Conclusion: Chinese Justice from the Bottom Up

Margaret Y. K. Woo

The Old Latin maxim ex oriente lux, ex occidente lex (from the East, light; from the West, law) evinces a deep assumption about the relationship between the East and law—that is, although civilization began in the East, the West is the source of rationality and law. Indeed, much of this assumption lies in present-day "rule of law" programs as they are often transported from the West to transitional economies in the East and South. Rule of law, with its rationality and predictability, is said to be fundamental to a market economy. Its ability to check abusive arbitrary powers is believed to go hand in hand with democratic politics. Pointing to today’s industrial democracies, reformers have concluded that rule of law is necessary for economic development and political liberalization.

Yet the challenges to these assumptions are numerous, ranging from whether there is such an East/West divide and, if so, whether the East is really antithetical to law; to the definition of "rule of law" itself and whether legal institutions are indeed transplantable. Furthermore, even as the rule of law has become a new rallying cry for global missionaries, reformers recognize that the rule of law is an exceedingly elusive notion. If "it is not already firmly in place, the rule of law appears mysteriously difficult to establish."¹

In its thirty years of economic reforms, China has challenged the pairing of law, markets, and democracy. Its "socialism with Chinese characteristics" strategy maintains tight political control while allowing economic freedom in the marketplace. Similarly, the thirty years of legal reforms now permit law and legal institutions to handle civil and economic disputes, but they must steer clear of political disputes. Scholars critical of Chinese legal reforms correctly point to the limits on judicial independence and the top-down state control of the legal profession as obstacles to the "rule of law." In addition to ideological influences, Chinese courts are said to suffer from a host of practical problems, such as lack of trained personnel, limited funding, and a restrictive bureaucratic structure. This has led some scholars to refer to Chinese legal reforms as a "bird in the cage."²

Nor is the history of courts in authoritarian countries encouraging to Chinese legal reformers hoping for political liberalization. Courts in authoritarian countries are known to primarily serve state goals—whether maintaining social control, legitimating the regime, or controlling administrative agents and maintaining elite cohesion.³ Authoritarian regimes establish courts to check low-level corruption and bureaucratic arbitrariness but, at the same time, suppress local dissent and bolster the credibility of the central regime. Arguably, authoritarian regimes and courts go hand in hand, but primarily to serve state goals.

Yet, despite the difficulties with the Chinese legal reforms, official statistics reveal that ordinary citizens are using the legal system at a growing rate. For example, in 1995, more than 2 million (2,718,533) civil lawsuits were accepted for adjudication by Chinese courts, a 14.04 percent increase from 1994. As late as 2006, the number of lawsuits filed by Chinese lawyers, though not as high as in the mid-1990s, was still increased by 54 percent from 2001. Chinese civil cases are primarily in the areas of family law, debt, and housing, with personal injury cases increasing by a whopping 60 percent from the late 1990s to 2003.⁴ These cases, representing the daily and immediate contested values of a society in transition, deal with conflicts in personal interactions—between family, friends, and neighbors.

³In 2003, the Supreme People’s Court also noted that contract cases increased by 9 percent, divorce and family law cases increased by 5 percent, commercial cases increased by 39 percent, and administrative appeals increased by 65 percent, but labor cases increased by only 1.7 percent. See Zaozao renmin fazuo gongzuo baogao (Supreme People’s Court Work Report), March 11, 2003, http://www.people.com.cn/GBwz/zheng/19/2003/03/22/93024_.html (accessed December 15, 2010).
This jump in the use of courts by Chinese citizens is perhaps unsurprising. Economic reforms are clearly fueling tensions and conflicts in Chinese society. Laid-off workers protest the misuse of company assets by managers in the newly privatized economy, and farmers are angered by unbearable taxes and land confiscations by callous officials. Chinese citizens are using the courts as dispute-resolution mechanisms as the influence of the danwei and the neighborhood committees is dwindling. A recent frank report by a research group under the Central Committee of the Chinese Communist Party (CCP) describes concern about the spread of “collective protests and group incidents” arising from greater economic inequities and official corruption. Party officials, worried that the masses are “tense, with conflicts on the rise,” are calling for a strengthening of the legal system. Acknowledging that victims of change must be fairly compensated, Chinese officials hope that limited use of the legal system will diffuse the escalating social tensions.

Although the need for law is great, the use of law and the legal system by Chinese citizens has followed an uneasy path. In the 1990s, the Chinese state encouraged the use of the formal courts by private citizens and placed greater emphasis on promoting the neutrality of adjudicators. Hoping that courts can assist in stabilizing society and reining in local bureaucrats, the Supreme People's Court (SPC) decreed that Chinese courts should “further improve the work of trying civil cases, protect the civil rights and interests of citizens and legal persons according to the law, and promote the just, safe, civilized, and healthy development of society.” More recent fears of instability, however, have resulted in a return to an emphasis on mediatory and conciliation methods, greater consideration of the social and political context of cases, and greater state control of courts and the judiciary.

After taking office in March 2008, new SPC President Wang Shengjun retracted the path set forth by his predecessor Xiao Yang. He shifted the role of the courts as neutral adjudicators, calling on judges to consider the “three Supremes” in judicial decision making— the supremacy of party work, the supremacy of the people’s interests, and the supremacy of the Constitution and the law. As China approaches its thirtieth year of legal reform, China’s justice minister declared that above all, lawyers should obey the Communist Party and help foster a harmonious society. To improve discipline, the minister added, party liaisons should be sent to all law firms in China to “guide their work.”

