

# CHINA'S CRIMINAL JUSTICE SYSTEM

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## ROUNDTABLE

BEFORE THE

### CONGRESSIONAL-EXECUTIVE COMMISSION ON CHINA

ONE HUNDRED SEVENTH CONGRESS

SECOND SESSION

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JULY 26, 2002

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FRIDAY, JULY 26, 2002

CONGRESSIONAL-EXECUTIVE  
COMMISSION ON CHINA,  
*Washington, DC.*

The roundtable was convened, pursuant to notice, at 10:02 a.m., in room SD-215, Dirksen Senate Office Building, Ira Wolf, (Staff Director) presiding.

Also present: John Foarde, Deputy Staff Director; Susan Weld, General Counsel for the Commission; Matt Tuchow, Office of Representative Levin; Karin Finkler, Office of Representative Joe Pitts; Susan O'Sullivan, for Lorne Craner, Assistant Secretary of State for Democracy, Human Rights, and Labor.

Mr. WOLF. All right. I would like to welcome all of you to the ninth staff-led issues roundtable of the Congressional-Executive Commission on China. The tenth, and final roundtable before the summer, will be an open forum on Monday, August 5 in this room at 2:30 p.m. If you are interested in participating in that, please check our Website in order to register.

Today we will look at the criminal justice system in China. We have four panelists with us today—Professor Jerome Cohen from the New York University School of Law; Professor Murray Scot Tanner from Western Michigan University; Dr. Veron Mei-Ying Hung from the Carnegie Endowment for International Peace; and Jonathan Hecht from the China Law Center at the Yale Law School.

We appreciate, Jonathan, that this is your second time here, the first being at one of the full Commission hearings earlier this year.

There is a wide breadth of experience on the panel today, many years—decades—of research, of advocacy, of assistance to the development of China's legal system.

Jerry, let us begin with you, please.

### **STATEMENT OF JEROME A. COHEN, PROFESSOR, NEW YORK UNIVERSITY SCHOOL OF LAW, NEW YORK, NY**

Mr. COHEN. I am delighted to have a chance to talk with the Commission staff. In 1997 and 1998, Presidents Jiang Zemin and Clinton made agreements that we should cooperate, the United States and China, on legal reform. Finally, in the last couple of years, we have witnessed significant cooperation.

I think this hearing on criminal law matters is very, very important and I am happy to talk about the role of China's criminal defense lawyers, if only to assure their American counterparts that the post-9/11 government actions in this country have not yet sub-

jected American lawyers, fortunately, to the problems of the Chinese defense lawyer.

China's lawyers have come a long way in the last 20-odd years. They were denounced, of course, in the 1950s, 1960s, and 1970s as "the worst of that stinking ninth category of intellectuals." They were suppressed, resurrected in 1980, and in the last two decades, China's lawyers have really come a long way.

They play a very important role in the country's economic development and cooperation with the rest of the world, supporting social and economic progress at home. They are making money, they are prestigious. They are important players. Lawyers are now one of the top categories for people's professional aspirations in China, but not criminal defense lawyers.

Criminal defense lawyers are in a sad, frustrating situation. Some of them make money. Some of them are even recognized and admired. But even they lead a dangerous life, and a difficult, frustrating life. In my paper, for which I apologize, since it is so long, there is much material about this, and I discuss many cases of people based in the United States who have been detained in China. I have taken part in a number of those cases as advisor to the family and in my paper I try to link that experience to the more abstract propositions of my report.

But essentially what I do, is first show the variety of excuses developed by the police—public security and secret police—and prosecutors, unfortunately, for keeping lawyers out of the case, frustrating the right given by the revised Criminal Procedure Law to counsel, even in the investigation stage.

The pretexts that have been developed are a tribute to the ingenuity of police and prosecutors in developing mostly phony excuses, finding loopholes in the law which they then exaggerate.

Second, I show that even when a lawyer gets into a case at the investigation stage, what the lawyer can do is extremely limited. Lawyers can give advice if they can manage to meet the detained person, but usually they are only allowed to meet him once.

They cannot investigate the case at that stage. Usually they cannot even discuss the facts of the case with the suspect. They are very limited. It is highly artificial what they can do and it does not amount to much.

Now, when the case is sent to the prosecutor at the conclusion of investigation, lawyers come into their own. In principle, they are recognized then as not merely legal advisors, but defense lawyers. Nevertheless, that is a very frustrating situation for them. They get very limited access to the material on which the prosecution is requested by the investigators.

They do not see the evidence that the investigators are giving the prosecutor at that stage. In principle, they can talk to witnesses, they can gather evidence, but they need the consent of witnesses. In some circumstances, they need the consent of the victim or his family, or the prosecutors.

People do not want to talk to defense lawyers in China. Even though witnesses rarely go to court, they do not want to get involved even for purposes of giving their statements prior to trial.

The upshot is, at the time when the prosecutor is deciding whether or not to indict, at the time when the defense lawyer is

supposed to have an opportunity to discuss the case with the prosecutor before a decision to indict is made, the opportunity does not amount to much. It is hard to get the attention of prosecutors. Because of the restrictions involved, it is also hard for the lawyer to understand the case sufficiently to have a significant opinion.

Things get even worse at the trial stage. At the trial stage, you would think a defense lawyer now would have an opportunity. They have not had pre-trial discovery to a significant extent, so they do not know the government's case in advance. They usually do not have enough time to prepare for trial, and they do not have enough access to witnesses and other evidence before trial.

But here, you think, in court, when there is going to be a public trial, here is their chance because the new Criminal Procedure Law of 1996 made a significant innovation by providing the right to cross-examine witnesses.

However, the problem is, if the witnesses do not come to court, there is nobody to cross-examine. If their statements are merely read out in court, as they are in almost all criminal cases in China, the right of cross-examination is hollow.

There are a variety of other restrictions in the trial. Of course, if the case is one involving political sensitivities, then there are even greater restraints on the counsel during the trial.

My paper goes into all of this, with examples. Time is limited. I just want to reserve some time, not for the appeal or post-conviction stages which I also mention, but for the plight of the defense lawyer in terms of his personal insecurity. That insecurity is professional. It is also very personal.

I have been involved in cases where, when the lawyers point out to the police that they have violated the Criminal Procedure Law, the lawyers get detained, sometimes so intimidated they drop the case, and in one case I know of, even gave up the practice of law.

Then there is the risk of formal criminal prosecution. Under article 306 of the Criminal Law, dozens of lawyers have been detained, prosecuted, some even convicted, for supposedly assisting defendants in providing false testimony.

Usually that is because the lawyer tells the accused, the confession you gave during investigation was coerced so you do not have to stick with that. You can tell the truth as you see it.

But when the defendant tells the truth as he then sees it, the lawyer is later charged with telling the defendant to give false testimony.

One of China's leading lawyers, Zhang Jianzhong, is now in detention in China. We do not know for sure what the basis of the charge is under article 306. The police are reporting informally that it has nothing to do with criminal defense work, but he has been a leading criminal defense lawyer, and many of his colleagues at the Beijing bar feel he is being discriminated against because of his criminal defense work.

There are other sanctions against lawyers, including control in sensitive cases by the local judicial bureau. Lawyers sometimes need to have the permission of the local judicial bureau to handle cases, certainly Falun Gong cases, and a variety of other politically sensitive cases.

They have been prosecuted, on a selective basis, for not paying taxes, for corruption and for defamation of officials when they charge officials with misconduct.

In sum, we have to recognize that, 20 years ago, criminal defense lawyers were just coming back after an absence of over two decades. But the life of the criminal defense lawyer today is a frustrating and difficult one.

Finally, I end my prepared statement with certain proposals that might, at the suggestion of many criminal defense lawyers, boost their status and their cooperation with the outside world.

We ought to have joint research with them to underlie that cooperation, and I hope that Congress will continue the funding that it has recently begun for rule of law projects, and indeed, expand it. I think one of the most worthy subjects for Congressional support would be to study the plight of the Chinese criminal defense lawyer.

Thank you.

[The prepared statement of Mr. Cohen appears in the appendix.]  
Mr. WOLF. Thanks very much, Jerry. Scot.

**STATEMENT OF MURRAY SCOT TANNER, PROFESSOR,  
WESTERN MICHIGAN UNIVERSITY, KALAMAZOO, MI**

Mr. TANNER. I would like to begin by expressing my sincere thanks to the members of the Commission for honoring me with this invitation, and thank in particular the Commission staff, in particular Mr. Wolf and Dr. Susan Roosevelt-Weld, for their kind help in inviting me and arranging my visit to the Commission.

It is also, by the way, an honor to share a panel with such well-known China legal scholars as Professors Cohen, Hung, and Hecht.

The purpose of my testimony today is to focus some attention on the political and legal battle within China's legal system to confront the widespread and horrific use of torture, especially tortured confessions.

Members of the Commission have heard testimony on the prevalence of torture, which has been carefully documented by Amnesty International, by Human Rights Watch, our own State Department, and many others. As an individual analyst, there is very little I can add to this excellent monitoring work.

Instead, my testimony draws on my research on China's police to look at an important and unusual aspect of this battle against torture, the battle within the law enforcement system itself.

For the past half-dozen years, a growing number of officials and scholars within China's law enforcement system, even some within the public security and procuratorial systems, have been criticizing China's pervasive torture problem with increasing bluntness.

These officials and analysts are also openly debating policy reforms designed to control torture, in particular, pushing to professionalize reforms of law enforcement, as well as revising China's Criminal Procedure Law to create disincentives for torture. In many instances, these proposed revisions draw explicitly on U.S. and Western law.

I cannot stress strongly enough that my purpose here today is not to argue the brief that either China's leadership or its law en-



forcement system are making adequate progress in dealing with torture. Emphatically, they are not.

Nor am I here arguing that this emerging group of anti-torture critics is strong enough to reform the system without a major overhaul backed by pressure from Chinese society and from the international community.

Instead, my purpose is to carefully evaluate the origins of this pressure for improvement from within the system, to examine critically the proposals these officials and analysts are making, and analyze the obstacles they face in trying to promote progress.

Such an analysis hopefully can assist the Commission and other U.S. policymakers trying to evaluate the most effective ways for the United States to assist in fighting torture and encouraging legal reform.

In my mind, there is little question that the key obstacle to fighting torture in China lies in her authoritarian political system and we cannot realistically anticipate fundamental self-generating and self-sustaining progress against torture until China constructs the package of social, political, and legal institutions that most liberal democracies rely on to fight torture, most importantly a free, competitive, and aggressively investigatory press, citizen-based human rights organizations, independent, fair, and accessible courts, and, of course, multi-party elections as an implicit threat against unresponsive leaders.

But even among authoritarian systems there can be significant differences in the levels of torture and law enforcement abuses. Thus, even without waiting for or weakening our commitment to full democratization, we can and must expect, promote, and support significant improvement in China's torture record through reforms within the existing system.

In many societies, even fledgling democracies, torture is greatly exacerbated by a severe lack of law enforcement professionalism, including excessively compliant judges, a lack of even rudimentary commitment to legal procedure, and rules of evidence that create incentives for torture, as well as weakly trained police who lack the professional skills to solve non-political criminal cases using legally gathered evidence.

But in systems like China, even partial progress is impossible unless top leaders exert sustained monitoring and punishment of abuses. Under Jiang Zemin's leadership, that commitment to fighting torture has been largely instrumental, and at best sporadic, ambivalent, or to use Amnesty International's term, "indifferent."

Periodic crackdowns on police abuses are only part of a strategy of the government to use rule by law to revive its legitimacy and to offer average citizens a bargain that says, in effect, if you stay away from politics, if you stay away from officially suspect religions, and do not commit crimes, the Party is going to try to guarantee you an orderly, low-crime society and gradually expand legal protections against arbitrary law enforcement and abuses.

Such a strategy, however, is extremely risky for the regime. In particular, any serious effort to reign in torture risks undermining the capacity of police and prosecutors to fight crime and maintain adequate law and order, which is of course the other cornerstone of this rule by law legitimacy strategy.

As in many authoritarian systems, decades of being protected by an undemocratic government have rendered China's law enforcement departments, quite simply, rather weak in modern criminal investigation skills and excessively reliant upon compliant courts, coerced confessions, and a culture of informants to obtain their convictions.

This is, one might say, a police State in which the police are not very good at regular police work. These dilemmas help explain the start-stop and ambivalent character of legal reforms.

Among the most noteworthy steps forwarded in recent years has been the growing willingness of legal officials to acknowledge, sometimes rather publicly, that torture is extremely widespread. This contrasts with the denials and linguistic dodges that Foreign Ministry press spokespersons typically employ when they are asked about specific torture cases.

Senior officials and analysts now characterize the torture problem as "very serious," "pretty common," "a long, persistent, chronic disease," and even claim that "the vast majority of police interrogators regard torture as a fast and effective technique."

Even Minister of Public Security Jia Chunwang told the summer 1998 Police Conference that torture and related abuses were one of the two most common complaints he heard from ordinary citizens.

In late 1997, the Supreme People's Procuratorate openly published this case book entitled, in English, "The Crime of Tortured Confession," that not only describes hundreds of real torture cases in the dispassionate and gut-wrenching detail we expect from an Amnesty International report, but also for the first time openly reported official statistics on torture cases.

These statistics, though they clearly greatly understate the magnitude of the problem, nevertheless contained, for example, the striking admission that 241 persons were tortured to death in China between 1993 and 1994.

In response to this, many law enforcement analysts are putting forward new proposals that typically fall into four or five categories: (1) greater professionalization and training for police and prosecutors; (2) reforming legal incentive structures, especially strengthening rules of evidence; (3) increased legal prosecution and punishment for torturers; (4) increased publicity for torture and its punishment; and (5) encouraging lawsuits by torture victims.

Clearly, we can see that to the extent that if these are actually implemented—and that is a huge if—these proposals could yield significant benefits. But all of these proposals are also largely State initiated and state dominated, not self-generating and self-sustaining. The only partial exception to that would be the last two, aggressive press publicity and lawsuits.

My written statement addresses each of these. In the interest of time, I want to touch just very briefly on two of the most prominent, professionalization and reforming the legal incentive structure.

Calls for increasing professionalization of police and procurators are seeing that these officials employ torture primarily because they lack the professional skills necessary to solve many cases any other way. Investigatory skills and technology, legal knowledge, professional norms, education, personnel quality are all weak.

I do not exaggerate when I say that many street-level Chinese police probably have less knowledge of modern crime scene management, fingerprinting, blood typing, and rudimentary forensic and investigatory skills than the average educated American viewer of “Law and Order” or “NYPD Blue.” I see my time is short. I will skip ahead.

In the area of creating legal and institutional disincentives, anti-torture advocates are criticizing China’s Criminal Procedure Laws for a lack of a presumption of innocence, a lack of an unambiguous right to remain silent, and in particular, the lack of an exclusionary rule to keep tortured confessions from being used in court.

In recent years, there has also been rather fascinating debate by many public security scholars over whether or not to adopt a “fruit of the poison tree” exception for this.

For U.S. observers, it is striking to see these officials using and advocating rules borrowed from Western law. While we have to be cautious about overestimating our foreign intellectual influence on legal reform, it is important to recognize the impact that exposure to these legal notions appears to be having in, of all places, Chinese law enforcement policy debates on torture.

It may be, sadly, that the best we can hope for in the current authoritarian system is strengthening professionalization and legal disincentives. For the West, however, all of this raises an extremely complex and morally difficult dilemma of how to deal with such reform. Clearly, strengthening some aspects of law enforcement professionalism are an essential prerequisite to fighting torture.

But, while improving the ability of law enforcement officials to solve real, non-political crime without resorting to forced confessions will very likely contribute to the rule of law and the Chinese’s people’s sense of legal rights in the long term, in the short term, it risks contributing to the institutional strength of the current flawed system.

Along these lines, this research raises the question of whether or not expanded legal exchanges between carefully selected individual analysts and scholars within China’s procuratorial system and with United States and other legal training institutes might contribute to some of these anti-torture recommendations.

I thank the Commissioners for their invitation, their time, and their kind indulgence.

[The prepared statement of Mr. Tanner appears in the appendix.]  
Mr. WOLF. Thanks very much. Veron.

**STATEMENT OF VERON MEI-YING HUNG, ASSOCIATE, CHINA PROGRAM, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, WASHINGTON, DC**

Ms. HUNG. Thank you for inviting me to speak here today.

Over the past 10 years, I have, in different capacities, studied legal reform and human rights in China. I was legal associate for Asia at the Washington-based International Human Rights Law Group. I was also assistant professor of law at the City University of Hong Kong, and a visiting scholar at the People’s University in Beijing. I worked with international law firms in Beijing, Hong Kong, and Los Angeles.

As an associate of the Carnegie Endowment for International Peace, I implement its Political and Legal Reform Project to study, among other subjects, the impact of China's accession to the World Trade Organization [WTO] on its legal system and the legal reform in Shanghai.

I recently trained legislative affairs officials from China's provinces and the State Council, the country's highest executive organ, on "WTO and Judicial Review."

I am also a consultant for the United Nations Office of the High Commissioner for Human Rights, advising the office on implementing human rights technical cooperation programs in China. Today I will focus on re-education through labor, a mechanism of punishing "minor crimes" in China.

I will discuss the greatest problems of this system, the current debate in China about its future, and my reasons for recommending its abolition.

I will draw on discussion in my doctoral thesis entitled "Administrative Litigation and Court Reform in China," which is based on empirical research that includes observation of eight administrative trials and interviews with over 140 judges, law professors, lawyers, administrative officials, and litigants in Guangdong province, Chongqing, Wuhan, and Beijing.

Re-education through labor, one of the most prominent administrative sanctions in China, is imposed on people whose act is not serious enough to warrant criminal punishment, but too serious to deserve other lenient administrative sanctions. However, the Chinese criminal law and courts' interpretations do not clearly define "serious" and "minor" crimes.

There are four problems of this system. First, the mechanism has been abused. As shown in principal legislative documents governing the system, the scope of re-education through labor has gradually expanded. Such expansion has drawn criticisms that these documents are conflicting, and that the police have turned re-education through labor into a crime control mechanism.

The police dominate the committees that decide the imposition of re-education through labor and reportedly send suspects to labor camps if they lack evidence to support a criminal charge.

Since its establishment in the 1950s, re-education through labor has sent 3.5 million people to labor camps. At present, 300,000 people are being reeducated in nearly 300 camps nationwide. At least 1,000 of them are Falun Gong followers. Human rights groups estimate that the number could be 10 times more.

The second problem: Re-education through labor is more severe than some criminal punishments. Anyone who is subjected to re-education through labor may be detained in a labor camp for up to 4 years. Ironically, some criminal punishments are more lenient, fines and surveillance, for example. Even "criminal detention" only lasts for 6 months at the most. This problem has aroused much concern because torture and maltreatment are alleged to be common in these camps.

The third problem: The legality of re-education through labor is questionable. China's Administrative Punishment Law requires all administrative punishments that restrict personal freedom to be prescribed by "laws." Under Chinese law, only the National Peo-

ple's Congress [NPC] and its Standing Committee can promulgate. Although re-education through labor is such type of administrative punishment, it is only prescribed by three decisions either made by the State Council or the Ministry of Public Security.

The National People's Congress' Standing Committee did approve two of these decisions, but it does not mean that the approved decisions were transformed into "laws."

The fourth problem: Implementation of re-education through labor is not effectively supervised. Re-education through labor is not a criminal punishment. So it is not subject to any human rights safeguards, however limited they are, embodied in China's Criminal Law and Criminal Procedure Law.

In theory, aggrieved parties facing re-education through labor may resort to judicial review, or what they call in China, administrative litigation. In practice, the courts' role in reviewing the legality of administrative sanctions such as re-education through labor is limited. Aggrieved parties are afraid of suing administrative organs. They have limited access to lawyers. Above all, administrative organs' interference with the judicial process is serious.

To tackle these problems, many Chinese scholars call for abolishing re-education through labor. They also suggest reform as an alternative. In this case, the maximum detention period should be reduced from 4 years to 1 or 2 years. Courts, as opposed to the police, should decide whether re-education through labor can be imposed, and these decisions can be challenged on appeal. Further, re-education through labor should be incorporated into the criminal law to subject it to human rights safeguards embodied in criminal legislation.

However, these reform measures that I just mentioned, as proposed by the Chinese scholars, will not effectively resolve the problems of re-education through labor. Why? Although Chinese courts are undergoing a 5-year reform program, interference will not disappear soon.

