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*231 The Plight of China's Criminal Defence Lawyers

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This article describes and analyses the problems of China's criminal defence lawyers in gaining access to and representing detained clients during the investigation, indictment and trial stages of the criminal process, with brief reference to problems at the appeal and post-conviction stages. The article also discusses the harassment and intimidation suffered by defence counsel who live under threat of prosecution for waging too vigorous defences and who are subject to other restraints and sanctions. It concludes with some suggestions for foreign co-operation with and support for these embattled but essential lawyers in China.

Introduction

Lawyers in the People's Republic of China (PRC) have come a long way since the end of the Cultural Revolution and the start of Deng Xiaoping's "Open Policy". Formerly denounced as the worst type of "stinking intellectuals" and totally suppressed for over 20 years beginning with the 1957-1958 campaign against "rightists", PRC lawyers -- now almost 120,000 in number -- are currently transforming themselves from Soviet-style "state legal workers" [FN1] to prosperous and semi-independent professionals with increasingly recognised status. Many play an important role in business transactions that facilitate domestic economic development. A growing number promote the international trade, foreign investment and technology transfer that have spurred their nation's remarkable progress. Others foster the rights of women and children, and some even go so far as to protect the rights of workers. Although dismayed by the extent to which corruption, politics and personal influence affect -- and often involve -- their law practice, even when settling disputes before courts, China's lawyers, by and large, now lead an increasingly satisfying and attractive life. So attractive, indeed, that it has become difficult to recruit and retain top talent to serve as the country's under-appreciated and under-paid judges, prosecutors, government legal experts and law *232 professors. According to some recent social surveys, being a lawyer is now considered one of China's most favoured career choices.

Criminal defence lawyers, however, are an exception. Certainly, some of them are well-compensated, and a few have become deservedly famous and admired. Yet even they have a daily diet of disillusionment and danger, and their situation is not improving, despite the hopes that in 1996 accompanied the enactment of the Lawyers Law [FN2] and the revision of the Criminal Procedure Law (CPL). [FN3] The following remarks, based upon conventional legal research as well as experience advising the American families of people detained in China, suggest why this is so.

Obstacles to Entering a Case

One of the major innovations of the 1996 CPL revision is the right it confers on a detained suspect, after the first interrogation by investigators or from the first day of detention, to select and meet a lawyer. [FN4] In 1998 the revised CPL was authoritatively interpreted to confer on the family the right to select a lawyer on behalf of the suspect, so that a lawyer chosen by the suspect or his family is recognised as having a right to enter the case and meet with the suspect. [FN5] These rights are not contingent upon the approval of the detaining authority, unless the case is determined to involve "state secrets". [FN6] Yet PRC police and prosecutors often deny lawyers access to their clients on far-fetched claims of "state secrets". For example, in the 1999 case of detained Dickinson College librarian Song Yongyi, even after the prosecutor had rejected the State Security Bureau's (SSB's) application for a formal arrest warrant on a "state secrets" charge, the SSB continued to deny his lawyer an opportunity to meet him.

More often, the police simply do not transmit a detainee's request for a lawyer, or delay or refuse access to a lawyer without giving any reason, as the Inner Mongolia Public Security Department (PSD) did for months in 2001 in the case of Connecticut resident Liu Yaping and as the Beijing Public Security Bureau did for weeks after the recent detention of well-known lawyer Zhang Jianzhong. If the frustrated criminal lawyer becomes too assertive in ***233*** reciting the CPL provisions authorising access to his client, the police seldom hesitate to demonstrate that they are in charge, especially outside the major cities. In the Liu case, which involved a blatant use of the criminal process to settle a political struggle within the police force itself, those in charge of the Inner Mongolia PSD, tired of listening to the arguments of local counsel about the PSD's illegal detention of Liu and its illegal denial of access to him, detained the lawyer as well. She was released 28 hours later, but only after "agreeing" to sign a false statement, and was so intimidated that she not only dropped the case but also said that she would give up the practice of law for some less hazardous occupation! When the suspect's family retained a former prosecutor from Beijing to take up the case, he too was detained by the PSD and released only after agreeing to board the next flight out of the province and not return. And when one of the police officers handling the case mentioned the provisions of the CPL to the then Party Secretary of the Inner Mongolia Communist Party Political-Legal Committee, which "co-ordinates" the work

of police, prosecutors and courts, the Secretary, who was one of the two major combatants in the political struggle, said: "I am the law in Inner Mongolia."

