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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

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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

Ping Yu*

ABSTRACT

In this Article, the Author examines the recent revisions to the Chinese Criminal Procedure Law. The Author maintains that while the revisions were intended to promote a more equitable criminal justice system, the political climate in fact has rendered the revisions a step down for both defense attorneys and defendants. The Author analyzes different aspects of the revised law in order to support this point. In his conclusion, the Author suggests some changes to the criminal procedure law that may help to bring the Chinese defense system up to international standards.

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* Research fellow at the New York University School of Law. The Author is extremely grateful to many who have helped to formulate this Article, including judges, lawyers, prosecutors, law enforcement officers as well as legal scholars being interviewed in the cities such as Beijing, Shanghai, Wuhan, and Xian during 1999-2001. The Author also would like to acknowledge that the Open Society Institute (OSI), where the Author was a senior fellow during 1998-1999, kindly sponsored the research trips to China and provided financial support. Miriam Porter, a program officer at OSI, deserves a special credit for her enthusiastic help and advice in many aspects. My thanks also go to Ms. Sophia Woodman for her patience in reading and commenting on the earlier version of this Article.

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I. INTRODUCTION

Historically, Chinese lawyers have been characterized as “state legal workers”¹ who were supposed to safeguard the interests of the state instead of their particular client. An independent lawyer who confronts the state prosecutor is alien to the Confucian tradition. During the Dynasty period, individuals who aided others in litigation or advised them in legal matters were treated negatively by the government and were given the nickname “litigation tricksters” (*song gun*).² Ironically, there was an official recognition of the legitimate need for legal service, particularly in view of the high rate of illiteracy in the society.³ While there remained a hostile attitude toward the legal professional into the Republic era, some changes were made following efforts to modernize the legal system.

After seizing power, the Chinese Communist Party (CCP) immediately abolished all Republic of China laws and prohibited the

1. Zhonghua Renmin Gongheguo Lushi Zhanxing Tiaoli [Interim Regulations of the People's Republic of China on Lawyers] art. 1 (1980) (passed by the Standing Committee of the National People's Congress on Aug. 26, 1980), translated in 19 I.L.M. 1451, 1456, available at <http://www.chinalegal.net/databank/lawdata/eng/c0058.htm> (last visited Feb. 24, 2002) [hereinafter Interim Regulations on Lawyers].

2. Timothy A. Gelatt, *Lawyers in China: The Past Decade and Beyond*, 23 N.Y.U. J. INT'L L. & POL. 751, 751 (1991).

3. PEERENBOOM, R. P., LAWYERS IN CHINA: OBSTACLES TO INDEPENDENCE AND THE DEFENSE OF RIGHTS 11 (1998).

practice of the abolished laws by legal professionals.⁴ As an independent profession, lawyers virtually disappeared from society. In the mid-1950s, however, China began to rehabilitate the legal system after the enactment of the Constitution⁵ and the Organic Law of People's Courts.⁶ The total number of lawyers nationwide in 1995 totaled only eighty-one in twenty-six cities.⁷ The number of lawyers grew rapidly in the following year to 2800.⁸ The number of bar associations was nineteen nationwide.⁹ With the introduction of the Anti-Rightist Campaign in 1957, lawyers were criticized and purged. Many lawyers were sent to labor camps for re-education because of their professional role in defending the criminally accused. Until 1959, the government closed all law offices through which lawyers provided legal services throughout the nation. Again, lawyers vanished from the normal life of the ordinary Chinese.¹⁰

In the two decades between 1959 and 1980, China did not have any active lawyers, nor did China have any viable laws to be practiced by lawyers. The introduction of the Interim Regulations on Lawyers enacted by the National People's Congress Standing Committee on August 26, 1980 began the rehabilitation of the role of lawyers. Chinese lawyers have played an increasingly important role, initially in the commercial area and then in all aspects of society.

More specifically, the Lawyers Law of People's Republic of China (Lawyers Law), which was promulgated in 1996, turned a historical page for the legal profession.¹¹ Under the Lawyers Law, a lawyer is defined as "a professional who provides society with legal service" (*wei shehui tigong falu fuwu de zhiye ren yuan*) instead of "a state legal worker" (*guojia de falu gongzuozhe*) as in the old provision.¹² This change is expected to enable lawyers to work more independently and to provide legal services more effectively. In

4. Gelatt, *supra* note 2, at 753.

5. ZHONGHUA RENMIN GONGHEGUO XIANFA [CONST.] art. 75 (1954), translated in LIU, SHAO-CHI, REPORT ON THE DRAFT CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA 67, 94 (1954) [hereinafter 1954 Constitution]. The first Constitution of the People's Republic of China ("1954 Constitution") was passed by the National People's Congress on September 20, 1954. *Id.* Article 75 of the 1954 Constitution stipulated that the accused has the right to retain a defender. *Id.*

6. [Organic Law of the People's Courts of the People's Republic of China]. The Organic Law of the People's Courts of the People's Republic of China was enacted on September 28, 1954. *Id.* Article 7 of the 1954 Organic Law stated: "Apart from exercising self-defense, defendant may retain a lawyer to conduct defense. . . ." *Id.*

7. ZHANG GENG ET AL., ZHONGGUO LUSHI ZHIDU FAZHANG DE LICHENGBEI [A MILESTONE IN THE PROGRESS OF THE CHINESE LAWYERS SYSTEM] 3 (1997).

8. *Id.*

9. *Id.* at 4.

10. *Id.* at 6-8. See also PEERENBOOM, *supra* note 3, at 15.

11. For details of the process of drafting the Lawyers Law, see generally ZHANG GENG ET AL., *supra* note 7.

12. Interim Regulations on Lawyers, *supra* note 1, art. 1.

addition, the Lawyers Law details the scope of legal services that a licensed lawyer can provide and ensures that lawyers are protected by law while performing their legal duties.¹³ Lawyers are also legally required to provide legal aid to indigent people.¹⁴ The Lawyers Law provides a legal guarantee for the lawyer's practice in a psychological and arguably a material sense. Overall, the Lawyers Law brings prosperity to the legal profession. The upsurge of the legal profession can be seen from its booming numbers. As of May 15, 2001, China had approximately 117,000 lawyers serving in 9,691 law firms.¹⁵

In spite of diverse practice areas, Chinese lawyers were primarily recognized for their function in criminal proceedings. Not coincidentally, the rectification of the legal system was initially focused on the lawyer's role in the criminal process.¹⁶ This public image was partly reinforced by the official campaign on enhancing public awareness about the law (*puji falu changshi yundong*), of which the publicity of criminal cases and process has been a prominent feature. Further, the Chinese media coverage of law has mainly told the story of the criminal trial.

In addition, the revision of the Criminal Procedure Law (CPL) in 1996 highlighted the role of the lawyer in the criminal process and allowed the lawyer to participate in the process as early as the preliminary stage.¹⁷ The revised CPL seemingly paved the way for lawyers to further glorify their career in criminal defense. The 1996 revision also included other reforms such as the procedural improvement aimed at introducing a more active role for lawyers in the trial process. International society and the human rights watchdogs warmly welcomed these reforms.¹⁸ It was hoped that lawyers would play a significant role in the criminal process in terms of safeguarding the defendant's or suspect's rights and bringing the criminal trial closer to the internationally recognized standards.

