

THE LI ZHUANG CASE: EXAMINING THE CHALLENGES FACING CRIMINAL DEFENSE LAWYERS IN CHINA

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Abstract

This article examines the deeper roots of the plight of Chinese criminal defense lawyers in the pre-trial stage by arguing that, although the Chinese government intends to promote the lawyer's role through advocacy of the rule of law, the authorities' implementation of law is compromised by a variety of factors. Although some academics are inclined to blame the indeterminacy of the law, the recent high-profile Li Zhuang case reveals that Chinese lawyers' difficulties in carrying out their duties arise from extralegal factors. This article focuses in particular on certain political, ideological, and institutional frameworks that play critical roles in the deterioration of criminal defense lawyers' working environment. It concludes that, although some legal reforms are called for to improve lawyers' pre-trial stature by adopting some complementary legal mechanisms in an effort to limit the authorities' paramount powers, given the Chinese state's unique political and legal culture, prospects for effective legal defense in China are rather unpromising.

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INTRODUCTION

For many Chinese criminal lawyers, legal practice is not only difficult but also dangerous. One of three theoretically related but practically insulated stages of Chinese criminal proceedings, the pre-trial phase exerts the most chilling influence on the criminal defense work of lawyers in China. The challenges they routinely face include various forms of obstruction, harassment, intimidation, and even physical abuse, often inflicted by personnel in the public security agency and the procuratorate.¹ In brief, the “Three Difficulties” and the “Big Stick 306” comprise the major problems faced in defense practice.² Although the role of the criminal lawyer was significantly expanded in the revised 1996 Criminal Procedure Law (“CPL 1996”)³ and was reinforced in the 2007 Lawyers’ Law (律师法),⁴ the functionality of criminal defense practice remains more on paper than in practice. The recent high

¹ See 陈瑞华 [CHEN RUIHUA], 问题与主义之间 [BETWEEN PROBLEMS AND PRINCIPLES] 402 (人民出版社 [China Renmin University Press] (2008)); HUMAN RIGHTS WATCH, “WALKING ON THIN ICE”: CONTROL, INTIMIDATION AND HARASSMENT OF LAWYERS IN CHINA 4 (2008), available at <http://www.hrw.org/reports/2008/chinao408/chinao408web.pdf>; 陈兴良 [Chen Xingliang], 为辩护权辩护—刑事法视野中的辩护权 [Defending the Defense Right: Defense Right from the Perspective of Criminal Law], 法学 [LEGAL SCI.], no. 1, 2004, at 15-17; Mike P. H. Chu, *Criminal Procedure Reform in the People's Republic of China: The Dilemma of Crime Control and Regime Legitimacy*, 18 UCLA PAC. BASIN L.J. 157 (2000); Ethan Michelson, *Lawyers, Political Embeddedness, and Institutional Continuity in China's Transition from Socialism*, 113 AM. J. SOC. SCI. 352 (2007); Dean G. Rojek, *The Criminal Process in the People's Republic of China*, 2 JUST. Q. 117, 121 (1985).

² The “Three Difficulties” refer to the practical difficulties of lawyers (1) in meeting criminal suspects, (2) in obtaining access to case files, and (3) in collecting evidence to defend criminal defendants. The “Big Stick 306” is the term used by Halliday and Liu in their article to describe the threat of Article 306 of the Criminal Law to criminal lawyers. Article 306 provides that lawyers are subject to criminal penalties if they persuade witnesses either to change their testimony or to commit perjury. These situations are discussed in detail below. 中华人民共和国刑法 [Criminal Law of the People's Republic of China] (promulgated by the Nat'l People's Cong., Mar. 14, 1997, effective Oct. 1, 1997), art. 1, available at <http://www.lawinfochina.com/display.aspx?lib=law&id=354>; see Terence C Halliday & Liu Sida, *Birth of a Liberal Moment? Looking Through a One-Way Mirror at Lawyers' Defence of Criminal Defendants in China*, in FIGHTING FOR POLITICAL FREEDOM: COMPARATIVE STUDIES OF THE LEGAL COMPLEX AND POLITICAL LIBERALISM 72, 87 (Terence C Halliday, Lucien Karpik & Malcolm M Feeley eds., 2007).

³ 中华人民共和国刑事诉讼法 [Criminal Procedure Law of the People's Republic of China] (promulgated by the Nat'l People's Cong., Mar. 17, 1996, effective Jan. 1, 1997), available at <http://www.lawinfochina.com/display.aspx?id=347&lib=law> [hereinafter CPL 1996].

⁴ 中华人民共和国律师法 [Law of the People's Republic of China on Lawyers] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 28, 2007, effective June 1, 2008), available at <http://www.lawinfochina.com/display.aspx?id=6463&lib=law> [hereinafter 2007 Lawyers' Law].

profile, hotly-debated case of Li Zhuang (李庄) illustrates this phenomenon.⁵ Li, a criminal defense lawyer, was sentenced to one-and-a-half years in prison under charges of perjury and obstruction of justice for allegedly instructing his witness to lie. Li was prosecuted and tried in the context of the official "Strike Black Society" (打黑) (*Da hei*) campaign launched in the southwestern city of Chongqing. The entire criminal process from the time Li was formally arrested until he was convicted and sentenced took only eighteen days.

Since the promulgation of the CPL 1996, the obstacles facing Chinese lawyers carrying out defense work have increased. Although the Chinese government intended to improve legal practice through an amendment to the old Criminal Procedure Law, the way in which many common law ideologies and legal principles were incorporated in the revised law contradicts historical Chinese legal culture and has resulted in the recalcitrance of old customs.⁶ To ameliorate this effect, compromises were built into the final version of the CPL 1996.⁷ As a result, contradictory concepts and ideologies are embodied in the same law in an attempt to balance the conflicting interests of actors in the criminal justice system.⁸ In order to ensure effective criminal defense, the authorities in multiple agencies have issued a flurry of complementary regulations and notices. Nearly all of them, however, have failed to improve

⁵ Wang Huazhong, *Lawyer Jailed for Falsification*, CHINA DAILY, Feb. 10, 2010, http://www.chinadaily.com.cn/usa/2010-02/10/content_11015852.htm. The legal profession in the People's Republic of China has undergone circles of regression and development with the construction of a socialist legal system. For detailed discussions, see LEUNG SHAN-CHUAN & CHIU HUNGDAH, *CRIMINAL JUSTICE IN POST-MAO CHINA: ANALYSIS AND DOCUMENTS* 72-76 (1985); RANDALL PEERENBOOM, *CHINA'S LONG MARCH TOWARD RULE OF LAW* 343-93 (2002); Timothy A. Gelatt, *Lawyers in China: The Past and Beyond*, 23 N.Y.U. J. INT'L L. & POL. 751, 751-99 (1991).

⁶ The major amendments to the old Criminal Procedure Law encompass the introduction of adversarial system in the court session, the recognition of presumption of innocence, the abolition of "Shelter for Examination" (收容审查), elimination of exemption from persecution and the widening of lawyer's role. For detailed accounts, see Jianfu Chen, *A Criminal Justice System for a New Millennium?*, in *CHINA'S LEGAL REFORMS AND THEIR POLITICAL LIMITS* 77 (Eduard B. Vermeer & Ingrid d'Hooghe eds., 2002); JONATHAN HECHT, *OPENING TO REFORM? AN ANALYSIS OF CHINA'S REVISED CRIMINAL PROCEDURE LAW* 77-87 (1996); STANLEY B. LUBMAN, *BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO* 160-71 (2002); Chu, *supra* note 1; Fu H. L., *Criminal Defense in China: The Possible Impact of the 1996 Criminal Procedural Law Reform*, 153 CHINA Q. 31 (1998); Daniel C. Turack, *The New Chinese Criminal Justice System*, 7 CARDOZO J. INT'L & COMP. L. 49 (1999).

⁷ Sida Liu & Terence C. Halliday, *Recursivity in Legal Change: Lawyers and Reforms of China's Criminal Procedure Law*, 34 L. & SOC. INQUIRY 911, 929 (2009).

⁸ Liu and Halliday identify four interrelated ideological contradictions inherent in the CPL 1996: (1) striking crimes versus protecting human rights; (2) substantive law versus procedural law; (3) efficiency versus justice; and (4) rights of the victim versus rights of the defendant. See Liu & Halliday, *supra* note 5, at 929.

the lawyer's status; instead, they have generated new conflicts and ambiguities for defense lawyers.⁹

Therefore, further legal reforms are vital in order to resolve the plight of defense lawyers. Unlike legal academics and theorists, who tend to advance the lawyer's functions from a macro perspective by reforming flawed processes and institutions,¹⁰ most legal practitioners, particularly criminal lawyers, are more pragmatic. They are looking for substantial mechanisms to improve the effectiveness of their defense work in protecting the legal rights of suspects.¹¹ For example, these practitioners claim that a mature adversary-based criminal procedure is badly needed to ensure that the exercise of lawyers' power is practical in the pre-trial stage, as a well-established adversarial system requires an equal balance of power between the state and the defense lawyer. If such a system were instituted, lawyers would likely be able to challenge the paramount discretion enjoyed by the authorities in the administration of criminal justice. More importantly, an increased role for lawyers in the criminal justice system would prevent suspects from being mistreated by the authorities, which is consistent not only with the ongoing construction of a rule-of-law state in China, but also with internationally accepted criminal justice standards.¹²

Not surprisingly, the Chinese government prefers more prudent steps in reforming criminal procedure. Compared with massive institutional overhauls, the unilateral reforms to enhance the lawyer's role entail both fewer modifications to the current legislation and smaller changes in the institutional framework. This philosophy, on one hand, has led to an indefinite delay of any revision to the CPL 1996. On the other hand, it has expedited the

⁹ Yi Sheng, *A Promise Unfulfilled: The Impact of China's 1996 Criminal-Procedure Reform on China's Criminal Defense Lawyers' Role at the Pre-trial Stage (Part 2)*, 5 PERSP. 8 (2002).

¹⁰ See, e.g., 中国刑事司法改革探索--以联合国刑事司法准则为参照 [THE EXPLORATION OF CHINESE CRIMINAL JUSTICE REFORM—BASED ON UNITED NATION'S CRIMINAL JUSTICE STANDARDS] 1-26 (卞建林 [Bian Jianlin] et al. eds., 中国人民公安大学出版社 [Chinese People's Public Security University Press]) (2007); 陈瑞华 [CHEN RUIHUA], 刑事诉讼的中国模式 [THE CHINESE PATTERN OF CRIMINAL PROCEDURE LAW] 295-329 (法律出版社 [Law Press] 2008); 陈光中、张建伟 [Chen Guangzhong & Zhang Jianwei], 联合国《公民权利和政治权利国际公约》与我国刑事诉讼 ["International Convention On Civil and Political Rights" and the Criminal Procedure in China], 中国法学 [CHINA LEGAL SCI.], no. 6, 1998, at 98.

¹¹ See, e.g., 《中华人民共和国刑事诉讼法》再修改律师建议稿与论证 [THE PROPOSALS AND ARGUMENTS OF THE RE-AMENDMENT OF THE CPL FROM THE PERSPECTIVE OF LAWYERS] 2-31 (田文昌、陈瑞华 [Tian Wenchang & Chen Ruihua] eds., 法律出版社 [Law Press]) (2007); 陈少林 [Chen Shaolin], 刑事律师的在场权 [The Right of Criminal Lawyer to be Present at Interrogation], 法学评论 [L. REV.], no. 5, 2000, at 67-72; 李本森 [Li Bensen], 论我国律师的调查取证权立法完善 [The Study of Perfecting Chinese Lawyers' Right of Investigating and Collecting Evidence], 中国司法 [JUST. CHINA], no. 2, 2004, 38-40.

¹² Melissa S. Hung, *Obstacles to Self-Actualization in Chinese Legal Practice*, 48 SANTA CLARA L. REV. 213, 239 (2008); Li, *supra* note 9, at 40; Tian & Chen, *supra* note 9, at 3-10.

enactment of the new Lawyers' Law. Apart from laying down the general principles regulating lawyers' practices, the new Lawyers' Law is specifically aimed at removing practical barriers to legal defense work by enhancing the existing rights of lawyers and granting more work-related privileges and autonomy to lawyers. Like the CPL 1996, the new Lawyers' Law was well-received by the legal community upon its enactment.¹³ Nevertheless, legal professionals soon realized that the specified procedural safeguards of defense lawyers in this law are merely symbolic. Moreover, given the ideological conflicts with the CPL 1996, these safeguards are unlikely to be fully implemented.¹⁴ Much evidence shows that because the CPL 1996 provides the police and procuratorate with dominant power throughout the criminal process,¹⁵ these groups continue to operate in accordance with this law. In the meantime, however, Chinese lawyers support the liberal defense rights granted to them under the new Lawyers' Law. They assert that the realization of a liberal defense mechanism and the new emphasis on procedure not only protect suspects' legal rights, but also ensure lawyers' personal safety in defense practice.¹⁶

Legal uncertainty is not the only cause of the predicament of China's criminal defense system. There are various cultural and ideological issues that are equally important components to this problem. The following section first explores the difficulties and dangers in pre-trial defense practices by examining the famous Li Zhuang case, and then explores the actual factors that contribute to the dilemma of criminal defense in China. In addition to legal deficiencies, philosophical and cultural factors that comprise the deeper roots of the problem will also be discussed. Although it would seem beneficial to equalize lawyers' roles with the roles of authorities by adopting a complementary legal scheme, the deeply-rooted institutions of Chinese legal culture would most likely diminish any willingness of the authorities to expand the role of lawyers during the pre-trial stage.

¹³ 董彦琳 [Dong Yanglin], 《新律师法》的亮点与实施制约解析 [The Highlights of the New Lawyers' Law and Its Limits on Implementation], 新西部 [NEW W.], no. 10, 2008, at 77; 田文昌 [Tian Wenchang], 新律师法与刑事诉讼法的冲突, 互动和衔接 [The Conflicts, Interactions and Connections between the New Lawyers' Law and the CPL 1996], 法学 [LEGAL SCI.], no. 7, 2008, at 34-35.

¹⁴ See, e.g., 黎卫华 [Li Weihua], 新《律师法》实施的几道“坎” [Few Obstacles to Implementing the New Lawyers' Law], 民主与法制 [DEMOCRACY & L.], no. 11, 2008, at 17; 汪海燕 [Wang Haiyan], 一部被折扣的法律 - 新律师法与刑事诉讼法的冲突 [A Bad Law—Analysing the Conflicts Between the New Lawyers' Law and the CPL 1996], 政法论坛 [TRIB. POL. SCI. & L.], no. 2, 2009, at 92-93.

¹⁵ 樊崇义、冯举 [Fan Chongyi & Feng Ju], 新律师法的实施及其与刑事诉讼法的衔接 [The Implementation of the New Lawyers' Law and Its Connection to the CPL 1996], 中国司法 [JUST. CHINA], no. 5, 2008, at 19.

¹⁶ 彭海清 [Peng Haiqing], 辩护律师权利的发展与遗憾 - 基于新律师法的思考 [The Developments and Regrets of Defense Lawyers' Rights—The Thinking Based on the New Lawyers' Law], 政法学刊 [J. POL. SCI. & L.], no. 1, 2008, at 33.