A more subtle technique frequently used by police and prosecutors to defeat a defence lawyer's entry into a case is simply to fail to comply with the requirement of the CPL that, within 24 hours of detaining a person, the detaining authority must notify the detainee's family or employer of the detention, [FN7] the reason therefor, the identity of the detaining authority and the place of detention. [FN8] If questioned about their failure to issue the required notice, "law enforcement officials" -- an ironic name for those who so frequently violate their own nation's law -- shamelessly exploit an exception to the CPL's notification requirement by claiming that notification would "interfere with the investigation". [FN9] Yet in most cases the only reason that notification might "interfere with the investigation" is that it might lead the family or employer to retain counsel to meet the detainee in accordance with the CPL in order to explain the nature of the offence suspected, relevant procedures and the rights of the detainee.

It should be emphasised that the CPL does not require a lawyer to show the detaining authority a copy of the detention notice in order to get access to his client. Yet police and prosecutors frequently take this position, and defence lawyers themselves will often reluctantly tell a would-be client that they cannot even accept the case unless a copy of the detention notice is provided to them. This, of course, is a ludicrous situation, because it denies ***234*** the family and employer of the detainee their legally-guaranteed access to counsel at the outset of a case, a time when all they may know is that the suspect is missing and is probably in the custody of an unknown agency in an unknown place on an unknown charge. This is a crucial time when a layman urgently needs the help of a criminal lawyer who has the knowledge and contacts to enable him to find the detainee, so that the rights conferred by the CPL upon the detainee, family, employer and defence counsel can all begin to be implemented. Moreover, if the detaining authority can defeat a lawyer's legally-guaranteed entry into a case by failing to give the legally-guaranteed detention notice, it has an added incentive to violate the CPL's notification requirements.

This farce was recently acted out in the case of the Boston-based democracy activist Yang Jianli. On 26 April 2002, Yang, a PRC national and US permanent resident who has been awarded doctorates from Harvard and Berkeley, was, after repeatedly being denied entry to his homeland and even to Hong Kong, detained in China's Yunnan Province on suspicion of using someone else's passport to return to his country illegally. Although at the time of writing almost 10 months have passed, no written detention notice has yet been received by his family, which has been frantically trying to obtain one so that defence counsel can belatedly begin to assist him. This is certainly not a case in which the detaining authority can claim that issuance of a detention notice might interfere with its investigation by revealing to others the fact of Yang's detention, since the case has been widely publicised abroad from the beginning

and is well known in China as a result of being publicised over the Internet and via email, fax, telephone and travellers. Furthermore, on 10 May 2002 the PRC Foreign Ministry, after inquiries from foreign journalists and the US Government, admitted at a press conference that Yang was in custody, but it neglected to state in whose custody and where. Similarly, local police in Shandong Province subsequently confirmed the detention orally to Yang's brother, but refused to provide necessary details.

Letters from Yang's American wife to the Ministry of Foreign Affairs, the Ministry of Public Security, the Ministry of State Security and their local agencies requesting notification of Yang's detention have all gone unanswered and, when she arrived at Beijing Airport in May in an effort to call upon relevant agencies, her visa was cancelled and she was sent home on the plane that brought her. Yang's brother, who is a loyal Communist Party member, believes that the police should follow the country's law. He has courageously persisted in knocking in vain on the doors of Beijing's various law enforcement agencies as well as its criminal law firms, and in talking to any journalist who will listen, despite increasing police pressures upon him. The sad fact is that for over nine months lawyers were unwilling to take on this politically sensitive case without a detention notice. One lawyer reportedly agreed to ***235*** enter the case but changed his mind by the time Yang's brother, whose telephone is presumably tapped, reached his office.