As this Article will demonstrate, however, subsequent implementation of the CPL has indicated resilient resistance from the

13. [Lawyers Law of the People's Republic of China], art. 25, 32 (1996) [hereinafter *Lawyers Law*]. For the English translation of the Lawyer's Law, see RANDALL PEERENBOOM, *LAWYERS IN CHINA: OBSTACLES TO INDEPENDENCE AND THE DEFENSE OF RIGHTS* 111-21 (1998).

14. *Id.* art. 42.

15. See Speech of Mr. Zhang Fusen, Vice-Minister of the Justice, The Conference on Commemorating Fifth Anniversary of the Lawyer's Law on May 15, 2001 (on file with the author).

16. Gelatt, *supra* note 2, at 775.

17. [Criminal Procedure Law of the People's Republic of China], art. 96 (1996) [hereinafter 1996 CPL]. For translation of the Criminal Procedure Law of the People's Republic of China (1996), see WEI LUO, *THE AMENDED CRIMINAL PROCEDURE LAW AND THE CRIMINAL COURT RULES OF THE PEOPLE'S REPUBLIC OF CHINA: WITH ENGLISH TRANSLATION, INTRODUCTION, AND ANNOTATION* 78 (2000).

18. JONATHAN HECHT, *OPENING TO REFORM?: AN ANALYSIS OF CHINA'S REVISED CRIMINAL PROCEDURE LAW* 76 (1996) [hereinafter *OPENING TO REFORM*].

judiciary and law enforcement officers to legal reform. Contrary to the expectation of the general public, many legal provisions contained in the CPL with regard to suspect's and defendant's rights have been ignored or substantially cut short in the process. The resistance is particularly great regarding certain aspects of the involvement of lawyers in criminal cases.

As described below, a lawyer's capacity in the early stage of criminal investigation has been generally impaired. For instance, lawyers are not able to meet and communicate with clients in custody and largely fail to collect evidence on their own initiative. After prosecution, lawyers normally have less access than previously to case information gathered by the prosecution. Moreover, they can face criminal penalties for engaging in vigorous defense of their clients. The role of lawyers in legal defense envisaged in the revised CPL has been severely diminished by various implementation measures.

This Article will first review the general situation of lawyers in criminal proceedings. Then, it will examine a lawyer's practice at different stages of the criminal process by comparing the 1979 Criminal Procedure Law (1979 CPL) and the CPL. The comparison will include the investigation stage and the trial phase. It will also address the critical issue of the lawyer's risk in handling a criminal case after the revision of the CPL and the Criminal Law. Finally, the Article will assess the lawyer's role under the CPL reform and will offer comments about actions that are necessary on the part of the government in order to improve the overall system and to bring the Chinese legal system into compliance with the internationally recognized standard.

The two primary sources of information for this paper are official Chinese publications and interviews with Chinese legal scholars and practitioners both inside and outside China. In the past three years, the legal press and professional periodicals have published a large number of articles and reports on the implementation of the 1996 CPL. The Author also carried out a series of interviews with Chinese legal scholars, lawyers, judges, prosecutors, and officials of legislatures in different areas.¹⁹ These interviews provided first hand information about the implementation of the CPL in some areas. The Author also used information from observations of several criminal

19. In total, twelve judges from Shanghai, Beijing, Wuhan, Xi'an, and Shenzhen were interviewed between the period from 1999 to 2000. The judges interviewed were selected at random and represent all levels of the Chinese judiciary, including a judge from the Supreme People's Court. A total of thirty lawyers from Shanghai, Beijing, Wuhan, and Xi'an were also interviewed between 1999 and 2000. In addition, over the same period of time, the Author interviewed a total of around twenty legal scholars and several prosecutors.

trials in Beijing and Shanghai that provide details on trial reform. Finally, the Author collected various official documents, both legally enacted and internally circulated, that shed light on the real picture of CPL implementation nationwide as well as in specific localities.

II. THE LAWYER'S FORMAL ROLE AND THE REALITY OF THE CRIMINAL PROCEEDINGS

According to the stipulations of the CPL, lawyers can perform two different functions in the criminal process: provide legal counsel (*falu zixun*) and defense representation (*daili bianhu*). To safeguard the rights of defendants or suspects, the CPL allows attorneys to provide legal counseling to individuals being detained or questioned.²⁰ In contrast, the old CPL permitted attorneys to be involved in the process only after the cases were brought before the courts.²¹ After cases are transferred to the prosecutor's office for prosecution, defendants have the right to hire lawyers to handle their defense.²² Compared to the old provision, this represents a step forward.²³ While they are preparing a defense, lawyers can collect evidence and have the right to check, take note of, and duplicate the evidence collected by prosecutors.²⁴ In addition, lawyers have the right to meet with their clients and maintain communication with them.²⁵ More importantly, lawyers have the right to defend their clients in court trials, including cross-examining witnesses²⁶ and appealing on behalf of their clients.²⁷

The Chinese media, however, has reported that lawyers involved in defending criminal cases encountered great difficulties when the CPL first entered into force.²⁸ Often, during the early stages of investigation, lawyers could not obtain access to suspects held in custody by public security departments and procuratorates, although the CPL authorizes lawyers to meet with criminal suspects if the suspect so requests. Lawyers were usually required to obtain an approval from the public security departments or the procuratorate in

20. 1996 CPL, *supra* note 17, art. 96.

21. [Criminal Procedure Law of the People's Republic of China], art. 110(2) (1979), translated in LEXIS Chinalaw No. 40 [hereinafter 1979 CPL].

22. 1996 CPL, *supra* note 17, art. 33.

23. 1979 CPL, *supra* note 21, art. 110(2). The 1979 CPL provided defense attorneys with seven-days advance notice for preparing defense. *Id.*

24. 1996 CPL, *supra* note 17, art. 36.

25. *Id.*

26. *Id.* art. 156.

27. *Id.* art. 180.

28. Xia Lu, *Lushi Xingbian Shisan Nan De Wenti Ji Gaijin* [Thirteen Difficulties that Lawyers Encounter in the Course of Criminal Defense And Suggestions to Improve], ZHONGGUO LUSHI [CHINESE L.], No. 12, at 6 (1997).

order to be able to meet with their clients.²⁹

In most cases, lawyers were denied access to suspects either under the pretext of "state secrets" or for no reason at all. On a few occasions, lawyers were granted such permission, but their meetings were held under the direct supervision of the authorities, with the personnel directly in charge of the investigation (*anjian chengban renyuanyuan*) listening in on attorney-client conversations. In preparing their case, lawyers found it very hard to obtain the necessary information from prosecutors or to collect evidence on their clients' behalf.

