

**Examining Protections of Chinese Defense Lawyers' Rights in
Criminal Proceedings**

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Abstract

This thesis examines the human rights situation of defense lawyers in China. It describes how difficulties in handling criminal cases may affect the rate of legal representation in criminal cases. This thesis analyzes the deep roots of the current plight of defense lawyers through an examination of the obstacles Chinese defense lawyers face in the pre-trial stage. Criminal defense lawyers run the risk of being arrested and accused of “evidence fabrication” under Article 306 of the Criminal Law, and attacked by the victim’s family or judicial organs. Furthermore, lawyers face difficulties in meeting with clients, getting prosecutions files, investigating and collecting evidence. The lack of an independent judiciary and autonomous bar association along with the presence of various cultural and institutional obstacles, contribute to the deterioration of the legal environment in which lawyers must practice. Thus to improve that legal environment and to promote the status of defense lawyers, the Chinese government should speed up the process of judicial reform. Finally, the thesis makes recommendations to both the government and National People’s Congress by urging them to comply with various international conventions concerning the rights of lawyers.

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Introduction

In recent years, the national rate of legal representation among criminal cases has remained below 30%. The data in some cities, such as Beijing, suggest rates even as low as 20%.¹ One reason for this is the low fee lawyers earn for criminal cases. Fees for criminal cases is about one third of what could be earned through civil or administrative cases.² What is more important is the risks associated with representing defendants of criminal cases makes lawyers reluctant to engage in criminal cases. Cases in which defense lawyers are charged of evidence fabrication have been increasing sharply, particularly after 1997 when the Article 306 was added to the Criminal Law of the People's Republic of China (PRC). This article, known as the "Sword of Damocles" hanging over defense lawyers' heads, stipulates that lawyers or other legal agents who falsify evidence or lure witnesses into changing their testimony will be sentenced to not more than three years in prison. This provision has been strongly criticized by Chinese legal scholars, as it does not clearly provide the details of what constitutes falsifying evidence. What is more, Article 306 only targets lawyers, while police, prosecutors and other judicial officials who may also falsify evidence are not included in this provision. In practice, procuratorates (检察院) frequently charge defense lawyers who expose evidence of torture in trial of fabricating evidence. The risk of prison is the main reason why some defense lawyers decide against representing defendants in criminal cases.

The international community often criticizes the lack of protection of criminal defendants' human rights in China. China must admit that the protection of suspects is

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¹ Xinhua News, Eighty Percent Defendants in Beijing Without Defense Lawyers, 1 December 2011 http://news.xinhuanet.com/legal/2011-12/01/c_122361444.htm (consulted on 27 June 2012). [新华网, 北京八成刑事被告人无律师辩护 刑辩率低于全国。]

² *Ibid.*

not as effective as it is in developed countries. “Torture remains widespread in China,” says Professor Manfred Nowak.³ However, the international community pays more attention to the protection of the rights of criminals, than to the rights of lawyers. Lawyers are defenders of human rights. Their rights should be protected and improved first. Only if the rights of lawyers’ are not obstructed from the outside, will lawyers be able to make every effort to defend their suspects. This thesis focuses on the protection of the rights of Chinese defense lawyers. By first explaining the current situation and analyzing the root of the plight of Chinese defense lawyers, this thesis tries to find a way to solve the existing problems.

This thesis has three chapters. The first chapter begins with a brief introduction to the history of lawyers in China. Lawyers in the modern sense did not appear until the late Qing Dynasty, but the lawyer system began to develop three decades ago. Thus the establishment of lawyer system was not as mature as that of some Western countries. There are some problems in the construction of law, like the existence of Article 306 of the Criminal Law (CL) and the Article 38 of the Criminal Procedure Law (CPL). Due to these two articles, defense lawyers are intimidated, harassed by government organs, and even prosecuted by the procuratorate. Therefore, in the following part, the author presents the current human rights situation of Chinese defense lawyers. They have “three difficulties” in handling cases: difficulty in meeting with suspects, difficulty in getting access to the prosecution’s files, difficulty in investigation and evidence collection. Without sufficient evidence and documents, the difficulty of constructing a defense is not difficult to imagine. Moreover, even if lawyers do their utmost to defend a suspect, and there is ample evidence to prove that the suspect is innocent, the court

³ UN Economic and Social Council, 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, Manfred Nowak, Mission to China) E/CN.4/2006/6/Add.6, 10 March 2006, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/117/50/PDF/G0611750.pdf?OpenElement> page 2 (consulted on 9 July 2012).

rarely accepts the opinion of the defense lawyers. Consequently, more and more defense lawyers have turned to represent civil cases or economic cases. What is the consequence of this phenomenon? The last part of this chapter analyzes the consequence of the low rate of criminal defense. Under this current situation, human rights situation of defendants is getting worse. Suspects being tortured to death, violations of the right to a fair trial, and increasing numbers of wrongful convictions are all direct consequences of this phenomenon.

The second chapter illustrates the roots of the problems by exploring aspects of culture, law, institution, politics and the judicial responsibility system. The public does not sympathize with arrested lawyers. Instead some support the procuratorate's decision to allow prosecutors to arrest defense lawyers during trial. The awareness of the role of lawyers in Chinese culture and history is the inseparable factors for this phenomenon. In the law aspect, problematic legal provisions make the law uncertain and leaky, which gives the procuratorates and courts broad interpretive space. However, the interpretations of various judicial organs are inconsistent. Moreover, due to the lack of judicial independence, the outcome of a case is not decided by trial judges, but by upper court judges or government leaders. Thus, no matter how hard defense lawyers work, they cannot impact the direction of a case. Furthermore, if defense lawyers become defendants, the bar association cannot help them as the bar association is under government control. The powerless position of defense lawyers can also be found in the campaigns launched by government. To achieve social stability, the government launched a political-oriented campaign to fight against crime. However, the duration of court hearings and protections of due process were reduced through the merging of the investigation and prosecution stages in order to ensure the success of the campaign. Lawyers were warned by authorities to not become deeply involved in these cases. Even if lawyers plea not guilty for their clients, courts rarely accept their defense. Owing to

the existence of misjudged-case investigating system, judges cannot acquit defendants. If they were to do so, it would be thought of as a dereliction of duty. Thus the courts and the procuratorates usually cooperate with each other to avoid the acquittal of the defendants. That is why when lawyers expose torture or ill-treatment, judges ignore the lawyers' claim.

The final chapter contains recommendations. First, China, as one of the signatories of the Basic Principles on the Role of Lawyers, should facilitate the implementation of this convention. Lawyers' independent status and personal safety should be guaranteed. Meetings between lawyers and their clients should not be subject to surveillance. Second, as analyzed above, Article 306 is the main reason why lawyer stay away from criminal cases. Thus this provision should be repealed from the Criminal Law. Third, even though the new Lawyers Law already modified the provisions of lawyer-client meetings, the right of access to prosecution files, the rights of investigation and evidence collection, problems still exist. One effective way to change the situation is to transfer the power to administer the detention center from the public security bureau to judicial organs. The public security bureau is responsible for investigation. If they also take charge of the administration of detention centers, it is not difficult to imagine that torture or other illegal means would be used to extract testimonies. Hence, transferring control of the detention center to judicial organs will solve not only the problem of torture, but also the problem of "three difficulties." Last but not least, China should continue to strengthen judicial reforms, particularly to ensure the independence of the judiciary. Only once the judiciary is independent can courts exercise judicial power without outside interference, or more precisely, without government interference.

Chapter One: The Status of Chinese Defense Lawyers' Rights and its Adverse Effects

This chapter is divided into two parts: the first part presents the current status of defense lawyers in China: the “three difficulties” they often meet when handling criminal cases; attacks on lawyers from either victim’s family or judicial organs; and the risk for the lawyer to be sentenced to prison. The second part describes the consequences of the current situation, such as the low rate of representation among criminal defendants, violation of the human rights of defendants, number of wrongly convicted increasing.

1.1 Current Situation of Chinese Defense Lawyers

To understand the current problems Chinese lawyers face, it is important to first go over a brief history of the lawyer system in China. What is China’s lawyer system? “Lawyer system” is a general term refereeing to a set of legal norms regarding lawyers’ qualifications, tasks, rights and obligations as well as the organizational structure, management system, legal liability and the scope of the business.⁴

1.1.1 Brief History the Lawyer System in China

While China’s legal ideologies and legal system can be traced back a thousands years, the lawyer system did not emerge until the end of China’s feudal dynasties at the turn of the last century.⁵ For a better understanding of the lawyer system, we should view it in the historical and cultural context from which the lawyer system grew.

Law in China has a long history and rich sources, such as the Tang Code (652 A.D.),

⁴ China.org, Judicial System in China, available at <http://www.china.com.cn/ch-sifa/sifa-2/sifa2-1-5.htm> (consulted on 11 July 2012). [中国网，中国司法制度.]

⁵ Cited by Charles Chao Liu, 2002, p.1039.

Ming Code (1397 A.D.) and Qing Code (1646 A.D.).⁶ The earliest published law in China is believed to be the “Book of Punishment” (刑书), which was inscribed on a set of bronze tripod vessels probably in 536 B.C.⁷ These legal arrangements not only represent the most advanced stage of legal development in the world at the time,⁸ but also rebut one of the major misconceptions that there was no law in traditional China.⁹

In imperial China, the construction and application of law was influenced by several schools of philosophy, notably Confucianism and Legalism.¹⁰ The biggest difference between Confucianism and Legalism is whether human nature is inherently good. Confucianism maintains the goodness of human nature while Legalism claims that human nature is evil. Therefore, Confucianism advocates that society should be governed by *li* (礼), which could be thought as morality, virtue, rites or rituals, or the combination of all of these.¹¹ In fact, “Confucianists call all rules which uphold moral habits and serve to maintain social order by the generic name of *li*.”¹² However, this does not mean that Confucianism abandons law, but that law is meant to complement the rule of *li* to protect the minimum interests of members of society.¹³ In one of his most cited passages Confucius writes:

“Lead the people by regulations, keep them in order by punishment, and they will flee from you and lose all self-respect. But lead them by virtue and keep them in order by the established *li*, and they will keep their self-respect and come to you.”¹⁴

⁶ Chen Jianfu, 2008, p.9.

⁷ Cited by Chen Jianfu, 1999, p.6

⁸ Zhang Jinfan, 1988, p.1, p.27-28.

⁹ Geoffrey MacCormack, 1996, p.13-14.

¹⁰ E. Ann Black & Gary F. Bell, 2011, p.27.

¹¹ *Ibid*, p.28.

¹² Chang Chin-tsen, 1960, p.4.

¹³ E. Ann Black & Gary F. Bell, supra footnote 11.

¹⁴ Derk Bodde & Clarence Morris, 1967, p.21-22.

The ultimate goal of Confucianism is to achieve a harmonious social order by the correct operation of hierarchical human relationships, which is the core concept of *li*. Hierarchical human relationships could be understood as “(to) let the ruler be ruler, the minister minister, the father father, and the son son.”¹⁵ Law, as complementary rules, should be avoided as much as possible. Because for a Confucianist, “law has only short-term effects whereas *li* has a broad and permanent influence on members of the society.”¹⁶ To achieve a harmonious society, people are encouraged by self-cultivation and self-containment, namely moral internalism.¹⁷ As E Ann Black & Gary F. Bell said,¹⁸ “under this influence, legal proceedings in imperial China attached great importance to self-motivated and self-initiated submission to the authorities, because confession represented a person’s willingness to return to good virtue. Further the primary goal of the legal system was to achieve substantive justice, while ‘the formal character of the process and the emphasis on the predetermined procedures for resolving conflict have often been seen as obstacles to a more personalized and creative approach to interpersonal conflict.’”¹⁹

On the contrary, Legalism holds that man is naturally evil.²⁰ Legalists “were mainly interested in maintaining legal and political order, and they asserted that the governing of a state depended primarily upon the rewards which encourage good behavior and the punishment which discouraged bad behavior.”²¹ Legalists believe that the only means to govern a state is a uniform law, universally applicable to all except the highest

¹⁵ Fung Yulan, 1966, p.41

¹⁶ Chen Jianfu, 1999, p.10.

¹⁷ E. Ann Black & Gary F. Bell, 2011, p.28.

¹⁸ *Ibid.*

¹⁹ Randall Peerenboom, 2002, p.30.

²⁰ Fung Yulan, 1966, p.162.

²¹ T’ung Tsu Ch’u, 1961, p.241.

ruler.²² In applying law, legalists advocate very cruel punishments even for minor crimes.²³ They assert that “bad law is better than no law.”²⁴ One of the most famous Legalists, Han Fei Zi (韩非子), writes: “It is by means of strict penalties and heavy punishments that the affairs of state are managed.”²⁵ As one of the earliest Legalists, Shang Yang (商鞅), whose reforms helped the Qin State to conquer six other states and unify China, writes: “Nothing is more basic for putting an end to crimes than the imposition of heavy punishment.”²⁶ In Legalists’ opinion, therefore, the effective way to govern and establish interdicts and commands of state are rewards and punishments.²⁷

China’s imperial legal traditions have profoundly affected the current legal system. Contemporary Chinese law, for example, still sees law as a political tool, an administrative tool, a supplementary tool and a tool for social stability.²⁸ Pursuit of substantive justice is still the main purpose of the Chinese legal system today while procedural justice must give way to substantive justice when they conflict.

Since the law was not used for providing rights, but for maintaining social order, rulers “discouraged any tendency for legal professionals to act as intermediaries between the individuals and the state.”²⁹ Therefore the modern conception of lawyers did not exist at that time. But in the 16th century there were some people known as “*songshi*” (讼师, litigation instigator, literally “litigation master”) or “*songgun*” (讼棍, litigation monger, literally “litigation stick”) who helped litigants draft complaints or other legal documents.³⁰ These people, seen as “self-trained shysters”, could not defend

²² *Ibid*, p.257.

²³ E. Ann Black & Gary F. Bell, 2011, p.29.

²⁴ Cited by Yu Ronggen, 1984, p.62.

²⁵ Cited by Chang Chin-tsen, 1960, p.6

²⁶ *Ibid*.

²⁷ Fung Yulan, 1966, p.162.

²⁸ Chen Jianfu, 1999, p.15-17.

