

# **Roundtable Discussion On “Challenges for Criminal Justice in China”**

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## **“The Plight of Criminal Defense Lawyers”**

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At a time when American criminal justice values are being challenged by a range of post-9/11 U.S. government actions, I welcome the opportunity to discuss the plight of China’s criminal defense lawyers, if only to assure their American counterparts that things in the United States could be a lot worse.

Of course, lawyers in the People’s Republic of China (“PRC”) have come a long way in the past quarter century since the end of the Cultural Revolution and the start of Deng Xiaoping’s “Open Policy.” Formerly denounced as the worst type of “stinking intellectuals” and totally suppressed for over twenty years beginning with the 1957-58 campaign against “rightists”, PRC lawyers -- now almost 120,000 in number -- are currently transforming themselves from Soviet-style “state legal workers” [\[1\]](#) to increasingly recognized, prosperous and semi-independent professionals. Many play an important role in business transactions that facilitate domestic economic development. A growing number promote the international trade, foreign investment and technology transfer that have spurred their nation’s remarkable progress. Others foster the rights of women and children, and some even dare to protect the rights of workers. Although dismayed by the extent to which corruption, politics and personal influence affect -- and often involve -- their law practice, even when settling disputes before courts, China’s lawyers, by and large, now lead an increasingly satisfying and attractive life. So attractive, indeed, that it has become difficult to recruit and retain top talent to serve as the country’s underappreciated and underpaid judges, prosecutors, government legal experts and law professors. According to some recent social surveys, being a lawyer is now considered one of China’s most favored career choices.

Criminal defense lawyers, however, are an exception. To be sure, some of them are well-compensated, and a few have become deservedly famous and admired. Yet even they have a daily diet of disillusionment and danger, and their situation is not improving, despite the hopes that in 1996 accompanied enactment of the Lawyers Law [\[2\]](#) and revision of the Criminal Procedure Law (“CPL”). [\[3\]](#) The following remarks, based upon conventional legal research as well as experience advising the American families of people detained in China, will suggest why.

### **1. Obstacles to Entering a Case**

One of the major innovations of the 1996 CPL is the right it confers on a detained suspect, after the first interrogation by investigators or from the first day of detention, to select and meet a lawyer. [\[4\]](#) In 1998 the revised CPL was authoritatively interpreted to confer on the family the right to select a lawyer on behalf of the suspect, so that a lawyer chosen by the suspect or his family is recognized as having a right to enter the

case and meet with the suspect.<sup>[5]</sup> These rights are not contingent upon the approval of the detaining authority, unless the case is determined to involve “state secrets.”<sup>[6]</sup> Yet PRC police and prosecutors often deny lawyers access to their clients on far-fetched claims of “state secrets”. For example, in the 1999 case of detained Dickinson College librarian Song Yongyi, even after the prosecutor had rejected the State Security Bureau’s application for a formal arrest warrant on a “state secrets” charge, the SSB continued to deny his lawyer an opportunity to meet him.

More often, the police simply do not transmit a detainee’s request for a lawyer or delay or refuse access to a lawyer without giving any reason, as the Inner Mongolia Public Security Department did for months last year in the case of Connecticut resident Liu Yaping and as the Beijing Public Security Bureau did for weeks after the recent detention of well-known lawyer Zhang Jianzhong. If the frustrated criminal lawyer becomes too assertive in reciting the CPL provisions authorizing access to his client, the police seldom hesitate to demonstrate who is boss, especially outside the major cities. In the Liu case, which is a blatant use of the criminal process to settle a political struggle within the police itself, those in charge of the Inner Mongolia PSD, tired of listening to the arguments of local counsel about the PSD’s illegal detention of Liu and its illegal denial of access to him, detained the lawyer as well. She was released 28 hours later, but only after “agreeing” to sign a false statement, and was so intimidated that she not only dropped the case but also said that she would give up the practice of law for some less hazardous occupation! When the suspect’s family retained a former prosecutor from Beijing to take up the case, he too was detained by the PSD and released only after agreeing to board the next flight out and not return. And when one of the police officers handling the case mentioned the provisions of the CPL to the Party Secretary of the Inner Mongolia Communist Party Political-Legal Committee, which “coordinates” the work of police, prosecutors and courts, the Secretary, who was one of the two major combatants in the political struggle, reassured him by saying: “I am the law in Inner Mongolia.”