Frequently, lawyers ran into serious trouble with prosecutors and public security personnel. In some cases, lawyers have been detained and even convicted of various crimes for doing nothing more than vigorously defending their clients and refusing to submit to official pressure. According to some official reports, the number of criminal cases represented by a defense lawyer dropped sharply nationwide after the CPL took effect, a phenomenon that aroused public concern. According to one authoritative source, lawyers presented a defense in less than thirty percent of criminal cases.³⁰ Another commentary indicates that since 1997 close to sixty percent of criminal cases had no attorney participating.³¹ This account is corroborated by official sources, noting that cases with legal defense account for only thirty percent of all cases tried during the first six months of 1997.³²

Administrative control over lawyers has been strengthened, particularly during government-sponsored campaigns. Various sources indicate that justice departments across the country have issued executive circulars regulating legal services provided by lawyers. Most of these documents establish the case reporting system and approval practices that require lawyers and firms to report "major or difficult cases" (*zhongda yinan anjian*) to the local justice department either for filing or approval purposes. In 1999, the Beijing Municipal Justice Department formally established a "leading

29. 1996 CPL, *supra* note 17, art. 96. Article 96 stipulates that only those cases involving state secrets require formal approval from the public security departments or people's procuratorates for lawyer's meetings with suspects. *Id.*

30. Liu Jinxing, *Lushi Weihe Buyuan Zuo Xingshi Bianhu?* [Why are Lawyers Unwilling to Defend Criminal Cases?], JIANCHA RIBAO [PROCURATORATE DAILY], Apr. 7, 1999, at 4. The statistics we obtained from different sources confirm each other.

31. Gao Qiong, *Lushi Yu Xingshi Bianhu* [Lawyer and Criminal Defense], in FAN CHONGYI ET AL., XINGSHI SUSONG FA ZHUANLUN 168 [SPECIAL COMMENTARY ON CRIMINAL PROCEDURE LAW] (1998).

32. ZHANG GENG ET AL., ZHONGGUO FALU YUANZHU ZHIDU DANGSHENG DE QIANQIAN HOUBOU [INS AND OUTS OF THE LEGAL AID SYSTEM COMING INTO BIRTH IN CHINA] 36 (1998). The chief author is the former Vice-Minister of Justice. *Id.*

group" within its organizational structure to handle such reports.³³ This group mainly consists of chief officials from the justice department. All cases concerning state security as well as those involving celebrities or high ranking officials above director level (*ju yi shang lingdao ganbu*) must be reported. Lawyers handling such cases must report to and abide by decisions, which may concern the substantive outcome of a case, made by the leading group.³⁴

III. INVOLVEMENT IN THE EARLY STAGE OF CRIMINAL INVESTIGATION

The 1996 reform of the Criminal Procedure Law was hailed as the "most significant legislative development in China's criminal justice system in nearly 20 years" because it expanded the rights of criminal suspects and defendants.³⁵ According to the CPL, criminal suspects and defendants can retain legal counsel upon being questioned or subjected to coercive measures by authorities.³⁶ At this stage of the proceedings, lawyers may perform the following services: provide legal advice, petition or complain to authorities on behalf of their clients, arrange for bail under the provision of "taking a guarantee and awaiting trial" (*qubao houshen*), and check with authorities on the criminal charges under which their clients are being held in custody or questioned.³⁷

Lawyers may also meet with criminal suspects or defendants and learn the details of their cases from them.³⁸ There is ample evidence, however, that lawyers have not been able to fulfill their duties for two reasons. First, the rules issued by public security departments and prosecutors set up extra restrictions on lawyers meeting with their clients. Second, individual officers dealing with criminal investigations have independently denied lawyers access to their clients.

A commentary from an author who works for the public security departments demonstrates why it is so difficult for lawyers to provide legal counsel at an early stage of the investigation:

The main reasons [for the investigating authority to refuse to allow the involvement of lawyers] may be summarized as follows:

33. [The Rules of the Beijing Municipal Justice Department on Reporting Major Legal Matters by the Beijing Law Offices], JING SI FA No. 7 (1999) (issued on Jan. 14, 1999) (on file with author) [hereinafter Rules on Reporting].

34. Rules on Reporting, *supra* note 33, art. 4-6.

35. OPENING TO REFORM, *supra* note 18, at 77-79.

36. 1996 CPL, *supra* note 17, art. 50-76. There are altogether five forms of coercive measures: compulsory summons (*juchuan*), taking a guarantee and awaiting trial (*qubao houshen*), supervised residence (*jianshi juzhu*), pre-arrest detention (*juliu*), and arrest.

37. *Id.* art. 96.

38. *Id.*

1. Lawyers are hired by criminal suspects and regarded as opponents of the investigating authority; their early involvement is detrimental to the work of cracking down on the enemy and protecting the people.
2. Lawyers provide criminal suspects with legal counsel and legal aid, which enable suspects to realize and master more knowledge and skills in self-defense; or [help them] carefully design their statements, so as to avoid critical issues about the crime and to evade legal punishment. All of these hinder the investigating authority from acquiring crucial evidence from the suspect's statement, therefore creating great difficulty for criminal investigations.
3. Criminal suspects often refuse to confess or retract their earlier statement while waiting for the involvement of a lawyer since they hope to get the lawyer's help.
4. The [authorities] believe that lawyers may [help suspects] destroy or conceal evidence after meeting with suspects and learning the details of their cases, which will cause extra trouble for the criminal investigation.³⁹

With such an official mentality, the current situation regarding the early involvement of lawyers in the criminal process can only be described as miserable.

A. *Lawyers Need Approval for Meeting Clients*

According to official investigations, post CPL working conditions for defense attorneys were disheartening. A survey by All China Lawyers Association (ACLA) undertaken from March to April 1997 found that lawyers were commonly limited or even flatly denied access to their clients.⁴⁰ In Huangshi City, Hubei Province, lawyers from fifteen law firms accepted 108 cases in which legal counsel was requested. Lawyers, however, managed to meet with their clients in only thirty of these cases. One law firm working on seven cases was not allowed a single meeting between its lawyers and their clients.⁴¹ In one province, during the period from January 1, 1997—the date the CPL entered into force—to the beginning of 1998, authorities allowed only four requests of lawyers to meet with their clients.⁴²

39. Wang Longtian, *Zhengcha Jiguan Jujue Lushi Jieru Zhengcha Huodong De Sikao* [Thoughts on the Refusal of Crime Investigation Authorities to Permit the Involvement of Lawyers in Crime Investigation Activities], GONGAN DAXUE XUEBAO [J. PUB. SECURITY U.] No.2, at 82-83 (1998).

40. Wang Ningjiang, *Lushi Tiqian Jieru Zaoyu Kunnan* [Lawyer's Early Involvement Encountering Difficulties], MINZHU YU FAZHI [DEMOCRACY AND L.], No. 19, at 18 (1997).

41. *Id.*

42. Cui Min, *Xingshi Susongfa Shishi Zhong De Wenti Yu Jianyi* [Problems and Suggestions That Have Occurred in Implementation of the Criminal Procedure Law], XIANDAI FAXUE [MOD. JURISPRUDENCE], No.1, at 19 (1998).

