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Abstract

This Article tries to find some practical resolutions for the problematic situation of Chinese defense lawyers. Part I introduces how Chinese laws and regulations provide legal protection for criminal defendants and their defense lawyers, and compares Chinese laws with well-established international standards. Part II focuses on examples of the problems and difficulties faced by Chinese lawyers in their defense work. Part III specifically discusses criminal charges that lawyers face in their practice. Part IV argues that the long-awaited new Chinese Lawyers Law cannot solve all of the problems or wipe away all obstacles they face. Rather, solving those problems requires an integrated and comprehensive approach that combines legislation, improved practice, and the society's efforts at large.

WHEN CHINESE CRIMINAL DEFENSE LAWYERS BECOME THE CRIMINALS

*Yanfei Ran**

INTRODUCTION

As a Chinese lawyer who has practiced law in China for twelve years, I used to be enthusiastic about criminal defense work. After I graduated from law school, I worked as an assistant at one of the district Beijing procuratorate offices[1] and I had a natural calling to criminal law. I enjoyed the challenge of fighting others in court. However, I experienced so many obstacles in my work, and I regretfully gave up criminal defense work after one of my classmates from Peking University School of Law, Chen, was imprisoned for his criminal defense work.

Around the spring of 2001, after learning that Chen was detained for representing a criminal defendant, some of my lawyer-classmates gathered together to discuss how to defend Chen, who is brilliant and a little bit radical. We learned that he was being detained because he had offended two prosecutors who were assigned to his client's corruption case. When those two prosecutors tried to get information from Chen about his client, Chen told them, "I am his lawyer, I can not reveal my client's information to you because I have the privilege not to do so." Outraged by Chen's arrogant attitude, one of the prosecutors told Chen, "Let's just wait and see if you can have your privilege." Five days later, Chen was summoned to the procuratorate's office and was detained for one year.

When we gathered to celebrate Chen's release after his imprisonment, his face was extremely dull and his eyes appeared as though he was still fearful about something. He displayed hand-

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1. "Procuratorate" is another term for a government prosecutor or district attorney.

cuff marks on his wrists. We learned that he was sentenced to one year for "falsification of evidence." He did not appeal because nearly one year had already passed before he was able to learn of his sentence. He told us he was tortured in the detention center and was transferred to a prison hospital after his family members used some "back door" measures to help him. Even in the hospital, he was tied to a bed for most of the day, even though he was not sick or mentally ill. He was so desperate about his environment that he almost tried to commit suicide a few times. Without the nurses' kindness and his own longing to see his one-year-old son and his wife, we would never have seen him again.

I was shocked by Chen's experience. His father-in-law was a high-ranking officer in the Marine Army Force. Chen was born, raised, and educated in Beijing. He had strong and wide connections[2] in Beijing, where networks are sometimes more important than laws. If Chen was not rescued when he met trouble, what could I do?[3]

Chen is only one of many Chinese criminal defense lawyers who have been harassed, intimidated, and prosecuted simply for doing their jobs. Nobody knows how many lawyers have been put through this predicament. Since the lawyer's' system was restored in 1979, criminal defense lawyers have been hindered by all kinds of difficulties and problems in their work.[4] As early as 1997, scholars summarized these issues in a symposium on criminal defense and justice held in Shenzhen.[5] Drawing Chinese defense lawyers out of this predicament has long been the subject of commentary Chinese lawyers and scholars.[6] In 2005, the Standing Committee of the National People's Congress ("NPC")

2. In China, people use the term *guanxi,* which means relationships or connections.

3. I did not dare to request a court decision from Chen and unfortunately I was unable to find any further information about his case through my legal research.

4. *See, e.g.*, Jerome Cohen, *The Plight of China's Criminal Defence Lawyers*, 33 HONG KONG L.J. 231 (2003) (describing the problems faced by China's criminal defense lawyers including difficulty gaining access to detained clients); Ping Yu, *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*, 35 VAND. J. TRANSNAT'L L. 827 (2002).

5. *See Criminal Defense: The Necessary Stanchion to Construe the Building of Justice, Digests in a Symposium on Criminal Defense and Justice*, ZHONGGUO LUSHI [CHINESE LAWYER], Issue 1, 1998 (available only in Chinese).

6. *See, e.g.*, Cohen, *supra* note 4 (analyzing the problems of China's criminal defense system and noting how international pressure can help solve many of them); Ping

conducted an investigation into the matter.[7] As a result, the NPC was pressured to revise the Lawyers Law, which was passed on October 28, 2007.[8] The predicament of criminal defense lawyers also has attracted wide international attention,[9] which undoubtedly will negatively impact the glorious image of the Chinese government in the international community.

Combining my own law practice experience in China, interviews with some Chinese lawyer colleagues, and legal research, this Article tries to find some practical resolutions for the problematic situation of Chinese defense lawyers. Part I introduces how Chinese laws and regulations provide legal protection for criminal defendants and their defense lawyers, and compares Chinese laws with well-established international standards. Part II focuses on examples of the problems and difficulties faced by Chinese lawyers in their defense work. Part III specifically discusses criminal charges that lawyers face in their practice. Part IV argues that the long-awaited new Chinese Lawyers Law cannot solve all of the problems or wipe away all obstacles they face. Rather, solving those problems requires an integrated and comprehensive approach that combines legislation, improved practice, and the society's efforts at large.

Yu, *supra* note 4 (discussing how revisions to China's Criminal Procedure Law actually constituted a step back for defense attorneys).

7. STANDING COMM. NAT'L PEOPLE'S CONG., REPORT OF THE LAW ENFORCEMENT EXAMINATION UNIT ON THE SITUATION OF THE IMPLEMENTATION OF THE LAWYERS LAW, *available at* http://www.acla.org.cn/forum/showflat.php?Cat=&Number=715175&page=11&view=collapsed&sb=5&o=&fpart=1.

8. *See generally China Amends Law to Make Life Easier for Lawyers*, XINHUA NEWS, Oct. 28, 2007, http://news.xinhuanet.com/english/2007-10/28/content_6966548.htm.

9. *See, e.g.*, *Defense Lawyers Turned Defendants: Zhang Jianzhong and the Criminal Prosecution of Defense Lawyers in China* (2003), CONG.-EXEC. COMMISSION ON CHINA, http://www.cecc.gov/pages/news/ZhangCriminalDef.pdf; Manfred Nowak, Comm'n on Human Rights, Econ. and Soc. Council, Mission to China, Civil and Political Rights, Including the Question of Torture and Detention, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. E/CN.4/2006/6/Add.6 (Mar. 10, 2006), *available at* http://www.universalhumanrights index.org/hrsearch/displayDocumentVersions.do?lang=en&docId=813. Additionally, some international press also reported some cases. *See, e.g.*, David Barboza, *Chinese Lawyer Recounts Abduction*, N.Y. TIMES ONLINE, Oct. 3, 2007, http://www.nytimes.com/2007/10/03/world/asia/03china.html; Joseph Kahn, *Lawyer takes on China's 'Unwinnable' Cases*, INT'L HERALD TRIB., Dec. 13, 2005, at 2.

I. *BACKGROUND ON THE RIGHTS OF LAWYERS UNDER CHINESE LAW*

In order to understand the current problems that Chinese lawyers face, it is important to understand the historical development of lawyering in China. After the great pains of the Cultural Revolution, China adopted major economic, political, and legal reforms in 1978[10] to meet Deng Xiaoping's instructions on legalization and the "Four Modernizations."[11] Specifically, after a series of laws were written or revised in 1996 and 1997, China seemingly moved into a new era of jurisprudence and criminal justice that could be understood by western people as the "rule of law" principle.[12] Under these new laws, the rights of criminal suspects and defendants and their lawyers become superficially compatible with the well-established international standards.[13]

A. *Brief History of the Lawyering System in China*

The idea of "no suing" and "suing equals evil" has been the main trend in the traditional Chinese legal culture.[14] "Suing agents" who have the same functions as lawyers have been restrained and prohibited by the government.[15] As a result, a lawyering system did not exist in China until 1906 when Shen Jiaben

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10. *See* Sang Woo Lee, *An Obligation to Act: When the U.S. Voices Concern About China's Criminal Justice System*, 20 TEMP. INT'L & COMP. L.J. 591, 591 (2006).

11. The Four Modernizations refers to the modernization of industry, agriculture, national defense, and science and technology. It was initiated by the first Premier Zhou Enlai in 1954 but was not regarded as one of the main tasks in the new era by the Communist Party of China ("CPC") until 1978. *See* Library of Cong., Fed. Research Div., Country Studies, Area Handbook Series, Glossary—China, http://lcweb2.loc.gov/frd/cs/china/cn_glos.html; *see generally* Shixia, *How Were the "Four Modernizations" Brought Out?*, CPC NEWS, http://cpc.people.com.cn/GB/64156/64157/4418435.html (last visited Feb. 19, 2009) (available only in Chinese).

12. *See generally* Ian Dobinson, *The Criminal Law of the People's Republic of China (1997): Real Change or Rhetoric?*, 11 PAC. RIM L. & POL'Y J. 1 (2002).

13. *See id.* at 19.

14. *See* Gerard J. Clark, *An Introduction to the Legal Profession in China in the Year 2008*, 41 SUFFOLK U. L. REV. 833, 833-34 (2008); Ni Zhu, *A Case Study of Legal Transplant: The Possibility of Efficient Breach in China*, 36 GEO. J. INT'L L. 1145, 1151 (2005).

15. Wang Liming, *Wo Guo Lushi Zhidu De Fazhan* [*The Development of Lawyers' System in Our Country*], CHINESE LAWYERS' WEB, Dec. 27, 2006, at *1, http://acla.org.cn/pages/2006-12-27/s37774.html (available only in Chinese) (describing the difficulty of obtaining an attorney in China); *see generally* Tang Yan, *Zhong Guo Lushi Zhedu de Fazhan* [*The Development of Chinese Lawyers' System*], JINAN BROADCAST TELEVISION U. WEB, July 3, 2006, http://www.jnrtvu.com.cn/show.aspx?id=1029&cid=152 (available only in Chinese) (tracing the development of lawyers' roles in society throughout Chinese history).

and others made the first attempt to edit the Great *Qing* Dynasty's Criminal and Civil Procedure Law, and adopt a Western-style legal system.[16] However, these revisions were rejected because they did not comport with Chinese reality. After 1949 when the Communist Party of China ("CPC") took power and abolished the legal system of Guomingdang,[17] the legal system followed the practice of the former Soviet Union, which incorporated all lawyers as part of the state.[18] In June 1950, the People's Court Organizing Principles provided defendants the rights to defend themselves or to retain others to defend them.[19] The 1954 Constitution Law clearly stipulated that defendants had a right to a defense and the Court Organizing Law also entitled defendants to defend themselves or entrust lawyers to defend them.[20] In 1956, the State Council approved a proposal submitted by the Ministry of Justice to establish and organize the legal profession. In 1957, there were 2572 full-time lawyers and 350 part-time lawyers in the entire country.[21] Unfortunately, soon after, the Anti-rightism Campaign of 1957 brought tragedy to that first generation of lawyers.[22] Most lawyers were wrongly accused as being part of the "Right Wing" and were put into jail because they defended criminal suspects.[23] From 1957 until the conclusion of the Chinese Cultural Revolution in 1979, the entire legal system completely collapsed. Numerous mass organizers without any legal background arbitrarily detained, tortured, and sentenced anybody outside the rule of law.[24] The entire nation was a disaster without order or law.

When Deng Xiaoping took Chairman Mao's position after Mao's death, the Third Plenary Session of the Eleventh CPC in December 1978 pledged:

> In order to safeguard people's democracy, it is imperative to

16. *See* Wang Liming, *supra* note 15, at *3.

17. *See* XIAN FA pmbl. (2004) (P.R.C.).

18. *See* Fu Hualing, *When Lawyers Are Prosecuted . . . The Struggle of a Profession in Transition*, 2-3 (May 2006), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=956500.

19. *See* Wang Liming, *supra* note 15, at *3.

20. *See* XIAN FA art. 76 (1954) (P.R.C.).

21. *See* Wang Liming, *supra* note 15, at *3.

22. *See* Joseph W. Dellapenna, *The Role of Legal Rhetoric in the Failure of Democratic Change in China*, 2 BUFF. J. INT'L L. 231, 246 (1995).

23. *See* Wang Liming, *supra* note 15, at *3.

24. *See id.*

> strengthen the socialist legal system so that democracy is systemized and written into law in such a way as to ensure the stability, continuity and full authority of this democratic system and these laws; there must be laws for people to follow, these laws must be observed, their enforcement must be strict and law breakers must be dealt with. From now on, legislative work should have an important position on the agenda of the National People's Congress and its Standing Committee. Procuratorial and judicial organizations must maintain their independence as is appropriate; they must faithfully abide by the laws, rules and regulations, serve the people's interests, keep to the facts; guarantee the equality of all people before the people's laws and deny anyone the privilege of being above the law.[25]

In order to have "laws for people to follow," the NPC and its Standing Committee passed several important laws in 1979. This included the Criminal Procedure Law ("1979 CPL"), which provided the legal basis to restore the lawyers' system.[26] The 1979 CPL defined the legal rights of lawyers through the State's law: lawyers have the right to get involved in criminal cases as a defender and to safeguard the legal rights of criminal defendants.[27] Defenders have a duty to provide materials and arguments that can prove a defendant's innocence, decrease the severity of the charges, or reduce the defendant's criminal responsibilities.[28] Lawyers may check all files, obtain information about the cases, and meet or communicate with the detained defendants during the court trial period.[29]

Early in 1980, Deng Xiaoping emphasized the need to expand the number of lawyers and implement a legal system.[30] In August 1980, the Interim Regulations on Lawyers defined lawyers—similar to the 1950s—as a "state legal worker."[31] Lawyers

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25. *See* Communique of the Third Plenary Session of the Eleventh Central Comm. of the Communist Party of China, PEKING REV., Dec. 26, 1978, at 14 [hereinafter 1978 Plenary Session].

26. *See* Chin Kim, *Introduction* to THE CRIMINAL PROCEDURE CODE OF THE PEOPLE'S REPUBLIC OF CHINA AND RELATED DOCUMENTS 1, 5 (Chin Kim trans., 1985).

27. CRIMINAL PROCEDURE LAW arts. 26-30 (promulgated by the Standing Comm. Nat'l People's Cong., July 7, 1979, effective Jan. 1, 1980), 1 P.R.C. LAWS 120, 125 [hereinafter 1979 CPL].

28. *Id.* at art. 28, 1 P.R.C. LAWS at 125.

29. *Id.* at art. 29, 1 P.R.C. LAWS at 125.

30. *See* Tang Yan, *supra* note 15, at *3.

31. Interim Regulations on Lawyers art. 1 (promulgated by Order No. 5 of the

played a role as one of the triangular parts in the state legal system (prosecutor, defender, and adjudicator) necessary to maintain society. Ironically, in 1983, during China's "Fierce Striking" campaign, some law firms became branch agencies of the public security bureaus or the procuratorates and some lawyers even took on the role of policemen.[32] It is no wonder that lawyers became easy targets for corruption and cover-up charges, accusations previously pressed only on state servants.

Pursuant to the 1979 CPL and Interim Regulations, lawyers had the right to examine all court files and documents, obtain information about the cases, and meet or communicate with the detained defendants during the court trial period.[33] Lawyers also had the right to investigate, and the agencies and individuals who were related to the cases were obligated to support lawyers' work.[34] Legal practice was gradually incorporated into a regulatory and systematic rule of law.[35]

The year 1996 was a milestone for Chinese legal reform, especially for Chinese criminal defendants and their lawyers. On March 17, 1996, the NPC revised the 1979 CPL to include many Western standards.[36] On May 15, 1996, the Lawyers Law was passed ("1996 Lawyers Law"), and the definition of lawyers was changed from "state legal workers" into "legal practitioners . . . [who] provide legal services."[37] Heralded by Chinese lawyers, these two laws seemingly symbolized the beginning of a new era for Chinese criminal defense lawyers.