A more subtle technique frequently used by police and prosecutors to defeat a defense lawyer’s entry into a case is simply to fail to comply with the requirement of the CPL that, within 24 hours of detaining someone, the detaining authority must notify the family or employer of the detainee of the detention,<sup>[7]</sup> the reason therefore, the identity of the detaining authority and the place of detention.<sup>[8]</sup> If questioned about their failure to issue the required notice, “law enforcement officials” – an ironic name for those who so frequently violate their own nation’s law – shamelessly exploit an exception to the CPL’s notification requirement by claiming that notification would “interfere with their investigation.”<sup>[9]</sup> Yet in most cases the only reason that notification might “interfere with the investigation” is that it might lead the family or employer to retain counsel to meet the detainee in accordance with the CPL in order to explain the nature of the offense suspected, relevant procedures and the rights of the detainee.

It should be emphasized that the CPL does not require a lawyer to show the detaining authority a copy of the detention notice in order to get access to his client. Yet police and prosecutors frequently take this position, and defense lawyers themselves will often reluctantly tell a would-be client that they cannot even accept the case unless a copy of the detention notice is provided to them. This, of course, is a ludicrous situation, for it denies the family and employer of the detainee their legally-guaranteed access to counsel at the outset of a case, a time when all they may know is that the suspect is missing and is probably in the custody of an unknown agency in an unknown place on an unknown charge. This is a crucial time when laymen urgently need the help of a criminal lawyer, who has the knowledge and contacts to enable them to find the detainee, so that the rights conferred by the CPL upon detainee, family, employer and defense counsel can all begin to be implemented. Moreover, if the detaining authority can defeat a lawyer’s legally-guaranteed entry into a case by failing to give the legally-guaranteed detention notice, it has an added incentive to violate the CPL’s notification requirements.

This farce has recently been acted out in the case of the Boston-based democracy activist Yang Jianli. On April 26, 2002, Yang, a PRC national and U.S. permanent resident with Ph.Ds from Harvard and Berkeley,

after repeatedly being denied entry to his homeland and even to Hong Kong, was detained in China's Yunnan Province on suspicion of using someone else's passport to return to his country illegally. Although three months have passed, no detention notice has yet been received by his family, which has been frantically trying to obtain one, so that defense counsel can belatedly begin to assist him. This is surely not a case in which the detaining authority can claim that issuance of a detention notice might interfere with its investigation by revealing to others the fact of Yang's detention, since the case has been widely publicized abroad from day one and well-known in China via the internet, e-mail, fax, phone and travelers. Furthermore, on May 10, 2002 the PRC Foreign Ministry, after inquiries from foreign journalists and the U.S. Government, admitted at a press conference that Yang was in custody, but it neglected to state in whose custody and where.

Letters from Yang's American wife to the Ministry of Foreign Affairs, the Ministry of Public Security, the Ministry of National Security and their local agencies requesting notification of his detention have all gone unanswered, and, when she arrived at Beijing Airport in May in an effort to call upon relevant agencies, her visa was cancelled and she was sent home on the plane that brought her. Yang's brother, who lives in Shandong Province and is a loyal Communist Party member, nevertheless believes that the police should follow the country's law. He has courageously persisted in vainly knocking on the doors of Beijing's various law enforcement agencies as well as its criminal law firms, and in talking to any journalist who will listen, despite increasing police pressures upon him. The sad fact is that lawyers seem unwilling to take on this politically sensitive case until a detention notice is received. Recently one lawyer reportedly agreed to enter the case but changed his mind by the time Yang's brother, whose phone is presumably tapped, reached his office.

On July 12, 2002 the Ministry of Foreign Affairs, aware of the bad publicity generated by the illegal conduct of the police, informed the American Embassy in Beijing that Yang is being detained by the Beijing Public Security Bureau and predicted that a detention notice would soon be issued. Two weeks later, the family is still waiting.

Another frequently used technique to keep lawyers out of the detention/investigation process is for police or prosecutors to pretend that the suspect is not really detained but merely being accommodated – forcibly to be sure – at a “guest house” run by the detaining agency. Sometimes, as in a current case I am not at liberty to identify, the family is informally told who the detaining authority is (in this case the local branch of the State Security Bureau) and vaguely what the investigation is about (student sexual activities) and the family is even required to pay 100 RMB (roughly US\$12) a day for room and board, which really adds insult to injury! Since the case has not yet become a formal criminal matter, and might not become one, the family has been advised against legalizing the situation by retaining a lawyer.