Many complaints have charged that lawyers were denied meetings with their clients under the pretext that the case involved "state secrets." According to the CPL, "state secrets" cases require lawyers to obtain approval to meet with their imprisoned clients.⁴³ The CPL, however, does not define the concept of "state secrets." Other regulations concerning state secrets also fail to provide a clear definition of this concept. Thus, public security departments and procuratorates have a convenient tool for preventing lawyers from having contact with their clients.

Specifically, Item 6, Article 8 of the Law on Preservation of State Secrets of the People's Republic of China (State Secrets) specifically stipulates that details of the investigation of crimes are to be protected as "state secrets."⁴⁴ In addition, a Ministry of Public Security (MPS) regulation states that all details of criminal investigations should be considered state secrets.⁴⁵ Under this provision, almost all criminal cases under investigation could be construed as involving "state secrets," and therefore advance approval for meetings between lawyers and their clients in official custody can be required. It is not clear to the extent that such excuses are being used on a nationwide basis to refuse requests from lawyers for such meetings. One article indicated that from January to March 1997, a lawyer was allowed to see the suspect during the investigation period in only one out of the forty-two cases handled by an intermediate court in Henan Province.⁴⁶ On at least one occasion, officials admitted that some public security departments were denying all requests from lawyers for meetings with their clients on a "state secrets" basis.⁴⁷ Another report said that, during the first five months of the CPL's implementation, lawyers in one city were denied meetings with their clients in sixty percent of all criminal cases.⁴⁸ In

43. 1996 CPL, *supra* note 17, art. 96.

44. [The People's Republic of China Law on Preservation of State Secrets], art. 8, § 6 (1988). The People's Republic of China Law on Preservation of State Secrets was promulgated by the National People's Congress in 1988.

45. Gong'an Gongzuo Zhong Guojia Mimi Jiqi Miji Juti Fangwei De Guiding [The Rules on State Secrets and Its Detailed Ranking Scopes Involving Public Security Work], art. 2(C)-11 (1989) (issued by the Ministry of Public Security on Oct. 17, 1989). Article 2(C)-11 states that all details of criminal cases under investigation should be considered "state secrets." *Id.*

46. Zhou Guojun, *Zhengque Renshi Lushi Yu Bei Zhuisuzhe De Guanxi Baozhang Lushi De Susong Quanli* [Correctly Appreciating the Relationship between Lawyers and the Accused and Guaranteeing Lawyer's Rights to Participate in Legal Action], ZHENGFA LUNTAN [POL. AND L. F.], No. 5, at 66 (1997).

47. Guo Guanghua, *Gonganbu Yaoqiu Geji Gong'an Jiguan Jianjue Baozhang Lushi Tiqian Jieru* [The Ministry of Public Security Requests that All Public Security Departments Strictly Guarantee Lawyers' Early Involvement in Criminal Cases], RENMIN GONGAN [PEOPLE'S PUB. SECURITY], No. 4, at 10 (1999).

48. Shao Jianping, *Qianxi Lushi Tiqian Jieru Yu Guojia Mimi De Guanxi* [Brief Analysis of Relationship between 'State Secrets' and Lawyers' Early Involvement], DANGDAI SIFA [CONTEMP. JUDICIARY], No. 2, at 35 (1999).

some cities, the percentage of such cases in which access was denied under the state secrets clause was close to ninety percent of all criminal cases.⁴⁹ A lawyer complained that since the CPL entered into force, he has never had the chance to meet with his clients.⁵⁰

Interviews with Chinese lawyers and scholars reveal a concern that local officials have tended to treat all details concerning the investigation of crimes as state secrets.⁵¹ Therefore, in practice, any meeting with a criminal suspect under investigation requires formal approval from the authorities.⁵² Apparently during the first six months of the CPL, requests from lawyers for meetings with clients in custody were generally denied under the state secrets rubric.⁵³ Ironically, even minor crimes such as reckless driving can be considered to involve state secrets.⁵⁴

By other occasions, a lawyer's requests to visit his or her clients have been rejected for no reason at all. Some reports said that public security departments give no explanation when they decline to grant lawyers' applications to visit. In a few situations, lawyers were told that public security departments were too busy to make any arrangements for such meetings. In at least two cases, lawyers were informed that suspects did not want to see them and were given no chance to speak with the suspects themselves.⁵⁵

49. *Lushi Canyu Xingsu Jiangsu You Xin Changshi [Report: New Practice of Jiangsu Province for Lawyers' Participation in Criminal Litigation]*, RENMIN GONGAN [PEOPLE'S PUB. SECURITY], No. 17, at 15 (1997).

50. Wang Guangjing & Wang Longtian, *Lushi Tiqian Jieru De Xianzhuang Ji Sikao [The Current Situation and Thoughts on Lawyers' Early Involvement]*, MINZHU YU FAZHI [DEMOCRACY AND L.], No. 5, at 30 (1998).

51. Interviews with lawyers and scholars in Shanghai, Xi'an, Wuhan, Beijing, and Anqing (on file with author).

52. *Id.*

53. *Id.*

54. Zou Gaoxiang et al., *Zhengcha Jieduan Jieru Yi Ge Ling Lushi Ganga De Huati [Early Involvement in the Stage of Criminal Investigation: An Embarrassing Topic for Lawyers]*, NANFANG DUSHI BAO, [S. URB. DAILY], Aug. 29, 1998, at 21 [hereinafter *Early Involvement*].

55. In Shanghai, a lawyer told us that he was informed that the suspect declined to see him though he had secured a document from his client long before. The authorities did not give him a chance to check with his client. *Supra* note 51. In another case in Xiamen, Fujian Province, the lawyer was informed that the suspect was unwilling to meet with him after he had been retained by the suspect's family and worked on arranging a meeting for more than a month. *Id.* Mu Liancai, *Dui Lushi Caiyu Xingshi Susong Zhiye Huangjing De Sikao [Thoughts on the Environment in Which Lawyers are Practicing Criminal Procedure Law]*, ZHONGGUO LUSHI [CHINESE LAW.], No. 12, at 10 (1997).

B. *Limitation on Number and Duration of Meetings Between Lawyers and Clients*

Even if they are allowed to meet with their clients during the investigatory phase, various restrictions have limited the legal services lawyers can effectively provide. Indeed, the regulatory environment sometimes renders attorney-client meetings virtually meaningless.

Prior to the CPL coming into effect, the MPS drafted implementation rules⁵⁶ stating that meetings between lawyers and suspects, if approved, should ordinarily involve a one-time visit lasting no longer than thirty minutes.⁵⁷ The rules further specify that such meetings should not be permitted more than twice.⁵⁸ Many authorities, including the public security departments and procuratorates, have reportedly enacted similar rules limiting the number and duration of meetings. In Guizhou, regulations set an even shorter duration for lawyer-client meetings to between ten and twenty minutes, while sometimes meetings were to be limited to only five minutes.⁵⁹ The provincial public security departments in Shandong and Zhejiang restricted meetings to a one-time consultation lasting no more than thirty minutes.⁶⁰ In accordance

56. Lushi Canyu Xingshi Susong Zangxing Guiding [Interim Rules on Lawyers' Participation in Criminal Litigation], art. 10 [hereinafter MPS Interim Rules].