The Criminal Procedure Law only offers limited human rights protections and has not yet been fully implemented since its revision in 1996. Abolition of re-education through labor is the best option.

The Chinese Government is planning to enact a law on re-education through labor to fix some of its shortcomings. This intent is welcomed. The government must understand that any changes that fall short of addressing the problems discussed today will negate its efforts in establishing a rule-of-law-based legal system. Re-education through labor is a major anomaly in such a legal system and the Chinese Government should abolish it. Thank you.

[The prepared statement of Dr. Veron Mei-Ying Hung appears in the appendix.]

Mr. WOLF. Thank you. Jonathan.

**STATEMENT OF JONATHAN HECHT, DEPUTY DIRECTOR,  
CHINA LAW CENTER, YALE LAW SCHOOL, NEW HAVEN, CT**

Mr. HECHT. Thank you, Ira. Thank you, other members of the Commission staff for having me back.

Today, I am going to talk about developments in the area of evidence law in China. Evidence law, in my view, is the area where

the most interesting and important debates about criminal justice in China are now taking place.

I think this may seem curious to American lawyers.

We tend to think of evidence law as a very narrow technical subject having to do with the presentation and examination of evidence in court.

I think, in China, evidence law is also, to some extent, viewed as a technical subject, which may be why it has proved to be a useful vehicle for looking at bigger issues of criminal justice reform in China.

In fact, the people who are focusing on evidence law in China are using it in that way, in order to focus on fundamental issues, fundamental problems in the criminal justice system, including many of the ones that Jerry and Scot were just talking about.

The subject of re-education through labor is the other area where there is important work going on in China on criminal justice, but the legislative work in that area seems to have come to a stop. I think it would be interesting, perhaps, during the question and answer period to talk a little bit about what could be done to restart the legislative process in China on re-education through labor.

In contrast, in the evidence law area, there is a lot of ongoing work. There is local experimentation, local court rules, for example in Shanghai, on evidence in criminal cases. Just in the last month or two, a very distinguished group of Chinese legal scholars put out what they are calling a scholar's draft, of an entire evidence law.

In the National People's Congress, in the Legislative Affairs Commission there, there is a very active process of looking at issues of criminal evidence and drafting up legislation that would be presented to the NPC for its enactment.

I guess the basic question, is why evidence law. In answering that, I want to go back a little bit to look at where Chinese criminal justice has come from in the last 10 years. I think maybe at the end, if I have a little bit of time, I can talk about what this suggests about the process of reform in the criminal justice area in China.

The current interest in evidence law in China really is an outgrowth of the reforms in the trial process that were enacted as part of the amendments to the Criminal Procedure Law in 1996.

Traditionally, fact finding in China in the criminal process has been done out of court and pre-trial. Judges in China have traditionally had broad powers of investigation. In reality, they often depended on the files that had been assembled by the police and reviewed by prosecutors. But before the trial began, they had the power to go out and do whatever investigations of the facts that they wanted. They did, as a routine matter, talk to the defendant, talk to witnesses, and they could, again, go and look at crime scenes, and so on. Only where, as a result of this pre-trial examination of the evidence, they felt that the facts were clear, would they actually open the trial.

A number of factors led to a rethinking of this approach and to the reforms that were adopted in 1996.

Some of these were very practical factors having to do just with the increase in the number of cases, the complexity of cases, the

expense that the courts had to go to to actually go out and investigate. But there were also concerns about fairness.

There was a good deal of criticism within China of this system of pre-trial examination of facts because it essentially negated the right to defense entirely, because the court had already looked at all of the facts and made up its mind about the case before it even began the trial. There were also a lot of concerns about corruption, because all of this fact-finding was taking place behind closed doors.

Then judges themselves, I think, were becoming increasingly unhappy with the sort of position that the system put them in, where, as a gatherer of facts and a presenter of facts in court, they were essentially acting as the prosecutor and coming into conflict with defense counsel. I think that they felt that that was undermining the respect that they ought to be getting as fair and neutral arbiters of the facts.

So in the 1996 amendments, the trial process was reformed in the direction of putting the burden more on the prosecution and on defense counsel to collect and present the evidence at trial.

The most significant change that this represented was the expansion in the role of the defense lawyer, who, before 1996, only came into a criminal case 7 days before the trial was to open. Of course, that was at a point where the court had already done its examination of the facts and essentially already decided the outcome, so there was not much for a defense counsel to do.

So this shift in the 1996 amendments to putting the burden of collecting and presenting evidence on the parties correspondingly meant that the role of the judge as investigator would be much more limited.

At the same time, the 1996 revisions tried to turn the trial itself much more into a fact-finding exercise in open court, where the parties would have an opportunity to present their case, the proceedings would take place in a transparent fashion that people had confidence in, and in that way try to address both these issues of fairness, as well as the sort of practical issues of how the courts could handle cases.

As this has been implemented, as Jerry and others have made quite clear, things have not worked out the way that they were intended. There is still very little proof-taking at trial. Witnesses do not appear, experts do not appear. The written statements of witnesses and experts are presented as evidence. There is no opportunity to cross-examine.

There is still very little ability, in reality, for defense lawyers to prepare for trial, as Jerry details in his paper. They have very limited powers to gather evidence on their own, and very little access to evidence gathered by the state. Where lawyers do try to play an active part in gathering evidence, oftentimes they are subjected to various forms of harassment, or ultimately prosecution, by the state.

So the result is that the case that comes before judges is still quite one-sided, and one could even argue that is more one-sided than before, because at least before the judges, in theory, could be going out and doing their own investigation of the facts. Now judges are sitting in the court waiting for facts to be presented to

them, but the only facts they are seeing are the facts that are developed by the state.

So the current debates about evidence law are largely about how to make the 1996 trial reforms work. One of the big areas of interest has to do with witnesses and how to get witnesses to appear in court. There are a lot of obstacles to this, some of them having to do with traditional preferences against testifying, some of them having to do with fear of retribution. But there are also some more technical problems involved.

The Chinese courts have no process for compelling witnesses to appear in court and they have no basis for providing compensation for people who miss work, or have various expenses in connection with coming to court.

Naturally, on the prosecution side, they are not very enthusiastic about having witnesses appear in court because they prefer to have the "sure thing" of their written statements.

While in most respects judges would like to see fact finding take place in open court in the way that was foreseen in the 1996 revisions, they themselves do not have a lot of experience doing it and I think that they are not quite sure how they should oversee trials that have live witnesses.

But there is a broad recognition of the need to get witnesses to appear if fact finding is going to occur at trial, if these issues of transparency are going to be addressed, and if the defense is going to be given a chance to question the witnesses.

As I have said, there has been some local experimentation. The Shanghai courts have adopted some rules about requiring key witnesses to appear in all criminal cases. There was talk about enacting a separate law on witnesses at the National People's Congress. That now has been folded into this broader effort on evidence.

With respect to the right to defense, which was the other major goal of the 1996 reforms, there is a lot of emphasis now on developing a system of discovery. This would compensate for the lack of ability that defense lawyers have under the 1996 law to gather evidence themselves, as well as improve their access to evidence that is in the hands of the state.

There are, again, local experiments going on in Yantai, in Shandong Province, with discovery. This is also now being focused on as part of this broader evidence law.

Let me just quickly say one thing about some of the bigger issues that are being considered. I think one of the interesting things about what has happened with the evidence law, is that it has also gone beyond the immediate problems with the 1996 revisions to address a lot of the pre-trial problems in the criminal justice system.

This reflects a recognition that importing an adversarial process into the trial stage alone is not sufficient if the entire pre-trial stage is highly inquisitorial and police-dominated.

So, there is a lot of interest in various issues concerning the defendant as the source of evidence, and this relates directly to what Scot was talking about in terms of torture and the development of rules on the right to silence and rules on exclusion of illegally gathered evidence. I think that this is in some ways the most significant area in terms of long-term development because of the problem of a police-dominated pre-trial system.



Mr. WOLF. Thanks. I will start out with questions.

I am going to keep coming back to this question in further rounds, because I want everyone to address the role of legal scholars and legal reformers in China.

If we look at economic reform, the Communist Party determined decades ago that it needed consistent growth to maintain public support of the regime. Deng Xiaoping made a decision that he could pursue economic reform without having a significant impact on political reform.

In the case of judicial reform, what, in fact, are the powers and the influence of legal scholars today? How would you differentiate between the ability of Deng Xiaoping to go down the road of economic reform—trying to isolate it from political reform, and the fear or unwillingness of the top leadership to take interest in legal reform because of the possible implications.

So, Jerry, let us start out with you.

Mr. COHEN. I admire very much the role that Chinese legal scholars and law professors have played in recent years. When I first visited China in 1972, legal education was non-existent. In 1973, I met some law professors. They had nothing to say.

I admired their deep suntans, because they had been working in the fields for years. But now they are important players, and they are courageous players, and they take a very active role in law reform, more important than their counterparts in the United States.

There are also legal scholars working in the National People's Congress as staff people. There are legal scholars in the Ministry of Justice. Even Public Security has good legal scholars in the sense of people sincerely concerned with law reform who are highly knowledgeable experts. The State Council also has these people. They are very important.

As the number of lawyers increases, as the number of specialists expands in all of these government departments, including state-owned enterprises, and even in private enterprises now, and joint ventures, a legal elite is developing in China that is increasingly influential.

But their influence, as Scot has indicated, is not sufficient. You really need to reach the leaders of China. While the Standing Committee of the Politburo allows itself to be photographed on the front page of the People's Daily occasionally like schoolboys studying international business law and WTO matters, I would like to see someday a similar photograph of them studying the Criminal Procedure Law of China and the U.N. Convention Against Torture, to which China has adhered. These are not purely domestic questions.

Supreme Court leaders, in principle, have been very enlightened, but they operate within a limited sphere. I like very much the quotation from Veron Hung's paper of the previous Supreme Court President Ren Jianxin, who in late 1996 criticized law enforcement officials who have taken advantage of legal loopholes, intentionally misinterpreted the law, distorted evidence, and broken the law they enforce. That is an admirable summary of my paper.

Similarly, when I have said that the courts are sometimes an instrument of oppression in China, I am quoting reports of the Supreme Court leadership saying the courts must be used to suppress

“counter-revolution,” and a lot of these troublesome political problems.

The legal elite themselves are not strong enough. They need political support. Our hope must be that there will be a new political leadership coming in during the next year or two, as China phases in new leaders, who will be more sensitive to the values that we are talking about today. Those values are under challenge in our own country at this moment also, but the fact is, China is in much more serious shape.

Now that China is a member of the world community, taking part in WTO, hosting the Olympics, having millions of people visit China every year, I think the Chinese Government has to move up criminal justice in its priority list.

Mr. WOLF. Thanks. We will come back to this question in a little while.

Next is John Foarde who is the Deputy Staff Director of the Commission.

Mr. FOARDE. Thanks to all four of you for sharing your expertise with us this morning. This has been a very rich conversation that has gotten us deeply into something that we are very interested in. So, thanks for putting the effort into the papers, and what have you.

Scot, I think I will begin with a question to you, please. What do you think would be the biggest disincentive for Chinese police or law enforcement authorities to torture, an exclusionary rule or some ability by a victim to sue, as we have in section 1983 of title 42 of the United States Code? What is the biggest disincentive?

Mr. TANNER. Well, obviously both of those are very significant. But actually the one that I would put up at the top, is that extorting a confession by torture is very clearly and unambiguously a crime under Chinese law.

One of the things that is made clear if you read these case books, is that the punishments meted out for these things are extremely light, even when they bothered to prosecute.

We did a statistical run-down on the 200 and some-odd cases in this, and less than 10 percent actually involved anybody being sent to prison. In many cases, these are suspended sentences anyway. In most cases, there are administrative penalties for this sort of thing.

We do not even know what percentage of torture cases actually get prosecuted. Indeed, I suspect an extremely small percentage, and I will tell you why I suspect that. The official number of torture cases in China in a given year is listed at about 400 to 500. Yet, we know that upward of 125 people a year are reported killed as a result of torture. It is not credible that one-fourth of all cases that begin in torture end in death.

What that strongly suggests to me, is that the cases that get prosecuted are the ones where there is clear physical harm or the death of the person involved. So I would say that the biggest thing that the leadership could do to create a powerful disincentive in addition to, as you mentioned, lawsuits and exclusionary rules, would be if they very seriously prosecuted a much larger percentage of these cases, and that would require pushing local Communist Party

officials to prosecute these cases and then to mete out the punishments that the law prescribes.

Mr. COHEN. It is a problem in every society, including our own. The police and so-called law enforcement authorities tend to protect each other, and sometimes there are understandable reasons. We struggle with that every day in New York City, in Washington, and in lots of places. But it is worse, much worse, in China. I agree, criminal punishment should be used against police who violate the law.

Mr. TANNER. Pardon me. Since you raised the question of New York City, every Chinese police scholar I have spoken with knows the cases of Abner Louima in New York and Rodney King in Los Angeles. They have all seen the King tape. One thing that they did all take note of, is the very long prison sentence that was given to Officer Volpe. A lot of them found that a very encouraging thing.

I would say, without even hinting at moral equivalence here, one of the things that the United States can do that actually has an impact on China, is when we punish these things very strongly, this stuff gets noticed in China.

Mr. FOARDE. The exclusionary rule is very controversial, even today. What sort of conversation is going on in legal circles in China about it? Is it the same sort of issues that proponents and opponents of the exclusionary rule in the United States have, or is it different?

Mr. COHEN. Well, Jon can talk about this, of course. They have been debating and going back and forth, settling sometimes on the position of excluding illegally obtained confessions, but continuing to admit illegally obtained physical evidence, because the physical evidence does not lie. You can have less confidence in a confession. But they are wavering on this. It is, understandably, a very difficult subject.

Mr. TANNER. I would point out that one of the first things they do when they study an issue like this, is that they undertake a tremendous translation of Western legal materials.

You can see the research materials that they compile of United States law, and British, and Canadian, and all sorts of other systems. So, they address these things with a very strong understanding of how these issues have been battled in the United States. For example, questions of good-faith exceptions.

Mr. FOARDE. We will come back to this, because other people want to ask questions, I think.

Mr. WOLF. Matt Tuchow works for Congressman Sander Levin, one of our Commissioners.

Mr. TUCHOW. Thanks. My question comes down to a more practical policy-oriented question for you about the Commission's work and how to tackle the difficult issue of trying to influence the Chinese. In listening to the witnesses today, I heard an encouragement of technical assistance programs in the area of rule of law and exchange.

But I am wondering if the panelists—and maybe I will direct this, first, to Professor Cohen, then if we have time, the others—could address what policy recommendations you feel the Commission should make to play a role in pressuring the Chinese or en-

couraging the Chinese to fairly and honestly reform and implement their criminal procedure laws.

Mr. COHEN. Well, I think the Chinese Government, not only at the top but at the working level, and the Chinese judiciary, even the prosecutor's office, the procuracy, generally welcomes foreign assistance, not only United States assistance, but European, Japanese, whatever, and they are quite right to do so.

This is a wonderful time to try to make some progress in the light of this possibility and in light of the obvious needs of China's system. Chinese leaders are very proud people. They do not want to be criticized, as they are being criticized today, in a prominent forum. I think we should try to work with them.

Now, it gets more controversial. We have started training judges, and that is an exciting and rich field, I think, with many possibilities. But prosecutors also need legal training, more than even judges. The most controversial question will be, and it was implicit in what Scot said, about the police. It is obvious the police are the most powerful of the law enforcement agencies in China.

They really dominate the show, as Jon and Veron have also impressed on us. Something has to be done. There are, within the police, as Scot has demonstrated, people who are receptive to law reform assistance. On the other hand, that may be politically unpalatable at home in the United States because "the optics," are not too good. Some will ask: Training Chinese police? Are we going to make them better repressors?

But the truth is, at the working level, they need all kinds of sensitivity to legal values and to better legal methods of investigation. The more cooperation we can have with them, I think, the better.

It is a little bit like the analogous question, to what extent do we cooperate with the Chinese military? There are pros and cons. Sometimes engagement is politically impossible, as after June 4, 1989. But I lean to engagement.

Engagement, I think, spreads the values that we increasingly share with China. I think there are many possibilities, and this Commission can encourage a number of specific programs, and even recommend their financing.

Mr. TUCHOW. How about the other panelists? In particular, if you agree that technical assistance is part of the solution, how do you do it smartly so it does not get wasted or get in the wrong hands?

Mr. HECHT. I think, as someone who has actually been involved in that for a long time, it is a very difficult question. But I think the starting point has to be understanding what the situation is in China.

I think that that is another very important function that the Commission is performing, getting more information out about what the actual State of affairs is in China, where the problems lie, where the opportunities for improvement lie, and what are the institutions and the people in those institutions that can be looked to as real movers for change in the Chinese context.

I do not think there is really any magic formula. It is just a lot of hard, painstaking work in order to identify where those opportunities and where those potential partners lie.

Ms. HUNG. Perhaps I may add one remark on—actually, in the context of reform of the re-education through labor system—what kind of assistance the United States can offer to help China.

The answer to this question is also linked to the first question raised about the role of legal scholars in China. Look at the recent developments in this area, re-education through labor. In early 2001, the Chinese Government said that they had a plan to enact a law on re-education through labor by the end of the year. But right now, this plan seems to have changed. There is no clear time-frame existing as to when they will enact this piece of legislation.

I recently went to Beijing to interview legal scholars in this area. They actually said that this could be a good opportunity, because now they have more time to do research, to learn from other countries' experiences. They want to take this opportunity to have joint research projects, or maybe to have a chance to come to the United States or other Western countries to understand how they punish offenders of minor crimes.

So in this regard, I think that one type of assistance the U.S. Government and also organizations here in this country can offer is to establish training and joint research projects.

Mr. WOLF. Thanks.

Susan O'Sullivan works for Lorne Craner, Assistant Secretary of State for Democracy, Human Rights and Labor.

Ms. O'SULLIVAN. Thank you all for your presentations today. They were very helpful to me, and I am sure to everyone here.

I have a question related to Matt's, and also to Ira's, that focused a little bit more on criminal lawyers. I read somewhere recently that criminal lawyers made up 3 percent of the bar in China several years ago, and now it is down to 1 percent. At the State Department, we are following these recent arrests that you referred to, and Jonathan, also.

I am wondering if there is something that you could recommend to us that we could be doing diplomatically, or even programmatically, to help the criminal defense bar in China. Generally, I think we all agree that rule of law programs are the way to go, but if you have any more specific recommendations of things we could be doing at the State Department, as well as in the Commission.

Mr. COHEN. I think there are two levels. One, is to show support for them in various ways. For example, the State Department has a distinguished program for visitors. You seldom see a Chinese criminal lawyer invited on those. They are not people who know English, by and large. They are people who concentrate domestically.

We can encourage our bar associations to put on programs. Recently, the Canadian Bar Association had a very good 2-week program with Chinese criminal defense lawyers. They have emphasized to me, we should be doing similar things.

I brought one of the leaders of the Chinese bar to NYU for a week. It was fabulous for us, our students, and people in the New York community. But we ought to be doing much more to make that kind of visit, not merely the 1-month tour but the follow-up for staying in one place and doing some serious exchanges.

But then there are many subjects we ought to be pursuing with them. Although our system suffers from many defects and we are

struggling with them, we are making progress and we are way ahead of China in this regard, and the Chinese are aware of that.

There are so many things that we ought to be sharing with them, exchanging ideas about, now that they are coming into a serious period of law reform.

I mean, how can they establish some functional equivalent of habeas corpus? One of the most frustrating things about being a defense lawyer in China, is where do you go when the police or prosecutors violate their own law? To whom can you appeal?

In traditional Imperial China, you could ring the county magistrate's gong and sometimes get a hearing that way, or even make it to Beijing to the Imperial Court. Where do you ring that gong now? We have a provision. The Chinese are working with us about that possibility.

Mr. WOLF. Thanks. Can I suggest that you let some other people participate?

Mr. HECHT. Well, just to follow up on where Jerry is going, I think the underlying problems that the Chinese defense bar faces are these structural problems in the criminal justice system. Obviously, we should be giving support to individual criminal defense lawyers, but more fundamentally we need to be helping them create an environment in which it is possible to be a criminal defense lawyer.

That goes to, I think, the range of things that we have been talking about today in terms of how to reform the trial process so that what the criminal defense lawyer does has some meaning, how to reform the pre-trial process so criminal defense lawyers can actually prepare a case and do it without risking ending up in jail themselves.

