEN *supra* note 3, at 355-58; PEERENBOOM, *supra* note 9, at 355-58; see also CAI & YANG, *supra* note 40, at 166 (describing effects on incentives from state regulation of fees).

46. See CHEN, *supra* note 3, at 179.

47. See PEERENBOOM, *supra* note 9, at 358-59. Indeed, stories of physical violence and incarceration of lawyers are all too common. *Id.* at 360-61.

48. See CHEN, *supra* note 3, at 192.

49. See Carol Langford & Nathaniel Nicoll, *Ethics Abroad: A Shanghai Surprise*, CAL. ST. B.J., Nov. 2002, available at <http://www.calbar.ca.gov> (follow "California Bar Journal" hyperlink; follow "Archived Issues" hyperlink; follow "November" hyperlink under "2002"; then follow "MCLE Self-Study" hyperlink)

Regulations enacted in 2003 acknowledge four categories in which the government is obligated to provide legal assistance to those who cannot afford it: maintenance claims by the elderly against their children, claims for workplace injury, claims for state compensation, and criminal cases.⁵⁰ This national regulation leaves the funding and administration of the program to the provinces and counties, and every lawyer is ethically obligated to participate.⁵¹

The profession today continues to struggle with issues of competence.⁵² In 2002, a unified national judicial examination for lawyers, judges, and prosecutors was instituted. A college degree is now required, although a degree from a correspondence school is sufficient. A law degree, however, is not required.⁵³ The two-day exam that one must pass to practice law has both essay and multiple choice sections. The pass rate is always under 10 percent. The Ministry can waive the exam by inviting qualified persons to receive a license. A year of apprenticeship, however, is required to receive the lawyers' qualification, which is necessary to represent clients. All lawyers are considered members of the All China Lawyers Association, established in 1986.⁵⁴ Additional bar associations may be established at the provincial or municipal levels.⁵⁵

IV. LEGAL EDUCATION

Since the end of the Cultural Revolution, the expansion of legal education in China has been rapid and dramatic. While only two functioning law schools existed in 1979, there are currently over 500. Much of this growth has occurred within the past few years. While at the end of 1998 there were approximately 300 law schools, today there are approximately 560 universities offering legal education to 300,000 enrolled students: 200,000 undergraduate students, 20,000 J.M. students, 60,000 L.L.M. students, and 6,000 doctoral students.⁵⁶

(discussing differences between Chinese and California codes).

50. See CHEN, *supra* note 3, at 182-83.

51. See CHEN, *supra* note 3, at 182. In 2003, the Beijing Legal Aid Center had a staff of twelve individuals. *Id.* at 182-84. Between 1997 and 2002, the office handled more than 3,000 criminal cases with more than 300 civil cases and 281 firms and 2,175 lawyers participating. *Id.* at 183-84.

52. See CAI & YANG, *supra* note 40, at 152; Zhang, *supra* note 16, at 96. "It is estimated that in the early 2000s, over 48% of lawyers had a primary college education (*dazhuan*, or an education between senior high school and college), while only about 40% had received a college education or higher." See CAI & YANG, *supra* note 40, at 165.

53. See CHEN, *supra* note 3, at 168. Indeed, many of my students insist that law school was of little assistance in passing the bar. One of my students passed the bar one year after graduating from medical school and before even being admitted to law school. When asked how he did it he said he committed many laws to memory.

54. See CHEN, *supra* note 3, at 177; see also All China Lawyers Association, *Brief Introduction*, <http://www.chineselawyer.com.cn/html/union/englishunion/briefintroduction.html> (describing ACLA as professional association of which all lawyers of PRC are members) (last visited May 7, 2008).