Article 10 states:

Upon request by a crime suspect and approval by the public security department, a lawyer may meet with him or her once and no more than twice if the circumstances of the case is complicated. The date and place of meeting shall be decided by the authorities investigating the crime, and each meeting shall last no longer than 30 minutes.

Id. See Xingshi Bianhu Goujian Sifa Gongzheng Dasha Buke Queshao De Zhizhu [Report on the Symposium "Criminal Defense: Indispensable Pillars for Building Judicial Justice System"], ZHONGGUO LUSHI [CHINESE LAW.] No. 15, at 18 (1998) [hereinafter Symposium]. The MPS Interim Rules were widely circulated for solicitation of opinions within the public security system. *Id.* Most local public security departments made their own rules modeled on these draft trial rules, though the formal MSP Trial Rules dropped the time limits later on when it was issued on December 20, 1996. *Id.*

57. *Id.*

58. *Id.* See FAN CHONGYI ET AL., XINGSHI SUSONG FA ZHUANLUN [SPECIAL COMMENTARY ON CRIMINAL PROCEDURE LAW] 168 (1998).

59. Wang Ningjiang, *Lushi Tiqian Jieru Zaoyu Kunnan* [Lawyer's Early Involvement Encountering Difficulties], MINZHU YU FAZHI [DEMOCRACY AND L.], No. 19 (1997).

60. See Xiao Zhou, *Xingsufa Sifa Jieshi Yu Lushi Susong Quanli Baozhang* [On Guaranteeing the Rights of Lawyers in Litigation And the Criminal Procedure Law And the Judicial Interpretations], ZONGGUO FAXUE [CHINA JURISPRUDENCE], No. 1, at 132 (1999). See also Wang Shujing, *Lushifa Shishi Hou Jidai Jiejue De Jige*

with a document jointly issued by several judicial authorities in Xi'an, Shanxi Province, lawyers could only meet with imprisoned suspects once and for no more than one hour.⁶¹ It was reported that most public security departments imposed limits on the number and duration of meetings either by enacting formal detailed rules or through issuing internally circulated notices.

Although the SPP's Trial Rules did not spell out any limit on the number and duration of lawyers meetings with their clients in its custody, most local procuratorates in fact followed the exact same rules as the public security departments.⁶² One report revealed that in early 1997, the courts imposed the same type of restrictions on meetings between lawyers and defendants even after cases entered into the trial stage, which is in direct violation of the CPL.⁶³

C. Conditions of Meetings with Suspects

Often characterized as an official right to "be present" at the lawyer-client meeting (*huijian zaichang quan*), officials insist on being present during meetings between lawyers and suspects. Most officials attending such meetings are those in charge of the criminal investigation in question.⁶⁴ Their presence naturally has a direct impact on the nature of the conversation. Moreover, some local officials installed video cameras or tape recorders to monitor the conversation between lawyers and suspects.⁶⁵ Lawyers and scholars also complain of the official practice of warning, "educating," and even

Wenti [Several Urgent Issues That Need to Be Solved Following the Lawyers Law Coming Into Effect], ZHONGGUO LUSHI BAO [CHINESE LAW. NEWSPAPER], May 24, 1997, at 3.

61. See Xi'an Shi Renmin Jianchayuan Xian Shi Zongji Renmin Fayuan Xian Shi Gongganju Xianshi Sifaju Guanyu Shishi Zonghua Renmin Gongheguo Xingshi Susongfa Ruogan Yijian Shixing [The Several Opinions of the People's Procuratorate, the Intermediate People's Court, the Bureau of Public Security, and the Bureau of Justice of Xi'an on Implementing the Criminal Procedure Law of the People's Republic of China], issued on Feb. 28, 1997.

62. Article 127 of the fourth Draft of the SPP's Trial Rules and Article 130 of the Fifth Draft of the SPP's Trial Rules (for discussion) stipulated the same two visit rule and thirty minute duration. The final version of the SPP's Trial Rules, however, dropped these clauses and left the matter to the discretion of the people's procuratorates.

63. See *Xingshi Bianhu Goujian Sifa Gongzheng Dasha Buke Queshao De Zhizhu [The Report on the Symposium on Criminal Defense: Indispensable Pillars for Building Judicial Justice System]*, ZONGGUO LUSHI [CHINESE LAW.], No.15, at 19 (1998) [hereinafter *Symposium*]. See also 1996 CPL, *supra* note 17, art. 36 (specifying that lawyers may meet and maintain correspondence with defendants, while other defense representatives (*qita bianhuren*) need approval from the courts to meet with defendants). See also *Lawyers Law*, *supra* note 13, art. 30.

64. See interviews cited *supra* note 19.

65. See Ningjiang, *supra* note 40.

intimidating suspects in front of their lawyers before the meeting begins. Some investigative authorities even suggest that officials should take advantage of such meetings to crack cases or obtain statements from suspects or defendants.⁶⁶

In some localities, lawyers met with their clients under outrageous conditions. Detention centers generally do not provide sufficient space for lawyers to meet with detainees, and sometimes this shortage resulted in lawyers lining up to meet with suspects. For instance, in Changsha Number One Detention Center, there is only one visiting room for legal consultations in a center with a population of over a thousand detainees.⁶⁷ It is common that two meetings are held simultaneously in the same room.⁶⁸ In Shiyan City, Hubei Province, meetings are held in an outside yard.⁶⁹ And in Xiangyang, there is a glass screen separating lawyers from suspects with a hole in the middle of the glass.⁷⁰ Both sides have to speak loudly to make themselves heard.⁷¹ One of the worst places is E'zhou, where lawyers and suspects meet in a metal cage without any chairs inside it.⁷² This arrangement makes it convenient for officials to monitor the conversation. Under such circumstances, lawyers are not likely to have long consultations with their clients.⁷³

The authorities often attempt to censor the content of conversations between lawyers and suspects in advance. Some officials told lawyers they were only permitted to know with what suspects had been charged.⁷⁴ Other officials insisted that any inquiry about details of the case concerned would jeopardize the official criminal investigation.⁷⁵ To ensure that lawyer-client meetings would not damage the investigation, some officials required the lawyer to submit a written account of what they planned to talk about before holding a conversation with a suspect.⁷⁶ The officials would also require that the meeting be carried out exactly according to the written talking points.⁷⁷

66. Guo Ziaobin, *Lun Xin Xingshi Susongfa Shishi Hou Xingshi Zhengcha Gongzuo De Gaige Yu Fazhang*, [On Reform and Development of Work of Crime Investigation After the New Criminal Procedure Law Took Effect] XIGZHENG YANJIU (Study of Crime Investigation), No. 1, 1998, at 11.