Apart from top-down dictates, how the thirty years of legal reform have fared in China depends largely on how law has been received by ordinary Chinese citizens and how these citizens have utilized the legal system. Has the wavering course of legal reforms in China empowered citizens, or has it served only state goals? Is the present retrenchment short-lived or, on the flip side of the same question, have the thirty years of legal reforms penetrated Chinese legal culture?

The authors in this volume present a complex picture of law reforms in China by focusing on on-the-ground implementation of the reforms. The chapters in this volume examine the role of legal institutions and actors in adapting and diffusing norms introduced through top-down reforms and the concomitant complex indigenous grassroots responses. Equally important, the chapters illustrate the importance of empirical work and the disaggregation of data that is so necessary to clarify the picture for a country as vast and diverse as China.

Several preliminary conclusions can be drawn from these chapters, offering insights into both China’s specific adaptations of rule of law and, more generally, how rule of law occurs. First, institutions do matter, but they exist in a broad interdependent matrix, the dynamics of which cannot be ignored, particularly as they play out in the local context. It is the local site that diffuses top-down norms and the local context that provides the direct incentives or disincentives to legal actors in implementing reforms. Second, historical legacy is important for legal reformers, because it reaches deep into the memories of ordinary citizens and colors their receptivity to changes within the legal system. But even as historical memories can influence the legal culture, the culture is further

---


7 Supreme People’s Court Work Report, ” delivered by Supreme People’s Court President Ren Jianxin at the Fourth Session of the Eighth National People’s Congress in Beijing. Xinhua news agency, 13 Mar 96 in BBC Summary of World Broadcasts Part 3 Asia-Pacific, 9 Apr 96, p. S1.

defined by actual experiences with the legal system, and, importantly, by an individual's status within the system. As such, expectations can outpace actual experience, and the resulting disappointment engendered can undermine any reform progress. Third, formal legal process can create greater predictability but, if ossified, can impede democratic development. When legal reforms are not structured to encourage greater participation by those trying to use the system, formal legality can be a barrier leading popular voices back into the streets and to channels outside the system.

As a whole, the chapters in this volume underscore the constant tug and pull between historical determinism and actual experiences on legal culture, the potential fragmentation of diffuse sources of law, and, finally, the growing technical alienation and the danger of high levels of unmet expectations facing Chinese citizens today. Excessive formalism can be counterproductive absent the mediating forces of democratic legal professionals, whether lawyers or judges — those professionals trained not only in law but also in representation that gives greater voice to ordinary citizens.

INSTITUTIONAL DYNAMICS, LEGAL CULTURE, AND HISTORICAL LEGACY

The history of Chinese legal reform cannot be explained by a simple unidirectional trajectory. Indeed, the thirty years of Chinese legal reform have waivered between informality and mediation to more formality and adjudication and now back again. This is confirmed by the careful analysis of state policy documents (see Chapter 1) and the historical tracing of popular legal publications (see Chapter 8). In Chapter 1, Fu and Cullen point out that, although the first ten years (1979–1989) of China's legal reforms saw the enactment of substantive legislation, the next ten years (the 1990s) saw greater attention to improvements in the legal process, and in the last ten years (the 2000s), there has been a return to a focus on informality and mediation. Although this fluctuation can be explained by top-down policies by the CCP, it can also be explained by institutional dynamics and clarified by local institutional interplay. Indeed, top-down policies have no bite absent implementation by local legal institutions.

By legal institutions, I refer to those bodies (formal and informal) charged by society to make, administer, enforce, or adjudicate its laws or policies. Many of the international law reform projects of the 1990s relied on the arguments of Douglass North and other new institutional economists to focus on the legal institutional framework as the basis for creating incentives for changes in behavior. But rule of law projects have largely been state-centric, with a special emphasis on elite state actors implementing top-down change, mostly by transplanting institutions wholesale from other countries. By contrast, the authors in this volume point out that a focus on institutions must take into account the social context within which these institutions operate, their interactions with other institutions, and the idea that there are multiple competing sites for law in China today. Most importantly, the authors note the importance of localized grassroots efforts that often can serve as the basis for more enduring legal change.

Thus, as Fu and Cullen pointed out in Chapter 1, much of the second phase of Chinese legal reform is traceable to the SPC, which has proven to be a stubborn institution that has spearheaded many procedural initiatives. However, even as the SPC switched gears to refocus attention on mediation, the response has been strategic reporting by on the ground actors, such as by grassroots courts who “count cases that have been withdrawn by plaintiffs as cases mediated. In doing so, judges appear to have embraced the rhetoric of mediation and at the same time diluted its impact.” Similarly, Minzer notes in Chapter 2 that, despite some far-reaching reforms implemented by the SPC, local provincial regulations on promotions and punishment of judges can serve as a disincentive for judicial independence and hamper reform at the local level. Judges in China, like judges everywhere, are as affected by their immediate career advancement as they are by broad political campaigns in completing their judicial work.

Furthermore, institutions have a way of building up momentum on their own and in interaction with one another in surprising ways. For example, in Chapter 3, Douglas Klob demonstrates that it is the bottom-level implementation of the top-down reforms that matters. It is local fazhi ban (FZB) (legal-affairs offices) that exercise a gatekeeping and agenda-setting influence over rule making, mediate administrative conflicts that arise between government organs, and also emphasize, implement, and enforce administrative procedure. Thus, it is these local offices that actually give meaning to the top-down initiatives and adapt such initiatives to local conditions. Such local legal offices serve the (as yet unexamined) function of bridging national laws with local norms.