Standing Comm. of the Fifth Nat'l People's Cong., Aug. 26, 1980, effective Jan. 1, 1982; repealed by the 1996 Lawyers Law), 1 P.R.C. LAWS at 177, 177 [hereinafter Interim Regulations].

32. *See* Liu Guiming, *Pain with Joy: Gu Peidong, Gu Yongzhong and Li Chun Discussing Chinese Lawyers*, ZHONGGUO LUSHI [CHINESE LAWYER], Issue 1, 2002, at 42-48 (available only in Chinese).

33. 1979 CPL, art. 29, 1 P.R.C. LAWS at 125.

34. *See* Interim Regulations on Lawyers, art. 7, 1 P.R.C. LAWS at 178.

35. *See generally* Tang Yan, *supra* note 15 (detailing the developments of modern Chinese legal regulations).

36. *See* Criminal Procedure Law (revised in accordance with the Decision on Revising the Criminal Procedure Law by the Eighth Nat'l People's Cong., Mar. 17, 1996, effective Jan. 1, 1997) 8 P.R.C. LAWS at 63 [hereinafter 1996 CPL].

37. Law on Lawyers art. 2 (adopted by the Eighth Nat'l People's Cong. and promulgated by Order No. 67 of the President, May 15, 1996, effective Jan. 1, 1997), 8 P.R.C. LAWS at 161, 161-62 [hereinafter 1996 Lawyers Law].

B. *Chinese Laws Regarding the Rights of Criminal Suspects and Their Lawyers*

1. Rights of Criminal Suspects and Defendants

The right to a defense is secured by the Constitution Law,[38] the 1979 CPL, and the 1996 CPL.[39] Under the 1996 CPL, criminal suspects may receive legal services from lawyers "[a]fter the criminal suspect is interrogated by an interrogation organ for the first time or from the day on which compulsory measures are adopted against him . . . ."[40] Criminal suspects and defendants may defend themselves or entrust lawyers or others to defend them from the date on which the case is transferred for prosecutorial examination.[41] If defendants cannot afford a lawyer due to financial difficulties or other reasons, the court may designate a lawyer for them.[42] It is clear that no person shall be found guilty without being adjudicated as such by a court according to laws.[43] Although criminal suspects do not have a right to remain silent in China, they may explain that they are innocent and have the right to refuse to answer any irrelevant questions.[44]

2. Rights of Defense Lawyers

Compared to the 1979 CPL, the 1996 CPL (and the 1996 Lawyers Law) better protects the rights of criminal suspects and defendants.[45] Under the 1979 CPL, lawyers could only participate in criminal cases at the final stage, the trial period.[46] After the 1996 CPL and the Lawyers Law went into effect, defense lawyers could render their services at the first stages of the criminal case, immediately after the first interrogation or after compulsory measures were applied against the defendant. At this point, defense lawyers can be appointed to meet with defendants, pro-

38. *See* XIAN FA art. 125 (2004) (P.R.C.).
39. *See* 1996 CPL, art. 11, 8 P.R.C. LAWS at 66.
40. *Id.* art. 96, 8 P.R.C. LAWS at 85.
41. *Id.* arts. 32-33, 8 P.R.C. LAWS at 70.
42. *Id.* art. 34, 8 P.R.C. LAWS at 70.
43. *See id.* art. 12, 8 P.R.C. LAWS at 66.
44. *See id.* art. 93, 8 P.R.C. LAWS at 85.
45. *Compare* 1979 CPL, arts. 26-30, 1 P.R.C. LAWS at 125, *with* 1996 CPL, arts. 32-41, 8 P.R.C. LAWS at 70-72.
46. *See* JONATHAN HECHT, LAWYERS COMM. FOR HUMAN RIGHTS, OPENING TO REFORM?: AN ANALYSIS OF CHINA'S REVISED CRIMINAL PROCEDURE LAW 36 (1996).

vide legal advice, and file petitions and complaints on the suspect's behalf.[47] Except in cases involving state secrets, the investigation agencies' approval to appoint a defense lawyer is not required.[48] For arrested or detained defendants, their lawyers can apply for a release under guaranty pending trial.[49] From the day that the procuratorate begins to examine a case for prosecution, defense lawyers can consult, extract, and copy legal documents and technical evaluation materials, and can meet and correspond with criminal suspects in custody.[50] At the trial stage, defense lawyers can extract and copy materials pertaining to the facts of the charged crime(s).[51]

With the consent of witnesses or other agencies and individuals concerned, lawyers can collect related information from them, or lawyers can also apply to the procuratorate or the court to collect and obtain evidence, or request the court to inform the witnesses to appear in court and give testimony.[52]

However, the 1996 Lawyers Law is not a law that protects lawyers. Rather, it is a law to limit or even restrict the rights of lawyers. The 1996 Lawyers Law contains 53 articles.[53] Among those 53 articles, five articles provide that "lawyers must . . ."; eight articles state that "lawyers shall not . . ."; eleven articles read that "lawyers shall . . ."; and fifteen suggest that "lawyers must or shall not . . ."[54] More than seventy-three percent of those articles limit or restrict lawyers' rights. In this law that is specifically meant to govern lawyers, only nine articles say that "lawyers may" or "lawyers have the right. . . " Even among those limited nine articles, some articles simply state basic principles without any practical meaning since there are no other detailed regulations to implement these rights. For example, Article 3 states that "[l]awful practice by lawyers shall be protected by law."[55] However, if this provision is violated, lawyers have no effective way to seek remedy or penalize the violators. As a result,

47. *See generally* 1996 Lawyers Law, art. 25(3), 8 P.R.C. LAWS at 165.
48. *See id.*
49. *See id.*
50. *See* 1996 CPL, art. 36, 8 P.R.C. LAWS at 71.
51. *Id.*
52. *See id.* art. 37, 8 P.R.C. LAWS at 71; *see also* 1996 Lawyers Law, art. 31, 8 P.R.C. LAWS at 166.
53. *See generally* 1996 Lawyers Law, 8 P.R.C. LAWS at 161.
54. *See id.*
55. *Id.* art. 3, 8 P.R.C. LAWS at 162.

defense lawyers have encountered many problems and obstacles during their practice.[56]

The revised 2007 version of the Lawyers Law ("2007 Lawyers Law")[57] entitles criminal defense lawyers to meet with their clients as early as the investigation stage without being monitored and without getting approval from the authorities even for state secrets cases.[58] From the day that the procuratorate begins to examine a case for prosecution, defense lawyers have the right to consult, extract, and duplicate legal documents and materials related to their cases.[59] The 2007 Lawyers Law also deleted the requirement that lawyers may conduct an investigation "with the consent of relevant [agencies] and individuals."[60] Now, they may collect evidence either by requesting it from the procuratorate or the court, or by their own investigation, regardless of whether the investigated groups or individuals agree.[61] Additionally, lawyers enjoy immunity for their statements and arguments in court.[62]

C. *Gaps Between the International Standards and Chinese Laws*

Even before the 2007 Lawyers Law went into effect, on the surface, there was only a small gap between Chinese legal protection of criminal defendants' rights and well-established international standards set by international covenants and documents.[63]

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56. *See infra* Part II.

57. In 2001, the Lawyers Law was amended, and in 2007, the Lawyers Law was again heavily revised. *See* Lawyers Law (promulgated by Order No. 76 of the President, Oct. 28, 2007, effective June 1, 2008) [hereinafter 2007 Lawyers Law].

58. *See id.* art. 33.

59. *See id.* art. 34.

60. *Compare* 1996 Lawyers Law art. 31, 8 P.R.C. LAWS at 166, *with* 2007 Lawyers Law art. 33.

61. *See* 2007 Lawyers Law art. 35.

62. *See id.* art. 37.

63. Those international standards are established by various United Nations declaration and covenants, including Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter Universal Declaration]; International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), at 49, U.N. GAOR, 21st Sess., Supp. No. 16, UN Doc. A/6316 (Dec. 16, 1966) [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), at 59, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316, 999 U.N.T.S. 302 (Dec. 16, 1966); Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, G.A. Res. 43/173, Annex, 43 U.N. GAOR, Supp. No. 49, U.N. Doc. A/43/49 (Dec. 9, 1988); Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res.

International law protects the right not to be arbitrarily arrested or detained,[64] the right to have prompt access to a lawyer after arrest,[65] the right to have a lawyer to defend them in all stages of criminal proceedings,[66] the right to receive compensation for unlawful arrest or detention or conviction,[67] the presumption of innocence,[68] the right to a fair and public hearing,[69] the right to be tried without undue delay,[70] and the defendant's right to communicate and consult with legal counsel.[71] All these above-mentioned basic rights are also protected in some degree under

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40/34, Annex, U.N. GAOR, 40th Sess., 96th plen. mtg., Supp. No. 53, U.N. Doc. A/RES/40/34 (Nov. 29, 1985). Specifically, lawyers' rights were proclaimed in the Basic Principles on the Role of Lawyers, Eighth U.N. Congress on the Prevention of Crime and the Treatment of Offenders, Aug. 27–Sep. 7, 1990, U.N. Doc. A/CONF.144/28/Rev.1 [hereinafter Basic Principles for Lawyers].

64. *See* ICCPR, *supra* note 63, art. 9.1; Universal Declaration, *supra* note 63, art. 9; *see also* XIAN FA arts. 37(2)-(3) (2004) (P.R.C.) ("No citizen may be arrested except with the approval or by decision of a people's procuratorate or by decision of a people's court . . . . Unlawful deprivation or restriction of citizens' personal freedom by detention or other means is prohibited . . . .").

65. *See* Basic Principles for Lawyers, *supra* note 63, art. 7; *see also supra* note 40.

66. *See* Basic Principles for Lawyers, *supra* note 63, art. 1; *see also* 1996 CPL arts. 36, 96, 8 P.R.C. LAWS at 71, 85.

67. *See* ICCPR, *supra* note 63, arts. 9(5), 14(6); Universal Declaration, *supra* note 63, art. 8; *see also* XIAN FA art. 41(3) (2004) (P.R.C.).

68. *See* ICCPR, *supra* note 63, art. 14(2); Standard Minimum Rules for the Treatment of Prisoners, 84(2), adopted Aug. 30, 1995 by the First U.N. Congress on the Prevention of Crime and the Treatment of Offenders, E.S.C. Res. 663C, Annex I, at 11, U.N. ESCOR, 24th Sess., Supp. No. 1, U.N. Doc. A/CONF/611 (July 31, 1957), *amended by* E.S.C. Res. 2076, at 35, U.N. ESCOR, 32nd Sess., Supp. No. 1, U.N. Doc. E/5988 (May 13, 1977); Universal Declaration, *supra* note 63, art. 11; *see also* 1996 CPL art. 12, 8 P.R.C. LAWS at 66. For a nuanced discussion of the complicated role of the presumption of innocence in Chinese criminal jurisprudence prior to the 1996 CPL, see Timothy A. Gelatt, *The People's Republic of China and The Presumption of Innocence*, 73 J. CRIM. L. & CRIMINOLOGY 259 (1982).

69. *See* ICCPR, *supra* note 63, art. 14(1); *see also* 1996 CPL art. 5, 8 P.R.C. LAWS at 65 ("The People's Courts shall exercise judicial power independently in accordance with law and the People's Procuratorates shall exercise [prosecutorial] power independently and in accordance with law, and they shall be free from interference by any administrative organ, public organization or individual."); 1996 CPL art. 11, 8 P.R.C. LAWS at 66 ("Cases in the People's Courts shall be heard in public, unless otherwise provided by this Law. A defendant shall have the right to defence, and the People's Courts shall have the duty to guarantee his defence.").

70. *See* ICCPR, *supra* note 63, arts. 9(3)-(4). The 1996 Criminal Procedure Law ("CPL") establishes different time limits for the investigation organs to collect evidence, the procuratorate to prepare the indictment, and the court to hold a trial. *See* 1996 CPL art. 69, 8 P.R.C. LAWS at 78; *see also* Daphne Huang, *The Right to a Fair Trial in China*, 7 PAC. RIM L. & POL'Y J. 171, 180-81 (1998).

71. *See* Basic Principles for Lawyers, *supra* note 63, art. 8; ICCPR, *supra* note 63, art. 14(3)(b); *see also* 1996 CPL arts. 36, 96, 8 P.R.C. LAWS at 71, 85.

Chinese laws.[72] However, even the more progressive 2007 Lawyers Law lags behind the international standards as delineated by the Basic Principles on the Role of Lawyers.

1. Access to Lawyers and Legal Services

All persons are entitled to get assistance from the lawyer(s) of their choice and have legal representation at all stages of a prosecution.[73] The public shall be informed about their rights and the important role of lawyers in protecting their fundamental freedoms.[74] All persons arrested or detained, with or without criminal charges, shall have prompt access to a lawyer,[75] and "shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception, or censorship and in full confidentiality."[76]

There was no provision to protect the rights of lawyers to meet criminal clients in the 1996 Lawyers Law.[77] To address lawyers' dissatisfaction and frustration over the difficulty of accessing their clients, the 2007 Lawyers Law reiterates a lawyer's' right to meet their criminal clients as first set by the 1996 CPL and its Implementation Provisions.[78] The 2007 Lawyers Law provides:

> Since the date when the criminal suspect has been interrogated for the first time by the investigation organ or when compulsory measures have been imposed on the criminal suspect, a lawyer under entrustment, by producing his lawyer's practising certificate, a proof of the law firm as well as a Letter

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72. *See supra* notes 64-71 and accompanying text.

73. *See* Basic Principles for Lawyers, *supra* note 63, arts. 1, 7.

74. *See id.* art. 4.

75. The defendant must be able to access his lawyer no later than forty-eight hours from the time of arrest or detention. *See id.* art. 7.

76. *Id.* art. 8. Such consultation may be within sight, but not within earshot of law enforcement officials. *See id.*

77. The 1996 Lawyers Law only says that "a lawyer may . . . accept engagement by a criminal suspect in a criminal case to provide him with legal advice . . . ." 1996 Lawyers Law art. 25(3), 8 P.R.C. LAWS at 165.

78. *See* Rules of the Sup. People's Ct. et al. on the Enforcement of the Criminal Procedure Law art. 11 (promulgated by the Sup. People's Ct. and Supreme People's Procuratorate, the Ministry of Public Security, Ministry of Nat'l Security, Ministry of Justice, the Legislative Affairs Commission of the Standing Comm. Nat'l People's Cong., Jan. 19, 1998), *available at* iSINOLAW [hereinafter CPL Implementation Provisions].

> of Entrustment, or a letter of legal aid, shall have the right to interview a criminal suspect or defendant and get to know with the circumstances of the relevant case. A lawyer interviewing a criminal suspect or defendant shall not be subject to be monitored.[79]

This provision is a departure from the 1996 CPL and its Implementation Provisions, which contained an approval requirement thereby restricting persons from receiving assistance from their chosen lawyers.[80] Under the 2007 Lawyers Law, lawyers need not seek government approval to meet their clients for state secrets cases, nor do they need to wait for interrogation organs to make arrangements. Although their meeting shall not be monitored, there is a question whether their meetings could be recorded by video cameras.

Obviously, the 2007 Lawyers Law conflicts with the 1996 CPL. Although arguably the new law supersedes the older if there are any conflicts, the 1996 CPL should be changed to harmonize with the 2007 Lawyers Law.[81] How will the conflict in that gap before the 1996 CPL is revised be reconciled, and when can that be done?

Additionally, despite the fact that the Implementation Provisions clearly provide that lawyers need not get approval in non-state secret cases, in reality, the interrogation organs ignore those provisions and intentionally prevent lawyers from meeting with their detained clients. Nie Jianhua, the vice director of the Office of the Procuratorate Indictment in the Supreme People's Procuratorate, admits that "our regulations on protecting law-

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79. 2007 Lawyers Law art. 33.