On 12 July 2002 the Ministry of Foreign Affairs, aware of the bad publicity generated by the illegal conduct of the police, informed the American Embassy in Beijing that Yang was being detained by the Beijing Public Security Bureau and predicted that a detention notice would soon be issued. The family is still waiting. Finally, however, perhaps as a result of the bad publicity, in February 2003 a lawyer who had long resisted taking on the case without a detention notice agreed to do so.

Another frequently used technique to keep lawyers out of the detention / investigation process is for police or prosecutors to pretend that the suspect is not really detained, but merely being accommodated -- although forcibly -- at a "guest house" run by the detaining agency. Sometimes, as in a recent case, [FN10] the family is informally told who the detaining authority is (in this case the local branch of the State Security Bureau) and vaguely what the investigation is about (student sexual activities) and, to add insult to injury, the family is even required to pay RMB 100 (roughly US$12) a day for room and board. Often, if the case has not yet become a formal criminal matter, and might not become one, the family is advised against "worsening" the situation by retaining a lawyer.

American University scholar Gao Zhan and her husband, whose families thought they had been kidnapped, were secretly confined in separate "safe houses" by the State Security Bureau for three weeks before pressure from the American Embassy prompted the PRC Government to admit they were in detention. Similar techniques are even used on Party members, who can be summoned by the local Party discipline and inspection committee for investigation of matters that later become criminal. The

procedure is called shuanggui and can result in a long period of incommunicado detention. And when ordinary people are detained pending determination of whether they should receive the administrative punishment of "reeducation through labour", which can result in three or four years in a labour camp, no detention notice need be issued if the police regard the case as certain to result in this "non-criminal" punishment rather than a formal criminal sanction. [FN11]

In some cases, defence lawyers are forbidden or informally discouraged from assisting a detainee by the local bureau of the Ministry of Justice. Local justice bureaux formerly exercised control over defence lawyers' conduct in all cases. In recent years, after the 1996 promulgation of the Lawyers Law and **236* the revised CPL, they have relaxed their grip in most cases. Yet old habits die hard, and in some parts of China rules issued by local justice bureaux restrict defence lawyers to varying extents in certain types of cases. In Beijing, for example, according to rules issued in early 1999, [FN12] without the advance approval of the Leading Group established by the Municipal Justice Bureau, no defence lawyer may accept a case that involves "state security", foreigners or "critical social influences". [FN13] A special notice issued six months after the issuance of the rules, after the onset of the continuing campaign to suppress the Falun Gong, makes clear that cases against Falun Gong followers are deemed to involve "critical social influences". [FN14] This continuing control by the Beijing Judicial Bureau over the entry of lawyers into politically sensitive cases may be the reason why Beijing lawyers long refused to enter the Yang Jianli case until shown a copy of his detention notice. They may have been tacitly complying with a condition imposed by their masters.

Obstacles During the Investigation Stage

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

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

the case, personnel from the investigating agency may be present during the lawyer's interview with the criminal suspect." [FN15]

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

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

Yet there is nowhere else to go for a hearing concerning investigators' arbitrary actions, including torture. Although the prosecutors' office is supposed to serve as the "watchdog of legality" and protest the misconduct of not only the police but also investigative prosecutors, it seldom offers relief, and it frequently is difficult for lawyers even to meet with prosecutors or higher police officials in order to challenge investigators' violations. China lacks any proceeding similar to habeas corpus, so lawyers who try to persuade a court to hear a detainee's grievance are told that courts have no jurisdiction until after indictment, and the local judicial bureau will also disclaim authority. Nor will a lawyer without powerful connections find assistance at any level of the People's Congress or the Party political-legal committee that co-ordinates the government law enforcement agencies or the Party discipline and inspection committee that deals with misconduct by Party members. In rare cases, the Chinese press reveals egregious police misconduct, but lawyers attuned to a government that suppresses political freedoms seldom risk contact with journalists.