²⁹ Charles Chao Liu, 2002, p.1042

³⁰ Philip C.C. Huang, 2001, p.39.

or argue for the litigants in the trial. They were described as “litigation tricksters [and] rascally fellows [who] entrap people for the sake of profit [and] fabricate empty words and heap up false charges.”³¹

It was not until the late Qing dynasty that the notion of “lawyer” was first introduced by Shen Jiaben(沈家本) when he drafted the Great Qing Dynasty Criminal and Civil Procedural Law. The jury and lawyer systems were also adopted in some other law drafts.³² Lawyers were, for the first time, allowed to participate in litigation and would be trained at law schools (法律学堂) and certified by examinations. However, with the collapse of Qing dynasty, these drafts were never promulgated.³³

In 1911, Dr. Sun Zhongshan (孙中山, also known as Sun Yat-sen) led the Nationalist Revolution (辛亥革命), which ended the Chinese imperial era and led to the founding of the Republic of China.³⁴ Later in 1912, the Northern Government (北洋政府, 1912-1928) enacted the Interim Rules on Lawyers (律师暂行章程) and the Interim Rules on the Registration of Lawyers (律师登记暂行章程), which were the first laws regarding the lawyer system in Chinese history.³⁵ At that time, there were 1,426 registered lawyers who were graduates of the new Chinese law schools or had been trained in Japan, the United States and Great Britain.³⁶

In 1949, the People’s Republic of China (PRC) was founded. The Communist Party of China (CPC) abolished Nationalist law and established a socialist legal structure with the adoption of the 1954 Constitution. Later the Ministry of Justice (MOJ) established tentative legal advisory offices in parts of China³⁷, which initiated the founding of a

³¹ Frances Foster-Simons, 1987, p.139.

³² These drafts include: revision of the *Draft Law of Criminal Procedure* (刑事诉讼律草案) and the *Draft Law of Civil Procedure*(民事诉讼律草案) in 1910.

³³ Philip C.C. Huang, 2001, p.16, 34-35; see Chen Qiuyun & Zhang Ping, 1999, p.197-202.

³⁴ Chen Qiuyun & Zhang Ping, 1999, p.203.

³⁵ Philip C.C. Huang, 2001, p.43.

³⁶ *Ibid.*

³⁷ The law offices did not set up in every city, but in Beijing, Tianjin, Shanghai, Chongqing, Wuhan and Shenyang.

new lawyer system.³⁸ In the mid-1950s, the social and political atmosphere was more open such that “there was considerable progress in the creation of the Chinese legal order ... patterned primarily after the Soviet and East European models.” However this open atmosphere did not last long.³⁹ During the Anti-Rightist Campaign (1957-1958) lawyers and legal professionals seen as advocating “bourgeois” ideas and challenging the socialist system, were persecuted. The MOJ was abolished as well.⁴⁰ Far worse was the Culture Revolution (1966-1967). Not only were the legal profession and legal organs abolished and all law schools closed, but most legal professionals were forced into “reeducation.”⁴¹ During the twenty years from the start of the Anti-Rightist Campaign to the end of the Culture Revolution, the country suffered from widespread lawlessness allowing lawyers and other intellectuals to again fall into political disfavor. The legal and lawyer systems were virtually non-existent.⁴²

When Deng Xiaoping came into power, the legal system was reestablished in accordance with the “Open Door” policy (改革开放). To achieve economic growth and social stability, the National People’s Congress (NPC) promulgated many laws in July 1979, including People’s Republic of China Criminal Law, Criminal Procedure Law, the Organic Law of People’s Courts, and the Organic Law of People’s Procuratorates.⁴³ Deng Xiaoping affirmed the importance of lawyers and stressed the indispensability of the lawyer system.⁴⁴ On 26 August 1980, the Interim Regulation on Lawyers was enacted, defining lawyers as “state legal workers” (国家的法律工作者) who are

³⁸ Charles Chao Liu, 2002, p.1048.

³⁹ Chin Kim, 1987, p.1413-1414.

⁴⁰ Cited by Charles Chao Liu, 2002, p.1051-1952.

⁴¹ Chin Kim, *supra* footnote 39; see Stanley B. Lubman, 1999, P.151; see Cynthia Losure Baraban, 1998, p.1257.

Re-education was launched by Mao in December 1968 when Mao called on urban-educated youth to go to the countryside to “learn from poor and middle-level peasants.” During that period, each year millions of students left school or university and work in the countryside. Intellectuals and other enemies of the Cultural Revolution were also sent to the countryside as punishment.

⁴² Cited by Charles Chao Liu, 2002, p.1053.

⁴³ Shao-Chuan Leng, 1982, p.207.

⁴⁴ Liu Guiming, 1997, p.8-9.

responsible for protecting the interests of the state, the collective and the people.⁴⁵ But with deepening of economic reform, China's economic system transformed from a socialist planned economy (计划经济) to a socialist market economy (市场经济). The role of lawyers was later changed to "legal practitioners... [who] provide legal services to public" (为社会提供法律服务的执业人员) in the 1996 Lawyers Law which is a milestone in the development of the Chinese lawyer system.⁴⁶ "The Lawyers Law is the most authoritative law on the regulation of lawyers since 1949. It is the first law to recognize the concept of an independent legal profession and emphasize the need for lawyers to represent clients rather than the state."⁴⁷

The 1996 Lawyers Law was amended in 2007 and became effective on 1 June 2008 (hereafter referred to as new Lawyers Law). Even though some new, positive elements were added to the Lawyers Law, nothing had fundamentally changed. As Western critics claim, the Chinese defense lawyer is becoming an "endangered species".⁴⁸

When lawyers are treated unjustly or even persecuted by authorities, many people are happy with the result. It's not difficult to understand when considering traditional Chinese legal culture mentioned above. It is not only that some lay people do not understand lawyers' work and their role in maintaining the rule of law, but also some government and even judicial officials see lawyers as "troublemakers". In order to limit lawyers' rights, legislators established some "obstacle" provisions to restrict their work in handling cases. An example of such an "obstacle" provision is Article 306 of the Criminal Law of People's Republic of China which stipulates that lawyers can be sentenced to prison for three to seven years if his client changes testimony after meeting

⁴⁵ The People's Republic of China Interim Regulations on Lawyers, issued by the Standing Committee of the National People's Congress, 5th National People's Congress 15th Session, 26 August 1980, adopting regulations to be effective 1 January 1982.

⁴⁶ The People's Republic of China Law on Lawyers, issued by the Standing Committee of the National People's Congress, 8th National People's Congress, 19th Session, 15 May 1996, adopting regulations to be effective 1 January 1997, Article 2.

⁴⁷ Charles Chao Liu, 2002, p.1074.

⁴⁸ Cited by Hou Shumei & Ron Keith, 2011, p.379.

him.⁴⁹ The so-called “Big Stick 306” (306 大棒) gives prosecutors near unlimited power to intimidate lawyers, deterring more and more lawyers from representing criminal defendants. That is why more than 70% defendants are without defense lawyers in trial.⁵⁰

1.1.2 The “Three Difficulties” of Criminal Defense Work

In China, an ordinary case begins when the public security organ initiates the investigation procedure. In theory, lawyers have the right to meet with their clients during the investigation stage. When the public security organ ends the investigation stage, they will hand over the case to the procuratorate with a recommendation as to whether to prosecute. The procuratorate in China, “as a legal institution, are treated as part of the judicial system, not part of the executive branch, as is the case in many other countries.”⁵¹ The procuratorate will decide whether to prosecute suspects after reviewing the facts and the legal grounds submitted by the police. If the evidence of the charge is sufficient, they will formally charge the suspects in court and participate in the trial on behalf of the state. During the prosecution phase, lawyers, according to the CPL, have the right to access to the prosecution’s case files. According to law, lawyers have the right to meet with their clients, the right to access to prosecution’s case files, and the right to investigate and collect evidence during the prosecution stage. But how well are these rights upheld in practice?

1.1.2.1 Difficulty in Meeting with Suspects

⁴⁹ Cai Yongshun and Yang Songcai, 2005, p.129.

⁵⁰ Wang Jin, 22 May 2001.

⁵¹ E. Ann Black & Gary F. Bell, 2011, p.51.

Both Chinese legal scholars and lawyers claim that it is rarely possible to have a meeting with suspects in a detention center, for the public security bureau will not approve the meeting requested by lawyers until the defendant is formally charged, which means that the case has been already handed over to the procuratorate.⁵²

According to Article 96 of the Criminal Procedural Law (CPL):

“Lawyers can meet suspect ... after the suspect is interrogated by an investigation organ for the first time or from the day on which compulsory measures are adopted against him or her. If a case involves State secrets, the suspect shall have to obtain the approval of the investigation organ for appointing a lawyer. When the lawyer meets with suspect in custody, the investigation organ may, in light of the seriousness of the crime and where it seems necessary, send its people to be present at the meeting. If a case involves State secrets, before the lawyer meets with the criminal suspect, he shall have to obtain the approval of the investigation organ.”⁵³

This article indicates that lawyers have the right to access their client after the investigation organs interrogate the client for the first time or from the day the detention starts. Lawyers are not required to get prior approval from investigation organs to visit a client. But in practice, gaining permission to visit clients is one of the largest obstacles lawyers face. “A survey of police detention cells in Beijing’s Haidian district indicated that lawyers were able to visit only 14.6% of detainees under investigation, even though 46.3% of the demands to see a lawyer from pre- and post-trial detainees were met”.⁵⁴

⁵² Human Rights Watch, “Walking on Thin Ice”: Control, Intimidation and Harassment of Lawyers in China, Index: 1-56432-311-0, 28 April 2008, p.67, available at <http://www.hrw.org/zh-hans/reports/2008/04/28/walking-thin-ice-0> (consulted on 18 May 2012).

⁵³ Criminal Procedure Law of the People’s Republic of China (1996 Amendment,) issued by National People’s Congress on 17 March 1996, effective on 1 January 1997, available at <http://www.dffy.com/faguixiazai/sf/200701/20070119172221.htm> (consulted on 11 July 2012).

⁵⁴ Cited by Human Rights Watch, *supra* footnote 52, p.66.

Some typical rejection excuses given by the Public Security were that “the handling person is not here (who can never be found),” “the responsible person is on a business trip, it may be a long time until he comes back,” “the leaders are not here,” or “we will arrange the meeting after a few days.”⁵⁵ One lawyer in Beijing complained:

“The Public Security doesn’t grant you access; they just don’t. They don’t tell you why. You file your application [for a visit],⁵⁶ and that’s it-no reply. What can you do? You have to know personally the court officials [to intercede], but sometimes it doesn’t help. You have to look at the local conditions. If the Public Security doesn’t want it, the fact is that nobody can force them.”⁵⁷

However according to the Joint Regulation,⁵⁸ meetings should be arranged within 48 hours from the time a valid visit request is submitted by a retained lawyer, except for cases involving organized crime or “especially complicated” cases, which must be arranged within 5 days. In fact, “the actual visit very seldom takes place within the fixed time limits. It takes at least a week, most of the time a month, sometimes even longer to gain access to a suspect. Sometimes, the visit is denied.”⁵⁹

According to the CPL, the only exception in which an attorney-client meeting must be approved by investigation organ is in cases involving “state secrets”. But what are state secrets? There is a no explicit definition. Therefore, in practice, police officers

⁵⁵ Cheng Tao, 2006, p.160.

⁵⁶ Lawyers who want to meet the clients must to fill out an “application to access criminal suspect” and get the approval from the Public Security Bureau where the suspects are detained.

⁵⁷ Human Rights Watch, *supra* footnote 52, p.68.

⁵⁸ Regulations on a Number of Issues Concerning the Implementation of the Criminal Procedure Law, Jointly Issued by the Supreme People’s Court, Public Security Ministry, State Security Ministry, Justice Ministry, National People’s Congress Standing Legal Work Committee, 19 January, 1998.

⁵⁹ F.H. a Beijing lawyer was interviewed by Human Rights Watch in October 2007, Human Rights Watch, 2008, p.69.

broadly interpret the scope of “state secrets” when refusing visits for politically sensitive cases and cases involving political offenses.

In some cases, lawyers cannot visit the suspect because investigators fail to inform the suspect or his or her family of their right to hire a lawyer. “Another partial survey of 200 detainees in Beijing showed that 75.5% were never told by the investigators that they could request a lawyer. 17.3% of those who requested a lawyer were told that it was useless to do so, 12.2% were scolded by the investigators, and 12.2% were told to ask again later.”⁶⁰

Even if lawyers do get permission to meet with a suspect, public security organs will warn lawyers before meeting that they are not allowed to discuss details of the case and the meeting will last not more than half an hour. Moreover, the meeting is under the surveillance of the police. If the suspect starts to describe the facts of the case, the police will come in and stop him. Usually the public security organs arrange only one meeting during the investigation period, maximum two times. In the meeting, lawyers are now allowed to take notes except they get permission in advance.⁶¹

1.1.2.2 Difficulty in Getting Access to the Prosecution’s Case Files

Defense lawyers have the right to “consult, extract and duplicate the judicial documents” from the day on which the procuratorate begins examining a case.⁶² The legal documents include technical verification material, detention and arrest warrants, search and seizure orders, lists of witness affidavits, and forensic diagnostics. When the procuratorate hands over the case to the court, defense lawyers have access to “consult, extract and duplicate” the “material of the facts of the crime.”⁶³ The “material of the facts of the crime,” brought by the procuratorate, do not include the substantive

⁶⁰ Human Rights Watch, *supra* footnote 52, p.66.

⁶¹ Ran Yanfei, 2008, p1015

⁶² Criminal Procedural Law of the People’s Republic of China, Article 36.

⁶³ *Ibid.*

documents, but only the “principal evidence,” such as a list of evidence and a list of witnesses interrogated. The key documents that may involve determining the nature of the crime and the sentencing will not be presented. As one lawyer told Human Right Watch:

“The judicial organs will only give you what they want, and it is not uncommon to see the real evidence only on the day of the trial. This is like a tiger blocking the road. Chinese lawyers are powerless.”⁶⁴

“It is not hard to fathom, that at any given state, the main documents that the lawyer can check are procedure documents. He has no means to acquaint himself fully with the substantive ones. This results in the lawyer basically being powerless to fully grasp the details of the case.”⁶⁵

But during the trial phase, it is tough for lawyer to complete reviewing all documents in such a short period of time, which indicates that the cross-examination is just a formality. A long-standing problem in criminal cases in China is how rarely witnesses appear at trial. Those who provide the authorities with written testimonies are seldom present for cross-examination, even when lawyers have applied for their presence.⁶⁶ According to a survey of 293 criminal cases, only 84 cases involved actual witness testimony; only 16 of 129 witnesses were present in trial.⁶⁷ Chen Guangzhong, China’s leading criminal justice expert, claimed that only 20% of witnesses in all criminal cases are called to the stand because of safety concerns.⁶⁸ Another important element is that prosecutors are reluctant to allow the attendance of witnesses, for they think that witnesses might change or retract their testimony.⁶⁹

Another serious problem is that procuratorate never presents exculpatory evidence during the trial; only evidence in support of the accusation is submitted during the trial.

