

Law's protectors

Jerome A. Cohen and Yu Han urge the adoption of wider oversight powers for Chinese prosecutors in a revision to the Criminal Procedure Law, allowing the 'watchdogs of legality' to rein in investigators' misconduct

In mainland China, when criminal investigators take someone into custody, there is no timely way to effectively challenge their misconduct. Suspects are usually detained throughout investigations. Torture during interrogation, although banned, is rife. Investigators, usually police but also prosecutors in certain cases, often ignore legal requirements to notify the suspect's family that he has been detained, where he is held and why, and to allow him to see a lawyer. Even a competent lawyer has nowhere to turn for an independent review of official abuse.

In Anglo-American jurisdictions, including Hong Kong, courts decide the legality of a suspect's criminal detention. In continental European democracies, police detention practices are reviewed by prosecutors and judges. In Taiwan today, judges must approve all detentions. Yet mainland China continues to rely on institutions imported from the Soviet Union.

Under China's current Criminal Procedure Law, courts play no role in this earliest, crucial stage of the criminal process. China's procurators, the nation's prosecutors, are supposed to discover and correct investigative misconduct, even that of their own investigative units, but they seldom do. The prosecutors must approve the arrest of detained suspects. Yet, through misapplication of the current law, Chinese investigators give themselves 30 days to seek such approval and sometimes do not comply with that broad limit.

Moreover, through another twisting of the law, they subject certain people to as long as six months of incommunicado "residential surveillance" before resorting to their arrest option. Thus, it is normally a long time before incarcerated individuals benefit from procuratorial review.

Two documents jointly promulgated by the Supreme People's Procuratorate and the Ministry of Public Security late last year, if implemented in good faith, promise abused detainees greater access to procuratorial assistance. Those documents, however, lack the full authority of law, and the Standing Committee of the National People's Congress is currently debating, behind closed doors, the extent to which the NPC should incorporate them when it issues its long-awaited revisions of the Criminal Procedure Law next March.

The draft revisions were published for public comment in August and drew almost 80,000 responses. The vast majority reportedly focus on the interaction of defence lawyers with police and courts. Relatively little attention appears to have been paid to the draft's expansion of prosecutors' power to curb investigators' misconduct.

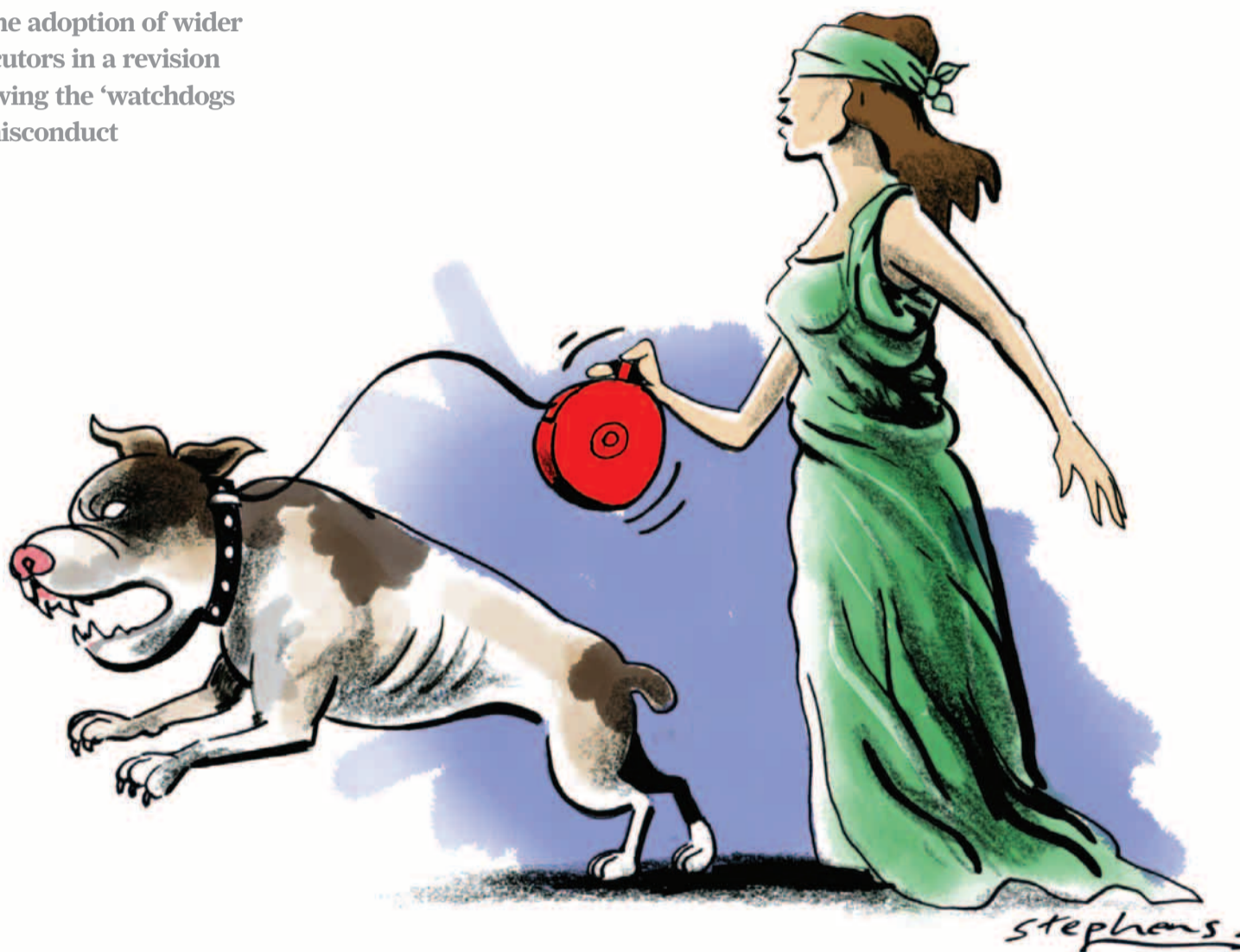
Informed Chinese observers often dismiss the prosecutors – who have the same legal training as judges – as timid, powerless in practice, and too cosy with the police and the