80. Under the 1996 CPL, if a case involves state secrets, the criminal suspect must obtain approval to appoint a lawyer. If the approved lawyer wants to meet the client, the lawyer must also seek approval. The interrogation organs cannot refuse the approval by excuse of needing to keep secrets in the interrogation period. *See* CPL Implementation Provisions, *supra* note 78, art. 11. When lawyers request to meet their clients, the arrangement shall be made within forty-eight hours. *Id.* For complicated cases in which more than two people are involved, such as organized crime, underworld gangs and terrorist activities, the meeting shall be made within five days. *Id.*

81. Amending the 1996 CPL has been among plans of the Standing Committee of National People's Congress. *See generally* Lin Shiyu, *Xin Lu Shi Fa Gei Jian Cha Ji Guan Dai Lai Le Shen Me?* [*What Does the New Lawyers Law Bring to the Procuratorate?*] (available only in Chinese). Experts and scholars believe this is a chance to improve the implementation of laws and the quality of prosecutors. *See generally* Procuratorial Daily, Nov. 7, 2007, *available at* http://www.jcrb.com/n1/jcrb1466/ca651326.htm (available only in Chinese).

yers' rights have been relatively perfect, the next step is how to implement them."[82]

Furthermore, the 2007 Lawyers Law only stipulates that lawyers have the right to meet criminal clients after the first interrogation or after clients are fist imposed by compulsory measures. But defining "after" can be tricky. Are lawyers able to meet with their clients with adequate opportunities or time?

2. The Right to Begin or Continue Practicing Law on the Grounds of any Status

There shall be no discrimination against a person with respect to entry into or continued practice within the legal profession on the grounds of race, color, sex, ethnic origin, religion, political or other opinion, or economic status.[83] However, the 2007 Lawyers Law clearly stipulates that the first condition to practicing law is to uphold China's Constitution.[84] There is nothing wrong with requiring lawyers to uphold their own Constitution. However, the problem is that according to the Constitution, Chinese citizens shall uphold the one party (Chinese Communist Party) leadership system.[85] If anyone dares to have any different political opinions regarding the one party system, he or she will definitely be barred from entering into the legal profession. For example, authorities refused to give Chen Yongmiao a lawyer license because "such a person's thinking is active and full of heresy (*Si Xiang Huo Yue, Chong Man Yi Duan*)."[86] Zhuang Daohe cannot get his lawyer's license because he participated in the June 1989 Tiananmen Incidents.[87]

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82. *See* Lin Shiyu, *supra* note 81.

83. *See* Basic Principles for Lawyers, *supra* note 63, art. 10.

84. 2007 Lawyers Law art. 3.

85. *See* XIAN FA pmbl. (2004) (P.R.C.).

> Both the victory of China's new-democratic revolution and the successes of its socialist cause have been achieved by the Chinese people of all nationalities under the leadership of the Communist Party of China . . . . The system of multi-party cooperation and political consultation led by the Communist Party of China will exist and develop in China for a long time to come.

See id.; *see also* Stephen L. McPherson, *Crossing the River by Feeling the Stones: The Path to Judicial Independence in China*, 26 PENN ST. INT'L L. REV. 787, 795-96 (2008).

86. *See* Zhao Guojun, *An Investigation Report on the Living Status of Rights Protection Lawyers in China*, ZHONG GUO LU SHI GUAN CHA WANG [CHINESE LAWYERS OBSERVING WEB], http://blog.sina.com.cn/s/blog_56bb2d630100a8mi.html (available only in Chinese).

87. *See id.*

3. Maintaining the Honor and Dignity of the Legal Profession

According to international standards, attorneys "shall at all times maintain the honour and dignity of their profession as essential agents of the administration of justice"[88] and "shall always loyally respect the interests of their clients."[89] The 2007 Lawyers Law has a similar provision: Chinese lawyers shall safeguard the lawful rights and interests of their clients and shall maintain the equity and justice of the society.[90] However, without strong provisions to protect lawyers, it is questionable whether lawyers can really maintain the honor and dignity of their profession.

4. Upholding Human Rights and Acting Freely and Diligently

According to international standards:

> [I]n protecting the rights of their clients and in promoting the cause of justice, [lawyers] shall seek to uphold human rights and fundamental freedoms recognized by national and international law and shall at all times act freely and diligently in accordance with the law and recognized standards and ethics of the legal profession.[91]

However, since the Chinese government does not strongly protect basic human rights and fundamental freedoms for Chinese citizens,[92] the 2007 Lawyers Law does not mention human rights at all.

5. Performing all Professional Functions Freely

According to international standards, lawyers shall be ensured of being "able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference[,]" not to suffer or "be threatened with prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics."[93] The 2007 Lawyers Law only provides that

88. Basic Principles for Lawyers, *supra* note 63, art. 12.

89. *Id.* art. 15.

90. 2007 Lawyers Law arts. 2, 30.

91. Basic Principles for Lawyers, *supra* note 63, art. 14.

92. *See generally* BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES—CHINA (2006), *available at* http://www.state.gov/g/drl/rls/hrrpt/2005/61605.htm [hereinafter CHINA COUNTRY REPORT].

93. Basic Principles for Lawyers, *supra* note 63, art. 16.

"lawful practice by lawyers shall be protected by law" and "no organization or individual may infringe upon the legitimate rights and interests of lawyers."[94] There is no remedy for lawyers to seek if any organizations or individuals violate lawyers' rights. This should raise concerns, especially considering that in recent years, a number of lawyers have been intimidated, hindered, and harassed by authorities.

6. A Lawyer's Right to Immunity for Statements Made in Good Faith

International standards allow attorneys "civil and penal immunity for relevant statements made in good faith . . . before a court, tribunal or other legal or administrative authority."[95] This right was absent in the 1996 Lawyers Law.[96] The 2007 Lawyers Law states that "[t]he liability in respect of the opinion of representation or defense submitted by the lawyer in court shall not be subject to investigation."[97] However this provision does not apply to "the endangerment to national security, malicious defamation to others, or serious disruption of the court order."[98]

This provision has limitations and defects. Firstly, defense lawyers do run the risk of being detained for representing clients, even in non-criminal cases.[99] Secondly, although lawyers have immunity for their statements in court, it is unclear whether lawyers can still be sanctioned for statements made at the investigation stage or at the prosecution stage. Currently, because defense lawyers can provide only very limited legal services at the interrogation stage, lawyers do not run much risk of government interference and sanctions. At the prosecution stage, although lawyers begin to actively represent their clients

94. 2007 Lawyers Law art. 3.

95. Basic Principles for Lawyers, *supra* note 63, art. 20.

96. The former version of the Lawyers Law only principally provided that "[i]n practice activities, a lawyer's right of the person shall not be violated." 1996 Lawyers Law art. 32, 8 P.R.C. LAWS at 166.

97. 2007 Lawyers Law art. 37.

98. *Id.*

99. For example, Zhu Jiuhu, a counsel for private investors who owned numerous small oil and natural gas fields in an administrative suit to protect their rights and interests on their invested oilfields in northern Shaanxi Province, was detained with some of his clients in May 2005 for suspicions of "unlawful assembly" and "disrupting social order." *See* HOWARD W. FRENCH, *In China, Whose Oil Is It?, Property-rights Suit Challenges Seizures By the State,* INT'L HERALD TRIB., July 19, 2005, at Finance 3, *available at* http://www.iht.com/articles/2005/07/18/business/china.php.

and may express their arguments and opinions to prosecutors, defense attorneys only have limited information and prosecutors do not pay much attention to the work of defense lawyers. Paradoxically, if the law or law enforcement officers allowed defense lawyers to be more involved in criminal representation, defense lawyers would increase their exposure of being found criminally responsible for their actions and statements. Therefore, the rights under the 2007 Lawyers Law are not enough to protect the defense attorneys.

Finally, since no Chinese laws or regulations define what actions constitute endangering "state security," "endangering state security" is a catch-all crime that could potentially include any possible crime that does not precisely fit another charge, especially in politically sensitive cases. Therefore, many Chinese citizens are detained and sentenced to several years in the prison just because they published articles that criticized Chinese authorities, and they are charged for various crimes under the general category of "endangering state security."[100] Will Chinese lawyers face the same fate if they make statements in court that authorities do not like?

7. The Right to Access Appropriate Information, Files, and Documents

Government authorities shall "ensure lawyers access to appropriate information, files and documents . . . in sufficient time to enable lawyers to provide effective legal assistance to their clients."[101] Access should be provided at the "earliest appropriate time."[102] The 2007 Lawyers Law remains silent on whether a lawyer has the right to review files at the interrogation stage. However, at the prosecution stage, "Lawyers have right to review, extract and duplicate the litigation documents and materials pertaining to the current case."[103] The terms "litigation documents"

100. *See, e.g.*, David Lague, *China Frees Journalist Jailed on Spy Charges*, INT'L HERALD TRIB., Feb. 5, 2008, http://www.iht.com/articles/2008/02/05/asia/reporter.php; Jim Yardley, *China Gets a Rebuke From Rights Activists*, INT'L HERALD TRIB., Aug. 8, 2007, at 1, *available at* http://www.iht.com/articles/2007/08/07/asia/china.php ("[T]he Committee to Protect Journalists, a New York-based advocacy group, called Tuesday for the release of 29 domestic reporters currently imprisoned in China as well as greater press freedom for foreign and Chinese journalists.").

101. Basic Principles for Lawyers, *supra* note 63, art. 21.

102. *Id.*

103. 2007 Lawyers Law art. 34.

and "materials pertaining to the current case" have not been defined.

Furthermore, how are these "litigation documents and materials pertaining to the current case" different from "the judicial documents pertaining to the current case and the technical verification materials" provided in the 1996 CPL?[104] Although the 1996 CPL does not define "judicial documents" and "technical verification materials," the Supreme People's Procuratorate defined these terms in the following manner:

> [Judicial] documents shall refer to the procedural documents made for placing a case on file, taking compulsory measures and investigation measures, and instituting review and prosecution, including, but without limitation to, the paper of decision for placing a case on file, detention warrant, written decision of approving an arrest, written decision of arrest, arrest warrant, search warrant, letter of proposal for prosecution.
>
> The technical expertise materials shall mean the documents recording the details of expert evaluation and expert's conclusion formed in the process that the qualified persons authenticate the persons, articles and other relevant evidences and materials, including, but without limitation to, medicolegal expertise, authentication of judicial psychiatry, technical expertise of material evidences.[105]

Will the terms "litigation documents" and "materials pertaining to the current case" be defined in the same way? If so, how will those provisions be implemented?

The 2007 Lawyers Law provides that during the trial stage, lawyers have the "right to inspect, copy or duplicate materials on litigation instruments and case files related to the case."[106] Notably, the language in the prior version of the Lawyers Law reads somewhat differently; the 1996 Lawyers Law allowed rights over "the material of the facts of the crime accused in the current case."[107] What is the difference between these two expressions? What does "materials on litigation instruments and case files re-

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104. 1996 CPL art. 36, 8 P.R.C. LAWS at 71.

105. Criminal Procedure for the People's Procuratorate art. 319 (adopted by the Eighth Procuratorial Committee of the Supreme People's Procuratorate, Jan. 15, 1997; *amended by* the Ninth Procuratorial Committee of the Supreme People's Procuratorate, Dec. 16, 1998; revised Sept. 21, 1999), *available at* iSINOLAW [hereinafter Procuratorate's Rules].

106. 2007 Lawyers Law art. 34.

107. 1996 CPL art. 36, 8 P.R.C. LAWS at 71.

lated to the case" mean? Does it mean all the materials that the procuratorate forwards to the court? What kind of materials must the procuratorate forward to the court, and who will decide that? Will the Supreme People's Procuratorate limit the necessary materials to only include the bill of indictment, a list of evidence, lists of witnesses, and copies of physical evidence or pictures that may prove a defendant's guilt to a court?[108]

The 2007 Lawyers Law went into effect on June 1, 2008. Hopefully the Criminal Procedure Law and the Criminal Law will be revised soon in order to be harmonious with the 2007 Lawyers Law and guarantee lawyers the right to immunity for statements,[109] rights to access files and documents,[110] and rights to keep clients' secrets confidential.[111] As for the right to effectively represent a client without fear of reprisal, and the right to perform their professional functions without intimidation, hindrances, harassment, improper interference, or legal sanctions,[112] there is still a long way to go.

II. *PROBLEMS AND DIFFICULTIES DEFENSE LAWYERS FACE*

Having "laws for people to follow" (*You Fa Ke Yi*) is just the first step for China to realize its goal to be a country with a rule of law. Since China now has some laws for people to follow, does China really observe laws (*You Fa Bi Yi*), implement laws strictly (*Zhi Fa Bi Yan*), and prosecute those who violate laws (*Wei Fa Bi Jiu*)?[113] Lawyers in China have a lot to say on this subject.

One famous Beijing-based lawyer summarized the common opinions of lawyers in China:

> Lawyers defend bad men who are disliked by people; Lawyers are in opposition to *Gongjianfa*[114]—hinders them; No good result comes from lawyers' defense work—not satisfied by the

108. *See* Procuratorate's Rules, *supra* note 105, art. 282.

109. *See* 2007 Lawyers Law art. 37; *see also* Basic Principles for Lawyers, *supra* note 63, art. 20.

110. *See* 2007 Lawyers Law art. 34; *see also* 1996 CPL art. 36, 8 P.R.C. LAWS at 71; Basic Principles for Lawyers, *supra* note 63, art. 21.

111. *See* 2007 Lawyers Law art. 38; *see also* 1996 Lawyers Law art. 33, 8 P.R.C. LAWS at 166-67; Basic Principles for Lawyers, *supra* note 63, art. 22.

112. *See* 2007 Lawyers Law art. 37; *see also* Basic Principles for Lawyers, *supra* note 63, art. 16.

113. *See generally* 1978 Plenary Session, *supra* note 25.

114. *Gong* means public security bureaus, *Jian* means procuratorates, *Fa* means the court.

parties; Lawyers give bribes for judges—they are corrupting the judicial officers; Lawyers are not responsible—they just know how to cheat for money.[115]

A. *Problems*

1. Cultural Problems from a Historical View

To meet international standards, the 1996 CPL clearly states that, "no person shall be found guilty without being judged as such by a People's Court according to law."[116] However, since China's long history has lacked legal consciousness, it is not easy to change the historical and entrenched view that criminal suspects are presumed guilty until proven innocent. Under the traditional view, if someone is detained or suspected by the government, that person must have done something wrong; otherwise, why would the government take the trouble? With that idea, criminal procedure has long been a tool to suppress class enemies.[117] Similarly, from the legal point of view, lawyers went from state workers to legal service providers, and if a lawyer defends "bad" men, that means the lawyer is in the same boat with those "bad" men.[118] Due to these historical ideas, the main task of the Criminal Procedure Law and the Criminal Law is to punish crimes, and the Lawyers Law restrains the rights of lawyers. Furthermore, these attitudes allow law enforcement officers to find a good excuse not to comply with laws. Since criminal suspects or defendants are automatically regarded as "bad" men, and defense lawyers are defending those "bad" men, and because the police's main task is to uncover crimes, law enforcement officers instinctively believe they have the right to arbitrarily detain or arrest and torture criminal suspects to force them to admit their crimes, despite the fact that such police actions violate the law.[119] Law enforcement officers also tend to act hostile and suspicious towards defense lawyers.[120]

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115. Tian Wenchang, *Lawyers Need to Know Themselves While They Need More Understanding From Society*, ZHONGGUO LUSHI [CHINESE LAWYER], Issue 2, 2004, at 44 (available only in Chinese) (translated by the author).

116. 1996 CPL art. 12, 8 P.R.C. LAWS at 66.

