

In Whose Service? The Transnational Legal
Profession's Interaction with China and the
Threat to Lawyers' Autonomy and
Professional Integrity

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ARTICLE

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I. INTRODUCTION

When in May 2016, Peng Jiyue, a Chinese lawyer employed by the Chinese part of the international law firm Dentons Dacheng, undertook to represent the family of Lei Yang, a young environmental activist who had died under suspicious circumstances in police custody, it was an act of kindness, partly motivated by friendship with the family. They had not formally appointed him in writing, but he accompanied them to view the bruised body and called for an independent autopsy on their behalf. The authorities claimed that Lei had died of a heart attack during a raid on a brothel, whereas his friends

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and family thought he had been beaten to death as a result of his activism.¹

A few days later, Lawyer Peng abruptly withdrew from the case.² Shortly after his withdrawal, other lawyers from the same firm took on the representation of the police officers alleged to bear direct responsibility in Lei's death.³ Subsequently, another lawyer, Chen Youxi, started representing the family.⁴ A settlement between the police and the family, reportedly reached due to great pressure on the family, led to the dropping of charges against the officers in question.⁵

This sequence of events raised the question if Dentons had become implicated in an apparent conflict of interest.⁶ There was also the question why Lawyer Peng had withdrawn in the first place. Did this happen following a request by the authorities? Much was left to speculation, and the concerns that had been raised were not, apparently, followed up. The incident illustrated, at any rate, how problematic operating in the Chinese legal system can be. It suggested that this system could pose threats to lawyers' autonomy, as well as their professional integrity, especially in "sensitive" cases.

The autonomy and integrity of the legal profession have long been understood as a cornerstone of the rule of law, and lawyers have been important actors in the struggle for more open societies in many places.⁷ The governments and civil society of the United States, continental European nations, and the United Kingdom have long

1. Anne Henochowitz, *Minitrue: Man dies in Beijing Police Custody*, CHINA DIGITAL TIMES (May 10, 2016, 6:19 PM), <https://chinadigitaltimes.net/2016/05/minitrue-beijing-man-dies-police-custody/> [<https://perma.cc/3FGJ-PV4B>]; Li Fangping, 大成律所历来不办类似案件, 难道官方委托或指定除外?, WEIBO (June 28, 2016) http://www.weibo.com/1786822605/DCibt6ZYY?type=comment#_rnd1467451531408 [screenshot of broken link on file with author] (discussing this case).

2. Samuel Wade, *Lei Yang Case Closure Stirs Discontent*, CHINA DIGITAL TIMES, (Dec. 29, 2016, 12:06 AM), <https://chinadigitaltimes.net/2016/12/lei-yang-case-closure-related-censorship-stir-discontent/> [<https://perma.cc/S78R-J9MD>].

3. *Id.*

4. *Id.*

5. *Id.*

6. *Dentons accused of conflict of interest over Chinese corpse*, ROLLONFRIDAY (July 8, 2016), <http://www.rollonfriday.com/TheNews/EuropeNews/tabid/58/Id/4660/fromTab/58/currentIndex/58/Default.aspx> [<https://perma.cc/NU6S-XVW8>].

7. Terence C. Halliday et al., *Introduction—The Legal Complex in Struggles for Political Liberalism*, in *FIGHTING FOR POLITICAL FREEDOM: COMPARATIVE STUDIES OF THE LEGAL COMPLEX AND POLITICAL LIBERALISM* 1-42 (Terence C. Halliday, Lucien Karpik, Malcolm M. Feeley eds., 2007).

engaged in efforts to develop and export what one might call rule of law “best practice” models. They have trained key actors in the legal system such as judges, lawyers, prosecutors and the police, and conducted exchanges at with partners in authoritarian jurisdictions such as China.⁸ The professional bodies representing the legal profession, such as the Law Society of England and Wales and the Bar Council in the United Kingdom, have long interacted with the All China Lawyers’ Association and its local branches to promote rule of law through improvements for the legal profession.⁹

Against the wider background of collaboration and exchange, foreign governments, legal professional bodies, and entities working with them have also not shied away from criticizing the Chinese government (and other governments) for persecuting human rights lawyers. For example, in the wake of a crackdown that began in July 2015, the United Kingdom’s Bar Human Rights Committee issued a joint statement condemning the crackdown for its flagrant violations of human rights standards.¹⁰ The Committee’s letter detailed these violations and drew attention to the “significant implications” these cases had for the rule of law and exercise of the legal profession in China.¹¹ Such engagement is very commendable; and it is important that it continue. The situation has never been worse for China’s human rights lawyers. The latest crackdown on human rights lawyers, discussed later on, has made this entirely clear; it has seen hundreds of lawyers and their assistants detained and questioned, as well as several held incommunicado for long periods, tortured, and publicly paraded “admitting guilt” and expressing repentance.¹²

8. Thomas E. Kellogg, *Western Funding for Rule of Law Initiatives in China: the importance of a civil society based approach*, 2012 CHINA PERSP. 3, 53-59.

9. See, e.g., Holly McKenzie, *Meeting with the China Law Society*, THE L. SOC’Y (Nov. 8, 2017, 4:39 PM), <http://communities.lawsociety.org.uk/international/regions/north-asia-and-the-pacific/china/meeting-with-the-china-law-society/5063447.fullarticle> [<https://perma.cc/6PKV-BWY5>] (reporting on discussions about opening up markets in second tier Chinese cities).

10. See Open Letter from Kirsty Brimelow QC, Chair, Bar Human Rights Comm. of Eng. and Wales to Xi Jinping, President of China (July 17, 2015) <http://www.barhumanrights.org.uk/wp-content/uploads/2015/10/china-activists.pdf> [<https://perma.cc/CQL9-D9E7>]; see also An Open Letter by Legal Professionals To President Xi Jinping On the Occasion of the anniversary of the 709 Crackdown, CHINA HUM. RTS. LAW. CONCERN GROUP (July 15, 2016), <http://www.chrlawyers.hk/en/content/open-letter-legal-professionals-president-xi-jinping-occasion-anniversary-709-crackdown> [<https://perma.cc/34KS-GX3E>] [hereinafter Open Letter to President Xi Jinping].

11. See Open Letter from Kirsty Brimelow QC, *supra* note 10; Open Letter to President Xi Jinping, *supra* note 10.

12. See *infra* note 37.

But to be effective, commitment to the excellent standards invoked here should be demonstrated throughout the legal profession's engagement with colleagues in authoritarian systems. China's human rights lawyers are a tiny group of legal professionals whose situation is especially dire; but their predicaments reflect problems of the legal profession more widely. Party-State control of the legal profession is pervasive, and repression of forceful rights advocacy is inherent to the political-legal system. When international firms go to China, do they buy into such repression? When Chinese firms go abroad, do their lawyers bring repressive regulatory demands and practices with them?

Up to a point. In this article, I discuss a few key aspects of control of the domestic and international legal profession in China. I argue that the regulatory scheme that international firms practicing in China subscribe to systematically undermines the autonomy of the legal profession, the lawyer's duty (under UK rules, discussed by way of example) to uphold the autonomy of the law, and the ability of law firms and lawyers to keep client information confidential. This has further implications under international law standards. In addition, weak rule of law and extra-legal, illegal or even criminal Party-State interference with legal practice may affect the international legal profession indirectly and end up implicating international law firms in the human rights violations of the Party-State. However, attempting to discuss the nexus between "big law" and human rights lawyer persecution in authoritarian countries is an attempt to lift the lid of a very large black box. The analysis that follows will in part consist of a study of available rules, and in part rely on hypothesizing, rather than proving, likely facts. A wider, systematic, evidence-based study of this issue is as yet outstanding.

II. DOMESTIC VICTIMHOOD AND COMPLICITY

Domestically, the legal profession is subject to stringent controls, most importantly through a licensing system that is maintained by the Ministry of Justice ("MoJ"), aided by the All China Lawyers' Association ("ACLA"), in accordance with the 2007 Law on Lawyers

and further regulations.¹³ ACLA claims to be a self-regulatory body.¹⁴ But both the MoJ and ACLA are subject to Party-State controls.¹⁵ As argued in the following, all the officially recognized organizations of the legal profession, including individual law firms, come within the reach of Party-State control and are therefore potentially both victims and complicit (if at times reluctant) supporters of a governance system designed to repress activist and human rights defense-orientated lawyering. The interlocking systems of control rely on mechanisms of “relational repression” to achieve comprehensive control.¹⁶

To obtain a license to practice, lawyers must not only fulfil professional requirements but also swear allegiance to the Party as well as to the rule of law.¹⁷ Lawyers operate under an ethics code issued by the ACLA, called the “Basic Rules on Lawyers’ Professional Ethics,” according to whose Article 1 they “shall be firm in the ideal and belief in socialism with Chinese characteristics, adhere to the essential attribute of the socialist lawyer system with Chinese characteristics, uphold the party’s leadership and the socialist system, and consciously uphold the dignity of the Constitution and the law.”¹⁸ As the Party itself and scholars commenting on these developments have pointed out, “maintaining the leadership” of the Communist Party of China (“CPC”) is increasingly a “fundamental requirement” of the Party’s conception of law.¹⁹ Genuine rule of law reform, understood as a

13. See EVA PILS, *CHINA'S HUMAN RIGHTS LAWYERS: ADVOCACY AND RESISTANCE* 146-88 (2014); see also 中华人民共和国律师法 [People’s Republic of China Law on Lawyers] (promulgated by the Standing Comm. Nat’l People’s Cong., Oct. 28, 2007, effective June 1, 2008) (for the Chinese text, see http://www.gov.cn/flfg/2007-10/28/content_788495.htm [<https://perma.cc/57WD-BS3A>]) (for an English translation, see National People’s Congress of the People’s of China, *Law of the People’s Republic of China on Lawyers* (2007), http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content_1471604.htm [<https://perma.cc/4QT2-B2CB>]).