⁶⁴ Human Rights Watch interview with L.W., a Beijing lawyer, November 2007, *supra* footnote 52, p.12.

⁶⁵ Ye Qing & Gu Yuejin, 2005, p.186.

⁶⁶ Yu Ping, 2002, p.850.

⁶⁷ Cui Min, 1998, p.20-21.

⁶⁸ Cited by Yu Ping, 2002, p.852.

⁶⁹ *Ibid.*

As one Chinese legal expert writes:

“Using the system of ‘communication of the principal evidence,’ the procuratorate... simply selects what supports the accusation, and according to them this cherry-picked evidence unquestionably becomes the ‘principal evidence’”⁷⁰

1.1.2.3 Difficulty in Investigation and Collecting Evidence

As the CPL states, if defense lawyers want to collect evidence from witnesses and individuals, lawyers have to receive their consent; if they want to collect evidence from the victim, or his relatives, they must get “double permission” —approval from court and/or procuratorate as well as permission from the victim and/or his relatives.⁷¹ In fact, few individuals want to participate in evidence collection. One reason is simply that many people do not want to be involved in a case. To add to that, “it is usual for the Public Security to threaten witnesses. They say: ‘we already have your testimony ... if you change it, we will accuse you of perjury and arrest you.’”⁷² That is why it is rare for witnesses to accept interviews with lawyers.

Another serious challenge that defense lawyers have to confront during the investigation is the “Sword of Damocles” hanging over their heads—Article 306 of the 1997 CL. This article makes lawyers fear investigation and evidence collection, since they will face the risk of prosecution if the evidence in their hands is different from what the procuratorate has.

Article 306

The article 306 of the CPL stipulates:

⁷⁰ Cited by Human Right Watch, 2008, p. 66.

⁷¹ The Criminal Procedure Law, Article 37

⁷² Human Rights Watch, supra footnote 52, p.78.

During the course of criminal procedure, any defender, law agent destroys, falsifies evidence, assist parties concerned in destroying, falsifying evidence, threatening, luring witnesses to contravene facts, change their testimony or make false testimony is to be sentenced to not more than three years of fixed-term imprisonment or criminal detention; when the circumstances are severe, to not less than three years and not more than seven years of fixed-term imprisonment.

Why was this provision added to the 1997 CL? It is related to the reforms in the 1996 CPL. One big step forward in the reforms of the CPL was that the time by which lawyers could become involved in a case was advanced. Before the amendment, only when a case had been presented in court could lawyers become involved in the case. But after the amendment, lawyers were able to get involved during the investigation stage, which caused a great controversy in judicial organs. As Tian Wenchang commented:

“This is an unprecedented breakthrough in China’s lawyer system. However, the modification has aroused another consideration. The judicial officials worried that lawyers might impact the organs’ investigative work if they could involve in a case at the investigation stage. Therefore, if lawyers were allowed to intervene in a case at investigation state, it is necessary to limit the lawyers’ right of investigation and collecting evidence. The outcome of the game was that Article 38 was added to the CPL.⁷³ In order to stay consistent with Article 38 of the CPL, Article 306 was added in the Criminal Law

⁷³ Article 38: Defense lawyers 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.

amendment one year later. These two articles constrain and limit the lawyers' rights from procedural and substantive aspects."⁷⁴

Lawyers were given increased powers to protect their clients during the investigation phase in the 1996 CPL. It was a political tradeoff intended to meet the objections of the police and procuratorate, Article 38 prohibited lawyers from assisting the suspects by concealing or falsifying evidence. Article 38 of the CPL and Article 306 of the CL provide that lawyers will be subject to criminal penalties if they persuade witnesses either to change their testimony or to commit perjury, both of which seem to correspond with rule-of-law norms. But in fact they open up avenues for abuse. The meaning of the provisions can be stretched to suit the interests of the police and prosecutors, because the provisions themselves inadequately clarify what constitute these crimes.⁷⁵

The logic of Article 306 is straightforward. A witness gives testimony to the police. If the witness changes his testimony after meeting with his lawyer, the police or procuratorate will verify the change with him. At this time, the witness faces a problem: he falsified evidence either to the police or to the lawyer. To avoid a charge, the witness will always claim that "it was the lawyer who let me say this," then the lawyer will be accused.⁷⁶ For the defendant, one of the most likely reasons that he alters his testimony is that the first statement is obtained through torture.

One lawyer in Beijing said that Article 306 makes the legal profession tremble:

"If you want to practice law, don't become a lawyer; if you want to become a lawyer, don't do criminal work; if you want to do criminal work, don't collect evidence; if you want to collect evidence, don't collect testimonies from

⁷⁴ Wang Jian, 2011, p.33.

⁷⁵ Terence C. Halliday and Liu Sida, 2007, p. 87.

⁷⁶ Wang Jian, 2011, p. 34.

witnesses. If you fail to follow all these, just go to the detention center to register.... Doesn't a system like this push the lawyer to the fire hole?"⁷⁷

Chen Ruihua, a renowned law professor at Peking University Law Faculty, has identified the genuine nature of Article 306:

“Given that there are no specified provisions to criminalize the authorities’ misconduct in the criminal process, the specified target of Article 306 reflects professional discrimination against the legal profession. Further, the widespread use of this provision shows the attempt of the Chinese authorities to isolate criminal defense lawyers from the administration of criminal justice. More generally, law enforcement agencies likely want to maximize their legal resources and consolidate their dominant roles by penalizing “uncooperative” defense lawyers.”⁷⁸

When the new Lawyers Law came into force on 1 June 2008, lawyers had expected it could solve many problems. However, the “three difficulties” still exist. For instance, even though the new Lawyers Law states that lawyers have the right to meet suspects and receive information related to a case, just by presenting their lawyers’ practicing certificate, certificate of their law firm and power of attorney or official legal aid papers, the police do not follow these rules. Moreover, the meeting will not be under police surveillance.⁷⁹ But it is hard to enforce the new law. The new Lawyers Law also advances the date on which lawyers can begin investigating and collecting evidence to the investigation stage; lawyers no longer need to get approval from the court or procuratorate when they want to collect evidence from a victim or his family; the scope

⁷⁷ Cited by Terence C. Halliday and Liu Sida, 2007, p. 89-90.

⁷⁸ Cited by Li Enshen, 2010, p.140; See Chen Ruihua, 2008, p.19.

⁷⁹ Law of the People’s Republic of China on Lawyers (2007 version, effective), Article 33.

of reviewing prosecution files was expanded, which allows lawyers to acquire more substantive materials in prosecution stage. But why are the effects the new law not obvious? Professor Chen Ruihua said, “Provisions of the new Lawyers Law that relating to the lawyers’ rights are more like a slogan. Such rules are almost impossible to implement. The life of the law lies in the implementation of rules. Any propaganda-style rules are doomed not possible to implement.”⁸⁰ Tian Wenchang said, “There is no law like the new Lawyers Law that encounters so much friction in the implementation process. The problems in the past were more related to the effectiveness of the implementation, rather than whether to implement. But the situation of implementation of the new Lawyers Law is completely different across various parts of the country: some parts refuse to implement overtly; some parts implement it but conditionally or only partly.”⁸¹

In January 2011, the *Legal Weekly* reported that the “three difficulties” of criminal defense work became “ten difficulties”. The new “seven difficulties” were listed as the following (without rank): (1) obtaining bail; (2) getting witnesses to appear in court; (3) ensuring a hearing during appellate review; (4) pleading not guilty; (5) participating in the process of death penalty review; (6) abolishing Article 306 of the Criminal Law; (7) excluding illegally obtained evidence from the court’s consideration.⁸² Among these new difficulties, the difficulty of pleading not guilty is the most insurmountable obstacle for defense lawyers. Documents show that the national rate of acquittal in criminal cases has rarely broken above 0.2% over a period of many years.⁸³ Lawyer

⁸⁰ ND Daily, Three Difficulties still exist after one year implementation of New Lawyers Law, 4 June 2009, available at http://epaper.oeccc.com/A/html/2009-06/04/content_810622.htm (consulted on 21 June 2012). [南都网, 新律师法“周岁”“三难”仍未解决。]

⁸¹ *Ibid.*

⁸² Todd Foglesong & Katherine Zhao, “Three Difficulties” of Criminal Defense Work Become “Ten Difficulties”, p.4, available at http://www.hks.harvard.edu/var/ezp_site/storage/fckeditor/file/pdfs/centers-programs/programs/criminal-justice/ChinaJusticeNews/CJNU_54_FINAL-March%202011.pdf (consulted on 21 June 2012).

⁸³ Dui Hua Human Rights Journal, “Translation: How ‘Three Difficulties’ of Criminal Defense

Sun Jibin said: “Some courts go many years without even one acquittal. A judge can hear hundreds of cases over a period of several years without a single acquittal.”⁸⁴ In the wrongful conviction cases of “She Xianglin” and “Zhao Zuohai” (more details are below), we can find that the defense lawyers in these cases had all made innocence pleas on behalf of the defendants but none of their arguments were accepted.⁸⁵

1.1.3 Defense Lawyers Suffer Personal Attacks From Victim’s Families and/or Judicial Organs

Lawyers in China, especially defense lawyers, could be seen as a vulnerable group or “endangered species”, for they have to remain on high alert for their personal safety at all times. Without realizing it, they may become a target either of the victim’s family or government authorities.

According to an All China Lawyers Association’s report, among 79 cases from 1999 to 2001, in at least 14 cases the defense lawyer was attacked by the opposing side.⁸⁶ Such incidents happen almost every year. Besides the victim’s family, the judicial officials may also attack on lawyers. The three examples given below is the proof.

Beihai case

The most high-profile case in 2011 provoking public indignation and protests from legal professionals was the “Beihai” case. Four lawyers were detained for “witness tampering” due to the defendants changing their testimony after meeting with their

Became ‘10 Difficulties’”, 2 February 2011, available at <http://www.duihuahrjournal.org/2011/02/translation-how-three-difficulties-of.html> (consulted 18 April 2012).

⁸⁴ Todd Foglesong & Katherine Zhao, 2011, p.2.

⁸⁵ Supra footnote 83.

⁸⁶ Cited by Fu Hualing, When Lawyers are Prosecuted: The Struggle of a Profession in Transition, 13 January 2007, p.9-10, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=956500 (consulted on 31 May 2012).

lawyers. Four lawyers, Luo Sifang, Liang Wucheng, Yang Zhonghan, and Yang Zaixin, represented four defendants accused of murdering a young man in Beihai, Guangxi Zhuang Autonomous Region in 2009.⁸⁷ At the first trial in September 2010, the defense lawyers pleaded not guilty for the defendants by presenting evidence obtained through their own investigation, which indicated that suspects were not even present at the crime scene when the murder took place.⁸⁸ The defense lawyers also claimed that their clients admitted guilt because they were tortured while in police custody. After bringing this to the court, the lawyers were arrested for “witness tampering”. The defense lawyers’ detention raised indignation among the legal profession. 20 lawyers from Beijing, Shanghai, and other cities formed a Beihai Lawyers Concern Group (hereafter referred to as the Group) to support the four detained lawyers.

When the Group set out to handle the case after arriving in Beihai on 18 July 2011, they were beaten two times by more than 50 unidentified men in their hotel⁸⁹; they were hit, scratched, bitten, abused, spit on and so on. There were about ten wounds on a 60-year-old attorney Chen Guangwu’s body. His colleagues, Yang Mingkua and Xu Tianming, were also repeatedly attacked.⁹⁰ As Mr. Chen said on his website:

While we were having dinner around 9 p.m., another group of more than 10 unidentified people came to our table and told us not to defend the Beihai case, and specifically targeted Lawyer Li Jinxing. They ordered us to leave Beihai.

They surrounded and beat up Lawyer Li, who was thrown to the ground head

⁸⁷ The Epoch Times, “Chinese Lawyers Attacked for Investigating Local Case”, 6 August 2011, at <http://www.theepochtimes.com/n2/china-news/lawyers-attacked-for-investigating-local-case-59763.html> (consulted on 4 April 2012).

⁸⁸ Li Shanshan, the whole story of “Beihai Case”, 15 August 2011, available at <http://www.mzyfz.com/html/1468/2011-08-15/content-131325.html> (consulted on 5 April 2012). [李珊珊，北海律师妨碍作证案始末。]

⁸⁹ Supra footnote 87.

⁹⁰ Sina News, Lawyers personal safety is often threatened, 2 September 2011, available at http://news.sina.com.cn/c/sd/2011-09-02/121923094980_2.shtml (consulted on 5 April 2012). [新浪新闻，律师人身安全常受到威胁。]

first. He immediately started having convulsions; his face turned white and he began foaming at the mouth, then he lapsed into unconsciousness.⁹¹

When the incident occurred, the Group called the police several times and stressed that the attackers were too many and that the situation was out of control. They urged the police to come rapidly. The police, however, not only did not promptly send out officers, but also did not try to stop the attackers from being identified by the lawyers as being connected to the murder victim's family⁹². Afterward, the police released distorted facts to the media.

Gao Zhisheng case

Compared with the assault from a victim's family, prosecution from government authorities is even less tolerable. Most lawyers who have been detained experience various degrees of torture. The most well-known case is of the attorney Gao Zhisheng, who is a well-known dissident defending religious minorities. He has experienced horrific torture and been secretly arrested several times. As he wrote on his account "Dark Night, Dark Hood, and Kidnapping by Dark Mafia":

"While Wang was saying this, the electric shock prods were put on my face and upper body shocking me. Wang then said, "Come on guys, deliver the second course!" Then, the electric shock baton was put all over me. And my full body, my heart, lungs and muscles began jumping under my skin uncontrollably. Wang then shocked me in my genitals. My begging them to stop only returned laughing and more unbelievable torture.

⁹¹ Supra footnote 87.

⁹² Human Rights in China, "Defense Lawyer in High-Profile Beihai Base Beaten while Police Watch", 21 October 2011, available at <http://www.hrichina.org/content/5587> (consulted on 5 April 2012).