117. *See, e.g.*, CARLOS WING-HUNG LO, THE LEGAL SYSTEM AND CRIMINAL RESPONSIBILITY OF INTELLECTUALS IN THE PEOPLE'S REPUBLIC OF CHINA 1949-82, at 19-21 (1985).

118. *See* Ping Yu, *supra* note 4, at 828, 854.

119. *See* CHINA COUNTRY REPORT, *supra* note 92, §1(d).

120. *See* Ping Yu, *supra* note 4, at 852-59.

Even after more than twenty years of development in the legal system, some judges and prosecutors still regard defense lawyers as dissidents outside of legal offices.[121] The judges and prosecutors enjoy higher social status than lawyers who are just individuals representing defendants. Defense attorneys are viewed as mouthpieces or helpers of criminals. It is no wonder that judges and prosecutors criticize and yell at defense lawyers as though they were the defendants.[122]

What should defense lawyers do? The answers are not clear in ordinary people's minds. Tian Wenchang, a well-known criminal defense lawyer and a former professor at the China University of Political Science and Law told this story. One of his students challenged Mr. Tian on the internet with the following statement:

> Dear Mr. Tian, I am one of the students at the China University of Political Science and Law . . . I used to admire you very much because in my mind, you were the symbol of justice and a lawyer of civilians. But today, I cannot imagine that you are defending big corrupted officers and notorious thugs. Now in my mind, you are a perfect dissembler and all of your justice is false.[123]

Mr. Tian's story illustrates how difficult it is to change the traditional view even among law school students, not to mention the attitudes of ordinary people and law enforcement officers.

2. Low Level of Quality of Government Law Enforcement Agents[124]

Bear in mind that the Chinese legal system was only restored less than thirty years ago.[125] At the beginning of the restoration, legally-trained government law enforcement agents were rare. Most of them were army veterans who had no legal training at all before they switched to the judicial departments.[126]

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121. *See id.*

122. *See* Wen Zhimin, *Perplexities that Chinese Defense Lawyers Face*, ZHONGGUO LUSHI [CHINESE LAWYER], Issue 1, 2005, at 74 (available only in Chinese).

123. Tian Wenchang, *supra* note 115, at 21.

124. I use generally the term 'government law enforcement agent' to refer to police officers, judges, and prosecutors.

125. *See* LO, *supra* note 117, at 110.

126. Jordana Cornish, *Cracks in the Great Wall: Why China's Copyright Law Has Failed to Prevent Piracy of American Movies Within Its Borders*, 9 VAND. J. ENT. & TECH. L. 405, 426 (2006) ("[I]n an effort to rapidly expand the number of judges in China [after the

During the past thirty years, with many law graduate students entering the government departments, the quality of the staff has improved.[127] However, since even legally trained members entered these government positions directly from law school without any prior practical experience, they cannot avoid the negative effect of the low quality of the staff. Additionally, since they have no experience as lawyers, they do not understand the role and work of a private lawyer. Instead, government law enforcement agents are jealous of lawyers' increasing income and they believe private lawyers are out to embarrass them. Furthermore, if the private lawyers prevail—and the prosecutor loses his or her case, or the appellate court reverses the lower court's decision—the lower court judge or prosecutor will likely not be promoted or given a bonus.[128] Therefore government officers are eager to find fault with private lawyers, so that lawyers are afraid to challenge government officials.

3. Institutional Problems

Under the Chinese legal system, where one political party controls everything, including legal professionals, it is hard to establish a truly independent judicial system and it is impossible for the so-called self-governing bar associations to be independent.[129] Above the procuratorates and the courts, there are the Political and Legal Committees whose members are often party leaders and non-legal professional officers.[130] Often, these laypersons lead and instruct professionals on how to do their professional work, or even interfere with the legal professionals'

1978 reforms] many retired army officers without legal training were recruited to the bench.").

127. RONALD C. BROWN, UNDERSTANDING CHINESE COURTS AND LEGAL PROCESS: LAW WITH CHINESE CHARACTERISTICS 27 (1997) (describing the professionalization of China's judges in the mid-1980s). *But see* Clark, *supra* note 14, at 836-37 (noting that even today many judges are not law school graduates and some have not even attained their bachelor's degree).

128. Furthermore, prosecutors must consider the state's compensation to the wrongly charged party. *See generally* Law on State Compensation, 6 P.R.C. LAWS at 39 (adopted by the Standing Comm. of the Eighth Nat'l People's Cong. and promulgated by Order No. 23 of the President, May 12, 1994, effective Jan. 1, 1995); *see also* XIAN FA art. 41(3) (2004) (P.R.C.).

129. *See* RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW 15 (2002); Clark, *supra* note 14, at 839.

130. *See* PEERENBOOM, *supra* note 129, at 84-85, 133-34.

work.[131]

Since all the personnel, financial, and material matters in the judicial departments are controlled by the local governments, which are controlled by the Chinese Communist Party, even when judicial officers know that something is wrong with a case, they cannot ignore their leaders' directives.[132] When there is a conflict between justice and the leadership, it is understandable for judicial officers to defer to the Party leadership. Lawyers have no power to confront the powerful government while their role is to advocate justice, as a result, this tension ultimately victimizes the defense attorney.

The All-China Lawyers Association ("ACLA") was established in 1986 and consequently, many bar associations were established throughout China under the control of the Ministry of Justice and its judicial bureaus.[133] During the past twenty years, these bar associations have played an active role to save and protect a few lawyers whose legal rights were violated.[134] However, because they are dependent on the government, in recent widely-known cases of lawyers' rights violations the bar associations seemingly kept silent.[135] Not only did the bar associations help the government control and limit the rights of lawyers from

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131. *See id.* at 84-85.

132. *See id.*

133. *See* All China Lawyers Ass'n, Law Committees: Brief Introduction, http://www.chineselawyer.com.cn/html/union/englishunion/briefintroduction.html (last visited Feb. 19, 2009); *see also* PEERENBOOM, *supra* note 129, at 15.

134. *See, e.g.*, ZHONGGUO LUSHI SHE'AN SHILU [A REAL RECORD OF CASES INVOLVING CHINESE LAWYERS] (Wang Gong ed., 2001) [hereinafter REAL RECORD] (available only in Chinese) (detailing the incidents involving Peng Jie, Feng Zhide, Ma Dewang, Lu Jianzhong).

135. *See, e.g., Gao Zhisheng Held Incommunicado, Without Charge or Access to His Defense Lawyer*, CONG-EXEC. COMMISSION ON CHINA, Sep. 29, 2006, http://www.cecc.gov/pages/virtualAcad/index.phpd?showsingle=71484 (reporting that the government shut down Mr. Gao's law firm—which defended many activists, religious leaders, and writers—and arrested Mr. Gao and held him without formal charge because he issued an open letter to President Hu Jintao decrying the persecution of Falun Gong members); *China: Restrictions on Lawyers Fuels Unrest*, HUMAN RIGHTS WATCH, Apr. 29, 2008, http://china.hrw.org/press/news_release/china_restrictions_on_lawyers_fuel_unrest (providing accounts of the detainment or harassment of three prominent Chinese lawyers); Barboza, *supra* note 9 (reporting that Beijing lawyer Li Heping was abducted, beaten and threatened by unidentified men who demanded that he and his family leave the city); Posting of Li Subin to China Human Rights Lawyers Concern Group Online Forum, *Lu Shi Xie Hui Cheng Jie Lu Shi Bu Ying Gao An Sha [Bar Association Who 'Punish' Lawyers Should Not Engage in 'Assassination']*, http://www.chrlcg-hk.org/phpbb (Nov. 12, 2007, 2:21 HKT) (available only in Chinese).

a political view,[136] but they also helped violate the rights of lawyers.[137] If the mandatory so-called self-regulated special organization for lawyers cannot protect lawyers when their rights are violated, lawyers have no place to seek remedy.

4. Problematic Laws

As discussed above, the 1996 CPL substantially improved the Chinese criminal justice system. The 1996 CPL gives lawyers the right to be involved in criminal cases as early as in the investigation stage. To prevent lawyers from possibly using their expanded rights to hinder the interrogation, some legislative members argued that conduct of lawyers should be limited accordingly.[138] As a result, Article 38 of the 1996 CPL states that:

> Defense attorneys and other defenders shall not help the criminal suspects or defendants to conceal, destroy or falsify evidence or to tally their confessions, and shall not intimidate or induce the witnesses to modify their testimony or give false testimony or conduct other acts to interfere with the proceedings of the judicial organs. Whoever violates the provisions of the preceding paragraph shall be investigated for legal responsibility according to law.[139]

To supplement Article 38 of the 1996 CPL,[140] the later revised 1997 Criminal Law ("1997 CL") added Article 306, which makes it a crime for defense lawyers or other defenders to:

> [D]estroy or forge[ ] evidence, assist[ ] the party concerned in destroying or forging evidence, threaten[ ] or entice wit-

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136. For example, in 2006, the All-China Lawyers Ass'n issued *Guiding Opinions of the All-China Lawyers Association on Lawyers Handling Mass Cases* in order to limit the legal rights of lawyers. *See* HUMAN RIGHTS WATCH, "A GREAT DANGER FOR LAWYERS": NEW REGULATORY CURBS ON LAWYERS REPRESENTING PROTESTERS 62-68 (2006), *available at* http://www.unhcr.org/refworld/country,COI,HRW,COUNTRYREP,CHN,,45cb13482,0.html.

137. *See, e.g.*, Press Release, Human Rights in China, Chinese Authorities Abuse Licensing System to Harass Rights Defenders (June 2, 2008), http://hrichina.org/public/contents/press?revision_id=56870&item_id=55445 (reporting that the Beijing Lawyers Association refused to renew the lawyer's license of defense attorney Teng Biao because he and other seventeen lawyers offered to provide legal service to Tibetans).

138. *See* Ping Yu, *supra* note 4, at 853-54.

139. 1996 CPL art. 38, 8 P.R.C. LAWS at 71.

140. *See* Su Nan & Jiao Yan, *Keep Your Eye on the Crime of Lawyers Evidence Fabrication—Interview Tian Wenchang, the director of the Criminal Defense Committee of ACLA*, http://www.jcrb.com/zyw/n635/ca393263.htm (last visited Feb. 19, 2009) (available only in Chinese).

> nesses to, contrary to the facts, change testimony or provide false evidence, they shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention. If the circumstances are serious, the offender shall be sentenced to fixed-term imprisonment of not less than three years and not more than seven years.[141]

There was strong opposition to this Article from the Ministry of Justice, the ACLA, and scholars during the process of amending the 1997 CL.[142]

Among all the cases where lawyers were criminally detained, a large portion involved charges of evidence fabrication under Article 306 of the 1997 CL.[143] It has been widely regarded as the "Sword of Damocles" hanging over the heads of Chinese criminal defense lawyers.[144] Law academics also strongly oppose this biased and discriminative provision against lawyers because it is a specific provision in the criminal procedure that targets Chinese criminal defense lawyers.[145]

Firstly, there is a general prohibition on the fabrication of evidence under Article 307 of the 1997 CL, which makes it a crime for any person, including judicial officers, who "by violence, threat, bribery or any other means, obstructs a witness from giving testimony or instigates another person to give false testimony . . . [or] helps any of the parties destroy or forge evidence."[146] If lawyers commit this crime, they can be charged under Article 307, therefore Article 306, the special provision against lawyers, is redundant. Secondly, defense lawyers should

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141. Criminal Law art. 310 (promulgated by the Eighth Nat'l People's Cong., March 14, 1997, effective Oct. 1, 1997), 9 P.R.C. LAWS 21, 108-09 [hereinafter 1997 CL].

142. *See* Zhao Binzhi & Shi Yan'an, *Lawyers' Criminal Responsibilities*, http://www.jcrb.com/zyw/n453/ca326418.htm (last visited Feb. 19, 2009) (available only in Chinese).

143. *See August 2006: Setback For the Rule of Law—Lawyers Under Attack in China*, HUMAN RIGHTS IN CHINA, Aug. 28, 2006, § 1, http://www.hrichina.org/public/contents/article?revision%5fid=36024&item%5fid=30425.

144. *See* Ping Yu, *supra* note 4, at 857.

145. Although Article 306 does not say that only lawyers may be charged with this crime, nevertheless in the criminal cases, the defenders are almost always lawyers. As a result, lawyers argue Article 306 was geared specifically towards them. *See generally* Ouyang Zhenghan, *There is Hope to Revise the Lawyer Evidence Fabrication Crime*, DEMOCRACY AND LEGAL SYSTEM, Dec. 2004, http://www.zydg.net/magazine/article/1003-1723/2004/12/18025.html (available only in Chinese).

146. 1997 CL art. 307, 9 P.R.C. LAWS at 108. "Any judicial officer who commits any of the crimes mentioned in the preceding two paragraphs shall be given a heavier punishment." *Id.*

be treated the same as judicial officers on similar cases. Under Article 306, if lawyers destroy or forge evidence, or help destroy or forge evidence, or coerce or induce a witness to change his testimony or give false testimony, they commit a crime. However, under Article 307, the more powerful judicial officers do not commit a crime until their actions have reached the level of "serious" and they have fabricated evidence by violence, threat, bribery, or other means. It is obviously unfair for lawyers, and even some procurators have commented so.[147] Equal treatment between the prosecution and the defense sides is a basic principle of a modern criminal justice system. If the two sides are treated differently, it would allow the problems that the defense lawyers are facing to get much worse, especially, when the defense lawyer in China is still a developing profession. Thirdly, the wording of Article 306 are very vague, especially the part pertaining to the meaning and scope of "help destroy or forge evidence" and "coerce or entice the witnesses to change his testimony in defiance of the facts."[148] In reality, numerous lawyers were detained because witnesses changed their testimony, regardless of whether lawyers actually coerced or enticed witnesses.[149] Considering that in most cases the investigating or indicting officer handling the lawyer's case is the same person who investigated or indicted the lawyer's client, Article 306 became a powerful tool for professional reprisal.

B. *Difficulties that Defense Lawyers Face*

The 1996 CPL and its Implementation Provisions clearly state that defense lawyers may get involved in criminal cases after the investigation organs have initially interrogated criminal suspects, or when they have taken compulsory measures.[150] Lawyers have some basic rights to meet their clients and provide legal services during the interrogation phase. Lawyers have the right to consult, extract, and duplicate some judicial documents, as well as meet and correspond with the criminal suspects in cus-

147. *See generally* Ouyang Zhenghan, *supra* note 145 (referring to comments made by Liang Genlin, the Deputy General Attorney in Dongcheng District Procuratorate, Beijing).

148. *See* 1997 CL, art. 306, 9 P.R.C. LAWS at 108.

149. *See infra* Part III.A.

150. *See* 1996 CPL art. 96, 8 P.R.C. LAWS at 85; CPL Implementation Provisions, *supra* note 78, art. 11.

tody during the prosecution stage without being monitored.[151] There are no approval requirements for non-state secret cases, and attorney-client conferencing/interviewing time length is not limited. It seems that such laws have opened the wide door for lawyers who take a criminal case. However, even though the door is wide open from the outside, the route leading to the inside is narrow.

1. Difficulties in Client Access

In the investigation stage, while lawyers have several rights in legal theory, the only meaningful right is the right to meet with detained clients. Only one year after the adoption of the 1996 CPL, lawyers have the same views on the once highly expected law: "excited in January and February; felt at a loss in February and March; disappointed in April and May; despaired in June and July; gave up in September."[152] When even basic rights such as access to clients and evidence cannot be guaranteed, who dares to accept a criminal case?[153]

The "right to provide legal services" means only that lawyers are permitted to learn of the suspected crime and interpret what the statutory language means. The "right to represent in petition and complaints" is a hollow right: what is the complaint? A complaint of being tortured? Even the so-called supervisory procuratorate would turn a deaf ear to this kind of matter. How can that complaint be made to the torturer? Similarly, the "right to apply for being released on bail" is generally unsuccessful.