I. THE LI ZHUANG CASE

Li Zhuang was a successful lawyer who specialized in the defense of violent criminal cases. In 2009 he was rated by the *Fayi* website as the second best lawyer among "The Best Hundred Lawyers in China."¹⁷ As one of the most outspoken criminal lawyers in Beijing, Li frequently used tough arguments in his defense strategy. For example, on April 3, 2007, Li aggressively defended his clients' innocence by stating that the procuratorial evidence presented to the court had been falsified and coerced. He was then taken into custody by the local police and detained for five hours. Upon his release, Li brought an action against the local public security agency for illegal detention.¹⁸

Due to his success in defending criminal cases, Li was hired by Gong Mogang, an alleged gang boss. Gong was implicated in a large-scale crackdown on organized crime in the southwest city of Chongqing. Since June 2009, the Chongqing government had waged war against organized crime and gang activities.¹⁹ During this massive crackdown, local authorities arrested 1,176 people and prosecuted 782 who were involved in seventy-eight criminal gangs. Eighty-seven officials were prosecuted after this campaign, including twelve high-ranking officials.²⁰ As one of the gang leaders, Gong was charged with nine counts: running a gang, murder, dealing in and transportation of guns and ammunition, drug trafficking, operation of illegal businesses, bribery, illegal possession of guns and ammunition, operation of a casino, and tolerating drug use. Having taken on the case, Li flew to Chongqing from Beijing to meet his client. Li visited Gong three times in the detention center of Jiangbei District on November 24 and 26 and December 4, 2009. After three brief meetings, Li was suddenly detained on December 12, 2009. He was later arrested for perjury and obstruction of justice for instructing his client to lie, in violation of Article 306 of the Chinese Criminal Law.

Seven days after the arrest, the procuratorate brought charges against him, and the trial was held immediately afterwards on December 30, 2009. During the trial, Li was accused of covertly telling his client, by blinking, that he should recant his confession and say that he confessed his crimes only after being tortured. Li was monitored by the police during this exchange. In addition, Li was accused of offering to pay police officers to give false

¹⁷ 李庄的背景与北京律师 [Li Zhuang's Background and Beijing Lawyer], 南方网 [NANFANG NET], Feb. 2, 2010, <http://news.mylegist.com/1605/2010-02-02/20480.html>.

¹⁸ 重庆黑帮大审判之律师造假案 [Lawyer's Fabrication Case in Chongqing's Gangster Trail], 环球网 [HUANQIU NET], <http://www.huanqiu.com/zhuanti/china/lvshizjia/>.

¹⁹ It is reported that the brazen killing of Li Minghang, a forty-four-year-old man whom authorities say had a history of drug-dealing and loan-sharking, spurred the launch of the citywide crackdown on organized crime in Chongqing. See 天钥 [Tiao Yao], 重庆打黑风暴 [The Crackdown on Black Society in Chongqing], 检察风云 [PROCURATORIAL VIEW], no. 21, 2009, at 6-7.

²⁰ Xinhua, 34 Sentenced in Chongqing Mob Trial; Two Get Death, CHINA DAILY, Feb. 10, 2010, http://www.chinadaily.com.cn/china/2010-02/10/content_9459291.htm.

testimony and coaching his client's associates to testify that Gong was not the head of the mafia group but had been forced to act by other gangsters.²¹ Although Li pled innocent, he was convicted and later sentenced to thirty months in prison. Li's defense attorneys argued that Li's trial was too hasty and, although their statements were read into evidence, witnesses testifying against him did not appear in court for cross-examination. Li decided to appeal to the Chongqing No. 1 Intermediate People's Court.

On February 9, 2010, the Chongqing No. 1 Intermediate People's Court upheld the previous conviction, but after "considering Li's (cooperative) attitude in pleading guilty during the second trial," the court shortened the sentence from two-and-a-half years to eighteen months.²² It was reported that "Li made a dramatic U-turn in two trials from being defensive to cooperative."²³ Surprisingly, he admitted that the evidence against him was "clear and sufficient," acknowledging that his acts "stained the role of lawyers" and that he "lacked the ethics an outstanding lawyer should have."²⁴ This confession astonished even Li's defense lawyers, who attributed this unexpected expression of guilt to a plea bargain between Li and senior officials.²⁵ This speculation was soon substantiated by Li's outrageous statements in the wake of his conviction. Upon hearing the eighteen-month sentence, Li vociferously denied the earlier guilty plea and furiously denounced the dishonesty of the government in luring him into making a confession. Li's lawyers were convinced that "there had been plea bargain deals between Li and the procuratorate and the final sentence without reprieve surely failed Li's expectations."²⁶

Chinese media have covered the Li case extensively. Not surprisingly, most mainstream reports portrayed Li as an unethical legal practitioner who was hired to prevent a gang boss from being criminally sanctioned.²⁷ These reports

²¹ Wang Huazhong, *Lawyer for Gang Boss Suspect Gets Prison Sentence*, CHINA DAILY, Jan. 9, 2010, http://www.chinadaily.com.cn/china/2010-01/09/content_9291841.htm.

²² 李庄伪造证据妨害作证案二审宣判 维持原定罪量刑少1年 [Li Zhuang Gets One Year Less Sentence in Second Trial], 法制日报 [LEGAL DAILY], Feb. 10, 2010.

²³ Wang, *supra* note 5.

²⁴ 张晓辉、方迎定 [Zhang Xiaohui & Fang Yingding], 李庄案罗生门 [The Complexity of the Li Zhuang Case], 经济观察报 [ECON. OBSERVATION], Jan. 4, 2010.

²⁵ 孙莹 [Sun Ying], 李庄突然认罪动机难测 [Unexplainable Motive of Pleading Guilty by Li Zhuang], 北京晚报 [BEIJING EVENING NEWS], Feb. 3, 2010.

²⁶ Wang, *supra* note 3; 余春红 [Yu Chunhong], 李庄二审被改变徒刑一年半 [Li Zhuang Received a Reduced One-and-a-Half-Year Prison Term in Second Trial], 浙江法制报 [ZHEJIANG LEGAL DAILY], Feb. 10, 2010.

²⁷ For example, the *China Youth Daily* (中国青年报) published a series of reports concerning Li's "falsification of evidence" in his legal representation. On December 14, 2009, a newspaper article titled "Falsification Gate in the Chongqing's Crackdown on Organized Crime—The Arrest of Lawyer Li Zhuang, Ma Xiaojun" was published two weeks before the formal trial. See 郑琳、庄庆鸿 [Zheng Lin & Zhuang Qinghong], 重庆打黑惊爆律师造假门—律师李庄, 马晓军重庆捞人被抓记 [Falsification Gate in

take the view that Li's immoral and deceitful behavior violated professional ethics and badly tarnished the image of the Chinese legal profession. More importantly, his acts undermined the resolution of the Chongqing government to strike hard against the "Black Society" (黑社会) (*hei shehui*) and the state's attempt to build up a socialist rule of law system in China.²⁸

The legal community, however, finds this official argument problematic. Many legal scholars have questioned the conviction from the perspectives of substantive and procedural justice. Professor Long Zongzhi of the Southwest University of Political Science and Law, for example, argues that the current evidence provided by the procuratorate does not prove Li's attempt to forge evidence.²⁹ Professor Hei Weifan of Peking University agrees, and further points out that the absence of witnesses during the trial placed Li in a disadvantageous position. Li's defenders were unable to cross-examine witnesses, and this prevented them from seeking the truth.³⁰ Similarly, Professor Ruan Qiling of China University of Political Science and Law claims that it is still an open question as to whether Li's client, Gong Mogang, was qualified to be one of the witnesses testifying against Li.³¹

In the meantime, more doubts have been raised about the procedure itself. Professor Zhang Qianfan of Peking University has indicated a skeptical attitude toward the procedural justice of the Li case. He has asserted that although the speedy handling of Li's case was not in conflict with legal stipulations set out in the CPL 1996, the significantly shortened investigatory and procuratorial phases were less likely to guarantee the collection of legally sufficient incriminating evidence, thereby undermining the verdict.³² Given the lengthy criminal process typically seen in contemporary China, a two-week period of criminal proceedings is exceptional, if not unprecedented. Thus, the prevailing view among legal academics is that Li's conviction was in reality

Chongqing's Crackdown on Organized Crime—The Arrest of Lawyer Li Zhuang, Ma Xiaojun, 中国青年报 [CHINA YOUTH DAILY], Dec. 14 2009, http://zqb.cyol.com/content/2009-12/14/content_2980416.htm.

²⁸ 李克杰 [Li Kejie], 李庄当庭认罪尴尬了谁 [Who Is Embarrassed by Li Zhuang's Confession?], 检察日报 [PROCURATORIAL DAILY], Feb. 3 2010.

²⁹ 龙宗智 [Long Zongzhi], 李庄案法理研判—主要从证据学的角度 [Legal Theory of the Li Zhuang Case—From the Perspective of Evidentiary Study], 法学 [LEGAL SCI.], no. 2, 2010, 3–13.

³⁰ 何帅彤 [He Shuaitong], 戏说李庄案教授们的交锋 [The Confrontations Between Legal Professors in the Li Zhuang Case], 东方法眼 [FAR EAST LEGAL EYE], Jan. 2, 2010, <http://www.dffy.com/fayanguancha/sd/201001/20100102194347.htm>.

³¹ *Id.*

³² 范忠信 [Fan Zhongxin], 李庄案的法理和伦理反省 (3) [The Rethinking of Legal and Ethical Grounds of the Li Zhuang Case (3)], 中国刑事法治网 [CHINESE CRIM. L. WEB], Jan. 8, 2010, <http://www.criminallaw.org.cn/dushu/html/?348.html>.

driven more by political factors than by legal considerations.³³ This perception appears to be particularly true because socialist ideologies stressing the importance of the Party and the government to Chinese rule of law were mentioned repeatedly in Li's prepared confessional statements.³⁴

Aside from the theoretical debate on Li's verdict, Chinese legal practitioners are more concerned about the longstanding "Sword of Damocles," namely the "Big Stick Article 306" hanging over the heads of lawyers when they perform their legal duties.³⁵ As the Li case has continued to incite fierce controversy, criminal defense lawyers have voiced their concerns about the abusive use of this article as a means of procuratorial retaliation against them.³⁶ Though there were reports of a number of lawyers being charged under Article 306, before the Li case, very few lawyers were actually sentenced to prison time.³⁷ However, this time, Chinese lawyers sensed the difference. They conceded that the conviction of Li was indicative of the alarming deterioration of the environment for lawyers in criminal adjudication.³⁸ Specifically, the outcome of Li's case will not only aggravate

³³ See 赵蕾 [Zhao Lei], 李庄案：法庭内外的较量 [The Li Zhuang Case: Battle Between Inside and Outside of Court], 南方周末 [S. CHINA WKLY.], Jan. 6, 2010.

³⁴ The political influences on defense lawyers are discussed in detail below.

³⁵ Yu Ping, *Glittery Promise vs. Dismal Reality: The Role of a Criminal Lawyer in the People's Republic of China after the 1996 Revision of the Criminal Procedure Law*, 35 VAND. J. TRANSNAT'L L. 827, 857 (2002).

³⁶ For example, a *TIME* article quotes Albert Ho, a Hong Kong legislator and chairman of the China Human Rights Lawyers Concern Group: "We are interested in this case not because of Mr. Li. . . . He is not known as a human-rights lawyer and he is not active in human rights. We are interested in this case because he is apparently being victimized by Article 306 of the criminal code." Austin Ramzy, *China's Dark City: Behind Chongqing's Crime Crackdown*, *TIME*, Mar. 15, 2010, <http://www.time.com/time/magazine/article/0,9171,1969642-2,00.html>. The article also quotes Tang Jitian, a Beijing lawyer, who asserts that the prosecution of Li is a political vendetta because he, unlike most of the other defense lawyers, fought hard for his client: "To the people who are accusing Li Zhuang—the police, the procuratorate, the court and the local government—his flaw is that he opposes them." *Id.*

³⁷ CHEN RUIHUA, *supra* note 1, at 402; HUMAN RIGHTS WATCH, *supra* note 1, at 58.

³⁸ There have been numerous online comments on the legal consequences and possible influences resulting from the Li Zhuang case in the aftermath of conviction. For example, a well-known Beijing lawyer, Yang Jingzhu (杨金柱), raised five questions in his blog as to how this case would affect the construction of in the Chinese criminal law framework and the likely destiny of Chinese criminal defense lawyers. Three questions are related to defense lawyers' future practices prior to trial: (1) Does the Li Zhuang case indicate a considerable setback to criminal defense?; (2) How can Chinese criminal defense lawyers better protect themselves?; (3) How can the occurrence of similar cases be prevented? See 杨金柱 [Yang Jinzhu], 杨金柱律师就李庄案建议国内律师同仁思考五个问题 [Five Problems to be Considered by Chinese Lawyers Regarding Li Zhuang Case Suggested by Yang Jinzhu], SINA, Mar. 31, 2010, http://blog.sina.com.cn/s/blog_4e00bcd90100hvy5h.html.

difficulties in representation of criminals at the pre-trial stage but also worsen the existing imbalance of power between defense lawyers and law enforcement agencies. Clearly, although the Criminal Procedure Law was amended in 1996 in an attempt to enhance the lawyer's role while giving the accused more procedural protections,³⁹ Chinese criminal defense lawyers have encountered more obstacles and difficulties in providing effective legal representation at the pretrial stage. The threat posed by Article 306 is merely the tip of the iceberg.

II. THE LIMITS ON THE ABILITY OF LAWYERS TO REPRESENT CLIENTS

A. Article 306 of the Criminal Law

As demonstrated by the Li Zhuang case, a subject of concern to criminal lawyers is their vulnerability to prosecution for the crime of "falsifying evidence" under Article 306 of the Criminal Law. In light of this provision, lawyers are prohibited from tampering with evidence and "coercing or inducing witnesses" to change their testimony.⁴⁰ This rule is also stipulated in Article 38 of the CPL 1996, which states:

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.⁴¹

However, these articles have been widely criticized by legal professionals for their ambiguous language and uncertain implementation. Mounting evidence

³⁹ CHEN JIANFU, CHINESE LAW: CONTEXT AND TRANSFORMATION 334 (2007); Yi Sheng, *A Promise Unfulfilled: The Impact of China's 1996 Criminal-Procedure Reform on China's Criminal Defense Lawyers' Role at the Pre-trial Stage (Part 1)*, 4 PERSP. 1, 1 (2004); 陈光中 [Chen Guangzhong], 坚持惩罚罪犯与保障人权相结合, 立足国情与借鉴国外相结合—参与刑事诉讼法修改的几点体会 [Combining the Punishment of Criminals and the Protection of Human Rights, Combining Relying on Domestic Particularities and Borrowing Western Experiences—Few Thoughts from Participation of the Criminal Procedure Law Reform], 政法论坛 [TRIB. POL. SCI. & L.], no. 6, 1996, at 29–30.