After a few hours of this I had no energy to even beg, let alone, try to escape. I felt my body was jerking very strongly when the baton touched me. I clearly felt some water sprinkled on my arms and legs as I was jerking. It was then I realized that this was sweat from me.”⁹³

Li Zhuang case

Another high-profile case is the “Li Zhuang” case that caused uproar domestically in 2009. Li Zhuang was the initial defense lawyer for Gong Gangmo, who was a gang leader in Chongqing Province and charged with illegal weapons trade, murder, drug dealing and heading a criminal organization.⁹⁴ At that time, the Chongqing Communist Party Chief Bo Xilai commenced an aggressive campaign to wipe out organized crime and the bonds between the underworld and local government officials.⁹⁵ However, the speed and intensity of dealing with the organized crime aroused the public’s suspicions about the abuse of due process by the Chongqing public security bureau.⁹⁶

Li Zhuang was arrested two days after Gong Gangmo, Li Zhuang’s client, told the police that Li lured him to falsify evidence suggesting that he had been tortured in December 2009. However, Gong’s medical documents recorded wrist scars that appear to corroborate Li Zhuang’s claim that Gong was hung from the ceiling by handcuffs, with only his toes touching the ground.⁹⁷ In the detention center, the defense lawyer

⁹³ Human Right in China, “Torture Account By Missing Rights Defense Lawyer Gao Zhisheng”, 8 February 2009, available at <http://www.hrichina.org/content/245> (consulted on 5 April 2012).

⁹⁴ Hou Shumei & Ron Keith, 2011, p.392.

⁹⁵ New Tang Dynasty Television, “Chinese Lawyer Tells of Bo Xilai’s Torture Methods”, 29 March 2012, available at http://english.ntdtv.com/ntdtv_en/news_china/2012-03-29/chinese-lawyer-tells-of-bo-xilai-s-torture-methods.html (consulted on 6 April 2012).

⁹⁶ Hou Shumei & Ron Keith, supra footnote 94.

⁹⁷ Supra footnote 95; See The New York Times, “Crime Crackdown Adds to Scandal Surrounding Former Chinese Official”, March 26, 2012 <http://www.nytimes.com/2012/03/27/world/asia/bo-xilais-china-crime-crackdown-adds-to-scandal.html?pagewanted=2&ref=asia> (consulted on 6 April 2012).

was deprived of sleep and drink.⁹⁸ Twenty-six days later, the lawyer Li Zhuang was convicted of evidence fabrication and sentenced to 18 months in prison. The rapid conviction of Li Zhuang played a role of “kill one to warn a hundred”, a warning from Chongqing public security bureau to other lawyers who were representing similar defendants.

The reason why the Li Zhuang case drew national attention is that he was framed by his client—Gong Gangmo. “Why did he (Gong Gangmo) escape from the death penalty? Because he squealed on me. The Chongqing Public Security Bureau mobilized Gong to report on me. Basically the Chongqing police told him to do it, or risk losing his life,” as Li Zhuang explained.⁹⁹

From the Li Zhuang case we can see that the fate of Chinese lawyers is tied to politics. Lawyers can become victims or defendants when the government launches a political movement. In the Beihai case, the legal profession showed their courage and determination to challenge the abuse of power by authorities. When the authorities persecuted their colleagues, they were not silent. Instead, they united to defend justice, to defend the law’s dignity, and to protect the interests of the four lawyers. The lawyer Group suffered injury from the opposing side. The reason why the police did not stop their illegal actions was that the police intended to use the opposing side’s hands to fight against lawyers. After reading Gao Zhisheng’s account, we also realize that torture in China is very serious. Lawyers should be human rights defenders, but now they are becoming defendants and suffering the same fate as their defendants. More severe than physical harm is their psychological harm. They and even their family have been harassed and intimidated by authorities and opposing parties because some people cannot understand why they speak for the “bad guys”. Therefore, defense lawyers are

⁹⁸ The author interviewed with Li Zhuang via email.

⁹⁹ Youtube, “Mystery of Li Zhuang’s Guilty Plea Unraveled”, 20 February 2012, available at <http://www.youtube.com/watch?v=VwGJNELybKQ> (consulted on 6 April 2012).

dancing with handcuffs in a minefield.

1.1.4 Defense Lawyer Face the Risk of Prison

While the number of licensed lawyers in China has reached almost 200,000, according to statistics released at the eighth National Lawyers' Congress held in Beijing in 2011,¹⁰⁰ the number of lawyers representing criminal cases has declined in recent decades. The *Legal Daily*, under the supervision of the Ministry of Justice, reported in 2003 that the percentage of criminal defendants represented by a lawyer decreased from 40% in 1996 to 30% in 2001.¹⁰¹

Why has the criminal defense business gradually slid into this predicament? Chinese lawyers give several reasons, such as the low fees earned in criminal cases, and the “three difficulties” of criminal defense work, but the most important factor is that they face the risk of prison.

No one knows how many lawyers have been arrested, detained and convicted for defense work. According to the All-China Lawyers' Association (ACLA) report, there were no more than 20 lawyers arrested in 1995, but the number sharply increased to 70 between 1997 and 1998; then it declined to 18, 30, 31 in 1999, 2000, and 2001 respectively.¹⁰² In 2005, the number of lawyers who were criminally punished reached 128.¹⁰³ However, Tian Wenchang and Mo Shaoping, two well-known defense lawyers, estimated that as many as 500 lawyers were punished for doing their working from

¹⁰⁰ China Daily, “Licensed Lawyer number 200,000 in China”, 25 December 2011, available at http://www.chinadaily.com.cn/china/2011-12/25/content_14324123.htm (consulted on 7 April 2012).

¹⁰¹ Congressional-Executive Commission on China, *Defense Lawyers Turned Defendants: Zhang Jianzhong and the Criminal Prosecution of Defense Lawyers in China*, 27 May 2003, p11, available at <http://www.cecc.gov/pages/news/ZhangCriminalDef.pdf> (consulted on 23 May 2012).

¹⁰² Cited by Fu Hualing, 2007, p.3.

¹⁰³ *Ibid.*

1997 to 2002.¹⁰⁴ Others report as many as 100 cases of punishment per year.¹⁰⁵

On what charges are these lawyers arrested and detained? People might think that most lawyers were prosecuted for falsification of evidence after Article 306 was added into the Criminal Law in 1997. What about before the 1997?

Before 1997, police and prosecution authorities mostly used the charge of covering up and malpractice to punish lawyers who challenged prosecution's case.¹⁰⁶ Moreover, due to a lawyer's status as a state legal worker, which means that they were governmental officials, they were subject to two criminal charges like other public servants: embezzlement of state funds and taking bribes.¹⁰⁷ After 1997, the post-reform era of CL, police and prosecution switched the charge to Article 306, but the total number of prosecution did not increase drastically. "The difference, today, is that the prosecution has shifted and is now concentrated on falsification of evidence offences. There is an increase in this particular prosecution, not a general increase in prosecution," Fu Hualing said.¹⁰⁸

However, whatever the charge against defense lawyers, half of these lawyers were wrongly detained and sentenced, according to a statistical analysis the ACLA conducted on 23 such cases.¹⁰⁹ In some aspect, the prosecution of lawyers can be seen as the procuratorate's "professional revenge". They use the criminal law to harass and intimidate lawyers so that lawyers dare not oppose them. They prosecute lawyers to prevent them from handling a case. However, according a survey, almost half of cases against lawyers do not reach the trial stage after the investigation stage.¹¹⁰

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

¹⁰⁶ Fu Hualing, 2007, p.6.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*

¹⁰⁹ Terence C Halliday and Sida Liu, 2007, p.88.

¹¹⁰ Fu Hualing, 2007, p.4.

1.2. Adverse Effects

1.2.1 Extremely Low Rate of Legal Representation Among Criminal Defendants

Even though the number of licensed lawyers is increasing, the quantity of lawyers representing criminal cases is dropping. Only 30% of the suspects have defense lawyers.¹¹¹ For instance, in 2000 the number of lawyers in Beijing was 5,495. The total number of criminal cases they took on was 4,300, which accounted for 10% of the total criminal cases. The annual average number of criminal cases taken on by each lawyer declined from 2.64 in the previous year to 0.78.¹¹²

1.2.2 Violation of the Defendants' Human Rights

1.2.2.1 Suspects Tortured by Police

“Torture remains widespread in China” as Professor Manfred Nowak, UN Special Rapporteur on torture and other cruel, inhuman degrading treatment or punishment, said in his report after visiting China in 2005.¹¹³ The Chinese political leadership as well as scholars and the public admit that torture is prevalent in China today. It usually happens in detention centers during the pre-trial phase in order to extract a confession.¹¹⁴

In recent years, more and more cases involving suspects being tortured to death have been exposed by media. One common feature is that the police give ridiculous excuses for their death.

One hotly debated case was called “duo maomao” (躲猫猫), the Chinese name for hide-and-seek. 24-year-old Li Qiaoming was arrested for illegally cutting down trees, and died of brain injuries. The police claimed that Li was injured while playing with

¹¹¹ Wang Chao, 2001, p.4-6.

¹¹² Cai Yongshun & Yang Songcai, 2005, p.120.

¹¹³ UN Economic and Social Council, supra footnote 3.

¹¹⁴ Hatla Thelle, 2006, p.269.

other prisoners in detention center.¹¹⁵

Wang Yahui was arrested by the police and charged of stealing on 18 February 2010. Three days later, his family was informed that Wang had died in the detention center after “drinking some sort of hot water during the interrogation”. However, Wang’s aunt said she was shocked to see cuts and bruises all over Wang’s body. Wang’s nipples were seriously wounded. Bruises and injuries were also found on his arms, head and genitals.¹¹⁶

Similar cases have been noted, such as “the death of suspect of drowning while he was washing face” or “ dying by falling down when he went to the bathroom at midnight”.¹¹⁷ Whatever excuses the police use, one fact is that these suspects have been tortured when detained, as lots of wounds can be found on their body.

1.2.2.2 Violation of the Right to A Fair Trial

The right to a fair trial is an essential right in all countries respecting the rule of law.¹¹⁸ Throughout the history of China, no formal written laws comply with the right to a fair trial, although amendments to the Criminal Procedure Law and Criminal Law bring China closer to ensuring access to a fair trial.¹¹⁹ The right to a trial fair includes: independence, impartiality, and the presumption of innocence. However, it seems impossible for courts to adjudicate independently under the current legal system as they

¹¹⁵ New York Times, Duo Maomao, 2 March 2009, available at <http://schott.blogs.nytimes.com/2009/03/02/duo-maomao/> (consulted on 12 April 2012).

¹¹⁶ Asia One News, Suspect Horrifically Tortured to Death, 2 March 2010, available at <http://www.asiaone.com/News/Latest+News/Asia/Story/A1Story20100302-201730.html> (consulted on 12 April 2012).

¹¹⁷ 163 News, An inexplicable death of a felon in Inner Mongolia, 19 March 2010, available at <http://news.163.com/10/0319/11/624TG3LC00011229.html> (consulted on 12 April 2012). [网易新闻，内蒙古重刑犯莫名死亡，警方称其如厕时摔伤。]

¹¹⁸ Wikipedia contributors, Right to a fair trial, available at http://en.wikipedia.org/w/index.php?title=Right_to_a_fair_trial&oldid=479296771 (consulted on 12 April 2012).

¹¹⁹ Daphne Huang, 1998, p.172.

are not independent from government. This means that political leaders can decide the outcome of a case, especially in politically sensitive cases. As a lawyer said:

“Due to the political considerations of those in power, intervention is common. From the very beginning, the judgment is based on the decision of leaders. When a lawyer gets involved in a case, he or she may find many questions and have some good cases to make. He or she may conduct investigations to collect evidence and make thorough preparations for the trial. But such efforts are often a waste because the outcome has already been decided *ex ante*. This is very frustrating.”¹²⁰

The presumption of innocence in Chinese law is stated as, “a person shall not be deemed guilty without being judged as such by the court”.¹²¹ This does not imply that suspects have the right to remain silent. Indeed, a suspect “shall answer the investigator’s questions truthfully, but he shall have the right to refuse to answer any questions that are irrelevant to the case”.¹²² Therefore, the suspect has to answer questions relevant to the case truthfully otherwise he can be punished for not doing so. The suspect is obliged to help the prosecutor prove the charges against him/herself, which is regarded by legal scholars as contributing to the risks of using torture to obtain a confession.¹²³

1.2.3 Increase in the Number of Wrongful Convictions

As mentioned above, due to the “three difficulties” and the “big stick” Article 306, few lawyers want to represent a criminal defendant. Therefore, in most cases defendants

¹²⁰ Cited by Cai Yongshun & Yang Songcai, 2005, p.132.

¹²¹ Criminal Procedure Law, Article 12.

¹²² Criminal Procedure Law, Article 93.

¹²³ Hatla Thelle, 2006, p. 272.

are convicted without attorneys, which increases the number of wrongfully convicted cases. However, even though lawyers do appear in trial, judges rarely accept their defense.

We can see this phenomenon from the three typical examples given below.

“Zhao Zuohai” case

In 2010, Zhao Zuohai, a 57-year-old peasant was declared innocent and released after serving an 11 year prison sentence for murder after the “murder victim” was found alive and returned home.¹²⁴

In October 1997, Zhao Zuohai and his neighbor Zhao Zhenshang had a fight, after which the latter went missing. Two years later, a headless body was found in their village. Police detained Zhao Zuohai, accusing him of murder even though the body’s identity was not 100% certain. In 1999, after being tortured for 33 days, he finally confessed to killing his neighbor.¹²⁵ Zhao was sentenced to 29 years in prison.

In 2010, the “victim” returned to the village because he suffered from hemiplegy and needed medical assistance. He had not heard that Zhao Zuohai was jailed for “killing” him. “I thought I killed him and I wanted to escape,” the “victim” said, he chopped Zhao Zuohai with hatchet during their fight.¹²⁶

According to the State Compensation Law, Zhao Zuohai received 650,000 yuan (\$103,025) as “state compensation”. However, he could no longer return to his pre-detention life. His wife remarried with another villager after she learned he was convicted and three of his four children had been adopted by other families.¹²⁷

¹²⁴ China Daily, Murder Convict Set Free after ‘Victim’ Turns Up, 10 May 2010, available at http://www.chinadaily.com.cn/china/2010-05/10/content_9826537.htm (consulted on 10 April 2012)

¹²⁵ China Law and Policy, When the Murder Victim Turns Up Alive—Will Justice Be Served?, 21 July 2010, available at <http://chinalawandpolicy.com/tag/zhao-zuohai/> (consulted on 10 April 2012).