Unfortunately, even the only meaningful right lawyers may enjoy—the right to meet with a detained client—is highly limited. In the wake of the 1996 CPL, criminal lawyers were extremely disappointed to find that their rights to access clients entitled by the law were being ignored. I still remember the experience when I tried to meet my client at one of the Beijing

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151. *See* CPL Implementation Provisions, *supra* note 78, art. 12.

152. *See generally Criminal Defense: The Necessary Stanchion to Construe the Building of Justice, supra* note 5. A similar disappointment settled in after the 2007 Lawyers Law went into effect. Lawyers soon found that authorities made efforts to avoid abiding by the new law. *See generally* Press Release, Human Rights in China, Revised 'Lawyers Law' Fails to Protect Lawyers (June 19, 2008), www.hrichina.org/public/contents/56883 [hereinafter Lawyers Law Fails].

153. *See generally Criminal Defense: The Necessary Stanchion to Construe the Building of Justice, supra* note 5.

detention centers: one police officer on duty there stated to me, "no, you are not allowed to meet your client yet." When I argued that according to the new Criminal Procedure Law, lawyers have the right to meet with their clients, he responded, "You have a right? Your rights are in my hand." It is typical for lawyers to gain access to their clients after a few attempted visits.

Furthermore, whether or not the case concerns state secrets, almost all lawyers who try to meet with their clients during the interrogation stage have to get approval from the investigative agencies. A wide variety of excuses are used to turn lawyers away from client meetings, such as insufficient legal documentation, the absence of a superior necessary to approve the lawyers' request, and allegations of a shortage of staff to be present during the meeting. Lawyers have even sued the interrogation agencies for not letting them meet with their clients.[154]

When lawyers do get permission to meet with clients, they are usually permitted less than thirty minutes at the conference. Lawyers are often limited to discussing only the case and to meeting only one time during the investigation period.[155] Lawyers are prohibited from taking notes or have to get advance permission to take notes; suspects are not allowed to sign any papers; and both the lawyers and the suspects may be constantly monitored either by personnel or cameras.[156] Some places even require that lawyers be handcuffed to their clients during meetings, or pay fees for meeting their clients.[157]

To avoid having the "trouble makers"—lawyers—interfere with the investigation, sometimes the investigation officers either do not tell the criminal suspects that they have right to hire lawyers, or tell them it is a waste of money and time to have lawyers. Alternatively, they may use particularly fussy procedural rules to hinder lawyer's meetings with clients. For instance, in Beijing, when criminal suspects are notified that they may retain lawyers,

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154. *See* Zhao Gang, *Lu Shi Hui Jian Dang Shi Ren, Lu Kan Ke Dao Nan Zou* [*When Lawyers Meet with Clients, the Road is Rough and the Way is Difficult*], PEOPLE'S COURT DAILY, Apr. 13, 2007, http://rmfyb.chinacourt.org/public/detail.php?id=107753 (available only in Chinese); *see also* Lawyers Law Fails, *supra* note 152.

155. *See* Chen Qiulan & Qian Lieyang, *It Is Difficult for Chinese Lawyers to Practice Law*, ZHONGGUO LUSHI [CHINESE LAWYER], Issue 5, 2002 (available only in Chinese).

156. *See* Sun Yequn, *Zuo Yi Ge Xing Bian Lv Shi Jiu Jing You Duo Nan* [*How Difficult to be a Criminal Defense Lawyer*], ZHONGGUO LUSHI [CHINESE LAWYER], Issue 4, 2003, 67-70 (available only in Chinese).

157. *See* Chen Qiulan & Qian Lieyang, *supra* note 155, at 5.

they are required to post a postcard from the detention center to the lawyer or their family members.[158] It takes time to send out the postcard and for the postcard to be received; sometimes the postcard never reaches its destination.

As one of the worst procedural tactics, investigative agencies keep criminal arrests secret, and do not notify the suspects' family member(s) or their employers of the arrest, even though according to law an arrestee's family or employer should be notified within twenty-four hours of the arrest.[159] Meanwhile, officers require lawyers to bring either the postcard or the detention notice when they request to access their clients.

As a result, lawyers either cannot get permission to meet with their clients or their access is greatly limited. This puts lawyers in a poor position to help their clients. Oftentimes, the only help that lawyers can provide is to act as a mere messenger, shuttling correspondence between their clients and the clients' families.

After the investigation stage, when the procuratorate examines and indicts the case, the right to client access improves slightly. Although no laws require lawyers to get approval to meet with their clients—even in cases involving state secrets—many procuratorates still require an approval letter.[160] Even though most courts clearly state that lawyers may meet their clients freely in the trial period, detention centers may refuse such meetings without approval letters from the court.[161] For example, in *Anyang*, Henan Province, the local judicial officers required that all lawyers get approval from case managing officers, no matter what stage the case is in. After the local judicial bureau reported this illegal requirement to the local Political and Legal Committee, the local procuratorate and court realized the error and corrected it. However, the local public security bureau and its detention centers still insisted on the incorrect procedure, requiring all lawyers to get the approvals at each procedural stage in order to meet with their clients. Defense lawyers' rights are negatively limited by this procedure.[162]

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158. My own experience in Beijing when I practiced.

159. 1996 CPL art. 64, 8 P.R.C. LAWS at 77.

160. *See* HUMAN RIGHTS IN CHINA, EMPTY PROMISES: HUMAN RIGHTS PROTECTIONS AND CHINA'S CRIMINAL PROCEDURE LAW IN PRACTICE 28 (2001).

161. *See* Chen Qiulan & Qian Lieyang, *supra* note 155, at 5.

162. *See id.* Even after the 2007 Lawyers Law became effective on June 1, 2008,

2. Difficulties in Reviewing Prosecution Files

The 1996 Lawyers Law did not give lawyers rights to review any documents during the interrogation period. From the day when the procuratorate examines and indicts the case, defense lawyers have the right to review, extract, and duplicate litigation documents and technical verification materials;[163] and from the date on which the People's Court accepts a case, they have the right to review, extract, and duplicate materials related to the facts of the crime accused in the current case.[164] Legally, there is no need to argue whether those judicial documents are useful or helpful for defense work. To give one example of how hard it is in practice to get such information, in one case involving illegal gangs in *Shijiazhuang*, Hebei Province, there were more than 870 pages of materials transferred to the court. The lawyer in that case requested the right to copy those materials by copy machine at his own expenses. The court officer in charge of criminal cases responded that "duplicating" does not include copying

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these difficulties have not improved. For example, as early as June, lawyers Cheng Hai and Li Xiongbing were prevented to meet their clients, again due to the "state secrets" case excuse. *See* Lawyers Law Fails, *supra* note 152, para. 5. After lawyers sued for the rights to meet clients, their clients were released. *See* Interview with Cheng Hai, Attorney (Sept. 26, 2008) (on file with author). Also in June 2008, lawyers Mo Shaoping and Ding Xikui made multiple attempts to meet with their client, Mr. Huang. However, the lawyers' applications were denied because Mr. Huang's case supposedly involves state secrets. *See generally Case Update: Huang Qi Denied Access to Counsel*, HUMAN RIGHTS IN CHINA, June 24, 2008, http://www.hrichina.org/public/contents/60742. The lawyers had to wait for three months until they were finally allowed to meet with Mr. Huang. *See Mo Shaoping lushi zhong yu huo zhun hui jian Huang Qi [Lawyer Mo Shaoping Finally Allowed to Meet Huang Qi]*, RADIO FREE ASIA, Sept. 24, 2008, www.rfa.org/cantonese/news/dissident_huangqi-09242008105838.html (available only in Chinese).

163. *See* 1996 CPL art. 36, 8 P.R.C. LAWS at 71.

> The litigation documents shall refer to the procedural documents made for placing a case on file, taking compulsory measures and investigation measures, and instituting review and prosecution, including, but without limitation to, the paper of decision for placing a case on file, detention warrant, written decision of approving an arrest, written decision of arrest, arrest warrant, search warrant, letter of proposal for prosecution.
>
> The technical expertise materials shall mean the documents recording the details of expert evaluation and expert's conclusion formed in the process that the qualified persons authenticate the persons, articles and other relevant evidence and materials, including, but without limitation to, medicolegal expertise, authentication of judicial psychiatry, technical expertise of material evidences.

Procuratorate's Rules, *supra* note 105, art. 319.

164. *See* 1996 CPL art. 36, 8 P.R.C. LAWS at 71.

by machine; the materials must be duplicated by hand.[165] Despite the 2007 Lawyers Law and its efforts to change the legal environment,[166] without further clarification the *Gongjianfa* officers can still intentionally set obstacles for lawyers, and difficulties for defense lawyers will continue.[167]

3. Difficulties in Obtaining Evidence

The 1996 CPL first brought adversarial advocacy into the Chinese criminal system, allowing both the indicting prosecutors and the defenders to present evidence and to cross-examine their opponents' evidence. With the adoption of this new adversarial model, it is extremely important that defense lawyers be able to exercise their right to collect, examine, and apply evidence to defend their clients.[168]

However, the revised 1996 CPL limited this right. Prior to 1996, the Interim Regulations entitled defense lawyers to investigate and collect evidence, and the investigative parties had an obligation to cooperate with lawyers.[169] The 1996 CPL stipulates that lawyers may collect evidence only with the consent of the investigated parties,[170] or apply to the procuratorate or the court to gather evidence or produce witnesses.[171] In practice, very few

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165. *See generally* Chen Qiulan & Qian Lieyang, *supra* note 155.

166. *See supra* Part I.C.

167. As late as October 2008, when lawyer Mo Shaoping and Ding Xikui wanted to review case files in the procuratorate's office, they were told that case files were returned to the public security bureau for further investigation. However, when they went to the public security bureau, they were told case files were sent to the procuratorate's office. These two lawyers could not access the files despite several attempts shuttling back and forth through the bureaucracy. *See Huang Qi de lushi Zhi Jin Wei Zhun Cha Yue An Juan* [*Huang Qi's Lawyers Have Not Been Permitted the Access to Files*], RADIO FREE ASIA, Oct. 9, 2008, www.rfa.org/cantonese/news/dissident_huangqi-10092008111601.html; *see also Huang Qi She Ji You Guo Jia Jimi An Tuihui Gonganju* [*Huang Qi Case Involving State Secrets was Sent Back to the Public Security Bureau*], RADIO FREE ASIA, Nov. 12, 2008, http://www.rfa.org/cantonese/news/china_dissident-11122008112526.html (available only in Chinese).

168. *See* 1996 CPL art. 35, 8 P.R.C. LAWS at 71.

> The responsibility of a defender shall be to present, according to the facts and law, materials and opinions proving the innocence of the criminal suspect or defendant, the pettiness of his crime and the need for a mitigated punishment or acquittal from criminal responsibility, thus safeguarding the lawful rights and interests of the criminal suspect or the defendant.

See id.

169. *See* Interim Regulations art. 7; 1 P.R.C. LAWS at 178.

170. *See* CPL Implementation Provisions, *supra* note 78, art. 13.

171. *See id.*

individuals or organizations are able to give their consent to defense lawyers; government agencies like the administration of industry and commerce, real estate managing departments, banks, and post offices are particularly unable to do so. One lawyer in *Shanxi* Province reported that when he tried to get evidence from the local public security bureau, he was rudely turned down. When the lawyer tried to explain his request to the policeman, the officer threatened him: "Why don't you go away, do you want to be beaten?"[172]

When lawyers cannot gather evidence because of lack of consent, they apply to the procuratorate or the court to collect it instead; however, those organs may not feel there is a need to do so.[173] If the court believes it is necessary, the court will issue a permit to the defense to investigate.[174] However, because of the adversarial nature of the procuratorate, prosecutors do not bother to collect evidence that would mitigate the defendants' crimes. Additionally, the court seldom finds "necessity" in such cases, tending to refuse the application based on the theory that it is the responsibility of the defense.[175]

Although the new 2007 Lawyers Law deleted the consent requirement,[176] without a procedure compelling the investigative organs of the court to cooperate with the defense, there is no hope of changing this difficult situation.

There is another serious challenge facing defense lawyers who wish to gather evidence: the "Sword of Damocles" hanging over their heads—Article 306 of the 1997 CL.[177]

4. Defense Lawyers' Work Denied and Ignored

My husband, as one of the few Chinese lawyers who is skillful with law, economic theories, and the English language, represented some Fortune 500 companies in the Chinese courts and

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172. *See* Li Yuansheng & Liu Yanping, *Why Does the State Need the Lawyers System?*, ZHONGGUO LUSHI [CHINESE LAWYER], Issue 7, 2005 (available only in Chinese).

173. *See* Procuratorate's Rules, *supra* note 105, art. 323; CPL Implementation Provisions, *supra* note 78, art. 15.

174. *See* Interpretation on the Implementation of the Criminal Procedure Law arts. 43-44 (promulgated by the Sup. People's Ct., Sept. 2, 1998, effective Sept. 8, 1998), *available at* iSINOLAW.

175. *See* Yu Dashui, *Practice Environment: Lawyers' Environment*, ZHONGGUO LUSHI [CHINESE LAWYER], Issue 7, 2002 (available only in Chinese).

176. *See* 2007 Lawyers Law art. 35.

177. *See supra* Part II.D.

arbitration tribunals before he received his further legal education in the United States. It was a big surprise that he decided to stay in the United States to practice law after he graduated from his U.S. law school, instead of returning to China to continue his highly-promising career as an experienced and successful lawyer. One of his reasons was his disappointment with how Chinese courts treated lawyers. The courts frequently interrupted lawyers, extended little respect, and the hard work that he, his legal team and his clients put forward would often not even be cited in the court's decisions. Even today—ten years later—he still clearly remembers how shocked he felt when a judge at the Beijing Second Intermediate People's Court rebuked him in his first hearing for a criminal case.

I still remain regretful and frustrated about a murder case that I defended in the Beijing High Court. I was defending an appeal where the Beijing First Intermediate People's Court sentenced my client to the death penalty with two years' suspension of the execution. The High Court did not hold a public hearing on the appeal. Instead, I was required to submit my written arguments and opinions to the Court; I also had the opportunity to have a conference with the judge, who agreed with my arguments. I pointed out inconsistencies in the evidence that the lower court had relied on, and also submitted new exculpatory evidence. The only evidence that incriminated my client was the defendant's admission, which was the result of being tortured by the police. Even within the admission, there were contradictory claims. Both my client and I had hoped that the High Court would reach a just decision based on our new evidence and persuasive arguments. However, the intermediate court's decision was upheld. As often happens in China, the High Court simply mentioned briefly in its decision that although the defense had submitted some new evidence and argued that the defendant was innocent, the Court had concluded that there was no factual basis for those claims.

Zhang Sizhi, a highly respected, eighty-year-old lawyer who, by his own account, has never won a case, told about his experiences in an interview:[178] sometimes prosecutors had no re-

178. *See* Zhang Sizhi, *Human Rights is the Biggest "Face" for a Country*, http://gsslawyer.bokee.com/viewdiary.12787762.html (last visited Feb. 19, 2009) (available only in Chinese).

sponse at all to defense lawyers' arguments at a hearing, and it would appear that the defense was successful. But when the decision was issued, it would not be relate the defending arguments that were stated at the hearings. The sentence had been decided even before the hearing was held. The hearing process was just symbolic. In some cases involving the administration, even when lawyers brought compelling evidence to light at the hearing, the judge did not dare to mention the defense's evidence in the decision. This turns defense work into an empty formality.

With such a low rate of defense arguments being accepted, some defense lawyers have turned to "back-door" tactics to win their cases, violating laws and lawyers' ethics as a result.