⁴⁰ Article 306 provides that "If, in criminal proceedings, a defender or legal agent destroys or forges evidence, helps any of the parties destroy or forge evidence, or coerces the witness or induces him into changing his testimony in defiance of the facts or give false testimony, he shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention; if the circumstances are serious, he shall be sentenced to fixed-term imprisonment of not less than three years but not more than seven years. Where a witness's testimony or other evidence provided, shown or quoted by a defender or legal agent is inconsistent with the facts but is not forged intentionally, it shall not be regarded as forgery of evidence."

⁴¹ CPL 1996, *supra* note 3, at art. 38.

shows that a large number of criminal defense lawyers in China have been charged and incarcerated under Article 306.⁴² By reviewing these cases, most suspected lawyers ran into the situation where witnesses, suspects, and/or defendants changed their testimony or statements after lawyers became involved, thus prompting suspicion from procuratorates that the lawyers had suborned perjury.⁴³ Moreover, empirical research has revealed that the overwhelming majority of cases charged under Article 306 are baseless, and that under this charge prosecution serves as a weapon of the authorities to retaliate against defense lawyers who provide successful legal representation.⁴⁴

This point of view is echoed in a small-scale statistical analysis by the All China Lawyers Association (ACLA). In 2002, ACLA examined seventy-nine appealed cases involving the breach of Article 306 by lawyers. After ACLA's investigation, nine lawyers were acquitted of the charges, six were released from detention and given bail (取保候审) (*qubao houshen*), two were under investigation, and the remaining fifty-two cases were being reviewed further by local Lawyers Associations.⁴⁵ This survey clearly illustrates that the legal footing in the imposition of Article 306 in China is shaky. Perhaps Chen Ruihua, a renowned Chinese legal academic, has succeeded in identifying 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

⁴² According to the Lawyers' Rights Report issued by the All-China Lawyers Association, 347 lawyers were detained, accused, or sanctioned for falsification of evidence under Article 306 between 1997 and 2002. See 马宏建 [Ma Hongjian], 重庆律师造假门引发刑法 306 条存废之争 [*Chongqing Fabrication Gate Results in Debate Over the Abolition and Preservation of Article 306*], 中国改革报 [CHINA REFORM DAILY], Dec. 25, 2009, <http://www.crd.net.cn/web/NewsInfo.asp?NewsId=676>; 孙莹 [Sun Yin], 涉嫌伪证律师自称无罪 [*Lawyer Suspected of Falsifying Evidence Plead Not Guilty*], 北京晚报 [BEIJING EVENING NEWS], Dec. 26, 2009.

⁴³ 陈兴良 [Chen Xingliang], 为辩护权辩护 - 刑事法视野中的辩护权 [*Defending the Defense Right—Defense Right from the Perspective of Criminal Law*], 法学 [LEGAL SCI.], no. 1, 2004, at 17-18. In its report, "Walking on Thin Ice: Control, Intimidation, and Harassment of Lawyers in China," Human Rights Watch publicized some representative cases that occurred recently. HUMAN RIGHTS WATCH, *supra* note 1, at 56-57.

⁴⁴ *Id.* at 57, 59.

⁴⁵ 中华全国律师协会, 全国律协维权工作报告 [ALL CHINA LAWYERS ASSOCIATION, WORK REPORT OF THE ALL CHINA LAWYERS ASSOCIATION TO UPHOLD LAWYERS' RIGHTS] 2 (2002).

and consolidate their dominant roles by penalizing “uncooperative” defense lawyers.⁴⁶

B. Access to Clients in Detention

While the risk of Article 306 wields the most chilling effect on the willingness of defense lawyers to take on criminal cases, there are also some smaller, but equally salient elements that constrain effective legal defense work in China. Chinese legal practitioners have long characterized these elements as the “Three Difficulties.” Specifically, these are meeting with criminal suspects in detention, getting access to case files, and collecting evidence. These “difficulties” constitute the most significant struggles for criminal defense at the pretrial stage.

CPL 1996 seemed to be a significant advance in the protection of criminal suspects because it widened the scope of legal representation from the trial phase to the investigatory phase.⁴⁷ Compared to the old Criminal Procedure Law where a lawyer’s defense work could not begin until seven days before trial, CPL 1996 allows lawyers to meet their clients after the first interrogation by the investigatory organ. Moreover, the 1998 Joint Regulation on Several Issues in the Implementation of the Criminal Procedure Law (“1998 Joint Regulation”)⁴⁸ by six state agencies stipulates that, unless the case involves state secrets, a lawyer’s application for visiting suspects should not require the authorities’ approval and must be arranged within forty-eight hours.⁴⁹ In practice, however, lawyers often complain about the unenforceability of this legal defense right.

Chinese criminal defense lawyers face immense obstacles to obtaining permission to visit their clients in detention.⁵⁰ Although the official approval

⁴⁶ 陈瑞华 [Chen Ruihua], 法律职业共同体形成了吗? (下)—以辩护律师调查权问题为切入的分析 [Has the Law Community Been Formed? (Part II)—Analysis Based on the Defense Lawyer’s Investigatory Right], 中国司法 [JUST. CHINA], no. 3, 2008, at 19.

⁴⁷ Article 96 of the CPL 1996 provides: “After the criminal suspect is interrogated by an investigation organ for the first time or from the day on which compulsory measures are adopted against him, he may appoint a lawyer to provide him with legal advice and to file petitions and complaints on his behalf. If the criminal suspect is arrested, the appointed lawyer may apply on his behalf for obtaining a guarantor pending trial [取保候审].” CPL 1996, *supra* note 3, at art. 96.

⁴⁸ 1998 Joint Regulation on Several Issues in the Implementation of the Criminal Procedure Law [hereinafter 1998 Joint Regulation].

⁴⁹ See *id.* at art. 11. This regulation was issued on January 19, 1998 by the Supreme People’s Court, Supreme People’s Procuratorate, Ministry of Public Security, Ministry of State Security, Ministry of Justice and National People’s Congress Standing Committee Legislative Affairs Commissions.

⁵⁰ See, e.g., 田文昌、周汉基 [Tian Wenchang & Zhou Hanji], 刑事诉讼: 律师为你而困惑 [Criminal Litigation: Lawyers Puzzled], 中国律师 [CHINESE LAWYER], no. 11, 2000, at 39-42; 孙业群 [Sun Yequn], 做一个刑辩律师究竟有多难—律师参与刑事诉讼活动有关问题

of a lawyer-suspect meeting is no longer a prerequisite in the statute, the actual practice often follows the old rule that the lawyer must apply for the authorities' permission to visit suspects.⁵¹ As such, the authorities often deny or delay these meetings by making various excuses.⁵² Even if the lawyer is eventually allowed to see the suspect, the meeting will most likely be rendered meaningless. First, the duration and times of the meetings are strictly controlled.⁵³ There is limited opportunity for the lawyer to gain sufficient case-related information from the suspect in a hurried conversation. Second, the quality of meetings is not guaranteed. It is not uncommon for the meetings between lawyers and suspects to be monitored by investigatory officers or surveillance cameras.⁵⁴ Although the 1998 Joint Regulation makes the presence of the authorities at meetings optional,⁵⁵ the investigatory agencies choose to make full use of this power in supervising lawyer-suspect conversations. In this regard, lawyers are believed to do no more than provide emotional support and perhaps inform the detainee of the alleged offense and some relevant statutes.⁵⁶

C. Access to Case Files

Another serious burden that inhibits defense work is that, although CPL 1996 was intended to facilitate the defense lawyer's preparation before trial, crucial case information, files, and documents are largely inaccessible by

的思考 [How Difficult to be a Criminal Defense—Thinking of Relevant Issues Concerning Lawyer's Participation in Criminal Procedural Activities], 中国律师 [CHINESE LAWYER], no. 4, 2003, at 68–71. These two papers address some representative cases that have been widely reported in the media.

⁵¹ 房保国 [Fang Baoguo], 当前“律师会见难”的现状剖析 [An Analysis of Difficulty of Meeting the Suspect in Contemporary China], 中国刑事法杂志 [CHINESE CRIM. SCI.], no. 3, 2004, at 68.

⁵² The excuses are diversified, including “the handling person is not in town,” “this case is exceptional,” “the case involves state secrets,” and so on. See *id.* at 77; LAWYERS COMMITTEE FOR HUMAN RIGHTS, *LAWYERS IN CHINA: OBSTACLES TO INDEPENDENCE AND THE DEFENSE OF RIGHTS* 76 (1998).

⁵³ 雷成 [Lei Cheng], 律师会见权: “红头文件”下的空中楼阁 [The Lawyer's Right to See His Client: Made Impossible by Internal Bureaucratic Directives?], 中国青年报 [CHINA YOUTH DAILY], Mar. 24, 2007, <http://www.66law.cn/archive/news/2007-03-26/9272.aspx>. This report presents a case where a lawyer visited the police station twenty-two times in forty days, finally getting to see his client for a mere thirty minutes.

⁵⁴ See, e.g., Yi, *supra* note 38, at 10; Yu, *supra* note 34, at 839; 赵永林, 律师会见难若干问题研究 [Zhao Yongling, Study on Few Issues Concerning Lawyers' Right to Meeting Suspects], 法学杂志 [JURIDICAL SCI. J.], no. 5, 2003, at 62.

⁵⁵ 1998 Joint Regulation, *supra* note 48, at art. 12.

⁵⁶ Halliday & Liu, *supra* note 2, at 85.

lawyers prior to trial. The amended law stipulates that lawyers are entitled to "consult, extract and duplicate the judicial documents pertaining to the current case and the technical verification material" during the procuratorial stage.⁵⁷ In addition, defense lawyers may "from the date on which the People's Court accepts a case, consult, extract and duplicate the material of the facts of the crime accused in the current case."⁵⁸ These prescriptions, however, barely ensure lawyers' access to important evidence.

The reasons at a legal level are twofold. First, the ambiguous legal definitions create difficulties for the lawyers in accessing procuratorial evidence. The 1998 Joint Regulation, for example, stipulates that only "major evidence" is required to be submitted to the court with indictment.⁵⁹ The legal definition of "major evidence," however, is general and abstract. The Supreme People's Procuratorates' Rules on Criminal Law Proceedings provide that "major evidence" shall include the following: (1) major evidence among all categories of evidence under the bill of indictment; (2) major evidentiary materials in the same category of evidence; and (3) voluntary confession, withdrawal, and failed attempt to commit a crime, self-defense, and other exculpatory or mitigating evidence.⁶⁰ Notably, these explanations fail to provide an exhaustive list of "major evidence." Thus, key evidence, such as the deposition of criminal suspects, full witness statements, and pivotal physical evidence,⁶¹ in practice is often ruled out from the procuratorial evidence list in order to prevent its early exposure to defense lawyers.

Furthermore, lawyers' access to evidence is hindered by various restrictive judicial interpretations by state organs. It is clear that the Supreme Procuratorate interprets the scope of major evidence based on the subjective judgment of the procuratorates. Article 238 of the Supreme People's Procuratorates' Rules on Criminal Law Proceedings grants the procuratorate unlimited power in defining major evidence in accordance with the practical effectiveness of each piece of evidence in the substantive case.⁶² Given the accusatory role of procuratorates in the criminal procedure, evidence submitted to the court usually precludes both exculpatory and mitigating evidence and places special emphasis on incriminating evidence. Crucial incriminating evidence may be purposely hidden by the procuratorates, in an attempt to suddenly attack defense lawyers in the court hearing. Many

⁵⁷ CPL 1996, *supra* note 3, at art. 36.

⁵⁸ *Id.*

⁵⁹ 1998 Joint Regulation, *supra* note 48, art. 36. The "major evidence" practice is a result of the adoption of adversarial system in the court session since the promulgation of the CPL 1996. In order to combat the premature evaluation of a case by the judge before it comes to the court, a thinning of evidence in the case files transferred by the procuratorate to the court has been advanced. See Chen, *supra* note 4, at 94-95.

⁶⁰ Supreme People's Procuratorates' Rules on Criminal Law Proceedings, art. 283.

⁶¹ HUMAN RIGHTS WATCH, *supra* note 1, at 74.

⁶² Supreme People's Procuratorates' Rules on Criminal Law Proceedings, art. 283.

Chinese defense lawyers then consider themselves to be not only extremely powerless in accessing substantive evidence at the pre-trial phase but also incapable of providing effective defense during trial.⁶³

D. Right to Investigation by Defense Lawyers

The third difficulty of defense lawyers is generally referred to as “difficulty in collecting evidence.” CPL 1996 provides lawyers inadequate power to gather evidence. In theory, defense lawyers may collect evidence concerning the case from witnesses and other units or individuals with their consent.⁶⁴ Further, Article 37 provides that upon the approval of the procuratorate or the court and with the consent of the victim, his near relatives, or witnesses provided by the victim, defense lawyers may gather case-related evidence from such persons.⁶⁵ In practice, however, the lawyers’ evidence-gathering capability is subject to a number of practical limits. Above all, witnesses in China are not legally obligated to provide defense lawyers with any information related to the case, so lawyers’ efforts to obtain their own evidence are commonly frustrated by uncooperative witnesses.⁶⁶ Despite the general distrust of lawyers by the Chinese public, many defense lawyers attribute non-cooperation to both the intervention of authorities and witnesses’ fear of retribution at the hands of the authorities.⁶⁷

Secondly, given the active role that procuratorates play in pushing crime control, it is unlikely that the lawyer’s application for collection of evidence from witnesses who support the victim will be approved by the procuratorates. Worse still, the police and procuratorates have been found to frequently interfere with lawyers’ activities by secretly intimidating, threatening, and attacking those who try to acquire useful evidence on their own initiative.⁶⁸

⁶³ 中国律师制度研究 [STUDY OF THE LAWYER SYSTEM IN CHINA] 186, (叶青、顾跃进 [Ye Qing & Gu Yuejin] eds., 法律出版社 [Law Press]) (2005); 曹小红, 律师阅卷难的成因分析 [Cao Xiaohong, *Reasoning Analysis of the Difficult of Accessing Case Files by Lawyer*], 律师世界 [LAWYER WORLD], no. 5, 2003, at 40.

⁶⁴ CPL 1996, *supra* note 3, at art. 37.

⁶⁵ *Id.*

⁶⁶ 吴真文 [Wu Zhengwen], 律师取证难的原因及对策 [Reasons and Solutions of the Difficulty of Collecting Evidence by Lawyers], 中国律师 [CHINESE LAWYER], no. 4, 2000, at 52; 潘传平、吴始真 [Pan Chuansheng & Wu Shizhen], 刑事诉讼中律师调查取证权之我见 [Pan Chuansheng & Wu Shizhen, *My Views on Lawyers’ Right to Collect Evidence in the Criminal Process*], 中国律师 [CHINESE LAWYER], no. 5, 2001, at 48.

⁶⁷ 张军、姜伟、田文昌 [ZHANG JUN, JIANG WEI & TIAN WENCHANG], 刑事诉讼: 控, 辩, 审三人 [CRIMINAL LITIGATION: DISCUSSION ON ACCUSATION, DEFENCE AND ADJUDICATION BY THREE PERSONS] 398-99 (法律出版社 [Law Press]) (2001); 刘荣军 [Liu Rongjun], 论证人的证言拒绝权 [The Refusal Right of Witnesses to Give Testimonies], 法学 [LEGAL SCI.], no. 5, 1999, at 27-28; Michelson, *supra* note 1, at 360.