It is the tensions and interactions between institutions such as the fazhi ban and the sifa si or sifa ting (justice departments) that critically affect

how law is actually implemented at the local levels. Indeed, the fazhi banlixia ting rivalry appears to have the potential to propel legal development and make it more self-enforcing. The FZB’s authority has expanded as its role has grown in rule making and in mediating the “legality gap” at the local level. Institutional rivalry between local FZBs and local justice departments may contribute to the development of legal institutions at the grassroots level. Because legal resources are scarce in some localities, such rivalry, despite existing budget constraints, has spurred legal activities and served the role of bringing law to the grassroots.

However, such institutional vibrancy may lead to problems as well as solutions. In China, there is always the danger of fragmentation and local protectionism. Legal and normative pluralism can also lead to the fragmentation of the state into competing agencies and competing levels of government. There is “justice,” or at least legality, in many institutions: In China, this can be the procury, the courts, governmental and legislative legal affairs offices, legal services and “justice offices,” and the providers of mediation and arbitration. Disputants resort to different legal, normative, and coalitional enforcement mechanisms depending on their perceptions of each office’s receptivity to their claims. But unless there is coherence among these different institutional sites, such diverse fora may lead to a sense of bifurcated justice.

Multiple institutions and sites may increase efficiency by funneling different disputes to different fora, but as disputants receive varying resolutions for the same dispute, the differing outcomes may compromise consistency and undermine the legitimacy of the legal system as a whole. Furthermore, such a system may provide specialized tribunals to those with sufficient political clout, thus benefiting those who are already privileged within the system and, in the process, instilling a greater sense of inequality. In sum, institutions matter, but in the specific contexts of their interactions with one another. Reformers must be cognizant of the need to understand the multifaceted effects of local as well as national institutional change.

HISTORICAL CONTEXT OR HISTORICAL DETERMINISM?

If context matters, how much does it matter? Political economists have long emphasized the centrality of path dependency in the evolution of social institutions. That is, institutional reforms are never written on a tabula rasa; rather, they operate within a complex set of historical particularities — economic, political, and social — that continue to shape the evolution of the existing institutions. These historical particularities impact the nature and scope of feasible institutional reforms. The authors in this volume give added weight to the idea that China’s reformers must pay special attention to the historical context. If Pierre Landry and, to a large extent, Carl Minzner are correct, legal reforms in China will not mimic those in the West but will take on an entirely different formulation as an offshoot of China’s historical past.

Landry’s research argues that legal memories can occur across generations through socialization in the household or in the community where historical experiences are retained. Such memories shape the legal culture, and reforms work better in communities with favorable historical memories of the existing legal institutions. In Chapter 3, Landry’s findings in his nationwide survey demonstrate that villagers’ memories are long and that legal institutions with roots in the early Maoist era and Nationalist legacies are viewed with more optimism than those without such roots. During the early years of the People’s Republic, state institutions were viewed with great respect, and this legacy endures to color Chinese citizens’ views of legal institutions today. Landry’s data further challenge the general assumption that villagers prefer informal to formal legal mechanisms and that displacing such preferences will be more difficult in the rural areas than in the urban areas. Landry finds that rural villagers with positive memories of formal legal institutions by and large express a preference for formal state dispute-resolution mechanisms.

Similarly, Minzner, viewing the Chinese judiciary as informed by the Chinese imperial civil service system, concludes that even modern legal institutions maintain traces from the imperial past. As during imperial times, the Chinese judiciary today is subject to an elaborate grid of locally set incentives and discipline. Chinese judges are promoted or demoted depending on a point system that takes into consideration job performance, number of cases processed, and number of reversals of decisions, as well as judicial misconduct. The Chinese system of discipline and promotion means that Chinese judges are under constant pressures to avoid adjudicating cases that may be reversed, as their pay and promotion largely depend on the efficient and “correct” resolution of disputes.

Although some scholars attribute this discipline and promotion system to socialist tradition, Minzner points to the traditional Chinese distrust of formal legality and the imperial system of treating magistrates as civil servants within an immense bureaucracy. Because of the close supervision of their work, Chinese judges are more risk adverse and tend to seek upper-level approval prior to rendering judgments, if they render any judgments at all. This result is neither an independent nor efficient system
of justice. With roots stretching back to the imperial civil service system, Chinese judges continue to act as bureaucrats in a governmental system charged with processing disputes rather than as independent adjudicators determining right from wrong.

Undeniably, Chinese courts and the law are tied to tradition, with the Chinese legal system often drawing on both its socialist and Confucian past. Cultural receptivity to legal reforms is shaped by institutional memory, and reform efforts are offspring of historical traditions. For Landry, the general population’s trust in legal institutions can be traced not to the recent reforms, but to the longevity of legal institutions in Chinese history. For Minzner, judicial reforms are also limited by their historical roots. Thus, if the historical legal culture that informs the norms and expectations of legal actors is at odds with the new legal culture imposed by rule of law reforms, displacing these habits and interests may be more realistic in new rather than in existing legal institutions. Unsurprisingly, reform finds more fertile soil if it can germinate to be consistent with historical legacies.

But what happens when a legal culture informed by historical legacy encounters actual present-day experiences? This is a topic of interest for Michelson and Read and for Gallagher and Wang. Several of the chapters in this book suggest problems for legal reform when expectations outpace reality and rhetoric is met with actual experience.

LEGAL CULTURE AS SHAPED BY ACTUAL EXPERIENCES

Whereas Landry and Minzner focus on the historical determinism underlying legal reforms in China, other authors in this volume emphasize the importance of legal culture as shaped by actual experiences. For these authors, judicial reform is only effective if it is being used and the reality today is that Chinese citizens are making use of the courts and using the language of “rights.”