55. See CHEN, *supra* note 3, at 177.

56. Robert Lancaster & Ding Xiangshun, *Addressing the Emergence of Advocacy in the Chinese Criminal*

The rapid expansion of legal education creates challenges for maintaining the quality of programs, teaching, and curricula.⁵⁷ While no standards exist to regulate the creation of new law schools, the Ministry of Education has some minimal requirements for “qualification” as a law school.⁵⁸ A nationally established core curriculum exists, comprised of fourteen required courses for L.L.B. students.⁵⁹ Although schools that cannot provide the fourteen core courses are deemed unqualified, the requirement is minimal, and there is no quality oversight.⁶⁰ None of the fourteen courses contains practical curricula or the teaching of lawyer-practice skills.⁶¹

Tuition approximates \$1,250 per year, although J.M. tuition is slightly higher, and student loans are available. Teaching methods favor lecture over discussion, doctrine over case studies, and the presentation of a systematic body of knowledge over the development of analytical skills. There is wild variation not only between law schools, but also between classes at any particular law school.⁶² Students complain that the courses are highly theoretical and have little relevance to the real world. Some classes are taught without course books and many professors appear to have many professional commitments outside of the law school. The professor’s salary is approximately \$12,000 and may include benefits like housing and children’s education. Chinese culture and history seem to lack lawyer heroes like Webster, Lincoln, or Darrow to whom students can look for inspiration.⁶³

V. LITIGATING WITH THE GOVERNMENT

Many Chinese lawyers, especially those in the criminal and administrative fields, avoid litigating against the government because of its overwhelming

Justice System: A Collaboration Between a U.S. and a Chinese Law School, 30 FORDHAM INT’L L.J. 356, 365-66 (2007).

57. *See id.* at 366 (describing development and reform of legal education in China).

58. *Id.*

59. *See* CHEN, *supra* note 3, at 196. The fourteen courses are legal theory, Chinese legal history, constitutional law, administrative law and law of administrative litigation, criminal law, law of criminal procedure, civil procedure, civil law, commercial law, economic law, intellectual property, private international law, international law, and international economic law. Lancaster & Xiangshun, *supra* note 56, at 366 n.49.

60. *See* Lancaster & Xiangshun, *supra* note 56, at 366 (explaining technical requirements of Chinese legal education system).

61. *See* Lancaster & Xiangshun, *supra* note 56, at 366.

62. In the civil-law tradition, law school is a four-year undergraduate major after which the student is awarded the L.L.B. degree. Even more popular at Tsinghua University is the Juris Master program, which lasts three years for students who have a bachelor’s degree that is not in law. The L.L.M. degree is available for students who have completed any bachelor degree, including the L.L.B. degrees. L.L.M. degrees are a popular form of international exchange with foreign students attending twelve or fifteen month programs, often in conjunction with an American university. Chinese L.L.B. and J.M. students are interested in attending masters programs offered in the United States.

63. *See* Gerard J. Clark, *Lawyer as Hero?*, 21 ADVOC. 39, 39 (1991) (describing mythological aspects of famous American lawyers).

power.⁶⁴

A. Criminal Cases

“A traditional emphasis on stability and social order and a deeply rooted fear of chaos culminate in a public that is unsympathetic to the plight of criminal defendants.”⁶⁵ This helps to explain why China leads the world in imposing the death penalty.⁶⁶

China enacted its first comprehensive Law of Criminal Procedure in 1979, in the very early stages of rebuilding its legal system.⁶⁷ An extreme example of the civil-law tradition, it makes the judge, with the assistance of the procurator, the dominant figure at the criminal trial; the defense counsel has little or no role at all.⁶⁸ The 1996 Code established a rudimentary framework for adversarial trials, and specified particular requirements for criminal trials.⁶⁹ The defendant is presumed innocent before trial in the absence of “a judgment lawfully rendered by a people’s court.”⁷⁰ Although a suspect can be detained and questioned for three days, he is thereafter entitled to the assistance of counsel.⁷¹ The 1996 Code reduced the judge’s role in the discovery process and

64. See generally CAI & YANG *supra* note 40, at 65 (relating fear of litigating against government to lack of adherence to rule of law); Zhang, *supra* note 16, at 63 (observing reluctance to litigate due to lack of independent judiciary and respect for rule of law).