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

*238 Limited Role During the Indictment Stage

Under the revised CPL, defence counsel are supposed to assume a greater role once the government investigation concludes and the case is sent to the prosecutors' office together with a report recommending indictment. Prior to the 1996 reforms, defence lawyers were not even admitted to a case at this stage, but had to wait until it had reached the court following indictment. The revised CPL requires the prosecutors' office, within three days of reviewing the case file, to inform the suspect of his right to ask a lawyer to defend him. [FN16] In principle, the lawyer, now formally referred to as "defence lawyer", has a right to conduct his own investigation of the case and to read, excerpt and reproduce "litigation documents and technical materials" in the file, as well as to meet and correspond with the suspect in custody. [FN17] The lawyer also has a right to present his views on the evidence and applicable law to the reviewing prosecutor before the decision is made concerning indictment. [FN18]

Unfortunately, the provisions of the revised CPL that detail the newly-granted rights of the defence lawyer at this stage lend themselves to frustration of those rights. The revised CPL fails to define the scope of the "litigation documents" in the file to which the prosecutor must grant access, and it affirmatively restricts defence counsel's prospects for independently gathering evidence. The law provides that defence counsel may only collect materials concerning the case from witnesses or other persons or organisations with their consent, and may only obtain materials relating to the case that are in possession of "the victim, the victim's close relatives and witnesses proposed by the victim" with the consent of the victim and the approval of the prosecutors' office. [FN19]

Not surprisingly, these detailed provisions governing the defence lawyer's pre-indictment role have been applied in ways that severely limit the possibility of mounting an effective defence. Although some scholars hoped that the "litigation documents" that the prosecution is required to show defence counsel would include documentary evidence, physical evidence and the records of statements made by witnesses, the victim and the suspect himself during the investigation stage, as well as other evidence available to the prosecution, the term has been construed narrowly by the nation's chief prosecutor's office, the Supreme People's Procuratorate (SPP), to exclude all such material. [FN20] Prosecutors are required to grant access only to the formal ***239*** documents in the file, such as copies of the detention and arrest notices. In practice, prosecutors have been even more restrictive in withholding relevant documents. Even the investigators' summary of the case and recommendation to indict, a most important formal document, is not usually revealed, although the SPP's interpretation requires it to be. [FN21] Of course, defence counsel "may apply" to see the evidence in the file and even ask the prosecutors to help collect additional evidence for the defence, [FN22] but such requests seldom yield a positive response.

Moreover, defence counsel, lacking the power and prestige of police and prosecutors, find it very difficult to obtain the consent and co-operation of witnesses, of victims and their families and of other people and organisations. Despite the fact

that witnesses do not usually appear in person to testify in criminal trials in China, they do not even wish to be interviewed, and lawyers have no way of forcing them to co-operate. Thus the belated right of the defence lawyer to conduct an investigation often turns out to be a sham.

These restrictions plainly limit the ability of the defence lawyer to persuade the prosecution not to issue an indictment or to indict for fewer or lesser offences. There is no way the defence lawyer can know the case as well as the prosecution does, especially in view of the fact that the indictment stage is usually brief, unlike the investigation stage, and prosecutors often place little stock in the defence lawyer's views. In any event it is frequently difficult for defence lawyers even to arrange a meeting with the responsible prosecutors in order to discuss the matter. These realities help to explain the fact that, year after year, prosecutors approve over 98 per cent of investigators' requests for indictment. [FN23]

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

The fact that defence lawyers in important cases are often not independent is confirmed by the 1999 Rules of the Beijing Municipal Justice Bureau, ***240** referred to above. [FN24] This is true not only in those cases for which approval of the Bureau's Leading Group is required for entry into a case, but also in a broad variety of other major cases. The Rules grant the Leading Group the power "to listen to the requests and reports of law firms in major cases" (written reports that the firms are required to make at every stage of the case), [FN25] "to decide the principles for handling major cases and to co-ordinate the work connections between lawyers and relevant agencies". [FN26] If a written report causes the Leading Group to believe that a meeting is necessary with the lawyer handling the case, it can summon him to "report relevant circumstances", which include "the tactics adopted by the lawyer for handling the case as well as the issues that need to be discussed". [FN27] The Rules conclude by stating: "The lawyer handling the case must prepare his tactics in accordance with the decision made by the Leading Group after its discussion." [FN28] If circumstances subsequently change, the lawyer is authorised to revise his defence arguments in accordance with the new situation, but must report the details to the Leading Group. [FN29] It would be surprising if the rules of at least some other local judicial bureaux were very different in this respect.