Indeed, although Chinese courts are used primarily to assert private socioeconomic rights against other private individuals, as in debt, contract, and family law cases, an increasing number of lawsuits are seeking greater structural change. China’s lawyers are filing lawsuits over discrimination and poor labor conditions, and sometimes they win (see Gallagher and Wang, Chapter 7; Kellogg, Chapter 11). After the 2008 massive earthquake that rocked Sichuan province and resulted in a loss of tens of thousands of lives and immense property damage, initially there was social unrest, followed, as in rights-based societies, by calls for litigation. With many citizens blaming local party officials for faulty construction, the survivors sought to sue the government.10 At camps for survivors, volunteers distributed “law promotion” handbooks published by the Chengdu Justice Bureau to explain how to use the law to sue the government for building-code violations. It appeared that local governments preferred to face citizens in court rather than on the streets.

However, the details of Chinese citizens’ experiences with the legal system are telling. First, the urban/rural divide that is so prominent in economic disparities seems to be replicated in Chinese legal institutions and culture (see Gallagher and Wang, Chapter 7; Michelson and Read, Chapter 6; and Landry, Chapter 3). But the verdict is still out regarding whether these disparities mean that rural disputants are more likely to trust official justice. In Chapter 6, Michelson and Read conclude that rural disputants are more likely to “lump” their disputes or utilize traditional administrative and/ or neighborhood mediation and that they rate bilateral negotiations and informal relations as more trustworthy than official justice officials. By contrast, in those districts where the historical legacy of official justice is longer and more positive, Landry finds that rural disputants tend to trust official justice more than informal justice.

These differing results point to the importance of disaggregating data and to the need for further research. For one, the differing results may be explained by the different research sites. More significantly, however, the different conclusions may reflect the disparities between actual experiences and rising abstract expectations of the legal system and the collision of rural litigants’ informed assessments with their uninformed expectations. Indeed, higher expectations, whether formed by legal propaganda or historical memory, may stall legal reforms. As Gallagher and Wang discovered, unrealistic expectations have far outpaced realistic reform efforts, leading to greater disenchantment. The closer one brings a legal dispute to the Chinese legal system, the less positively he or she will assess the experience.

Such a downbeat assessment of official justice by those who use the system is particularly understandable in those rural areas with limited funding for the courts. Rural residents who actually try to use the courts face high court fees and other related expenses that result in financial barriers to official justice. More economically developed areas, meanwhile, enjoy

---

greater geographical proximity to the courts and more resources, resulting in more favorable experiences and assessments by litigants. Rural areas with limited funds also may lack a positive historical legacy of legal institutions.

Indeed, even in areas with a positive historic legacy, Landry may have measured villagers' general perceptions of official justice, untested by actual experience. Landry’s rural informants have high expectations in this instance, formed more by historical legacy and less by legal propaganda but nonetheless still unmarred by actual experience with the current legal system. It would have been informative to test the strength of historical legacy in the face of actual experience and vice versa. A return visit to either of these test sites would provide valuable information about the enduring factors of history and cultural change. Certainly, trust in the legal system in China is shaped as much by actual experience as by historical legacy and legal propaganda.

Furthermore, actual experience with and perceptions of the legal system also seem to depend on the litigants’ insider/outsider status. In their study of labor litigants, Gallagher and Wang (see Chapter 7) conclude that older, urban disputants employed in the state sector are more likely to feel powerless and that younger, rural disputants employed in the non-state sector are more likely to embrace their legal experience. Older state workers are more inclined to stay within the system and petition the state for recourse, whereas younger, non-urban workers tend to resort to the legal system. Disenchantment is most profound among those who are relatively well-off and protected by the socialist system of employment, whereas those who remain on the outside by virtue of age or birthplace are more sanguine about the law. In other words, outsiders trust the legal system because it represents an opportunity to challenge the status quo.

If so, trust in the legal system will depend on legal propaganda, a positive historical legacy, and a litigant’s own status within the legal system. Those who receive more propaganda, live in areas with a positive historical legacy of legal institutions, or live outside the status quo are more likely to resort to the legal system. However, the danger is that such greater awareness of rights and trust is be translated into higher expectations and greater disenchantment with the legal system when experiences do not comport with expectations. Rights consciousness raised through legal propaganda can create unrealistic expectations that are exacerbated by the unequal distribution of legal services. From a policy standpoint, rather than alleviating inequalities, the Chinese legal system may be replicating existing disparities and widening the urban/rural gap caused by market reforms. Although economic development can serve to raise expectations of official justice, economic development has and will continue to be uneven across China’s vast geography, coloring in the different experiences of everyday litigants.

Until court performance improves or greater access to legal assistance is provided, rights education may be counterproductive, as the high expectations fueled by legal propaganda can backfire from unrealistic expectations, higher levels of disillusionment, and more negative perceptions of the legal system’s effectiveness and fairness. Although a modest dose of distrust is needed for the health and well-being of rule of law systems by keeping them under constant scrutiny, high levels of disillusionment fueled by high expectations ultimately may undermine the legitimacy of the legal system and, by extension, the Chinese state.

LEGAL TECHNOCRATS OR LEGAL PROFESSIONALS?

If the legality and formality of the past thirty years of legal reforms have indeed led to greater “disenchantment,” one final reason may be that law has not become an organic part of social life. According to Liu (see Chapter 8), formalistic law has become more technocratic, authoritative, and sometimes even incoherent. As such, formality has become a barrier to rights attainment rather than an equalizer enabling citizens to access justice. Legal technicalities can even legitimize state repression as long as the state acts “in accordance with the law.” Formal processes in China have led to greater responsibilities for litigants, but absent greater legal assistance, those with more resources will be able to use legal niceties against those with fewer resources.