14. PILS, *supra* note 13.

15. *Id.*

16. Yanhua Deng & Kevin O’Brien, *Relational Repression in China: Using Social Ties to Demobilize Protesters*, 215 *CHINA Q.* 533, 533-52 (2013).

17. Joshua Rosenzweig, *New Pledge of Allegiance for Chinese Lawyers*, SIWEILUOZI’S BLOG (Mar. 21, 2012), <http://www.siweiluozi.net/2012/03/new-pledge-of-allegiance-for-chinese.html> [<https://perma.cc/5MQD-ZVEF>].

18. *律师职业道德基本准则* [Basic Principles of Lawyer’s Professional Ethics], ALL CHINA LAW. ASS’N (June 2, 2015), <http://www.dffyw.com/faguixiazai/ssf/201506/38582.html> [<https://perma.cc/U597-3KVH>].

19. 党的领导和社会主义法治是一致的·社会主义法治必须坚持党的领导·党的领导必须依靠社会主义法治, translated by China Law Translate, *CCP Central Committee decision concerning several major issues in comprehensively advancing governance according to law*, *CHINA L. TRANSLATE* (Oct. 28, 2014), <http://chinalawtranslate.com/fourth-plenum->

project enhancing control of public power and the protection of fundamental rights, is increasingly in jeopardy, as recent commentary from the Supreme People's Court's President Zhou Qiang illustrated.

²⁰ The judiciary “should resolutely resist,” he said, “erroneous influence from the West: ‘constitutional democracy,’ ‘separation of powers’ and ‘independence of the judiciary,’ [and] make clear our stand and dare to show the sword.”²¹ In other words, becoming a lawyer in China is premised on committing to upholding a political-legal system that lies well outside the normative framework of current public international law which, *inter alia*, includes Basic Principles on the Role of Lawyers and commitments to protecting Human Rights Defenders.²²

To keep their license, licensed Chinese lawyers must pass an annual re-assessment, which examines their overall performance, also in terms of political conformity criteria. Law firms are subject to a separate licensing system.²³ As has been widely documented, assessment and re-assessment of lawyers serve, *inter alia*, the function of controlling any political activity by lawyers.²⁴ Numerous cases of lawyers or law firms having their licenses suspended or revoked because they handled “sensitive” cases or brought certain legal challenges against the authorities have been documented, including those of Liu Wei and Tang Jitian.²⁵ Due to the overwhelming and paramount position of the Party, some of the aforementioned problematic lawyer conduct mentioned results from their dependence on Party leadership.

For example, upholding the party's leadership may mean that a law firm might tell its lawyer that they must refuse to accept instructions for a client at the behest of a Party-State official – that is,

decision/?lang=en [https://perma.cc/8UGB-VFM6]; Chongyi Feng, *Chinese Socialist Rule of Law – A Critical Appraisal of the Relationship Between the Communist Party and Comprehensive Law Reform*, in JOHN GARRICK & YAN CHANG BENNETT, *CHINA'S SOCIALIST RULE OF LAW REFORMS UNDER XI JINPING* 45-58 (2016).

20. Michael Forsythe, *China's Chief Justice Rejects an Independent Judiciary, and Reformers Wince*, N.Y. TIMES, (Jan. 19, 2017), https://www.nytimes.com/2017/01/18/world/asia/china-chief-justice-courts-zhou-qiang.html?_r=0.

21. *Id.*

22. See generally *Basic Principles on the Role of Lawyers*, UNITED NATIONS COMMISSION ON HUM. RTS. (Sept. 7, 1990), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfLawyers.aspx> [https://perma.cc/8SBX-BP6X]; G.A. Res. 53/144 (Mar. 8, 1999).

23. See PILS, *supra* note 13.

24. *Id.*

25. He Yang, *Disbarment* (吊照门) (independent documentary film, 2010).

for improper reasons. Lawyers have shared their early experience of such practices in 2004, detailing in eloquent testimony how first the authorities and then their own law firm bosses might instruct them not to represent a “politically sensitive” client.²⁶

The criminal justice system, too, has been used to control lawyers, who have historically been charged with crimes affecting the integrity of the judicial process, public order and national security, including “falsifying evidence,” “obstructing public office,” “gathering a crowd in a public place to obstruct order” and “[inciting] subversion of State power or overthrow of the socialist system.”²⁷ As early as 2011, a lawyer commented:

As long as you engage in rights defense, you may, superficially speaking, act within the law; but the government will never see it that way; for them, you attack them and shake their legitimacy (*dongyao ta de hefaxing*).²⁸

One of the key provisions that has been used to prosecute lawyers is Article 306 of the Criminal Law (“CL”), which provides for criminal punishment of lawyers who falsify or suppress evidence or instruct their clients to falsify or suppress evidence.²⁹ The main problem with Article 306 of the CL has been the retaliatory targeting of lawyers for trying to challenge the prosecution’s evidence, e.g., by producing

26. See, e.g., CHINA HUM. RTS. LAW. CONCERN GROUP, <http://www.chrlawyers.hk/en/content/%E9%A6%96%E9%A0%81> [<https://perma.cc/SG5V-H9FQ>]. Further examples are discussed in Pils, Chapter 5, which also discusses the problematic regulations requiring lawyers to submit information on their handling of ‘sensitive’ cases to the authorities.

27. Teng Biao, *The Political Meaning of the Crime of “Subverting State Power, translated in LIU XIAOBO, CHARTER 08 AND CHALLENGES OF POLITICAL REFORM IN CHINA* (Hong Kong University Press, 2012).

28. #21 2011-2 30. In Chinese characters, 动摇它的合法性.

29. Criminal Law of the People’s Republic of China (promulgated by the Nat’l People’s Cong., July 1, 1979, amended Feb. 25, 2011, effective Mar. 1, 2011), art. 306.

If, in criminal proceedings, a defender or agent ad litem destroys or forges evidence, helps any of the parties destroy or forge evidence, or coerces the witness or entices him into changing his testimony in defiance of the facts or give false testimony, he shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention; if the circumstances are serious, he shall be sentenced to fixed-term imprisonment of not less than three years but not more than seven years.

Where a witness’s testimony or other evidence provided, shown or quoted by a defender or agent ad litem is inconsistent with the facts but is not forged intentionally, it shall not be regarded as forgery of evidence.

Article 307 CL addresses non-lawyers and stipulates different rules for charges against them, creating bias. See *Criminal Law of the People’s Republic of China*, CONG.-EXECUTIVE COMMISSION ON CHINA, <http://www.cecc.gov/resources/legal-provisions/criminal-law-of-the-peoples-republic-of-china> [<https://perma.cc/48EX-L9AT>] (last visited Dec. 25, 2013).

witness statements contradicting those of the prosecution, or challenging the reliability of confessions; and the provision is widely held to have produced a chilling effect.³⁰

Following the adoption of increasingly principled, autonomous and vocal advocacy practices by some lawyers, the authorities have tightened controls and the Party has sought to strengthen its role within law firms.³¹ This process, which could be observed throughout the Reform and Opening era, accelerated under the leadership of Xi Jinping, which, as I argue, abandoned the paradigm of gradual transition to a more liberal system, and instead introduced explicitly anti-liberal changes.³² These changes have re-emphasized Party control of the law and weakened rule of law protections.³³ Most recently, they have resulted in constitutional revisions that enable Xi to stay in power without term limitations, while also enshrining his thought as guiding in the text of the Constitution.³⁴

The shift toward anti-liberal law initiated under Xi Jinping has had momentous consequences for all actors in the legal system, especially lawyers, whose fundamental role made them particularly vulnerable to being perceived as potential irritants and challengers. This shift is reflected, *inter alia*, in what Ahl has termed the “politicization of China’s judicial examination.”³⁵ At the level of legal rules, it became important to widen the mechanisms that allowed the authorities to outlaw and vilify ‘rights lawyers’ as troublemakers and

30. Ng Tze-wei, *Until clause goes, defense lawyers are just decoration*, SOUTH CHINA MORNING POST (July 7, 2011), <http://www.scmp.com/article/972741/until-clause-goes-defence-lawyers-are-just-decoration> [<https://perma.cc/9A9P-9CMZ>] (“An All China Lawyers’ Association officer, who asked not to be named, said in the 10 years after the clause was introduced in 1997, at least 200 lawyers had been detained under clause 306. At least half were proven innocent or not prosecuted, but those convicted faced jail terms and were disbarred for life.”); Mao Lixin (毛立新), ‘律师伪证罪的追诉程序探析 [*Analysis of the handling of crimes of falsification of evidence by lawyers*]’ (Aug. 30, 2011), http://blog.sina.com.cn/s/blog_4e7afe890102dssf.html [<https://perma.cc/7YQB-T92U>]; Ran Yanfei, *When Chinese Criminal Defense Lawyers Become the Criminals*, 32 *FORDHAM INT’L L.J.* 988 (2009).