III. *LEGAL ANALYSIS OF CRIMINAL CHARGES THAT LAWYERS MAY FACE*

Aside from the above mentioned challenges, what makes defense lawyers most stressful is the risk of being criminally charged for performing their work. Since 1984, when the notorious persecution of three lawyers in *Tai'an* County shocked China's lawyers in a way that still has ongoing repercussions today,[179] nobody has an accurate number of how many lawyers have been detained, arrested, and criminally charged for their defense work. The ACLA reported less than twenty such cases in 1995; approximately seventy between 1997 and 1998; eighteen cases in 1999; thirty cases in 2000; thirty-one cases in 2001; and twenty-two between 2002 and 2004.[180] In July 2005, an ACLA notification showed that the number of lawyers who have been criminally punished had reached 128 at that time.[181] Individual lawyers, however, have given much higher estimates. For exam-

179. For a brief explanation of *Tai'an* lawyers incident, see CARLOS WING-HUNG LO, CHINA'S LEGAL AWAKENING: LEGAL THEORY AND CRIMINAL JUSTICE IN DENG'S ERA 168 (1995). Peng Zhen, the director of the Sixth National People's Congress ("NPC"), had commented that "this case was the most serious case that violated the Constitution Law since the Chinese Communist Party took over." REAL RECORD, *supra* note 134.

180. *See* Fu Hualing, *supra* note 18, at 3.

181. *See* Zhang Youyi, *Gao Feng Xian Zhi Shi Bian Hu Lu Di, Xing Shi Bian Hu Lu Shi Mian Lin Liu Nan Ti* [*High Risk Caused Low Rate of Defense, Criminal Defense Lawyers Face Six Difficulties*], XINHUA NET, Jan. 8, 2008, http://news.xinhuanet.com/legal/2008-01/06/content_7372507.htm (available only in Chinese) (mentioning that the ACLA issued a notice in July 2005 to investigate issues relating to Article 306 of the Criminal Law).

ple, leading lawyers such as Tian Wenchang and Mo Shaoping have indicated that as many as 500 lawyers may have been punished for defense work from 1997 to 2002, while others reported as many as one hundred cases per year.[182]

A. *Criminal Charges Against Lawyers*

There is no doubt that lawyers should be held responsible for improper conduct under the law. However, in many of these situations, the government detained or charged these lawyers as a tool to punish lawyers whose aggressive work annoyed some powerful people. From 1997 to 2002, of the forty-three cases in which lawyers were detained or charged, thirty-three were retaliatory cases, including eleven cases that were dropped, three cases that were withdrawn by the procuratorates, seven cases that were not indicted, and eleven cases in which the lawyers were found innocent by the court.[183] From 2003 to 2004, among the twenty-two cases reported to the ACLA, there were twelve cases in which lawyers were found innocent.[184] To make a better analysis, I collected 151 cases concerning lawyers who had been detained, arrested, or charged from 1984 to 2008.[185] Among the 151 lawyers, eighty-nine were eventually found not guilty and five were found not guilty but were sentenced to Re-education Through Labor ("RTL") because the authorities wanted to punish them anyway.

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182. *See* Fu Hualing, *supra* note 18, at 3; *see also* Ping Yu, *supra* note 4, at 853 ("According to a [Ministry of Justice] official, in 1998 alone, more than one hundred lawyers were detained, prosecuted, or convicted under a variety of different charges.") (citing Tian Wenchang, *Lushi Weihe Buyuan Zuo Xingshi Bianhu?* [*Why Are Lawyers Not Willing to Engage in Criminal Defense?*], JIANCHA RIBAO [PROCURATORATE DAILY], Feb. 10, 1999, at 2).

183. Guo Chuntao, *The Current Situation of China's Lawyers and Bar Development*, at *7, http://www.lawstudy.gov.cn/asp/news/html/2007-03-26/20070326132627.9636.asp (last visited Feb. 19, 2009) (available only in Chinese).

184. *Id.*

185. These 151 lawyers include all lawyers who have been detained, arrested, prosecuted, or charged under criminal procedure rules (regardless of whether the charges were related to criminal defense), lawyers detained under the "Re-education Through Labor" ("RTL") program, and three "barefoot lawyers" (defenders who do not have law licenses). These statistics were compiled from ZHONGGUO LUSHI [CHINESE LAWYER] issues between 1990 to 2007, REAL RECORD, *supra* note 134; LUSHI WEIQUAN AN'LI XUAN [CASE SELECTIONS OF DEFENDING CHINESE LAWYERS] (Liu Wenyuan ed., 2003) (available only in Chinese) [hereinafter CASE SELECTIONS], and the numerous web sites that have been cited through this Article. The author's notes and charts are on file with the *Fordham International Law Journal.*

Table 1: Collected Cases of 151 Lawyers Who Were Criminally Charged[186]

OFFENSES	BEFORE 10/1/97	AFTER 10/1/97	TOTAL	Not guilty or no prosecution
Falsification of Evidence	10	56	66	39
Criminal Cover Up	22	1	23	20
Malpractice for Personal Benefits (*Xun Si Wu Bi*)	2		2	2
Fraudulence	3	9	12	6
Accepting Bribes	10		10	6
Corruption	3	5	8	5
Embezzlement of Public Money	1		1	1
Embezzlement Using the Principleship		2	2	
Harboring Dirty Money		1	1	
Illegal Business Activities		1	1	
Disturbing Public Order	1	4	5	5 RTL
Damaging Public Property		1	1	
Inducing Others to Disturb Public Order and Assemble Illegally		1	1	1
Theft		3	3	3
Divulging State Secrets		2	2	1
Criminal Libel	1		1	
Dereliction of Duty	1		1	1

186. Some lawyers have more than one charge and I only categorized such lawyers into the primary charged crime. For example, Zhang Jun was arrested for refusal to execute the Court's decision but was charged with enticing others to refuse to execute the court's decision, accepting bribes, and fraud. *See* Fu Hualing, *supra* note 18, at 5 n.27, 13 n.59; *see generally infra* Part III. Some lawyers have been charged more than once, but I listed them only once. For instance, Li Kuisheng was indicted twice; the first time he was found not guilty on December 31, 2000 on both Article 306 charges and tax evasion, but the second time he was sentenced to twelve years for fraud. *See* Erik Eckholm, *China Begins to Shine Light on Use of Torture*, N.Y. TIMES, Feb. 12, 2001, at A4 (reporting on Mr. Li's first imprisonment); *see also Week in Brief: Henan: Flawed Defense*, SHANGHAI STAR, Dec. 4, 2003, http://app1.chinadaily.com.cn/star/2003/1204/bz11-city.html (reporting on Mr. Li's fraud sentence). Guo Feixiong was also detained twice; the first time he was detained for four months and was released without an indictment, but the second time he was sentenced in November 2007 to five years for illegal business activities. *See Rights Defender Guo Feixiong Sentenced to 5 Years in Prison*, HUMAN RIGHTS IN CHINA, Nov. 13, 2007, http://www.hrichina.org/public/contents/press?revision%5fid=45551&item%5fid=45547.

OFFENSES	BEFORE 10/1/97	AFTER 10/1/97	TOTAL	Not guilty or no prosecution
Tax Evasion		1	1	1
Obstruction of the Execution of Court Judgment		1	1	1
Disturbing Official Business		1	1	1
Sexual Abuse of Children		1	1	
Soliciting Prostitution		1	1	1 RTL
Providing False Evidentiary Documents		2	2	
Inciting Subversion of State Power		3	3	
Involvement with Organized Crime		1	1	1
Total Number	55	96	151	89 & 5 RTL

This Table of cases is not an accurate representation of the national situation,[187] but at least it provides a general idea of the number of defense lawyers who are charged with crimes, and should be a basis for further study.

1. Falsification of Evidence

Among the charges brought against lawyers, "falsification of evidence" is the most common and worst charge. As reflected in the above Table, sixty-six out of 151 lawyers have been charged with this offense. If the number of attorneys charged with "criminal cover up" and "malpractice for personal benefits" were grouped into the same category, the number rises to ninety-one. Among the sixty-six lawyers officially charged with falsification of evidence, fifty-six were detained and/or prosecuted under Article 306 of the 1997 CL after it became effective on October 1, 1997. From 2002 to 2004, among the twenty-two cases reported to the ACLA, there were ten cases under that charge.[188] In *Hunan* Province alone, there were twenty cases in the eight years from 1997 to 2005.[189] From 1996 to 2006, more than 300 lawyers were charged under Article 306.[190]

Before the 1997 CL went into effect, ten lawyers were

187. *See supra* note 185 and accompanying text.

188. *See* Du Fuhai & Zhu Yu, *Chinese Lawyers Statistics*, FA ZHI ZAO BAO [CHINA LEGAL NEWS], June 27, 2005, http://www.chinalegalnews.com.cn/legaltimes/20050627/1402.htm (available in Chinese only).

189. *See* Guo Chuntao, *supra* note 183, at *7.

190. *See* Li Weixiong & Chu Danping, *Difficulties and Confusion*, http://www.bokee.net/bloggermodule/blog_viewblog.do?id=390064 (last visited Feb. 19, 2009) (available only in Chinese).

charged with falsifying evidence under Article 148 of 1979 Criminal Law ("1979 CL"), even though defense lawyers were not supposed to be subject to this charge.[191] Lawyers were more often charged with "criminal cover up" under Article 162 of the 1979 CL,[192] which is commonly regarded as the predecessor to the crime to falsifying evidence under the 1997 CL. In the Table presented above, twenty-two lawyers were charged with "criminal cover up" before the 1997 CL took effect. In contrast, only one lawyer was charged with this crime after 1997. Based on the alleged facts, legal experts agree that this one lawyer should have been charged under Article 306 for "falsification of evidence" rather under Article 162 of the 1979 CL and Article 310 of the 1997 CL for "criminal cover up."[193] However, two lawyers charged under Article 188 of the 1979 CL for malpractice probably should have been charged instead with "criminal cover up."[194]

Article 162 of the 1979 CL prohibits lawyers from fabricating evidence in order to cover up a crime.[195] However, it is applied to lawyers when their clients' stories change from what the client originally admitted to the investigative organs. For example, defense lawyer Ren Qingliang was defending a client who was a minor and who had been sentenced to five years on appeal. When Mr. Ren's client provided an alibi with three witnesses, Mr. Ren investigated and got the testimony of those witnesses. The appellate court considered the new evidence and remanded the minor's case back to the local court. Although the alibi witnesses told the same story to the local procuratorate,

191. CL art. 148 (promulgated by Order No. 5 of the Chairman of the Standing Comm. of the Fifth Nat'l People's Cong., July 1, 1979, effective Jan. 1, 1980), 1 P.R.C. LAWS at 87, 112 (indicating that only witnesses, expert witnesses, recorders and interpreters are subject to this article).

192. *Id.* art. 162, 1 P.R.C. LAWS at 114-15 (indicating that "whoever harbours counterrevolutionaries or gives false evidence to protect them" will be subject to imprisonment).

193. *Compare* 1997 CL art. 306, 9 P.R.C. LAWS at 108 (falsifying evidence), *with id.* art. 310, 9 P.R.C. LAWS at 21, 108-09. "Criminal Cover Up" requires that the person charged "knowingly provides a hiding place, money or property to a criminal, or helps the criminal escape or gives false testimony to protect the criminal." *Id.* art. 310, 9 P.R.C. LAWS at 21, 108-09.

194. *Compare* 1979 CL art. 188, 1 P.R.C. LAWS at 119, *with id.* art. 162, 1 P.R.C. LAWS at 114-15. A judicial functionary commits malpractice when he "intentionally protects from prosecution a person he clearly knows to be guilty, or intentionally twists the law, confounding right and wrong". *Id.* art. 162, 1 P.R.C. LAWS at 114-15.

195. *See id.* art. 162, 1 P.R.C. LAWS at 114-15.

they changed their statements after the prosecutors took them to the procuratorate's office. As a result, the procuratorate arrested the defense lawyer and the minor's father, charging them with criminal cover up.[196] Ridiculously, a precondition for charging the lawyer with "criminal cover up" is that his client should have already been found guilty.

The charge of malpractice under Article 188 of the 1979 CL is very similar to the charge of criminal cover up, although the charge of malpractice is limited to judicial personnel. If a government law enforcement agent intentionally prosecutes a person who he clearly knows is innocent, or intentionally protects from prosecution a person who he clearly knows is guilty, or "intentionally twists the law," that agent can be charged with malpractice.[197] Fu Aiqing defended an appeal case in October 1996.[198] After reviewing the files, she found that the local court's decision was based on unclear facts and insufficient evidence.[199] She went to the employer that the defendant Yang worked with and learned from some of Yang's colleagues that Yang was working at the same time as the alleged criminal act happened.[200] She provided these testimonies to the appeal judges and they confirmed those testimonies.[201] Then the court of appeal remanded the case back to the local court because key facts were not clear due to conflicting evidence. On February 27, 1997, the local court held a retrial hearing for Yang. In that hearing, all three of his colleagues testified that Yang was working with them when the alleged theft occurred. Unfortunately, soon after the witnesses signed their names on the court records, all of the witnesses were taken to the procuratorate's office. The next day, the lawyer Fu Aiqing was detained under suspicions of malpractice.[202]

The facts of the criminal cover up and defense attorney malpractice cases are almost the same as the cases involving lawyers charged with falsification of evidence under Article 306 of the 1997 CL. By analyzing the facts of the cases collected, I found a

196. *See* REAL RECORD, *supra* note 134, at 68-86.
197. 1979 CL art. 162, 1 P.R.C. LAWS at 114-15.
198. *See* REAL RECORD, *supra* note 134, at 342-45.
199. *See id.*
200. *See id.*
201. *See id.*
202. *See id.*

general pattern: lawyers were charged with falsification of evidence when, in the hearing, witnesses deviated from the testimony they provided to the investigated organ, or the lawyer caught prosecutors off guard and provided new evidence favorable to the defendant. In response, the prosecutors apply to adjourn the hearing, set aside the defendant's case, and promptly investigate into why that witness changed their testimony or affidavit, or how the lawyers could provide new evidence. The speed at which prosecutors detain defense lawyers is much faster than the speed of the actual investigative process. As a result, lawyers are often detained for a few months—or even more than two years—until finally prosecutors are forced to admit that the defense lawyers are innocent. It was reported that the rate of arrested lawyers who are wrongfully charged with a crime is as high as ninety percent.[203] For example, Chen Ya'nan, the first lawyer who was charged under Article 306 in *Xinjiang*, was entrusted to defend Tian Ming, who was accused of taking bribes on July 3, 2001. After reviewing the case files in the court and meeting with the client, Chen interviewed witnesses He, Lin, Xu, and more than ten other witnesses. The testimonies of these witnesses supported Mr. Tian's innocence. On July 15, a hearing was held in the *Kelamayi* District Court. The prosecutors indicted Mr. Tian for taking RMB¥85,000 in bribes, and relied on affidavits provided by He, Lin, and Xu. However, He, Lin, and Xu became witnesses for the defense. As a result, the hearing was adjourned. That night, the local procuratorate summoned the three witnesses and investigated the reason why they changed their testimonies. The three witnesses recanted what they had told the defense lawyer and claimed that when the lawyer investigated them, either the defendant Mr. Tian who was released on bail, or his wife was present. The witnesses claimed they were pressured by Mr. Tian and his wife, so they gave testimony in accordance with the defense lawyer's hints. On July 20, the hearing was continued, the witnesses He, Lin, and Xu provided testimony on behalf of the prosecution, and Mr. Tian was found guilty for taking bribes and sentenced to six years in prison. On August 5, the local procuratorate summoned Chen and detained her for "disturbing the judicial justice." When law-

203. Qin Hailing, *Discussion on Lawyers' Risk in the Practice* (available only in Chinese) (on file with the Fordham International Law Journal).

yer Chen was interrogated by prosecutors, she raised the argument that a "falsification of evidence" charge is not within the jurisdiction of the procuratorate and the procuratorate was violating the laws by interrogating her. A few days later, she was told that her case was forwarded to the public security bureau. Eight days later, she was indicted by the local procuratorate alleging "Chen Ya'nan, a professional lawyer, in furtherance of defending a client, ignoring the principle of adhering to the laws and facts, threatened and induced witnesses to change their testimonies, disturbed the criminal procedure, and her activities constituted the crime of tampering with evidence under Article 306." The prosecutor who indicted Chen Ya'nan was the same person who had indicted Chen's client. Meanwhile, the local bar association did a lot of work to help Chen. At a hearing on November 27, Chen was sentenced to six months' imprisonment. Nevertheless, at Mr. Tian's appeal, the court confirmed the testimony of the three witnesses *on behalf of the defense.* Noticeably, one day before the hearing, one judicial staff member from the local procuratorate told reporters, "Chen Ya'nan is sure to be sentenced. She is a victim. Originally her matter was not as serious as it is today. [A representative] from the bar association made her situation worse."[204]

2. Other Charges

Other charges that often bothered lawyers before the 1997 CL include "accepting bribes" and "corruption." As reflected in Table 1, there were ten lawyers who were detained for accepting bribes and three for corruption charges (and another five after 1997). Before the 1996 Lawyers Law, lawyers were state legal workers, therefore they were regarded as part of the state legal functionary. Because the status of lawyers was not clear enough, lawyers such as Peng Jie[205] were charged with malpractice and

204. See Democracy and Law Web (Min Zhu Yu Fa Zhi Wang), http://www.mzyfz.com (last visited Feb. 19, 2009).

205. Peng Jie was meeting with an incarcerated client. When his client first said that he needed a drink and to go to the bathroom, Peng followed him. When this client requested a drink a second time, Peng did not follow his client because his client was surrounded by security guards. Peng's client did not return to the meeting room, and in fact escaped from the detention center. Later, Peng learned that one of the guards in the detention center arranged for his client's escape. The district court sentenced lawyer Peng to three years but the appellate court announced that he was innocent. *See* REAL RECORD, *supra* note 134, at 247-75.

dereliction of duty. It takes time for the judicial officials to have a clearer idea of the real role of defense lawyers.