Communist Party apparatus that controls them. They are a far cry from the "watchdogs of legality" envisioned by Soviet legal theory. Some critics mock the prosecutors as waiters in a restaurant where the police are chefs and the judges are guests who eat only what the chefs decide the prosecutors should serve.

Yet, if the draft revisions are adopted as written, prosecutors will have greater opportunities, indeed obligations, to enforce the rules restricting investigators' powers. For example, if investigators reject a complaint that they have detained a suspect beyond prescribed time limits, carried out an illegal search and seizure, or obstructed a defence lawyer's activities, an appeal can be submitted to the procuratorate. Where it is justified, "rectification shall be made in accordance with law".



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Similarly, the procuratorate will be required to verify allegations that evidence has been collected illegally, which would include coerced confessions, and, if an allegation is confirmed, to "issue an opinion on the correction of such situation", suggest replacing investigators and prosecute them for any crimes committed. The procuratorate will also be required to oversee whether investigators' imposition of "residential surveillance" outside a suspect's home complies with the revised law.

Another article will require prosecutors approving an arrest to question the suspect instead of merely reading case documents, whenever they have doubts about the arrest, the suspect requests a meeting, or investigators may have violated the law. Prosecutors also may question witnesses and must hear the opinion of defence counsel if requested.

Moreover, even if arrest is approved, the procuratorate "shall examine the need for (continuing) custody" and, if custody is no longer necessary, "shall suggest release of the suspect" or itself grant release with restrictions. In the pre-arrest period, prosecutors must also promptly review requests for release from measures imposed by its own investigation units and state its reasons for denying such requests.

Unfortunately, the draft revision fails to incorporate the document jointly issued by the Supreme People's Procuratorate and the Ministry of Public Security last year that calls for establishing procuratorate offices in detention centres, which are operated by the police. That would facilitate prosecutors' monitoring of conditions and events there. Presumably that document will still govern police and prosecutors, even without legislative endorsement.

The real question is whether the procuratorate can muster the power and zeal to effectively interpret and implement the new, but often sketchy, criminal justice norms, whatever their source. Some Chinese elites appear to be increasingly impatient with government failures to enforce the laws in many fields, not only criminal justice. Perhaps the prosecutors' supervisory role will rise with that tide. Otherwise, the "watchdog of legality" will continue to have more bark than bite.

Jerome A. Cohen is professor and co-director of the US-Asia Law Institute at New York University School of Law and adjunct senior fellow for Asia at the Council on Foreign Relations. Yu Han is a research fellow at the US-Asia Law Institute. See also www.usasialaw.org