67. See Deng Ruixiang, *Tiqian Jieru, Moheqi Yi Guo* [Early Involvement: Gearing-Up Time Is Over], RENMIN GONGAN [PEOPLE'S PUB. SECURITY], No. 4, at 8 (1999).

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. See Ningjiang, *supra* note 40.

74. See Interview with lawyers in Shanghai and Beijing (Apr. 1999).

75. *Id.*

76. *Id.*

77. See *supra* note 19.

In many detention centers, lawyers are given the responsibility of maintaining security and are required to bring a pair of handcuffs to put on the suspect during their meetings.⁷⁸ Furthermore, authorities take every opportunity to charge unreasonable fees for everything from the purchase of application forms—to apply for a meeting or for bail—to making photocopies of various documents.⁷⁹

Some official public commentary on the work of lawyers during the criminal investigation phase further discounts the quality of the legal services provided. One commentator from the Public Security Department of Zhejiang Province writes:

Several points need to be noted [by the investigating authority] on answering questions from lawyers:

1. Answers [to the lawyer's questions] should be always given by concealing in full the real direction of the crime investigation concerned;⁸⁰
2. Answers should only touch on the charges but not give any details of the facts, witnesses, documentary evidence, physical evidence, as well as other evidentiary materials;
3. [Investigation personnel] should not answer any question related to the facts or charges yet to be verified.⁸¹

Another official from the public security department of Jiangsu Province even more openly lays out prohibitions for lawyers: "Lawyers are prohibited from holding private meetings with suspects . . . from learning the details of the whole case. . . from investigating or collecting evidence from others... from participating in official questioning of suspects."⁸²

D. Pretrial Release: Taking A Guarantee and Awaiting Trial

Although it is legally possible, lawyers rarely succeed in bailing

78. Zhou Guojun, *Zhengque Renshi Lushi Yu Bei Zhuisuzhe De Guanxi Baozhang Lushi De Susong Quanli* [Correctly Appreciating the Relationship between Lawyers and the Accused and Guaranteeing Lawyer's Rights to Participate in Legal Action], ZHENGFA LUNTAN [POL. AND L. F.], No. 5, at 12 (1997).

79. See Xia Lu, *supra* note 28, at 6.

80. In other words, officials should not make any indications that would allow lawyers and suspects from knowing anything regarding the stage of the investigation which would facilitate preparation of defense strategies.

81. Yuan Zhongmin, *Shi Lun Gong'an Jiguan Zai Zhengcha Jieduan Du Lushi De Jiedai* [Brief Points on the Public Security Department's Handling of Lawyers at the Stage of Crime Investigation], XINGZHEN YANJIU [STUDY OF CRIM. INVESTIGATION], No. 1, at 15 (1998).

82. Yang Zongzheng and Xue Hongwei, *Guanyu Lushi Jieru Zhengcha Jiege Wenti De Sikao* [Thoughts on Several Issues of Lawyers' Early Involvement in Crime Investigation], GONGAN DAXUE XUEBAO [J. OF PUB. SECURITY U.], No. 1, at 37 (1997).

out their clients during the criminal investigation period.⁸³ The CPL allows lawyers to start the process of applying for “taking a guarantee and awaiting trial” (*qubao houshen*) after the formal arrest of a suspect is ordered.⁸⁴ Article 51 of the CPL stipulates:

People’s courts, people’s procuratorates, as well as public security departments may, under the followings circumstances, put a defendant or suspect under the measures of taking a guarantee and awaiting trial or supervised residence:

1. the defendant or suspect may be sentenced to control, criminal detention or a supplementary penalty;
2. the defendant or suspect may be sentenced to a fix-term imprisonment but his or her release on either measures will not pose a threat to the society.

Measures of taking a guarantee and awaiting trial or supervised residence is carried out by the public security departments.⁸⁵

Article 52 specifically allows defendants or suspects themselves to apply or their legal counsels, legal guardians, and their family members to apply on their behalf for such measures.⁸⁶

A lawyer’s petition for taking a guarantee and awaiting trial, however, is either quickly dismissed or left forever pending. There have been only a very few occasions in which lawyers managed, after a long painful process, to get their clients out on bail under this measure. One commentator claimed that to his knowledge not a single application for bailing out suspects had been granted by the people’s procuratorates since the 1996 reforms.⁸⁷ In fact, pretrial release is an exception in China, which clearly conflicts with international standards on pretrial detention.⁸⁸

The lawyers and legal scholars interviewed for this report complained that provisions concerning taking a guarantee and awaiting trial are often rendered meaningless.⁸⁹ In practice, there is no set standard for deciding whether or not to grant such a request. This allows the determination to be made on an arbitrary basis. Among the small number of people released awaiting trial, very few gain release as a result of a lawyer’s application or a request from the suspect. Most suspects are released on the initiative of the authorities.⁹⁰ Though the CPL stipulates the conditions for taking a

83. See 1996 CPL, *supra* note 17, art. 36.

84. *Id.*

85. See 1996 CPL, *supra* note 17, art. 51.

86. *Id.* art. 52.

87. See *Symposium*, *supra* note 63, at 17.

88. International Covenant on Civil and Political rights, Dec. 19, 1966, art. 9(3), 999 U.N.T.S. 171 (“[I]t shall not be a general rule that persons awaiting trial shall be detained in custody . . .”).

89. See *supra* note 19.

90. *Id.*

guarantee and awaiting trial, public security departments and procuratorates usually do not consider a pre-trial release unless such a release becomes absolutely necessary.⁹¹

According to a Shanghai lawyer, public security departments consider the release of a suspect in only two situations: if the public security departments will exceed the time limit for pretrial detention or if the offenses in question are so minor that suspects are unlikely to be sentenced to any jail term.⁹² Procuratorates are even more reluctant to release suspects. In the overwhelming majority of situations, suspects are not released until the investigation is over.⁹³ Prosecutors claim that all cases investigated by them are either so complicated or serious that it is inappropriate to release suspects before the investigation is complete.⁹⁴ This statement explains why lawyers are unable to gain the release of their clients during the criminal investigation period when cases are handled by prosecutors.⁹⁵

E. Joint Provisions by the Six Central Departments

Due to concerns about the deteriorating environment for lawyers engaged in criminal defense, particularly at the early stage of criminal investigations, the Ministry of Justice (MOJ) coordinated a joint interpretation of the CPL. Although many agreed that the various judicial interpretations have greatly diminished their ability to represent defendants, it was not until January 19, 1998, that the Joint Provisions were enacted.⁹⁶ The fact that the six central departments, including all major players in the implementation of the CPL, jointly interpreted a major law is an unprecedented event. The joint interpretation reflects a struggle for power and control among departments rather than a well-reasoned judicial consideration. Major corrections in the Joint Provisions include clarifying the concept of "state secrets," setting time limits for approval of applications for lawyers to visit clients in cases involving state secrets, and stipulating the rights of defendants in a clearer way.⁹⁷ Nevertheless, the discretion of the authorities to handle the practicalities of visits by lawyers was left largely untouched.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. See Xue Chunxi & Zhao Jianji, *Tongyi Guize Lushi Canyu Xingshi Susong Do Xing Fabao* [Uniform Rules: New Magic Weapon for Lawyers to Participate in Criminal Litigation], ZHONGGUO LUSHI [CHINESE L.], No. 4, at 40-43. See also ZHONGGUO LUSHI [CHINESE L.], No. 5, at 37-39 (1998).