65. See PEERENBOOM, *supra* note 9, at 375.

66. See David Lague, *China Moves to Lessen the Broad Use of Death Sentences*, N.Y. TIMES, Nov. 1, 2006, at A3 (noting China executes more people than all nations combined). Amnesty International estimated in 2005 that China accounted for 80 percent of the world’s executions. *Id.* In 2004, of the 3,797 executions Amnesty International documented, 3,400 occurred in China. *Id.*

67. See CHEN, *supra* note 3, at 203.

68. See Lancaster & Xiangshun, *supra* note 56, at 359-60.

Under the 1979 Code, the judge was charged with collecting and examining evidence before the court was ever called into session. Most of the evidence was verified through this pre-trial process. Since the judge took this active pre-trial role, the actual court trial was often an administrative event conducted in accordance with a pre-prepared questionnaire . . . emphasis was placed on the judge’s interrogation and production of evidence . . . witnesses rarely appeared at trial: In fact, the vast majority of criminal trials took place with no live witnesses. [Because the 1979 code allowed written statements and reports to be introduced] in lieu of live testimony, live witnesses simply did not appear in court. In most cases, the court clerk simply read the available reports and statements in open court . . . the defendant could not challenge witnesses’ pre-trial statements through cross-examination . . . trial judges had no independence to make decisions on the cases they heard. The upper court levels had authority over the lower courts to mandate lower court decisions . . . Also, decisions were sometimes made in the upper court levels prior to the trial being conducted in the lower court.

Id.

69. See Lancaster & Xiangshun, *supra* note 56, at 361-63 (describing major changes in 1996 Code).

70. See CHEN, *supra* note 3, at 212 (citing provisions of Article 12).

71. See CHEN, *supra* note 3, at 208 (discussing rights of criminal detainees in China). These rights and presumptions, however, are subject to certain exceptions. *Id.*

strengthened the independence of the trial court bench.⁷² The prosecution, however, continues to forward its evidence to the judge prior to trial, supposedly for the purpose of giving the judge adequate information as to the evidence's sufficiency for presentment at trial.⁷³ After the presentation of the procurator's case, the new code provides for a debate in which defense counsel is entitled to participate and actually to present a defense.⁷⁴ From a Western perspective, the defendant's rights appear meager, and often the role of defense counsel may be reduced to a plea for mercy in sentencing.⁷⁵ The 1996 Code supposedly strengthened the independence of the lower court bench by requiring that the court conduct an independent trial.⁷⁶ Lower courts now transfer a case to the court president only when the lower court bench decides that it does not have the capacity to handle the matter.⁷⁷ The court president then transfers the case to the Court Trial Committee to decide any outstanding issues, while the lower court loses its independent adjudicatory authority only after it requests this transfer.⁷⁸

The 1996 Code provides no mechanism to compel witnesses' attendance.⁷⁹ Further, Article 306 of the revised 1997 Criminal Law punishes any counsel or legal representative who destroys or fabricates evidence, assists the litigant in destroying or fabricating evidence, or threatens or induces a witness to change his or her testimony. The penalty for violation of Article 306 is incarceration for a period of three to seven years. Lawyers are arrested under the charge of coaching the defendant to give false evidence if the defendant changes his or her statement after meeting with the lawyer. But, as the public security department may extract a confession through torture, it is common for the accused to withdraw the false confession when he or she has an opportunity to do so. The government can charge the lawyer when there are disparities between evidence the lawyer collected and evidence the prosecution collected.⁸⁰ By the early 2000s, at least 150 lawyers had been arrested on the

72. Lancaster & Xiangshun, *supra* note 56, at 361.

73. Lancaster & Xiangshun, *supra* note 56, at 361-62.

74. Lancaster & Xiangshun, *supra* note 56, at 362.

75. A brief list of rights that the American Constitution vests in the defendant, but which the 1996 Chinese Code withholds, includes: search and seizure rights, grand jury presentment, double jeopardy, self-incrimination, speedy and public trial, jury trial, confrontation of witnesses, subpoena power and right to counsel. See U.S. CONST. AMENDS. IV-VI. Indeed, the United States Department of State's 2006 China Country Report that assesses the rendition of civil rights and liberties in most nations was scathing in its criticism of the Chinese criminal justice system. See China, Country Reports for Human Rights and Practices, Mar. 6, 2007, available at <http://www.state.gov/g/drl/rls/hrrpt/2006/78771.htm> (last visited May 9, 2008). The report called it corrupt and political and accused it of contributing to widespread human rights violations. *Id.*