31. See PILS, *supra* note 13 (discussing this process through 2013, which was the beginning of the Xi era).

32. Eva Pils, *The Party and the Law*, in *HANDBOOK ON THE CHINESE COMMUNIST PARTY* 248, 248-65 (2018).

33. *Id.*

34. Jerome A. Cohen, *Xi Jinping amends China’s Constitution*, JEROME A. COHEN: JERRY’S BLOG, (Mar. 8, 2018), <http://www.jeromecohen.net/jerrys-blog/2018/3/8/xi-jinping-amends-chinas-constitution> [<https://perma.cc/FD8B-GHR5>].

35. See generally Bjoern Ahl, *The Politicization of the Chinese National Judicial Examination, 2007–2012*, 44 *MODERN CHINA* 208 (2017).

rabble-rousers. For example, Article 309 of the CL, as revised in 2015, prohibits:

[I]nsulting, defaming or threatening judicial personnel or litigation participants, and not heeding the court's admonitions, seriously disrupting courtroom order . . . [as well as] other conduct seriously disrupting court order.³⁶

A MoJ Regulation on the Management of Law Firms, moreover, requires Chinese law firms to ensure that the lawyers on their staff not engage in too-vocal advocacy or political speech.³⁷ They must ensure, *inter alia*, that their lawyers do not:

[P]ublish distorting or misleading information on cases handled by themselves or others, or maliciously hype up cases, . . . [that they not] put pressure on the authorities and attack legal authorities or undermine the legal system by setting up groups, producing joint letters, or by publishing open letters, . . . [that they not] humiliate, defame, threaten or beat judicial personnel or participants in a litigation, *or engage in denial of the state-determined nature of an evil sect organization or other conduct seriously disrupting court order* [sic]; . . . [and that they not] publish or disseminate speech that denies the political order laid down in the Constitution, denies fundamental principles or endangers national security, or *use the internet or the media to stoke discontent toward the Party and Government*.³⁸ (Emphases added)

In the hands of a Party-State controlled judiciary, the language of these newly introduced provisions is highly elastic. In practice, the use of these provisions is likely to complement the already available arsenal of criminal and other legal provisions hampering lawyers' exercise of their profession. Such sweeping obligations imposed on law firms are all the more problematic because lawyers are in some cases compelled to use (otherwise arguably questionable) means such as open letters about pending cases and peaceful online demonstrations about procedural violations. They resort to such methods in order to

36. China Law Translate, *People's Republic of China Criminal Law (amended 2015)*, <http://chinalawtranslate.com/%e4%b8%ad%e5%8d%8e%e4%ba%ba%e6%b0%91%e5%85%b1%e5%92%8c%e5%9b%bd%e5%88%91%e6%b3%95%ef%bc%882015%e5%b9%bb4%e4%bf%ae%e6%ad%a3%ef%bc%89/?lang=en> (last visited May 31, 2018) [link broken].

37. 律师事务所管理办法 [Regulation on the Management of Law Firms] (promulgated by edict 133/2016 of the Ministry of Justice on Sept. 6, 2016), http://www.gov.cn/gongbao/content/2016/content_5109321.htm [<https://perma.cc/6UWY-U3LF>].

38. *Id.*

overcome inherent weaknesses of the judicial process, such as violations of the right of access to lawyers of one's own choice, the lack of publicness and openness of judicial proceedings, and what Li Ling has aptly described as the principle of Chinese judicial dependence.³⁹ The new rules impose an explicit obligation on law firms to ensure that their staff politically censor themselves. Noncompliance puts the firms' registration and hence their very existence at risk.

Beyond the regulatory regime and the rules of criminal law, lawyers who take on criminal defense cases or other cases involving confrontation with the Party-State's security apparatus have always been at risk of wider persecution.⁴⁰ Such persecution has included violence.⁴¹ In many instances, lawyers have triggered persecution simply by insisting on compliance with legal rules the authorities are unwilling to follow, such as rules safeguarding the right to file cases, securing their access to case files and defendants in custody.⁴² They have also been persecuted for refusals to comply with unlawful orders and instructions from the authorities and for complaining about government illegality or criminality.⁴³

While Lei Yang's, the young environmental activist, unexplained death in custody was a shock, it fit in with what human rights lawyers had learned to expect. For example, in June 2016, in Nanning, lawyer Wu Liangshu was beaten and had most of his business suit torn off when questioning the necessity of undergoing an enhanced body check in one of Nanning's district courts of law.⁴⁴ Perhaps more commonly, lawyers engaging in work that provokes the authorities will be attacked by persons referred to as "unknown thugs."⁴⁵ There can be a blurred line between these actors, a sort of obscurity which can in turn be exploited by the authorities. For example, the police threatened one

39. Li Ling, *The Chinese Communist Party and People's Courts: Judicial dependence in China*, 64 AM. J. COMP. L. 4 (2016).

40. EVA PILS, CHINA'S HUMAN RIGHTS LAWYERS: ADVOCACY AND RESISTANCE (2014)189-231.

41. *Id.*

42. *Id.*

43. *Id.*

44. Stephen McDonnell, *The Chinese lawyer who had his clothes ripped off in court*, BBC NEWS: CHINA BLOG, (June 7, 2016), <http://www.bbc.co.uk/news/blogs-china-blog-36466485> [<https://perma.cc/5KZF-U7W8>]. The article contains a picture of Lawyer Wu wearing the remnants of his suit with his bare leg and underpants showing.

45. Li Jiayu, *Mob storms into hotel, beats up two defense lawyers*, GLOBAL TIMES, (July 20, 2011), <http://www.globaltimes.cn/content/666978.shtml> [<https://perma.cc/3BMK-J7JU>].

lawyer explicitly with “being Lei Yang’ed” if he failed to comply with instructions; he bravely reported this later via social media.⁴⁶

As already mentioned, moreover, some lawyers have been subjected to even more severe measures such as enforced disappearance and torture, as well as criminal convictions and incarceration under various detention systems (the line between these two is becoming increasingly blurred).⁴⁷ I discussed the example of lawyer Gao Zhisheng eleven years ago in these pages.⁴⁸ A pioneer of human rights lawyering in China, he later suffered brutal torture and long-term detention at the hands of the police, who, on the occasion of his first torture experience told him that he would be given the same “treatment” as the clients he had sought to defend by exposing their torture in open letters published online.⁴⁹

The use of state-centered violence, too, has intensified under Xi Jinping, which saw a particularly severe and extensive lawyer crackdown that is still ongoing as of this writing.⁵⁰ Beginning in July 2015, some three hundred lawyers and legal assistants were rounded up and subjected to coercive questioning by the authorities.⁵¹ The majority were released after promising not to advocate on behalf of a small number of lawyers subjected to secret detention, some of whom were later convicted of political crimes.⁵² Of those who were forcibly disappeared or held under extremely permissive rules on “residential surveillance in a designated location,” some, such as lawyer Wang

46. Social media post, on file with the Author.

47. See PILS, *supra* note 40.

48. Eva Pils, *Asking the Tiger for His Skin: Rights Activism in China*, 30 *FORDHAM INT’L L.J.*, 1209-87 (2006)

49. Gao Zhisheng (高智晟), *Dark Night, Dark Hood, and Kidnapping by Dark Mafia – (my account of more than 50 days of torture in 2007)*, SINA (Mar. 10, 2009, 12:07 AM), <http://blog.sina.com.tw/64777/article.php?pbgid=64777&entryid=595609&comopen=1&trackopen=1> [<https://perma.cc/A9NE-DN63>].

50. Wang Yu, *The Nightmare – An Excerpt of Lawyer Wang Yu’s account of 709 detention and Torture*, CHINA CHANGE (Nov. 13, 2017), <https://chinachange.org/2017/11/13/the-nightmare-an-excerpt-of-lawyer-wang-yus-account-of-709-detention-and-torture/> [<https://perma.cc/X57C-2JMM>].

51. *A Year On China’s Crackdown On Human Rights Lawyers*, AMNESTY INT’L (June 22, 2015), <https://www.amnesty.org/en/latest/campaigns/2016/07/one-year-since-chinas-crack-down-on-human-rights-lawyers/> [<https://perma.cc/6JPG-X9RY>].

52. Fu Hualing, *The July 9th (709) Crackdown on Human Rights Lawyers: Legal Advocacy in an Authoritarian State*, 112 *J. CONTEMP. CHINA* 554 (2018); Eva Pils, *China’s turn to public repression: the case of the 709 Crackdown on human rights lawyers*, 3 *CHINA L. SOC’Y REV.* 1, 1-47 (forthcoming 2018).

Quanzhang, have not come back at all yet as of this writing.⁵³ Among those who came back, or were formally punished and could be visited in prison, Li Chunfu, was diagnosed with serious mental illness the following day.⁵⁴ A few days later, lawyer Xie Yang provided a detailed account of his torture to his defense lawyer, who decided to publish the news.⁵⁵ By July 2017, it had emerged that some six detainees claimed to have been forcibly drugged. One of them commented in a conversation in July 2017 that the forced drugging, in particular:

... made you think you were finished ... you couldn't know [what you'd been given] and so you thought, for sure they want to kill you. You won't get out of here alive. It was only in there that I really understood what torture was.⁵⁶

The same month, lawyer Wang Yu released a statement in which she described how she had been kept confined, deprived of food, and tormented in various other ways during her detention.⁵⁷ Releasing this statement no doubt took great courage. It was also a step in a process of recovery from what the authorities had put her through. Like others, Wang Yu had been wheeled out in front of television cameras, where they had to talk about their 'crimes,' admit guilt, profess to repentance, and praise and thank the Party-State authorities.⁵⁸

Wang Yu, having been detained for over a year "on suspicion of state subversion," spoke to the media in what appeared to be a holiday resort, renouncing her former advocacy denouncing two foreign

53. *China human rights: Wife marches for 'vanished' husband*, BBC NEWS (Apr. 4, 2018), <http://www.bbc.co.uk/news/world-asia-china-43644599> [<https://perma.cc/B8GA-XU7K>].