American University scholar Gao Zhan and her husband were secretly confined in separate “safe houses” by the State Security Bureau for three weeks before pressure from the American Embassy caused the PRC government to admit they were in detention. Similar techniques are even used on Party members, who can be summoned by the local Party discipline and inspection committee for investigation of matters that later become criminal. The procedure is called shuanggui and can result in a long period of incommunicado detention. And, of course, when ordinary people are detained pending determination whether they should receive the administrative punishment of “reeducation through labor,” which can result in three years in a labor camp, no detention notice need be issued if the police regard the case as certain to result in this “non-criminal” punishment rather than a formal criminal sanction.[\[10\]](#)

In some cases defense lawyers are forbidden or informally discouraged from assisting a detainee by the local bureau of the Ministry of Justice. Local justice bureaus used to exercise control over defense lawyers' conduct in all cases. In recent years, after the 1996 promulgation of the Lawyers Law and the revised CPL, they have relaxed their grip in most cases. Yet old habits die hard, and in some parts of China rules issued by local justice bureaus restrict defense lawyers to varying extents in certain types of cases. In Beijing, for

example, according to rules issued in early 1999,<sup>[11]</sup> without the advance approval of the Leading Group established by the Municipal Justice Bureau, no defense lawyer may accept a case that involves “state security”, foreigners or “critical social influences.”<sup>[12]</sup> A special notice issued six months later, after the onset of the continuing campaign to suppress the Falungong, makes clear that cases against Falungong followers are deemed to involve “critical social influences.”<sup>[13]</sup> This continuing control by the Beijing Judicial Bureau over the entry of lawyers into politically sensitive cases may be the reason why Beijing lawyers have refused to enter the Yang Jianli case until shown a copy of his detention notice. They may be tacitly complying with a condition imposed by their masters.

## **2. Obstacles During the Investigation Stage**

The 1996 CPL and other laws authorize lawyers to perform two different functions in the criminal process. During the investigation stage they may offer legal counseling (falu zixun). During the prosecution and trial stages, they may offer defense representation (daili bianhu). The differences between the two functions are significant.

In view of the extreme difficulties that lawyers confront in entering the investigation stage, one might think that those who manage to do so might then be allowed to render substantial service. Unfortunately, the revised CPL, while for the first time granting lawyers access to detainees during investigation, nevertheless severely restricts what they can do. At this stage, which usually lasts for many months and sometimes even years, the lawyers may merely “offer legal advice” and file a complaint or petition on behalf of the suspect. If the suspect has been formally arrested, the lawyer may also apply for “release under guarantee pending trial.” The lawyer also has the right to ask the investigating agency about the nature of the alleged offense and to interview the suspect to understand the circumstances of the case. However, the revised CPL ominously provides: “Depending on the circumstances and necessities of the case, personnel from the investigating agency may be present during the lawyer’s interview with the criminal suspect.”<sup>[14]</sup>

Police and prosecutors have applied these provisions in ways that minimize the opportunities for a lawyer to affect their investigation. In practice, lawyers are generally allowed only one brief meeting with the detainee at this stage. Usually these meetings are closely monitored, and sometimes recorded, by investigators, so that confidential communication is impossible. Lawyers are frequently not allowed to ask their clients detailed questions about the case. When, for example, a lawyer was finally permitted to meet American citizen Fong Fuming last year, after he had been in detention on bribery and “state secrets” charges for almost a year and after the investigation was virtually concluded, no detailed discussion of his case proved possible, and counsel and client were required to talk through a glass partition by means of microphones that broadcasted their every word to the nearby guards.

During the lengthy investigation period, lawyers are definitely not permitted to undertake their own inquiry into the case – no interviewing of witnesses, no collecting of other evidence, not even discussion with the detaining authority about the inadequacy of its evidence. The complaints or petitions that lawyers are authorized to file with investigating authorities usually fall upon deaf ears, even if based upon clear violations of the CPL’s procedures. Although police sometimes grant “release under guarantee pending trial” for their own convenience, lawyers’ requests for such release are rarely granted.

Yet there is nowhere else to go for a hearing concerning investigators’ arbitrary actions, including torture. Although the prosecutor’s office is supposed to serve as the “watchdog of legality” and protest the misconduct of not only the police but also other prosecutors, it seldom offers relief, and it frequently is difficult for lawyers even to obtain meetings with prosecutors or higher police officials in order to challenge investigators’ violations. China lacks any proceeding similar to habeas corpus, so lawyers who try to persuade a court to hear a detainee’s grievance are told that courts have no jurisdiction until after indictment, and the local judicial bureau will also disclaim authority. Nor will a lawyer without powerful connections

find assistance at any level of people's congress or the Party political-legal committee that coordinates the government law enforcement agencies or the Party discipline and inspection committee that deals with misconduct by Party members. In rare cases the Chinese press reveals egregious police misconduct, but lawyers attuned to a government that suppresses political freedoms seldom risk contact with journalists.

In China, as elsewhere, the investigation stage is the most crucial phase of the criminal process. In the PRC, in law and even more so in practice, it is heavily weighted against the suspect, so that even the ablest defense lawyers find the system to be an exercise in frustration.