76. Lancaster & Xiangshun, *supra* note 56, at 361-64.

77. Lancaster & Xiangshun, *supra* note 56, at 363.

78. Lancaster & Xiangshun, *supra* note 56, at 362.

79. See CONG.-EXEC. COMM'N ON CHINA, 109TH CONG., ANNUAL REPORT, at 31 (2005), available at <http://www.cecc.gov/pages/annualRpt/annualRpt05/index.php>. According to Professor He Jiahong of Renmin University Law School, witnesses appeared at trial in less than 8 percent of the cases. See *id.*

80. See P.R.C. CRIM. LAWS, ch. VI, art. 306 (criminalizing certain acts of defense counsel). "In 1995, the

charge of falsifying testimony, although most of them were later acquitted.⁸¹ Similar kinds of harassment and intimidation exist throughout the process of evidence collection, including during the interviewing of witnesses and accessing of files in the possession of the state.⁸²

Gaining access to one's clients can be problematic. The Criminal Procedure Law and the Lawyers' Law state that the lawyer has the right to meet with his client.⁸³ "A directive by the central legal organs also states that in criminal cases that do not involve national security, lawyers are entitled to speak with suspects without the approval of legal organs during the investigation period. However, in practice, lawyers are commonly denied access to their clients."⁸⁴

B. Administrative Cases

One problem with the administrative system is its sheer complexity. The number of entities with the right to legislate has resulted in a bewildering and inconsistent array of laws, regulations, provisions, measures, directives, notices, decisions, and explanations that all claim legitimacy.⁸⁵ Further, the often vaguely delineated organic laws make questions of the laws' legitimacy relevant. Not all laws are published, and often, a CPC policy or internal directive may govern.

Administrative cases, like criminal cases, place a party and his or her lawyer in opposition to the government. In a study of these cases by Yongshun Cai and Songcai Yang, it was discovered that about one-half of administrative cases filed are subsequently withdrawn as a result of pressure and intimidation brought to bear on the plaintiff.⁸⁶

Often the government official whose decision is the subject of the case will refuse to appear in court, some using the power of their own office to issue orders to the court or judge.⁸⁷ Because of such pressure, some courts simply refuse to hear actions or dismiss them even if meritorious. This, of course, undermines public confidence in such cases and leads to the filing of fewer cases.⁸⁸

Lawyers fear taking criminal and administrative cases because they are

Association of Chinese Lawyers received less than twenty appeals from its members for protection of their rights. After the Criminal Law was enacted in 1997, the number of appeals reached seventy per year. About 80% of these appeals pertained to accusations of 'fabricating evidence' or 'obstruction of evidence collection.'" See SUIHENG ZHAO, *DEBATING POLITICAL REFORM IN CHINA: RULE OF LAW VS. DEMOCRATIZATION* 176 (2006).

81. See ZHAO, *supra* note 80, at 176.

82. See ZHAO, *supra* note 80, at 174.

83. See ZHAO, *supra* note 80, at 174-75.

84. See ZHAO, *supra* note 80, at 174-75.

85. See PEERENBOOM, *supra* note 9, at 241.

86. See Cai & Yang, *supra* note 40, at 171 (discussing problems in administrative litigation).

87. See CAI & YANG, *supra* note 40, at 172.

88. See CAI & YANG, *supra* note 40, at 172.

difficult to win and the government may abuse its power to punish lawyers.⁸⁹ Only 20 percent of parties to these proceedings are represented by counsel.⁹⁰ The most recent intrusion into their independent representation came in the spring of 2006 with the promulgation of “guiding opinions,” which require lawyers who accept cases that involve ten or more plaintiffs suing organs of the government or the ruling party to submit to “guidance and supervision” by their local judicial bureau and the All China Lawyers Association, both of which are under government control. They must obtain consent from at least three partners in their law firm before accepting such cases and refrain from “stirring up” news media coverage.⁹¹ State security officers and the police have arrested or intimidated people associated with China’s *weiquan* (rights protection movement).⁹² The government charged at least four prominent lawyers and leading rights advocates, including Gao Zhisheng, Chen Guangcheng, Guo Feixiong and Zheng Enchong, after accepting politically delicate cases.⁹³