Ms. HUNG. Perhaps one specific issue we can also address is that, while criminal defense lawyers encounter this problem, in fact, administrative law lawyers also encounter the same problem. Lawyers are not willing to stand up to the government. That is why they do not want to take up administrative cases and criminal cases. They do not want to offend the government.

Why? Because their licenses to practice have to be renewed by the government every year. So, perhaps we need to think about whether this system should be changed.

Ms. O'SULLIVAN. Thank you.

Mr. WOLF. Next is Susan Weld, general counsel of the Commission.

Ms. WELD. Thanks a lot.

One thing that occurred to me in listening to some of the testimony today is whether strengthening the aspects of an adversarial system now present in the Chinese procedure is the way to go, and what the problems might be for China in the future. I guess I will start with Jonathan on that. I would like to hear what Veron has to say, then going left.

Mr. HECHT. Well, I think the Chinese themselves have decided they want to strengthen the adversarial nature of their system. The problem—and I referred to this but did not really get to it in my remarks—is how to get from here to there, and what are the problems that can emerge between here and there. I think that

that has been characteristic of a lot of areas of reform in China, not just the legal area.

Ira referred earlier to economic reform. Economic reform has been described in China as a process of crossing the river by feeling the stones. To some extent, I think that has been the case in the legal area as well. As each reform has been adopted to address some immediately apparent problem, it has tended to throw up a lot of other issues.

Either it has exacerbated other problems, as has happened with the criminal defense bar as we have been talking about, or it has served as a forum for discussing underlying problems that perhaps could not be discussed previously, but which are now too obvious for people to ignore.

I think that is what we are seeing now with respect to this discussion about pre-trial procedures which do not fit with the increasingly adversarial trial process. So, I think that that is the nature of the reform process.

The challenge for us, and this goes back to Matt's question, is to identify what are the problems on which progress can be made in the short term, but which contribute in the long term to a criminal justice system that is both effective and fair.

I do not know if there is time to talk a little bit more about re-education through labor, but I think this is an excellent case study of how to engage effectively in legal reform in China.

I agree with all of Veron's analysis of the problem and with the need for fundamental reform, but I disagree that the answer is simply to tell the Chinese to abolish it. In addition to being used to suppress political dissent, re-education through labor is used to deal with a lot of problems that all societies face: Prostitution, drug use, minor crimes, juvenile delinquency. To go to the Chinese and simply say, abolish this system, is a non-starter because these other problems still need to be dealt with in some way.

So the challenge for us to help them craft responses to those problems so that then the use of re-education through labor as a political tool is exposed. If it has no purpose other than to deal with political dissidents, then it has no legitimacy, even in the Chinese context.

Ms. HUNG. Perhaps I can say something about re-education through labor. According to recent developments, the government seems to have said they do not want to consider abolition as an option.

As I quoted in my statement, the director of the Ministry of Justice's Bureau of Re-education Through Labor, explained, "For such a populous Nation as China, the re-education through labor, which aims at stopping those on the verge of committing serious crimes, is an effective way of reducing crime."

Based on the research I did in China, one main concern they have is exactly what Jonathan just mentioned. They want to use re-education through labor as a means to punish drug addicts, prostitutes, brothel visitors, and other offenders of minor crimes.

In fact, based on recent statistics, of all the current inmates, one-third are punished by re-education through labor because they were drug addicts, prostitutes, and brothel visitors. The other third are offenders of minor crimes that I just mentioned.

One point we need to bear in mind, is that when I say abolition is probably the best option for curing the problems they face in re-education through labor, it does not mean that we cannot do other things.

For example, the government has said that there is a need to have re-education through labor because this is a means to punish drug addicts and prostitutes. Then my question is, are there any other measures you can take? Can you help these people or punish these people in another way? What other countries' experiences can the Chinese Government refer to instead of using such a harsh punishment like re-education through labor?

So I am not suggesting that these people should go free and we do not offer any assistance. This is not my idea. I just say that the re-education through labor system is such a big anomaly in this rule-of-law-based legal system, that it should not exist anymore. Thank you.

Mr. WOLF. Karin Finkler is with Congressman Joe Pitts of Pennsylvania.

Ms. FINKLER. Thank you to all of you for your testimony.

I would like to follow-up on Ira and John's questions, in the interest of time, so there is a little more time for people to expand on their ideas. Jonathan, you looked like you had some things to say earlier, so if you would please start, on the role of legal scholars in reform, and also on the disincentives for Chinese police, regarding use of torture.

Mr. HECHT. I think the Chinese legal scholars, if you look back over the last 15 years, have played an incredibly important part in opening up new areas of debate.

The whole area of human rights, which was a taboo area in China as recently as 1989, 1990, was essentially opened up to public debate and ultimately embraced as part of the government's own discourse, largely through the efforts of academics.

A lot of the more concrete problems that we have been talking about today, right to silence, exclusionary rules, and so on, again are things that have been introduced into China as ideas by scholars.

But at the same time, I do not think we can overestimate the influence of scholars. Ultimately, the power of decision is in the government. The bureaucracies are tremendously powerful. A lot of what is ultimately possible in China depends on a political decision at the very top.

So, I think academics are a very important conduit for new ideas, but I think we also have to be building bridges to reformers within the institutions of the legal system and the political system themselves. I think that Ira's earlier point about developing a broader constituency for legal reform in the government is very, very important.

I think one way to do that is to make more explicit the link between economic reform and legal reform. I think that there has to be a much broader recognition within the government that if economic reform is going to continue to be successful, the importance of a professionalized, independent legal system cannot be overlooked.



As far as disincentives to torture, I think if you look at our own experience in the United States, criminal penalties are, of course, important. Compensation to victims is, of course, important. But in our own experience, these were not enough to stop police abuses.

What has ultimately been effective in cutting down police abuses in the United States—though of course they still occur—has been a combination of the exclusionary rule and other sorts of measures, both taken within the police and forced upon the police, to create conditions where coercion is less likely to occur.

If you look at the Chinese criminal process, there is no bail system, so all criminal suspects are held in police custody for long, long periods of time. Access to lawyers, as Jerry has talked about, is limited. Access to family is limited. Outside oversight of detention centers themselves is quite limited. These are all inducements to torture.

So I think that, ultimately, there has to be a focus on both of those areas of reform in China, both the exclusionary rule so that there is a disincentive to torture because the evidence that you come up with will not be admissible, and also creating conditions that are less conducive to torture in the first place.

Ms. HUNG. Two examples actually illustrate very well the roles played by the legal scholars. On the one hand, they play a significant role, but on the other hand, their role is also very limited.

One, is re-education through labor, another is judicial reform. For example, as I just said before, because the government seems to have already set the tone that abolition should not be considered earlier this year, legal scholars in Beijing organized two large-scale forums.

One was on procedural issues involved in the reform of re-education through labor, the other one focused on the substantive issues involved in this system. So, they cannot go beyond the scope, saying that we recommend to abolish the system.

Another example, is judicial review. I interviewed the Supreme People's Court senior judges. Quite a few of them are scholars at the same time. They said that they felt their hands were tied.

For example, the scope is severely limited by the Supreme People's Court's 5-year court reform plan. If we take a look at that 5-year reform plan, the focus is more on training, on something that they can do within the court system.

But a major problem of the court system right now that we have in China is that the courts are controlled by the local governments. Because courts' personnel arrangements and financial arrangements are, to some extent, subject to local governments' control. So, that is why the type of reform we need for improving the court system is institutional reform.

But this is not mentioned in the court reform plan, only briefly mentioned, saying that maybe within these 5 years we can conduct some research on this area to see what other countries do in terms of the relationship between the court and other branches of the government. But that is all. So, you can see how limited these legal scholars' roles are.

Mr. WOLF. Thanks.

Scot, can you address my earlier question? And maybe bring it down to the area of torture, where, as you said, the senior leader-

ship is simply uninterested in addressing this. Is there a role for the legal scholars, and those in the system who are looking at reform, or under current conditions is it a fruitless effort because of the concerns of the impact of that reform?

Mr. TANNER. Well, as I stressed in the beginning part of my statement, significant progress is possible within the current system, though I still believe that fundamental progress on that particular issue is going to require a full-scale change of the Chinese political system.

But let me use that to step off a little bit and talk about the role of scholars. The ones that I have been studying play a particularly interesting and important role here because a number of these people train students in China's police college system.

That means that they get to train the people who are then going to go out to the provincial police colleges throughout the country and train, and so on down the line.

They do have a great opportunity to influence the way that these people think about the handling of criminal cases, whether or not they have at their disposal a repertoire of ways of solving a case that do not just involve what some people call the "Claude Raines theory" of policing—round up the usual group of suspects and beat them until somebody confesses.

So they can have an enormous impact on what is one of the fundamental long-term challenges, which is retraining this vast core of prosecutorial and police officials throughout the country.

Another place where they have a tremendous amount of influence, alluded to by my colleagues here, is that several of these people take part and play a prominent role in the actual drafting of these laws.

One who has written widely about the redrafting of the Criminal Procedure Law is Professor Cui Min of the People's Public Security University, who happens to be one of China's most vocal and persistent critics of the problem of torture. So, here is another person who has an opportunity to influence the actual regulations on this.

Nevertheless, these people still have to deal with the regular officials within the procuracy, the public security system. It is quite clear that on some of these issues, particularly things such as exclusionary rules, they face an enormous amount of opposition from the working level leaders within this system.

In the end, however, within an authoritarian system, as I say, there are not self-sustaining, self-generating mechanisms for fighting torture. So, it still comes down to, how much pressure does the top leadership put on lower levels to fight torture as opposed to pressuring them to solve crimes?

Very clearly, the top leadership in China right now is more concerned about the crime rate spiraling out of control and are more fearful that that loss of control over crime is going to eventually undermine their legitimacy and authority. So, in the end, they put more pressure on that than they do on fighting torture.

Mr. WOLF. Before President Bush met with Jiang Zemin, Senator Baucus and Congressman Bereuter, the Chairman and Co-Chairman of the Commission, sent a letter to the President asking him to raise the issue of the visit by the U.N. Special Rapporteur on Torture, requesting that this be allowed.

I heard in Beijing, a couple of months ago, that the Chinese had agreed to his visit, but I do not think anything has happened since then.

How significant is it in your mind, as you try to influence the more senior levels to have a visit by the Special Rapporteur on Torture?

Mr. TANNER. I would say moderately significant, not enormously significant. There are some within the Chinese police system who believe that, because China has acceded to a wide variety of these agreements, that means that China should therefore revise its internal laws to meet these international agreements against torture.

That is rather striking because, of course, as Ms. O'Sullivan knows, the standard line from the Chinese is that human rights standards are unique to each country, and that international agreements like this should not be used to force China to change its system. But we do see some voices within the system saying that we should accept this sort of outside international influence.

Mr. WOLF. Thanks.

John.

Mr. FOARDE. Some odds and ends questions. Jerry, at the beginning when you were talking about the criminal bar, defense bar in China, you said that some are able to make a living doing it. How do they set fees, and how do they collect them?

Mr. COHEN. Well, this raises some important questions, again, that we could share in cooperation with them because we have had to deal with these. The British have a different way, sometimes, of dealing with questions of contingency fees.

Chinese lawyers will sometimes take contingency fees of a very significant nature. In other words, if they get a certain result, then maybe their original fee might be trebled, or many times more than that.

But that troubles me, because it is a real incentive to corruption. Lawyers in China—unfortunately, criminal defense lawyers prominent among them—are often channels to corruption, conduits.

Some of them feel that, although they will not take part, they know their clients sometimes take measures and they just look the other way, the way some foreign corporations look the other way when they know middle men are taking actions that are not legal on their behalf.

So I think this whole question of fees is very important to study. I have been in some cases where I have been disturbed by some of the criminal defense lawyers' actions, trying, for example, to take advantage of the helpless suspect who is awaiting trial and has no access to the outside world except through the defense lawyer, and the defense lawyer says, here, sign here an agreement that will say if I get you out in the next 10 days, that you will give me X.

I mean, that is terrible coercion of the client. You are supposed to be, as a defense lawyer, protecting the interests of the person who is subject to incommunicado detention and interrogation, not exploiting them. So, there are serious questions of fees.

I think the financial problem is not a serious problem for criminal defense lawyers. It is these other sanctions. Also, the question of respect. That is why I mentioned individuals who can be recog-

nized, and the desirability of foreign bar associations indicating their support.

We should be interested in not only the WTO, not only in foreign investment and arbitration of commercial disputes, we should show greater interest in criminal defense problems that these people are confronting and we have a long experience with.

Mr. FOARDE. Is there a nationwide criminal defense organization?

Mr. COHEN. Yes. Under the ALL China Lawyers Association, there is a nationwide criminal defense lawyers' group. It is headed by distinguished, experienced people. Even these people feel under pressure. When lawyer Zhang Jianzhong got locked up in Beijing, people in the Beijing Bar Association, people in the national bar association, were very concerned, but it was hard to get a peep out of them.

One point I mentioned in my report that I did not talk much about in my summary is the control of the local judicial bureau over sensitive matters. I made a brief allusion to it, but did not go into any detail.

These defense lawyers are people who can lose their law practice, they can lose their partners' law practice, their law firm can be shut down. They can go to jail, informally, for long periods, and they can be formally prosecuted. I think article 306 of the Criminal Law should be abolished because it is, indeed, as the lawyers say, a sword of Damocles that intimidates them.

Mr. HECHT. If I could just add two things on defense lawyers. Of course, the vast majority of criminal defendants are poor in China, as they are everywhere. The Chinese have tried to deal with that by keeping the mandated fee for criminal defense lawyers quite low.

The Ministry of Justice rules on lawyers fees set the amount that lawyers can charge. Of course, they do a lot on the side with these contingent fee arrangements, and so on, but the actual fee that they are supposed to charge is quite low. That has created another disincentive, of course, for lawyers to take these cases.

So one of the big problems that China has to face is coming up with some sort of public defender system that is going to enable the majority of criminal defendants to get a lawyer under conditions that they can afford.

But you also have to recognize that even with those sorts of measures, that chances are you are not going to have enough criminal defense lawyers in the near term in China to handle the number of cases.

Getting back to re-education through labor and its reform, if those cases are moved into the formal criminal justice system, the numbers of cases is going to go up considerably. That is a real, practical concern that the Chinese also have that could be addressed by thinking about alternatives to lawyers per se. If you go to U.S. drug courts, if you go to U.S. community courts, you see various types of representatives and advocates for the indigent other than defense lawyers. There is a whole range of different people who can serve a similar sort of function, especially in fairly minor cases.

So, this is another example of where we have an opportunity to share some quite practical, useful experience that could actually open up some of these bigger problems that we have a tendency to try to come at at very high levels.

We do not like the system, we want it to change, but you have to get down into the guts and see what is making the system go in China and what conditions are there or not there in China for solving the problem.

Mr. WOLF. Thanks.

Matt.

Mr. TUCHOW. There are so many questions I would like to ask, but I am going to stick, again, to a large, over-arching question. In my previous question, we spoke a lot about engagement. Some think that the flip side of engagement is pressure, but perhaps that is part and parcel of the same thing because when you engage, you try to pressure as well.

One of our mandates as a Commission is to create a prisoner's list. Professor Cohen has mentioned in his paper a number of political prisoners. I am interested in your thoughts as to how we as a Commission can best work on behalf of political prisoners, whether it makes sense for the Commission to mount campaigns on behalf of individual political prisoners, and if doing so cuts back at all on our ability to engage the Chinese.

So I guess the question kind of boils down to, how do you sensitively pressure, if you feel that is appropriate? Why don't I start again with Professor Cohen, and then to the others if we have time.

Mr. COHEN. I think the most important thing we can do in the United States does not directly concern China. It is the example we set within our own society and legal system. As Jon has already noted, this is widely appreciated in China.

Are we people who say "do as I say but not as I do," who expect the Chinese to adhere in practice to our theories even though we ourselves are under pressure constantly, especially after 9/11, to abandon some of our values?

Now, as to direct measures of cooperation with China, of course, I think the Chinese are practical people. They know they need cooperation. They are willing to cooperate with us now on legal matters, and that is something, as I said, we should take advantage of.

But we should not do it at the sacrifice of ventilating problems that exist now. There are courageous, democratic people in China serving many, many years in prison simply because of efforts to organize a truly democratic party.

Xu Wenli has put in about 18 years in prison. He is in deteriorating health now. What is his offense and what kind of a trial did he really get? Mrs. Rebiya Kadeer, out in Xinjiang Province, is another example. There are a lot of people whose cases deserve continuing ventilation until China gets smart enough to release them and get them off United States-China relations' agenda, because they are very negative examples of good people being suppressed. China is impugning its own reputation by harming these people.

A final point. I do not want Jon to be misunderstood. He has been supplementing my remarks so I am not misunderstood, and

I appreciate it. I just want to say, none of us is for keeping re-education through labor. None of us. The question is, how to deal with it? It is a kind of a false dichotomy we are talking about here. Abolish it, in the sense of ignoring the problems it is designed to meet? Veron has explained she did not mean that.

China has to stop the current version, where it puts people away for 3 or 4 years with no real substantive guidance that at least the Criminal Law purports to provide in other cases, and no real procedural protections which the Criminal Procedure Law provides. It is not that one should ignore prostitution, or drug addicts, or a lot of these other problems that plague China as well as other societies.

The problem is, it is inconsistent with all of China's criminal justice reforms to allow re-education through labor to persist to let people be put away for 3 or 4 years under this sanction.

As Jon says, we have to address, if the Chinese want our help, how can we find legal techniques in light of our experience, and that of others, that might address these problems in a way more consistent with the Chinese Constitution and legal reforms that we are talking about, even with their limitations.

So I agreed with Veron's statement, because I understood her. It would be desirable to abolish the current sanction, but one cannot walk away from the problem, as Jon said. It has to be handled in some ways that are more consistent with the post-1996 criminal justice reforms in China.

Mr. TUCHOW. Jon, real quickly, what are your thoughts about our role regarding political prisoners?

Mr. HECHT. There is no question that there should be a list of political prisoners. I think that the Commission's role as an educator of the American public about the situation in China and the potential for legal reform can be carried out at the same time as you are preparing prisoners' lists. I do not really see any problem with that. But, as to who is going to actually take these prisoner lists and do something effective with them, that is a more difficult matter.

Mr. WOLF. Next, Susan O'Sullivan.

Ms. O'SULLIVAN. Just to pick up on the list issue. I think that we have had our greatest success with putting pressure on the government to release people when it has been kind of a joint project.

The Song Yongyi case comes to mind, where the academic community spoke out very forcefully on his behalf. Jerry Cohen played a key role. Members of Congress, Senator Specter and others, played a key role. The State Department was in there doing its thing.

So I really think that if you are going to talk about lists, leaving it to the State Department is probably not the way to go because we need other people to be reinforcing what we are doing. I mean, I think we have lists. We pass them all the time and we raise cases all the time, but my experience has been that it is really helpful when other people are raising their voices, too.

In terms of a question, on the human rights agenda that we have been trying to push for a long time for China's ratification of the International Covenant on Civil and Political Rights, and China has signed this under pressure at the summits in 1998, they now tell us as a matter of course that they are reviewing their laws and

trying to bring their laws into compliance, and this is why they have not ratified, and this is why they cannot predict when they will be finished and when they will be able to ratify this.

I am wondering, going back to the question of what sort of outside pressure is affected and supports those inside China working for change, whether you think this is something useful for us to continue to pursue, keeping in mind that a lot of people ratified it and do not comply with it, just your sense of the futility of that as a human rights agenda item.

Mr. COHEN. Again, the United States sets a powerful example, negative or positive. If we would complete our adherence to various human rights agreements, we would be in a better posture, and that would exert very influential pressure on China, and others.

Mr. HECHT. I think it should continue to be pursued, not with any expectation that it is likely to actually happen any time soon. But I think that China has accepted this as the benchmark. It has not ratified it, but its government has signed it and its leadership has said that it is committed to ultimately ratifying it. I think that it should be held to that standard.

I think that if you look at a lot of the issues that we have been talking about today, one of the sources of argumentation that reformers within China use again and again, is the international standards.

To the extent that you have an inside/outside effort to both push for formal ratification, use the standards in discussions at the Commission on Human Rights, and at the same time provide an international backing to the effort within China to look at the covenants as the standard that China should aspire to, I think that is a very powerful and useful combination.