### **3. Limited Role During the Indictment Stage**

Under the revised CPL, defense counsel are supposed to come into their own once the government investigation concludes and the case is sent to the prosecutors' office together with a report recommending indictment. Prior to the 1996 reforms, defense lawyers were not even admitted to a case at this stage but had to wait until it had reached the court following indictment. The revised CPL requires the prosecutors' office, within three days of reviewing the case file, to inform the suspect of his right to ask a lawyer to defend him.<sup>[15]</sup> In principle, the lawyer, now formally referred to as "defense lawyer," has a right to conduct his own investigation of the case and to read, excerpt and reproduce "litigation documents and technical materials" in the file, as well as to meet and correspond with the suspect in custody.<sup>[16]</sup> The lawyer also has a right to present his views on the evidence and applicable law to the reviewing prosecutor before the decision is made concerning indictment.<sup>[17]</sup>

Unfortunately, the provisions of the revised CPL that detail the newly-granted rights of the defense lawyer at this stage lend themselves to frustration of those rights. The revised CPL fails to define the scope of the "litigation documents" in the file to which the prosecutor must grant access, and it affirmatively restricts defense counsel's prospects for independently gathering evidence. The law provides that defense counsel may only collect materials concerning the case from witnesses or other persons or organizations with their consent, and may only obtain materials relating to the case that are in possession of "the victim, the victim's close relatives and witnesses proposed by the victim" with the consent of the victim and the approval of the prosecutors' office.<sup>[18]</sup>

Not surprisingly, these detailed provisions governing the defense lawyer's pre-indictment role have been applied in ways that severely limit the possibility of mounting an effective defense. Although some scholars hoped that the "litigation documents" that the prosecution is required to show defense counsel would include documentary evidence, physical evidence and the records of statements made by witnesses, the victim and the suspect himself during the investigation stage, as well as other evidence available to the prosecution, the term has been construed narrowly by the nation's chief prosecutor's office, the Supreme People's Procurator ("SPP"), to exclude all such material.<sup>[19]</sup> Prosecutors are required to grant access merely to the formal documents in the file, such as copies of the detention and arrest notices. In practice prosecutors have proved even stricter in withholding relevant documents. Even the investigators' summary of the case and recommendation to indict, a most important formal document, is not usually revealed, although the SPP's interpretation requires it to be.<sup>[20]</sup> Of course defense counsel "may apply" to see the evidence in the file and even to ask the prosecutors to help collect additional evidence for the defense,<sup>[21]</sup> but such requests seldom yield a positive response.

Moreover, defense counsel, lacking the power and prestige of police and prosecutors, find it very difficult to obtain the consent and cooperation of witnesses, of victims and their families and of other people and organizations. Despite the fact that witnesses do not usually appear in person to testify in criminal trials in China, they do not even wish to be interviewed, and lawyers have no way to make them cooperate. Thus the belated right of the defense lawyer to conduct an investigation often turns out to be a sham.

These restrictions plainly limit the ability of the defense lawyer to persuade the prosecution not to issue an indictment or to indict for fewer or lesser offenses. There is no way the defense lawyer can know the case as well as the prosecution, especially in view of the fact that the indictment stage is usually brief, unlike the investigation stage, and prosecutors often place little stock in the defense lawyer's views. In any event it is frequently difficult for defense lawyers even to arrange a meeting with the responsible prosecutors in order to discuss the matter. These realities help to explain the fact that, year in year out, prosecutors approve over 98% of investigators' requests for indictment.[22]

Plea bargaining is neither authorized nor practiced in the PRC, at least in principle. Of course, during the investigation stage interrogators frequently bargain with the suspect, offering "leniency for those who confess and severity for those who resist," and in some cases defense lawyers do have an opportunity to exchange ideas with prosecutors about their case, and perhaps even negotiate after a fashion. Indeed, in some of the PRC criminal cases in which I have advised, our Chinese defense counsel surely conducted conversations with prosecutors, sometimes at my suggestion. They did not feel free to inform me of the occurrence or content of certain other meetings with prosecutors. The latter experience led me to believe that in sensitive cases defense counsel may not be free agents.

That defense lawyers in important cases are often not independent is confirmed by the 1999 Rules of the Beijing Municipal Justice Bureau to which I previously referred.[23] This is true not only in those cases for which approval of the Bureau's Leading Group is required for entry into a case, but also in a broad variety of other major cases. The Rules grant the Leading Group the power "to listen to the requests and reports of law firms in major cases" (written reports that the firms are required to make at every stage of the case),[24] "to decide the principles for handling major cases and to coordinate the work connections between lawyers and relevant agencies." [25] If a written report causes the Leading Group to believe that a meeting is necessary with the lawyer handling the case, it can summon him to "report relevant circumstances," which include "the tactics adopted by the lawyer for handling the case as well as the issues that need to be discussed." [26] The Rules conclude by stating: "The lawyer handling the case must prepare his tactics in accordance with the decision made by the Leading Group after its discussion." [27] If circumstances subsequently change, the lawyer is authorized to revise his defense arguments in accordance with the new situation but must report the details to the Leading Group. [28] It would be surprising if the rules of at least some other local judicial bureaus were very different in this respect.