VI. COMMERCIAL LAW

Large financial entities may be represented by in-house counsel or lawyers retained from law firms. Firm lawyers most commonly work on a commission basis. Firms require that their lawyers generate at least \$5,000 per year in billings, of which the firm takes one-half. The individual lawyer more closely resembles a solo practitioner working out of the firm.⁹⁴ The firm may merely supply a desk, which is often shared with another, receptionist, telephone, and minimally supplied library. With respect to work that lawyers generate, they retain 50 percent of the fee.⁹⁵

89. See CAI & YANG, *supra* note 40, at 172. The authors recite the story of Zhang, a lawyer who represented some townspeople in an eminent domain case. See *id.* at 172-73. After zealously advocating for his client, he was not only beaten but sentenced to fifteen years in prison. *Id.* at 173. The county court and district courts then turned against his wife, who was also a lawyer and had helped Zhang in the case, wanting to imprison her as well out of concern that she would lodge appeals to higher-level authorities. *Id.* In December 1991, the county court sentenced her to three years in prison on charges that she was involved in accepting bribes. *Id.* The district court effectively conditioned her release on her not lodging appeals for Zhang. She agreed and was released. *Id.*

90. PEERENBOOM, *supra* note 9, at 362.

91. See Joseph Kahn, *Rights Group Urges China to End Curbs on Lawyers*, N.Y. TIMES, Dec. 11, 2006, at A6.

Luo Gan, a member of the Politburo Standing Committee, the committee that oversees police and judicial matters for the ruling party, said in an [sic] speech published in a state-run magazine that officials should take ‘forceful measures’ against lawyers or rights advocates who use the law as a pretext to ‘undermine social stability.’

Id.

92. See *id.*

93. See *id.*

94. See *id.*

95. See Robert M. Lloyd, *Hard Law Firms and Soft Law Schools*, 83 N.C. L. REV. 667, 677 n.56 (2005)

VII. FOREIGN LAW FIRMS

China's large industrial cities have witnessed the growing presence of foreign law firms,⁹⁶ primarily from the United Kingdom and the United States.⁹⁷ These firms provide services that include "drafting contracts and opinion letters on Chinese law; conducting due diligence; handling applications and registrations with Chinese government agencies; and directing litigations and arbitrations in which Chinese lawyers make the appearances."⁹⁸ As foreign firms are ineligible to practice in China, they hire Chinese-licensed lawyers as "assistants" to provide legal services; the assistants, however, must surrender their licenses upon joining foreign firms, technically making them ineligible to

(describing "eat what you kill" law firm structure).

96. Between July 1992—when China first opened its legal offices to overseas markets—and 2000, the Ministry of Justice has approved ninety-two law offices from eleven countries and twenty-eight Hong Kong law firms to establish representative offices in China. Law firms from foreign countries—the United States, the United Kingdom, France, Australia, Italy, Japan, the Netherlands, Sweden, Singapore, Jordan, Switzerland, and Hong Kong—have branch offices in ten Chinese cities, including Beijing and Shanghai. See *Foreign Law Firms Establish China Branches*, PEOPLE'S DAILY, Jan. 9, 2000, available at http://english.people.com.cn/english/200006/08/eng20000608_42541.html.

97.

Rank	Name	Number of Lawyers
1	Freshfields	37
2	Clifford Chance	36
3	Baker & McKenzie	33
4	Jones Day	33
5	Linklaters	32
6	Herbert	24
6	Lovells	24
8	Paul, Hastings, Janofsky & Walker	18
8	O'Melveny & Myers	18
10	Hogan & Hartson	17
11	Sidley Austin Brown & Wood	16
12	Squire Sanders & Dempsey	12
13	Allen & Overy	11
13	Weil, Gotshal & Manges	11
13	Shearman & Sterling	11

"Coudert Brothers had 41 lawyers in the two cities before it closed in October 2005. Most of the firm's China lawyers went to O Herrick, Herrington & Sutcliffe; the remainder to DLA Piper Rudnick Gray Cary." Law.com, *Law Firms With the Highest Number of Lawyers in Beijing and Shanghai in 2005*, <http://www.law.com/jsp/article.jsp?id=1147856733414> (last visited May 9, 2008).