¹²⁶ Global Times, Innocent Man Spent 11 Years in Jail, 10 May 2010, available at <http://www.globaltimes.cn/china/society/2010-05/529982.html> (consulted on 10 April 2012).

¹²⁷ China Daily, “Killer” Jailed for 10 Years; then Victim Returns, 7 May 2012, available at

How could this tragic story happen? One of the prosecutors, Wang Jihua, said, when the case was handed over to the procuratorate, the prosecutors found that the evidence was not sufficient to prove that the suspect was the murderer.¹²⁸ The procuratorate told the police they would not prosecute against the suspect based on the current, insufficient evidence.¹²⁹ Therefore the case was shelved for 3 years. In 2002, in response to a nationwide activity promoting the cleaning-up of backlogs and overdue cases, the local police submit the “Zhao Zuohai” case to the local Political-Law Committee (PLC) who later instructed the police to prosecute the suspect within 20 days. Therefore, under the instruction of the local PLC, the court had to convict Zhao. Because Zhao did not have money to hire a lawyer, the court arranged a defense lawyer for him. But the defense lawyer, without a lawyer license, was an intern in a law firm and without any experience in handling cases. Even so, the defense lawyer still found that the headless body could not be identified as the victim. So, he pleaded not guilty for his client. But the trial was just a formality and lasted no more than half an hour. The judge finally convicted Zhao and sentenced him to 29 years in prison.

“Shen Xianglin” case

The “She Xianglin” case is similar to the “Zhao Zuohai” case. She Xianglin, a 29-year-old man in Hubei Province, was sentenced to prison for 15 years after being convicted of killing his wife Zhang Zaiyu who disappeared in January 1994. However, his wife reappeared in March 2005. One month later, he was freed after being wrongly jailed for 11 years.

<http://www.victimsofthestate.org/Foreign/Zuohai.pdf> (consulted on 10 April 2012).

¹²⁸ Huanqiu News, Tracking of Zhao Zuohia Case, 15 May 2010, available at <http://china.huanqiu.com/roll/2010-05/816029.html> (consulted on 10 July 2012). [环球网新闻, 赵作海冤案追踪: 当年法院指定辩护律师是实习生。]

¹²⁹ China daily, They Beat My Head with a Long Stick, 12 May 2010, available at http://www.chinadaily.com.cn/cndy/2010-05/12/content_9837321.htm (consulted on 17 May 2012).

In January 1994, She Xianglin found his wife was missing. Three months later, a body of a woman was found in the nearby village. After Zhang's brother identified her, She Xianglin was arrested and charged with murder. He was tortured and deprived of sleep for 8 days before finally confessing to the crime.¹³⁰ Even though there was not enough evidence to prove that he was the murderer, (no murder weapon was found, there were four inconsistent testimonies, and no eyewitnesses) public security still handed over case to the procuratorate.¹³¹ The procuratorate turned the case back to public security, asking them to collect more evidence. But the public security bureau sent it back again without new evidence three months later. At the same time, the victim's family convened hundreds people to protest the government by demanding a harsh punishment for She Xianglin. Under public pressure, the court received the case. Even though the prosecutor and judge probably believed She Xianglin was innocent, no one dared to release him with such strong public pressure. Finally, with the interference of the Political-Legal Committee, She Xianglin was sentence to 15 years in prison.¹³² After 11 years in prison, She Xianglin's wife reappeared again in 28 March 2005. On 1 April, She Xianglin was set free and declared innocent.

Even though She Xianglin got 700,000 yuan (\$111,020) in "state compensation", his life had already changed irreparably—his mother died from the incident. Believing his son was innocent, She Xianglin's mother appealed for him but was detained for more than 90 days. His mother died soon after being released.¹³³

In this case, She Xianglin's defense lawyer pleaded not guilty for him. Because the lawyer found that the suspect's statement had a few dubious points. In the four different

¹³⁰ China Daily, Wronged Man Demands Compensation, 12 May 2005, available at http://www.chinadaily.com.cn/english/doc/2005-05/12/content_441385.htm (consulted on 10 April 2012).

¹³¹ Lan Rongjie, 2010, p.134.

¹³² *Ibid.*, p.138.

¹³³ ABC News, Wrongly Convicted 'Murderer' Free At Last, 25 May 2005, available at <http://abcnews.go.com/International/story?id=785975&page=1#.T4Re6O15XhU> (consulted on 10 April 2012).

statements by She Xianglin, there are four inconsistent plans. In addition, no direct evidence except for his confessions prove that the suspect murdered his wife. Therefore, the lawyer defended the innocence of his client. But the court did not adopt the lawyer's view.

“Nie Shubin” case

Although the two men discussed above were in jail for 11 years after being wrongfully convicted, fortunately they are still alive. But for the “Nie Shubin” case, we unfortunately cannot say the same.

Nie Shubin was barely 20 years old when he was killed by an executioner's bullet to the back of his head. In the summer of 1994, Nie Shubin was charged with the rape and murder of a 38 year old woman in a corn field. On 25 April 1995, the court convicted Nie and executed him two days later—without notifying his parents. On 28 April 1995, his father, as usual, delivered some things to him, but was told that he need not come back as his son had been executed the day before.

In 2005, ten years after Nie was executed, another man named Wang Shujin, who was detained by the police in connection with another case, confessed that he raped and murdered the woman with corroborative details.¹³⁴ After knowing this, Nie's mother petitioned the court to retry the case to exonerate her son. Despite the high court's claim that they paid high attention to this case and would retry it as soon as possible, results have yet to appear. “I bike to the closest bus stop and then take a two-hour ride to the Hebei provincial high court, I've been doing this for the past six years—and as long as I still move, I'm not giving up,” said Nie Shubin's mother.¹³⁵

¹³⁴ Amnesty International, Nie Shubin—Wrongly Executed, 23 March 2008, available at <http://www.amnesty.org.au/china/comments/11243/> (consulted on 10 April 2012).

¹³⁵ CNN, Steven Jiang, Mother's Fight to Exonerate Executed Son Galvanized China, 20 October 2011, available at <http://edition.cnn.com/2011/10/19/world/china-mother-executed-son/index.html> (consulted on 4 July 2012).

Nie's mother said that the lawyer hired by her and her husband told her that Nie was beaten into a confession. She was convinced that her son was a victim of torture, for she saw her son walk with a limp into the courthouse before the first trial.¹³⁶

Nie Shubin's father tried to kill himself by drinking pesticide. He and his wife were driven to madness and depression by the death of their only son.¹³⁷ Nie's family was denied access to him after his arrest and never got to say goodbye, they have never even been given a copy of the court's verdict.¹³⁸

Chapter two: Reasons for Why the Human Rights Situation of Chinese Defense Lawyers is Deteriorating

Chapter two analyzes the root of criminal defense lawyers' predicament from five angles. The role of lawyers in Chinese culture is one of the most important reasons. In addition, inconsistent legal provisions, non-independent judiciary and bar association, political influence, and the misjudged-case investigating system are also the main reasons for the decrease in rate of legal representation in criminal cases.

2.1 Cultural and Traditional Reasons

According to analyses of many Chinese and foreign legal scholars, one reason for conflicts between defense lawyers and law enforcement personnel is that the procedural rights of criminal defendants and role of defense lawyers in preserving these rights are

¹³⁶ *Ibid.*

¹³⁷ BBC News, China's New Wealth and Old Failings, 12 October 2006, available at http://news.bbc.co.uk/2/hi/programmes/from_our_own_correspondent/6041524.stm (consulted on 10 April 2012).

¹³⁸ Amnesty International, *supra* footnote 134.

not be fully recognized by Chinese police and prosecutors.¹³⁹ “Such attitudes reflect dominant public attitudes towards the legal profession and the criminal process in China. The public has a poor perception of lawyers generally, a perception based in part on growing ethics problems in the Chinese bar.”¹⁴⁰ Furthermore, the public affirms the government’s efforts to fight crimes, but have little understanding of the need for strong procedural protections for criminal defendants.¹⁴¹

The root of this phenomenon is that ancient Chinese legal traditions offer prototypes of judges, prosecutors and the police but not of lawyers.¹⁴² Even though law in China has thousands of years of history, the Western-type of professional lawyers only appeared roughly 100 years ago. China’s modern legal profession was transplanted from the West. But what China transplanted was merely the legal form; the concept of rights did not exist in China.

Individual rights originated from the Roman Empire, after which notions of individual freedom, individual autonomy and equality before the law were developed and ripened at the height of the European Industrial Revolution in the 18th century.¹⁴³ The administration of criminal justice became more democratized under the influence of rights-oriented philosophical thinking.¹⁴⁴ The legal profession became prosperous and criminal defense work was thought of as a crucial constraint on state power over individuals.¹⁴⁵ “Therefore, in many Western countries, the development of the legal profession and criminal defense work was a natural outgrowth of the increasing

¹³⁹ Li Yujie and Dong Juan, 2001, p.94-95.

¹⁴⁰ CECC, *supra* footnote 101, p.10.

¹⁴¹ Randall Peerenboom, 2002, p.375-376.

¹⁴² Yi Sheng, A Promise unfulfilled: The Impact of China’s 1996 Criminal-Procedure Reform on China’s Criminal Defense Lawyer’s Role at the Pre-trial Stage (Part 2), 31 March 2004, p.1, available at http://www.law.yale.edu/documents/pdf/Part_2.pdf (consulted on 25 May 2012).

¹⁴³ Xiong Qihong, 1998, p.26-37.

¹⁴⁴ *Ibid.*

¹⁴⁵ Yi Sheng, 2004, p.2.

appreciation of individual rights, and of the need for mutual constraint between individual rights and state power.”¹⁴⁶

In contrast, when the legal profession was first introduced to China in the Qing Dynasty, it was still a feudal society in which social hierarchy was rigorously enforced. People were educated to sacrifice individual interests for those of the state and place the sovereign interest above all else.¹⁴⁷ As a result, the thought of pursuing political freedom or equality before the law as well as the function of the legal profession were contradictory to the culture and traditions of imperial China. “Lawyers were analogized as litigation tricksters that had long been blamed for pettifogging trivial disputes and backlogging imperial courts.”¹⁴⁸

Another important factor in the formation of bias against lawyers is the Chinese attitude towards crimes and criminals.¹⁴⁹ Due to the low tolerance for crimes in traditional society, very cruel laws were enacted suggesting that the only role of law was to “punish”.¹⁵⁰ The public believed it was worthwhile to sacrifice a relatively small number of individuals’ rights in exchange for greater social stability, even though they knew how cruel the punishment could be. Criminal defendants were banished by their own communities, for they undermined social harmony and destroyed the reputations of their families and friends.¹⁵¹ Owing to this view of criminals, lawyers who spoke on behalf of criminals did not leave a good impression on public. In traditional society, the Songshi (讼师, litigation tricksters) were always poorly regarded by the public. Public conceptions of lawyers portrayed them as greedy, ruthless, cunning, treacherous and expert in stirring things up, call black white and white black.¹⁵²

¹⁴⁶ *Ibid.*

¹⁴⁷ Xie Youping, 2000, p.235-238.

¹⁴⁸ Yi Sheng, 2004, p.3.

¹⁴⁹ *Ibid.*

¹⁵⁰ Xie Youping, supra footnote 147.

¹⁵¹ Yi Sheng, supra footnote 148.

¹⁵² Liang Zhiping, 2004, 275-276.

Despite the fact that the legal system of new China was established more than sixty years ago, public awareness of the legitimate rights of criminal suspects as well as the lawyers' function in protecting those rights remained at almost the same level as during the Qing Dynasty. Even some law students do not understand lawyers' role. For example, one student of Tian Wenchang's, who is a well-known criminal defense lawyer and a former professor at the China University of Political Science and Law, could not understand Tian's defense work for corrupt officials and challenged him on the internet by saying:

“Dear Mr. Tian, I am one of your 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, corrupt officials and notorious thugs. Now in my mind, you are a perfect dissembler and all of your justice is false.”¹⁵³

Another factor is that lawyers' reputation is very bad. In the field of justice, the fact that lawyers bribe judges is not news. The corruption of judges is the root of many problems in social justice. Judicial corruption directly damages the basic order of society. A survey of lawyers' motivations in doing criminal defense work showed that 9 of the 112 interviewed lawyers admitted that their political embeddedness within the criminal justice system was the main motivation for doing criminal defense work.¹⁵⁴ A lawyer's connections with the police, prosecutors and judges, can reduce a lawyer's professional difficulties and, in addition, they can get more case sources and more easily achieve favorable outcomes in their cases.¹⁵⁵ In another study, 130 of 388 cases

¹⁵³ Cited by Ran Yanfei, 2008, p1008.

¹⁵⁴ Terence C. Halliday & Liu Sida, 2011, p.847.

¹⁵⁵ *Ibid.*

involved judicial corruption.¹⁵⁶ “The most common types included admitting or excluding evidence without giving the parties equal opportunities to contest it, tampering with evidence, and obstructing access to evidence by violating the discovery procedure or manipulating the forensic examination results.”¹⁵⁷

Therefore, the public’s impression of lawyers is not only affected by history and culture, but also by the malignant activities of lawyers themselves.

2.2 Problematic Legal Provisions

As Fu Hualing, associate professor at the University of Hong Kong Law School, wrote in an article: “Of great importance is the fact that this confrontation between aggressive lawyers and frustrated police and prosecution is taking place in the context of great legal uncertainty where rules are vague and their meanings unsettled. The police and prosecution authorities are taking unfair advantage of uncertain rules. When the law is uncertain, it is up to the procuratorate to define and explain what the law is and whether a prosecution should be instituted.”¹⁵⁸

According to the Constitution of the PRC, the relationship between the courts, procuratorates and public security organs have been defined as to “divide their functions, take responsibility for its own work, cooperate with each other and check on each other.”¹⁵⁹ However in practice, the three bureaucratic organizations all seek to expand their jurisdictions and restrict the power of the other two agencies in both lawmaking and practice. For example after the 1996 CPL was passed by NPC, various interpretative regulations and notices on how to implement the new CPL were made by

¹⁵⁶ Li Ling, The ‘Production’ of Corruption in China’s Courts: Judicial Politics and Decision Making in a One-Party State, 7 May 2011, p.25, available at <http://www.usasialaw.org/wp-content/uploads/2011/07/The-production-of-corruption-in-Chinas-courts.pdf> (consulted on 23 June 2012).