However, after the 1997 CL was put into effect, in addition to the Article 306 charge, charging lawyers with fraud also became a common trend. It was reported that from 1999 to 2002, there are more than 100 lawyers have been charged by "fraud."[206] The most recent case—in which lawyer Ma Kedong was charged with fraud—rings a warning bell to lawyers.[207] Since lawyers' opinions are rarely accepted by the court, some lawyers have to use "back-door" methods like giving bribes or using their good relationship with the court to try to win the case. When lawyers are hired by the client, one important question clients ask is, "are you familiar with the court? Do you have a good relationship with the court?" If lawyers answer "no," clients usually do not hire that lawyer. From time to time, lawyers have to set up good relationships by bribery or other illegal ways. That is the reality that lawyers have to deal with, although all lawyers know that such practices violate professional ethics and criminal laws. As Ma Kedong argued in his own fraud case, under the current legal environment, in each case, defending according to the law is the main task for lawyers while getting *Guanxi* is the ancillary tool.[208] According to the rationale in his case, once lawyers indicate that they are familiar with the court, there are two results: if lawyers really are familiar with the court, they might be under suspicion for bribery, if not, they might be under suspicion for fraud. One lawyer who attended Ma's hearing commented that if Ma is guilty in this case, each lawyer in China would become the next Ma Kedong. Fraud charges may become another Sword of Damocles hanging over the heads of lawyers.

3. Re-education Through Labor

RTL is a special administrative penalty for people whose illegal actions are not serious enough to be punished through crim-

206. Zhang Youyi, *Gao Feng Xian Zhi Shi Bian Hu Lv Di, Xing Shi Bian Hu Lv Shi Mian Lin Liu Nan Ti* [*High risk caused low defense rate, criminal defense lawyers face six difficulties*], XINHUA NEWS, Jan. 8, 2008, http://news.xinhuanet.com/legal/2008-01/06/content_7372507.htm.

207. *See* Jasmine Wang, *Lawyer Accused of Cheating Alleged Drug Trafficker Out of 1M Yuan*, SOUTH CHINA MORNING POST, Jan. 26, 2007, at 4.

208. *See supra* note 2.

inal procedure. Such penalties normally stem from criminal procedure. After a person is detained, if the investigation organs find that the suspect's actions are not serious enough or that there is not enough inculpatory evidence, the investigation organs will refer the case to one of the "RTL Committees." These Committees are organized under all levels of Public Security Bureaus and make RTL decisions without any judicial review.[209] Although RTL is not part of the criminal procedure, it is a mandatory sentence of labor and it completely deprives people of their liberty. In some ways, an RTL sentence is a more ominous penalty than the criminal sanction because there is much less of opportunity to be cleared under an RTL sentence. Referring to Table 1, among the five lawyers who were detained and sentenced by RTL, only one person was cleared.[210]

B. *Reasons for Being Charged*

Through case analysis, it becomes apparent that there are several reasons why lawyers in China have been charged with crimes. These reasons include professional reprisal, abuse of power, legal misunderstandings by unqualified judicial officers, and the lawyer's own problems. Bad law is an efficient and convenient tool for those in power to use against lawyers.

1. Professional Reprisal

Case records and other reported statistics demonstrate that a large number of lawyers were detained for various kinds of suspicious crimes, yet they were not found guilty. Cao Jingxue's case is one such example. Mr. Cao was continuously investigated by the procuratorate simply because he asserted that his client was not guilty. Immediately after one of Mr. Cao's client's hearings, the procuratorate proclaimed, "Isn't Cao Jingxue able to argue? Investigate where his cell phone came from."[211] Shortly after the hearing, on November 7, 1995, Mr. Cao was summoned to the procuratorate's office and detained for twenty-four hours

209. *See generally* Provisional Rules of Re-educational Labor (promulgated by the Ministry of Public Security, Jan. 21, 1982), *available at* iSINOLAW.

210. Lawyer Shi Zhe was charged with disturbing public order. Starting from June 18, 1996, he was incarcerated for 583 days. He opted to serve three years of RTL after the procuratorate refused to approve to arrest him.

211. Jiang Zongbo, *Erase the Regret of His Heart*, ZHONGGUO LUSHI [CHINESE LAWYER], Issue 7, 1998.

because his cell phone allegedly came from unknown sources. The investigation proved that his cell phone was the property of his law firm and he was released; however the prosecutor confiscated his cell phone. On April 14, 1996, Mr. Cao was again summoned and held for twenty-four hours for an investigation regarding his law firm's cars and other properties. The prosecutors finally found some "clues" when they investigated the accounting books of Mr. Cao's firm. Mr. Cao was detained and charged with corruption on June 5, 1996, and subsequently arrested for the same charge fifteen days later. On September 9, 1996, his case was indicted to the court, but was returned twice to the prosecutor for insufficient evidence. The case was finally heard on February 24, 1997. His hearing was attended by the media, local government officials, the secretary of *Jilin* Province Lawyers' Association, and many procuratorates from the local procuratorate's office. Mr. Cao pled not guilty and his attorney presented a good deal of evidence to support the defense case. Due to public pressure and concern for the image of the court, the case was returned to the procuratorate's office for the procuratorate to render a decision. Finally, on July 4, 1997, the procuratorate's office decided to not re-indict Mr. Cao.

When reporters interviewed Wang Yunhai, the head of that procuratorate's office, he explained that Cao Jingxue was not acquitted, but merely released and not indicted for questioning. The procuratorate also stated that the case was not over and Mr. Cao may be detained whenever the procuratorate wishes to investigate him further. In other words, Mr. Cao will fear government reprisal from the procuratorate's office for the rest of his life. As a result, the procuratorate's office suffered negative public opinion. Reporters asked Wang Yunhai, the head of the procuratorate's office, why they detained many people, including Cao Jingxue, without sufficient evidence, only to subsequently release the detainees once lawyers were involved. Wang Yunhai's responded,

> Yes, we have wrongfully detained some people, but what you do not understand is that nowadays, lawyers are instigators. Especially Cao's lawyer, Wang Haiyun, he is very much an instigator. He is the reason why we could not proceed with Cao's case. Due to insufficient evidence, we released people,

and as a result, he made a bad effect on us.[212]

Wang Haiyun, who represented Cao Jingxue, was a prominent lawyer. However, due to professional reprisal by the procuratorate, particularly pressure on defendants, Wang Haiyun was forced to give up his defense work for one of his clients. The procuratorate told one of Wang Haiyun's clients that he would be released if he would fire Mr. Wang as the defense counsel, but if he chooses not to fire him, the defendant would be in trouble.[213] After the defendant fired Mr. Wang, he was released on bail. In yet another case, one of Mr. Wang's clients was told by the presiding judge that the reason he received his sentence was because he hired Wang Haiyun to defend him.[214]

Perhaps the most ridiculous case is that of lawyer He Xin who was criminally convicted of libel. The head of the local court prosecuted He Xin after He Xin ignored the head of the court's orders to stop defending certain cases.[215]

2. Abuse of Power

In some cases, the powerful judicial officers cannot accept challenges from others, particularly from attorneys. If anyone dares to challenge the officials, they abuse their power and fight back illegally. Since these officials are afforded with strong judicial power, it is easy for them to use any tool in the criminal justice system to punish those who challenge them. Yu Yunbin's case is a clear example of this abuse of judicial power. Yu Yunbin was representing Mr. Feng for an intentional injury case.[216] Yu Yunbin found nine witnesses who could testify that Mr. Feng was not at the crime scene when the injury occurred.[217] Yu Yunbin submitted an application to subpoena that these witnesses appear in court. When the public security officers

212. Jiang Zongbo, *Heal the Regret in His Heart*, ZHONGGUO LUSHI [CHINESE LAWYER], Issue 7, 1998, (available only in Chinese) (translated by the author).

213. *See* Wang Haiyun, *Repeat the Chinese Lawyers' Confusion in Criminal Defense Work*, ZHONGGUO LUSHI [CHINESE LAWYER], Issue 4, 2002, at 45-48 (available only in Chinese).

214. *See id.*

215. *See* He Xin, *Li Hu Xia Xiang* [*Thinking at the Lakeside of Lihu*], ZHONGGUO LUSHI [CHINESE LAWYER], Issue 5, 2006, at 13 (available only in Chinese).

216. *See* Yu Yunbin, *Xing Bian Lu Jian Ye Yao Xing* [*Although the Criminal Defense Path is Tough, I Will Continue*], ZHONGGUO LUSHI [CHINESE LAWYER], Issue 7, 2003, at 43-44 (available only in Chinese).

217. *See id.*

learned of these witnesses, they went to the witnesses' homes and threatened them with detention if they did appear.[218] The public security officers ridiculed Yu Yunbin, proclaiming him, "A little lawyer, he dares to fight against the public security, he did not evaluate his strength."[219]

Abuse of power continued to plague the Feng case during the hearing itself, which took place on August 7, 2001. Public security officers took one witness off the stand immediately following his cross-examination, before the witness had a chance to sign his name on the court document. Another witness was prevented from entering the courthouse to testify; he was detained and removed by a policeman waiting outside the courtroom.[220] As a result, the hearing had to be adjourned. On the evening of the hearing, the defendant's parents were detained by public security officers for one night and were forced to testify that they conspired with the lawyer to induce the witnesses to give false testimony.[221] One witness was forced to "admit" that the lawyer coerced him to testify that Feng was not at the scene of the crime. On August 16, 2001, the lawyer was taken to the police station where a public prosecutor was waiting with an arrest warrant.[222]

3. Legal Misunderstandings by Unqualified Judicial Officials

In the early developmental period of the current legal system, especially before the 1996 CPL, there were several cases wrongly decided against lawyers. This occurred because judicial officers did not understand or apply the law correctly. In 1984, there were only four lawyers in *Tai'an* County, *Anshan* City, *Liaoning* Province. Three of the four lawyers—Wang Baiyi, Wang Licheng, and Wang Zhishuang—were all arrested twice for their defense work. In the hearing of Xu Jun's rape and murder case, Xu Jun's attorneys, Wang Licheng and Wang Zhishuang, requested that the court exercise caution when deciding the case. The attorneys pointed out that there were some suspicious points to be checked and that the evaluation was against the legal procedure. Their requests were rejected and Xu Jun was sen-

218. *See id.*
219. *See id.*
220. *See id.*
221. *See id.*
222. *See id.*

tenced to death penalty.[223]

Wang Licheng and Wang Zhishuang appealed Xu Jun's case to the High Court but the decision and the sentence were upheld.[224] After Xu Jun was executed, Xu Jun's cellmate reported that Wang Licheng had released Xu's case information to Xu, and promised to defend his innocence.[225] Based on these allegations, the *Anshan* procuratorate decided to investigate Xu Jun's lawyers. Wang Licheng and Wang Zhishuang were arrested on October 13, 1984, accused of obstruction of justice.[226] Two months later, Wang Baiyi, the director of the firm, was also arrested in connection with this matter.[227] At the end of March 1985, the three lawyers' families wrote a letter to Peng Zhen, the director of the Sixth NPC. The NPC designated staff to *Anshan* to investigate this case. The NPC staff pointed out that detention of three lawyers had been over the time limit under the laws and that the *Anshan* procuratorate's investigation into the lawyers' actions should have been completed according to laws. Under this pressure from the NPC, the *Anshan* procuratorate decided to indict Wang Baiyi and Wang Licheng but exempted Wang Zhishuang from punishment.[228] On May 8, 1985, the Political and Legal Committee of *Liaoning* Province decided to release the two indicted lawyers on bail. On June 4, 1985, the *Anshan* Procuratorate decided to withdraw the indictment and admitted that the lawyers were wrongly arrested.[229] However, four months later, the higher level procuratorate double-checked this case and concluded that Wang Licheng's actions did constitute obstruction of justice. The higher level procuratorate also determined that two other attorneys did not commit obstruction of

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223. *See* REAL RECORD, *supra* note 134.

224. *See id.*

225. *See id.*

226. *See id.* Soon after his arrest, officials tied up Mr. Wang with rope and forced him to march through the streets. *See* LO, *supra* note 179, at 168.

227. *See* REAL RECORD, *supra* note 134.

228. Prior to 1997, the procuratorate had the power to permit a defendant to be "exempted from punishment" (*Mianyu Qisu*). Instead of indicting a case or dismissing it outright, this presented a third alternative. Essentially, the procuratorate would unilaterally declare that the defendant was indeed guilty, but that their office declines to punish the defendant. The procuratorate's power to declare guilt is now limited due to Article 12 of the 1996 CPL. *See* HECHT, *supra* note 46, at 43-50; *see also* 1996 CPL art. 12, 8 P.R.C. LAWS at 66.

229. *See* REAL RECORD, *supra* note 134.

justice but their mistakes were still serious.[230] In December 1985, the NPC designated staff to *Anshan* to double-check this case and concluded that the three lawyers were innocent based on facts and laws.[231] On January 25, 1986, Wang Hanbin, the secretary of the NPC Standing Committee, forwarded an opinion written by the famous legal expert Zhang Youyu to the director of the SPC and the SPP separately.[232] They both instructed their own relative departments to study this case.

In September 1986, the newly established ACLA hosted an experts' seminar and concluded that Xu's case was suspicious and the three lawyers' cases were wrong.[233] On October 28, 1986, the ACLA forwarded the experts' opinions to Peng Zhen and requested that Peng instruct relevant departments to promptly address issues in the three lawyers' cases.[234] However, in February 1987, the reviewing procuratorate again concluded that lawyer Wang Licheng was guilty. On May 12, 1987 Wang Licheng was arrested again.[235] In November 1987, the Ministry of Justice chose three famous lawyers to set up a lawyers' group for Wang Licheng's case.[236] After investigating in *Anshan*, the lawyers' group concluded that the accused lawyers were innocent and should be praised.