#### **4. Trials and Tribulations**

The frustrations of defense counsel do not diminish following indictment. The revised CPL purported to transform the criminal trial into a meaningful experience by precluding the court, prior to the judicial hearing, from reaching its judgment on the basis of the file submitted by the prosecution. In order to implement this objective the revised CPL eliminated the previous practice whereby the prosecution submitted its entire file to the court along with the indictment. Instead, it required only that the prosecution submit a list of the evidence and witnesses to be presented at the trial together with copies of "major evidence" and the litigation and technical documents to which defense counsel had access at the indictment stage. [29] This has meant that defense counsel, instead of gaining access to the whole file prior to trial, as in pre-1996 practice, now has the benefit of merely the skeletal prosecution file called for by the revised CPL, which again is narrowly construed by prosecutors in practice. Thus, in preparing for trial, defense lawyers have much less knowledge about the nature of the prosecution case and much less material to work with than under the old procedure, and this hinders their preparation greatly.

Nor does the revised trial procedure enhance the ability of defense counsel to gather evidence on their own. Indeed, it constitutes another setback. [30] Prior to 1996, although the old CPL was silent on this question, both the national interim regulation on lawyers and some local regulations emphasized the right of defense counsel to investigate and collect evidence and the obligations of witnesses and other relevant people and

institutions to cooperate with those efforts. The revised CPL, as the provisions cited in the previous section make clear, virtually invites witnesses and others to reject the requests of defense counsel, who have no power to compel their cooperation. Although the new law provides that defense lawyers may apply for a court order to collect essential evidence on behalf of the defense,<sup>[31]</sup> such applications tend to be as unsuccessful as similar requests made to the prosecutors' office, and there is no way to obtain review of such rejections. Moreover, the orders of Chinese courts are ignored to a shocking extent due to the absence of both appropriate punishments for contempt of those orders and an effective judicial enforcement system.

Denied the opportunity to learn the prosecutor's case in advance of trial and restricted in his ability to build his own case prior to trial, defense counsel, to the extent allowed by the judicial bureau, should at least be able to rely on the opportunity to puncture the prosecution's case at the trial. In China, as elsewhere, often the best way to demolish the factual allegations underlying the indictment is for defense counsel to cross-examine the prosecution's witnesses. Yet, prior to 1996, witnesses were not required to appear in court. One of the most well-known reforms of the revised CPL,<sup>[32]</sup> at least as its somewhat ambiguous language was clarified by Supreme Court interpretation,<sup>[33]</sup> is the requirement that generally witnesses must testify in court, rather than have their pre-trial statements read out during the trial, and that the opposing lawyers, as well as the judges, must have the right to cross-examine the witnesses. In view of the previous practice, this was a change of potentially historic proportions.

The problem is that this requirement has remained a dead letter. Except in a tiny percentage of cases, witnesses still do not appear in Chinese criminal courts. No one disputes that. The only debate is over whether, nationwide, as few as 1% or as many as 10% of the trials might be graced by the presence of even a single witness. So much for the right of cross-examination! Defense counsel inevitably confront difficulty in challenging the records of statements made outside their presence to police and prosecutors, although, as with physical and documentary materials, they seek to demonstrate discrepancies and other reasons to doubt the evidence.

Many other basic evidentiary challenges confront PRC trial lawyers. Is there a presumption of the defendant's innocence? If a confession or other evidence was illegally obtained, should it be excluded from evidence? What are the elements of proof required for conviction of various offenses and what standard of guilt should be applied by the court? Literally, scores of serious evidentiary issues arise, and many Chinese prosecutors and judges – and many defense lawyers – are ill-equipped to deal with them, especially in the absence of detailed legislative guidance.

It is often difficult for informed foreign observers to gain access to PRC criminal trials, especially since many important trials are still effectively closed, even to the Chinese public, contrary to constitutional and legislative prescriptions that generally require public trials. My impression from studying criminal court judgments, however, is that Chinese judges often do not address or respond in a reasoned manner to many of the factual and legal arguments presented by defense counsel. Although the Supreme Court has instructed the courts to state the reasons for their judgments, their decisions are often cloaked in cursory generalities.