Ms. HUNG. Perhaps we have to ask the question, why did they decide not to ratify the international covenant? Is it because there is no strong will to do that? Or is it because they believe that the system is not ready for them to ratify this international covenant as they cannot satisfy all of the obligations?

If this is the case, then one issue we need to tackle is, how can we help them to bring the legal system in line with these requirements? So that is the reason why we say human rights is a very sensitive topic. But legal reform, I believe, is a fundamental solution to the human rights problem. This issue is not sensitive, so the U.S. Government can offer some assistance in this regard.

Mr. TANNER. Ms. O'Sullivan, I think that pressure for Chinese ratification of these international covenants, and to bring their own system in line with that, is one of a wide variety of areas where we should continue pressure on the Chinese.

We cannot expect that this is going to have a huge impact. I do not see a lot of evidence that, internally within the system, that this is regarded as a major lever, but it is one among several.

We have the historical example of the way that the Helsinki agreements were used in Eastern Europe over a long period of time, two decades, to create increasing pressure for that. I see people in China who are thinking in the same sort of long-term fashion to use this as one more lever to change the system.

Mr. COHEN. I think it is important that we not bilateralize the question intellectually and in practice. I think Europeans are a

very important influence. China does business with Europe. European business people, visitors, and tourists want to be respected by a proper criminal justice system.

So I think, similarly, there are countries and areas adjacent to China whose example is very useful for the Chinese to study. That means South Korea, that means Taiwan.

Those places have made great progress in some of these problems in the last 15 years. The more we can bring to bear that experience, where social, economic, cultural, historical conditions more closely resemble those of the mainland of China, I think that, too, is useful.

There is a tendency here, naturally, to think of reform as a United States-China issue. Of course, I do not have to tell you, that is the most sensitive political relationship. Often, reform comes in a more multilateral way and more comparative way.

Mr. WOLF. Susan Weld.

Ms. WELD. Thanks, Ira.

I wanted to ask about something that many of you seem to talk about as a dead letter, which is the administrative litigation law. One problem with the punishment of re-education through labor, is that it is administrative in nature. It does not come within the scope of the protections of the criminal procedure laws.

If the administrative litigation law does not help people in administrative detention, could it be fixed to help them? I believe it is not just re-education through labor, but all sorts of other kinds of detention where that law might be helpful to people. So I guess I am asking all of you, starting with Veron, because that is her specialty.

Ms. HUNG. I want to understand the question better.

Ms. WELD. All right. As I understand from your statement, you do not feel that the ALL functions to protect people in those circumstances. Could it be fixed so that people could use it to protect themselves? Could it also operate in other kinds of administrative detention where people do not have access to help?

Ms. HUNG. Right. In fact, I have spent a lot of time studying administrative litigation in China. That, as I mentioned, was my focus in my doctoral thesis. There are a lot of problems, but there also have been some improvements, like I have noticed that there has been growing respect for procedural requirements.

But then a major problem, again, and again, and again, is interference from administrative organs and Communist Party members. Can that be fixed? It is very difficult, for the reasons I just said before. Why do we have that? Because the courts feel that they are subject to pressure. They are susceptible to their control because personnel and financial arrangements are controlled by local governments.

But I still remain hopeful. Why? Because there has been a lot of discussion among government officials on how they can improve the system. Recently, they have been talking about drafting a piece of legislation called "administrative procedure law" in addition to what they have now, "administrative litigation law."

I talked with a committee consisting of five scholars that is drafting this piece of legislation. They look at other countries' experience, including the United States and European countries, to see



whether they can learn from these experiences to improve the administrative litigation system. So, I try to remain hopeful.

Mr. COHEN. The judicial review of administrative action is a startling development in China that only got going in 1989, 1990. I am not so pessimistic. I would not characterize it as a dead letter.

WTO is going to inject a little more life into that.

So far, one of the restrictions of China's administrative litigation law is that the judges are not supposed to consider abstract regulations, only concrete cases, and there are questions of what meaning to ascribe to both of those terms.

But I think China will have to revise, soon, its administrative litigation law to permit judges also to review abstract regulations, and that could even justify a court that felt comfortable in doing it—and that is a big if—in saying that the re-education through labor regulation decisions are not in accordance with Chinese law.

Ms. HUNG. I am very happy that Jerry just mentioned the WTO, because I almost forgot. In fact, this is a big opportunity for the Chinese Government to improve the system because under the WTO agreement, China is required to ensure that their judicial review system is independent.

Judicial review system means the administrative litigation system in China's context. Because they are bound by this international treaty obligation, they have to improve it, otherwise they have to face the consequences. So, eventually this will benefit the entire legal system in China as well. Thanks.

Mr. HECHT. If I can just add one more comment on this. I think both Jerry and Veron have talked a lot about the reform of the administrative litigation law itself, and there is an active effort going on to reform the administrative litigation law, and there is an academic group that is drafting, again, what they are calling a scholar's draft, but they are very tied in with the NPC and the actual lawmakers.

But I think your point was specifically about detention and the role of administrative litigation in dealing with detention. I think this ties in somewhat with what Susan was saying. The problem in the Chinese case has been this division between criminal detention and administrative detention.

Re-education through labor has been such a huge human rights problem, precisely because it has continued to be viewed as an administrative measure. And where the international standards really play an important role, is that it cuts through that to make clear that what matters is not whether it is called "criminal" or called "administrative," but whether people are deprived of their liberty.

If people are deprived of their liberty, then there must be a prior judicial decision and prior judicial process. Administrative litigation, even in the best of circumstances, only happens after the fact.

So I think, again, this is an area where a new conception needs to be encouraged, away from this arbitrary division into criminal and administrative, and toward more explicit reference to the international benchmark.

Mr. WOLF. Well, this has been, obviously, a very rich discussion. We have a few more minutes, if there was something that was left unsaid that you would like to mention. We can start with Jonathan and work our way down. If there are things you think of, by the

way, afterward that you wish you had said, we are happy to add that into the record.

But, Jonathan, anything that you want to add, or sum up, whatever?

Mr. HECHT. Well, I think I have spoken a fair amount, actually.

Mr. WOLF. All right.

Veron.

Ms. HUNG. I want to add one remark that I have repeatedly mentioned ever since I arrived in Washington. I believe that United States assistance in legal reform in China bodes well for United States-China relations because such dialog is beneficial to the United States as well.

The topic is closely related to two issues that the American Government and also American citizens are most concerned about: "human rights," and "WTO and trade with China."

Human rights is a highly sensitive issue in China. But legal reform, a fundamental solution to this problem, is not.

It is also beneficial to the United States if they help China to reform the legal system because we know that China cannot satisfy all of the WTO obligations immediately. We can foresee that numerous trade disputes between China and the United States will occur. So, to reduce these conflicts, the United States should help China bring its legal system in line with the WTO agreements.

Once the United States offers this kind of assistance, I believe it can provide a springboard for improving United States-China relations, and that can also help resolve other thorny issues, such as Taiwan issues. This is my final note.

Mr. WOLF. Thanks.

Scot.

Mr. TANNER. Thank you.

One of the issues that was raised earlier was the way in which we consider whether or not to expand our legal cooperation to include elements of the procuracy, and perhaps even people within the public security system.

I sympathized greatly with one of the points that was made, which is that it is very, very difficult to figure out exactly how to section that sort of cooperation off to make sure that we are contributing to improvement in the human rights situation in China and not inadvertently simply making this repressive system better and more efficient at being repressive.

There are a few things that I think we can do that are controllable that we might be able to think about for helping. Perhaps by bringing some scholars and officials from these systems over to the United States, some of the people who are going to be training lower-level officials later on.

It has an enormous impact on them to see that the United States is not the anarchic, crime-ridden society that a lot of them have been told that it is, that crime can be fought without resorting to torture.

The exchange of materials, things like translation or study materials, or things like that. These are things that Chinese universities and training institutes are very starved for. So, that sort of thing is worth considering.

In a sad way, one thing that can be noted is that one area in which Western countries and the Chinese police already have a good deal of contact—and it is not official contact, it is market contact—is that a significant number of companies in the west that deal in police equipment already are involved in joint ventures in China.

I have walked along Zhengyi Street in Beijing. There is a strip of police goods stores. You can go in there, and they are perfectly happy to tell you, oh, yes, this stun gun we made in a joint venture with such-and-such a European country, or so on, and so forth. It is tragic that that is, in some way, the best-developed aspect of contact between the west and Chinese police.

I think we want to consider, with the procuracy and the public security system, trying to think of controllable ways in the academic sphere that we might contribute to improving their training so that they can fight crime without resorting to torture.

Mr. COHEN. I think structural reform has to be the ultimate proposal. The Manchu Dynasty did more for structural reform of its legal system than the Chinese Communist Party has done for its system.

For example, no Manchu judge would be sent back to his local area to work. Too many dangers of corruption, familistic ties, etc. Any Manchu judge was only kept in place, wherever he was sent, for 3 years for similar reasons. They moved them around.

The evil of local protectionism and the way it destroys any independence and integrity for the Chinese court system is recognized every year in the annual report of the president of the Chinese Supreme Court. But it is like Mark Twain said about the weather: "Everybody talks about it, but nobody does anything about it." They have to do something about it.

Some enlightened future leaders have to realize how important this is to China's system domestically, and increasingly, internationally. Chinese courts are weak. They need more professional help. They do not address many questions in their judgments.

They sort of hide them under the table or just ignore them. And they are under the coordination of the Communist Party Political Legal Committee, and I think that should be ended. They should be left to stand on their own professional feet. I think a lot of things can be done.

A final point. We have not mentioned the importance of a free media to rule of law. You cannot have, in any country or genuine legal system, a rule of law system, and human rights protection unless the media are free to report on the abuses that occur in every country.

Where would we be in our own society with respect to all of the problems we have mentioned here if we did not have a free press to ventilate these things to put the heat on legal administrators, police, politicians, etc.?

The more China can develop freedom of the press and competent legal specialists to report—they have some legal investigative reporters—the more likely it is that the government will be stimulated to stamp out corruption and create a genuine rule of law.

Mr. WOLF. Well, on behalf of Senator Baucus and Congressman Bereuter, I want to thank you all very much for spending the

morning with us today. This has been quite useful, and I think it is a significant contribution to the annual report that the Commission will be completing in October. Thanks again.

[Whereupon, at 11:55 a.m., the hearing was concluded.]

# APPENDIX

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## PREPARED STATEMENTS

PREPARED STATEMENT OF JEROME A. COHEN

JULY 26, 2002

## CHALLENGES FOR CRIMINAL JUSTICE IN CHINA

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 20 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"<sup>1</sup> 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<sup>2</sup> and revision of the Criminal Procedure Law ("CPL").<sup>3</sup> 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.<sup>4</sup> 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.

<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.

<sup>4</sup>CPL, article 96.

<sup>5</sup>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.

<sup>6</sup>CPL, article 96.

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 3 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.

<sup>7</sup> CPL, article 64.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*

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 canceled 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 3 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 3 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.<sup>10</sup>

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 6 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.

<sup>10</sup> 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.

<sup>11</sup> The Rules of Beijing Municipal Justice Department on Reporting Major Legal Matters by Beijing Law Offices, JING SI FA No. 7 (1999).

<sup>12</sup> *Ibid.*, article 4(a).

<sup>13</sup> 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.



## 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 3 days of reviewing the case file, to inform the suspect of his

<sup>14</sup>CPL, article 96.

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 Procuracy (“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 percent of investigators’ requests for indictment.<sup>22</sup>

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.

<sup>15</sup> CPL, article 33.

<sup>16</sup> CPL, article 36.

<sup>17</sup> CPL, article 139.

<sup>18</sup> CPL, article 37.

<sup>19</sup> Supreme People’s Procuratorate: Rules on the Criminal Process for People’s Procuratorates, issued on December 16, 1998, article 319.

<sup>20</sup> *Ibid.*

<sup>21</sup> CPL, article 37.

<sup>22</sup> Human Rights in China: Empty Promises-Human Rights Protections and China’s Criminal Procedure Law (hereafter “HRIC Report”), New York, March 2001, at 24.

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.<sup>23</sup> 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),<sup>24</sup> "to decide the principles for handling major cases and to coordinate the work connections between lawyers and relevant agencies."<sup>25</sup> 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."<sup>26</sup> 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."<sup>27</sup> 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.<sup>28</sup> 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.<sup>29</sup> 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.<sup>30</sup> 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

<sup>23</sup> *Supra* note 11.

<sup>24</sup> *Ibid.*, article 2.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*, article 6.

<sup>27</sup> *Ibid.*, article 7.

<sup>28</sup> *Ibid.*

<sup>29</sup> CPL, article 150.

<sup>30</sup> HRIC report, Chapter III, *supra* note 19.

<sup>31</sup> CPL, article 37.

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 percent or as many as 10 percent 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

<sup>32</sup> CPL, article 47.

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

<sup>34</sup> World Brief, Detroit News, March 12, 2000, at 9.

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 percent, 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.<sup>36</sup>

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 1 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.<sup>37</sup>

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

<sup>35</sup>For detailed rules, see CPL, articles 203–207.

<sup>36</sup>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."

<sup>37</sup>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.

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 percent in one court to roughly 90 percent in another, with the representation rate in most courts falling below 50 percent.<sup>38</sup>

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

<sup>38</sup> Interviews with judges in China, on file with the author.

<sup>39</sup> 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 5-month period and after 6 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.

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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PREPARED STATEMENT OF MURRAY SCOT TANNER

JULY 26, 2002

TORTURE IN CHINA: CALLS FOR REFORM FROM WITHIN CHINA'S LAW ENFORCEMENT SYSTEM<sup>1</sup>

I would like to begin by expressing my sincere thanks to the Members of the Congressional-Executive Commission on China for honouring me by with this invitation. I would also like to thank the Commission staff, in particular Dr. Susan Roosevelt Weld, for their kind help in inviting me and arranging my visit to the Commission.

The purpose of my testimony today is to focus some attention on the battle within China's law enforcement community to confront the widespread and horrific use of torture—especially tortured confessions—within the criminal justice system. The prevalence of torture has been carefully documented by international human rights monitoring organizations—such as Amnesty International, Human Rights Watch, the Lawyer's Committee on Human Rights—as well as by our own State Department and the U.N. Human Rights Commission. Members of this Commission have heard testimony on this terrific problem from representatives of many of these organizations, and I as an individual analyst can add little to their excellent work.

Instead, my testimony today draws on my studies of China's police and internal security system to focus on an important and unusual aspect of China's torture problem: for the past half-dozen years, a growing number of officials and scholars within China's law enforcement system—even many affiliated with China's police ministry (the Ministry of Public Security—"MPS") and its national prosecutors office (The Supreme People's Procuratorate—"SPP")—have begun criticizing China's pervasive torture problem with increasing bluntness. A few years ago, some officials within the procuracy for the first time publicized official statistics on cases of torture—even death by torture. Experts privately stress that these official numbers still greatly understate the prevalence of torture. At the same time, these figures and other characterizations clearly concede a pervasive, systemic, problem, and they mark a significant advance in the halting, ambivalent struggle against torture in China. These law enforcement officials and scholars are also openly debating policy reforms designed to control torture—in particular they are pushing for what I would call "professionalizing" reforms of China's law enforcement system, as well as revisions to China's criminal procedure laws which they believe will create disincentives for officials to commit torture—legal revisions that, in many cases, draw explicitly on U.S. and Western criminal procedure law. It is impossible to say for certain how numerous these officials and analysts are, and difficult to evaluate their policy influence.

I cannot stress strongly enough that my purpose here today is not to argue the brief that either China's top leadership or its law enforcement system are making adequate progress on dealing with torture—emphatically, they are not. Nor am I here to argue that this anti-torture cadre of officials and analysts is strong enough

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<sup>1</sup>This presentation includes sections revised and adapted from Murray Scot Tanner, "Shackling the Coercive State: China's Ambivalent Struggle Against Torture," *Problems of Post-Communism*, Sept-Oct, 2000.

for us to hope that this system can reform itself without a major system overhaul and increased pressure from Chinese society and the international community.

Instead, my purpose is to discuss these important policy debates and efforts at legal reform within China that I believe are important to those who must determine U.S. human rights and legal policy toward China. A careful review of such reform debates can help U.S. policymakers evaluate the initial signs of progress on the problem of torture, the sources of current or future progress, and also the limitations on such progress. Such analysis can also shed light on the degree to which U.S. human rights policies and legal exchanges may be having a positive impact in China.

As we evaluate the importance and limitations of such policy battles over legal reform, we have to confront the painful distinction between the kinds of significant improvements that may be possible within China's current authoritarian system, and the more fundamental improvements that must, unfortunately, await a fundamental liberalization and democratization of that system. In my opinion there is no question that the core of China's torture problem lies in her authoritarian political system, and fundamental improvement of the torture problem will be impossible before China liberalizes and democratizes. A perusal of international human rights reports, however, makes clear that there can be significant differences in levels of torture, law enforcement abuses, and police professionalism even among authoritarian systems. Nevertheless, their fundamental shortcoming compared with democratic systems is that authoritarian systems lack self-generating or self-sustaining social and political institutions to fight torture—most importantly a free, competitive, aggressively investigatory press, citizen-based human rights monitoring organizations, independent, fair and accessible courts and prosecutors, and multi-party elections as an implicit threat to unresponsive leaders. Authoritarian systems such as China cannot even make significant progress against torture unless their top leaderships undertake sustained, detailed monitoring and punishment of local law enforcement who commit the crime. In many authoritarian countries—in particular China—the leadership's commitment to fighting torture is, at best, instrumental and sporadic rather than fundamental and enduring. Thus, when competing political demands cause top-level pressure and monitoring to slacken, torture inevitably reasserts itself.

We cannot expect fundamental, self-generating and self-sustaining progress on torture in China until China constructs the package of liberal-democratic social, political, and legal institutions to oversee, expose, and compel the punishment of torturers. But even without waiting for, or weakening our commitment to, full democratization, Western countries can and must expect, promote and support significant improvement in China's torture record through reform of the existing system. Studies of torture in many societies, including China, demonstrate clearly that torture is also greatly exacerbated by a severe lack of law enforcement professionalism—including compliant judges lacking even rudimentary commitment to rule by law and legal procedure, rules of evidence that create incentives for interrogators to obtain tortured confessions, and weakly trained police and prosecutors who lack the professional ability to solve non-political criminal cases using legally gathered evidence. Such rudimentary problems of unprofessionalism are, at least in part, distinguishable from whether the system is democratic or non-democratic. Sadly, the continued disturbing human rights records in such fledgling democracies as Russia, Brazil, South Africa, Indonesia, and elsewhere demonstrate that where law enforcement organs suffer from severe unprofessionalism, not even democratization and freedom of the press can alleviate torture and other abuses—at least not for a very long time. Fighting torture is a long-term struggle that must be fought out on many fronts.

Therefore, I believe that recent calls from within China's legal and law enforcement communities for reining-in torture can best be understood against the backdrop of a top leadership—Jiang Zemin's leadership—whose efforts to deal with torture and legal abuses have at best been sporadic, irregular, instrumental, and marked by profound ambivalence.<sup>2</sup> Under Jiang, the leadership has ordered occasional short-lived crackdowns on police abuses,<sup>3</sup> but only as one part of a broader strategy to use "rule by law" to revive its threatened legitimacy, stabilize its authoritarian regime, and drive a wedge between average citizens and the politically ac-

<sup>2</sup>In its most recent report on torture in China, Amnesty International described these leadership efforts as betraying an attitude of "indifference," and I would not dispute that characterization.

<sup>3</sup>Perhaps the most prominent such crackdown on torture, abuses, and corruption within law enforcement organs occurred between late 1997 and Fall 1998, as part of the so-called "Education and Rectification" campaign.



tive. Jiang's leadership is offering citizens a legal bargain to "demobilize" them politically saying, in effect, that if the vast majority of citizens stay out of politics, eschew officially "suspect" religious groups, and do not commit crime, the Party and government will try to guarantee them an orderly, relatively low crime society coupled with gradually expanding legal protection against abuses by law enforcement officials. Jiang and his allies are, in effect, gambling that moderate legal reforms can prolong the current regime, and will not instead become a stepping stone toward expanded notions of political and legal rights and democratization.