98. See Anthony Lin, *Shanghai Bar Association Upset With Practices of Foreign Firms*, N.Y. L.J., May 17, 2006, at 1.

practice.⁹⁹ Predictably, this practice has generated antagonism on the part of local bar associations.¹⁰⁰ The competition appears most intense for the representation of foreign multinational corporations attempting to navigate Chinese regulations in order to expand their manufacturing and retail operations in the country.¹⁰¹ The movement of Chinese firms into the U.S. market is less common, although not unknown.¹⁰² The most recent solution to a fairly detailed set of regulations involves a “strategic alliance” between an American firm and one from China.¹⁰³

99. *See id.*

100. *See id.* (detailing Shanghai Bar Association’s memo accusing foreign law firms of conducting illegal business activities). The memo accused foreign firms of skirting regulations prohibiting them from practicing Chinese law, including hiring Chinese lawyers as assistants to provide legal services despite Chinese lawyers surrendering their licenses upon hiring. It also accused some foreign firms of disseminating “illegal and misleading propaganda,” including claims of expertise in Chinese law. *Id.* The Shanghai lawyers group also claims foreign law firms are evading Chinese taxes because significant revenue realized in overseas offices from China work is never reported to Chinese tax authorities”. *Id.*

101. *See Lin, supra* note 98, at 1 (suggesting representation of foreign multinationals navigating regulations provides strongest competition between Chinese and foreign firms). Top New York firms are heavily focused on cross-border capital markets handling work alongside the major banks. *Id.* Though Chinese firms are not generally in a position to compete for this work, large U.S. and British firms were very much “in the trenches,” competing with Chinese firms for what has become lucrative mid-market work representing foreign multinationals in a sort of regulatory navigation. *Id.* By heavily utilizing low-paid Chinese lawyers who can produce high margins for the firm’s partners, foreign firms defeat the China market’s reputation for forcing expensive foreign law firms to accept low or discounted fees. *See id.*

102. *See Marie-Anne Hogarth, Beijing by the Bay, THE RECORDER, May 11, 2005, <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1115715916698> (last visited May 9, 2008)* (observing few Chinese firms operate in the United States). Most of the Chinese firms operating in the United States limit themselves to a few lawyers dedicated to client retention and sending work back to China. *Id.*

103. *See Nathan Koppel, A U.S. Law Firm Takes a New Route into China, WALL ST. J., Jan. 30, 2007, at B1* (describing alliance between McDermott, Will and Emery of the U.S. and Yuan Da Law Chinese law offices). The Chinese State Council issued regulations in 2002 on the administration of representative offices set up in China by foreign law firms. *China Issues Regulation on Foreign Law Firms, PEOPLE’S DAILY, Dec. 29, 2001, available at http://english.people.com.cn/200112/29/eng20011229_87707.shtml* (last visited May 9, 2008). These regulations stipulate that foreign law firms must obtain permission from relevant State Council departments before creating and staffing offices. *Id.* Likewise, foreign firms cannot engage in legal services under the guise of a consulting firm. *Id.*

According to the Regulation, the offices and representatives of foreign law firms in China can only engage in five kinds of activities outside Chinese legal affairs.

1. Lawyers are allowed to offer consulting services on legislation of the country or region where the lawyers are licensed, and on international conventions and practices.
2. They are also allowed to handle the legal affairs of the countries or regions where they gained permission to become lawyers.
3. On behalf of foreign litigant [sic], they can entrust Chinese law firms to deal with Chinese legal affairs.
4. And foreign law firms can also enter into contract [sic] with Chinese counterparts to entrust them to deal with legal affairs.
5. They can also provide information on the impact of the Chinese legal environment. The regulation bans foreign law firms to recruit [sic] Chinese lawyers, and employed assistant staff can not [sic] provide law services. The representative office should conduct law service activities in accordance with the Regulation and therefore is protected by Chinese law.