97. *Id.*

It has been reported that the situation of lawyers representing their clients has somewhat improved. There is no evidence, however, that there have been any major changes in this regard following the joint interpretation. As one report shows, lawyers were not positive about the new provisions because the reality they face does not even come close to the requirements set forth in the Joint Provisions.⁹⁸

The lawyers and legal scholars interviewed for this report generally believe that any reforms will be ineffective unless the criminal process is made public and the CPL or relevant judicial interpretations clearly lay out the rights of suspects and defendants.⁹⁹ As long as the judicial authorities, such as the public security departments and the procuratorates, maintain enormous discretion, there will be little room for improvement.¹⁰⁰

F. Legal Defense

Lawyers who are retained by suspects or defendants have a duty to defend their clients. The CPL requires that the people's procuratorates notify suspects or defendants of their right to hire a lawyer within three days after the procuratorates receive cases from the public security departments to review for prosecution.¹⁰¹ At this point, defense lawyers should have access to certain case materials collected by the prosecution.¹⁰² Compared to the old provisions, this change allows lawyers a much longer time to prepare their defense.¹⁰³

Both the CPL and the Lawyers Law specify that lawyers have the right to collect evidence about the case on their own initiative.¹⁰⁴ After the case is transferred to the courts for trial, lawyers are allowed access to certain materials about the case held by the authorities.¹⁰⁵ During trial, lawyers can cross-examine witnesses, review the evidence presented by prosecutors,¹⁰⁶ and conduct a legal defense on behalf of defendants.¹⁰⁷

In practice, however, lawyers frequently encounter obstacles in presenting a proper defense for their clients. These obstacles include: restricted access to evidence collected by prosecutors, insufficient power to collect evidence, and inability to cross-examine prosecution witnesses who have provided testimony but who do not appear in

98. See Zou Gaoxiang, *Early Involvement*, *supra* note 54, at 21.

99. See *supra* note 19.

100. *Id.*

101. See 1996 CPL, *supra* note 17.

102. *Id.*

103. See 1979 CPL, *supra* note 21, art. 110 (3) (requiring only that the court notify the defendants of the rights to retain a lawyer at least seven days before trial).

104. See Symposium, *supra* note 71; 1996 CPL, *supra* note 17, art. 37.

105. See 1996 CPL, *supra* note 17.

106. *Id.*

107. See *id.* art. 157.

court.¹⁰⁸ These issues will be examined in detail below.

1. Access to Evidence Collected by Authorities

Defendants and their legal counsel encounter more difficulties in accessing prosecutorial evidence after the CPL revision. Overall, the new barrier to evidence greatly weakens the attorney's ability to prepare an effective defense.

The CPL's formulation of what case materials defense attorneys should be allowed to access is ambiguous. It states that in order to prepare their defense, lawyers have the right to "look up, make excerpts from and duplicate litigation documents and technical documents" in the prosecutors' files, after the case is transferred to the procuratorate by the police for "review for prosecution" (*shencha qisu*).¹⁰⁹ The CPL, however, does not clearly define such terms as "litigation documents" or "technical authentication documents."

The lacuna of evidence leaves authorities with broad discretion to hold back evidence from lawyers. Some commentators insist that all the major evidence related to the case should be included in the category of litigation documents, and therefore be accessible to lawyers.¹¹⁰ In practice, however, lawyers have not been able to examine any of the evidence collected by the public security departments or the people's procuratorates. Furthermore, judicial interpretation on what constitutes "litigation documents" has firmly shut out defense lawyers from discovery of official evidence during the prosecution's review of the case.¹¹¹ According to the SPP Rules:

Litigation documents refer to those legal litigation documents made specifically for filing for investigation, taking coercive measures, determining investigation methods, as well as initiating the prosecution review process, such as the document on filing for investigation (*lian jue ding shu*), detention order (*juliu zheng*), the document approving arrest (*pizhun daibu jue ding shu*), the document deciding arrest (*daibu jue ding shu*), the arrest warrant (*daibu zheng*), and the opinion on prosecution of the crime (*qisu yijian shu*).¹¹²

Moreover, an official SPP commentary expressly prohibits

108. See *supra* note 19.

109. See 1996 CPL, *supra* note 17.

110. See Li Baoyue, *Zai Lun Bianhu Lushi De Yuejuan Quan* [Commenting Again on Defense Lawyers' Right to Access Official Files], in XINGSHI SUSONG FA ZHUANLUN [SPECIAL COMMENTARY ON CRIMINAL PROCEDURE LAW] 161063 (Fang Chongyi et al., 1998) (1998).

111. [Supreme People's Procuratorate Rules on the Criminal Process for People's Procuratorates] issued on Dec. 16, 1998, art. 319.

112. *Id.*

lawyers from accessing any of the evidence relating to a case.¹¹³ The commentary states that “defenders can only look at the technical documents (*jishu xing ziliao*) and cannot examine the physical evidence, documentary evidence, witness testimony, victim’s statement, defendant’s statement or self-defense statement and other evidentiary materials such as crime-scene records and technical records.”¹¹⁴

The CPL only requires that, after cases are transferred to the court for trial, prosecutors provide courts with a list of the evidence and of the witnesses and with copies of “major evidence.”¹¹⁵ By contrast, under the old CPL, prosecutors had to submit to the courts all evidence and related materials along with the indictment. If they did not do so, prosecutors ran the risk of the court deciding that the case should be dismissed or returned to the procuratorate for supplementary investigation.¹¹⁶ This revision in the CPL was part of a larger trial process reform that prohibits judges from reviewing the substance of cases before trial.¹¹⁷ Instead, the reform promoted judges to decide cases based on both sides’ presentations. The reform has greatly weakened the defendant’s position at the trial stage, without some measures to balance the power of the prosecution, such as a mandatory discovery process.

The possibility that the “reform” would have such an outcome was not unforeseen. One commentator warned three years ago: “The fact that prosecutors are only required to submit to the courts a list of the evidence and the litigation documents will have a negative effect on the right of defendants to discovery. This will definitely hinder

113. See ZHANG QIONG ET AL., RENMIN JIANCHAYUAN XINGSHI SUSONG LILUN YU SHIWU [THEORY AND PRACTICE OF CRIMINAL PROCEDURE FOR PEOPLE’S PROCURATORATES] 84-85 (1997).

114. Guanyu Xiugai Zhonghua Renmin Gongheguo Xingshi Susongfa De Jueding Xuexi Gangyao [The SPP Study Department of Law and Policy: Study Guideline on the Decision to Revise the Criminal Procedure Law of the People’s Republic of China] at 207 (1996).