54. Wang Qiaoling, *Chinese Rights Lawyer Li Chunfu Mentally Disturbed and Physically Ruined After Abuse in Custody*, CHINA CHANGE (Jan. 13, 2017), <https://chinachange.org/2017/01/13/chinese-rights-lawyer-li-chunfu-mentally-disturbed-and-physically-ruined-after-abuse-in-custody/> [<https://perma.cc/6HEP-CG56>].

55. Xie Yang & Chen Jiangang, *Transcript of Interviews with Lawyer Xie Yang (3) – Dangling Chair, Beating, Threatening Lives of Loved Ones, and Framing Others*, CHINA CHANGE (Jan. 21, 2017), <https://chinachange.org/2017/01/21/transcript-of-interviews-with-lawyer-xie-yang-3-dangling-chair-beating-threatening-lives-of-loved-ones-and-framing-others/>/?.

56. Eva Pils, *A new torture in China*, ASIA DIALOGUE (Aug. 10, 2017), <https://cpianalysis.org/2017/08/10/a-new-torture-in-china/> [<https://perma.cc/4DLJ-4KBJ>].

57. Wang Yu, *王宇、包龙军：致敬！“709”案辩护人* [Wang Yu, Bao Longjun: *Saluting the “709” criminal defenders!*], BOTAN WEB (July 12, 2017), <https://botanwang.com/articles/201707/%E7%8E%8B%E5%AE%87%E6%9B%9D%E5%85%89%E9%85%B7%E5%88%91%E3%80%80%E6%84%9F%E8%B0%A2%E5%85%B3%E6%B3%A8%E4%BF%83%E5%A4%84%E5%A2%83%E6%94%B9%E5%96%84.html> [<https://perma.cc/V9NW-EA7X>].

58. See Pils *supra*, note 56.

organizations⁵⁹ for human rights awards given to her earlier that year, and thanking and praising the authorities. Her boss, Zhou Shifeng, at his trial, similarly admitted guilt and spoke of his deep gratitude toward the authorities that had already broadcast his statement of repentance shortly after his initial detention and held him *incommunicado* for over a year.⁶⁰ To prepare for this strange performance, the authorities had placed Zhou under “residential surveillance in a designated location” without access to legal counsel, ensured his ‘representation’ by a lawyer they had chosen and procured a note, handwritten by Zhou, stating that he did not wish his family to attend the trial.⁶¹ Another

59. Namely, the American Bar Association and the Ludovic Trarieux Human Rights Prize Committee. Chinachange James Podgers, *Chinese lawyer Wang Yu given ABA International Human Rights Award in absentia*, ABA JOURNAL, 6 (Aug. 6, 2016), http://www.abajournal.com/news/article/chinese_lawyer_wang_yu_given_inaugural_aba_international_human_rights_award; *The XXIst Ludovic Trarieux International Human Rights Prize 2016*, LUDOVIC TRARIEUX, <http://www.ludovictrarieux.org/uk-page3.callpt2016.htm>; China Change, “My son is everything to me:” how China forced lawyer Wang Yu to denounce her human rights award, H.K. FREE PRESS (May 13, 2018), <https://www.hongkongfp.com/2018/05/13/son-everything-china-forced-lawyer-wang-yu-denounce-human-rights-award/>.

60. Esteemed Presiding Judge, judges, state prosecutors and my two esteemed defense lawyers: you have all been put to so much trouble! Through today's trial, I have come to realize fully what crimes I have committed, and the harm my actions have caused to the Party and the Government. I hereby express my deepest repentance toward our government! [Bows.] I trust that a trial so replete with fairness and justice and the rule of law as this will result in a fair verdict, and that it shall stand the test of history and legal scrutiny. I admit guilt and repent, admit guilt and subject myself to the law; and I will never appeal! . . . I thank the court! I thank the prosecutor! I thank my lawyers!

See *Annotated Excerpts from Hu Shigen and Zhou Shifeng's Trial Transcripts*, HUM. RTS IN CHINA (Aug. 12, 2016), <http://www.hrchina.org/en/annotated-excerpts-hu-shigen-and-zhou-shifengs-trial-transcripts> [https://perma.cc/XDS2-NT98]. See also Vivienne Zeng, *Human rights lawyers targeted in unprecedented crackdown*, HONG KONG FREE PRESS (July 13, 2015), <https://www.hongkongfp.com/2015/07/13/human-rights-lawyers-targeted-in-unprecedented-crackdown/> [https://perma.cc/8PUF-LEDH]. Some commentators thought Zhou was intentionally ironic.

In a 10-minute final statement, the Peking University law school master's degree holder praised China's legal system, saying it was “so much beyond the Western rule of law,” and that the trial would “stand the test of the world.” The praise was not included in the official transcript published hours later.

See, e.g., Jun Mai, *How Chinese rights lawyer's courtroom mea culpa went off script*, SOUTH CHINA MORNING POST (Aug. 22, 2016), <http://www.scmp.com/news/china/policies-politics/article/2006700/how-chinese-rights-lawyers-courtroom-mea-culpa-went> [https://perma.cc/KR63-AQVD].

61. Zhou Shifeng (周世锋), 天津二中院：周世锋向法院书面请求不希望亲友旁听庭审 [Tianjin Second Intermediate Court: Zhou Shifeng submits written request to the Court, stating that he does not wish for family and friends to audit his trial], PEOPLE'S NETWORK (Aug.

lawyer described at length how his own trial was negotiated, scripted and, indeed, rehearsed, even though it was not selected for a “TV trial.”⁶² The effects of the TV trials were further amplified by accompanying articles in the official news media, as well as further audio-visual materials officially circulated video-clips that cast human rights advocates as enemies of the People and the State.⁶³

Of course, the vast majority of lawyers, and in particular those in commercial practice, are not affected by the more intense repressive measures outlined here. Their professional experience, especially if, like the vast majority of lawyers, they do not take on criminal cases, is removed from that of the human rights lawyers who fall victim to persecution. Contrary to how the Chinese and international legal profession in China tend to be discussed by professionals and academics, there is no neat and clear dividing line. There can be no such line, not least because legal work does not always neatly fall into separate categories. Many cases can engage the abuse-prone criminal justice and/or Party investigation system or become ‘sensitive’ for variety of other reasons. Even in the absence of such connections the Party-State system deliberately uses the social and professional networks on which lawyers depend to influence their actions. For example, it uses the law firm and its head as a tool to pass on instructions to individual lawyers, as when it instructs a ‘boss’ to demand that a particular law firm employee cease to represent a particular client.

Indeed, there is every indication that the control of the legal profession is not only intensifying with regard to perceived ‘subversive’ elements within the profession, but also being extended further to all its members, as a few further examples of new practices will illustrate. The first, perhaps most powerful and pervasive way in which this is achieved is through the licensing system, which affects all lawyers.⁶⁴ In a situation where, by nearly everyone’s admission, by anecdotal accounts and according to official statements, corruption in the judicial profession and more widely amongst actors in the legal

3, 2016), <http://legal.people.com.cn/n1/2016/0803/c42510-28608968.html> [<https://perma.cc/4A7E-4BD8>]

62. Anonymous conversation #300-17-1.

63. 林乐媛, 颜色革命 Color Revolution (Aug. 4, 2016), <https://www.youtube.com/watch?v=8qBt-i9ErSY>. *English translation available at* <http://chinadigitaltimes.net/2016/08/hk-activist-branded-us-backed-separatist-govt-video/>.

64. See PILS, *supra* note 13.

system, has long been endemic, lawyers' independence from the Party-State is adversely affected as it makes them vulnerable.⁶⁵ Scholars investigating how corruption affects the legal profession have, for example, described practice of “nurturing judges” (*yang faguan*) – potentially meaning anything from taking them to restaurants to money bribes – as widespread, and viewed as common and acceptable, at least in some locations.⁶⁶ For example, lawyers encounter a world of ‘state capitalism’ where legal rules of corporate governance are routinely disrupted by the Party exercising control.⁶⁷ Defenders of the strict licensing system requiring an annual re-assessment to keep one’s license might contend that it is necessary to weed out corrupt lawyers. But from the perspective taken here, this system is itself corrupted, in ways indicated above; it is incompatible with rule of law principles.