Indeed, even in light of recent shifting policy changes, it is important to note that the baseline for legal formality apparently has shifted. Liu’s analysis reveals an overall shift from 1979 to 2003 toward a greater propensity by legal professionals to give technical legal answers in response to questions regarding civil disputes. For example, legal professionals in popular legal magazines are not reverting back to political responses. Rather, they are exuding an increased reverence for legal technicalities.

Although thirty years of legal reforms have meant greater legality and technical niceties, greater formal process unmatched by increased voice and access will not foster the ordinary citizen’s sense of empowerment. Indeed, a rural litigant’s negative view of the legal system can be explained in part by an inability to separate outcome from process, such that losing litigants have negative views of the legal system (see Michelson and Read,
Chapter 6). This is particularly true of older litigants who tend to judge their experience by distributive outcomes, whereas younger litigants seek improved procedures (see Gallagher and Wang, Chapter 7). But the “disenchanted” experiences of Chinese litigants may ultimately be explained by the ongoing lack of true procedural justice even after the thirty years of legal reform in the direction of greater formality.

Procedural justice is only valued when a disputant feels that he or she has been heard in the legal process. Rather than conflating substantive outcomes with procedural justice, Chinese litigants may not be receiving procedural justice if their experiences with the courts do not truly provide them with an opportunity to be heard. Chinese litigants’ disappointment with the legal system cannot be attributed solely to not obtaining winning outcomes. Rather, litigants are disappointed with the legal system because they do not have a sense of participation in the process and do not feel that their stories have been heard.

From my own research, I have found that although litigants are more “rights” conscious and the litigation experience may be educational, few litigants feel a sense of participation in the process. In my survey of sixty-four litigants in a Beijing legal-aid office in 2002, for example, the majority demonstrated a preference for rights and chose “enforced rights” as a preferred outcome, indicating a greater “rights” consciousness. By contrast, the option of “benefits to both sides” came in a distinct second, and only a very few respondents selected “restoring relationships” as their preferred outcome. But even though litigants are more rights conscious, more litigants perceive that they have little influence over the decision-making process. After the legal process, these same litigants reported a sense of greater self-respect but little sense of empowerment from the experience. Legal propaganda may have led to greater “rights” awareness and expectations in the legal process, but the turn to a more formal legal process has not necessarily added to a greater sense of participation for Chinese citizens.

A more formal process works if it can render the court process more transparent and predictable, even the playing field between judges and litigants, and increase participation by lawyers and litigants. At its most basic, a legal system relies on a process that will support “hearing the other side/laudi alteram partem,” whatever the subject matter. A process that allows both sides to be heard means a greater sense of democratic participation by litigants who have a hand in shaping state norms from the top, as they can argue how such norms may be applied to local conditions from below. Absent that kind of participation within the legal system, ordinary citizens are apt to go outside the system to seek their redress.

Chinese litigants, therefore, will and have gone outside the courts to apply popular pressure on the court with such strategies, continuing to challenge court reforms and professionalization of the judiciary. Where critics of Chinese legal reforms are more concerned with the influence of the CCP in politically sensitive cases, Ben Lieberman returns our focus to the day-to-day popular and institutional pressures faced by Chinese courts. According to Lieberman, professionalizing the judiciary alone is insufficient to establish judicial independence without an understanding of how the xinfang (letters and petitions) system and the less institutionalized methods of popular protest check the judicialization process in China.

Undoubtedly, Chinese courts today view popular opinion and individual protests as challenges to their authority, and, as Lieberman points out, these courts may also be too responsive to popular pressures (see Chapter 9). When cases rise to the level of popular attention, either through the media or mass protests, Chinese judges will move beyond the legal technicalities and adjust their decisions to meet popular demand. Although this may serve as a necessary route to buffer the bluntness of legal technicalities, the problem is that when popular pressures change judicial outcomes, this change occurs through the media or mass protests rather than through the orderly presentation of information or through the deliberation of fair and open contestation that can be provided by court procedures. This makes for neither a predictable nor consistent legal system. Lieberman thus concludes that “the determination of petitioners to pursue their grievances may reflect greater awareness of rights among litigants. But it also suggests that a system that is increasingly focused on rights will not necessarily lead to a system in which judges and courts are the central players, or make the final determinations.”

In sum, not only are Chinese courts subject to political pressures, but surprisingly, they also are susceptible to popular pressures. Law reform efforts may add greater rights awareness, but such rights awareness has had the contrary effect of placing greater popular pressures on the courts, with the popular pressures checking the judicialization process.
Professionalization of the judiciary is important, but legal reformers also will do well to refocus their energies on popular rights education and to provide legal assistance to those seeking to assert rights and steer disputes properly within the legal system.

Indeed, true access to justice and greater participation by litigants require the assistance of independent and powerful mediating legal institutions — whether the judiciary or the bar — to navigate the legal system and to mediate between citizens and the state. Disenchantment with and alienation from the technicalities of the legal system can only be mitigated by constant contact with legal-aid staff, a supportive social network, and a less bureaucratic judiciary. There must be a sufficient number of these institutions so they are readily accessible to ordinary citizens. As important as actual numbers, legal experts should be part of a “profession” that can give voice to clients and to the broader public interest.