⁶⁸ HUMAN RIGHTS WATCH, *supra* note 1, at 78-80; Ye & Gu, *supra* note 63, at 174-76.

Therefore, Chinese lawyers are compelled to apply to the court to gather evidence because the court is legally required to collect evidence on the behalf of lawyers if this is necessary.

Further unfavorable realities hinder the lawyer. In practice, a court's attitude toward a lawyer's demand for gathering evidence is similar to that of the procuratorates. Some Chinese lawyers attribute the court's indifference to vaguely phrased provisions in the law and complementary regulations. For example, they argue that the legislation lacks further legal elaboration of situations constituting "necessity" in which the court should approve the lawyer's request.⁶⁹ However, those who support this view may be overlooking the real nature of the judiciary in the Chinese criminal justice system. In China, the court does not act as an impartial arbitrator, but instead acts as a participant in the administration of criminal justice. Its accusatory role, to a large extent, enables the court to put more attention into criminalizing suspects than balancing justice and crime control.⁷⁰

Thus, Article 306 and the "Three Difficulties" have rendered useless the efforts of the CPL 1996 towards expanding the lawyer's role in criminal defense. Chinese lawyers now are facing greater hurdles and daunting personal danger in their daily work. Meanwhile, the Chinese government has recognized the deterioration of pre-trial criminal defense and has been willing to take steps to improve the practice environment for lawyers. Accordingly, a new Lawyers' Law was enacted in 2008 to supersede the 1996 Lawyers' Law. The new law introduced some revised stipulations to improve defense practice. Upon its enactment, the Chinese legal academy observed that the 2008 Lawyers' Law had made dramatic changes, limiting the authorities' powers and providing lawyers with more institutional autonomy in carrying out their responsibilities. However, the practical effectiveness of this new law has been unsatisfactory to date.

III. THE NEW LAWYERS' LAW

The new Lawyers' Law was promulgated on October 28, 2007 by the Standing Committee of the Chinese National People's Congress, and took effect on June 1, 2008. Not surprisingly, this law was hailed as a considerable advance for lawyers because of its specified procedural protections for defense

⁶⁹ Article 15 of the 1998 Joint Regulation provides that "if the court believes it is indeed necessary, the procuratorate and the court shall request and collect evidence." But how to determine whether the evidence is "necessary" is subject to the subjective judgment of the court. 1998 Joint Regulation, *supra* note 48, at art. 15; see HUMAN RIGHTS WATCH, *supra* note 1, at 82.

⁷⁰ 陈瑞华, 刑事诉讼的前沿问题 [CHEN RUIHUA, THE FRONTIERS PROBLEMS OF CRIMINAL LITIGATION] 345 (中国人民大学出版社 [China Renmin University Press]) (2005); 冀祥德, 中国刑事辩护的困境和出路 [Ji Xiangde, *Dilemma and Solution of Chinese Criminal Defense*], 政法论坛 [TRIB. POL. SCI. & L.], no. 3, 2004, at 149.

lawyers.⁷¹ More precisely, to combat the “Three Difficulties,” lawyers are provided more work-related privileges, autonomy in meeting with detained suspects, access to case files, and guaranteed permission to collect their own evidence. Article 33 stipulates that a lawyer may meet the suspect at the first interrogation or on the day the suspect is detained.⁷² Compared to the CPL 1996, this provision increases opportunities for lawyer–suspect meetings from the first interrogation onwards. Additionally, the new Lawyers’ Law provides that the lawyer may meet the suspect in the detention center without any procedural limits. Lawyers are entitled to visit their clients freely and required to present only their lawyer’s license, a letter of proof from their law firm, and authorization letters.⁷³ However, the most important change is that during the meeting the lawyer shall not be monitored or “under surveillance” (监听) (*jianting*) by the authorities. Any form of oversight or control of the time or duration of meetings is prohibited.⁷⁴

With respect to the lawyer’s right to review case materials, the new Lawyers’ Law significantly extends the scope of case-related files accessible to lawyers. In light of Article 34, lawyers are entitled to consult, excerpt, and photocopy litigation documents and files relating to the case at the procuratorial stage. Once the case enters the trial stage, lawyers are allowed to consult, excerpt, and photocopy all case-related materials.⁷⁵ In addition, the capacity of lawyers to collect evidence has been strengthened. In general, Article 35 of the new Lawyers’ Law gives counsel the right to apply to the procuratorates or courts to request and collect evidence according to the needs of the case.⁷⁶ If lawyers desire to gather evidence on their own initiative, they may do so with corresponding units (单位) (*danwei*) and witnesses from both sides by simply presenting their lawyer’s licenses and letters of proof issued by their law firms.⁷⁷ Clearly, these prescriptions are intended to maximize the lawyer’s ability to collect evidence for a well-prepared defense. Many legal commentators therefore are optimistic that defense lawyers are now able to obtain a comprehensive volume of case information, thus

⁷¹ 李贵方, 律师法的改进与辩护权的完善与保障 [Li Guifang, *The Improvement of the Lawyer’s Law and the Protection and Guarantee of Defense Right*], 法学 [LEGAL SCI.] No. 7, 2008, at 37; 杨明仑, 新律师法解读—法律修改要与社会发展同步 [Yang Minglun, *The Analysis of the New Lawyers’ Law—Amendment of Law Shall Coincide with Social Advancement*], 中国律师 [CHINESE LAWYER] No. 12, 2007, at 14; 张文举, 新律师法研讨丛书 [Zhang Wenju, *The Overview of the New Lawyers’ Law Studies*], 中国检察官 [CHINESE PROCURATORATES], no. 5, 2008, at 24.

⁷² 2007 Lawyers’ Law, *supra* note 4, at art. 33.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at art. 34.

⁷⁶ *Id.* at art. 35.

⁷⁷ *Id.*

preventing them from being defenseless while facing the procuratorates at trial.⁷⁸

In addition to empowering defense lawyers, the new Lawyers' Law tends to uphold their defense rights. Article 36 states that the defense rights of lawyers shall be protected while lawyers are carrying out their legal duties.⁷⁹ For example, according to Article 37, lawyers' statements while representing defendants at trial shall be exempted from legal liability.⁸⁰ Meanwhile, the new Lawyers' Law specifically prohibits any violations of personal rights of lawyers during their defense activities.⁸¹ Although the provision does not identify the scope of personal rights under protection, illegal means such as intimidation, threats, and physical abuse that the authorities have used in the past to obstruct lawyers' practices are now considered to be illegal, falling within the scope of the provision's protection.⁸²

Indeed, the promulgation of the new Lawyers' Law signifies a further step toward a more balanced role for lawyers in Chinese criminal justice procedure. However, the extent to which a fragmentary law may fundamentally alter the status of criminal lawyers is doubtful. After briefly acclaiming the new law, many Chinese legal professionals now agree that this piecemeal legislation is unable to solve the roots of the problem facing Chinese criminal lawyers. There is academic debate about the legal effectiveness of the new Lawyers' Law,⁸³ and the police and procuratorates are, in reality, more than willing to keep carrying out the same practices as they did under the CPL 1996. This situation is in part because the Lawyers' Law produces some serious legal conflicts with the CPL 1996, but more importantly, the new Lawyers' Law imposes considerable constraints on the paramount powers of the authorities, and equalizes the roles of defense lawyers and the state accusatory apparatus.⁸⁴

However, in examining whether the new Lawyers' Law is desirable, Chinese legal scholars tend to analyze the problems from a legal perspective.

⁷⁸ 韩旭, 新律师法实施后的律师刑事取证问题 [Han Xu, *The Issues of Collecting Evidence by Lawyers After the Enactment of the New Lawyers' Law*], 法学 [LEGAL SCI.], no. 8, 2008, at 54; 韩旭、刘燕, 新律师法实施后律师刑事取证权的保障问题 [Han Xu & Liu Yan, *The Issues of Protecting the Lawyer's Rights to Gather Evidence After the Enactment of the New Lawyers' Law*], 西部法学评论 [W. L. REV.], no. 4, 2008, at 50.

⁷⁹ 2007 Lawyers' Law, *supra* note 4, at art. 36.

⁸⁰ *Id.* at art. 37.

⁸¹ *Id.*

⁸² See Peng, *supra* note 16, at 32; 朱永华, 辩护律师的人身权保障研究 [Zhu Yonghua, *Study on the Protection of Defense Lawyers' Personal Rights*], 法制与社会 [LEGAL SYS. & SOC.] No. 4, 2008, at 81.

⁸³ Fan & Feng, *supra* note 15, at 18; 田文昌, 新律师法与刑事诉讼法的冲突, 互动和衔接 [Tian Wenchang, *The Conflicts, Interactions and Connections between the New Lawyers' Law and the CPL 1996*], 法学 [LEGAL SCI.], no. 7, 2008, at 34; Wang, *supra* note 14, at 91-93.

⁸⁴ Li, *supra* note 71, at 39.

For example, some legal practitioners complain that there are no supplementary mechanisms or an ongoing legislative agenda to ensure that the lawyers' defense rights will be fully realized according to the new law.⁸⁵ They would prefer that an impartial review system be implemented in which lawyers could seek redress while being deprived of work-related privileges.⁸⁶ Worse still, the legal immunity of lawyers' defense work does not necessarily prevent lawyers from being mistreated by the authorities.

For example, before the Li Zhuang case, it was reported that a lawyer from Guangxi Autonomous Region was charged with committing perjury after the passage of the new Lawyers' Law.⁸⁷ The case involved an experienced criminal lawyer in Wuzhou named Huang Zhenghong. He was prosecuted in April 2008 for perjury after two critical witnesses changed their original testimonies in court. Like Li Zhuang, Huang was targeted by the procuratorate as an abettor who incited the witnesses to change their statements. Thanks to the intervention of the local bar association and the Ministry of Justice, however, Huang was finally cleared of legal liability. Due to the acquittal, Huang's case did not draw the attention of the general public.

A few months later, the guilty verdict in the Li case eventually caused widespread concern among scholars. The lack of legal effectiveness and the infeasibility of the new Lawyers' Law have been hotly debated in the Chinese legal community. Regardless of the divergence of academic insights into the new law, a consensus seems to have been reached at least among legal practitioners, who believe that the new Lawyers' Law has not effectively strengthened conditions for the work of defense lawyers.⁸⁸ Rather, if lawyers were to undertake many of the practices permitted by the new Lawyers' Law, this action would most likely trigger the antipathy of the authorities, resulting in retaliatory action against them.⁸⁹

⁸⁵ See 陈学权, 新律师法与刑事诉讼法再修改之衔接 [Chen Xuequan, *The Connection of the New Lawyers' Law and the Re-Amendment of the CPL 1996*], 学术论坛 [ACAD. F.], no. 15, 2008, at 153; Wang, *supra* note 14, at 91.

⁸⁶ Peng, *supra* note 16, at 35.

⁸⁷ 陈文峰, 莫小松, 庭审后证人和律师先后被捕, 广西一律师涉嫌伪证罪受法律界广泛关注 [Chen Wenfeng & Mo Xiaosong, *Witnesses and Defense Lawyer Arrested After Court Session, A Guangxi Lawyer Suspected of Committing Perjury Drew Attention of the Legal Community*], 中国法制报 [CHINA LEGAL REP.], May 26, 2008.

⁸⁸ 黄秩和, 新律师法第 33 条可诉不可诉? [Huang Yihe, *Whether Article 33 of the New Lawyer's Law is Prosecutable?*], 北大法律网 [CHINA LAW INFO] (Dec. 31, 2008), http://article.chinalawinfo.com/Article_Detail.asp?ArticleID=44144; 奇斌, 李庄为同行所害论——兼谈律师界之怪现象 [Qi Bing, *Li Zhuang Set up by Peers? Strong Phenomenon of Legal Profession*], 北大法律网 [CHINA LAW INFO] (Jan. 8, 2010), http://article.chinalawinfo.com/Article_Detail.asp?ArticleID=52347.

⁸⁹ 孙永标, 《刑事诉讼法》与新《律师法》的衔接问题——以律师会见权为例子 [Sun Yongbiao, *The Linkage Problems of the Criminal Procedure Law and the New Lawyers' Law—An Example of Lawyers' Visiting Rights*], 安徽律师协会论坛 [ANHUI LAWYER ASSOCIATION FORUM], Aug. 11, 2009, http://bbs.ahlawyer.com/dv_rss.asp?s=xhtml&boardid=16&id=445&page=1.

The legal and practical inapplicability of the new Lawyers' Law certainly gives rise to a number of questions. Have the "bad" laws necessarily produced the current predicament in the defense work of lawyers? More specifically, do the laws' ambiguous provisions and the contradictory ideologies of judicial interpretations contribute to the weak position of Chinese defense lawyers? If so, to what extent are their legal practices affected? In their answers to these questions, many legal scholars are inclined to assert that the indeterminacy of the law is a major factor weakening of the status of lawyers.

For example, U.S.-based legal professors Sida Liu and Terence C. Halliday argue that Chinese lawyers' difficulties in criminal defense were produced by the interactions of the four mechanisms of recursivity in both lawmaking and implementation.⁹⁰ In their view, indeterminacy of law, contradictions of laws, diagnostic struggles, and actor mismatch are four contributing elements of Chinese lawyers' difficulties in criminal defense. Although they tend to explore deep roots in the recursive nature to explain the lawyers' plight, it appears that the first two factors, namely legal indeterminacies and contradictions, are the most fundamental reasons and, in a way, make the two latter factors the logical consequences. Liu and Halliday first point out that the indeterminacy of laws results in many interrelated ideological contradictions inherent in the CPL 1996. This indeterminacy generates conflicting regulations and official interpretations by law enforcement agencies. Although these provisions are designed to increase clarity and predictability, the competing interpretations augment the power of each law enforcement agency and hinder the exercise of lawyers' defense rights, rendering their defense work extremely difficult.⁹¹

Indeed, this perception is indicative of the long-standing problem of legal uncertainty in Chinese legal practice. There are indications that Chinese laws have actually afforded defense lawyers adequate legal rights to perform their pre-trial duties. At the practical level, their unpleasant working environment is attributable to other root causes, which may not be as evident as the legal factors, but which have been in existence for decades and have shaped the implementation of laws affecting defense lawyers. Among these, the three most powerful causes of indeterminacy are the political, ideological, and institutional components of the Chinese criminal justice system.

V. THE PLIGHT OF DEFENSE LAWYERS: A RESULT OF INDETERMINACY OF LAW?

A. Political Influences

Before its recent advocacy of the rule of law (法治) (*fazhi*),⁹² China long dwelled outside any normative legal framework. Prior to the economic reforms

⁹⁰ Liu & Halliday, *supra* note 6, at 911.

⁹¹ *Id.* at 931.