Second, partly claiming to respond to malpractices in the legal profession and wider legal system, the authorities are rolling out ever more comprehensive programs of surveillance include the so-called Social Credit System.⁶⁸ Once this program is in place nationwide, all lawyers, along with all other Chinese citizens, will be given a ‘social

65. Commenting on corruption within China’s court system, Supreme People’s Court President Zhou Qiang said, for example, that “the situation is grim and the task arduous.” In March 2016, after a year in which, according to the same official report, a total of 2,424 judicial staff were investigated and punished over graft, he said, “we will continue to put high pressure on corruption.” Every year, the Annual Work Report by the Supreme People’s Court President (see, e.g., Zhou Qiang (周强), 最高人民法院工作报告——2017年3月12日在第十二届全国人民代表大会第五次会议上 [Supreme People’s Work Report — submitted at the Fifth Plenary Meeting of the Twelfth NPC on 12 March 2017], The Supreme People’s Court of the People’s Republic of China (Mar. 19, 2017), <http://www.court.gov.cn/zixun-xiangqing-37852.html>) includes a rundown of disciplinary procedures, investigations, prosecutions and convictions for judicial corruption-related crimes, such as “bending the law” and bribe-taking; and professional judges have been quitting in rather large numbers. See 法官离职潮背后:丰满的理想抵挡不住现实骨感 [What lies behind the wave of judges quitting: fine ideals cannot withstand sense of realism], SINA.COM (July 24, 2016), <http://news.sina.com.cn/c/nd/2016-07-24/doc-ixuhukz0907342.shtml> [<https://perma.cc/2EFK-N23W>].

66. Outside litigation contexts, the situation is not necessarily better. See Sida Liu, *Lawyers, State Officials, and Significant Others: Symbiotic Exchange in the Chinese Legal Services Market*, 206 CHINA Q. 276, 276-93 (2011); see also TERENCE C. HALLIDAY & SIDA LIU, *CRIMINAL DEFENCE IN CHINA: THE POLITICS OF LAWYERS AT WORK* (2016).

67. JiangYu Wang, *Corporate Governance in China: The Law and Its Political Logic*, in *Routledge Handbook of Corporate Law* 183-211 (Roman Tomasic ed., 2017)

68. Yongxi Chen & Anne S.Y. Cheung, *The Transparent Self Under Big Data Profiling: Privacy and Chinese Legislation on the Social Credit System*, 12 J. COMP. L. UNIV. H.K. 356 (2017); Jeremy Daum, *China’s Social Credit System*, CHINA DIGITAL TIMES (Jan. 18, 2018), <https://chinadigitaltimes.net/2018/01/giving-credit-jeremy-daum-chinas-social-credit-system/> [<https://perma.cc/DZJ8-UTYE>]; Merics, *China’s Social Credit System*, CHINA MONITOR (May 24, 2017), <https://www.merics.org/en/microsite/china-monitor/chinas-social-credit-system>.

credit' score by the State, and this score will affect questions such as whether they can travel abroad.⁶⁹ (An additional issue is the government's plans "to rank lawyers by seniority and restrict [the handling of] key cases to 'qualified' advocates.")⁷⁰

Lastly, the Party has not only pursued a goal of achieving "total coverage" of Chinese law firms' establishment of Party branches through "professional Party-building work."⁷¹ As the abovementioned MoJ Regulation indicates, Chinese lawyers and law firms are increasingly required to aid the Party-State in ensuring political self-censorship.⁷² Through extensive reporting obligations in the context of the re-assessment system as well as the penetration of law firms by the Party, the wider Chinese legal profession is thus also affected by a process of intensified "politicization," or intensified Party control.

In sum, the arsenal of rules and measures by which the Party-State controls the domestic Chinese legal profession is impressive, and it has been further extended under Xi Jinping. The suggestion that lawyer repression in China limited to a handful of marginalized human rights lawyers is inaccurate, and there are plenty of trajectories whereby undue pressure on legal professionals is extended to the wider, including the commercial legal profession. International lawyers coming to China might thus face many calls on their sense of solidarity and responsibility for upholding the autonomy of the legal profession. As the following section discusses, however, the system gives them many reasons to stay silent.

III. TRANSNATIONAL IMPLICATION

When foreign lawyers go to work in China, they come under the jurisdiction of domestic Chinese law. When Chinese lawyers work abroad, they are required to obey local laws, too. In both cases, however, they do not entirely shed the system of their jurisdiction of origin; foreign lawyers generally remain bound by certain professional

69. Jay Stanley, *China's Nightmarish Citizen Scores Are a Warning For Americans*, AM. C.L. UNION (Oct. 5, 2015), <https://www.aclu.org/blog/privacy-technology/consumer-privacy/chinas-nightmarish-citizen-scores-are-warning-americans?redirect=blog/free-future/chinas-nightmarish-citizen-scores-are-warning-americans> [https://perma.cc/97TY-JSZX].

70. Jun Mai, *Justice fears over reform plans to rank China's lawyers*, SOUTH CHINA MORNING POST (Nov. 19, 2015), <http://www.scmp.com/news/china/policies-politics/article/1880166/plan-chinese-lawyers-be-ranked-sparks-fears-over> [https://perma.cc/47RN-DVJP].

71. See PILS, *supra* note 13.

72. See PILS, *supra* note 40.

standards grounded in the values of the legal system that admitted them to the profession. Chinese lawyers remain bound not only by the rules of their profession narrowly speaking; they also retain their status as subjects of the Party-State and remain in important ways subject to its control⁷³ As shown in the previous Section, such control and influence take a variety of forms, not all of which are legal even on the terms of the domestic Chinese legal system.⁷⁴ Moreover, domestically, lawyers and law firms can be both victims and complicit supporters of repression. The Chinese system's transnational effects in some ways reflect its domestic traits. In particular, foreign lawyers and law firms, too, are at risk of becoming complicit in the repressive system, even though a special system of rules has been devised for them, and even though they are barred from directly competing with their Chinese peers.

The regulatory regime governing foreign law firms in China is based on the 2001 Regulation on the Management of Representative Offices of Foreign Law Firms in China ("Representative Office Regulation") and its 2002 Interpretation Rules.⁷⁵ Formally, the Representative Office Regulations are secondary legislation, and are also governed by the 2007 Law on Lawyers (Article 58).⁷⁶ Under these rules, any international law firm setting up an office in China will be required to go through a licensing system for setting up a representation; and it cannot "practice Chinese law," not even by employing Chinese lawyer staff.

73. This includes registration and reporting requirements. *See, e.g.*, '关于提供律师事务所在境外设立分支机构详细信息的通知 [notice on supplying detailed information on establishment of law firm branches abroad],' GZLAWYER.COM (Apr. 12, 2017), <http://www.gzlawyer.org/info/0c0ee283b9dc4734822c70d1f750acd9> [<https://perma.cc/5JWZ-5BSJ>]. *See also infra* note 88 (discussing the Belt and Road Initiative).

74. *See* Jiayu, *supra* note 45.

75. 外国律师事务所驻华代表机构管理条例 [Regulations on the Administration of Foreign Law Firms' Representative Offices in China] LAWINFOCHINA.COM (2001), <http://www.lawinfochina.com/display.aspx?lib=law&id=2169> [<https://perma.cc/5XNA-J5C2>]; 司法部关于执行《外国律师事务所驻华代表机构管理条例》的规定 [Provisions of the Ministry of Justice on the Execution of the Regulations on the Administration of Foreign Law Firms' Representative Offices in China], LAWINFOCHINA.COM, <http://www.lawinfochina.com/display.aspx?lib=law&id=2402&CGid>. Law firms based in Hong Kong and Macau—which are separate jurisdictions from mainland China—are subject to similar rules, *see* The People's Republic of China Law on Lawyers, *supra* note 13.

76. The People's Republic of China Law on Lawyers, *supra* note 13.

The Representative Office Regulation requires that such representative offices and individual representatives (lawyers) shall, *inter alia*:

respect Chinese laws, regulations and rules, abide by *Chinese lawyers' professional ethics and professional discipline*, and not harm China's national security or social public interests. (emphasis added)⁷⁷

The language of “professional ethics and professional discipline” creates a link to domestic standards. Domestic lawyers found guilty of breaches may face punishment under the Ministry of Justice “Measures for Punishment of Unlawful Acts by Lawyers and Law Firms” (“Measures for Punishment”).⁷⁸ Misconduct by foreign lawyers would be dealt with in accordance with Articles 24 and 31 of the the Representative Office Regulation.⁷⁹ It stipulates that when foreign lawyers engage in conduct endangering national security or public order or “social management order” (a vague term), they too may be subject to criminal or administrative punishment, although it does not specify under what administrative rules.⁸⁰

What is perhaps of more immediate practical relevance is that all lawyers working in such representative offices are barred from actually engaging in “practicing Chinese law.”⁸¹ In practice, it is virtually impossible to operate in China without in some way engaging in an interpretation of Chinese law while providing services to clients. Any specific activity may or may not constitute “provision of Chinese law services”⁸² – what matters, according to informal and confidential conversations held with foreign lawyers of over ten years of experience of practicing in law firm offices in China, is that this requirement hangs

77. Regulations on Administration of Foreign Law Firms' Representative Offices in China (promulgated by State Council of the People's Republic of China on Dec. 22, 2001, effective Jan. 1, 2002), art. 3 [hereinafter the Representative Office Regulation].

78. Ministry of Justice, ‘*律师和律师事务所违法行为处罚办法*’ [*Measures for Punishment of Unlawful Acts by Lawyers and Law Firms*] (promulgated on April 8, 2010, effective June 1, 2010), MINISTRY OF JUST. OF THE PEOPLE'S REPUBLIC OF CHINA (Apr. 10, 2010), http://www.moj.gov.cn/government_public/content/2010-04/10/fggz_6422.html [https://perma.cc/9PVJ-VJ3K].