Yet such conditions are still evolving in China today. First, poor distribution continues to exist, with a lack of legal professionals in some areas of China (see Peerenboom, Chapter 4). The move toward a private marketplace for legal services, although adding more lawyers in sheer numbers, nevertheless has created an inequality gap that has triggered social discontent and a resurgence of state involvement in the legal profession. What we are seeing is a bifurcated system, not only between political and less political cases (in politically sensitive cases, Chinese courts are known either to turn away the case or to solicit the case and carefully construct the parties, issues, and remedies to ensure a global settlement of the dispute), but also between those with legal assistance and those without.

Away from big cities such as Shanghai and Beijing, lawyers are still few and far between. Whereas there is one lawyer for every 270 people in the United States, there is one lawyer for every 10,650 people in China. China has made progress toward its target goal of 150,000 lawyers nationwide. China now has reportedly 124,000 full-time lawyers, up from 48,000 in 1997. But lawyers are poorly distributed, with more lawyers in the cities than in the countryside, and more lawyers in the lucrative areas of commerce than in the less lucrative areas of family law, debt, and employment. With the latter areas being of greatest concern to ordinary citizens, there exists a tremendous gap in the availability of services between those with commercial disputes and those with more mundane disputes, and between the urban rich and the rural poor.

The Chinese government recognizes the needs of the rural poor for legal assistance, and during the last ten years it has devoted substantial funds to establishing a nationwide legal-aid system complementing the system of rural township legal services/“justice offices” (shifang), the lowest branch in the Ministry of Justice bureaucracy. But these efforts vastly underserve the rural poor. As pointed out by Fu Yulin (see Chapter 10), legal services and local justice offices rise and fall, depending more on central policy dictates than on local populist needs and demands. Thus, despite the fact that in the first six months of 2007, China’s three-thousand-and-plus legal-aid offices handled 1,532,600 cases, a jump of nearly 40 percent from the previous year, only one-quarter of the existing rural cases had legal representation. Many legal-services providers, despite the recent influx of funds, are still hampered by resource limitations. In addition to minimal funds, they lack staff, means of publicity, legal training, and recognition by state agencies.

More problematically, the call for better training of judges and lawyers has meant a body of legal professionals more educated in the technicalities of the law but less trained in the nuances of representation and serving their clients. The focus on professional independence has urged independence from the state, but this has met with limited success, as undue influences — be it from popular pressures (see Liebman, Chapter 9) or internal salary incentives and disincentives (see Minzer, Chapter 2) — still pervade the judiciary.

Apart from sheer numbers, each member of the judiciary and the bar needs to have an identity as a “democratic professional.” A “democratic professional” utilizes legal skills and expertise to include rather than exclude the participation of clients and to uphold the social conception of justice. Technocratic authority grounded in the expertise of legal methods and language can block local knowledge of the disputants. A “technocrats” can take the most critical aspects of decisions out of the hands of those they serve and thus immobilize citizens. Access to justice requires a vast number of legal professionals, but these professionals must be able to play the role of buffers between citizens and elites by


accommodating their clients' needs and problems within a larger system of
domination and control. ¹⁴

Such a vision of legal professionals has yet to take root in China. Bar
associations remain weak, with key positions often filled by state justice
officials. Legal education is more theoretical than practical, with a greater
emphasis on memorization of the law than on problem solving and shaping
legal solutions. Furthermore, the role of the lawyer is often poorly
understood. Chinese lawyers encounter frequent problems in representing
their clients and at times are even subject to physical abuse from the
public or arbitrary arrest by the state. At the same time, Chinese judges
increasingly are acting to process disputes rather than solve them (see
Minnzner, Chapter 2). My own research showed that litigants expressed
vast dissatisfaction when judges acted "too simply," "too quickly," or
were too "cold and bureaucratic."¹⁵ These litigants felt that the judges
were acting as mere administrators rather than as administrators of
justice.

Still, there are some promising signs. The constraints caused by the
limited resources have meant that some public-interest or "cause" lawyers
are beginning to network, interact, and cooperate with one another. Through
their interactions, "cause" lawyers, as "gatekeepers" to the legal system,
are developing some public space in which an identity of public service
is evolving.¹⁶ Piggybacking on the government's goal of enforcing social
controls, some individual lawyers have sought to enforce laws on behalf
of the public, and there are pockets of progressive lawyers who have
developed a public consciousness that is commensurate with their profes-

Although the All-China Lawyers Association remains conservative -
for example, by issuing a 2006 "guiding opinion" instructing law firms
to assign only "politically qualified" lawyers to cases involving ten or
more litigants - there are individual lawyers who take great risks to

¹⁴ Dewey conceived of democratic professionals as task sharers who seek to produce
social goods for the public and to solve problems by organizing the public. John Dewey,
Jo Ann Boydston (Carbondale: Southern Illinois University Press, 1981-1990), vol. 1,
Restorative Justice and Democratic Professionalism, "Law & Society Review 38, no. 1,
355-396.

¹⁵ Woo, "Law, Development and the Rights of Chinese Women: A Snapshot from the
Field," 345-356.

¹⁶ Margaret Y. K. Woo, Christopher Day, and Joel Hugenberg, "Migrant's Access to

Concluding: Chinese Justice from the Bottom Up

litigate discrimination cases and environmental protection or property
rights cases even as they often face retribution by the state. This was evi-
dent in the numerous discrimination cases brought by carriers of hepatitis
B, as lawyers sought to enforce constitutional norms through ordinary
civil litigation (see Kellogg, Chapter 11). More recently, several lawyers
have even filed suits to test the new government information law, which
took effect on May 1, 2008, trying to hold the government to a standard of
to greater transparency. According to one lawyer, Liu Xiaoqian, "You
do not have to kill yourself to be a rights lawyer. . . . You just have to be
careful about the methods you use and the way you approach the truth."