⁹² The notions of *fazhi* and using law to rule the state were not new, but the biggest event in terms of the evolution of rule of law discourse occurred in the mid-90s by the official endorsement by the Party of concept of *Yifa zhiguo*, *jianshe shehuizhui fazhiguo*

initiated by Deng Xiaoping in the late 1970s, China suffered from many lawless and chaotic periods when political movements were randomly promoted by the government.⁹³ From 1949 to 1977, China underwent a number of political uprisings. During these campaigns, the law was either abrogated or ignored entirely.⁹⁴ Instead, Party policies and administrative rules that served political needs became the guidelines of the state.⁹⁵ In the aftermath of the Cultural Revolution, state leaders who suffered personally and severely from the arbitrary and lawless acts of the Red Guards advocated greater reliance on law as a means of preventing the reoccurrence of such policy-driven excesses.⁹⁶ They conceded that the want of a legal system and the demise of legal ideology in mass campaigns had contributed significantly to social unrest and disorder.⁹⁷

In order to initiate and maintain economic reforms, China started a vast legislative scheme to ensure legal stability and continuity for purposes of attracting foreign investment. Within an extremely short period, the Chinese government generated an extraordinary outpouring of laws and re-created the legal institutions that were necessary to implement law.⁹⁸ In addition to passing numerous laws and rebuilding law enforcement organs, a number of steps were taken to strengthen the legal system. Perhaps the most crucial action was the endorsement by the Party of the rule of law. Together with the construction of the socialist legal system, rule of law was established and evolved into the official rationale for governing the state.⁹⁹ Unlike the theory

(Rule by Law, Building Socialist Rule-by-Law Country). For detailed discussions of the development of Chinese Rule of Law, see PEERENBOOM, *supra* note 3, at 55-125; 孙国华、黄文艺, 论社会主义的依法治国 [Sun Guohua & Huang Wenyi, *The Socialist Rule by Law*], 中国法学 [CHINESE SOC. SCI.], no. 6, 1998, 10-20; 郝铁川, 依法治国的十大建议 [Hao Tiechuan, *Ten Suggestions to Rule of Law*], 法学 [LEGAL SCI.], no. 5, 1996, at 3-4.

⁹³ For example, the 1966-1976 Cultural Revolution has been characterized as the "ten-year great calamity" of Chinese people and society. During this period, the country was not ruled by law, but by man. See LOWELL DITTMER, *LIU SHAO-CH' I AND THE CHINESE CULTURAL REVOLUTION: THE POLITICS OF MASS CRITICISM* 315-27 (1974); HONG YUNG LEE, *THE POLITICS OF THE CHINESE CULTURAL REVOLUTION: A CASE STUDY* 110-39 (1978); Lu Xiuyuan, *A Step Toward Understanding Popular Violence in China's Cultural Revolution*, 67 PAC. AFF. 533, 533 (1995).

⁹⁴ KENNETH LIEBERTHAL & MICHEL OKSENBURG, *POLICY MAKING IN CHINA* 246 (1988).

⁹⁵ Franz Michael, *The Role of Law in Traditional, Nationalist and Communist China*, 9 CHINA Q. 124, 143 (1962); Tao Lung-Sheng, *Politics and Law Enforcement in China: 1949-1970*, in *LAW, THE STATE, AND SOCIETY IN CHINA* 99, 108 (Tahirih V. Lee ed., 1997).

⁹⁶ PEERENBOOM, *supra* note 5, at 55.

⁹⁷ Randall Peerenboom, *What Have We Learned About Law and Development: Describing, Predicting, and Assessing Legal Reforms in China*, 27 MICH. J. INT'L L. 823, 837 (2005).

⁹⁸ Stanley Lubman, *Looking for Law in China*, 20 COLUM. J. ASIAN L. 1, 6-7 (2006).

⁹⁹ 郝铁川, 中国依法治国的渐进性 [Hao Tiechuan, *Progression of Rule of Law in China*] 法学研究 [CHINESE J. L.], no. 25 (6), 2003, 27-30.

of rule by law,¹⁰⁰ rule of law in practice requires not only that the law be supreme but also that the government be bound by it.¹⁰¹ Although skeptics claim that the rule of law movement is likely to fail due to a variety of institutional and political reasons,¹⁰² the rule of law concept has been implemented by the government as an underlying state policy in contemporary China.

It appears that the authorities have acknowledged the importance of law for the regulation of the state. Both the promulgation of a considerable number of laws and establishment of the rule of law as state policy seem to emphasize state acceptance of the supremacy of law and the equality of all before the law. However, even though the stature of rule of law has been raised to state-level prominence, the extent to which the law is genuinely implemented is doubtful. There is mounting evidence that the authorities still sanction extralegal behaviors at the behest of periodic Party policies and specific internal rules, not because Chinese law is badly drafted and therefore impossible to implement, but because of the persistent need to maintain political stability. More specifically, political needs have been assigned a priority above the rule of law, regardless of any philosophical inconsistencies.

Perhaps the most typical example of this phenomenon is the launch of the "Hard Strike" (严打) anti-crime campaigns in the early 1980s. Initiated by the government, the "Hard Strike" campaigns were intermittent activities to stop crime waves by swiftly and severely punishing serious criminals.¹⁰³ Recent research into the three big rounds of severe strikes launched in 1983, 1996, and 2001, respectively has revealed that a wide range of specific crimes were speedily and harshly handled in those campaigns in line with the political needs of each phase.¹⁰⁴ Clearly, swiftness and severity were the two major principles behind the administration's direction of the crackdowns. First, criminal punishments were rendered faster than they would be if criminal procedure laws had been followed. This haste was reflected in the speedy proceedings of the investigatory activities and trial. Law enforcement agencies were required to complete their investigations within a short period, and the

¹⁰⁰ Peerenboom defines rule by law as a form of instrumentalism where law is merely a tool to be used by the state to control others without imposing meaningful restraints on the state itself. See PEERENBOOM, *supra* note 5, at 64.

¹⁰¹ *Id.* at 63; Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 781 (1989); 王利明, 也谈依法治国 [Wang Liming, *The Study of Rule of Law*], 法学评论 [L. REV.], no. 2, 1999, at 47.

¹⁰² For example, some legal scholars argue that without democracy and pluralistic forms of political participation, implementing rule of law will serve authoritarian ends and bolster the legitimacy of the Party. See Randall Peerenboom, *Let One Hundred Flowers Bloom, One Hundred Schools Contend: Debating Rule of Law in China*, 23 MICH. J. INT'L L. 471, 533-34 (2002).

¹⁰³ Liang Bin, *Severe Strike Campaign in Transitional China*, 33 J. CRIM. JUST. 387, 391 (2005).

¹⁰⁴ Susan Trevaskes, *Severe and Swift Justice in China*, 47 BRIT. J. CRIMINOLOGY 23, 25 (2006).

criminal cases were pushed even faster through the trial process.¹⁰⁵ Second, criminals received punishments more severe than those stipulated by criminal law. Statistical surveys show that death sentences and executions in the Anti-Crime campaigns were prevalent.¹⁰⁶ At the same time, substantially stiffer fixed-term sentences were imposed on those who had committed minor offences.¹⁰⁷ It should be noted that the Chinese authorities' fondness for the "Hard Strike" policies initiated in these three nationwide campaigns has continued into the present. Increasingly frequent reports show that from 2000 onwards, a number of small-scale crackdowns aimed at various targets were periodically carried out. However, targets are no longer limited to criminal activity; targeted activities now include political dissent.¹⁰⁸

While many Chinese scholars have debated whether the "Hard Strike" campaigns conformed to law, and whether the harsher punishments and quicker criminal procedures were in line with legal stipulations,¹⁰⁹ in reality those particular crackdowns functioned more politically than legally. The 1983 campaign first characterized the "Hard Strike" movement as a form of political struggle. One of the campaign leaders proudly claimed the "Hard Strike" campaign as "the milestone of insisting on the People's democratic dictatorship in the aftermath of the Anti-Rightist movement held from 1950 to

¹⁰⁵ Liang, *supra* note 103, at 393.

¹⁰⁶ For example, the estimated number of death sentences and executions is 6,000 and 4,015 in 1996 and 2001 respectively. The figures of the years from 1995 to 2003 other than 1996 and 2001 fluctuate around 1,500. For detailed information on death sentences and executions in the Anti-Crime Campaigns, see AMNESTY INTERNATIONAL, CHINA: NO ONE IS SAFE: POLITICAL REPRESSION AND ABUSE OF POWER IN THE 1990S 88 (1996); AMNESTY INTERNATIONAL, DEATH PENALTY 3 (1996); AMNESTY INTERNATIONAL, PEOPLE'S REPUBLIC OF CHINA: DEATH PENALTY 2 (1997); AMNESTY INTERNATIONAL, PEOPLE'S REPUBLIC OF CHINA: THE DEATH PENALTY IN 1997 1 (1998); AMNESTY INTERNATIONAL, PEOPLE'S REPUBLIC OF CHINA: THE DEATH PENALTY IN 1998 1 (1999); AMNESTY INTERNATIONAL, CHINA: DEATH PENALTY LOG 1999 1 (2000); AMNESTY INTERNATIONAL, CHINA: DEATH PENALTY 1 (2001); AMNESTY INTERNATIONAL, PEOPLE'S REPUBLIC OF CHINA: THE DEATH PENALTY IN 2000 1 (2002).

¹⁰⁷ HAROD TANNER, STRIKE HARD! ANTI-CRIME CAMPAIGNS AND CHINESE CRIMINAL JUSTICE, 1979-1985 45 (1999).

¹⁰⁸ For example, in 2005, the Chinese government initiated another "Hard Strike" campaign in Tibet before the fortieth anniversary of the founding of the Tibet Autonomous Region. The launch of the action was intended to curb political activism to ensure the smooth celebrations. See Tibetan Centre for Human Rights and Democracy, *China Launches "Strike Hard" Campaign Ahead of Sensitive Anniversary*, TIBET POST, Mar. 3, 2005, <http://www.thetibetpost.com/en/news/tibet/683-china-launches-strike-hard-campaign-ahead-of-sensitive-anniversary>.

¹⁰⁹ 陈光中, 严打与司法公正的几个问题 [Chen Guangzhong, *Few Issues About the Hard Strike Campaigns and Justice*], 中国刑事法杂志 [CHINESE CRIM. L. MAG.], no. 2, 2002, 5-6; 苏惠渔、孙万怀, 严打方针的刑法学思考 [Su Huiyu & Sun Wanhui, *The Thinking of the Hard Strike Principle from the Perspective of Criminology*], 法学 [LEGAL SCI.], no. 1, 2001, at 28.

1952.¹¹⁰ Similarly, Deng Xiaoping specifically stressed the significance of the criminal dictatorship by stating that criminals ought to be treated harshly as anti-revolutionaries and anti-socialists.¹¹¹ He pointed out that under special social circumstances, “striking crimes harshly and swiftly is the best way to combat crimes, and can be justified on the ground of retribution to appease the masses and maintain political stability.”¹¹² Many scholars further assert that punishing criminals severely was to fulfill a societal need as a requirement of moral boundary and to strengthen the “conscience collective” among people.¹¹³

In addition to the ideological motive for the campaigns, the way in which they were carried out was also politicized. During the campaigns it was not uncommon for criminal cases to be handled in an extremely short manner. For example, in the 2001 Anti-Crime crackdown, the Beijing police investigated 2,095 cases and arrested 1,088 suspects within five days, from October 27 to October 31.¹¹⁴ The handling process was greatly shortened in the interests of efficiency. As a result, the investigatory and procuratorial stages were merged. The judiciary became no more than a rubber stamp on the procuratorates’ decision on the guilt of the accused. Worse still, procedural protections for suspects were totally neglected.

However, the circumvention of the law during the campaigns was most prominently reflected in the exclusion of legal counsel from the criminal process. The “Hard Strike” campaigns were politically motivated and politically legitimized movements¹¹⁵ that treated suspects and defendants as class enemies who had undermined the political control of the Party.¹¹⁶ As such, the accused did not enjoy any procedural protections, including legal representation by a lawyer. Instead, they were thought to deserve mass trials

¹¹⁰ 刘复之, 严打就是专政 [Liu Fuzhi, *Hard Strike Is Dictatorship*], 中国检察报 [CHINESE PROCURATORATES], Jan. 13, 1992.

¹¹¹ 中宣部 司法部《邓小平论民主法制建设》编选组, 邓小平谈民主法制建设 (THE EDITORIAL COMMITTEE OF “DENG XIAOPING’S VIEWS ON DEMOCRATIC AND LEGAL CONSTRUCTION” AT THE PUBLICITY DEPARTMENT OF THE COMMUNIST PARTY OF CHINA CENTRAL COMMITTEE AND MINISTRY OF JUSTICE, DENG XIAOPING’S VIEWS ON DEMOCRATIC AND LEGAL CONSTRUCTION) 22 (法律出版社 [Law Press]) (1994).

¹¹² 邓小平, 邓小平文选第三卷 [DENG XIAOPING, SELECTED WORKS FOR DENG XIAOPING (III)] 33 (人民出版社 [People’s Press]) (1993).

¹¹³ 北京市公安局西城分局, 关于人民群众对严打期望值的调查与思考 [Beijing Municipal Police Station Xi Cheng Branch, *The Research and Thinking of the People’s Expectation Toward the Hard Strike Campaign*] 公安研究 [POLICING STUD.], no. 9, 2001, 24–26; Andrew Scobell, *The Death Penalty in Post-Mao China*, 123 CHINA Q. 503, 506 (1990).

¹¹⁴ Liang, *supra* note 103, at 392.

¹¹⁵ Susan Trevaskes, *Courts on the Campaign Path in China: Criminal Court Work in the “Yanda 2001” Anti-Crime Campaign*, 42 ASIAN SURV. 673, 675 (2002).

¹¹⁶ 陈兴良, 严打利弊之议 [Chen Xinliang, *The Discussion of Cons and Pros of the Hard Strike*] 河南省政法管理职业学院学报 [J. HENAN ADMIN. INST. POL. & L.], no. 5, 2004, at 122.

and exposure to a large audience, which were imposed as deterrents.¹¹⁷ Furthermore, to express their support of Party policy, the authorities were more concerned about quickly imposing severe punishments on suspects than legitimately administering the criminal process.¹¹⁸ The penalty-oriented campaign rhetoric enabled law enforcement agencies to dictate the administration of criminal justice during the crackdowns. The involvement of defense lawyers, who were considered an obstacle to crime control, was barred. 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.

Apparently, China’s tradition of ruling the state according to Party policy has not really changed since the legal developments initiated in the 1980s. Although rule of law has been invoked by the nation’s central leaders on many occasions, Party rules overrides all laws when political needs arise. Moreover, in an authoritarian system where power is concentrated in one party, it is undoubtedly mandatory for Chinese law enforcement agencies to prioritize enforcement of Party rules. Although Party rules are usually aimed at special legal problems that pose a threat to social stability, the Party rules also serve political purposes. Thus, in reality their active implementation is in line with the political needs of the state and therefore contradictory to existing laws and legal principles.¹¹⁹ As demonstrated above, in the “Hard Strike” campaigns, the standard criminal procedure was largely compromised for the political purposes of preserving social order and political control. To achieve this goal, the entire procedural framework was replaced by swift and harsh handling of suspects by the authorities. During these actions by the authorities, the underlying law, the CPL 1996, was either directly ignored or unlawfully bypassed. To be sure, the authorities’ malpractice of the law is not the result of the indeterminacy of the law, at least in the criminal law domain, but resulted from the idea that Party policy can override the law in contemporary China.