79. Representative Office Regulation, art. 24.

80. *Id.*

81. Article 15 of the Representative Office Regulation lists the activities they are allowed to engage in, explicitly excepting “Chinese law services *Zhongguo falü shiwu*.” *Id.* art. 15.

82. On detailed questions, see, e.g., Andrew Godwin, *The Professional ‘Tug of War’: The Regulation of Foreign Lawyers in China, Business Scope Issues and Some Suggestions for Reform*, 33 MELB U.L. REV. 132 (2009).

“like a sword of Damocles” over each Representative Office.⁸³ Falling afoul of the requirement can result in suspension or revocation (*zhuxiao, diaoxiao*) of the license (permit) to practice.⁸⁴ One lawyer observed that they did not think that any effective legal challenges to license revocation or means of redress would be available in practice in such a case.⁸⁵ Low confidence in the possibility of challenging unfair interpretations of such rules, due to the weak rule of law environment, can only enhance their chilling effect.⁸⁶

Partly in response to such pressure, but mainly for wider commercial reasons, a growing number of foreign law firms is creating loosely structured mergers.⁸⁷ There is, for example, the form of the Swiss *Verein*.⁸⁸ The *Verein* merger retains separate local profit pools for the two entities (the Chinese and foreign firms).⁸⁹ The *verein*

83. Anonymous conversation #400-17-1.

83. In accordance with Article 26 (1) of the Representative Office Regulation, *see* Representative Office Regulation, *supra* note 77, art. 26(1).

85. Anonymous conversation #400-16-1.

86. Whether the current restrictions imposed on foreign lawyers and law firms in a legal services market perspective are in compliance with China’s international obligations, in particular under World Trade Organization (“WTO”) rules, has been a matter of debate for some time. After China’s accession to the WTO, some argued that the WTO presented challenges to the domestic legal services market, and that China was deviating from its WTO commitments. *See* Jane Heller, *China’s New Foreign Law Firm Regulations: A Step in the Wrong Direction*, 12 PAC. RIM. L. & POL’Y J. 751, 765 (2003); *see also* Rachel E. Stern & Su Li, *The Outpost Office: How International Law Firms Approach the China Market*, 41 L. & SOCIAL INQUIRY 184 (2016). The focus of the present discussion is not on restrictions of the legal services market as such but, rather, on the effects existing restrictions have on the autonomy of the legal profession.

87. Anna Zhang, *Will More Law Firms Look to Joint Ventures For China Business?*, ALM (Oct. 24, 2016), <http://www.law.com/sites/almstaff/2016/10/24/will-more-law-firms-look-to-joint-ventures-for-china-business/?kw=Will%20More%20Law%20Firms%20Look%20to%20Joint%20Ventures%20For%20China%20Business?&et=editorial&bu=International&cn=20161024&src=EMC-Email&pt=Asian%20Lawyer%20News&pc=ASLNALERT&slreturn=20160926100151> [https://perma.cc/3EVU-D9Z2].

88. A representative example for this sort of merger is that of Dentons and Dacheng. The firm in China now uses both names (大成). *See* DENTONS DACHENG, <https://www.dentons.com/zh> [https://perma.cc/5UFH-6G2U] (last visited June 3, 2018).

89. A *verein* is an association of independent legal entities for specifically defined purposes — generally, marketing and branding in nature. Financial separation and local entity independence of control for each *verein* member law firm is confirmed in the *verein*’s governing documents, and reaffirmed in dedicated disclaimer and notice sections prominently featured on the website of every *verein* member, along with the important note that the *verein* itself does not practice law anywhere.

See Edwin B. Reeser & Martin J. Foley, *Are verein-style law firms ignoring the fee-splitting ethics rules?*, ABA J. (Oct. 1, 2013), http://www.abajournal.com/legalrebels/article/are_verein-style_law_firms_ignoring_fee-splitting_ethics_rules/ [https://perma.cc/8HRN-GPK2].

structure cannot necessarily avoid reputational liability for one's partner, however.

Some new local regulations have created further opportunities for Chinese and foreign law firms to create joint offices. In particular, administrative regulations created by the Shanghai Bureau of Justice, allow for what is called "reciprocal assignment" (*hupai*) of legal consultants between a Chinese and a foreign firm, and for "affiliated operation" (*lianying*) of a Chinese and a foreign firm.⁹⁰ These new opportunities would appear to reduce the risks of "providing Chinese law services" by normalizing such activities but also bring some new problems, since there would be even greater proximity to the obligations and liabilities of domestic Chinese lawyers, and thus greater risks of complicity with Party-State illegality or crime.

In parallel with this, the interaction between domestic and foreign lawyers and law firms has come within the ambit of Xi Jinping's global expansion project called the "Belt and Road Initiative" ("BRI").⁹¹ This initiative has not only led to ambitious attempts to remodel law on anti-liberal lines and weaken the international human rights law regime by reinterpreting its fundamentals, such as human rights.⁹² It has also led to numerous subordinate initiatives and organizations including a new "'Belt and Road' Cross-border Lawyers" Talent Pool

90. See 中国（上海）自由贸易试验区中外律师事务所互派律师担任法律顾问的实施办法 [Measures for the Implementation of the Reciprocal Assignment of Lawyers to Serve as Legal Consultants by Chinese and Foreign Law Firms in the China (Shanghai) Pilot Free Trade Zone] (promulgated by the Shanghai Bureau of Justice, People's Gov't of Shanghai Mun., effective Nov. 18, 2014) (addressing what is called the "reciprocal assignment" (*hupai* 互派) of legal consultants between a Chinese and a foreign firm); 中国（上海）自由贸易试验区中外律师事务所联营的实施办法 [Measures of the Implementation of Affiliated Operation between Chinese and Foreign Law Firms in the China (Shanghai) Pilot Free Trade Zone] (promulgated by the Shanghai Bureau of Justice, People's Gov't of Shanghai Mun., effective Dec. 21, 2014) (involving the "affiliated operation" (*lianying* 联营) of the Chinese and a foreign firm).

91. See *Building the Belt and Road: Concept, Practice and China's Contribution*, BELT AND ROAD FORUM (May 11, 2017), <https://eng.yidaiyilu.gov.cn/zchj/qwfb/12731.htm> [<https://perma.cc/KJS2-MFRZ>].

92. See "首届"南南人权论坛"《北京宣言》[*First South-South human rights dialogue "Beijing Declaration"*], XINHUA NET (Dec. 8, 2018), http://news.xinhuanet.com/politics/2017-12/08/c_1122081753.htm [<https://perma.cc/R3AT-2WWC>]; see also 常驻联合国日内瓦办事处俞建华大使 [Ambassador Yu Jianhua of the Chinese Mission to the United Nations Office at Geneva], 坚持合作共赢 共促人权发展 [*Win-Win Cooperation for the Common Cause of Human Rights*], PEOPLE'S REPUBLIC OF CHINA MINISTRY OF FOREIGN AFF., http://www.fmprc.gov.cn/web/dszlsjt_673036/t1538415.shtml (May 1, 2018) [<https://perma.cc/RS35-F2FW>], translated in PERMANENT MISSION OF THE PEOPLE'S REPUBLIC OF CHINA TO THE UNITED NATIONS OFF. AT GENEVA AND OTHER INT'L ORG. IN SWITZ., (Mar. 1, 2018), <http://www.china-un.ch/chn/dbtzyhd/t1538411.htm> [<https://perma.cc/A22R-FULP>].

whose establishment indicates that ACLA, as an organization of the Party-State, intends to play a key role in the selection of foreign lawyers invited to participate in BRI projects.⁹³

In sum, international law firms in China operate at the sufferance of authorities that have become increasingly intolerant of autonomous legal practice over the past few years. They are required to follow a rule of “not practicing Chinese law” that stifles their activities and makes them vulnerable to pressure.⁹⁴ While the regulatory framework is somewhat obscure, these firms moreover seem to be subjected to explicit requirements to ensure that their staff censor themselves politically, avoiding any criticism of the government or the system under which they operate.⁹⁵ Taking these factors into account, it is perhaps not surprising that when the authorities launched their latest, and thus far biggest, crackdown on Chinese human rights lawyers, *The American Lawyer* reported, “In China’s crackdown on rights lawyers, big law says little.”⁹⁶ (In fact, it appears that Big Law said nothing at all publicly, leaving expressions of concern and protest to be produced by professional associations and their representatives.)

There are several problem areas of international (or transnational) legal services with a China element.

The first is (client) confidentiality, an issue encompassing different sets of rules that govern contractual obligations of confidentiality, professional ethics regarding privileged information,

93. The initiative is described as follows: “At the event, the All China Lawyers Association announced the establishment of a ‘Belt and Road’ Cross-border Lawyers Talent Pool. 143 Chinese and foreign law firms and 205 Chinese and foreign lawyers became the Pools’ inaugural members. It is reported that ACLA will further refine its management on the basis of different national systems and areas of professional specialization and actively recommend outstanding foreign legal service personnel to participate in the assessment and arbitration organizations [评审、仲裁机构] of international economic and trade organizations, and to recommend foreign legal personnel to participate in investment in Chinese enterprises in countries and regions along the ‘One Belt and One Road’”. 中国律协与“一带一路”沿线多国搭建法律服务合作网 [The All China Lawyers Association and the “One Belt, One Road” Multinational State Building Legal Services Cooperation Network], XINHUA NET (June 24, 2017), http://www.xinhuanet.com/world/2017-06/24/c_1121203227.htm [<https://perma.cc/6B2N-BBVQ>].