With more predictable and formal procedures, some Chinese "cause"
lawyers may be able to utilize court procedures strategically by appealing
to judges through seemingly less political procedural arguments rather
than by directly attacking substantive policies. Yet, undeniably, these legal
professionals take enormous risks in bringing litigation challenging the
state. "Cause" lawyers face threats from the state when they become too
public in their advocacy. Because of its fear of instability and social unrest,
the Chinese government will clamp down (as it already has) on the more
visible legal activists, detaining lawyers representing migrant workers,
dead row inmates, or mass tort victims.¹⁶ For example, lawyers who
signed a petition in support of Tibetan protestors now find their licenses
under threat of nonrenewal and may even face disbarment.¹⁸

Although there are some promising signs, then, the legal profession
in China has yet to become the "trustee" of the public interest. It is just
as important in the development of a legal culture that legal expertise
include rather than exclude local knowledge of the disputants. Absent
local knowledge of the communities affected by social problems, the
legal expert cannot adequately solve such problems. Legal professionals
can serve as intermediary catalysts between a fragmented and underin-
formed public and a distant and increasingly complex political system.

¹⁷ Xu Zhiyong, aged thirty-six, a soft-spoken and politically shrewd legal scholar who
made a name for himself by representing migrant workers, death row inmates, and the
parents of babies poisoned by tainted milk, was accused of tax evasion. Released after
a one-month detention, the charge was seen almost universally as a cover for his true
offense: angering the Communist Party leadership through his advocacy of the rule of
law. Mr. Xu also had been the director of the now-closed Open Constitution Initiative.
Others include Chen Guangcheng, a blind activist who exposed abuses in China's birth
control program, and Gao Zhisheng, who worked on behalf of underground Christian
churches and practitioners of Falun Gong. He mysteriously "disappeared" for fourteen
months in 2009-10.

¹⁸ Jim Yardley, "China Disbars Lawyers Who Offered to Defend Tibetans," Inter-
asia/03tibet-q.html (accessed December 16, 2010).
Democratic legal professionals work with lay participants in the construction of norms that constrain and direct professional action. Neither the Chinese judiciary nor the legal profession has yet to fully embrace such a concept of law and legality.

Ultimately, mediating actors in China may take the form of semiprofessionals, such as “barefoot lawyers” who straddle the field between lawyering and activism in lending advice to the rural poor. In the rural areas, far away from central directives, there is necessity a synchronization of legal norms with local dictates. In norm setting, we see local legal affairs offices massaging national legislation to local conditions through local administrative rule making and administrative reconsideration (see Grob, Chapter 3). These local offices are often staffed by semiprofessional legal workers rather than full-time lawyers. And traditional values still dominate, as grassroots residents prefer those with whom they have a relationship, whether legal professionals – a lawyer, judge, public security officer, or procurator – or, more frequently, semi-professional legal workers (see Fu Yulin, Chapter 10). Thus, in a number of fora, we are seeing semiprofessional legal actors carving out openings through which ordinary citizens, with greater support, can access the law.

In sum, if Chinese litigants by and large are dissatisfied with their experiences in the courts, it may be the case that judges and lawyers as technocrats are not giving voice to the participants. The focus on formalism has meant the rise of technocratic control. Absent the consistent development of a profession more oriented toward the public good than toward commercial gain, more oriented toward problem solving than toward technocratic application of the law, and more directed toward independent adjudication than toward bureaucratic processing of claims, the role of the Chinese legal system will continue to be the processing and, at times, the resolver of individual disputes rather than the broader role of encouraging the formation of a more engaged and democratic citizenry.

THIRTY YEARS OF CHINESE LEGAL REFORMS (1979–2009)

In enforcing rights in ordinary litigation, a legal system not only produces decisions, but it also sends messages about entitlement and vindication.19 In applying top-down norms to individual disputes, a legal system conveys messages from the state as reconciled with local social values.20 Even if an ordinary dispute is not a direct and open challenge to the state, the contest of how a legal norm is to be applied in a particular dispute provides an opportunity to mediate and redefine state messages with local values. In the ideal, then, civil disputes as funneled through a legal system can be the locus for local resistance, for a reshaping of the legal culture, and for participation in the political system by ordinary citizens.

Quite apart from a state's goals for the legal system to be a coercive force, legal mechanisms for dispute resolution have the potential of changing people's interactions with the state.21 The experience of vetting conflicts between different interests and through legal procedures can change the interactions between citizens and officials to those of equal exchange between citizens and government officials. If the legal disputing process allows the citizen a say in the enforcement of public norms, as, for example, litigants in public interest litigation, a legal system can alter citizens' self-perception — from governed subordinates to responsible citizens in a more participatory society.

Thus, the process of asserting legal claims in a formal legal context, even in ordinary litigation and, arguably, nonpolitical cases, is important. In adjudicating, courts can teach individuals the language of rights and the skills of participation. By institutionalizing conflicts through dispute resolution methods, a legal system teaches ordinary citizens the language of rights and equal justice, the "grammar of justice," so to speak.22 Citizens may learn the language of rights as "part of a repertoire of skills used, either individually or collectively, as a weapon against recalcitrant Longman, 1983). As Galanter has noted, "[Courts produce not only decisions, but messages. These messages are resources which parties... use in envisioning, devising, negotiating and vindicating claims (and in avoiding, defending and defeating them)."