The Li Zhuang case underlines the influence of politics on the implementation of law in the criminal justice system. Li’s conviction was not a random occurrence: Li was sentenced in the context of Chongqing’s powerful campaign to crackdown on organized crime. This campaign was initiated by Chongqing Communist Party Secretary Bo Xilai, who aimed to restructure the rule of law in Chongqing by striking down the protective network between the criminal underworld and law enforcement agencies.¹²⁰ Analogous to the “Hard Strike” campaigns, this citywide movement saw the arrest of thousands of people and the conviction of hundreds within a few months.¹²¹ Perhaps the

¹¹⁷ Liang, *supra* note 103, at 393.

¹¹⁸ *Id.* at 394.

¹¹⁹ PEERENBOOM, *supra* note 5, at 214.

¹²⁰ Ramzy, *supra* note 36.

¹²¹ *Id.*

only difference between the previous “Hard Strike” campaigns and the Chongqing crackdown is that the former targeted citizen criminals while the latter was aimed at both gang members and corrupt officials.¹²² Politically, this campaign has earned considerable praise for both the government and Bo. A brief statistical survey shows that an overwhelming majority of citizens have spoken highly of the authorities’ effort to dismantle the “Black Society.”¹²³ Meanwhile, Bo’s “anti-triad tornado” has gained applause and support from the Party’s central leadership,¹²⁴ rousing intense debate as to whether similar action is feasible in other regions.¹²⁵

Irrespective of what intentions may have constituted the grounds for Chongqing’s “anti-triad crackdown,” its tactics followed the pattern of a political movement.¹²⁶ Although the leading cadres of Chongqing asserted that the crusade was operated according to the law, the swift and severe handling of criminals reflected the strength of the political impetus. Practices used during the crackdown were considered illegal and unconstitutional due to their apparent circumvention of formal procedure. In addition, some commentators claimed that, as a high-profile political figure, Bo Xilai had now become the focus of the national media because of his resolve to wipe out the “Black Forces,” by which his political fortune had been linked and his career and image had been boosted.¹²⁷

Like the hostility of the authorities toward defense lawyers in the “Hard Strike” campaigns, those who defended gang leaders in the “anti-triad” action were seen as a great obstacle to the success of the campaign. The Li Zhuang case clearly shows the authorities’ political stance toward any “disruptive element.” A review of the judicial process of Li’s case demonstrates that his conviction falls short of the basic requirements of both substantial and procedural justice.

In substance, neither the first instance nor the second trial provided clear facts and sound evidence to convict Li. All the evidence presented to the court

¹²² Willy Lam, *Mafias Expose China’s Legal Woes*, ASIAN TIMES, Nov 18, 2009, <http://www.atimes.com/atimes/China/KK18Ad01.html>.

¹²³ More than ninety-eight percent of internet users of a Chongqing local legal website expressed their delight at the crackdown. See 杨磊, 重庆打黑赢得 98% 网民支持, 行为向区县延伸 [Yang Lei, *Chongqing’s Crackdown on Black Society Won 98% Internet Users’ Support, Action Extension in Districts and Counties*], 新华日报 [XINHUA DAILY], Oct. 19, 2010, <http://news.qq.com/a/20091019/000784.htm>.

¹²⁴ Willy Lam, *Chongqing’s Mafia Expose Grave Woes in China’s Legal Apparatus*, CHINA BRIEF, Nov. 4, 2009, http://www.jamestown.org/programs/chinabrief/single/?tx_ttnews%5Btt_news%5D=35689&tx_ttnews%5BbackPid%5D=25&cHash=4211849ef6.

¹²⁵ For example, see 李鸥, 也说“重庆打黑为何不见其他地方跟进” [Li Ou, *Why the Chongqing Campaign has been Followed by Other Regions*], 决策探索 [POL’Y EXPLORATION], no. 21, 2009, at 85.

¹²⁶ Luo Ya, *Fierce Campaign in Chongqing Reminiscent of Cultural Revolution*, THE EPOCH TIMES, May 10, 2010, <http://www.theepochtimes.com/n2/content/view/29604/>.

¹²⁷ Lam, *supra* note 124.

was *ex parte* and collected by the investigatory agencies individually. During the court sessions, the evidence was examined only in written form without the presence of witnesses. Moreover, the written evidence was gathered from the detained suspects. Procedurally, the case developed surprisingly fast. Given the low efficiency of the Chinese authorities in handling criminal cases in general, the brief weeklong criminal process of Li's case was unprecedented among cases implicating lawyers. Some legal scholars thus observed that Li's procedural rights, such as the legal right to apply for bail and avoidance of conflicts of interests, were disregarded when the proceedings were significantly shortened.¹²⁸

Clearly, Li's trial lacked legality. Many legal professionals agree that the guilty verdict of Li was not according to law, but a result of political demands. This view is true in at least three particular respects. First, the expedited process of the case reflects the Party's attempt to ensure the triumph of the campaign at all costs. In launching an "anti-triad" crackdown, the government needed to show citizens its resoluteness in eradicating any obstructive elements to a secured society. Li's sentencing was seen as the best channel to convey that message. On the one hand, it signaled that during the campaign any attempt to help gang leaders avoid criminal punishment was futile. On the other hand, Li's verdict was expected to have a deterrent effect on the actions of other defense lawyers.

Second, political influence was exercised over the course of the judicial process. In sharp contrast to his claim of innocence in the first trial, Li unexpectedly pled guilty in the second trial. His confession implies that his admission of guilt was a result of a compromise reached with the authorities. Furthermore, Li also implied that the Party was involved in his "6-Point" final statement based on its contents. The first point states:

During criminal detention, my thoughts have changed a lot. Thanks to my patient education by leaders and institutions at different levels, I have gradually acknowledged that my actions have tarnished the duty of lawyers and have fallen short of the professional ethics of a legal practitioner.¹²⁹

His declaration enabled legal commentators to believe that his plea of guilty was enticed by "relevant departments" (有关方面) (*youguan fangmian*).¹³⁰ As the case continued to cause scholarly controversy, the authorities were facing

¹²⁸ See 赖丽华, 没有程序正义的打黑只能是黑打 [Lai Lihua, *The Lack of Proceduralism Makes Strike Black Society Movement an Illegal Action*], 江西网 [JIANGXI NET], Jan. 4, 2010, <http://blog.jxcn.cn/u/jxsskylh/86341.html>.

¹²⁹ 李晨, 李庄陈述'藏头'暗示被逼认罪 [Li Cheng, *Hidden Messages in Li Zhuang's Statement Implies His Forced Confession*], 北京青年报 [BEIJING YOUTH DAILY], Feb. 6, 2010.

¹³⁰ 郭国松, 谁是李庄案的受害者 [Guo Guosong, *Who Are Victims of the Li Zhuang Case*], 中国民商法律网 [CHINESE CIV. & BUS. L. WEB], <http://www.civillaw.com.cn/article/default.asp?id=48079>.

mounting pressure from the legal community, in particular from legal practitioners and professors. To prevent broader suspicion of the righteousness of the “anti-triad” campaign, it was imperative for the authorities to make a plea bargain with Li. According to the speculation of Li’s defense lawyers, the authorities were supposed to promise Li a reduced sentence and probation in return for his confession.¹³¹ The plea bargain explains Li’s outburst in the end of the appeal trial. Upon hearing the final verdict of an 18-month incarceration, Li immediately accused the authorities of breaking their promises and denied his guilty plea by explaining it as merely having been a defense strategy.

Third, media propaganda was widely employed to rationalize Li’s conviction. Despite the strong skepticism of the legal community towards the handling of Li’s case, local and national media uniformly condemned Li. Most of their arguments were based on the justice of the crackdown on gangsters.¹³² Such wide-scale reports successfully fanned public sentiment against any discouraging factors to the operation of the “anti-triad” campaign. Even though Li’s charge under Article 306 remained highly debatable among legal professionals, the masses were convinced of Li’s immoral behavior in helping his client escape legal punishment. Acquiring the support of citizens has commonly been integral to the success or failure of Chinese political movements. The Chinese government firmly believes that launching political campaigns means waging war on class enemies and requires grassroots support to maintain the established proletariat order.¹³³

Indeed, political concerns can trample law in China. However, it is unfair to place blame exclusively on political causes for the impediment of Chinese defense lawyers. The politically-motivated campaigns were short-term in nature, and took place periodically in China in light of diverse societal needs. In fact, given the distinctive legal culture and institutional framework in China, there are certain ideological factors that lead to the crooked enforcement of the law by the authorities, which prevent defense counsel from performing pre-trial legal duties.

B. Ideological Factors

The concept of the legal profession has been relatively alien to the Chinese legal system. Unlike judges, procurators, and the police, all three of which can be traced to prototypes in China’s ancient legal systems, lawyers have no real equivalent in ancient China.¹³⁴ Instead, because the dominant Chinese

¹³¹ 龙婧, 陈有西: 李庄案正面意义极其深远 [Long Jin, Chen Youxi: Li Zhuang Case Has a Far-Reaching Positive Meaning], 时代周报 [TIMES WKLY.], Apr. 7, 2010, <http://www.time-weekly.com/show.php?contentid-6461.html>.

¹³² *Id.*

¹³³ Tao, *supra* note 95, at 102.

¹³⁴ Yi, *supra* note 9, at 1.

philosophy of Confucianism applauded harmony and disdained formal disputes, lawyers were thought to be devious, and the legal profession did not take shape as a class in ancient Chinese society.¹³⁵ This perception, however, was changed by virtue of the introduction of Western legal theories and systems in the early eighteenth century.¹³⁶ By the end of the Qing Dynasty, the first generation of Chinese criminal lawyers emerged in the context of the immense influx of Western culture.¹³⁷ Law schools were established and lawyers started practicing in the courts according to the Criminal Procedure Law drafted by Shen Jiaben.¹³⁸ However, the rapid development of the Chinese legal profession did not occur until the Nationalist government was in power from 1912 to 1949. During that period, the legal system was modernized and numerous lawyers started legal businesses in large coastal cities such as Shanghai.¹³⁹

The legal profession in post-1949 China has undergone some difficulties. Before the enactment of the 1979 Criminal Procedure Law ("CPL 1979") and the 1982 Provisional Regulations of China on Lawyers, criminal defense lawyers were generally thought of as symbols of bourgeois values. More precisely, according to the proletariat rationale, defense lawyers represented the interests of the enemy and preserved class distinctions, so they were seen as an ideological foe that the Communist regime sought to eradicate.¹⁴⁰ As a result, intermittent eliminations of the legal profession took place during government-launched political campaigns, and in particular, during the Anti-Rightist Movement and the Cultural Revolution.¹⁴¹

Lawyers began to reappear with the economic reforms that were initiated in 1979.¹⁴² Having recovered from political turmoil, the ruling regime realized

¹³⁵ Although there had emerged a group of 'litigation tricksters' (*Songgun*) [讼棍] that resembled western lawyers in the past, their job was merely to draft complaints and provide legal advice. See Frankie Fook-Lun-Leung, *The Re-Emergence of the Legal Profession in the People's Republic of China*, 6 N.Y.L. SCH. J. INT'L & COMP. L. 275 (1985); Rojek, *supra* note 1, at 143.

¹³⁶ VICTOR H. LI, *LAW WITHOUT LAWYERS: A COMPARATIVE VIEW OF LAW IN CHINA AND THE UNITED STATES* 19 (1978).

¹³⁷ 张志铭, 当代中国的律师业: 以民权为基本尺度 [Zhang Zhiming, *Lawyer Industry in Contemporary China: Civil Rights as the Basis Yardsticks*], in 走向权利的时代 [TOWARDS AN ERA OF RIGHTS] 140 (夏勇 [Xia Yong] ed., 中国政法大学出版社 [China University of Political Science and Law Press]) (2000).

¹³⁸ 徐家力、吴运浩, 中国律师制度史 [XUE JIALI & WU YUNHAO, *INSTITUTIONAL HISTORY OF CHINESE LAWYERS*] 45 (中国政法大学出版社 [China University of Political Science and Law Press]) (2000).

¹³⁹ Li, *supra* note 136, at 21.

¹⁴⁰ Yi, *supra* note 9, at 4.

¹⁴¹ 熊秋红, 新中国律师制度的发展历程及展望 [Xiong Qiuhong, *Developments and Prospects of the Legal Profession in the New China*], 中国法学 [CHINESE LEGAL SCI.], no. 5, 1999, at 15.

¹⁴² Jerome Alan Cohen, *China's New Lawyers' Law*, 66 A.B.A. J. 1533 (1980).

that lawyers were essential to the construction of a socialist legal system and to the success of much needed economic reforms.¹⁴³ For example, the CPL 1979 and the Interim Regulations of China on Lawyers¹⁴⁴ both recognized that along with a legal framework, the criminal defense lawyer was one component of criminal procedure. However, at the same time, lawyers were clearly defined as state workers.¹⁴⁵ Their primary responsibilities were not to protect their clients' legal rights, but to promote the socialist legal order and to be faithful to the cause of socialism and the interests of the people.¹⁴⁶ That being so, duties carried out by defense lawyers under the CPL 1979 were in practice limited to persuading suspects to confess in hopes of obtaining a lenient sentence.¹⁴⁷

China's legal profession made great strides on both statutory and technical sides in the 1990s. While the 1996 Lawyers' Law redefined lawyers as legal practitioners who may provide society with legal services, the CPL 1996 significantly expanded defense lawyers' functions in the criminal process, particularly in the pre-trial phase. Meanwhile, because the importance of lawyers to the legal system had grown, the new Lawyers' Law was promulgated. In this law, considerable procedural protections were accorded to lawyers during their defense work. To date, many legal scholars take the view that China's legal profession has gained significantly not only in official recognition but also in social acceptance.¹⁴⁸ Criminal defense lawyers are no longer rendered meaningless. On the contrary, seeking lawyers has become the first option of suspects and their families. Needless to say, the wider range of legal services that defense lawyers may offer in the pre-trial stage enables them, at least on the books, to embody their given role in the criminal process.

Nevertheless, in reviewing the growth of the legal profession in China, it is not difficult to notice that the development of the legal profession has never been spurred by the rights-oriented philosophical thinking that sprang from democratic movements.¹⁴⁹ The heightening of the lawyer's role in China is the

¹⁴³ PEERENBOOM, *supra* note 5, at 347-48.

¹⁴⁴ 中华人民共和国律师暂行条例 [Interim Regulations of the People's Republic of China on Lawyers] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 26, 1980, effective Jan. 1, 1982), available at <http://www.lawinfochina.com/display.aspx?id=9&lib=law> [hereinafter Interim Regulations on Lawyers].

¹⁴⁵ Article 1 of the Interim Regulations on Lawyers states: "Lawyers are state legal workers whose task is to give legal assistance to state organs, enterprises and institutions, public organizations, people's communes and citizens in order to ensure the correct implementation of the law and protect the interests of the state and collectives as well as the lawful rights and interests of citizens." *Id.* at art. 1.