Chinese courts may be doing their best work in the field of commercial litigation.¹⁰⁴ The booming economy generates its share of disputes involving construction and construction financing, purchase and sale of materials and goods, commercial leasing, intellectual property, joint venturing, and the like. Although businesses probably prefer to arbitrate their disputes, arbitration requires two willing disputants, and businesses thus often have no choice but to litigate. The Chinese government has an adequate incentive to provide good service to these entities that fuel growth. Some local courts provide special divisions for commercial cases. In an empirical study in three provinces, Professors Woo and Wang report that the intermediate level courts in some smaller cities are being used overwhelmingly by business with satisfactory results.¹⁰⁵ Notwithstanding this fact, a residue of the inquisitorial system and even traditional Chinese legal culture can create a sense that the objective of litigation is to discover and unveil an objective rather than a legal truth, and the judicial system should not be called upon until the evidence is clear.¹⁰⁶ This may cause greater tendency to restrict case access to court.¹⁰⁷

Professors Woo and Wang further note that the parties are legal persons more often than natural persons.¹⁰⁸ They note that because “the intermediate

Id.

104. See Steve Dickinson, *Chinese Court System Surprisingly Effective*, May, 17, 2007, available at <http://www.jongonews.com/articles/07/0517/15630/MTU2MzA1xfVv5Fd.html> (last visited May 9, 2008) (describing success of China’s system in defending foreign businesses’ rights). To make effective use of the Chinese court system, four fundamentals have been proposed:

1. Be sure the Chinese side of the transaction is a well-established, legitimate business entity. The first step in any business transaction here in China is to ensure that the party with whom you are dealing is a legitimate business with the financial ability to pay on any claims. In other words, do your due diligence.
2. You must have a written contract. Chinese judges are professional bureaucrats. They know little or nothing about business. The judges are very good at taking the terms of a written agreement and applying them to a specific situation. They are not good at supplying contract terms based on commercial practice and common business sense.
3. The written contract should be in English *and* Chinese. A contract solely in English or any other foreign language will need to be translated and interpreted by the court. This can cause substantial delay in the court case, to the disadvantage of the plaintiff.
4. The contract should be subject to Chinese law and should provide for litigation in China. If you want to enforce your contract rights against a Chinese company, you almost always will need to take action in China. It is absolutely essential that foreign businesses operating in China ensure that they will have access to the Chinese courts to defend their rights. Most cases that we find where the court system is not effective or not available arise from the failure of the foreign company properly to prepare. Companies that follow the four basic steps outlined above will find that the Chinese court system is surprisingly effective in resolving normal commercial disputes.

See id.

105. See Woo & Wang, *supra* note 2, at 937 (discussing overwhelming use of intermediate Chinese courts in resolving business disputes).

106. See Woo & Wang, *supra* note 2, at 933-38.

107. See Woo & Wang, *supra* note 2, at 938.

108. Woo & Wang, *supra* note 2, at 937.

courts are getting the greater share of resources and better judges . . . ordinary citizens may not be benefiting much from Chinese legal reforms.”¹⁰⁹ In more than 50 percent of cases, one or both parties were not represented by counsel.¹¹⁰ The authors conclude that a disconnect may exist between official policy aims and practical necessities.¹¹¹ “The party responsibility system is highly dependent on attorney participation.”¹¹² Specifically, “the more formal the legal system and the more responsibility [is] placed on the parties in unearthing evidence and shaping complaints, the more lawyers are needed.”¹¹³ Attorneys, however, are still not present in most cases.¹¹⁴ “Despite top-down preferences for establishing a party responsibility system . . . judges must remain involved in shaping and investigating cases.”¹¹⁵ They conclude that more work is needed “to reconcile between top-down reforms with bottom up realities, both externally and internally within the system.”¹¹⁶

VIII. OTHER SERVICES TO INDIVIDUALS

The system delivering more generalized legal services to individuals appears not well developed for a variety of reasons. As a matter of simple economics, despite China’s booming economy, per capita income in China is still below \$2,000 per year. The aforementioned Chinese temperament in favor of the minimization of conflict and the reluctance of the Chinese to seek governmentally sponsored dispute resolution are clearly factors. Further, if the population of lawyers in the country is only 145,000, then there is only one lawyer for every 9,000 people.¹¹⁷ At least one-half of the country’s lawyers are servicing the booming commercial world and perhaps one-half of the remainder work for the government. Finally, the fact that the bar exam passage rate remains below 10 percent suggests a conscious decision by the Chinese that their system need not emulate the litigation explosion in the United States.