But such a social bargain is fraught with political dilemmas. First, most reforms that could help establish "self-sustaining" institutional checks on torture risk undermining the Party's hold on power and its control over law enforcement and the press. Second, any serious effort to rein in torture risks undermining the capacity of police and prosecutors to fight crime and maintain adequate "law and order"—the other cornerstone of the "rule by law" legitimacy strategy. As in other authoritarian systems, decades of being protected by an undemocratic government have rendered China's law enforcement departments, quite simply, rather weak in modern criminal investigation skills and excessively reliant upon compliant courts, coerced confessions, and a culture of informants to obtain convictions. Jiang's legal reform strategy requires cracking down on, reforming, and undermining the morale of, the very law enforcement organs on which he relies to control crime, suppress dissent, and contain "suspect" religious groups. It is these political and institutional dilemmas that give Chinese efforts to rein-in torture their "start-stop," highly ambivalent character.

Still, this backdrop of ambivalent leadership commitment over the past half dozen years has opened enough of a window to encourage unprecedentedly frank policy discussion about torture within the law enforcement community. But because of this ambivalence, this debate has also, emphatically, not been held for the benefit or consumption of foreigners—even educated Chinese only get to glimpse it through newspaper expose articles on torture. Clearly fearing that foreign press and governments will simply treat these discussions as an admission of China's embarrassing torture record rather than a harbinger of progress, these discussions have largely been limited to "internal circulation" (confidential) reports and documents, and unclassified journals, newspapers, and books that are rarely read by anyone outside of the criminal justice field.<sup>4</sup> In stark contrast to such heavy-handed propaganda exercises as China's various "White Papers" on legal and rights issues, the policy discussion on torture has largely been kept out of those official media most heavily monitored by foreigners.<sup>5</sup> In assessing these policy discussions, it is worth noting that these law enforcement officials and analysts have been criticizing China's extensive use of torture and debating how best to rein it in even when they had least reason to believe that foreign—or even domestic—critics were watching.

#### NEW ADMISSIONS ON THE PREVALENCE OF TORTURE

Among the most significant steps forward has been the growing willingness of legal officials to acknowledge—sometimes in public—the widespread use of torture. In sharp contrast to the denials and linguistic dodges Foreign Ministry spokespersons employ when asked about torture cases, senior Chinese police, procuratorial, and legal officials and scholars have become increasingly Frank in acknowledging the extent of the problem.<sup>6</sup>

<sup>4</sup>An excellent example would be the large number of articles on fighting torture in *Gongan Yanjiu* (English Titles: Public Security Studies or Policing Studies), the chief theoretical and policy journal of the Ministry of Public Security and of its Number Four Research Institute. Despite having converted to open circulation over a decade ago, and containing rich materials on China's police, the magazine is rarely read in China and almost never cited in international human rights monitoring reports or foreign analyses of China's legal system. The major exception to this relative anonymity has been the prominent role played by Fazhi Ribao (Legal System Daily), the highly respected and rather widely read flagship paper of the Party's top legal policy organ, the Central Political-Legal Committee. In recent years few papers have more regularly published investigatory articles on law enforcement abuses of all types, including torture.

<sup>5</sup>The mass media most heavily monitored by foreigners would include *People's Daily*, *China Daily*, the *New China* [Xinhua] News Service English reports, Radio Beijing International, China Central Television [CCTV], and so on.

<sup>6</sup>See, for example, the Foreign Ministry's dodgy response to the Canadian Broadcasting Corporation's (CBC) filming of Shanghai police beating several suspects: *Agence France Presse* (AFP) May 21, 1998; *Ta Kung Pao*, May 25, 1998, pg. A2; *Kyodo News Service* May 21, 1998, in *BBC Summary of World Broadcasts* (BBCSWB) May 23, 1998. By contrast, during the same period, *Fazhi Ribao* (Legal System Daily) and *Renmin Gonggan Bao* (People's Public Security Daily) were publishing numerous expose articles on police and procuratorial torture as part of

Continued

In recent interviews and publications, officials and analysts have characterized the torture problem as “very serious,” “rather common,” “especially prominent,” “a long-persistent, chronic disease among public security and other judicial organs”<sup>7</sup> and even claimed that “the vast majority (jueda duoshu) of people’s police who handle cases” believe “torture is a fast and effective interrogation technique,” and hence “tortured confession has existed for a long time on a large scale.”<sup>8</sup> Professor Cui Min of China’s national police college—the Chinese People’s Public Security University—one of the legal system’s most persistent critics of torture—has written that “using very large amounts of evidence derived from torture and other illegal means (especially the accused person’s confession) remains, as before, a principal basis for proving cases.”<sup>9</sup> Without question, Minister of Public Security Jia Chunwang provided the most authoritative characterization when he told a summer 1998 public security conference that police torture and related abuses was one of the two most common complaints he heard about in letters from ordinary citizens.<sup>10</sup>

This willingness to concede the pervasiveness of torture was further confirmed when the Supreme People’s Procuratorate published an open circulation volume in late 1997 entitled *The Crime of Tortured Confession (Xingxun Bigong Zui)*. This casebook for procurators described hundreds of real torture cases with a sort of dispassionate but gut-wrenching detail that was reminiscent of Amnesty International reports. The book also included China’s first openly published official statistics on criminal cases of tortured confession—reporting an average of 364 cases per year between 1979 and 1989, upward of 400 cases per year for most years in the 1990’s, and the striking admission that 241 persons had been tortured to death over the 2-year period 1993–1994.<sup>11</sup>

Numerous Chinese experts insist that for both political reasons and statistical shortcomings, these data greatly understate the real occurrence of torture, though they note that publishing the statistics at all was a major change in policy.<sup>12</sup> Also, as Amnesty International and others have pointed out, such official reports and statistics focus almost exclusively on torture as a source of confessions—not as a form of extra-judicial punishment or abuse or intimidation. Finally, they almost never mention torture of political detainees, religious activists, or ethnic minorities.

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the “Education and Rectification” campaign. See Tanner, “China’s Ambivalent Struggle Against Torture.”

<sup>7</sup> These phrases come from interviews with the author and various articles. See, for example, Xu Deming, “Gongan Minjing Zhiwu Fanzui de Tedian Yuanyin de Duice” (Crimes Committed by Public Security People’s Police in Performance of their Duties, their Special Characteristics, Origins, and Policies to Deal with Them), *Gongan Yanjiu* (Public Security Studies), 1998, Issue 4, pp. 75–77.

<sup>8</sup> Du Jingji, “Qianlun Xingxun Bigong de Chansheng ji qi Duice” (A Superficial Discussion of the Sources of Tortured Confession and Policies to Deal with it), in Wang Huaixu, ed., *Zhencha Xunwen Yanjiu yu Yingyong* (Research and Practise of Investigation and Interrogation), (Beijing, China People’s Public Security University Press, 1998), pp. 372–376, esp. pg. 374.

<sup>9</sup> Cui Min, *Zhongguo Xingshi Susongfa de Xin Fazhan: Xingshi Susongfa Xiugai Yantao de Quanmian Huigu* (New Progress in China’s Criminal Procedure Law: A Comprehensive Look Back at Research and Discussions of Reforming China’s Criminal Procedure Law), (Beijing, China People’s Public Security University Press, 1996), pg. 216. Because of Cui’s prominent role in revising the Criminal Procedure Law, this unclassified source is rather widely read in China’s legal community.

<sup>10</sup> Jia told the meeting:

“The problem of forced confessions—in a number of areas, it absolutely exists. Recently, while I was visiting basic level public security organs, talking with university student trainees, some of them told me that they themselves had beaten people. Of all the letters I have received from the masses since coming to the MPS, two types are most common. The first says that in some area, the social order is bad and the criminals are ferocious. The second type says that the people’s police are breaking the law as they enforce the law. By committing forced confessions, they have turned someone who has committed no crime into a criminal, or turned someone who committed a minor violation into a serious criminal violator, and harmed the masses terribly.” See “Minister Jia Chunwang’s Speech” to the Dalian conference on building the Public Security corps, June 12, 1988, in *Gongan Duiwu Zhengguihua Jianshe Lilun yu Shijian* (Beijing, China People’s Public Security University Press, 1998), pg. 7.

<sup>11</sup> *Xingxun Bigong Zui*, pg. 9.

<sup>12</sup> Owing to the narrow definition of “tortured confession” in Chinese law, these statistics only include torture aimed at extorting confessions (thereby excluding wanton assaults by the police) and only torture committed by “judicial officials” or those deputized by them (thereby excluding civilian legal activists, who according to these sources are a major part of the problem). Annual fluctuations reflect not only changing actual rates of these crimes, but also the changing willingness of victims to come forward, and of procurators to prosecute these sensitive cases. Finally, the fact that the 1993–1994 statistics on persons tortured to death (241) represents such an enormous percentage of all torture cases (between a fourth and a third) suggests strongly that most torture cases do not even get reported or prosecuted unless they result death or detectable serious injury.

Table One: Official Torture Statistics (1979–1996)

| Year(s)   | Tortured Confession Cases Formally Established | Persons Tortured to Death               |
|-----------|--|---|
| 1979–1989 | over 4,000 total (avg. 364+/year) .....        | (no report).                            |
| 1990      | 472 .....                                      | (no report).                            |
| 1991      | 407 .....                                      | (no report).                            |
| 1992      | 352 .....                                      | (no report).                            |
| 1993      | 398 .....                                      | 126.                                    |
| 1994      | 409 .....                                      | 115.                                    |
| 1995      | 412 .....                                      | (no report).                            |
| 1996      | 493 .....                                      | at least 32 (Jan.-Aug., MPS statistic). |

(Principal Source: Supreme People's Procuratorate Casebook, *The Crime of Tortured Confession*, pg. 9.)

#### RECOGNIZING THE FAILURE OF TRADITIONAL SOLUTIONS

Since about 1995, law enforcement analysts have also largely ceased blaming China's ancient feudal culture and residual leftist influence from the Cultural Revolution (1966–76) for current torture problems and conceded that the real reasons must lie in the failures of China's post-Mao law enforcement system. These officials are also gradually conceding that the traditional oversight mechanisms the State can most easily control—ideological education, internal police oversight, and procuratorial oversight—are grossly inadequate to China's pervasive torture problem.

To check law enforcement abuses China, like other Leninist systems, has historically relied almost exclusively on ideological-educational campaigns to inculcate norms, and oversight by various Party and government organs internal to local public security departments. Every department down to the county level has within Party committees and departments for discipline inspection, political work, personnel, State supervision, auditing, and the new "oversight police"—each one charged with internal oversight of some aspect of discipline and/or legality. There is, simply put, no shortage of internal oversight organs. Nevertheless, as these sources make clear, China is a textbook case of how internal police oversight can fail when local police leaders are more concerned with raising "case-cracking rates" than fighting abuses.

China primarily relies on the old Soviet institution of the Procuracy to augment internal with external oversight. But law enforcement sources stress that the Procuracy plays a contradictory triple role—prosecuting criminal cases, overseeing police investigatory procedure, and investigating government corruption cases—that often results in it paying more attention to convicting criminals than aggressively overseeing the police. Indeed, much torture is committed by procurators themselves. Moreover, Chinese legal organs are far more decentralized than their old Soviet counterparts. Local Communist Party Committees—not superior-level law enforcement officials—have primary control over local police, procurators, and judges. Thus, when the Party has promoted greater "legality," procurators sometimes oversee police more aggressively. But during Party-led anti-crime campaigns, procurators often deliberately abdicate their oversight role or risk being criticized for "obstructionism."<sup>13</sup>

With this lack of self-sustaining oversight institutions, it is little wonder that since 1990, the leadership has launched several short-lived official crackdowns on torture, all of which sooner lost steam or were overwhelmed by renewed fears of crime waves.

In response, many analysts have put forward new proposals aim at greater professionalization and training for police and procurators, reforming legal incentive structures (especially rules of evidence), increased publicity for torture crimes and their punishment, and encouraging lawsuits by torture victims.

#### GREATER PROFESSIONALIZATION

Proposals focusing on "professionalization" largely begin from the assumption that police and procurators usually employ torture because they simply lack the professional skills necessary to solve many cases any other way. Professional investigators contend that most torture cases occur in basic-level police stations, where investigatory skills, technology, legal knowledge, professional norms, education, and "per-

<sup>13</sup> For analysis of the procuracy and how its role can be undermined by campaigns, see Murray Scot Tanner, "State Coercion and the Balance of Awe: The 1983–1986 'Stern Blows' Anti-Crime Campaign," forthcoming in *The China Journal*, July 2000; also Harold M. Tanner, *Strike Hard! Anti-Crime Campaigns and Chinese Criminal Justice, 1979–1985* (Ithaca, N.Y., Cornell University East Asia Series, Number 104, 1999), esp. pp. 42–47.

sonnel quality” are all weakest. Many “professionalizers” lay considerable blame on local Communist Party leaders for forcing police to hire unqualified cronies, using the police as a “private army,” or funneling scarce budgetary revenues away from law enforcement training and pay into economically profitable ventures. Most local-level police get little or no training in crime scene management, fingerprinting, blood-typing, and rudimentary forensic and investigatory skills. One MPS document claims that “A few People’s Police . . . treat ‘beating people’ as their principal case-cracking technique.”<sup>14</sup> Advocates of professionalism also argue that many abuses are committed by the large array of untrained, non-professional citizen security activists, semi-private security guards, and “contract police” officers on whom regular Public Security officials rely to assist in protecting work units and maintaining social order.

Many other law enforcement analysts admit, however, that many professional problems are attitudinal—many if not most police officers simply don’t believe that torture is wrong, or at least that it leads to much more good than harm. According to another police official, “more than a few” local police captains “believe that during interrogations . . . as long as one doesn’t beat the person to death or until they are crippled, that’s all right.”<sup>15</sup> Cui Min of the Public Security University has recounted innumerable arguments he has had with local police who bluntly insist that torture is necessary and appropriate for law enforcement.<sup>16</sup>

Police and procuratorial experts agree with the judgment of international human rights monitors that during “strike hard” anti-crime campaigns professionalism is further undermined, causing torture cases to spike. Local Communist Party leaders, who are also under evaluated by their superiors on the State of local social order, turn up the pressure on local police to solve cases quickly. According to one police official, many officers “find it hard to resist this ‘fast and effective interrogation technique.’”<sup>17</sup>

In recent years, professionalization advocates have stressed expanding police training programs, increasing equipment purchases, raising hiring requirements, and giving police departments (vs. local CCP committees) tighter control over their personnel. Beginning in 1997 the MPS undertook a long-term effort to professionalize criminal investigation that would eventually remove local police station officers from investigatory work, while building a nationwide network of professional investigators. The MPS’s chief of criminal investigation, however, has shown little optimism that such a large professional corps could be trained in the near future.

#### CREATING LEGAL AND INSTITUTIONAL DISINCENTIVES

Public security and procuratorial anti-torture advocates also contend that flaws in China’s Criminal Law (CL) and Criminal Procedure Law (CPL)—both originally drafted in 1979—create powerful incentives for investigators to obtain confessions by torture. They seized on the efforts to revise both of these laws in 1996–97, launching a debate on how best to discourage torture. The reforms they recommended—and are still promoting—to change police and procuratorial incentives borrow strikingly from U.S. legal concepts and incentive structures.

They have been especially critical of the lack of an unambiguous “presumption of innocence” (*wuzui tuiding*) and the lack of a “right to remain silent” or avoid self-incrimination (*chenmo quan*). Despite strong efforts incorporate these presumptions, the new CPL ultimately moved only obliquely toward requiring the State to present an evidentiary proof of guilt beyond a mere confession.<sup>18</sup> But CPL Article 93 still tempts interrogators to press hard for confessions by requiring the criminal suspect to “answer the investigator’s questions truthfully.”<sup>19</sup> One police scholar complained that since the law encourages interrogators to believe they are dealing with guilty parties who have no right to withhold incriminating information, it clearly “creates

<sup>14</sup> Zhifa Shouce (1996), pg. 380–381.

<sup>15</sup> Du Jingji, pg. 374.

<sup>16</sup> Cui Min, “Zai Lun Jiezhi Xingxun Bigong” (Yet Again Discussing the Abolition of Tortured Confession), in Xingshi Susongfaxue de Xueke Qianyan Wenti (Beijing, Chinese People’s Public Security University Press, May 2002), pg. 255–256.

<sup>17</sup> Du Jingji, pg. 374.

<sup>18</sup> According to the revised CPL “No person shall be found guilty without being judged as such by a People’s Court according to law” and “A defendant cannot be found guilty and sentenced to a criminal punishment if there is only his statement but no evidence” (Articles 12 and 46).

<sup>19</sup> All quotes are from the official English translation, *Zhonghua Renmin Gongheguo Xingshi Susong Fa* [Zhong Ying wen ban] (Criminal Procedure Law of the People’s Republic of China [Chinese-English Edition]), (Beijing, China Procuratorial Press, 1997). For a side-by-side comparison of the 1979 and 1996 CPLs, see Cui Min, pp. 267–353.

a pretext for investigators to engage in torture.”<sup>20</sup> These advocates have clearly not given up, however, and in recent months the Public Security University press has brought forward volumes of essays by law enforcement scholars continuing to press for a clear right to remain silent. On this issue, however, there appears to be a fairly clear line of disagreement between the police scholarly community and the Ministry of Public Security itself.

Despite China’s longstanding insistence that “rights” are unique to each country’s special socio-economic and cultural conditions, some police scholars have recently claimed that the numerous international legal treaties China has recently signed obligate her to incorporate these fundamental “international principles of criminal procedure,” in her domestic CL and CPL.<sup>21</sup>

The central focus of these efforts to reform the legal-incentive structure has been their effort to adopt an “exclusionary rule” for illegally obtained evidence—in particular tortured confessions. Cui Min of the Public Security University, with typical bluntness, argues that so long as tortured confessions remain admissible for convictions, “the clause ‘extorting confessions by torture is strictly forbidden’ essentially exists in name only.”<sup>22</sup> Relatedly, many law enforcement scholars continue to support at least some modified version of a U.S.-style “fruit of the poisoned tree” rule (*du shu zhi guo*) barring the use of physical, documentary, and other evidence obtained as a result of a tortured confession. This rule has produced an enormous range of opinion among law enforcement scholars, from those favouring completely “chopping down the tree and discarding the fruit” (*kan shu qi guo*) to those who would “chop down the tree but savour its fruit” (*kan shu shi guo*), to a full range of compromise positions in between.<sup>23</sup>

Although reformers failed in their efforts to enshrine these principals in the revised CPL, they continue to use various means to write these rules into law. It appears that reform advocates within the Supreme People’s Court and Supreme People’s Procuratorate have tried to use their power to draft implementing regulations for the CPL to cautiously advance a fledgling exclusionary rule without a “poisoned fruit” exclusion. The SPC’s June 29, 1998 “interpretation” on the new CPL states that illegally obtained witness and defendant testimony may not be used to decide a case.<sup>24</sup> Likewise, the SPP, in its January 30, 1997 CPL Implementing Regulations, reportedly ordered that “tortured confessions cannot serve as evidence of guilt of a crime.” The SPP further reports it is experimenting with a “Miranda”-style warning to suspects.<sup>25</sup>

On January 2, 2001, the Supreme People’s Procuratorates’ latest (of many) confidential circulars condemning recent torture cases reflected these new proposals. It criticized what it called the outmoded traditional idea of a “presumption of guilt,” and the “blind worship of confessions as evidence.” The directive also called on local procurators to “clarify the principle of excluding illegal evidence,” and cited article 265 of its national criminal procedure regulations for procurators to the effect that confessions or victim or witness testimony obtained by torture may not be used as the basis for prosecuting criminals.<sup>26</sup>

Current efforts among these reform advocates appear to center of the drafting of an “Evidence Law” (*Zhengju Fa*) that would attempt to unify standards of admissible evidence among China’s major procedural codes (Civil, Criminal, and Adminis-

<sup>20</sup>Zhou Guojun, “Yanjin Xingxun Bigong de Sikao,” (Pondering the Prohibition of Extorting Confessions), *Gongan Yanjiu* (Public Security Studies), 1999, Number 1, pp. 26–29, 43.

<sup>21</sup>Zhou Guojun, pp. 27–28.

<sup>22</sup>Cui Min, pg. 216. Professor Cui was a key participant in drafting the revised Criminal Procedure Law.

<sup>23</sup>This complicated debate is summarized in some detail in Tanner, “China’s Ambivalent Struggle Against Torture,” pp. 21–24.