¹⁴⁶ *Id.* at arts. 2-3; LUBMAN, *supra* note 6, at 154.

¹⁴⁷ CHEN RUIHUA, *supra* note 1, at 562.

¹⁴⁸ Fu, *supra* note 6, at 31; Lu Hong & Terence D. Miethe, *Legal Representation and Criminal Processing in China*, 42 BRIT. J. CRIMINOLOGY 273 (2002).

¹⁴⁹ 熊秋红, 刑事辩护论 [XIONG QIUHONG, TREATISE ON CRIMINAL DEFENSE] 26 (法律出版社 [Law Press]) (1998).

by-product either of economic reforms or of the borrowing of Western legal notions. Skeptics claim that the Chinese legal profession was in reality created symbolically because there was little history of the public seeking individual rights and freedoms.¹⁵⁰ According to Confucian thinking, society's collective interests are always above individual rights.¹⁵¹ Any individual rights that are harmful to the interests of the collective must be removed, since ultimately they are harmful to the "higher" interests of individuals.¹⁵² This mentality specifically influences the administration of Chinese criminal justice. Given the Chinese tradition of emphasizing social stability, the value of crime control has always been given ultimate priority in the authorities' practices involving crime. Therefore, during criminal proceedings, the authorities are more likely to place weight on the pursuit of crime control, and to intentionally weaken lawyers' capability to challenge their exercise of power.

In the wake of the Cultural Revolution, the Chinese government has shifted its attention from political struggle to the preservation of social stability. Apparently, as the surge of economic development has continued, China has been deeply troubled by the emerging problems of crime and official corruption.¹⁵³ The transformation of a socialist traditional society to a market-based modern society has produced rapid social change as well as many new types of crimes.¹⁵⁴ At the same time, the widening income disparity between people who are "getting rich" and those who are not has created a fundamental social tension with potential for conflict.¹⁵⁵ In order to curb any traumatic disruptions of the social order before they occur, the authorities built a socialist criminal justice system and have used it as an instrument to strike down crime and corruption. An inquisitorial system was first adopted to achieve this goal. Under the inquisitorial system, Chinese law enforcement agencies, namely the police, procuratorates, and courts, were required to carry out investigation, prosecution, and trial, respectively.¹⁵⁶ However, in order to improve the efficiency of criminal proceedings, the judges were actively involved in investigation and fact-finding. Therefore, some commentators characterize this institutional feature as the "Iron Triangle," in which the

¹⁵⁰ 律师角色的理论定位与实证分析 [Xie Youping & Yan Ziming, *Theoretical Positioning and Empirical Analysis of the Lawyer's Role*], 中国司法 [JUST. CHINA], no. 10, 2004, at 42.

¹⁵¹ Randall Peerenboom, *Rights, Interests, and the Interests in Rights in China*, 31 STAN. J. INT'L L. 359, 362 (1995).

¹⁵² ROBERT WEATHERLY, *THE DISCOURSE OF HUMAN RIGHTS IN CHINA: HISTORICAL AND IDEOLOGICAL PERSPECTIVE* 76 (1999).

¹⁵³ Olivia Yu, *Corruption in China's Economic Reform: A Review of Recent Observations and Explanations*, 50 CRIME, L. & SOC. CHANGE 161, 161-62 (2008).

¹⁵⁴ LIU JIANGHONG, ZHANG LENING & STEVEN F. MESSNER, *CRIME AND SOCIAL CONTROL IN A CHANGING CHINA* 4 (2001).

¹⁵⁵ Daniel J. Curran, *Economic Reform, the Floating Population, and Crime*, 14 J. CONTEMP. CRIM. JUST. 262, 268 (1998).

¹⁵⁶ Chu, *supra* note 1, at 160.

relationship among the three agencies was sequential and coordinative for the collective purpose of combating crime.¹⁵⁷ Not surprisingly, defense lawyers played a limited role in the pre-trial process. Legally, the lawyer's involvement was restricted to the seven days immediately preceding trial. In practice, however, the great majority of defendants remained unrepresented at any stage, partly because lawyers were required to be loyal to the socialist cause and to put the interests of society first.¹⁵⁸ More importantly, the pressure of striking against increasing crime resulted in the authorities' hostile attitude toward defense lawyers, dampening the latter's enthusiasm for taking on criminal cases.

The crime control-oriented philosophy did not fade much as legal reform progressed. Acknowledging the shortcomings of the inquisitorial system, a more balanced tribunal procedure, based on the adversarial system, was introduced in the CPL 1996.¹⁵⁹ The decision to implement an adversarial-style procedure in lieu of the inquisitorial model has a twofold explanation. On one hand, the new system was adopted to improve the lawyer's effectiveness in protecting the legal rights of the accused, as limitations on lawyers' practices in the old code made the criminal process little more than a formality.¹⁶⁰ Furthermore, the adversarial scheme was expected to ensure the legality and justice of trial by redefining the role of each legal apparatus in the agency system. In particular, among the three agencies, the judiciary is supposed to act as a neutral and independent arbitrator in trying the case, rather than taking an active role in investigatory and procuratorial activities.¹⁶¹

Reality, however, differs considerably from expectations. Much evidence reveals that the ideology of crime control has still unduly dominated the operation of criminal proceedings. Legislatively, the CPL 1996 expressly states that the purpose of the law is to "punish[] crimes, protect[] the people, safeguard[] State and public security and maintain[] the socialist public order."¹⁶² Accordingly, the police, procuratorates, and courts "shall divide responsibilities, coordinate their efforts and check each other to ensure correct and effective enforcement of law."¹⁶³ Evidently, these revised prescriptions do not alter the legal landscape of striking hard against crime in the Chinese criminal justice system. Rather, the ideal of crime control appears to be intensified and further imbued in the mentality of law enforcement agencies.

¹⁵⁷ Liu & Halliday, *supra* note 6, at 925.

¹⁵⁸ LAWYERS COMMITTEE FOR HUMAN RIGHTS, CRIMINAL JUSTICE WITH CHINESE CHARACTERISTICS: CHINA'S CRIMINAL PROCESS AND VIOLATIONS OF HUMAN RIGHTS 38 (1993).

¹⁵⁹ CHEN JIANFU, CHINESE LAW: TOWARDS AN UNDERSTANDING OF CHINESE LAW, ITS NATURE AND DEVELOPMENT 201 (1999).

¹⁶⁰ Turack, *supra* note 6, at 59.

¹⁶¹ Pamela A. Seay, *Law, Crime and Punishment in the People's Republic of China: A Comparative Introduction to the Criminal Justice and Legal System of the People's Republic of China*, 9 IND. INT'L & COMP. L. REV. 143, 148 (1998).

¹⁶² CPL 1996, *supra* note 3, at art. 1.

¹⁶³ *Id.* at art. 7.

Over time, some legal scholars have noted that, compared to the “Iron Triangle” under the inquisitorial system, the way in which the authorities carry out criminal justice under the adversarial system can be vividly depicted as a “streamlined work process.”¹⁶⁴ In this view, the criminal procedure is divided into three independent but interrelated stages, namely the investigatory, procuratorial, and trial stage. At each phase, the police, procuratorates, and courts are responsible for investigation, prosecution, and adjudication, exclusively.¹⁶⁵ Although the adversarial system endows different law enforcement agencies with different roles in the criminal process, their practices in essence serve to criminalize suspects when taken as a whole. In particular, the administration of criminal justice by the judiciary manifests this effect. It is true that the courts under CPL 1996 are required to act as a neutral legal organ to impartially try each case, but practical judicial work shows that the courts serve mostly as the last in a series of actors to fulfill the goal of combating crime in association with the police and procuratorates. For example, if the evidence collected by the investigatory organs is not sufficient to convict the accused, the courts may remand the cases to the procuratorates for supplementary investigation.¹⁶⁶ Similarly, in order to successfully criminalize suspects, the courts are granted power to convict suspects on charges different from those in the procuratorial indictments.¹⁶⁷ Such discretion discloses the basic nature of the judiciary as a gatekeeper to prevent suspicious persons from escaping criminal punishment, a role that is in direct opposition to that of an independent arbiter.

If the judiciary is focused on crime control, the practices of the police and procuratorates are purely accusatory. The CPL 1996, in addition to each of its various official interpretations, accords unfettered discretion to the police and procuratorates in carrying out pre-trial activities. The police, for instance, enjoy discretionary power to detain suspects. Regardless of the legality of all forms of detention, when the accused are incarcerated, the police are more likely to obtain crucial evidence by using illegal means such as torture and beatings.¹⁶⁸ Likewise, in order to initiate prosecution successfully, the investigatory and procuratorial organs often only submit evidence that is of benefit to the prosecution, selectively omitting evidence of benefit to the

¹⁶⁴ CHEN, *supra* note 68, at 333; 宋英辉、吴宏耀, 刑事审判前程序研究 [SONG YINHUI & WU HONGYAO, THE STUDY OF PRETRIAL PROCEEDINGS] 5 (中国政法大学出版社 [China University of Political Science and Law Press]) (2002).

¹⁶⁵ CHEN, *supra* note 70, at 535.

¹⁶⁶ CPL 1996, *supra* note 3, at art. 140.

¹⁶⁷ *Id.*

¹⁶⁸ AMNESTY INTERNATIONAL, PEOPLE'S REPUBLIC OF CHINA: LAW REFORM AND HUMAN RIGHTS 13 (1997); 郭志忠, 刑讯逼供的法律分析 [Guo Zhizhong, *The Legal Analysis of Forced Confession Through Torture and Ill Treatment*], 公安研究 [POLICING STUD.], no. 4, 2007, at 64.

defense.¹⁶⁹ Materials tending to exculpate are mostly neglected, hidden, or even destroyed by the police and procuratorates.¹⁷⁰ In this context, the involvement of defense lawyers in the Chinese adversarial system is unwelcome. On one hand, the legal complex is concerned that lawyers may educate suspects about useful tactics to deal intelligently with the authorities during investigation. In doing so, the suspects will feel less terrified and helpless when facing the authorities' interrogations. On the other hand, the interference of lawyers enables suspects to know about their legal rights, requiring the authorities to make greater efforts to obtain oral testimony from suspects. All these concerns animate the hostility of the legal apparatus towards defense lawyers, in addition to the harm done to lawyers' pre-trial practice by meaningless implementation of the CPL 1996.

The Li Zhuang case reflects the continuing priority placed on crime control in the administration of Chinese criminal justice. In response to allegations that Li helped his client withdraw testimony, Li claimed that his client was innocent in the first instance by asserting that Gong's confession was coerced through torture. To support his argument, Li urged the court to conduct a physical examination of Gong. However, Li's request was denied. Although Gong testified that Li's enticement was conveyed through "winks," many legal scholars agree that, given all three meetings were under the supervision of investigatory officers, what Li did fell within the scope of his legal duties and conformed to professional ethics.¹⁷¹ Hence, there is reason to believe that the immediate arrest of Li was without legal basis and a result of the authorities' eagerness to remove hurdles to convicting Gong. It is clear that anything that may have proved Gong's innocence was completely ignored by the authorities. In addition, Gong was not given a chance to hire a replacement defense lawyer to represent him at trial. Further, in order not to delay Gong's conviction, Li's criminal process was handled in an especially speedy fashion. Over the course of the proceedings, Li was deprived of his basic legal rights. Procedurally, Li's request for reassignment of the adjudicators on the grounds that they had conflicts of interest was also turned down. Substantively, Li and his lawyers were not allowed to cross-examine the witnesses and their demands for the court's help in collecting evidence were concomitantly rejected. Therefore, Li's case evidently shows that, given the strong influence of ideals of retribution and punishment in contemporary China, law enforcement agencies are unlikely candidates for promoting a more balanced criminal system with a focus on protection of suspects' rights. Without a dramatic philosophical change, the authorities most likely will

¹⁶⁹ 龙宗智, 刑事庭审制度研究 [LONG ZONGZHI, *THE STUDY OF THE CRIMINAL TRIAL SYSTEM*] 150 (中国政法大学出版社 [China University of Political Science and Law Press]) (2001).

¹⁷⁰ 史卫忠, 建立中国的刑事证据展示制度 [Shi Weizhong, *The Establishment of Chinese Criminal Evidence Disclosure System*], 人民检察 [PEOPLE'S PROCURATORATE], no. 8, 2003, at 21.

¹⁷¹ 田磊, 李庄案的深层价值 [Tian Lei, *The Deeper Value of the Li Zhuang Case*], 南风窗 [S. WIND WINDOW], Jan. 17, 2010.

continue to subordinate all procedural requirements to so-called substantive justice, and for this fundamental purpose, the criminalization of suspects will continue to be strongly favored at the expense of procedural justice, especially with respect to limitations of the lawyer's active defense work during the pre-trial period.

C. Institutional Frameworks

Even though some commentators affirm that occupational discrimination still exists and undermines appreciation of the legal profession by the general public,¹⁷² nearly thirty years of legal publicity and education have helped foster the present high esteem in which lawyers are held. As a result, the law enforcement organs accept the fact that dealing with defense lawyers is an integral part of their work in the criminal process.¹⁷³ Since the role of the lawyer has now been equalized with the government law apparatus in terms of social status, another question has been raised with regard to the deeper impetus of the authorities to hobble lawyers. More specifically, if the long-existing legal tenet of crime control can only explain the dilemma of defense lawyers at a cultural level, then there must be a more practical reason underlying the antagonism between the authorities and defense lawyers in the exercise of their powers.

The answer is clear. Despite the supremacy of crime control that has shaped the ideological cause, certain institutional frameworks that have long been employed in the hierarchy of Chinese legal institutions account for this contradiction. To be precise, the Evaluation System (绩效考核制度) (*jixiao kaohe zhidu*), 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. Ever since the resurgence of legal institutions in 1978, there has been an administrative evaluation system in each law enforcement agency to evaluate state officials' achievements.¹⁷⁴ The purposes of such a scheme are multifaceted. However, the principal objectives are to effectively assess law enforcers' achievements, working ability, professional knowledge, and political ethics to determine their rewards, promotions, training, salary adjustments, and demotions.¹⁷⁵ It is common that in the criminal law arena, the highest evaluation standards are closely related to the rate of prosecution in successfully handling criminal

¹⁷² Gelatt, *supra* note 5, at 776; Yi, *supra* note 9, at 5.

¹⁷³ Chen, *supra* note 43, at 5.

¹⁷⁴ 万毅, 师清正, 检察院绩效考核实证研究—以 S 市检察机关为样本的分析 [Wan Yi & Shi Qingzheng, *Empirical Study of the Appraisal System in the Procuratorates—Sample Analysis Based on Procuratorates of S City*], 东方法学 [ORIENTAL L.], no. 1, 2009, at 28.