94. See Zhang, *supra* note 87.

95. See *id.*

96. In *China’s crackdown on rights lawyers, big law says little*, THE AM. LAW., (July 24, 2015), <https://www.law.com/almID/1202733049955/?sreturn=20180127060251> [<https://perma.cc/M2U2-739G>]. In fact, it appears that Big Law said nothing at all publicly, leaving expressions of concern and protest to be produced by professional associations and their representatives.

and data protection and privacy rights. Lawyers pointed out that electronic surveillance and data-selling are rife in China, and that Chinese law firms in general feel unable to refuse requests to relinquish information to the police or other authorities requesting them.⁹⁷ As a result, the promises made to clients that their information could be kept confidential may be spurious.⁹⁸ Academics, on the other hand, point to the generally weak legal protection in this area. Thus Chen and Cheung write that:

. . . [P]ersonal data as a general subject has yet to be clearly defined and effectively protected under Chinese law [and that] rights that data subjects are entitled to under a personal data protection regime are rarely mentioned in China and are, at best, provided for under scattered sector-specific laws . . . Given the inadequate protection afforded to personal data in China, the country is an ideal social laboratory for big data experimentation, data intelligence and mass surveillance.⁹⁹

Discussing the already-mentioned ‘Social Credit’ system being rolled out, these authors point out that the authorities in charge can gather records also from ‘industry associations,’ which may well be understood to include the lawyers’ associations at various levels as well as receive information supplied by private individuals. They also discuss the many ways in which private entities may gain access to and use information on ‘social credit’ or ‘public credit’ gathered in this way.¹⁰⁰ Additionally, it is recognized that the Party-State uses technology to practice involuntary cyber-surveillance.¹⁰¹ Even though it is impossible at this stage to gain a detailed understanding of the practices that may arise under these Party-State policies and practices, it is not difficult to see that both the provision and the use of ‘public credit information’ may be in tension with the obligations of lawyers and law firms under rules devoted to protecting confidentiality, privacy, and personal data, both with regard to clients, and with regard to employees and colleagues.

97. Anonymous conversation #401-16-1.

98. *Id.*

99. Yongxi Chen & Anne S.Y. Cheung, *The Transparent Self Under Big Data Profiling: Privacy and Chinese Legislation on the Social Credit System*, 12 J. COMP. L. 356, 357 (2017).

100. *Id.* at 366-71

101. See Maya Wang, *China’s Dystopian Push to Revolutionize Surveillance*, THE WASHINGTON POST (Aug. 18, 2017), https://www.washingtonpost.com/news/democracy-post/wp/2017/08/18/chinas-dystopian-push-to-revolutionize-surveillance/?noredirect=on&utm_term=.29fad8f24b0.

It is imaginable that such issues might arise with regard to foreign law firms operating in China, as well as with regard to Chinese law firms operating in western countries. To give a randomly chosen example of the latter case, lawyers working with King & Wood Malleson are listed as working in both the London and Shanghai branches of the firm.¹⁰² Of course, the Shanghai branch of this firm has established a Party cell.¹⁰³ It is not possible, without insider knowledge, to determine what the role of this Party cell is, what decisions, if any, it makes or passes on from the higher echelons of the Party leadership, what study sessions it organizes, and overall what the influence of the Party on the operation of the law firm is. But there can be no doubt that having a Party cell has a powerful symbolic significance, at least. It might serve to remind lawyers licensed under the Chinese system of their legal obligation to show loyalty to the Party and to serve a system in which the principle of Party leadership has been declared to be identical with the principle of “socialist rule of law with Chinese characteristics.”¹⁰⁴

A second issue is the interaction of transnational law firms with inherently abusive systems of discipline and criminal punishment in China. For example, there have been cases in which the criminal justice system was apparently abused by commercial actors seeking to put pressure on competitors or opponents.¹⁰⁵ In China, the issue is recognized and discussed as one of “turning private conflicts into criminal cases.”¹⁰⁶ It can involve, for example, taking a business competitor or opponent in a business lawsuit into police custody as a

102. See KING & WOOD MALLESONS, <http://www.kwm.com/en/cn> [<https://perma.cc/F8R5-ZLD5>].

103. Lüxinshe (律新社), 献礼十九大！上海哪 33 家律所的党建工作走在了前列？ [Tribute to the Nineteenth [Party Congress]! Which 33 Shanghai Law Firms are at the Forefront of Party-Building Work?], (Oct. 19, 2017), <http://www.lvxinweb.cn/detail.aspx?wid=35&aid=6135&openid=loseopenid> [<https://perma.cc/PR8P-6W7B>].

103. *CCP Central Committee Decision concerning Several Major Issues in Comprehensively Advancing Governance According to Law*, CHINA L. TRANSLATE (Oct. 28, 2014), <http://chinalawtranslate.com/fourth-plenum-decision/?lang=en> [<https://perma.cc/9S5E-7F3T>].

105. One such case affected a German businessman residing in China. See *Kunstspediteur darf Deutschland wieder verlassen*, *Sueddeutsche Zeitung*, (May 21, 2013), <http://www.sueddeutsche.de/panorama/inhaftierter-nils-jennrich-deutscher-kunstspediteur-darf-china-verlassen-1.1677561> [<https://perma.cc/T8RW-U6LC>].

106. Yu Lujuan & Zheng Weihong (于禄娟 郑伟红), *民事纠纷刑事化的根源及对策* [Root causes and responses to the practice of turning private conflicts into criminal cases], PEOPLE'S TRIBUNE, (Jan. 11, 2013), http://paper.people.com.cn/rmlt/html/2013-01/11/content_1195145.htm?div=-1 [<https://perma.cc/B567-C5WK>].

“favor” from the police;¹⁰⁷ under the revised rules of criminal procedure, this might include the use of “residential surveillance in a designated location” or, as it has been dubbed, “non-residential residential surveillance” of the target individual. Where such practices do occur, they can raise the very difficult question of how far legal representatives should go in exposing or challenging them.

The abuses, detailed earlier, against professional lawyer colleagues are different yet raise somewhat similar issues and may serve as a second example. Even where a lawyer or law firm has no obligations toward a detainee as a client they may have obligations of care or solidarity as an employer or colleague. Yet, the system provides many incentives against exposure or challenges, and incentives for participation in persecution, as has been discussed elsewhere. To give just one example, when human rights lawyer Pu Zhiqiang tried to expose abuses occurring in the Party-governed system for “discipline and inspection” typically affecting Party members, such as officials or CEOs of SOEs, who are suspected of corruption, he suffered severe persecution himself.¹⁰⁸

Due to the complexity and obscurity of abuses in the criminal justice system and parallel systems for discipline and punishment, it may be difficult to establish big law firms’ implication in abuses. But as the example, discussed at the outset, of lawyer Peng Jiyue’s attempt to help in the Lei Yang case illustrated, commercial law firms are not isolated against criminal injustices just by virtue of their status.¹⁰⁹ Their dependence on the goodwill of the authorities for permission to operate, moreover, exposes them to the same control techniques as other lawyers in China, once they have become involved in a “sensitive” case.¹¹⁰

107. For a somewhat conservative analysis illustrating that the problem is widely recognized, see Yu Lujuan & Zheng Weihong (于禄娟, 郑伟红), *民事纠纷刑事化的根源及对策* [*Turning private conflicts into criminal ones – causes and ways of tackling the issue*], *PEOPLE’S TRIBUNE* (Nov. 1, 2013), http://paper.people.com.cn/rmlt/html/2013-01/11/content_1195145.htm?div=-1 [<https://perma.cc/RSB9-PNB6>]; see also Xu Xin (徐昕), ‘在刑事法庭解决民事纠纷·是法治的灾难’ [Resolving civil disputes through criminal litigation is a disaster for the rule of law], *SOHU* (Nov. 15, 2017), http://www.sohu.com/a/204495601_570256 [<https://perma.cc/BUG4-JA2B>].

108. See JMSC HKU, *Interview on “Ningyuan Shuanggui” by Pu Zhiqiang* (*English Subtitles*), *VIMEO* (Aug. 21, 2014), <https://vimeo.com/104070378> [<https://perma.cc/882Z-D94Y>]; see also Tom Phillips, *Pu Zhiqiang given three-year suspended sentence*, *THE GUARDIAN* (Dec. 22, 2015), <https://www.theguardian.com/world/2015/dec/22/pu-zhiqiang-chinese-human-rights-lawyer-sentenced-to-three-years> [<https://perma.cc/3SVJ-T3PH>].

109. See Henochowitz, *supra* note 1; Fangping, *supra* note 1.

110. See *supra* Part II (discussing the control of the legal profession).

A third issue is potential threats arising from widely endemic corruption, be it with regard to the judiciary or more widely. As noted above, corruption in the judicial system, in particular, is a widespread problem.¹¹¹ In theory, because they commit to “not practicing Chinese law,” foreign law firms are somewhat shielded from the implications of such corruption. But through collaborative relationships, they may at least acquire knowledge of ongoing corruption. Similarly, they may risk becoming implicated in corrupt business practices of their clients.