<sup>24</sup>Zhou Guojun (pp. 29–43) indicates the SPC first issued this directive in its March 21, 1994 regulations on investigatory procedure. This document is unavailable to the author. The June 1998 Supreme People’s Court Explanation of Several Questions of Carrying Out the “People’s Republic of China Criminal Procedure Law,” Court Interpretation No. 23 [1998], Article 61, states “It is strictly forbidden to use illegal methods to collect evidence. Any witness testimony, defendant statement, or defendant confession which, through investigation, is confirmed to be obtained by using torture, threats, inducements, deception, or other illegal methods, cannot serve as a basis for deciding a case.” in Gong, Jian, *Fa Jiguan Zhixing Xingfa Xingshi Susongfa Xin Guiding* (Beijing, Qunzhong Chubanshe, 1999) pg. 428.

<sup>25</sup>Zhou Guojun, pg. 29–43; Beijing Xinhua English, Jan. 5, 1999, translated by FBIS-CHI, Jan. 5, 1999.

<sup>26</sup>“Zuigao Renmin Jianchayuan guanyu Yanjin jiang xingxun bigong huoqu de fanzui xianyiren gongshu zuo wei dingan yiju de tongzhi” (Circular of the Supreme People’s Procuratorate on Using Crime Suspect’s Confessions Obtained Through Torture as the Basis for Deciding Cases), January 2, 2001, in Ministry of Public Security, comp., *Gongan Jiguan Zhifa Xuzhi*, 2001 edition, pp. 526–528.

trative). Advocates want the draft law to clearly enshrine an exclusionary rule—at least for tortured confessions—although support for a relatively absolute “fruit of the poisoned tree” exclusion seems to have waned as China faces corruption, organized crime, and drug-trafficking cases that it finds harder to crack. Such a draft is not expected to be ready for National People’s Congress debate for at least one to 2 years. Participants in drafting the law indicate their proposals still face opposition from the MPS and local police who fear that China’s police are simply incapable of maintaining proper social order under stricter rules of legal procedure.<sup>27</sup>

#### DEEP AMBIVALENCE ABOUT PUBLICITY AND LAWSUITS

Several law enforcement analysts privately laud the great increase in publicity given to torture cases and the punishment of torturers. Publicizing the disturbing details of several torture cases, and spotlighting the punishment of guilty officers communicates leadership disapproval far more dramatically than any internal administrative document. It can also force officers to carefully recalculate the costs and risks of getting caught, thereby establishing powerful norms against the practice. In recent years, the cultivation of a corps of reasonably aggressive “investigative reporters” among the official press has helped extend the government’s monitoring capacity and help it crack through local cover-ups of torture cases. These reporters have become popular, even heroic, symbols for the government, and citizens often compete to entice them to come report on local abuses as a way of attracting top leaders’ attention.

But for the regime leadership, which fears for its stability, large-scale publicity of police abuses also risks undermining morale among the repressive forces that they rely upon for their grip on power. In the vast majority of cases reviewed for this project, officers convicted of torture have received administrative punishments, suspended sentences, or at most one-to-three years imprisonment.<sup>28</sup>

Encouraging bold investigative journalism risks further eroding regime control of the official media (reporters, in turn, have often faced retaliation by local officials, or even from the center, when policies changed). Moreover, the leadership cannot control the reaction among broader domestic and foreign audiences. Interviews with security experts indicate that government leaders have carefully debated whether publicizing torture cases will strengthen its legitimacy, or if skeptical citizens and foreign observers would simply dismiss the publicity as the regime’s admission that such abuses really are ubiquitous after all. As a result, publicity of torture cases tends to come in waves, and at other times been discouraged or carefully managed. Unprecedented domestic and official publicity has also, at times, been coupled with stronger efforts to fight international or unofficial publicity. Even while the official legal press investigates and exposes torture in unprecedented ways, police continue to arrest citizens who attempt to form autonomous “civil society” anti-torture monitoring groups. In one case, even a retired Chinese policeman was jailed.<sup>29</sup> Meanwhile, official spokespersons lambaste foreign reporters and human rights monitoring organizations for what they label as “lies” and “interference in China’s internal affairs.”

Through its cautious experimentation with popular lawsuits against police and procuratorial abuses over the past decade, the Party-state has tried to provide a new vehicle of popular oversight that is more self-sustaining, though still structured not to threaten the CCP’s ultimate grip on power. Partial statistics and anecdotal data indicate a growing minority of citizen plaintiffs have successfully sued for redress or compensation. Still, with the limited evidence available, it is difficult to go beyond the commonsense conclusion that plaintiffs are at least winning often enough to encourage more and more suits. And even when they do not win a court verdict, abused citizens can use these suits as a strategy to draw high level attention to their problems and force local officials to respond.

Some police officials have tried persuading their colleagues to embrace these new litigation systems as a powerful impetus to fight torture, and warned them of the problems that they will face if they fail to reform.<sup>30</sup> Several departments have protested that the Administrative Litigation Law has been applied far too broadly, and is obstructing interrogation and other criminal investigative work, which they insist

<sup>27</sup> Interviews with legal experts, Beijing, December 2001, June 2002.

<sup>28</sup> For a complaint about courts’ unwillingness to mete out tough punishments, see Cui Min, “Zai Lun Jiezhì Xingxun Bigong.”

<sup>29</sup> “Ex-China Cop Punished for Report,” Associated Press, March 25, 1999.

<sup>30</sup> Lu Quanzhen, (Jilin Province PSB Deputy Chief) “Renzhen Xuexi Guanche ‘Guojia Peichang Fa’ Dali Tuijin Gong’an Fazhi Jianshe.” (Resolutely Study and Implement the “State Compensation Law” to Powerfully Promote Public Security Legal System Construction), *Gongan Yanjiu*, 1994, No. 6, pp. 16–18; also Zhou Zhenbo, *ibid.*, pp. 13–15.

is “non-administrative” work. Still, courts nationwide have consistently found a variety of pretexts to block the use of these new legal avenues by political dissidents and religious activists, a fact which underscores the two-tiered nature of legal reforms and their strategic goal of splitting “average citizens” off from “activists.”

#### WEAK LEADERSHIP COMMITMENT, FRUSTRATION AMONG REFORMERS

Since the late 1990's, the leadership's ambivalent, sporadic commitment to fighting torture, along with the limitations imposed by its fear that police will not be able to solve crimes, or that the State will lose its political control, appear to be causing growing frustration among anti-torture advocates. Anti-torture advocates seem resigned to a very long, politically difficult battle over years and decades, requiring repeated persuasion of political leaders, the retraining of current law enforcement officials, the recruitment of new, better ones, persistent efforts to get procurators and judges to use their authority with greater independence. Many officials and scholars—who are very realistic that it might take China decades to really root out torture—are daunted by powerful enduring attitudes favouring or excusing torture at local levels, especially during anti-crime campaigns. It remains to be seen whether this frustration might push reformers to yet another level of even bolder proposals.

In a recently published speech before other criminal justice experts, Cui Min let his frustration at the start-stop pace of change show through:

“It is not just a few police officials at basic levels who have the confused belief that ‘tortured confession has many benefits a only does a little harm’—in fact, this also represents the views of a few middle and high-ranking leaders. Since the 1980's, when it comes to fighting tortured confession and other violations of law and discipline, even though we have tried to grasp this work many times, it has often been a case of ‘a lot of thunder, but very little rain’—we’ve been strict for a while, then we’re loose for a while. The focus and opinions of our leaders change especially during ‘strike hard’ periods—even to the point of finding various methods to overlook and excuse torture by lower level police. These past few years, torture problems haven’t just occurred in public security organs, even some people’s procuracies—the organ of legal oversight—have committed torture while doing their own investigations; it has even reached the point that the Discipline Inspection Committees of the ruling party are committing torture during their “two requireds”<sup>31</sup>—all of which has caused the trend of torture to get worse and worse.”<sup>32</sup>

In closing, Cui, in effect, threw up his hands in frustration and asked his colleagues rhetorically “Do we really want to get rid of torture?”

#### IMPLICATIONS FOR THE WEST

A key goal of this presentation has been to outline the proposals of analysts and officials in, of all places, China's law enforcement system, who have been highly critical of China's torture problem, and are fighting to rein it in. For U.S. observers, it is striking to note their advocacy of rules and institutions borrowed from Western law—and occasionally U.S. law of the Warren Court-era—to reform the incentives for police and prosecutors to commit tortured confessions. We must always be cautious in trying to attribute changes in something as complex as Chinese legal thinking to foreign intellectual influence, and we certainly do not want to overestimate the degree of our own influence. But it is important for the West and the U.S. to recognize the impact that exposure to Western legal notions appears to be having on policy debates over how to fight torture, even within Chinese law enforcement organs.

Until China undergoes a systemic transition to a system with the type of self-sustaining, self-generating oversight mechanisms needed to fundamentally root-out torture, it may well be that the best that can be hoped for is a change in the legal incentives to commit torture, greater professionalization, increased punishment of torturers, greater publicity, continued reforms with lawsuits, and related reforms within the current authoritarian system. Of course, no one can forecast when or if such a transition might occur.

This situation has always raised for the West an extremely complex and morally difficult issue of how best to support such legal reform. There is no avoiding a brutal

<sup>31</sup>The “two requireds” are a stipulation that Party anti-corruption investigators can place on a suspected corrupt official—that they be available for questioning by authorities at any time they are required, and at any place they are required—an often brutal interrogation regimen effectly somewhat similar to house arrest.

<sup>32</sup>Cui Min, “Zai Lun Jiezhì Xingxun Bigong” pg. 256.

dilemma—that strengthening some aspects of professionalism in law enforcement is an essential prerequisite to decreasing the incidence of torture in any country, not just China. But while improving the ability of law enforcement officials to solve real, non-political crime without resort to forced confession will very likely in the long term—contribute to the rule of law and the Chinese people’s sense of their legal rights, in the short term, it risks contributing to the institutional strength of the current flawed legal system.

The institution of the Procuracy demonstrates this policy conundrum very well. In recent years, the Supreme People’s Procuratorate has actively and wholeheartedly encouraged procurators to support the suppression of democracy and rights advocates, and officially suspect religious groups. But there is also significant evidence in this study that the SPP is one of the most important institutional “homes” for those advocating strengthened legal procedures to fight torture, including stronger evidence laws and exclusionary rules, strengthened oversight of police interrogations, expanded prosecution of torturers, and greater public acknowledgment of the scale of the problem. The evidence in this study raises the question of whether expanded legal exchanges between carefully selected procuratorial scholars and analysts and U.S. and other Western legal training programs might contribute to some of these anti-torture policy recommendations.

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PREPARED STATEMENT OF VERON MEI-YING HUNG\*

JULY 26, 2002

PROTECTION OF HUMAN RIGHTS IN THE CONTEXT OF PUNISHMENT OF MINOR CRIMES  
IN CHINA

Thank you for inviting me to speak here today.

Over the past decade, I have, in academia and the private sector, studied administrative litigation and judicial reform in China, constitutional development in Hong Kong, human rights in Cambodia, and trade with China.

I was Legal Associate for Asia at the Washington-based International Human Rights Law Group. I was also Assistant Professor of Law at the City University of Hong Kong and a visiting scholar at the People’s University in Beijing. I am qualified as a barrister in England, Wales, and Hong Kong, and an attorney-at-law in New York State and District of Columbia. I worked with Freshfields LLP in Beijing and Hong Kong and the U.S. law firm O’Melveny and Myers in Los Angeles.

As an associate of the Carnegie Endowment of International Peace, I implement its Political and Legal Reform Project to study, among other subjects, the impact of China’s accession to the WTO on its legal system and the legal reform in Shanghai. I recently trained legislative affairs officials from China’s provinces and the State Council, the country’s highest executive organ, on “China: WTO and Judicial Review.”

I am also a consultant for the United Nations Office of the High Commissioner for Human Rights, advising the office on implementing human rights technical cooperation programs in China. These programs focus on various legal reform and human rights issues including re-education through labor (laodong jiaoyang or laojiao) and training of prison staff.

In this testimony, I will examine “minor crimes” under Chinese law and how they are punished. I will then focus on re-education through labor, a mechanism of punishing “minor crimes,” by discussing its legal background, the legal and human rights problems it presents, the current debate in China about its future, and my reasons for recommending its abolition. I will, wherever appropriate, draw on discussion in my doctoral thesis titled Administrative Litigation and Court Reform in China, which is largely based on empirical research that includes observation of eight administrative trials and interviews with over 140 judges, law professors, lawyers, administrative officials, and litigants in Guangdong province, Chongqing, Wuhan, and Beijing.

*Summary*

Re-education through labor (“RETL”), one of the most prominent administrative sanctions in China, is imposed on people whose act is not serious enough to warrant

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\* I am very grateful to Tom Carothers, Vice President for Studies, Carnegie Endowment for International Peace, Professor Stanley Lubman, Lecturer in Law, School of Law, University of California (Berkeley), and Professor Hualing Fu, Associate Professor, Faculty of Law, University of Hong Kong, for their comments.



criminal punishment but too serious to be subjected to lenient administrative sanctions prescribed by the Security Administration Punishment Regulations (“SAPR”). Yet, neither the Chinese Criminal Law nor judicial interpretations clearly define serious and minor crimes.

RETL presents four legal and human rights problems:

- *Extensive Use.* The expansion of the scope of RETL, as manifested in the principal legislative documents governing the system, has drawn criticisms that these documents are conflicting and that public security organs have turned RETL into a crime control mechanism. The extensive use of the system has also led to widespread human rights concerns.

- *Severe Punishment.* Anyone who is subjected to RETL may be detained in a labor camp for up to 4 years. This punishment is more severe than some criminal punishments such as fines, surveillance, and criminal detention.

- *Inconsistent with Administrative Punishment Law.* The Administrative Punishment Law requires all administrative punishments that restrict personal freedom to be prescribed by “laws,” which, under Chinese law, must be promulgated by the National People’s Congress and its Standing Committee. Although RETL is such type of administrative punishment, it is only prescribed by three decisions either made by the State Council or the Ministry of Public Security. The Standing Committee of the National People’s Congress’s approval of two of these decisions has not transformed them into “laws.”

- *Lack of Effective Supervision.* RETL is not a type of criminal punishment and is thus not subject to any human rights safeguards embodied in the Criminal Law and Criminal Procedure Law. Aggrieved parties facing RETL may resort to protections granted under the Administrative Litigation Law. Unfortunately, the courts’ role in reviewing the legality of administrative sanctions such as RETL has been limited by aggrieved parties’ fear of suing administrative organs and limited access to lawyers as well as administrative organs’ interference with the process.

In light of these problems, many Chinese scholars call for abolishing RETL. Even if it is not abolished, they suggest that it should be reformed. The maximum detention period should be reduced from four to one or 2 years. Courts, as opposed to public security organs, should decide whether the punishment can be imposed and such decisions can be challenged on appeal. Further, RETL should be incorporated into criminal law.

These reform measures would not effectively resolve the human rights problems presented by RETL. Although Chinese courts are undergoing a 5-year reform program, extra-judicial interference will not disappear soon. The Criminal Procedure Law only offers limited human rights protections and has not yet been fully implemented since its revision in 1996. RETL should be abolished.

The Chinese government is planning to enact a law on RETL to improve the system. It appears to have ruled out abolition. While the government’s intent of not abolishing RETL is disappointing, its determination of improving the system is welcome. The government must understand that any reforms that fall short of addressing the problems discussed here will negate its efforts in establishing a rule-of-law-based criminal system.

### *I. Punishment of “Minor Crimes”*

#### A. “MINOR CRIMES”

In Chinese criminal law, both criminality and punishment of a particular act depend on whether the “circumstances” of the act are “serious” or “minor.”<sup>1</sup> The Criminal Law, however, does not clearly define the term “minor crimes” even though the distinction between the “serious” and the “minor” pervades the legislation.

Article 13 of the Criminal Law defines crimes as all acts that “endanger the sovereignty, territorial integrity and security of the state; split the state, subvert the political power of the people’s democratic dictatorship and overthrow the socialist system; undermine the social and economic orders; encroach upon property owned by the State or collectively owned by the laboring masses; infringe upon citizens’ privately owned property; infringe upon citizens’ rights of the person, democratic rights, and other rights; and other acts that endanger society and should, according to law, be criminally punished.” The provision, however, states that these acts are not deemed crimes “if the circumstances are clearly minor and the harm is not great.”

<sup>1</sup> See Criminal Law of the People’s Republic of China, promulgated on July 1, 1979, revised on Mar. 14, 1997, Dec. 25 1999, Aug. 31, 2001, and Dec. 29, 2001 [hereinafter Criminal Law].

Even if an act is deemed a crime, Article 37 provides that “[w]here the circumstances of a person’s crime are minor and do not require criminal punishment, the person may be exempted from criminal sanctions, but he may, according to the different circumstances of each case, be reprimanded or ordered to make a statement of repentance or formal apology or make compensation for losses, or be subjected to administrative sanctions by the competent department.”

The word “circumstances” is not defined in the law but scholars have generally agreed that it has a very broad meaning. It includes “all the aspects of a specified act that are thought relevant but are not expressly provided for in the written law governing that act.”<sup>2</sup> In particular, it can refer to “the subjective blameworthiness of a particular actor” or “external social and political effects of a crime.”<sup>3</sup>

A scholar points out that “the ‘circumstances’ need common knowledge to be understood”<sup>4</sup> but acknowledges that “it does not usually work well” and, therefore, it is necessary for the Supreme People’s Court and the Supreme People’s Procuratorate to issue judicial interpretations to provide clarifications.<sup>5</sup> The Supreme People’s Court is authorized to interpret “any problems of the concrete application of laws or regulations in the course of litigation” whereas the Supreme People’s Procuratorate has the power to interpret only “questions involving the specific application of laws and decrees in the procuratorial work of the procuratorates.”<sup>6</sup>

Numerous judicial interpretations have been issued to provide guidance as to whether or not the circumstances of a particular crime are minor. Two examples are illustrative. Article 294 of the Criminal Law states, *inter alia*, that

Whoever organizes, leads, or actively participates in an organization with characteristics of a criminal syndicate, which carries out lawless and criminal activities in an organized manner through violence, threat, or other means, with the aim of playing the tyrant in a locality, committing all evil things, bullying and harming the masses, and seriously undermining economic and social orders shall be sentenced to fixed-term imprisonment of not less than 3 years nor more than 10 years. Other participants shall be sentenced to fixed-term imprisonment of not more than 3 years, criminal detention, surveillance, or deprivation of political rights.

The Supreme People’s Court’s Interpretation on Several Questions Concerning the Concrete Application of Laws in Adjudicating Criminal Syndicate Cases<sup>7</sup> clarifies that participating in a criminal syndicate is not deemed a crime if the circumstances are minor, such as the participant did not carry out any criminal activity or was deceived or coerced to join the syndicate.<sup>8</sup>

Article 264 of the Criminal Law provides, *inter alia*, that “[t]hose who steal relatively large amounts of public or private money and property . . . shall be sentenced to fixed-term imprisonment of not more than 3 years, criminal detention, or surveillance, and may in addition or exclusively be subject to fines.” The Supreme People’s Court’s Interpretation on Several Questions Concerning the Concrete Application of Laws in Adjudicating Theft Cases<sup>9</sup> defines “relatively large amounts” as amounts of 500–2,000 yuan (US\$60–250) and above. The Higher Level People’s Court of each province, autonomous region, or municipality directly under the Central Government adopts, after considering the economic development and social order of its locality, an appropriate figure within this range as the standard to be applied in the locality.<sup>10</sup> Stealing of this amount of money and property is, however, not deemed a crime if the circumstances are minor.<sup>11</sup> The Interpretation does not

<sup>2</sup>Note: Concepts of Law in the Chinese Anti-Crime Campaign, 98 HARV. L. REV. 1890, 1901 n.52 (1985). See also Fang Huicheng, [Do Not Punish Multiple Crimes as a Single Crime Committed Under “Serious Circumstances”], FAXUE [JURISPRUDENCE], No. 3, 1984, 24; Wen Jing, [My Humble Opinion on the Circumstances of a Crime], FAXUE JIKAN [JURISPRUDENCE QUARTERLY], No. 1, 1984, 44.

<sup>3</sup>*Id.*

<sup>4</sup>Shizhou Wang, The Judicial Explanation In Chinese Criminal Law, 43 AM. J. COMP. L. 569, 575 (1995).

<sup>5</sup>*Id.*

<sup>6</sup>Resolution of the National People’s Congress Standing Committee on Strengthening Legal Interpretation Work, adopted on June 10, 1981.

<sup>7</sup>Supreme People’s Court’s Interpretation on Several Questions Concerning the Concrete Application of Laws in Adjudicating Criminal Syndicate Cases, adopted on Dec. 4, 2000 and effective on Dec. 10, 2000.