In this year's Fong Fuming case, for example, many questions of law and evidence went unanswered. What are the elements that must be proved to make out a "bribery" conviction? Did "extortion" occur and, if so, should it have vitiated a "bribery" charge? Was the court correct to exclude proffered evidence that the alleged extorter had also sought to extort other businessmen? On what basis could the court conclude that commercial documents found in Fong's laptop were "state secrets"? Should defense counsel and defendant have been allowed to read the documents in question in order to be able to rebut the charge? Did the prosecutors and judges themselves have an opportunity to read those documents or were they simply required to accept the decision of the national State Secrets Bureau? Did an opinion of the State Secrets Bureau accompany its decision and, if so, should the defense have been allowed an opportunity to review it, if not the documents themselves?

Similar questions relating to “state secrets” arose, but were not adequately addressed, in the 2001 prosecutions of scholars Li Shaomin and Gao Zhan on charges of spying for Taiwan. What was the basis for classifying the internal essays and analyses involved as “state secrets,” and did the accused have the knowledge and intent required for conviction?

Political trials, of course, subject defense lawyers to their gravest challenges, particularly trials such as those that followed the Tiananmen tragedy of June 4, 1989 or that have dealt with efforts to organize independent political or Falungong activities. The lawyer for Muslim activist Rebiya Kadeer was reportedly not even allowed to speak at her 1999 trial.<sup>[34]</sup> Judges in such trials generally keep defendants and their lawyers on a very short tether, as demonstrated by the 1998 prosecution of famed democracy advocate Xu Wenli for helping to establish the China Democratic Party. They frequently interrupt and even shout down efforts to refute the underlying basis for allegations such as “endangering state security” by acting with “intent to subvert state power,” for which Xu received a thirteen-year prison sentence. The Xu trial, like that of Li Shaomin, Gao Zhan and many others, was concluded in half-a day!

Although able defense counsel can sometimes utilize the right of appeal to obtain a more considered review of a deserving case, convicted defendants, who remain in police detention pending conclusion of their case, are often persuaded not to appeal by their jailers, their family or even their lawyers. If the defendant hopes for release prior to completion of his sentence, the lawyer may be concerned that appeal may be interpreted as a sign of the defendant’s obstinacy and lead to longer prison time. Moreover, knowing that trial courts frequently clear their decisions with the relevant appellate court before pronouncing judgment, the lawyer may well believe that pursuing an appeal would be throwing good money after bad. Yet, especially in cases involving complex business transactions, certain lawyers have developed the expertise and reputation for waging an impressive defense at the appellate level and sometimes winning a reduced sentence, a retrial or acquittal on certain of the charges. However, in a country where the final conviction rate is over 98%, defense counsels do not harbor illusions.

Less can be done after a conviction has become legally effective. Defense lawyers even have difficulty arranging a meeting with their client after the time for appeal has expired or the appellate court has confirmed the judgment below. Yet one advantage of China’s notoriously flexible criminal procedure is that, in cases of gross injustice or where important evidence is newly discovered, the defense lawyer may be able to find a post-conviction remedy by resort to “adjudication supervision.”<sup>[35]</sup>

It is possible that the Criminal Evidence Law that is currently being drafted by respected Chinese specialists inside and outside PRC government circles will improve the plight of defense lawyers in many respects, not only at the trial stage but also from the very beginning of the criminal process. Contrary to its title, the new legislation, which might be adopted within a few years, will probably not be strictly limited to matters of evidence but will touch upon many aspects of criminal procedure. Since the revised CPL is unlikely to be revised again in the near future, the Criminal Evidence Law will be of profound importance to the administration of criminal justice in China. If it closely resembles the comprehensive and impressive Expert Draft being prepared by a group of China’s leading academic specialists, and if the new law should actually be implemented, the work of China’s defense lawyers will become somewhat less depressing.

## **5. The Sword of Damocles**

Yet a new Evidence Law will do nothing to reduce the professional and personal risks that Chinese defense lawyers confront every day. I have already mentioned instances of police intimidation of lawyers who seek legally guaranteed access to detained suspects and the more covert controls exercised by local judicial bureaus. Failure to follow the instructions of a judicial bureau, which regulates the local practice of law, can lead to loss of benefits and to administrative sanctions that include suspension of the lawyer’s professional license and even closing of his law firm. Thus, not only the livelihood of the defense lawyer is at stake but

also that of his colleagues, which is undoubtedly why some judicial bureaus require a would-be defender to discuss whether and how to deal with a criminal representation with the other lawyers in his firm before deciding on a course of action.[\[36\]](#)

Defense lawyers whose efforts offend police, prosecutors or other power-holders also run the risk that, in retaliation, criminal prosecution may be initiated against them. Tax evasion has proved a readily available pretext for prosecution in a country where tax law and administration are in need of serious reform and non-compliance is rife. Corruption is another favorite. Lawyers who work for state-owned law firms have been convicted of embezzlement of public funds, and in a culture where, despite legislative prohibitions, lawyers are still expected to wine and dine judges, and where bribery is a huge problem, lawyers are easy targets for selective prosecution. They have also sometimes been convicted of criminal defamation for revealing official misconduct, and a lawyer in Hunan Province was recently sentenced to one year in prison for leaking “state secrets.” Her only offense was to allow the family of her client to see the court file in the case she was defending.[\[37\]](#)