The tort system is quite small. The majority of automobile accident cases are resolved in the individual police departments. While appeals to the courts are available, the judgments awarded by the courts are not large enough to

109. Woo & Wang, *supra* note 2, at 937-38.

110. See Woo & Wang, *supra* note 2, at 921.

111. See Woo & Wang, *supra* note 2, at 939.

112. See Woo & Wang, *supra* note 2, at 939.

113. See Woo & Wang, *supra* note 2, at 939.

114. See Woo & Wang, *supra* note 2, at 939.

115. See Woo & Wang, *supra* note 2, at 939.

116. See Woo & Wang, *supra* note 2, at 939.

117. See National Bureau of Statistics of the People’s Republic of China, China Statistics, 2005, http://www.allcountries.org/china_statistics/23_6_basic_statistics_on_lawyers_notarization.html (last visited on May 9, 2008) (reporting statistics on lawyers in China in 2004). The comparable number in the United States is approximately one lawyer for every 300 people. National Lawyer Population by State, American Bar Association, http://www.abanet.org/marketresearch/2007_Natl_Lawyer_FINALonepage.pdf (last visited May 9, 2008).

create the incentive to use the system fully, and liability insurance coverage is far from uniform.¹¹⁸ The same can be said for professional malpractice, product liability, and workplace injury. Recall that the government has the power to dictate the results of individual cases.

Legal service in the areas of family law,¹¹⁹ real estate transactions, consumer transactions, employment problems, housing, and property succession exist but are too costly for all but the wealthiest clients, especially when the amounts in controversy are not high enough to justify lawyer intervention. Further, as Professor Ethan Michelson suggests, fee collection becomes difficult in such cases, causing lawyers to avoid them all the more.¹²⁰ Thus the fee-for-services lawyer who serves individual clients outside of the big cities is still quite uncommon.

IX. CONCLUSION

Western Europe's legal systems can trace their roots back at least seven hundred years to Justinian and the English common-law foundations. Although China's continuous history rivals that of any country on earth, its legal history is more limited. Likewise, communism discourages an independent system of laws; rather, communism views law as a tool for the oppression of the proletariat. As under communism the state belongs to the people, the notion of suing the state or of opposing the state in a criminal proceeding seems counterintuitive. The instincts of the American Founding Fathers were the opposite: namely, that government was a necessary evil that required an ever-vigilant citizenry to ensure that it did not become oppressive. The Chinese Cultural Revolution, which distrusted intellectuals and professionals of every stripe, lasted until Mao's death in 1976, and Deng's signals about the acceptability of a legal system were not issued until 1979. A Contract Code was enacted in 1999; a Trust Law in 2001; a Rural Land Contract Law in 2002; a comprehensive civil code still awaits enactment.¹²¹ Thirty years is insufficient time to build a legal system from scratch in a country of 1.3 billion people whose long and proud history has an inherent skepticism about the merits of a legal system.¹²²

118. See Ethan Michelson, *Unhooking From the State: Chinese Lawyers in Transition* (Aug. 2003) (unpublished Ph.D. dissertation at 137-39, University of Chicago) (on file with author).

119. Divorcees as a group are viewed as morally inferior in China and Michelson suggests that they can be difficult to collect a fee from. *Id.*

120. See *id.*

121. See CHEN, *supra* note 3, at 241.

122. Frank K. Upham, *Who Will Find the Defendant if He Stays with His Sheep? Justice in Rural China*, 114 *YALE L.J.* 1675, 1701 (2005) (suggesting as suspect China's commitment to judicial modernization).