¹⁵⁷ *Ibid.*, p.25-26.

¹⁵⁸ Fu Hualing, 2006, p.35.

¹⁵⁹ Constitution of the People’s Republic of China, adopted on 4 December, 1982, Article 135

the Supreme People's Court (the SPC), the Supreme People's Procuratorate (the SPP), and the Ministry of Public Security (MOPS). These interpretations were often in conflict with the 1996 CPL or contradict one another over many issues.¹⁶⁰ As one law professor in Beijing comments:

“Our current CPL has 225 articles. This is too few for a large country like China. It is not satisfactory. In the implementation, the police, procuratorate and court have made all kinds of interpretations for implementation. Altogether there are approximately 1,440 articles from interpretations. In China the procuratorate and court could be considered judicial agencies. But the MOPS is an administrative agency and it is inappropriate that it should be putting together an interpretation like the court. All three contradict each other and each has its own rule and all try to check and constrain the power of other agencies. Also there are situations where the interpretations may directly violate the law. So the result of this in practice is that all the agencies when they deal with a case they use their own interpretation and this reduces the efficiency of the process.”¹⁶¹

For example, the provisions on meeting arrangements and access to records are stipulated differently in the CPL and new Lawyers Law. The new Lawyers Law indicates that lawyers are authorized to request direct interviews without surveillance in any case. The CPL, however, stipulates the officials of investigation organ may present at the meeting if necessary. According to the new Lawyers Law, lawyers are entitled to read, extract and copy related records from the date the case is accepted by the court. But the CPL, on the contrary, restricts lawyers from doing

¹⁶⁰ Liu Sida and Terence C. Halliday, 2008, p. 17.

¹⁶¹ Cited by S. Liu and T. Halliday, 2008, p. 17.

so at an equivalent phase of the proceedings.¹⁶² Despite the fact that the National People's Congress Committee of the Legislative Affairs states that cases must be governed by the new Lawyers Law, the law-enforcement organs still follow the CPL.¹⁶³ Consequently, "to validate the new Lawyers Law, the legislature must make corresponding revisions to associated legal instruments to increase the strength of investigations and establish consequences for legal violations. Public security departments and judicial bodies must also modify law-enforcement methods and case-management mentalities."¹⁶⁴

2.3 Institutional Problems

2.3.1 China's Lack of Judicial Independence

Judicial independence is a multifaceted concept.¹⁶⁵ According to Randall Peerenboom, "the most basic form of judicial independence, substantive or decisional independence, refers to the ability of judges to decide cases independently in accordance with law and without interference from other parties or entities."¹⁶⁶ Judicial independence includes internal independence, which means judges decide cases without regard to administrative hierarchies (especially without interference from senior judges), and external independence, which refers to judges being able to decide cases without interference from external sources such as the CPC, the government, peoples' congresses, administrative agencies, the procuratorate, etc.¹⁶⁷ However, given China's one party control, the CPC will inevitably influence judicial decision-making to some degree. For instance, the President of the Court at each level is appointed by the

¹⁶² Liu Renwen & Zhou Zhenjie, 2010, p.187.

¹⁶³ *Ibid.*

¹⁶⁴ *Ibid.*

¹⁶⁵ Shimon Shetreet & Jules Deschenes, 1985, p.556.

¹⁶⁶ Randall Peerenboom, 2002, p.298.

¹⁶⁷ Randall Peerenboom, 2010, p. 71.

corresponding People's Congress; the courts' budgets and judges' salaries are decided by local governments. Thus, it's not difficult to imagine how the administrative organs infringe on judicial independence.¹⁶⁸ However, this does not mean that the Party influences or decides the outcomes of all or most cases, only some politically insensitive cases.¹⁶⁹

The Party influences the courts' work both internally and externally.¹⁷⁰ Externally, the Party Committee (党委员会), the Political-Legal Committee (政法委员会) (PLC), and the Organization Department are the main organs that convey the Party's instructions. Internal independence is threatened by the Party Group, Party Institutional Organ, Party cells and Political Department (政治部).¹⁷¹ The Party Group, including all or most of the Vice-Presidents, the Head of the Discipline Inspection Committee, and the Head of the Political Department, is responsible for ideological work, policy dissemination and implementation, and supervision and punishment of Party personnel for violations of Party discipline. As the most authoritative entity in the court system, the Party Group rarely involves itself in cases. But when the adjudicative committee is deeply divided or a case is sensitive enough to attract the attention of Party organizations, the Party Group will intervene and make a final decision.¹⁷²

The PLC, as one of the most important institutional channels for intervening judicial justice, consists of the Deputy Party Secretary, the President of the Court and procuratorate, and the heads of various ministries and bureaus, such as Public Security, State Security, Justice, Civil Affairs, and Supervision. The PLC is one department within the Party organization and exists at each level. But to be a member of the PLC,

¹⁶⁸ Cited by Zou Keyuan, 2002, p.1047.

¹⁶⁹ Randall Peerenboom, 2002, p.302.

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.*

¹⁷² *Ibid.*, p.303.

one need not have studied law or be a Party member.¹⁷³ Like the Party Group's responsibility, the PLC is primarily charged to conduct ideological work, disseminating policy, etc. Only when a case is important or difficult will the PLC get involved in the decision-making process.

The Public Security Bureau is another powerful organ, or in Peerenboom's view it is the strongest institution that may intervene in the judicial decision-making process.¹⁷⁴ We can see this from its constitution element. The Chief of the Public Security Bureau may be the head of the PLC. For example, Meng Jianzhu, the Minister of Public Security, is also the Vice-Secretary of the central PLC. The result of such arrangement is that when there is a conflict between the Public Security Bureau and a court or procuratorate, the Head of Public Security may use his position on the PLC to force his way on the court or procuratorate.¹⁷⁵ The Public Security Bureau, according to the Law on the People's Police, is in charge of public security, state security, prisons and organs for re-education through labor, as well as the judicial police established within courts and procuratorates.¹⁷⁶ As the Public Security Bureau governs detention centers, it is not surprising that the police extract testimony by torture or ill treatment. Some suspects have even died while in a detention center, but the police denied it by saying that the death was caused by illness. Chinese legal scholars have advocated removing the detention center from the Public Security Bureau's control.¹⁷⁷ But as Hou Xinyi, Deputy-Dean of the law school at Nankai University, said, this recommendation has always been strongly resisted by police departments, because such a reform will obstruct their investigations and ability to crackdown on crime.¹⁷⁸

¹⁷³ Zheng Shipin, 1997, 172.

¹⁷⁴ Randall Peerenboom, 2002, p.312.

¹⁷⁵ Liu Renwen, 1999, p.144.

¹⁷⁶ Chen Jianfu, 2008, p.162.

¹⁷⁷ The New York Times, "China Daily Assails Prisoner Abuses", 24 March 2009, available at <http://www.nytimes.com/2009/03/25/world/asia/25china.html> (consulted on 23 June 2012).

¹⁷⁸ *Ibid.*

In addition to interference by the government organs, the present predicament facing defense lawyers also results from the Chinese court system. There is a four-level hierarchical system in the Chinese court system: the Supreme People's Court (national), the High People's Courts (Provincial), the Intermediate People's Courts (City and Prefecture), the Basic People's Courts (Rural/County and City/District).¹⁷⁹ Before a verdict is published for a sensitive case, judges have to not only read the prosecution's files, but also probably consult with court leaders or superior court judges, and even government leaders.¹⁸⁰ Indeed, those who tried the case do not have the power to decide.¹⁸¹ Thus, the case might have a verdict without hearing. This is so called "decision first, trial later" (先定后审). The reason for submitting cases to a superior court is to ensure politically correct results. Even in common cases in which lower court judges face controversial legal issues, they still present the case to upper courts, for the upper courts have more experience in handling difficult legal problems. Judges can also transfer the case to the Adjudicative Committee. The Adjudicative Committee is composed of President of the Court, Vice-Presidents of the Court, Division Chief Judges,¹⁸² and other senior judges, is tasked with hearing difficult cases. Usually, the Adjudicative Committee members do not attend the trial. Their decision, after listening to a report from the trial judges, is made by simple majority vote.¹⁸³ The trial judges have to implement the Adjudicative Committee, since their decision is final and binding. As one lawyer said: "Under this system, 'the judges who conduct the trial are not the ones adjudicating it, and those adjudicating the trial are not the one conducting it' (审而

¹⁷⁹ Stephen L. McPherson, 2008, p.795.

¹⁸⁰ Lan Rongjie, 2008, p.16.

¹⁸¹ Fu Hualing, 1998, p.32.

¹⁸² Lan Rongjie, 2010, p.141. See the footnote 126 of this article: "In general, China's courts consist of several divisions, including registration, criminal, civil, administrative and enforcement divisions, plus an administrative office, a policy and research office, and a political office."

¹⁸³ *Ibid.*

不判，判而不审)—it completely invalidates the role of the defense.”¹⁸⁴

Convened by the CCP’s central Political-Legal Committee in 2007, President Hu Jintao announced the doctrine of “the Three Supremes”(三个至上): “always regard as supreme the Party’s cause, the people’s interest, and the Constitution and laws.”¹⁸⁵ Even though it was unclear whether the Three Supremes were listed in hierarchical order and whether the doctrine was applicable to lawyers, Justice Minister Wu Aiying called upon lawyers to “above all obey the CPC and help foster a harmonious society”. She stressed the need for lawyers to “pay attention to politics, take into consideration the big picture, and observe proper discipline.”¹⁸⁶ What is absent in her announcement is any mention of “law” or the need to establish an independent judiciary, a competent legal profession and a rule of law society. Instead, CPC rhetoric stresses Party control of the legal system.¹⁸⁷ Beginning in March this year, all lawyers obtaining or renewing their professional licenses will have to pledge their loyalty to the country and the leadership of the party.¹⁸⁸ According to the Ministry, a person who obtains a lawyer’s practice certificate or renews the certificate should take the oath within three months after the date of getting the certificate. The measure is “ridiculous in a modern society” and “unimaginable in any other country” said by Jiang Tianyong who is a lawyer for AIDS activists and was detained for two months last year. Mo Shaoping, a well-known rights lawyer, told Reuters news agency, “as a lawyer, you should only pay attention to the law and be faithful to your client. The oath will hurt the development of Chinese

¹⁸⁴ Human Rights Watch, *supra* footnote 52, p.63.

¹⁸⁵ Cited by Elizabeth M. Lynch, 2011, p. 575.

¹⁸⁶ The New York Times, Arrest in China Backers of Legal Rights, 9 August 2009, available at http://www.nytimes.com/2009/08/10/world/asia/10rights.html?pagewanted=1&_r (consulted on 30 April 2012); Caijing, Mo Shaoping: Chinese Lawyers Face the Risk of System, 20 July 2010, available at <http://www.caijing.com.cn/2010-07-20/110482410.html> (consulted on 30 April 2012). [财经网，莫少平：中国律师面临的制度风险。]

¹⁸⁷ Elizabeth M. Lynch, 2011, p. 575.

¹⁸⁸ BBC News, Lawyers in China to Swear Allegiance to Communist Party, 22 March 2012, available at <http://www.bbc.co.uk/news/world-asia-china-17470818> (consulted 30 April 2012).

legal system.”¹⁸⁹

2.3.2 No Autonomy for the Bar Association

“The All-China Lawyers’ Association (ACLA) is a government-controlled body, that, together with the national Ministry of Justice and its local-government counterparts, is in charge of lawyers in China.”¹⁹⁰ It was set up in 1986, when the association leaders were government officials. 1995 was the first year that the leadership of the ACLA was composed of professionals because of its council reform.¹⁹¹ Since the functions of law and lawyers in China are related to the CPC’s regime, the operation of China’s bar association cannot avoid government supervision. The MOJ is the immediate government agency that has direct influence on the autonomy and quality of China’s bar.¹⁹² Lawyers, law firms and lawyer associations are subject to supervision and guidance from the MOJ and its affiliates.¹⁹³

According to Article 45 of the new Lawyers Law, “a lawyer or law firm shall join his or its local lawyers’ association. A lawyer or law firm that has joined his or its local lawyers’ association shall concurrently be a member of the ACLA.” That means all lawyers in China are members of ACLA. Even if you are unwilling to be the member, you have no other choice because joining the ACLA is automatic.

It is the responsibility of the ACLA and its local associations to protect the legal rights and interests of lawyers, provide practice training, mediate disputes arising out of the practice of law by a lawyer, and accepting petitions from lawyers.¹⁹⁴ However, one survey on whether lawyer associations effectively protect lawyers’ rights showed that

¹⁸⁹ *Ibid.*

¹⁹⁰ Donald Clarke, *Lawyers and The State in China: Recent Developments*, 7 October 2009, p.6, available at <http://www.cecc.gov/pages/hearings/2009/20091007/dclarke100709.pdf> (consulted on 10 July 2012).

¹⁹¹ Luo Qizhi, 1998, p.14.

¹⁹² *Ibid.*, p.18

¹⁹³ new Lawyers Law, Article 4.

¹⁹⁴ new Lawyers Law, Article 46.

52% of the respondents replied that they are not helpful, and only 18% of them answered that the lawyers' associations are somewhat helpful.¹⁹⁵ In recent widely known cases of violations of lawyers' rights, the bar association kept silent. For example, in "Li Zhuang" case, the ACLA not only did not support the innocent lawyer Li during trial, but the president of ACLA stated in an interview that Li deserved the punishment, just as Li was about to be released from prison.¹⁹⁶ In the "Beihai" case, although the ACLA issued a statement in which they expressed grave concern about the lawyers' personal safety, it did not take any practical initiatives.

Every year lawyers must register at local judicial bureaus, submitting his application for renewal by the law firm for which he works. The documents include describing his work during the year, a certificate of completion of training, a report regarding compliance with professional responsibilities and disciplinary rules, etc.¹⁹⁷ Through the year-end registration, judicial bureaus can effectively control lawyers' activities. Lawyers say that the risk of suspension or withdrawal of their professional license was their greatest concern when handling insensitive cases, such as "cases that can influence society, cases against government officials, or mass cases."¹⁹⁸ For example, attorney Li Zhuang had his license revoked in February 2010 because the case he was working on involved Chongqing government's political campaign; Gao Zhisheng's license was suspended in March 2005 for his active human rights lawyer status. But to revoke the license is the final step taken by judicial bureau. Usually they will warn lawyers via a call:

"The first warning is that someone at the Judicial Bureau will give you a simple phone call to invite you to "have a chat." There is nothing official in

¹⁹⁵ Luo Qizhi, 1998, p. 16.