The gravest threat to the personal security of defense lawyers comes from Article 306 of the Criminal Code, which specifically targets lawyers who “induce” or “force” their clients or witnesses to change their testimony, forge statements or commit perjury. Any lawyer who advises his client to repudiate at trial a confession that may have been coerced during the investigation stage risks of an Article 306 prosecution, and, although this provision only became law in 1997, dozens of lawyers have reportedly been investigated and prosecuted under it. This is why lawyers openly call Article 306 the “sword of Damocles” and why conferences sponsored by the All China Lawyers Association have expressed great concern about it as well as other forms of intimidation.

The May 3, 2002 detention and subsequent arrest of Zhang Jianzhong, managing partner of one of China’s leading law firms and head of the Beijing Lawyers Association’s committee for protecting lawyers, has had a chilling effect on the criminal defense bar. Mr. Zhang, in addition to maintaining a flourishing business practice, has represented some high-profile defendants in major corruption cases. It is feared that his current investigation and virtually incommunicado confinement for alleged violation of Article 306 -- for allegedly providing a false statement in a commercial transaction, an offense that in China would not normally warrant such severe treatment -- may be another instance of selective prosecution in retaliation for offending a prominent political figure through vigorous criminal defense work.

## **6. Conclusion and Recommendations**

In these circumstances, is it any wonder that China’s lawyers are reluctant to take on criminal cases? Yet, nationwide, defense lawyers probably appear in merely one-third of the cases brought to trial, and, even in cities where economic and educational standards are relatively high, many defendants go without counsel. In one Eastern city, for example, recent representation rates at basic level trials ranged from less than 18% in one court to roughly 90% in another, with the representation rate in most courts falling below 50%.[\[38\]](#)

The plight of China’s criminal defense lawyers is appalling, and the country’s entire criminal process is in need of radical reform. The people of China deserve far better. Moreover, now that the PRC is in the WTO, is preparing to host the 2008 Olympics and welcomes millions of foreigners to its shores every year for tourism, business, educational and cultural exchange and many other purposes, it is time for a new generation of Chinese leaders to make a genuine “great leap forward” in the direction of meeting international minimum standards for the administration of criminal justice. The legitimacy of the Chinese Government at home and abroad is at stake. Significant improvements in China’s justice will yield corresponding improvements in its international relations and reputation for safeguarding human rights and the rights of all foreigners who enter the country. The current Lai Changxing case, in which the PRC has been struggling for over a year to secure the return from Canada for trial in China of allegedly the greatest smuggler in China’s history, vividly

illustrates the extent to which Chinese justice itself can be put on trial abroad in an increasingly interdependent world.<sup>[39]</sup>

I cannot discuss in these remarks the radical, long-run political-legal restructuring that would be necessary in order to bring the PRC's criminal process into compliance with minimum international standards or even all the changes required in legislation and practice significantly to ease the plight of its defense lawyers. Many of the measures that ought to be adopted are implicit in my earlier comments and in any event are, of course, for China to decide.

I will conclude by merely suggesting several steps that can be taken now by others, including those of us in the United States, in and out of government, who wish to be useful in this area.

1. We should promote opportunities to cooperate with PRC defense lawyers through professional and academic conferences, workshops, study groups and training programs. Although China's criminal lawyers are not generally fluent in English or other foreign languages, as PRC business lawyers increasingly are, many have an intense interest in comparative criminal law and procedure and the situation of their counterparts in other countries. Many subjects can fruitfully be discussed. For example, might some form of plea bargaining be useful to China, thereby freeing court resources to provide better trials for the minority of genuinely contested cases? Would the process of sorting out contested cases from others be facilitated by establishing fair procedures for pre-trial discovery of evidence? Would some type of habeas corpus proceeding or criminal ombudsman be suitable for China?

Defense lawyers also confront difficult questions of legal ethics and might welcome exchanges regarding a number of problems. One topic worthy of exploration is the propriety of contingent fees for criminal defense lawyers. It is not unknown in China for a defense lawyer, in addition to charging a substantial retainer for his time, to arrange to be paid a very large fee, even by American standards, if successful in gaining acquittal, reversal of the judgment below or a designated reduction in sentence. The incentive to corruption provided by such an arrangement is obvious.