Juan Linz posits that five interacting arenas need to reinforce one another in order for democratic consolidation to occur: a free and lively civil society, an autonomous and valued political society, institutions that carry out the value of the rule of law, effective state bureaucracy, and institutionalized economic society. Juan J. Linz and Alfred Stepan, Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe (Baltimore: Johns Hopkins University Press, 1996), pp. 1–15.

husbands, in-laws, or officials.\textsuperscript{23} Courts can be a site for micro-assertions of rights, and, in determining rights, court adjudications are distinctly different from community compromises.

In this way, use of the legal system may shape a culture that is more conducive to the assertion of rights, with the micro-assertion of rights one of the first steps in democratic development. The process of rights of assertion through the legal system has the potential to go beyond adjudicating norms and resolving disputes, allowing citizens to think of themselves as equal to others and able to claim their rights vis-à-vis others.\textsuperscript{24} Although some may criticize law and litigation as self-centered individualism, litigation and the use of the formal legal process can represent an expression of one’s belief in justice, a growing sense of rights consciousness, and an emerging desire to participate in the public process.

But if the legal disputing experience is negative, giving no voice to participants, then the learned grammar of rights is met with an experience of disempowerment even beyond the outcome of the dispute. Law and courts then become an oppressive space, posing barriers rather than providing routes to relief and depriving citizens of the dignity and participation that is so necessary for the realization of equal citizenship.

In the last thirty years, Chinese legal reformers, arguing for more adjudication and greater judicial independence, have shared the state’s goal of moving toward legalism. Chinese state authority wants law and the courts to promote the state goals of economic development, state legitimacy, and social stability. This confluence of factors has served as fertile ground for the growth of legal formalism. Substantive laws were enacted, legal procedures were formalized, and the use of the courts was encouraged.

The increased utilization of the courts can be explained as the result of various factors: some political, such as the state’s desire to ensure stability by channeling disgruntled citizens through the legal system; some economic, in that increased economic activity may lead to additional disputes requiring resolution; and some social, such as the loosening of the household registration system that created more mobility and opportunities for disputes outside the traditional social milieu. Certainly the presence of courts and legal institutions has helped to establish legitimacy for the state by routing disputes to the central government for determination of right and wrong. But the question is whether Chinese courts and legal reforms have done more than legitimize state authority and provide some measure of social control.

The formal legal system in China is evolving and shifting along a continuum. The path of Chinese legal reform, however, is not simply an inevitable and unidirectional trajectory from enforcing central policy and asserting social control to performing the task of conflict resolution and, ultimately, building a sense of rights consciousness and participation. There are and will continue to be shifts and turns. Correctly or not, rather than serving simply as adjudicators of opposing interests, courts in China are increasingly called upon to serve as a much-needed social lubricant to adjust social values. This role is vital to the stability of the government, particularly in light of an arguably retreating moral authority of the party-state, and it also is critical to the development of a rights-conscious populace. In deciding rights from wrong, courts can provide the social stability that is necessary for democratic development as individuals are protected from arbitrary infringement of their rights. But recent escalating unrest suggests that Chinese courts and Chinese legal reforms have failed to provide the social stability desired by the state and the populace. The thirty years of legal reform has reached a juncture at which new and different reform strategies are needed.

For the Chinese state, law and courts can legitimize state authority, protect the market economy, and centralize its power. Formal procedural regularity bolsters the legitimacy of the courts and of the state. For Chinese citizens, formal legal process can resolve disputes, instill a culture of participation, and develop a sense of rights consciousness. Whether such process will serve ordinary citizens in these ways will depend on whether citizens view the legal authority as having a legitimate right to dictate their behavior and whether the citizens, when using the courts, experience some semblance of participation.\textsuperscript{25}

The extent to which and the direction in which Chinese legal reforms will continue are highly contested. Despite the significant limitations on the range of viewpoints that can be publicly expressed, there has been robust debate on the extent to which China should emulate the


\textsuperscript{24} Ibid., 31.

political and legal systems of Western liberal democracies. Liberal reformers view Western liberal democracies as the blueprint for Chinese development and see market integration as leading inevitably to political reform. Those who believe in the link between economic development and greater political liberalization would argue that China’s increasing wealth has and inevitably will lead to greater use of courts in a democratic manner.

By contrast, the “New Left” increasingly argues that China’s attempt to emulate the West has significantly increased inequality and further strengthened the existing authoritarian regime. Within this debate, we have seen support for some increased legal aid (or government-sponsored legal services for the economically disadvantaged) and some growing public interest litigation (gongyi susong), a form of litigation and related activities that seeks to represent the broad public interest and have a norm-setting impact. Wealth and markets alone are insufficient to create a legal system open to rights assertion and participation.

What this debate has not acknowledged is what scholars in this volume have unearthed — that is, the danger of high levels of unmet expectations, the constant tug and pull between historical determinism and actual experience, the potential fragmentation of diffuse sources of law, and, finally, the growing technical alienation posed by legal professionalism. Given the inconclusive experiences of ordinary citizens in the courts, the transition to greater participation and rights consciousness may not necessarily be equated with the latest set of legal reforms in China. Disparities in economic power promoted by market reforms are replicated, rather than alleviated, by the legal system. Legal technicalities have replaced legal justice. Until reformers pay close attention to these issues, the role of law and courts in China cannot be accurately gauged or fulfilled. It will continue to be a messy and complicated picture. Perhaps, then, the most important impact of the Chinese legal reforms in the last thirty years is the rising expectation among Chinese people that law and the legal system can and should be used to address their grievances. What remains to be seen is whether the system will meet these expectations and whether reforms can be carefully calibrated to avoid the pitfall delineated in this volume.