¹⁹⁶ Sina News, President of ACLA: Li Zhuang case makes defense lawyers more cautious, 11 June 2011, available at <http://news.sina.com.cn/c/2011-06-11/060122622997.shtml> (consulted on 2 May 2012). [新浪新闻, 全国律协: 李庄案对刑辩律师影响不能回避。]

¹⁹⁷ Lawyers' Practicing Certificate Administration Measures, Article 13.

¹⁹⁸ Human Rights Watch, *supra* footnote 52, p. 88.

this, but lawyers get the message. It's a threat.”¹⁹⁹

The bar association is too weak to protect lawyers. As a non-official part of the state apparatus, it only has indirect influence on case outcomes through the Justice Bureau, which is a much weaker agency than the courts, procuratorate and police.²⁰⁰

2.4 Political Influences

The process of the rule of law in China is accompanied by the development of China's political movements. Laws might become the tool for a political movement. In other words, laws may be used against those who are the target of political movements launched by the authorities. During these political movements, trials were much shorter than they would be if the due process of law had been followed and criminals received much more severe punishment than what was stipulated by criminal law²⁰¹—as was seen, for example, during the “Hard Strike” campaign launched three decades ago and the “Crime Crackdown” (打黑) launched in Chongqing in 2008. Although the establishment of the rule of law has been stressed by Chinese leaders on many occasions, party rules or party policy can override laws when political needs arise.

After the 1976 elimination of the “Gang of Four,” who took advantage of the Cultural Revolution to persecute a large number of senior revolutionaries, government officials and progressive intellectuals, the widespread smashing, looting, robbery, rape and murder occurred on such a large scale that general social security became a severe problem. To stop the crime wave and pursue economic development, the government initiated the “Hard Strike” anti-crime campaigns in the early 1980s. In these campaigns, Deng Xiaoping stressed the importance of swiftness and severity in the process of combating crimes. He pointed out that under special social circumstances, “striking

¹⁹⁹ *Ibid.*

²⁰⁰ Terence C Halliday & Liu Sida, 2011, p. 856.

²⁰¹ Liang Bin, 2005, p.387, p.391.

crimes harshly and swiftly is the best way to combat crimes, and can be justified on the grounds of retribution to appease the masses and maintain political stability.”²⁰² Therefore, the suspects and defendants were treated as class enemies in this politically legitimized movement. They did not enjoy any procedural protections, often going to trial without a lawyer. As a penalty-oriented campaign, defense lawyers were considered an obstacle, so the involvement of lawyers was barred.²⁰³ Defendants received punishments more severe than what criminal law stipulated. Statistical surveys show that the death penalty and executions were prevalent during the Anti-Crime campaigns. For example, 6,000 people were sentenced to death and executed in 1996.²⁰⁴

During the Anti-Crime crackdown campaign, the duration of a trial was much shorter than it would otherwise be. One typical example is that in the 2001 Anti-Crime campaign, the Beijing police investigated 2,095 cases and arrested 1,088 suspects within five days.²⁰⁵ In order to achieve the purpose of swiftness, the handling process was shortened through merging the investigation and prosecution stages. “The judiciary became no more than a rubber stamp on the procuratorates’ decision regarding the guilt of the accused. Worse still, procedural protections for suspects were totally neglected. Clearly, armed by political might, the ‘Hard Strike’ campaigns have been carried out beyond the legal and regulatory framework. The pursuit of crime control has fostered this unique culture of the disregard for procedural justice and disrespect for law in China.”²⁰⁶

In 2008 Bo Xilai, the CPC Chongqing Committee Secretary, launched a similar campaign—“Crime Crackdown” to wipe out organized crime and the bonds between the underworld and local government officials. In 10 months, 4,781 people were

²⁰² Deng Xiaoping, 1993, p.33.

²⁰³ Li Enshen, 2010, 153

²⁰⁴ Amnesty International, 1996, p.88.

²⁰⁵ Liang Bin, 2005, p.392.

²⁰⁶ Li Ensheng, 2010, p.152-153.

arrested, including business executives, police officers, judges and legislators and others accused of running or protecting criminal syndicates.²⁰⁷ “Among these people more than 700 were sentenced to prison, about 70 were sentenced to death and executed,” said Chen Youxi, “the data is reliable. It is from a Chongqing high-level insider who I met in one Beijing high-end meeting.”²⁰⁸

In the “heavy fist” of a crackdown campaign, the campaign was also characterized by swiftness and severity. Gong Gangmou (lawyer Li Zhuang’s client) and Wen Qiang²⁰⁹ are typical examples. In these two cases, only half a year passed from the beginning of the investigation to a conviction, which is very short when compared with other death penalty cases. The speed by which Li Zhuang was convicted was unprecedented—Li was arrested on 12 December 2009 and convicted on 8 January 2010.

During the campaign, the court, procuratorate and Public Security Bureau were supposed to work together to shorten the case-handling time and ensure the success of the campaign. Li Zhuang told the author that before his arrest the Chief of the Public Bureau, procuratorate and court had a meeting to discuss his arrest as well as his sentence. Before the trial, the Public Security Bureau went to the detention center to “talk” with Li. They told him if his attitude was genuine they would consider giving him reprieve. “We can influence the court,” the Public Security official added. Even when the case reached the trial phase, the Public Security Bureau still repeatedly visited

²⁰⁷ The New York Times, Crime Crackdown Adds to Scandal Surrounding Former Chinese Official, 26 March 2012, available at <http://www.nytimes.com/2012/03/27/world/asia/bo-xilais-china-crime-crackdown-adds-to-scandal.html?pagewanted=all> (consulted on 9 May 2012).

²⁰⁸ Chen Youxi, How Many People Were Arrested in Chongqing’s Crime Crackdown? 13 April 2012, available at <http://www.qlylawyer.com/newLawyersite/BlogShow.aspx?itemid=e2033476-3ed0-46fe-8916-a03200a87b6b&user=10420> (consulted on 9 May 2012). [陈有西：重庆打黑到底抓了多少人？]

²⁰⁹ Wen Qiang was the former director of the Chongqing Municipal Judicial Bureau. In the Chongqing’s campaign, he was charged with taking more than 12 million yuan (\$1.76m) in bribes for protecting criminal gangs, helping companies and business people obtain illegal profits. He was also charged with repeatedly raping a university student. He was sentenced to death and executed in July 2010.

the detention center to “talk” with him. They wanted Li Zhuang to plead guilty.²¹⁰

At the beginning of the Anti-Crime Crackdown campaign, the Chongqing Justice Bureau organized a meeting for all of its local lawyers. In the meeting, the Justice Bureau asked the lawyers not to mention lack of access to detained suspects, confessions forced by torture, nor improper procedure issues. After Li pointed out during trial that his client was tortured by the police and that the meeting between them was under the surveillance of the police, the Chongqing Public Security Bureau rushed to Beijing to see the Beijing Justice Bureau, asking them to stop Li from continuing with the case. Li also told the author that even though the rate of legal representation among criminal defense was not very low in the campaign, the defense lawyer could not play a substantive role in the game. The lawyers’ work would neither impact the result of the case nor act as an obstacle. Because if a lawyer’s work were to impact the process of a case, he would be intimidated or, more serious, might be the next Li Zhuang.²¹¹

“The anti-mafia campaign in Chongqing was not based on the rule of law. It was an anti-mafia campaign for political purposes. It overrode the law, it ignored basic legal procedure and it even violated basic human morality,” said Li Zhuang²¹² who was sentenced to prison for 18 months on the charge of falsifying evidence. Li Zhuang, exercising a legitimate right under the law, exposed to the court that his client was tortured by the police. However, like the hostility they got from authorities in the “Hard Strike” campaigns, defense lawyers who defended gang leaders in the anti-mafia campaign were viewed as troublemakers and obstacle to the success of the campaign.²¹³ The arrest and trial of Li Zhuang is strong evidence of it. As he said, his trial was designed to send a clear message:

²¹⁰ Lawyer Li Zhuang was interviewed by author via email on 28 May 2012.

²¹¹ *Ibid.*

²¹² NPR News, Abuse Claims Follow Mafia Crackdown in Chinese City, 27 March 2012, available at <http://www.npr.org/2012/03/27/149467544/in-chinas-crime-crackdown-claims-of-abuse> (consulted on 10 May 2012).

²¹³ Li Ensheng, 2010, p.154.

“It was a warning to all the lawyers in China: We are cracking down on the mafia here, no one should come here. They were ‘killing the chicken to scare the monkeys.’²¹⁴ They made all China’s lawyers so scared no one dared speak out. It was extremely terrifying.”²¹⁵

In these campaigns, the authorities sacrifice the rule of law when enforcing cruel procedures in order to pursue some political purpose. Suspects and defendants, in one sense, are offenders; in another sense, however, they are victims of the subversion of the due process of law. Although lawyers in China make every effort to uphold the rule of law and defend procedural justice, they do not have an option other than to sacrifice their personal freedom when challenging threats from powerful authorities.

2.5 The Evaluation System and the Misjudged-case Investigating System

As mentioned above, the rate of acquittal in China’s courts is very low, not more than 0.2% over a period of many years. One important reason is related to the evaluation system (绩效考核制度) and the misjudged-case investigating system (错案追究制度). The evaluation system was “designed to incentivize the work of authorities, in essence compels them to pay more attention to the success of their criminal accusations than to the justice of their actions.”²¹⁶ According to Article 26 of the PRC Public Prosecutor Law, “The appraisal of public procurators shall include their achievements in procuratorial work, their ideological level and moral characters, their competence in procuratorial work and their mastery of legal theories, their attitude towards and style of work. However, emphasis shall be laid on achievements in procuratorial work.” The achievements of prosecutors’ work in practice always link to the correct approval of

²¹⁴ It is a Chinese proverb, which means that to make an example out of someone as a way to warn others.

²¹⁵ NPC News, supra footnote 212.

²¹⁶ Li Ensheng, 2010, p.163.

arrest, the success rate of criminalizing suspects, and the rate of acquittal.²¹⁷ An acquittal is when a case is prosecuted by procuratorate and the defendant is acquitted by the judge after hearing the case. The acquittal of a case is seen as unfavorable for the prosecutors. Because only a guilty verdict is understood as the success of the prosecutors' work, acquittal is equal to failure. Moreover, the acquittal might lead to the start of the misjudged-case investigating system procedure.

The misjudged-case investigating system is created to “administratively penalize police, prosecutors, and court officers for their incorrect handling of cases,”²¹⁸ It aims at strengthening the supervision of judicial officers, improving the quality of case handling, eliminating judicial corruption and achieving judicial justice.²¹⁹ Despite that the intent behind the establishment of this system was to pursue justice, it did not turn out that way.

Since the misjudged-case investigating system links performance with the vital interests of the police, prosecutors and judges, those officials will not admit their fault if the case they handled was a “wrongly-handled case”. What is “wrongly-handled case”? There is no unified definition. Because the misjudged-case investigating system is basically established by the local Public Security Bureau, procuratorate and the courts themselves, not by the law. Thus the definition of a “wrongly-handled case” is different in different provinces. “Driven by the ideal of crime control, a ‘wrongly-handled case’ has long been defined as any case not successfully convicted by the authorities, in that an acquittal or return of the case to the procuratorates indicates dereliction of duty by the authorities.”²²⁰ If the suspects finally are identified as innocent or acquitted by the court, it is interpreted as the procuratorate mishandling a case, which will lead initiate the procedure for the misjudged-case investigating system. Not only will the

²¹⁷ Cited by Li Ensheng, 2010, p.164.

²¹⁸ Li Ensheng, 2010, p.164.

²¹⁹ Yang Yunfei, 2010, p11.

²²⁰ Li, supra footnote 218.

prosecutors face sanctions, such as administrative warnings, demerits, allowance deductions, or demotion, but also the procuratorates have to be responsible for the subsequent “state compensation” to the victim of the mishandled case. Thus procuratorates will work against the innocence of a suspect in any way possible by only submitting evidence that supports prosecution. Torture and other inhumane measures are frequently used to extract confessions to ensure a guilty verdict. The effect on defense lawyers is enfeeble and weaken them. Due to the role of protecting suspects’ procedural and substantive rights, lawyers are seen as in fundamental conflict with the officials’ individual interests. Despite frequent violations of procedural rights of suspects during judicial officials’ handling of cases, suspects rarely reveal such illegal activity in the hope that their cooperation will be considered and lead to more lenient treatment during trial.²²¹

To avoid the initiation of the misjudged-case investigating system, the courts rarely accept the plea of innocence made by defense lawyers for their client. This can be seen as a result of the complicated relationship between the Public Security Organs, the procuratorates and the courts. The relationship among the courts, procuratorates and Public Security organs is been defined in the Constitution of PRC so as to “divide their functions, take responsibility for its own work, cooperate with each other and check on each other”.²²² The Public Security Bureau, courts and procuratorate will always communicate and coordinate with each other when they come across jurisdictional conflicts. A good example in practice is that when judges find the argument of the procuratorate unconvincing or based on illegal evidence, they usually ask the procuratorate to withdraw the case rather than acquit the defendant.²²³ As a district

²²¹ Ge Lei, 2004, p.36.

²²² Constitution of the People’s Republic of China, adopted on 4 December, 1982, Article 135

²²³ Terence C Halliday & Liu Sida, *Dancing Handcuffed in the Minefield: Survival Strategies of Defense Lawyers in China's Criminal Justice System*, 14 May 2008, p. 19, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1269536 (consulted on 25 May 2012).

court judge in Xi'an explained:

“If the defense lawyer can show confession by torture, what is the result? The rule of evidence in China is not comprehensive. In practice when this occurs we will request the procuratorate to investigate in three days. If it is confirmed and illegal evidence is involved, you cannot really declare the person innocent but we request the procuratorate to withdraw the case and “digest” it in the system. The police, the procuratorate and the court are not independent from each other. They have equal positions under guidance of the Party, so we will try to avoid state compensation.”²²⁴

Chapter Three: Recommendations

This chapter provides recommendations for improving lawyers' status and legal environment in which lawyers' practice.