Trials and Tribulations

The frustrations of defence counsel do not diminish following indictment. The revised CPL purported to transform the criminal trial into a meaningful experience by precluding the court, prior to the judicial hearing, from reaching its judgment on the basis of the file submitted by the prosecution. In order to implement this objective the revised CPL eliminated the previous practice whereby the prosecution submitted its entire file to the court along with the indictment. Instead, it requires only that the prosecution submit a list of the evidence and witnesses to be presented at the trial together with copies of "major evidence" and the litigation and technical documents to which defence counsel had access at the indictment stage. [FN30] This has meant that defence counsel, instead of gaining access to the whole file prior to trial, as was the practice prior to 1996, now has the benefit only of the skeletal prosecution file called for by the revised CPL, which again is narrowly construed by prosecutors in practice. Thus, in preparing for trial, defence lawyers have much less knowledge about the nature of the prosecution case and much less ***241** material to work with than under the old procedure, and this hinders their preparation greatly.

Nor does the revised trial procedure enhance the ability of defence counsel to gather evidence on their own. Indeed, it constitutes another setback. [FN31] Prior to 1996, although the former CPL was silent on this question, both the national interim regulation on lawyers and some local regulations emphasised the right of defence counsel to investigate and collect evidence and the obligations of witnesses and other relevant people and institutions to co-operate with those efforts. The revised CPL, as the provisions cited in the previous section make clear, virtually invites witnesses and others to reject the requests of defence counsel, who have no power to compel their co-operation. Although the new law provides that defence lawyers may apply for a court order to collect essential evidence on behalf of the defence, [FN32] such applications tend to be as unsuccessful as similar requests made to the prosecutors' office, and there is no way to obtain review of such rejections. Moreover, the orders of Chinese courts are ignored to a shocking extent due to the absence of both appropriate punishments for contempt of those orders and other measures required for an effective judicial enforcement system.

Denied the opportunity to learn the prosecutor's case in advance of trial and restricted in his ability to build his own case prior to trial, defence counsel, to the extent allowed by the judicial bureau, should at least be able to rely on the opportunity to challenge the prosecution's case at the trial. In China, as elsewhere, often the best way to demolish the factual allegations underlying the indictment is for defence counsel to cross-examine the prosecution's witnesses. Yet prior to 1996 witnesses were not required to appear in court. One of the most well known reforms of the revised CPL, [FN33] at least as its somewhat ambiguous language was clarified by Supreme Court interpretation, [FN34] is the requirement that, generally, witnesses must testify

in court rather than have their pre-trial statements read out during the trial, and that the opposing lawyers, as well as the judges, must have the right to cross-examine the witnesses. In view of the previous practice, this was a change of potentially historic proportions.

The problem is that this requirement has remained a dead letter. Except in a tiny percentage of cases, witnesses still do not appear in Chinese criminal courts. No one disputes that. The only debate is over whether, nationwide, as few as 1 per cent or as many as 10 per cent of trials might be graced by the presence of even a single witness. So much for the right of cross-examination. *242 Defence counsel inevitably confront difficulty in challenging the records of statements made outside their presence to police and prosecutors, although, as with physical and documentary materials, they seek to demonstrate discrepancies and other reasons to bring doubt to the evidence.

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

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

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

Similar questions relating to "state secrets" arose, but were not adequately addressed, in the 2001 prosecutions of scholars Li Shaomin and Gao Zhan on charges

of spying for Taiwan: what was the basis for classifying the internal essays and analyses involved as "state secrets", and did the accused have the knowledge and intent required for conviction?

Political trials, of course, subject defence lawyers to their gravest challenges, particularly trials such as those that followed the Tiananmen Square tragedy of 4 June 1989 or that have dealt with efforts to organise ***243*** independent political or Falun Gong activities. The lawyer for Muslim activist Rebiya Kadeer was reportedly not even allowed to speak at her 1999 trial. [FN35] Judges in such trials generally keep defendants and their lawyers on a very short tether, as demonstrated by the 1998 prosecution of famed democracy advocate Xu Wenli for helping to establish the China Democratic Party. Judges frequently interrupt and even shout down efforts to refute the underlying basis for allegations such as "endangering state security" by acting with "intent to subvert state power", for which Xu received a 13-year prison sentence. The Xu trial, like that of Li Shaomin, Gao Zhan and many others, was concluded in half a day.