<sup>8</sup>*Id.* art. 3(2).

<sup>9</sup>Supreme People’s Court’s Interpretation on Several Questions Concerning the Concrete Application of Laws in Adjudicating Theft Cases, adopted on Nov. 4, 1997 and effective on Mar. 17, 1998.

<sup>10</sup>*Id.* art. 3.

<sup>11</sup>*Id.* art. 6(2).

provide an exhaustive list of minor circumstances but refers to several situations as examples: the stealing was committed by a person who has reached the age of 16 but not the age of 18, the stolen property and money have been completely returned, the person surrendered himself or herself to the police, or the person was coerced to steal and shared none or a relatively small amount of the stolen property.<sup>12</sup>

Although judicial interpretations help clarify the Criminal Law and are thus hailed as an “indispensable” source for understanding Chinese law,<sup>13</sup> the broad and indeterminate language found in these interpretations, as illustrated in the above two examples, create wide scope of discretion in interpretation.<sup>14</sup> Each of the cited interpretations defines “minor” as “minor,” and the resulting tautology fails to provide genuine clarification and guidance to the courts and administrative agencies.

### *B. Punishment*

When the circumstances of a person’s act are so minor that the act is not deemed a crime, or when the circumstances of a person’s crime are so minor that the crime does not require criminal punishment, the person may still be subjected to administrative sanctions. The re-education through labor, which is to be discussed in Part II, and those prescribed by the Security Administration Punishment Regulations (“SAPR”)<sup>15</sup> are the most prominent administrative sanctions.

Article 2 of the SAPR provides that “[w]hoever disturbs social order, endangers public safety, infringes upon a citizen’s rights of the person or encroaches upon public or private property” shall be punished in accordance with the SAPR “if such an act is not serious enough for criminal punishment” and “security administration punishment should be imposed.”<sup>16</sup> Penalties under the regulations include a warning, a maximum fine of 5,000 yuan (US\$625), and administrative detention of not more than 15 days.<sup>17</sup> The public security organs have exclusive responsibility for imposing these penalties.

## *II. Re-Education Through Labor*

### A. LEGAL BACKGROUND

Re-education through labor (“RETL”) is imposed on people whose act is not serious enough to warrant criminal punishment but too serious to be dealt with under the SAPR. RETL is mainly governed by three legislative documents. According to the 1957 Decision of the State Council Regarding the Question of Re-education Through Labor (“1957 Decision”),<sup>18</sup> the purposes of establishing RETL are “to reform into self-supporting new persons those persons who are able to work but insist on leading an idle life, violate law and discipline, or do not engage in honest pursuits” and “to further maintain public order, thus facilitating socialist construction.”<sup>19</sup> The sanctions should be imposed on the following four categories of people:

(1) “those who do not engage in honest pursuits, involve themselves in hooliganism, commit larceny, fraud or other acts for which they are not criminally

<sup>12</sup>Id.

<sup>13</sup>See Wang, *supra* note 4, at 569. Wang writes that judicial interpretations play an important role in the Chinese criminal justice system because they have six functions: (1) “indicating how to correctly understand the meaning of the law;” (2) “explaining the issues of the law;” (3) “indicating the concrete standard of sentencing within the statutory punishments;” (4) “clarifying the guilty line and line for giving a heavier punishment when the law requires ‘serious circumstances’ or ‘especially serious circumstances;” (5) “clarifying the limitation of time for a particular law;” and (6) “explaining how to implement laws.” Id. at 572–77.

<sup>14</sup>For detailed discussion of Chinese legislative drafting, see Perry Keller, *Legislation in the People’s Republic of China*, 23 U. BRIT. COLUM. L. REV. 653 (1989); PETER HOWARD CORNE, *FOREIGN INVESTMENT IN CHINA: THE ADMINISTRATIVE LEGAL SYSTEM*, 95–104 (1997); Claudia Ross & Lester Ross, *Language and Law: Sources of Systemic Vagueness and Ambiguous Authority in Chinese Statutory Language*, in *THE LIMITS OF THE RULE OF LAW* 221 (KAREN G. TURNER, JAMES V. FEINERMAN, AND R. KENT GUY, eds. 2000).

<sup>15</sup>Security Administration Punishment Regulations, adopted on Sept. 5, 1986, effective on Jan. 1, 1987, revised on May 12, 1994 [hereinafter SAPR].

<sup>16</sup>Articles 19–32 of the SAPR specify the circumstances under which the SAPR is violated and the corresponding punishments.

<sup>17</sup>SAPR, *supra* note 15, art. 6.

<sup>18</sup>Decision of the State Council Regarding the Question of Re-education Through Labor, approved by the Standing Committee of the National People’s Congress on Aug. 1, 1957, promulgated and effective on Aug. 3, 1957 [hereinafter 1957 Decision].

<sup>19</sup>Id. preamble.

liable, or violate public security rules and refuse to mend their ways despite repeated admonition;”<sup>20</sup>

(2) “counterrevolutionaries and anti-socialist reactionaries who commit minor crimes and are not criminally liable and who have been given sanctions of expulsion by government organs, organizations, enterprises or schools, and as a result have difficulty in making a living;”<sup>21</sup>

(3) “employees of government organs, organizations, enterprises and schools who are able-bodied, but have refused to work for a long period, violated discipline or jeopardized public order, and have been given sanctions of expulsion, and as a result have difficulty in making a living;”<sup>22</sup> or

(4) “those who refuse to accept the work assigned to them or the arrangement made for their employment or who decline to take part in manual labor and production despite persuasion, keep behaving disruptively on purpose, obstruct public officials from performing their duties and refuse to mend their ways despite repeated admonition.”<sup>23</sup>

Various bodies may apply for imposition of RETL on anyone who falls into one of the above four categories. These include “civil affairs and public security departments or the government organ, organization, enterprise, school or other units to which the person belongs; or his or her parents or guardians.”<sup>24</sup> The applications have to be approved by the “people’s committees of provinces, autonomous regions, and municipalities directly under the Central Government or by organs authorized by these people’s committees.”<sup>25</sup> The 1957 Decision stipulates that agencies in charge of RETL will be established “at the level of provinces, autonomous regions, municipalities directly under the Central Government” or established “with the approval of the people’s committees of provinces, autonomous regions, and municipalities directly under the Central Government.”<sup>26</sup> It also states that the work of these agencies will be jointly directed and managed by the departments of civil affairs and public security.<sup>27</sup>

In 1979, the State Council issued the Supplementary Decision Of The State Council For Re-education Through Labor (“1979 Decision”) to provide more details about RETL.<sup>28</sup> Under the 1957 Decision, a person can be subject to RETL for indefinite periods but the 1979 Decision confines these periods to one to 3 years, with 1-year extension “whenever it is necessary.”<sup>29</sup> The 1979 Decision clarifies that RETL Administrative Committees shall be established by “the people’s governments of the provinces, autonomous regions, and municipalities directly under the Central Government, and of large and medium-sized cities.”<sup>30</sup> These committees shall be composed of “persons who are in charge of civil affairs, public security and labor departments” and these persons shall be responsible for directing and managing the work of RETL.<sup>31</sup> Further, the 1979 Decision states that RETL can only be imposed on “those people in large and medium-sized cities who need to be re-educated through labor.”<sup>32</sup> The RETL Administrative Committees of provinces, autonomous regions, and municipalities directly under the Central Government, and of large and medium-sized cities, are responsible for examining and approving those who need such re-education.<sup>33</sup> In other words, RETL is not applicable to the rural populace.

In 1982, the Ministry of Public Security passed, with the approval of the State Council, the Trial Methods for the Implementation of Re-education Through Labor (“1982 Trial Methods”).<sup>34</sup> Under this document, RETL can be imposed not only on the four categories of persons listed under the 1957 Decision, but also on anyone

<sup>20</sup>Id. para. 1(1).

<sup>21</sup>Id. para. 1(2). When the Criminal Law was revised in 1997, the term “counterrevolutionary” was replaced with the term “crimes against state security.” The term “counterrevolutionary” found in the 1957 Decision has not been amended accordingly.

<sup>22</sup>Id. para. 1(3).

<sup>23</sup>Id. para. 1(4).

<sup>24</sup>Id. para. 3.

<sup>25</sup>Id. para. 3.

<sup>26</sup>Id. para. 5.

<sup>27</sup>Id.

<sup>28</sup>Supplementary Decision of the State Council for Re-education Through Labor, approved by the Standing Committee of the National People’s Congress on Nov. 29, 1979, promulgated and effective on Nov. 29, 1979.

<sup>29</sup>Id. para. 3.

<sup>30</sup>Id. para 1.

<sup>31</sup>Id.

<sup>32</sup>Id. para 2.

<sup>33</sup>Id.

<sup>34</sup>Notice of the State Council on Re-Issuing the Ministry of Public Security’s Trial Methods for the Implementation of Re-Education Through Labor, promulgated and effective on Jan. 21, 1982.

who “joined others to commit a crime such as murder, robbery, rape, and arson” or who “abetted others to commit a crime” and the circumstances surrounding these crimes are not serious enough for criminal punishments.<sup>35</sup> Moreover, RETL is also applicable to the rural populace if the person committed crimes “in cities, along railways, and in large-scale factories and mines.”<sup>36</sup>

## B. LEGAL AND HUMAN RIGHTS PROBLEMS OF RE-EDUCATION THROUGH LABOR

### 1. Extensive use

The expansion of the scope of RETL, as shown in the 1957 Decision, the 1979 Decision, and the 1982 Trial Methods, has drawn criticisms from Chinese legal scholars that these documents are conflicting<sup>37</sup> and that RETL has been turned by the public security organs into a “crime control mechanism,”<sup>38</sup> which is different from the legislative intent stipulated in the 1957 Decision.

Numerous reports about the extensive use of the system have also led to widespread human rights concerns. RETL is imposed by RETL Administrative Committees that are dominated by public security organs,<sup>39</sup> and these organs have reportedly abused the system to take actions against suspected offenders so as to avoid the procedural requirements or supervisory mechanisms presented under the Criminal Procedure Law.<sup>40</sup> In particular, it has been reported that public security organs have imposed RETL on offenders against whom they lack sufficient evidence to support a charge even though the circumstances of the crime committed are not minor.<sup>41</sup>

Official sources reveal that about 3.5 million people have been re-educated since its establishment in the 1950's.<sup>42</sup> At present, 300,000 people are being held in the country's nearly 300 RETL camps,<sup>43</sup> at least 1000 of whom are there because they

<sup>35</sup> Id. art. 10(2) and (6).

<sup>36</sup> Id. art. 9.

<sup>37</sup> See Shen Fujun, [Some Thoughts about the Abolition of Re-education Through Labor System], FAXUE [JURISPRUDENCE], No.7, 1999, 18, at 18; Chen Ruihua, [Historical Examination of Re-education Through Labor and Reflections], ZHONGWAI FAXUE [PEKING UNIVERSITY LAW JOURNAL] Vol. 13. No. 6 (2001), 657; Chen Xingliang, Research on China's Re-education Through Labor System: From the Perspective of Criminal Rule of Law, ZHONGWAI FAXUE [PEKING UNIVERSITY LAW JOURNAL] Vol. 13. No. 6(2001), 689, 693–94.

<sup>38</sup> Hualing Fu, Criminal Procedure Law, in INTRODUCTION TO CHINESE LAW 129, 134 (Chenguang Wang and Xianchu Zhang eds., 1997). See also Chen Xingliang, *supra* note 37, at 694.

<sup>39</sup> See Tao Jigang, [Some Thoughts on Laws Relating to Re-education Through Labor], ZHONGGUO RENMIN JINGCHA DAXUE XUEBAO [JOURNAL OF THE CHINA UNIVERSITY OF PEOPLE'S POLICE], No. 3, 1995, 12, at 12; Ma Kechang, Strengthen the Reform Efforts, Revise and Perfect the Criminal Law], FAXUE PINGLUN [LAW REVIEW], No. 5, 1996, 1, at 7–8; Chen Xingliang, Re-education Through Labor: Analysis Based on International Bill of Human Rights, FAXUE JURISPRUDENCE], No. 10 (2001), 49, 51–52; Chen Ruihua, *supra* note 37, at 668.

<sup>40</sup> Criminal Procedure Law of the People's Republic of China, promulgated on July 1, 1979, revised on Mar. 17, 1996 [hereinafter Criminal Procedure Law]. See LAWYERS COMMITTEE FOR HUMAN RIGHTS, CRIMINAL JUSTICE WITH CHINESE CHARACTERISTICS: CHINA'S CRIMINAL PROCESS AND VIOLATIONS OF HUMAN RIGHTS, 69–79 (1993); Amnesty International, Open Letter To The President Of The People's Republic Of China, M2 PRESSWIRE, Sept. 28, 1999, available in LEXIS, News Library, News Group File.

<sup>41</sup> See Fu, *supra* note 38, at 134; Chen Xingliang, *supra* note 39, at 52.

<sup>42</sup> See China—Government Re-education System on Legal Basis, CHINA DAILY, Nov. 2, 1998; Beijing to Introduce Re-education Through Labor Law This Year, ZHONGGUO TONGXUN SHE NEWS AGENCY, BBC SUMMARY OF WORLD BROADCASTS, Feb. 19, 2001, available in LEXIS, News Library, News Group File.

<sup>43</sup> See Minister Says 1.7 Million Held In Prisons, Labour Camps, XINHUA NEWS AGENCY, BBC SUMMARY OF WORLD BROADCASTS, May 22, 2000, available in LEXIS, News Library, News Group File; John Leicester, China Gives Reporters Glimpse of Labor Camp Dubbed 'Living Hell' by Critics, THE ASSOCIATED PRESS, May 23, 2001, available in LEXIS, News Library, News Group File.

are Falun Gong followers.<sup>44</sup> Torture<sup>45</sup> and maltreatment such as banning family visits and censoring inmates' personal correspondence<sup>46</sup> are alleged to be commonly practiced in RETL camps. Of all the current inmates, a third are punished by RETL because they were drug addicts, prostitutes, brothel visitors; another third are offenders of minor crimes such as larceny, fraud, and assault. The rest comprises of other types of inmates.<sup>47</sup>

## 2. Severe punishment

Although couched in terms of leniency, the 1979 Decision and the 1982 Trial Methods allow a person to be detained in a labor camp for up to 4 years. This punishment is far more severe than some criminal punishments, which include five types of "principal punishments" (zhuxing)<sup>48</sup> and three types of "supplementary punishments" (fujia xing).<sup>49</sup> The five types of principal punishments are:

- (1) Surveillance (guanzhi) (from 3 months to 2 years)<sup>50</sup>
- (2) Criminal detention (juyi) (from 1 month to 6 months)<sup>51</sup>
- (3) Fixed-term imprisonment (from 6 months to 15 years and up to 20 years when the death penalty is commuted to fixed-term imprisonment or in cases of combined punishment for more than one crime)<sup>52</sup>
- (4) Life imprisonment
- (5) Death penalty

Supplementary punishments, regardless of the opposite meaning conveyed by its name, may be imposed independently.<sup>53</sup> They include:

- (1) Fines (the amount of the fine imposed depends on the circumstances of the crime)<sup>54</sup>
- (2) Deprivation of political rights<sup>55</sup>
- (3) Confiscation of property Critics argue that because RETL is more severe than criminal punishments such as fines, surveillance, and criminal detention, application of the sanction violates the rationale behind RETL: the system should be applied to cases whose level of severity does not merit any criminal punishment.<sup>56</sup>

<sup>44</sup>China has not disclosed the exact number of Falun Gong followers held in re-education through labor camps. But it confirmed in January 2001 that at least 470 followers were held at the Masanjia Education-Through-Labour Education Institution in Liaoning Province and the official media reported in August 2001 that "[t]his camp has also succeeded in 're-educating' more than 90 per cent of the 1,000 female Falun Gong members housed there." See Forty-Seven Former Female Falun Gong Followers Released After Reform, XINHUA NEWS AGENCY, BBC SUMMARY OF WORLD BROADCASTS, Jan. 27, 2001, available in LEXIS, News Library, News Group File; China Rejects Report of Hunger Strike by Jailed Falun Gong Members, AGENCE FRANCE PRESSE, Aug. 30, 2001, available in LEXIS, News Library, News Group File. The Hong Kong-based Information Center for Human Rights and Democracy estimated that about 10,000 Falun Gong followers have been sent to these camps since the Falun Gong movement was banned in July 1999. See Nearly 500 Falun Gong Were Held At Just One Labour Camp: China, AGENCE FRANCE PRESSE, Jan. 18, 2001, available in LEXIS, News Library, News Group File.

<sup>45</sup>See Amnesty International: China—Torture In China Under The Spotlight At The United Nations, M2 PRESSWIRE, May 5, 2000, available in LEXIS, News Library, News Group File; Released Chinese Dissident Speaks of Horrors of Labor Camp Life, AGENCE FRANCE PRESSE, Feb. 15, 2002, available in LEXIS, News Library, News Group File.

<sup>46</sup>See Fong Tak-Ho, Dissident Threatens Legal Action, HONG KONG STANDARD, July 10, 1997, available in LEXIS, News Library, News Group File.

<sup>47</sup>See Chen Xingliang, *supra* note 37, at 694, 697.

<sup>48</sup>Criminal Law, *supra* note 1, art. 33.

<sup>49</sup>*Id.* art. 34.

<sup>50</sup>*Id.* art. 38.

<sup>51</sup>*Id.* art. 42.

<sup>52</sup>*Id.* arts. 45, 50, and 69.

<sup>53</sup>*Id.* art. 34.

<sup>54</sup>*Id.* art. 52.

<sup>55</sup>Deprivation of political rights refers to deprivation of the following rights: (1) the right to elect and the right to be elected; (2) the right to freedom of speech, of the press, of assembly, of association, of procession, and of demonstration; (3) the right to hold a position in state organs; and (4) the right to hold a leading position in a state-owned company, enterprise, or institution or people's organization. *Id.* art. 54.

<sup>56</sup>See Chen Zexian, [Re-education Through Labor System and Educational Reform of Prisoners in China], in [HUMAN RIGHTS AND ADMINISTRATION OF JUSTICE] 30, 33–4 (Liu, Li and Kjaerum, eds., 1999); Chen Ruihua, *supra* note 37, at 669; Chen Xingliang, *supra* note 37, at 694.

### 3. *Inconsistent with administrative punishment law*

The RETL system has also been challenged as inconsistent with the Administrative Punishment Law.<sup>57</sup> The statute specifically requires all administrative punishments that restrict personal freedom to be prescribed by “laws.”<sup>58</sup> Administrative regulations and rules can only prescribe other punishments such as warning, fines, confiscation of illegally gained income and property, and provisional suspension or revocation of permits or licenses.<sup>59</sup> According to the hierarchy of Chinese legislative authorities, only the National People’s Congress and its Standing Committee can promulgate “laws.”<sup>60</sup> RETL, which is a type of administrative punishment that restricts personal freedom,<sup>61</sup> is prescribed not by a “law” but by decisions made by the State Council or the Ministry of Public Security, and the legality of this system is therefore questionable.<sup>62</sup>

Those who disagree with the above view may argue that the Standing Committee of the National People’s Congress’s approval of the 1957 and 1979 Decisions has effectively transformed them into “laws.”<sup>63</sup> This view is debatable. But even if it is correct, the same argument cannot be applied to the 1982 Trial Methods because the Standing Committee of the National People’s Congress has never approved the document. Among the three documents, the 1982 Trial Methods has the most extensive and controversial coverage.

### 4. *Lack of effective supervision*

As an administrative, rather than criminal, sanction, RETL is not subject to any human rights safeguards, however limited they are, contained in the Criminal Law and Criminal Procedure Law.

The Chinese Criminal Law was promulgated in 1979 and amended four times from 1997 to 2001. The 1997 amendment was particularly remarkable. It abolished the provision on analogy<sup>64</sup> and adopted certain fundamental principles of justice such as equality before the law<sup>65</sup> and proportionality (*zuixing xiang shiyi yuanze*).<sup>66</sup> But it did not adopt the principle of double jeopardy as far as crimes committed outside China are concerned.<sup>67</sup>

The revision of the Criminal Procedure Law in 1996 brought the legislation closer to international human rights standards by adopting the presumption of innocence, expanding the right to counsel, and increasing the role of the courts so as to eliminate the prior practice of pre-trial determination of guilt. Despite these improvements, the revised Criminal Procedure Law still has various deficiencies.<sup>68</sup> For example, it allows long period of pre-arrest detention. The public security organs can detain for a period of 30 days those “strongly suspected of wandering around com-

<sup>57</sup> Administrative Punishment Law of the People’s Republic of China, promulgated on Mar. 17, 1996 and effective on Oct. 1, 1996.