3.1 Strengthen the Implementation of the Basic Principles on the Role of Lawyers

The Chinese government should improve the protection of lawyers' rights. China should fulfill its commitment as a signatory of the Basic Principles on the Role of Lawyers. As the Basic Principles on the Role of Lawyers stipulates:

In preamble: Adequate protection of the human rights and fundamental freedoms to which all persons are entitled, by they economic, social and cultural, or civil and political, requires that all persons have effective access to legal services provided by an independent legal profession

Principle 16: Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients

²²⁴ *Ibid.*

freely both within their own country and abroad; and (c) shall not 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.

Principle 17: Where the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities.

Principle 22: Government shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential.

Principle 24: Lawyers shall be entitled to form and join self-governing professional associations to represent their interests, promote their continuing education and training and protect their professional integrity. The executive body of the professional associations shall be elected by its members and shall exercise its functions without external interference.

China should also ratify the International Covenant on Civil and Political Rights to improve the human rights situation of both suspects and lawyers. Chinese leaders often stress on different occasions that China is a rule of law country. In this case, the government ought to accelerate the ratification process of this international convention.

3.2 Repeal Article 306 of the PRC Criminal Law

It is a generally accepted fact that lawyers have been subject to harassment and wrongful criminal prosecution in recent years. Most of them were charged of evidence fabrication (under Article 306 of the Criminal Law) if their client or witnesses changed their statements made to investigators. Chinese lawyers and legal scholars should

therefore appeal to repeal Article 306. They believe that Article 306 is a discriminatory article. “It unfairly targets defense lawyers, creating an uneven playing field with prosecutors.”²²⁵ They stress that Article 307 already addresses crimes of evidence fabrication. Article 307 stipulates: “A person who, by violence, threat, bribe or any other manner, hinders a witness from providing evidence or incites another person to provide false evidence, shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention....” Thus, the Article 306 is an unnecessary provision singling out defense lawyers. They also criticize that if anyone should be singled out for such provision, it should be Public Security officials or prosecutors, who often use illegal means to collect evidence.²²⁶ Moreover, since the legal interpretations of Article 306 are not clear, prosecutors wide the latitude in bringing evidence fabrication charges makes for a convenient mechanism to harass lawyers.²²⁷

Even though cases of lawyer prosecution have increased since Article 306 was added to the Criminal Law, some legal scholars and law enforcement officials oppose a repeal of Article 306. They argue that Article 306 and the criminal prosecution of lawyers’ misconduct is an essential approach to combat illegal behavior by defense lawyers as well as to uphold the administration of justice, because ethics are still a major problem in China’s legal profession.²²⁸ However, there are also some legal scholars who oppose repeal Article 306, but admit the inappropriate application of the provision. Repealing this provision cannot solve the problem of intimidation of defense lawyers, since the prosecutors will find other provisions with which to charge lawyers. They think the problem is that lawyers are too easily trapped by Article 306.²²⁹ Therefore, what is needs to change is not Article 306, but to add a statutory amendment or judicial

²²⁵ Cited by Congressional-executive commission on China, 2003, p.8.

²²⁶ *Ibid.*

²²⁷ Wang Jin, 2001.

²²⁸ Congressional-executive commission on China, supra footnote 101, p.9.

²²⁹ *Ibid.*

interpretation that would raise the evidentiary standards in evidence fabrication cases and define the crime of evidence fabrication more explicitly.²³⁰

The author thinks that Article 306 of Criminal law should be repealed since Article 307 offers enough of a general criminal provision on evidence fabrication. The Article 306 has raised the risk of engaging in criminal defense work and accelerated the deterioration of China's defense bar. Moreover, what constitutes the crime of evidence fabrication is not clearly stipulated in the Criminal Law, which gives the prosecutors wide discretion to prosecute lawyers and leave judges broad latitude to find lawyers guilty of such an offense.²³¹ Repealing the provision will improve the status of defense lawyers and make judicial organs more respectful of lawyers, at least in form if not always in practice.

3.3 Establish Autonomy of the Lawyers Associations

Lawyers associations should be independent from the government. The ACLA should be separated from the Ministry of Justice. Lawyers shall be entitled to form and join self-governing professional associations to represent their interests.²³² Lawyers associations more or less have the right to manage the legal profession. For example according to Article 46 of the new Lawyers Law, "The lawyers associations should safeguard the practice of law by lawyers, and protect the legal rights and interests of lawyers. The lawyers associations have the right to make a professional code and disciplinary rules; organize the lawyer practice training and the education on professional ethics and practice disciplines, and conduct the practicing assessment of lawyers; reward or discipline a lawyer or a law firm." However, the power to revoke a

²³⁰ *Ibid.*

²³¹ Yu Ping, 2002, p.855.

²³² Human Rights Watch, *supra* footnote 52, p.105.

decision on approving the practice of law and cancel a lawyer's practice certificate still rests with local Justice Bureaus.²³³ Therefore, to achieve the autonomy of lawyers associations, the right to revoke lawyers' practice certificates and renew their licenses should be transferred to lawyers associations.

In addition, China can also build a lawyers association disciplinary committee to hear the fabricating evidence cases or other similar cases as the Congressional-Executive Commission on China (CECC) recommended.²³⁴ The CECC recommend that if a case is related to a defense lawyers' evidence fabrication, it should be the lawyers association disciplinary committee that takes charge of investigating, evaluating evidence, and recommending disciplinary sanctions. If a case is not very serious, the committee will sanction the lawyer by issuing warning, suspending the lawyer or revoking his license. But a case will be shifted to the procuratorate to start a criminal prosecution if the case is particularly serious. "Under this system, lawyers would be more effectively protected from trumped up charges of evidence fabrication, since the lawyers associations would determine whether misconduct occurred.... Lawyers associations would have an interest in investigating cases aggressively, both as a means of enhancing the image of the legal profession and to prevent law enforcement agencies from backing out of the arrangement and once again applying criminal provisions in such cases."²³⁵

3.4 Remove Control of Detention Centers from the Local Public Security Bureau

Before the new Lawyers Law came into force, defense lawyers had confronted the "three difficulties" in handling cases, for they have to get the Public Security Bureau's

²³³ New Lawyers Law, Article 9.

²³⁴ Congressional-Executive Commission on China, supra footnote 101, p.14.

²³⁵ Congressional-Executive Commission on China, supra footnote 101, p.15.

permission before meeting their clients; they lack of access to investigation materials and collected evidence; and they face difficulties in acquiring case files. After the amendment of the Lawyers Law, those problems would not exist. According to the new Lawyers Law, lawyers do not have to be approved by the Public Security Bureau before meeting clients. They have expanded rights to collect evidence and increased access to case files.²³⁶ However, the dilemma of the “three difficulties” has not been changed substantially. The root of the problem is that detention centers are governed by the Public Security Bureau.²³⁷ The public security bureau is not only responsible for investigation, but also for governing detention centers in which suspects stay. This is why the “three difficulties” exist. The police are reluctant to allow meetings between lawyers and suspects, for they think the lawyers would help the suspect change his or her testimony and cause trouble for their case. Moreover, those cases in which suspects have died in detention happened because the police tortured them in order to extract a confession. Therefore, the only way to solve the “three difficulties” and sharply reduce abuse is to remove detention centers from local police control.

The power to govern detention centers should belong to the judicial organs. The advantages of detention centers governed by judicial organs are that the phenomenon of forced confessions and torture can be effectively prevented. If a detention center is under the control of judicial organs, the police must strictly follow legal procedures when interrogating suspects during the pre-trial stage. The police also have to obey the statutory time limit to carry out investigatory work. This would reduce the phenomenon of illegal interrogation for which might last several days and nights, avoid the abuse of power, and prevent torture and ill treatment. If the power to administer detention centers is transferred to judicial organs, the power to arrest, detain and set suspects free would be separated from Public Security organs. Moreover, the issue of lawyers’ “three

²³⁶ new Lawyers Law, Article 33, Article 34 and Article 35.

²³⁷ Detention Centre Regulations of the People’s Republic of China, Article 5.

difficulties” in handling cases would also be solved.²³⁸

3.5 Protect Judicial Independence

The PRC Constitution confirms the independent judicial power of the courts. According to Article 126 of the PRC Constitution, “The people’s courts shall, in accordance with the law, exercise judicial power independently and are not subject to interference by administrative organs, public organizations or individuals.” However, the preamble of the Constitution also recognizes that the Chinese people should follow the leadership of Communist Party of China, which, in practice, means that the courts must follow the guidance of the Party. This is not the true meaning of judicial independence. As the Basic Principles on the Independence of the Judiciary states:²³⁹

1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.
2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.
4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the court be subject to revision.

This principle is without prejudice to judicial review or to mitigation or

²³⁸ Huang Xiuli, 2009, A02.

²³⁹ The Basic Principles on the Independence of the Judiciary was adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.

China should speed up the judicial reform process to improve the legal environment in which lawyers' practice. The core of judicial reform is judicial independence. To continue the economic development of China, country must become a country governed under the rule of law. Even though China has already been a "rule by law" society, which means that law is used as an instrument by the government to restrain citizens, law in a rule of law society restrains both citizens and the government.²⁴⁰ "An independent judiciary is the best means for protecting the rule of law."²⁴¹ Judicial and administrative power should be separated from each other. Judges can enjoy independent jurisdiction and should determine the outcome of a case by relying only on evidence rather than the instruction of his or her superiors. The tragic cases, such as Nie Shubin who was wrongly executed when he was still quite young, should be avoided as much as possible.

3.6 Abolish the Evaluation System and the Misjudged-case Investigating System

The evaluation system and the wrong-case responsibility system not only failed fulfill its stated goals, but also brought about negative effects. Take the court for example. If a higher court changes a sentence or overturns the sentence of the lower court, the judge in the lower court will be regarded as having "wrongfully handled the case". The lower judge would then face penalties such as disciplinary measures or economic sanction. Therefore, in order to avoid the activation of the misjudged-case investigating system, the lower court judge might first ask for instruction from the higher court, or communicate with higher court about the outcome before sentencing. The principle of

²⁴⁰ Eric W. Orts, 2001, p.44.

²⁴¹ Cited by Zou Keyuan, 2002, p.1046.

independent adjudication is found on paper only, not in practice. Furthermore, as the outcomes of the case involving the interests of the judges, such as the rewards or punishments, promotions or demotions, the superior judges would yield to the decisions of the lower court judges. In other words, the superior judges will keep the sentence of lower court, if outcomes do not have to be corrected.

Consequently, keeping misjudged-case investigating system is both unnecessary and irrational. In practice, its positive effects are minimal, while bringing ample negative effects into the system. The professor Liang Huixing, a research Fellow at the Institute of Law of the Chinese Academy of Social Science, recommends replacing the misjudged-case investigating system with an impeachment system for judges.²⁴² He claimed that an impeachment system for judges is based on people's trust. Through the election of people's representatives', judges are given the power of sentencing the death penalty. Once the people no longer trust a judge, they can remove him from office. A necessary condition for the dismissal of judges is the people's distrust. Whether a judgment is right or wrong, or whether the conduct of a judge constitutes a crime would not be considered as a sufficient condition for the dismissal of a judge under the impeachment system. On the contrary, the misjudged-case investigating system, as he stressed, is based on the responsibility system. In another word, if a judge wrongfully convicted a defendant, he should be subject of accountability, for his wrongfully handled a case means that he breached his duty.²⁴³ The sufficient condition of dismissing a judge is evidence of incompetence, such as mishandling a wrongful conviction, rather than betraying the people's trust. The impeachment system of judges not only can ensure the impartiality of court judgments, but also embodies the

²⁴² Liang Huixing, 26 October 2003, Replacing the Misjudged-case Investigating System with Impeachment System of Judges, 26 October 2003, available at <http://www.civillaw.com.cn/article/default.asp?id=13236> (consulted on 2 July 2012). [梁慧星, “错案追究”叫停, “法官弹劾”上马。]

²⁴³ *Ibid.*

“democratic control” of judges through a legal procedure designed to eliminate judges who have derelicted their duty.

Conclusion

This thesis focuses on the current human rights situation of defense lawyers in China. It is a new field, which rarely gets attention from the international community. Over the past few years, the United Nations and various developed countries have begun to pay more attention on the protection of China’s lawyers. Under the pressure of the UN and international community, the human rights situation of human rights lawyers has been improved to a certain extent. However, the legal profession is still a new and vulnerable profession, as the history of legal profession extends only thirty years into the past. The public, owing to some problems caused by history and culture, are prejudiced against lawyers, particularly defense lawyers. Thus, this thesis tries to attract the Chinese government and international community’s attention to defense lawyers’ human rights by presenting the harmful predicament they face when handling cases.

The Chinese government shall pay attention to defense lawyers’ rights as well as their human rights. Domestic legal scholars and lawyers advocate improving the legal environment in which lawyers practice so that defense lawyers can provide better protection for their clients. Improving the status of defense lawyers and respecting their rights has already become the focus of attention among the public and legal professionals. The media is also an important power in promoting the role of legal professionals. For example, it is because of the wide dissemination of the media that the public, scholars and even the international community became highly concerned about the direction of the Li Zhuang incident.

China is now in a period of judicial reform. Scholars and lawyers, therefore, are seizing this opportunity to increase respect for lawyers and their rights; improving their

social status is particularly important. The purpose of this thesis fits within that context. However challenging the task of judicial reform in China, it is much more difficult than in other countries since China is a One-Party country.

The development of the rule of law in China was not a smooth process, but a tortuous one. In speaking of the process of the rule of law, Professor Jiang Ping, a prominent legal scholar and former president of the China University of Political Science and Law, famously said, “two steps forward, one step backward. That is to say, if you move forward too quickly, your [efforts] might be quashed by others. It is only by going forward on step, compromising some; then going forward by one step, and again compromising some. It is inconceivable for anything to be straightforward, to relentlessly move ahead—it is impossible. Therefore, progress and compromise, revolution and compromise, these are all normal.”²⁴⁴

Judicial reform and the development of the rule of law must also confront institutional issues. The development of the rule of law in China is closely related to China’s leaders’ recognition of the rule of law. If China’s leaders have an open mind to democracy and human rights, the development of the rule of law would not be encountering such obstacles. We hope that after the once-in-a-decade leadership transfer later this year, the new leaders will pay more attention on the development of the rule of law and improve the legal environment in which lawyers act, rather than developing the economy at the expense of legal reform.

²⁴⁴ China Digital Times, 31 October 2009, <http://chinadigitaltimes.net/2009/10/jiang-ping-江平-a-rule-of-law-is-my-sole-conviction/> (consulted on 30 June 2012)

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