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

Less can be done after a conviction has become legally effective. Defence lawyers face difficulty arranging meetings with their clients after the time for appeal has expired or the appellate court has confirmed the judgment. Yet one advantage of China's notoriously flexible criminal procedure is that, in cases of gross injustice or where important evidence is newly discovered, the defence lawyer may be able to find a post-conviction remedy by resorting to "adjudication supervision". [FN36]

It is possible that the Criminal Evidence Law that is currently being drafted by respected Chinese specialists inside and outside PRC Government circles will improve the plight of defence lawyers in many respects, not only at the trial stage but also from the very beginning of the criminal process. Contrary to its title, the new legislation, which might be adopted within a few years, will probably not be strictly limited to matters of evidence but will touch upon many aspects of criminal procedure. Since the

revised CPL is unlikely **244* to be revised again in the near future, the Criminal Evidence Law will be of profound importance to the administration of criminal justice in China. If it closely resembles the comprehensive and impressive Expert Draft being prepared by a group of China's leading academic specialists, and if the new law should actually be implemented, the work of China's defence lawyers will become somewhat less depressing.

The Sword of Damocles

A new Evidence Law will do nothing to reduce the professional and personal risks that China's defence lawyers confront every day. Instances of police intimidation of lawyers who seek legally guaranteed access to detained suspects and the more covert controls exercised by local judicial bureaux have been discussed above. Failure to follow the instructions of a judicial bureau, which regulates the local practice of law, can lead to loss of benefits and to administrative sanctions that include suspension of the lawyer's professional licence and even the closure of his law firm. Thus, not only the livelihood of the defence lawyer is at stake, but also that of his colleagues, which is undoubtedly why some judicial bureaux require a would-be defender to discuss whether and how to deal with a criminal representation with the other lawyers in his firm before deciding on a course of action. [FN37]

Defence lawyers whose efforts offend police, prosecutors or other power-holders also run the risk that, in retaliation, criminal prosecution may be initiated against them. Tax evasion has proved a readily available pretext for prosecution in a country where tax law and administration are in need of serious reform, non-compliance is rife and prosecution is selective. Corruption is another favourite. Lawyers who work for state-owned law firms have been convicted of embezzlement of public funds, and in a culture where, despite legislative prohibitions, lawyers are still expected to wine and dine judges, and where bribery is a huge problem, lawyers are easy targets for selective prosecution. They have also sometimes been convicted of criminal defamation for revealing official misconduct. A lawyer in Hunan Province was recently sentenced to one year in prison for leaking "state secrets". Her only offence was to allow the family of her client to see the court file in the case she was defending. [FN38]

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

The 3 May 2002 detention and subsequent arrest and trial of Zhang Jianzhong, managing partner of one of China's leading law firms and head of the Beijing Lawyers Association's committee for protecting lawyers, has had a chilling effect on the criminal defence bar. Mr Zhang, in addition to maintaining a flourishing business practice, has represented some high-profile defendants in major corruption cases. It is feared that his prosecution and long, virtually incommunicado confinement for alleged violation of Article 306 as well as Article 307 -- for allegedly providing a false statement in a commercial transaction, an offence that in China would not normally warrant such severe treatment -- may be another instance of selective prosecution in retaliation for offending a prominent political figure through vigorous criminal defence work. No sentence has yet been announced for Mr Zhang, who vigorously protested his innocence at trial.