¹⁷⁵ CHEN RUIHUA, *supra* note 10, at 311-13; 农中校, 论检察官绩效考核机制 [Nong Zhongxiao, *The Discussion of the Appraisal System of Prosecutors*], 正义网 [JUST. NET], June 28, 2004, <http://review.jcrb.com/zyw/n635/ca388401.htm>.

cases. For example, the promotion of or reward for an investigatory officer is in general dependent on the percentage of submitted cases finally prosecuted by the procuratorate.¹⁷⁶ Likewise, the evaluation of a prosecutor's performance is mainly tied to conviction rate.¹⁷⁷ Those who have a high percentage of successful cases are most likely to be promoted and rewarded internally in the next round of tenures. On the contrary, if the case is annulled, exempted from prosecution by the court, or the suspect freed by judges during the trial, the responsible prosecutor will be marked with a demerit (记过) (*jiguo*) and will lose the opportunity to compete for upcoming prizes and promotions.¹⁷⁸

In addition to the reward system, a wrong-case responsibility system (错案追究制度) (*cuo'an zhuijiu zhidu*) constitutes another salient part of the evaluation mechanism. The wrong-case responsibility system is designed to administratively penalize police, procuratorates, and court officers for their incorrect handling of cases. According to the Regulation of the Procuratorates of Being Responsible for Wrongly-Handled Cases (人民检察院错案责任追究条例) (*renmin jianchayuan cuo'an zeren zhuijiu tiaoli*), the term "wrongly-handled case" refers to the wrongly-handled case that results from either deliberate disregard of law and facts by procuratorates, or negligent mistakes made by prosecutors that cause serious consequences.¹⁷⁹ Similar stipulations also appear in various other regulations of the public security organs at different levels. In brief, investigators are responsible for wrongly-handled cases that were initially handled based on the police's immoral intent to complete investigations more quickly.¹⁸⁰ Nevertheless, 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 delinquency of duty by the authorities. Subsequently, the corresponding law enforcement officers are supposed to receive internal punishments from their working agencies. The penalties are wide-ranging, falling across a spectrum from administrative disciplinary measures (行政处罚) (*xingzheng chufa*) to economic sanctions. For instance, most Beijing district courts employ administrative warnings, demerits,

¹⁷⁶ 姜理军, 论我国公安机关的绩效评估机制 [Jiang Lijun, *The Discussion of the Appraisal System in the Public Security Organs*], 公安学刊 [J. ZHEJIANG POLICE C.], no. 6, 2002, at 80.

¹⁷⁷ 王新环, 定罪率与绩效考核 [Wang Xinhuan, *Conviction Rate and the Appraisal System*], 中国检察 [CHINESE PROCURATORATES], no. 9, 2003, at 49.

¹⁷⁸ The evaluation on the prosecutor's performances is not limited in the success rate of criminalizing suspects, but include a wide range of procuratorial activities, such as the correct approval of arrest, bringing the timely prosecution and providing sufficient written documents for prosecution, etc. See Wan & Shi, *supra* note 174, at 34-35.

¹⁷⁹ Chapter 2, the Regulation of the Procuratorates Being Responsible for Wrongly-Handled Cases.

¹⁸⁰ See Chapter 2, the Regulation of Shangxi Police, Procuratorates and Courts of Being Responsible for Wrongly-Handled Cases.

allowance deductions, and demotion as sanctions.¹⁸¹ Being responsible for an unsuccessful case can have a negative impact on the officer's political prospects or personal income.

In some ways the evaluation system benefits the quality, efficiency, and general effectiveness of criminal prosecution. However, its chilling effect on the authorities' willingness to obey procedural requirements has significant consequences. The internal evaluation system expressly dispenses reward and punishment to Chinese law enforcement officers according to incrimination rates of suspects in their cases. A higher success rate will likely earn a better position and better economic prospects. The personal responsibility mechanism, however, may seriously impede an officer's career if he is made liable for a "wrong case." As such, to maximize personal interests, law enforcement officers have to concentrate more on how to secure the conviction of the accused than how to administer criminal proceedings in accordance with legal prescriptions for proper procedure. Self-interest explains the authorities' circumvention of procedural justice. For example, investigatory and procuratorial personnel opt to collect and submit only evidence that supports prosecution. Meanwhile, illegal means such as torture and unlawfully long detention are frequently deployed to extract confessions from suspects in an attempt to ensure a guilty verdict. Moreover, the judiciary, as an ally in the legal institutional framework, is more willing to convict suspects because any claim of innocence or acquittal by the courts will activate the wrong-case responsibility system, making police and procuratorial officers liable for the failure to convict. This is true regardless of the claim that the Chinese judiciary is actually an accusatory actor in the criminal process.

Clearly, pressured by the evaluation system, the defense lawyers' role in protecting suspects' procedural rights is viewed as fundamentally conflicting with the authorities' individual interests. Although there is little doubt that a considerable number of procedural violations take place during the authorities' handling of criminal cases, most illegal actions are rarely revealed by suspects because, in part, isolation makes it impracticable to report the authorities' behavior to the outside world. The accused may be inclined to tolerate illegal governmental activities in hopes that their cooperation will be rewarded with more lenient treatment during trial.¹⁸² The lawyer's intervention, nonetheless, exerts a great impact on suspects' cooperative attitudes towards the authorities, instantly weakening the authorities' advantageous position in the pre-trial process.

As Chinese lawyers' defense tactics become more Western-styled by increasingly making use of procedural defenses,¹⁸³ the actions of an increasing number of authorities in violation of pre-trial procedural stipulations have

¹⁸¹ 葛磊, 法院错案追究制度分析 [Ke Lei, *The Analysis of the Judicial Wrong-Case Responsibility System*], 中国司法 [JUST. CHINA], no. 4, 2004, at 36.

¹⁸² Yi, *supra* note 9, at 27.

¹⁸³ 陈瑞华, 程序性制裁制度的法理学分析 [Chen Ruihua, *The Analysis of Legal Theories of Procedural Sanctions*], 中国法学 [CHINA LEGAL SCI.], no. 6, 2005, at 152.

become the target of lawyers' attacks during trial.¹⁸⁴ Specifically, lawyers now tend to make use of the authorities' infringements of suspects' procedural rights to invalidate illegally obtained evidence that is disadvantageous to suspects. Although procedural violations have not yet become technicalities capable of freeing suspects in China,¹⁸⁵ exclusionary rules do exist in the Chinese criminal justice system. Article 43 of CPL 1996 states, "It shall be strictly forbidden to extort confessions by torture and to collect evidence by threat, enticement, deceit or other unlawful means."¹⁸⁶ The Supreme People's Court later elucidated this provision in its judicial interpretation. Article 61 of the Interpretation on Several Issues Relating to the Implementation of the CPL provides that any illegally obtained evidence ought not to be used as legal grounds for conviction.¹⁸⁷ As such, the strategy of procedural defense has gained popularity among lawyers, and some prominent defense lawyers like Li Zhuang have relied on it as a general weapon in their quiver of defense arguments.

Although it is true that effective procedural defense does not necessarily result in the exoneration of suspects, the increasing exposures of authorities' wrongdoing by lawyers has elicited fear among authorities, at least to an extent. As the policy of the rule of law has gradually aroused the legal consciousness of the general public, Chinese citizens have become sensitive to the illegality of the actions of authorities. In particular, the media is keen to report typical cases with regard to authorities' malpractice to cast doubt on progress of the rule of law.¹⁸⁸ The mounting pressure of the masses, to a great extent, compels the courts to exclude corrupt evidence from trials, in an attempt to uphold the good image of Chinese criminal justice. Not surprisingly, without judicial collaboration, the police and procuratorates need to be more cautious about unlimited exercise of their powers. Significantly, illegal measures used to extract suspects' confessions are strictly prohibited, which has increased authorities' difficulties in securing "crucial evidence" for the convictions of suspects, in turn increasing the possibility of producing "wrongly-handled cases."

¹⁸⁴ Lu Hong and Terance D. Miethe point out in their study that the courts are unlikely to accept the lawyer's defense argument based on the truthfulness of the fact in the trial. See Lu & Miethe, *supra* note 147, at 277.

¹⁸⁵ 张会峰, 刑事诉讼法中的程序性裁判 [Zhang Huifeng, *Procedural Judgment in the Criminal Process*], 法学 [LEGAL SCI.], no. 4, 2002, at 37. For a detailed discussion of procedural violations in the Chinese criminal process, see 陈瑞华, 程序性制裁理论 [CHEN RUIHUA, THE THEORY OF PROCEDURAL SANCTIONS] 1-67 (中国法制出版社 [China Rule of Law Press]) (2005).

¹⁸⁶ CPL 1996, *supra* note 3, at art. 43.

¹⁸⁷ *Id.* at art. 61.

¹⁸⁸ For example, the media has disclosed a number of deaths in detention centers. In the reports, the deceased suspects were uniformly found dead with several injuries to vital body parts. See Wang Jingqiong & Chen Xin, *Detainees Dies Mysteriously in Henan*, CHINA DAILY, May 28, 2010; Xin Dingding, *Latest Detention Death Sparks Questions*, CHINA DAILY, Dec. 19, 2009.

CONCLUSION

As the continuing surge in endorsing the rule of law in China carries on, defense lawyers will most likely continue to move toward a legal profession that meets the high standards of properly qualified actors in the criminal process. However, the pace and path of reform will be determined primarily by the political atmosphere and the degree of ideological and institutional change in the country. Given that there are no signs that the Party is willing to retreat from the administration of the criminal justice system, political forces will continue to influence the direction of the authorities' administration of the criminal justice system. Further, ideological and institutional overhauls are very likely to encounter obstacles as well. Given the high value attached to punishment and retribution, the ideals of which deeply permeate Chinese legal culture, the extent to which the state is ready to consider the protection of suspects' rights as commensurate in importance with crime control is questionable. Therefore, some legal professionals suggest that the government first must embark on piecemeal legal reforms in the normative framework. The purpose of reform is arguably to employ compulsory legal norms to reformulate the authorities' pre-trial practices in hope that lawyer's rights in defense practice will be guaranteed by authority of law.

An examination of relevant scholarly views has shown that the establishment of a pre-trial judiciary review system as well as a procedural sanction system has gained massive support from the Chinese legal academy. The majority of Chinese scholars argue that an independent judiciary review may effectively prevent lawyers' legal rights from being arbitrarily violated by the authorities.¹⁸⁹ Fuelled by the practices of modern law in other countries, the Chinese judicial review system is expected to function in two major channels. First, the general power to approve the lawyer's pre-trial activities should lie with the judiciary instead of with the police and procuratorates.¹⁹⁰ Given that the Chinese investigatory and procuratorial agencies are reluctant to offer cooperation to lawyers, and even willfully hinder lawyers' performances of legal duties, a review procedure presided over by an impartial third party would increase the ability of defense lawyers to secure useful evidence.¹⁹¹ Second, the judicial review system should hear lawyers' appeals of infringement of their rights by the authorities.¹⁹² At present, lawyers who are

¹⁸⁹ 熊秋红, 从刑事司法国际标准的角度看我国刑事辩护制度 [Xiong Qiuhong, *Reviewing Chinese Criminal Defense from the Perspective of International Criminal Justice Standards*], 法学评论 [L. REV.], no. 2, 1998, at 61; 吴宏耀、张燕, 我国刑事辩护的困境与出路 [Wu Hongyao & Zhang Yan, *The Plight and Resolutions of Chinese Defense Lawyers*], 中国司法 [JUST. CHINA], no. 12, 2004, at 25; Yi, *supra* note 9, at 27-28.

¹⁹⁰ CHEN RUIHUA, *supra* note 8, at 184.

¹⁹¹ 章烽, 律师诉讼权利救济的价值分析与程序建设 [Zheng Feng, *Value Analysis and Procedural Construction of Legal Resort for Lawyers' Legal Rights*], 中国司法 [JUST. CHINA], no. 8, 2008, at 58.

¹⁹² CHEN RUIHUA, *supra* note 10, at 262.

deprived of their rights cannot bring a lawsuit but must seek administrative redress from law enforcement agencies. In this sense, the chances of correcting the behavior of authorities are undeniably negligible. Some Chinese legal scholars thus point out that an impartial judicial supervision system is badly needed to provide aggrieved lawyers with prompt legal recourse. Compared to an internal review, an external examination by the judiciary of the lawfulness of the authorities' actions during the criminal process is more likely to nullify the authorities' wrong decisions,¹⁹³ creating a more protective environment for lawyers to carry out their pre-trial defense work.

In addition to the judicial review mechanism, some legal professionals further advocate a procedural sanction system (程序制裁制度) (*chengxu zhicai zhidu*) to rule out the influence of the authorities' actions that fail to comply with procedural rules. Chen Ruihua, one of the leading Chinese scholars specializing in the Chinese criminal justice system, frequently highlights this point of view in his works. He firmly believes that it is imperative to invalidate any evidence, prosecutions, or adjudicatory decisions derived from violations of legal procedure.¹⁹⁴ At the same time, the authorities that made a procedural mistake must bear responsibility for negative results of their illegal conduct, such as the exoneration of suspects. Under such an arrangement, the incentive of the authorities to serve crime control by knowingly ignoring procedural requirements will be overshadowed to a great extent by the chance of a wrongly-handled case based on a procedural violation. In terms of lawyers' defense work, Chen specifically asserts that any situations disadvantageous to suspects stemming from violations of lawyers' legal rights should be precluded from constituting legal grounds for final verdicts.¹⁹⁵ For instance, given a situation in which procuratorates hide crucial evidence from lawyers in the procuratorial stage but bring it forth during trial, Chen suggests that such evidence should be completely excluded from the procuratorial evidence list as well, because by such actions the lawyer's privileged right to access evidence is greatly diminished.¹⁹⁶

Indeed, such legal proposals to enhance the lawyer's role in the pre-trial process exist on paper. However, it is a truism that there are serious doubts about the effectiveness of the above-mentioned legal reforms in the context of the current legal culture. Just as the CPL 1996 was initially relied on to equalize the balance of power between crushing out crime and protecting suspects' rights, and then failed to do so, the proposed legal mechanisms are likely to run into similar ideological and institutional impediments in their

¹⁹³ 刘根菊、黄新民, 刑事司法审查制度的内外机制条件探析 [Huang Xinmin & Liu Gengju, *The Explorations of Internal and External Conditions of the Criminal Judicial Review System*], 政法论坛 [TRIB. POL. SCI. & L.], no. 1, 2006, at 93; 任寰, 关于在我国刑事诉讼中建立司法审查制度的构想 [Ren Huan, *The Ideas of Constructing the Judicial Review System in the Chinese Criminal Process*], 法学 [LEGAL SCI.], no. 4, 2000, at 24.

¹⁹⁴ CHEN, *supra* note 185, at 159.

¹⁹⁵ CHEN RUIHUA, *supra* note 10, at 264.

¹⁹⁶ *Id.* at 263.

implementation. In essence, because of the deviousness of legal development in China, extralegal factors have always wielded undue influence on the implementation of law. Many legal issues in China cannot be resolved by legal measures, but are likely to be determined by deeper factors such as political considerations. This, however, does not mean that an idealized pre-trial defense system will never appear in Chinese lawmaking. On the contrary, given that the Party remains dominant in every aspect of Chinese people's lives, it could be the Party that stabilizes China's legal progress. Perhaps real improvement in the lawyer's role will eventually be a part of the Party's will and its commitment to constructing a state genuinely ruled by law.