2. Enhanced cooperation with Chinese lawyers of the kinds suggested above will need to be supported by scholarly research of a comparative nature. Here is an important role for academic institutions in China, the United States and other countries. China's leaders and legal officials are increasingly aware of the value of accurate knowledge of how their own legal system and that of other countries perform, and they have recently welcomed a range of cooperative activities in law. Opportunities even for joint legal research between PRC and foreign scholars may be expanding.

3. This scholarly research and the cooperation of defense lawyers that it is designed to support will require significantly increased funding from public international organizations, governments including our own and China's and charitable foundations. We should seize the moment, as Chairman Mao once said, but for a purpose that he could not have foreseen.

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<sup>[1]</sup> The Interim Regulations of the People's Republic of China on Lawyers, article 1 (1980) (passed by the Standing Committee of the National People's Congress on Aug. 26, 1980).

<sup>[2]</sup> The Lawyers Law of the People's Republic of China was enacted by the National People's Congress Standing Committee on May 15, 1996.

<sup>[3]</sup> The Criminal Procedure Law of the People's Republic of China was promulgated on July 1, 1979 and revised on March 17, 1996.

[\[4\]](#) CPL, article 96.

[\[5\]](#) Supreme People's Court, Supreme People's Procuratorate, Ministry of Public Security, Ministry of State Security, Ministry of Justice and the National People's Congress Standing Committee Legal Affairs Working Committee: Provisions Concerning Several Issues in the Implementation of the Criminal Procedure Law, issued on January 19, 1998, article 10.

[\[6\]](#) CPL, article 96.

[\[7\]](#) CPL, article 64

[\[8\]](#) *ibid.*

[\[9\]](#) *Ibid.*

[\[10\]](#) According to the Implementation Regulations of the Ministry of Public Security Concerning Reeducation through Labor, issued on January 21, 1982, although the decision to impose the sanction of "reeducation through labor" on someone should be announced to his family, there is no requirement to notify the family of his initial detention. See article 12 of the Implementation Regulations.

[\[11\]](#) The Rules of Beijing Municipal Justice Department on Reporting Major Legal Matters by Beijing Law Offices, JING SI FA No. 7 (1999).

[\[12\]](#) *Ibid*, article 4(a).

[\[13\]](#) Notice of Beijing Municipal Justice Department Concerning Reporting Legal Advice to and Representation of Falungong Followers, a document widely circulated in the internet, which was reportedly issued on July 29, 1999.

[\[14\]](#) CPL, article 96.

[\[15\]](#) CPL, article 33.

[\[16\]](#) CPL, article 36.

[\[17\]](#) CPL, article 139.

[\[18\]](#) CPL, article 37.

[\[19\]](#) Supreme People's Procuratorate: Rules on the Criminal Process for People's Procuratorates, issued on December 16, 1998, article 319.

[\[20\]](#) *Ibid.*

[\[21\]](#) CPL, article 37.

[\[22\]](#) Human Rights in China: Empty Promises-Human Rights Protections and China's Criminal Procedure Law (hereafter "HRIC Report"), New York, March 2001, at 24.

[\[23\]](#) *Supra note 11.*

[\[24\]](#) *Ibid*, article 2.

[\[25\]](#) *Ibid.*

[26] *ibid*, article 6.

[27] *ibid*, article 7.

[28] *Ibid*.

[29] CPL, article 150.

[30] HRIC report, Chapter III. *supra note 19*.

[31] CPL, article 37.

[32] CPL, article 47.

[33] Supreme People's Court: Interpretation on Several Issues Regarding Implementation of the PRC CPL, enacted on June 28, 1998, article 141.

[34] World Brief, *Detroit News*, March 12, 2000, at 9.

[35] For detailed rules, see CPL, articles 203-207.

[36] See, *e.g.*, The Several Provisions of Anhui Province on Law Practice issued by the Standing Committee of the People's Congress of Anhui Province, on March 26, 1999. Article 28 states that "the decision to defend a defendant on the basis of a not guilty plea should be discussed collectively within the law firm to which the defense lawyer belongs."

[37] Yu Ping: "Glittery Promise vs. Dismal Reality: The Role of a Criminal Lawyer in the People's Republic of China after the 1996 Revision of the Criminal Procedure Law", *VANDERBILT JOURNAL OF TRANSLATIONAL LAW*, May 2002, at 858-859.

[38] Interviews with judges in China, on file with the author.

[39] On May 6, 2002 a panel of the Refugee Division of Canada's Immigration and Refugee Board, after hearing testimony for forty-five days over a five-month period and after six months of subsequent deliberation, rejected the claim of Mr. Lai and his family to be considered political refugees, rather than criminal fugitives, from China. Much of the hearing and the reasons cited by the panel in support of its decision analyzed the administration of criminal justice in China. The case is currently being appealed to the Canadian courts.