At the February 1988 session of the Seventh NPC meeting, many of the representatives jointly submitted a motion to clear the attorneys and protection for rights of lawyers. The newly elected director of the Seventh NPC and the SPP paid much attention to the three lawyers' cases. Under the dual supervision of the NPC and the SPP, on December 17, 1988, the *Anshan* Procuratorate announced that the three lawyers were innocent and issued apologies.[237]

Another extremely disastrous example is the case of Zhang Jun and his wife. Zhang Jun defended farmers and annoyed the local authorities. Zhang Jun was arrested in 1990 on the suspicions of "refusal to execute court's judgment" and was sentenced

230. *See id.*
231. *See* LO, *supra* note 179, at 168.
232. *See* REAL RECORD, *supra* note 134.
233. *See id.*
234. *See id.*
235. *See id.*
236. *See id.*
237. *See id.*

to sixteen years for three counts of taking bribes, fraud, and "enticing others to refuse to execute court's judgment." His wife was detained on the suspicions of taking bribes but the authorities did not have enough evidence at that time to make their case, and charged her instead with obstruction of justice and sentenced her to three years. The couple appealed over 600 times and more than 5000 people requested their release—including NPCs representatives, prominent scholars, and farmers. Finally in 2001, the High Court of *Shanxi* Province announced that Zhang Jun was not guilty on his first two charges but upheld the third count, which does not even exist in the Criminal Law.[238] The reason it took so long for Zhang Jun to clear his case is that the authorities did not even want to bother correcting their mistakes.[239]

4. Lawyers' Own Problems

There is an old Chinese proverb saying "Flies do not bite uncracked eggs." Since the legal system was restored thirty years ago, it is understandable that out of more than 150,000 lawyers, there are bound to be some lawyers who would violate the law and should be punished. However, the vast majority of attorneys are law-abiding. We do not expect respected judicial officers to be more lenient with lawyers; however, we do hope the legal environment in China will improve.

C. *Chilling Effects*

> Tomorrow, you will not find any Chinese lawyers who dare [to] confront *Gongjianfa* and defend criminal suspects. When that becomes true, and you have unjustified case, you have to take care of yourself. No lawyers will help you. If you are innocent and have been wrongly accused of murder, you can only wait for death.[240]

The difficulties and problems that lawyers face not only put lawyers in a miserable situation, but also take a toll on all of soci-

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238. *See* Wang Tongyi, *Zhang Jun An De Wei Ba Hai Yao Liu Duo Jiu* [*How Long Will the Tail of Zhang Jun's Case Last?*], ZHONGGUO LUSHI [CHINESE LAWYER], Issue 2, 2003, at 41-43 (available only in Chinese).

239. *See id.*

240. Hu Xiying & Duanmu Zhengyang, *Chinese Lawyers Do Not Dare Defend Criminal Suspects*, ZHONGGUO LUSHI [CHINESE LAWYER], Issue 7, 2002, at 24 (available only in Chinese).

ety. Criminal suspects and defendants pay an especially high price.

1. Direct Effects: The Suffering of Individual Lawyers

There is no doubt that lawyers who have been detained suffer both physically and psychologically. The torture problem is notoriously a worldwide phenomenon, and most lawyers who have been detained experience the same pain. Xu Fangping was charged with "inciting subversion of the state power" and sentenced to four years' imprisonment. During these four years, Xu Fangping was beaten and lost sixteen teeth. He almost died five times.[241] Wang Yibin was arrested for an Article 306 violation when his client changed his trial testimony.[242] After being detained for more than two years, he was finally released and found not guilty. He and his wife were so poor and, discouraged with Wang Yibin's experience that they chose to become monks. He said, "If I, as a lawyer, can not protect my own rights, how can I protect the rights of others?"[243] Another extreme example is lawyer Gao Hongwei.[244] He was detained and charged under Article 306 and found guilty.[245] After he served his sentence and was released, he took revenge on society.[246] He turned into a fearful murderer after falling victim to the law. From 2005 to 2007, he killed four innocent people and seriously wounded

241. See Xu Fangping, *Eight Years Ago I Had the Same Experience*, BOXUN, Dec. 31, 2006, http://www.peacehall.com/news/gb/pubvp/2006/12/200612310853.shtml; *Who Do You Believe? The Two 'Human Rights Lawyer' Was Similar to the Allegations While the Final Outcomes were Different*, http://cdjp.org/Articles/article.php/705 (combining XINHUA NEWS on Dec. 31, 2006, RADIO FREE ASIA on Gao Zhisheng, and stories on Xu Fangping by BOXUN) (reporting Gao and Xu both were charged as "inciting subversion of state power, Gao got a sentence of three years in the prison with five years of suspension but Xu got four years of imprisonment and Xu almost died five times in the prison) (available only in Chinese).

242. Zeng Min, Ding Qiang & Zhou Muchun, *Today's Focus: Experienced Judicial Corruption, Two Lawyers Went to the Temple*, DONG FANG XIN WEN WANG [EASTDAY NEWS], June 15, 2001, http://society.eastday.com/epublish/gb/paper148/20010615/class014800018/hwz412089.htm (available only in Chinese).

243. *Id.* (translated by the author).

244. *See* Huo Shiming & Zhang Guoqiang, *Devil Used Hammer in the Hallway, Gao Hongwei: Beating People With a Hammer is the Way I Release My Hate*, XINHUA NEWS, Feb. 26, 2007, http://news.xinhuanet.com/legal/2007-02/26/content_5772526.htm (available only in Chinese).

245. *See id.*

246. *See id.*

more than twenty because of his hatred towards society.[247]

2. Number of Lawyers in China has not Increased Much

Even in 2003 Chinese lawyers led an increasingly satisfying and attractive life and being a lawyer was considered one of China's most favored career choices.[248] However, the number of lawyers has not been growing as fast as before. From 1979 to the end of 1994, the number of lawyers grew from 212 to 83,619.[249] From 1993 to 1997, the number of lawyers grew from 40,000 to 110,000, law firms grew from 3600 to more than 8300.[250] By June 2001, lawyers had grown in number to 114,892 and the number of law firms increased to nearly 10,000. By June 2004, the number of lawyers increased to 114,500 and law firms numbered 11,691.[251] Thus, from 1997 to 2004, the number of lawyers did not increase significantly. From 2001 to 2004, the number of lawyers barely increased. However, it is reported that by the end of 2006, China had approximately 130,310 lawyers.[252] As of October 25, 2008, the number of lawyers in China reached 140,000 and the number of law firms increased to more than 14,000.[253] A lawyer has concluded that starting in 2000, for every ten people who enter the legal profession, nine and a half people leave. The number of lawyers is almost stagnant.[254]

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247. *See id.*

248. *See* Cohen, *supra* note 4, at 232.

249. *See* Qiu Xuyu, *What Can We Do To Save Lawyers?*, CHINA LAW OF LAWYERING, Mar. 13, 2006, http://www.china-lawyering.com/main/list.asp?unid=94 (available only in Chinese).

250. *See* Xiao Yang, Minister of the Ministry of Justice, Promote Lawyers' Work to Enter the New Century in Full Scale, Address at the National Justice Department Meeting in Jinan (Dec. 17, 1997), *in* ZHONGGUO LUSHI [CHINESE LAWYER], Issue 2, 1998. In 1996, the number of lawyers reached over 100,000 and the number of law firms reached 8265. *See* Qiu Xuyu, *supra* note 249.

251. *See* Qiu Xuyu, *supra* note 249.

252. *See* Posting of Liu Guiming, *Lawyer, A Career That Has Stories*, http://qianguzhou.fyfz.cn/blog/qianguzhou/index.aspx?blogid=255006 (Sept. 30, 2007, 14:54 HKT) (available only in Chinese).

253. *See* Cui Qingxin & Zhang Jingyong, *Zhong Guo Zhi Ye Lu Shi Zong Shu Da Shi Si Wan, [Total Number of Chinese Lawyers has Reached 140,000]*, XINHUA NEWS, http://news.xinhuanet.com/newscenter/2008-10/25/content_10250583.htm (available only in Chinese).

254. *See* Qiu Xuyu, *Zhong Guo Lu Shi Ye Fa Zhan De Di Er Ci Chun Tian [The Second Spring of the Development of the Chinese Legal Profession]*, http://www.mie168.com/manage/2007-12/222284.htm (last visited Feb. 19, 2009) (available only in Chinese).

3. Criminal Suspects are Paying a Price: Less Access to Legal Services

In 1991, there were 427,000 serious criminal cases in the whole country, however defense attorneys were involved in only forty percent of these cases (less than 170,000 cases).[255] Although criminal cases increased every year, the number of criminal cases that each Beijing lawyer worked on in 1990 was 2.64 but it dropped to 0.78 per lawyer in 2000.[256] Professor Chen Xingliang estimated that more than seventy percent of criminal cases do not have defense lawyers involved.[257] The Haidian District Procuratorate in Beijing performed a survey of the largest Detention Center in the country. The survey showed that although 78.5% of the inmates wanted a lawyer's help as early as the investigation stage, only 31.5% finally hired lawyers.[258]

A lawyer's duty is to safeguard the lawful rights and interests of his client by presenting—in light of the facts and law—arguments in favor of his client's innocence, the need for a mitigated punishment, or exemption from criminal responsibility. Facing so many obstacles, executing a lawyer's duty is difficult.

IV. *RESOLUTIONS*

There is not just one resolution that will solve the problems that defense attorneys face. The solution must be a complete and integrated one. Using the words of Chinese leaders, if lawyers' system could follow the "Sixteen-Word Guidelines" in the Chinese legal system—which include having laws for people to follow, laws must be observed, strict enforcement of laws, and charging anyone who violates the law[259]—there would be hope.

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255. *See The Opinions of the Ministry of Justice Regarding Further Lawyering Reforms*, ZHONGGUO LUSHI [CHINESE LAWYER], Aug. 4, 1992 (available only in Chinese).

256. *See supra* note 181 and accompanying text; Feng Xiang, *Why Does China Need Lawyers?*, LUSHI WENZHAI [LAWYERS' DIGEST], Issue 2, 2003 (available only in Chinese).

257. *See* Su Nan & Jiao Yan, *supra* note 140.

258. Hou Xiaoyan, Liu Xiufang & Zhang Yi, *When Do Criminal Defendants Need a Lawyer's Help?: A Survey on 200 Detainees in a Beijing Detention Center (April 2003)*, ZHONGGUO LUSHI [CHINESE LAWYER], Issue 11, 2003 (available only in Chinese).

259. *See supra* note 25 and accompanying text.

A. *Proposals to Change the Law*

1. Ratify the International Covenant on Civil and Political Rights ("ICCPR") and Adopt Basic Principles on the Role of Lawyers

Having "laws for people to follow" means there should be good laws for citizens to comply with. Many years ago, China was the country that other countries followed. Presently, although China is somewhat behind some of the developed countries, it is not awful. As long as China is willing to follow the advanced steps of others, the gap between China and developed countries will shrink. China is the biggest developing country with more than a quarter of the world's population. Thus, whether other countries like it or not, China surely plays an increasingly important role in the international platform. Similarly, whether the Chinese government likes it or not, China has duties in the international community. Since China has signed the ICCPR[260] as early as 1998, China has to observe and perform its duties as one of the ICCPR signatories. China would not fulfill her rising status as a superpower if the Chinese legislative body does not ratify the ICCPR. Basic rights under the ICCPR must be guaranteed in the Chinese legislation as soon as possible. Before the ratification, principals and intents of ICCPR need to be followed as a signatory. It does not matter that law enforcement officers cannot implement the provisions in a short period. At the very least, there would be goals and guidelines to follow. In addition to accepting the ICCPR, China must also follow the Basic Principals on the Role of Lawyers[261] and other international covenants.[262]

2. Remove Article 306 from the Criminal Law

Compared to international standards, Article 306 is a bad provision and no other country has a similar provision. As Article 306 has drawn a lot of lawyers into its trap, it has become a dangerous tool to strike and retaliate against lawyers. As a result, Article 306 has not only had a fearfully large impact on the legal profession, but also a chilling effect on Chinese society. Article 306 should be removed from the books. Legal professionals, in-

260. ICCPR, *supra* note 63.

261. Basic Principles for Lawyers, *supra* note 63 and accompanying text.

262. *See supra* note 63 and accompanying text.

cluding scholars, lawyers, and even some prosecutors and judges have long cried out for the removal of Article 306. As a legislator chosen from a lawyers' group, Zhang Yan and others have repeatedly suggested the removal of Article 306.[263] Since Article 38 of the 1996 CPL is the equivalent of Article 306 of the Criminal Law, Article 38 should also be removed.

3. A New Lawyers Law Is Not Enough

It is regretful that the new 2007 Lawyers Law does not bring a glimmer of hope for the lawyers in the darkness. Similar to the 1996 Lawyers Law, the 2007 version is not a law to protect lawyers' rights; rather it is a law to restrict lawyers' rights. Its most shining improvement is that lawyers are entitled to immunity for statements in court, but with exceptions. Lawyers have the right to meet with their clients without being monitored. Lawyers may request the procuratorate or the court to collect evidence or notify witnesses to testify at a hearing. If lawyers investigate evidence by themselves, they may do so without the consent of the investigated parties. However, how judicial officers and others at large implement these Lawyers Law provisions is another issue. Additionally, if certain laws in criminal procedure and the criminal law remain the same, it will be impossible for these new bright points to shine through the darkness.

B. *Educate People on the Importance of the Role of Lawyers*

The next step is strictly executing compliance with the laws. Due to the long history of "rule by officials" rather than a "rule of law," lawyers do not expect that their situation will improve quickly. Improvement also cannot rely only on some people's efforts. Rather, it requires the whole society to change its attitudes towards lawyers and recast the role of defense lawyers. In the same way that—through legislation and public efforts—all people now understand the need to buckle their safety belts in a car, society must learn about the importance of defense lawyers. As a specialized professional group, defense lawyers are a crucial part of the legal system and they play a huge and important role in maintaining balance and fairness in society. The fate of de-

263. *See* Wu Yi, *Representative Zhang Yan Again Submitted to Remove Art. 306 of the Criminal Law*, ZHONGGUO LUSHI [CHINESE LAWYER], Issue 5, 2002, at 9; 233b 1997 CL art. 387, 9 P.R.C. LAWS at 132.

fenders affects everyone, not only those in current need of defense services. As a result, people will comply with the Lawyers Law and other rules that are in place to protect the rights of defense attorneys.

C. *Punish Those who Wrongfully Charge Lawyers*

Oftentimes, judicial officers are not punished for violating the law and impeding the rights of defendants and their lawyers. This presents a major obstacle for defense attorneys. Although some internal regulations do penalize such conduct by judicial officers with sanctions such as withholding promotions or diminishing bonuses, these sanctions are simply not enough. If state servants intentionally hinder, limit, or deprive a lawyer of his rights or hinder a defense attorney from performing his job, they should be charged with "abuse of the power" under Article 387 of the Criminal Law. Even if one judicial staff member is charged with this crime, it would send a big warning to many others.

D. *Improve the Bar Associations' Functions*

As the self-regulated associations for lawyers, the bar associations must play their own role to truly protect lawyers' rights. Unfortunately, since there is no independent legal profession in China right now, how can we improve the bar associations' real function and when can lawyers truly self-regulate the bar associations? There is no answer yet. Ironically, a group of Beijing lawyers appealed to have a democratic direct election for the new term of leaders of the Beijing Bar Association on August 26, 2008. The Beijing Bar Association not only did not support, rather, it soon put out a stern statement alleging that those lawyers were against socialism and even took some measures to dismiss or threaten lawyers who participated in the appeal.[264]

Nevertheless, if the integrated mechanism can function well, it would greatly help defense lawyers to escape their current plight. Without a doubt, it promises to be a long and winding way to go.

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264. Press Release, Human Rights in China, Lawyers Are Dismissed by Firms for Supporting Beijing Lawyers Association Direct Election, Law Firms are Threatened (Oct. 31, 2008), http://hrichina.org/public/contents/press?revision_id=73185&item_id=72449