<sup>58</sup> Id. art. 9.

<sup>59</sup> Id. arts. 8, 10 and 11.

<sup>60</sup> See XINGZHENG FAXUE JIAOCHENG [TEXT OF ADMINISTRATIVE JURISPRUDENCE] 205 (Ying Songnian, ed., 1988).

<sup>61</sup> This point was in dispute in the past. See Chen Xingliang, *supra* note 39; Chen Ruihua, *supra* note 37, at 669; Jiang Jinfang, [Legal Developments of Re-education Through Labor System and Practical Problems], ZHONGWAI FAXUE [PEKING UNIVERSITY LAW JOURNAL] Vol. 13, No. 6(2001) 674, 682.

<sup>62</sup> See Shen Fujun, *supra* note 37, at 19; Chen Zexian, *supra* note 56, at 34–35; JIANFU CHEN, CHINESE LAW: TOWARDS AN UNDERSTANDING OF CHINESE LAW, ITS NATURE, AND DEVELOPMENT 193 (1999).

<sup>63</sup> See *supra* notes 18 and 28. Chen Xingliang argues that they are not “laws;” they are “pre-laws” (*zhun falu*), at the very most, see Chen Xingliang, *supra* note 37, at 689, 692.

<sup>64</sup> Article 79 of the 1979 Criminal Law provided that “[a] person who commits crimes not explicitly defined in the Specific Provisions of this Law may be convicted and sentenced, after obtaining the approval of the Supreme People’s Court, according to the most similar article in this Law.” After the 1997 amendment, the Criminal Law provides that “[a]ny act deemed by explicit stipulations of law as a crime shall be convicted and given punishment by law and any act that no explicit stipulations of law deem a crime shall not be convicted or given punishment.” Criminal Law, *supra* note 1, art. 3.

<sup>65</sup> “Anyone committing crimes shall be treated equally in applying the law. No one shall have any privileges outside the law.” Id. art. 4.

<sup>66</sup> “The punishment shall be proportional to the criminal acts committed by the offenders and the criminal responsibilities that the offenders shall bear.” Id. art. 5.

<sup>67</sup> For detailed discussion of the amendment to the Criminal Law, see LAWYERS COMMITTEE FOR HUMAN RIGHTS, WRONGS AND RIGHTS: A HUMAN RIGHTS ANALYSIS OF CHINA’S REVISED CRIMINAL LAW (1998); JIANFU CHEN, *supra* note 62, at 174–183.

<sup>68</sup> For detailed discussion of the amendment to the Criminal Procedure Law, see Fu, *supra* note 38; LAWYERS COMMITTEE FOR HUMAN RIGHTS, OPENING TO REFORM?: AN ANALYSIS OF CHINA’S REVISED CRIMINAL PROCEDURE LAW (1996); JIANFU CHEN, *supra* note 62, at 200–16; Daphne Huang, The Right to a Fair Trial in China, 7 PAC. RIM. L. & POL’Y 171 (1998).

mitting crimes, of committing multiple crimes, or of forming gangs to commit crimes.”<sup>69</sup> The requirement for the public security organs to inform detainees’ families of the reasons for detention and the place of custody within 24 hours after the detention may be waived if this “may hinder the investigation or there is no way of notifying them.”<sup>70</sup>

As these limited human rights protections are beyond the reach of those who are punished by RETL, aggrieved parties may only resort to protections granted under the Administrative Litigation Law.<sup>71</sup> The statute stipulates that anyone who believes that his or her legitimate rights and interests have been infringed by administrative acts such as administrative sanctions may bring lawsuits to courts.<sup>72</sup> Should the court find the challenged administrative act illegal, it may revoke (chexiao) the act.<sup>73</sup>

Based on documentary sources and empirical research, I have noticed some improvements in administrative litigation such as growing respect for procedural requirements. However, the existing problems as discussed below appear to have limited the courts’ role in reviewing the legality of administrative sanctions such as RETL.<sup>74</sup>

a. *Fear*.—According to interviewees, aggrieved parties dare not sue administrative organs, especially public security organs, which have wielded extensive power over the populace for decades in China. They fear reprisals resulted from direct confrontation with these organs. Nevertheless, official statistics show that during the years from 1991 to 2000, a significant portion (ranging from 15 to 30 per cent) of administrative cases accepted by first-instance courts were “public security” (gongan) cases, which cover “social order” (zhian) cases, RETL (laojiao) cases, and “others” (qita).<sup>75</sup> (See Table One). If this fear exists, why do public security cases account for such significant portion?

Table One.—Number of First-Instance Administrative Cases Accepted in China, 1991–2000<sup>76</sup>

| Year | Administrative Cases | Public Security Cases | Percentage (percent) <sup>77</sup> |
|------|----------------------|-----------------------|------------------------------------|
| 1991 | 25,667               | 78                    |                                    |
| 1992 | 27,125               | 7,863                 | 28.99                              |
| 1993 | 27,911               | 7,018                 | 25.14                              |
| 1994 | 35,083               | 8,624                 | 24.58                              |
| 1995 | 52,596               | 11,633                | 22.12                              |
| 1996 | 79,966               | 15,090                | 18.87                              |
| 1997 | 90,557               | 14,171                | 15.65                              |
| 1998 | 98,350               | 14,288                | 14.53                              |
| 1999 | 97,569               | 14,611                | 14.98                              |
| 2000 | 85,760               | 13,173                | 15.36                              |

<sup>76</sup> CHINA LAW YEARBOOK 1992–2001.

<sup>77</sup> This column lists the percentage of the total number of administrative cases that public security cases account for.

<sup>78</sup> No data could be found to indicate the number of “public security” cases accepted in 1991. However, it was reported in CHINA LAW YEARBOOK 1992 that 7,720 “social order” (zhian) cases were accepted, accounting for 30.08 per cent of all first-instance administrative cases accepted in 1991.

Interviewees explained that the relatively high percentage of “public security” administrative cases simply reflected public security organs’ possession of enormous power affecting a wide range of citizens’ daily activities. Regardless of their fear, some aggrieved parties finally resorted to administrative litigation because they considered their grievances too grave to endure.

Some other evidence corroborates this explanation. According to a survey conducted in 1992, 51 of 90 plaintiffs interviewed said that they filed suits under the

<sup>69</sup> Criminal Procedure Law, *supra* note 40, arts. 61(7), 69(2).

<sup>70</sup> *Id.* art. 64.

<sup>71</sup> Administrative Litigation Law of the People’s Republic of China, promulgated on Apr. 4, 1989 and effective on Oct. 1, 1990.

<sup>72</sup> *Id.* arts. 1–2.

<sup>73</sup> *Id.* art. 54.

<sup>74</sup> See also Chen Ruihua, *supra* note 37, at 671; Chen Xingliang, *supra* note 37, at 695–96.

<sup>75</sup> In China, administrative cases are classified into about 30 categories including public security (gongan), industry and commerce (gongshang), land use (tudi), forestry (linye), city construction (chengjian), customs (haiguan), environmental protection (huanbao), patent (zhuanli), and tax (shuiwu) cases. Public security cases are further categorized as social order (zhian), re-education through labor (laojiao), or others (qita). Interviews with judges in Guangdong, Dec. 1998–Jan. 1999.



Administrative Litigation Law because they felt this was their last resort.<sup>79</sup> In 1993, an abstract painter reportedly sued Beijing's Haidian District Police after three officers beat him for arguing with a bus conductor. The painter won his case. However, the police arrested him two weeks later and charged him with a trumped-up bicycle theft. He was then sent, without trial, to 2 years in a labor camp. When interviewed in 1997, the painter recalled, "My vision was too optimistic. From now on, I will express myself through my art."<sup>80</sup> In fact, police misconduct was considered a "grave" problem by then—Supreme People's Court president Ren Jianxin in December 1996 and he criticized some law-enforcement officials "[who] have taken advantage of legal loop-holes, intentionally misinterpreted the law, distorted evidence and broken the law they enforce."<sup>81</sup>

b. *Limited Access to Lawyers.*—The fee for retaining a lawyer varies in accordance with individual lawyer's experience and competence. On average, the fee can amount to at least 2,000–3,000 yuan (US\$250–\$375) for a case tried by a basic level court and 5,000 yuan (US\$625) for one by an intermediate level court.<sup>82</sup> The average monthly income of an ordinary worker is below 1,000 yuan (US\$125).<sup>83</sup>

Free legal service is available but its effectiveness in administrative litigation is doubtful.<sup>84</sup> Legal aid rules generally require eligible applicants' monthly income to be less than a fixed amount ranging from 200–400 yuan (US\$25–\$50).<sup>85</sup> Few people except those living below the poverty line or those who are unemployed can meet this requirement.<sup>86</sup> Besides, priorities of legal aid are given to criminal defendants facing the death penalty as well as the blind, deaf, dumb, aged, and minors to assist their claim for compensation in personal injury cases.<sup>87</sup> Administrative cases do not seem to have attracted legal aid providers' attention. From its opening in 1995 to January 1999, the Guangzhou Legal Aid Center has only handled two administrative cases.<sup>88</sup> By contrast, within the year of 1998, 700 criminal and economic cases were handled.<sup>89</sup> Legal aid centers in the entire Chongqing handled about 2,400 criminal cases and 3,500 civil cases in 1999. Only about ten cases were administrative cases.<sup>90</sup>

Even if aggrieved parties can afford to retain lawyers, they may encounter difficulties because lawyers are not enthusiastic about handling administrative cases. Unlike economic and civil cases, the amount in dispute in an administrative case is low and thus lawyers cannot charge high fees. Moreover, most lawyers are reluctant to stand up to the government, which has power to decide whether or not a lawyer's license should be renewed.<sup>91</sup>

c. *Interference.*—The majority of interviewees identified interference by administrative organs and the Chinese Communist Party as the greatest difficulty encountered in administrative litigation. Such interference may occur during the entire course of handling an administrative case, but is especially common before the case is accepted. At subsequent stages, judges may be pressured to uphold the administrative act and aggrieved parties and/or courts pressured to have the case withdrawn.

In some administrative cases where public security organs are defendants, the organs have reportedly manipulated the blurred distinction between their dual roles of conducting criminal investigations and imposing administrative sanctions. When these organs intend to bypass the human rights protections provided under the criminal justice system, they often claim that whatever sanctions imposed on suspects are administrative sanctions. When these sanctions are challenged in court through administrative litigation, the public security organs often influence judges

<sup>79</sup> FAZHI DE LIXIANG YU XIANSHI [THE IDEAL AND REALITY OF THE RULE OF LAW] 322 (Gong Xiangrui et al. eds., 1993).

<sup>80</sup> George Wehrfritz and Michael Laris, Rules Are the Law, NEWSWEEK (ATLANTIC EDITION), Sept. 29, 1997, available in LEXIS, News Library, News Group File.

<sup>81</sup> Id.

<sup>82</sup> Interviews in Guangdong, Dec. 1998-Jan. 1999 and Chongqing, Dec. 1999-Jan. 2000.

<sup>83</sup> Id.

<sup>84</sup> For discussion of legal aid practices in China, see generally David Lee, Legal Reform in China: A Role for Nongovernmental Organizations, 25 YALE J. INT'L L. 363 (2000); Benjamin L. Liebman, Legal Aid and Public Interest Law in China, 34 TEX. INT'L L. J. 211 (1999).

<sup>85</sup> Guangzhou Legal Aid Center adopted "340–380 yuan" as the standard. See Pamphlet issued by Guangzhou Legal Aid Center, Jan. 1999 (on file with author).

<sup>86</sup> Interview with Director, Guangzhou Legal Aid Center, Jan. 1999; Interview with Directors, Chongqing Legal Aid Center, Jan. 2000.

<sup>87</sup> See Background: Qualifications for Chinese Citizens to Receive Legal Aid, XINHUA GENERAL NEWS SERVICE, JUNE 16, 2000, available in LEXIS, News Library, News Group File.

<sup>88</sup> Interview with Director, Legal Aid Center in Guangzhou, Jan. 1999.

<sup>89</sup> Id.

<sup>90</sup> Interview with Directors, Legal Aid Center in Chongqing, Jan. 2000.

<sup>91</sup> Interviews in Guangdong, Dec. 1998-Jan. 1999 and Chongqing, Dec. 1999-Jan. 2000.

to reject the cases on the ground that the court lacks jurisdiction because the sanctions are not administrative acts but acts of criminal investigation.<sup>92</sup>

Chinese judges are susceptible to pressure exerted by administrative organs and the Chinese Communist Party because courts' financial arrangements including courts' budgets, judges' salaries and welfare benefits as well as appointment and dismissal of judges are determined by people's governments at corresponding levels, which are ultimately controlled by the local party committees.<sup>93</sup>

### III. The Future of RETL and Concluding Remarks

In light of the legal and human rights problems of RETL, many scholars call for abolition or fundamental reform of RETL.<sup>94</sup> Some of those who support abolition of RETL suggest amending the SAPR to increase the maximum period of administrative detention from 15 days to a month.<sup>95</sup> Offenders of "minor crimes" may be detained for up to a month under the SAPR whereas other offenders may be punished under the Criminal Law, which provides that criminal detention should last from 1 month to 6 months.<sup>96</sup> As there is no gap between these two types of detention, there is no need to have RETL.<sup>97</sup>

If the RETL is not abolished, the system should be fundamentally reformed. The maximum detention period should be reduced from 4 years to one<sup>98</sup> or 2 years.<sup>99</sup> Imposition of these punishments should not be decided by public security organs but by courts whose decisions are subject to appeal.<sup>100</sup> If possible, the system should be incorporated into the Criminal Law by establishing a new type of punishment called "police orders" or "public safety orders" which are similar to community-based orders in western countries.<sup>101</sup>

The reform measures stated in the preceding paragraph, although they would alleviate some of the problems in the current system, would not effectively resolve the human rights problems presented by RETL. Designating courts as the authorities to decide whether or not RETL should be imposed will be an effective reform measure if and only if the courts can make these decisions independently. Although the Chinese courts are undergoing a 5-year reform program, the problem of extra-judicial interference will not be resolved in the near future, because the solution is necessarily linked to both political reform and changes in Chinese legal culture.<sup>102</sup>

The revisions of the Criminal Law and the Criminal Procedure Law marked the continued maturing of Chinese legality to reflect changed social and economic conditions. Yet the current Criminal Procedure Law only offers limited human rights protections, and it remains unknown when the legislation will be completely brought in line with international norms. The recognition of criminal suspects' right to keep silence, expressed in a regulation issued in Liaoning Province, gives hope of a trend toward greater incorporation of international human rights norms into the Chinese criminal justice system.<sup>103</sup> Integration of RETL into the Criminal Law would at

<sup>92</sup> Dong Hao, [Some Thoughts about Reforming Multiple Responsibilities System of Our Country's Judicial Organs, ZHONGGUO FAXUE CHINA'S LEGAL STUDIES], No. 4, 1997, 24, at 26.

<sup>93</sup> For discussion of constraints on judicial autonomy, see Stanley Lubman, *Bird in a Cage: Chinese Law Reform After Twenty Years*, 20 J. INTL. L. BUS. 383, 394-98 (2000); He Weifang, [The Realization of Social Justice Through Judicature: A Look at the Current Situation of Chinese Judges], in [TOWARD A TIME OF RIGHTS: A PERSPECTIVE OF THE CIVIL RIGHTS DEVELOPMENT IN CHINA] 209 (Xia Yong ed., 1995).

<sup>94</sup> See e.g. Shen Fujun, *supra* note 37; Tao Jigang, *supra* note 39, at 12; Ma Kechang, *supra* note 39, at 7-8; Chen Zexian, *supra* note 56; Chen Xingliang, [Dual Tasks for Criminal Revision: Change of Value and Adjustment of Structure], ZHONGWAI FAXUE [PEKING UNIVERSITY LAW JOURNAL], No.1, 1997, 55, at 56-60; Chen Guangzhong and Zhang Jianwei, [The UN's International Covenant on Civil and Political Rights and Our Country's Criminal Litigation], ZHONGGUO FAXUE [CHINA'S LEGAL STUDIES], No. 6, 1998, 98, at 108; Chen Ruihua, *supra* note 37, at 669-73.

<sup>95</sup> See *supra* Part I.B.

<sup>96</sup> Criminal Law, *supra* note 1, art. 42.

<sup>97</sup> See Shen Fujun, *supra* note 37, at 19; Chen Zexian, *supra* note 56, at 36; Chen and Zhang, *supra* note 94, at 108. See also Chen Xingliang, *supra* note 37, at 700.

<sup>98</sup> See Chen and Zhang, *supra* note 94, at 108.

<sup>99</sup> See Chen Zexian, *supra* note 56, at 35.

<sup>100</sup> See Chen and Zhang, *supra* note 94, at 108.

<sup>101</sup> See Ma Kechang, *supra* note 39, at 7-8; JIANFU CHEN, *supra* note 62, at 193; Chen Xingliang, *supra* note 94, at 56-60; and Chen and Zhang, *supra* note 94, at 108.

<sup>102</sup> The Supreme People's Court launched a Five-Year Court Reform Plan in October 1999. See China's Supreme Court Plans Greater Autonomy For Judges, CHINAONLINE, Oct. 26, 1999, available in LEXIS, News Library, News Group File.

<sup>103</sup> See China: New Regulation Sees Introduction of Criminal Suspects' Right to Silence, XINHUA NEWS AGENCY, BBC WORLDWIDE MONITORING, Nov. 22, 2000, available in LEXIS, News Library, News Group File.

least have the advantage of subjecting RETL to human rights protections already provided in the Criminal Procedure Law.

The incorporation of RETL into the Criminal Law ought not obscure the problems that it would continue to present, especially in light of the need to implement even the existing safeguards against official arbitrariness that are contained in the Criminal Procedure Law. After extensive investigations in six selected provinces, autonomous regions and cities, namely, Tianjin, Inner Mongolia, Heilongjiang, Zhejiang, Shaanxi and Hubei, the National People's Congress Standing Committee concluded that the Criminal Procedure Law has not been fully implemented since its revision in 1996. Over-extended detention of criminal suspects and forced confession are still "salient problems" in many parts of the country. Judges, procuratorates, and public security organs restrict defense lawyers' activities by obstructing the lawyers to meet with their clients and to access court files relating to their cases. The National People's Congress Standing Committee attributed this unsatisfactory implementation to law enforcers' "erroneous understanding" of the law. These enforcers regard the law as "too advanced" for China.<sup>104</sup> Against this backdrop, incorporating RETL into the Criminal Law would only subject the system to minimal human rights protections that are only available at the discretion of law enforcers. RETL is such a major anomaly in a legal system that is supposed to be ruled by law, that, the mechanism should be abolished.

I expressed the above views at the Seminar on Punishment of Minor Crimes, which was jointly organized by the Chinese government and the United Nations Office of the High Commissioner for Human Rights in February 2001. Since then, the Chinese government has announced its plan of drafting a law on RETL to improve the name, targets, and implementation mechanisms of RETL.<sup>105</sup> But it appears to have ruled out abolition. Wang Yunsheng, Director of the Ministry of Justice's Bureau of Re-education Through Labor, explained, "For such a populous Nation as China, the [RETL], which aims at stopping those on the verge of committing serious crimes, is an effective one for reducing crime."<sup>106</sup>

While the Chinese government's intent of not abolishing the RETL system is disappointing, its determination of improving the system is welcome. But the government must understand that any reforms that fall short of addressing the problems discussed here will negate its efforts in establishing a rule-of-law-based criminal system.

I thank you again for inviting me to speak today and I look forward to answering any questions you may have.



<sup>104</sup> See Official Admits Detention, Forced Confessions A Major Problem, XINHUA NEWS AGENCY, BBC SUMMARY OF WORLD BROADCASTS, Dec. 30, 2000, available in LEXIS, News Library, News Group File.

<sup>105</sup> See Speed Urged for Judicial System Laws, CHINA DAILY, Dec. 24, 2001; Beijing to Introduce Re-education Through Labor Law This Year, *supra* note 42.

<sup>106</sup> See China Reviews "Re-education Through Labor" System, DEUTSCHE PRESSE-AGENTUR, Feb. 5, 2001, available in LEXIS, News Library, News Group File.