Conclusion

In these circumstances, it is little wonder that China's lawyers are reluctant to take on criminal cases. Nationwide, defence lawyers probably appear in only one-third of the cases brought to trial and, even in cities where economic and educational standards are relatively high, many defendants go without counsel. In one Eastern city, for example, recent representation rates at basic level trials ranged from less than 18 per cent in one court to roughly 90 per cent in another, with the representation rate in most courts below 50 per cent. [FN39]

The plight of China's criminal defence lawyers is appalling, and the country's entire criminal process is in need of radical reform. The people of China deserve far better. Moreover, now that the PRC is a member of the World Trade Organisation, is preparing to host the 2008 Olympics and welcomes millions of foreigners to its shores every year for tourism, business, ***246** educational, cultural exchange and many other purposes, it is time for a new generation of Chinese leaders to make a genuine "great leap forward" in the direction of meeting international minimum standards for the administration of criminal justice. The legitimacy of the Chinese Government at home and abroad is at stake. Significant improvements in China's justice system will yield corresponding improvements in its international relations and reputation for safeguarding human rights and the rights of all foreigners who enter the country. The current Lai Changxing case, in which the PRC has been struggling for over two years to secure the return from Canada for trial in China of allegedly the greatest smuggler in China's history, vividly illustrates the extent to which Chinese justice itself can be put on trial abroad in an increasingly interdependent world. [FN40]

It is not within the scope of this article to discuss the radical, long-run political-legal restructuring that would be necessary in order to bring the PRC's criminal process into compliance with minimum international standards, or even all the changes required in legislation and practice to ease significantly the plight of its

defence lawyers. Many of the measures that ought to be adopted are implicit in earlier parts of this article and in any event are, of course, for China to decide. [FN41]

To conclude, there are several steps that can be taken now by others, including those of us in the United States, Hong Kong and elsewhere, in and out of government, who wish to be useful in this area:

1 We should promote opportunities to co-operate with PRC defence lawyers through professional and academic conferences, workshops, study groups and training programmes. Although China's criminal lawyers are not generally fluent in English or other foreign languages, as PRC business lawyers increasingly are, many have an intense interest in comparative criminal law and procedure and the situation of their counterparts in other countries. Many subjects can fruitfully be discussed. For example, might some form of plea bargaining be useful to China, thereby freeing court resources to provide better trials for the *247 minority of genuinely contested cases? Would the process of sorting out contested cases from others be facilitated by establishing fair procedures for pre-trial discovery of evidence? Would some type of habeas corpus proceeding or criminal ombudsman be suitable for China?

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

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

3 This scholarly research and co-operation among defence lawyers that it is designed to support will require significantly increased funding from public international organisations, foreign governments, the Chinese Government and charitable foundations.

We should seize the moment, as Chairman Mao once said, but for a purpose that he could not have foreseen.

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of the author's submission to the United States Congressional Executive Commission on China in Washington, DC on 26 July 2002.

[FN1]. The Interim Regulations of the People's Republic of China on Lawyers, Art 1 (1980) (passed by the Standing Committee of the National People's Congress (NPCSC) on 26 Aug 1980).

[FN2]. The Lawyers Law of the People's Republic of China was enacted by the NPCSC on 15 May 1996.

[FN3]. The Criminal Procedure Law of the People's Republic of China was promulgated on 1 July 1979 and revised on 17 Mar 1996.

[FN4]. CPL, Art 96.

[FN5]. Supreme People's Court, Supreme People's Procuratorate, Ministry of Public Security, Ministry of State Security, Ministry of Justice and the National People's Congress Standing Committee Legal Affairs Working Committee: Provisions Concerning Several Issues in the Implementation of the Criminal Procedure Law, issued on 19 Jan 1998, Art 10.

[FN6]. CPL, Art 96.

[FN7]. CPL, Art 64.

[FN8]. Ibid.

[FN9]. Ibid.

[FN10]. The author is not at liberty to identify this case.

[FN11]. According to the Implementation Regulations of the Ministry of Public Security Concerning Reeducation through Labour, issued on 21 Jan 1982, although the decision to impose the sanction of "reeducation through labor" on someone should be announced to his family, there is no requirement to notify the family of his initial detention. See Implementation Regulations, Art 12.

[FN12]. The Rules of Beijing Municipal Justice Department on Reporting Major Legal Matters by Beijing Law Offices, JING SI FA No 7 (1999).

[FN13]. Ibid., Art 4(a).