The examples discussed here raise not only the question how, and in whose service, such firms work when they operate transnationally in business locations with autocratic legal systems. In the system governing Chinese lawyers, at least, the obligations imposed on domestic lawyers are incompatible with principled and professional service to the client and adherence to the rule of law, on any credible understanding of this concept. In some measure, Chinese lawyers are instead required to serve the Party-State, and such obligations and the problems they bring can affect collaboration with foreign legal professionals operating in China, as well as Chinese legal professionals operating abroad, as long as these individuals retain their status as lawyers subject to the standards of the “sender” country. An even more urgent concern is the potential for direct clashes between rules and principles governing the legal profession “there” and “here.” For example, “soft law” human rights obligations and professional legal ethics obligations affect UK lawyers who go to China to work there.

First, UK lawyers working abroad operate under standards of professional legal ethics, such as, the England and Wales Solicitors’ Regulation Authority’s 2013 Overseas Rules.¹¹² These require, *inter alia*, that solicitors practicing overseas “act with integrity.”¹¹³ (They also require that solicitors “not allow [their] independence or the independence of [their] overseas practice to be compromised.”¹¹⁴

Even if only considering the obligations imposed upon Representative Offices by the Representative Office Regulation in conjunction with rules of professional ethics and discipline governing Chinese lawyers, it is hard to see how Principles 2 and 3 can be honored by lawyers admitted to practice in England and Wales who go to work

111. See PILS, *supra* note 40.

112. Solicitors’ Regulation Authority, SRA Overseas Rules 2013 (2017). See Solicitors Regulation Authority, Introduction to SRA Overseas Rules (Oct. 1, 2017).

113. *Id.*

114. *Id.*

in China. There they will be required, *inter alia*, to take on responsibility for their colleagues' censoring themselves so as not to "stoke discontent" with the Party-State. They will also work in an environment where the Party-State routinely interferes with the handling of certain kinds of legal case. Is working in and benefiting from organisations submitting to such requirements and such interference to act "with integrity"? Taking into account the wider problems of the Chinese legal system as it operates "on the ground," including the "problem areas" briefly considered just above, there are even more reasons to be concerned about whether UK lawyers can "act with integrity" and fend off situations in which their independence is compromised.¹¹⁵

From its published sources, it is not at this point clear what the Law Society of England and Wales does to ensure that its Overseas Rules are adhered to. Given its effective status as regulator, some monitoring may reasonably be expected. It would in any event be desirable for the Law Society and similar bodies to provide public accounts of how they discharge their transnational responsibilities.

Second, commercial law firms are under soft law requirements at the international level. The UN Guiding Principles of Business and Human Rights ("UNGP"), endorsed unanimously by the Human rights Council in 2011, stipulate that business enterprises should respect human rights.¹¹⁶ *Prima facie*, the designation "business enterprise" applies to large transnational law firms, whose operation can have a direct impact on the well-functioning or otherwise of domestic legal systems and hence on concerns such as access to justice, the right to a

115. Additional concerns may arise with regard to the new solicitors' qualifying examinations ("SQE") under the Solicitors' Regulation Authority ("SRA"), a branch of the Law Society of England and Wales. According to its recent consultation paper, it seems possible that qualifying work experience could be gathered in China if it qualifies as a "*a regulated*, overseas jurisdiction," providing "the opportunity for them to develop the practical legal skills that the SRA would [assess through the SQE]." SOLICITORS REGULATION AUTHORITY, A NEW ROUTE TO QUALIFICATION: THE SOLICITORS QUALIFYING EXAMINATION (2017).

116. U.N. OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS, GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: IMPLEMENTING THE UNITED NATIONS 'PROTECT, RESPECT AND REMEDY' FRAMEWORK (2011); John Gerard Ruggie, *The social construction of the UN Business and Human Rights Principles*, (Harvard Kennedy School Mossavar-Rahmani Center for Business and Government Corporate Responsibility Initiative Working Paper No. 67, 2017); *Human Rights Due Diligence*, BUS. AND HUM. RTS. RESOURCE CTR., <https://business-humanrights.org/en/un-guiding-principles/implementation-tools-examples/implementation-by-companies/type-of-step-taken/human-rights-due-diligence> (last visited July 3, 2018) [<https://perma.cc/8DYZ-5WN6>].

fair trial, and (as seen in the above context) on lawyers' rights of freedom of speech.¹¹⁷

As the International Bar Association (“IBA”) recognizes, professional bodies representing the legal profession should instruct their members on how the UNGP affect not only their clients, but potentially them as well.¹¹⁸ Certainly, the IBA is correct in stating that the UNGP cannot be taken to undermine any of the legal profession's most central roles in supporting the rule of law and human rights,¹¹⁹ and this must include principles such as access to counsel for human rights violators. However, precisely because the role of lawyers in upholding human rights is so central, we surely need to hold them to at least the same requirements as other businesses when it comes to refrain from undermining rule of law and human rights principles, or to acting to uphold these principles as best they can.

UNGP Principle no. 11 states that:

Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.¹²⁰

Principle no 13 states:

Business enterprises should not undermine States' abilities to meet their own human rights obligations, including by actions that might weaken the integrity of judicial processes.¹²¹

According to the Commentary provided by the Office of the High Commissioner for Human Rights, this means in particular that:

The responsibility to respect human rights requires that business enterprises: (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; (b) *Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations,*

117. The UNGP do not provide a definition of “business enterprise.” *See infra* note 117 on the IBA's interpretation.

118. *See* INTERNATIONAL BAR ASSOCIATION, IBA PRACTICAL GUIDE ON BUSINESS AND HUMAN RIGHTS FOR BUSINESS LAWYERS 28 (2016), <https://www.ibanet.org/LPRU/Business-and-Human-Rights-for-the-Legal-Profession.aspx> [https://perma.cc/Y5CK-7XWN] [hereinafter IBA].

119. *See id.*

120. U.N. Office of the High Comm'r for Human Rights, *supra* note 116.

121. *Id.*

*products or services by their business relationships, even if they have not contributed to those impacts. (Emphasis added)*¹²²

Principle no 23 states:

In all contexts, business enterprises should: (a) Comply with all applicable laws and respect internationally recognized human rights, wherever they operate; (b) *Seek ways to honor the principles of internationally recognized human rights when faced with conflicting requirements*; (c) Treat the risk of causing or contributing to gross human rights abuses as *a legal compliance issue* wherever they operate.¹²³

Taken together, these principles clearly enunciate the idea that business enterprises have human rights responsibilities. These responsibilities not only commit them to carrying out what is termed “human rights due diligence” to ensure that their responsibilities are not violated.¹²⁴ They also mean that operating in a legal system that contravenes human rights principles, the business enterprise is not neutral; it must “seek ways to honor” human rights principles. The failure to honor these responsibilities may result in specific legal liabilities, as the introduction of tort law rules connecting to the UNGP in France well illustrates.¹²⁵

IV. CONCLUSION

If transnational law firms may have been unaware that they could not simply do business in China as if there were just a few, minor, technical variations on legal practice that needed to be taken into account, recent developments and discussions ought to have put them on notice. As this article has sought to show, China’s legal system is fundamentally incompatible with rule of law principles adhered to by the legal profession in the UK and in other jurisdictions organized on liberal principles. In the former, lawyers, law firms and the lawyers’ associations are expected to work in the service of a repressive Party-State. In the latter, lawyers’ primary obligations are to law; and they are obligated to act in the best interest of their clients. Their independence is crucial; it is one of the principles that help protect

122. *Id.* at 14.

123. *Id.* at 25.

124. *Id.* at 5; *see Ruggie, supra* note 116.

125. *See id.*

those who might otherwise become defenseless against predatory practices of the state, or of the market.

As the illiberal – or indeed, antiliberal – Chinese legal system systematically undermines lawyers' independence and submits them to a thoroughly compromising system of regulation and oversight, it is important that liberal systems whose legal professions increasingly operate transnationally not neglect the ordering of the terms of their lawyers' operations abroad. Of course, it is in a sense up to a host country, such as China, to set rules governing the foreign legal profession. But this does not absolve the countries from whose jurisdictions foreign lawyers come to China of the responsibility to insist that the host country honor its international commitments, and to create guidance for overseas legal practice compliant with basic rule of law principles. The 2013 Overseas Rules well illustrate that in the United Kingdom, this transnational responsibility has been recognized in principle. The question is, how is adherence to these standards ensured? Are problems with adherence addressed case by case? Do regulatory authorities in liberal jurisdictions engage with the more principled incompatibility issues such as those set out just above, and do they provide guidance on these to their lawyers? What regulatory mechanisms are in place to audit or investigate compliance with these standards on the part of transnational law firms operating abroad?

Based on the analysis presented in this article, it is clear that law firms operating in China ought to conduct robust 'human rights due diligence' to ensure compliance with the UN Guiding Principles, and that regulatory bodies in other countries, such as the England and Wales Solicitors' Regulation Authority, provide guidance on the compatibility of their 2013 Overseas Rules with China's restrictive regulation and practices of extra-legal control of the legal profession. Beyond these immediate responsibilities, it would also be desirable that democratic parliaments scrutinise the effectiveness of the regulation of domestic lawyers overseas practice, and their governments' efforts, through government level interaction, to ensure that these lawyers are able to adhere to the professional standards they are bound to uphold, also when working in China.¹²⁶

126. In the context of a UK Parliamentary Inquiry concluded in January 2017, the author produced a submission for the NGO "Global Legal Action Network" ("GLAN") that set out some of the concerns discussed in this Article. The submission was published on the parliament website but there was no further response or engagement with the submission. See Eva Pils, *Written Evidence From the Global Legal Action Network*, DATA.PARLIAMENT.UK (Jan. 2017),