115. See 1996 CPL, *supra* note 17.

116. See 1979 CPL, *supra* note 21, art. 108

After reviewing the cases submitted for public prosecution, the people’s courts shall decide to hear those cases if the facts of the case are clear and *the evidence is sufficient* [to prove a crime has been committed by the defendant]; with regard to those cases in which major facts are unclear and the evidence is not sufficient, [the people’s court] may return them to the people’s procuratorate for a supplementary investigation; as to those cases that do not merit a sentence, [the people’s court] may request that the people’s procuratorate withdraw the prosecution.

Id. This provision forced prosecutors to submit all available evidence in order to avoid cases being returned for supplementary investigation or dismissed.

defendants and their defenders from preparing a defense."¹¹⁸

Many lawyers report that the rule prohibiting prosecutors from submitting their evidence to the courts effectively nullifies the right of lawyers to look at the documents and the evidence held by the authorities.¹¹⁹ It is a common practice for prosecutors to deliberately withhold evidence from defendants during the prosecution review stage (*shencha qisu jieduan*) as well as during the trial phase (*shenpan jieduan*).¹²⁰

Thus, lawyers are unable to obtain useful information at the prosecution review stage. When the case reaches court, defense lawyers are only allowed to look at the files deposited with the court,¹²¹ which generally contain little more than what they have seen at the earlier phases. Lawyers are thus left in the dark in the defense preparation.

Considering that prosecutors have a disproportionate advantage in collecting evidence and that lawyers are given a short time period to prepare their defense, many scholars insist on the adoption of a discovery process that would allow greater access to evidence. The discovery process would include access to all evidence collected by prosecutors and public security departments and all evidence that would be presented at trial.¹²² In some localities, experimental discovery procedures under the sponsorship of the courts have been reported. For instance, Yantai People's Intermediate Court experimented with this system and allowed defense lawyers to access the prosecution's evidence. Prosecutors were obviously critical of this experiment.¹²³ There is no sign, however, that the Chinese

117. See HECHT, *supra* note 18, at 55.

118. See Wang Minyuan, *Woguo Xongshi Susongfa Xiugai Shuping* [Comments And Description of the Criminal Procedure Law Revision of Our Country], FAXUE JIA [JURISTS], at 50 (1996).

119. See *supra* note 19.

120. *Id.*

121. Although the CPL does not specify what materials lawyers can have access to during the trial stage, judges and prosecutors universally assume that lawyers can only look at, excerpt from, as well as duplicate the materials deposited with the courts, obviously excluding any possibility of checking on materials held by the prosecutor's office. Some commentators suggest that the law should require that lawyers have access to prosecution evidence which has not been submitted to the courts. See Li Yin, *Shi Lun Xianxing Xingshi Zhengju Zhidu De Lifa Quexian Ji Wangshan* [On the Legislative Flaws and Improvements of the Current System of Criminal Evidence], LEGAL SCI. No. 1, at 123 (1999). See also Wang Minyuan and Zhu Changli, *General Commentary on Study of the Criminal Procedure Law*, CASS J. L. No. 1, at 145-46 (1999) (summarizing generally the scholarly discussion of the discovery system).

122. *Id.* Discovery system is also translated as "xianxi zhidu," which means "advanced knowledge (of the evidence)."

123. See *Ji You Duikang You You He Zuo Kongbian Shuanfang Tingqian Shidu Jiechu Yantai Changshi Zhengju Kaishi* [Confrontation as Well as Cooperation, Prosecutors and Defense Lawyers Get in Touch before Trial. Yantai Experiment

authorities will formally establish a discovery system anytime in the near future.

2. Limitations on the Rights of Lawyers to Collect Evidence

Another significant change in the CPL is that the right of lawyers to collect their own evidence is severely impaired. According to the CPL, lawyers may collect evidence from witnesses, units (*dan wei*) or other individuals only with their consent. Furthermore, lawyers must obtain permission from the people's procuratorates or the courts in order to collect evidence from victims or witnesses provided by victims.¹²⁴

In addition, the evidence requirements represent a setback in the lawyer's ability to prepare a case. Although the old CPL did not elaborate on the power of lawyers to collect evidence, the Interim Regulations on Lawyers provided some guarantees on collecting evidence.¹²⁵ Article 7 of the Interim Regulations stipulated:

In legal proceedings, lawyers shall have the right to consult the materials of the case and make enquires from organizations and persons concerned in accordance with relevant regulations. When acting as defenders in criminal cases, lawyers may meet and correspond with defendants held in custody. Lawyers may meet and maintain correspondence with defendants in custody.

The organizations and persons concerned shall have the duty to render assistance to the lawyers engaged in the activities mentioned in the preceding paragraph.¹²⁶

Some local regulations also provided lawyers with safeguards for securing evidence. For instance, a Shanghai regulation, promulgated in 1995, provided:

Lawyers shall present a letter of introduction from their law office and a lawyer's license while investigating and collecting evidentiary materials relating to the legal matter or cases in question from units and individuals. Unless law or regulations stipulate otherwise, those units or individuals shall assist lawyers and provide them with the relevant materials.¹²⁷

Some may argue that individuals or institutions are not legally obliged to cooperate with lawyers in many other criminal justice systems, especially litigation adversaries. Considering that Chinese lawyers lack access to officially-collected evidentiary materials and

'Discovery of Evidence', PEOPLE'S PROCURATORATE DAILY, Dec. 22, 1999, available at http://www.jcrb.com/html/1999/12/22/e19991222_01.htm

124. See 1996 CPL, *supra* note 17, art. 37.

125. See Interim Regulations on Lawyers, *supra* note 1, art. 7.

126. *Id.*

127. Shanghai Lushi Guanli Banfa [Article 28 of the Practice on Management of Lawyers in Shanghai], issued by People's Municipal Government of Shanghai, on December 23, 1994 and entered into force on February 1, 1995 (on file with author).

are unable to summon witnesses to testify in court, however, this revision has undoubtedly further diminished the ability of lawyers to effectively represent their clients at trial.

An alternative for lawyers seeking favorable evidence is to apply for a court order to secure the evidence in question. Under the CPL, lawyers may apply to the court requesting the collection of certain evidence should they believe that the evidence in question is critical to the case and they are not able to obtain it on their own.¹²⁸ Courts, however, often dismiss such applications by ruling that the evidence in question is unnecessary or insignificant.¹²⁹ There is no recourse for lawyers if a court decides to reject their application for an official collection of evidence. Prior to the enactment of the Joint Provisions on January 19, 1998, such applications from lawyers often failed. In most cases, the courts indiscriminately dismissed such applications. In other cases, the courts issued lawyers with permission to investigate (*zhunxu diaocha zheng*) and let them collect the evidence on their own. This practice directly contravened the CPL, which requires that the court itself collect evidence if a lawyer's application has been granted.¹³⁰ There has been no improvement despite the Joint Provisions' requirement that the courts abide by the CPL and collect the evidence on the lawyer's behalf if they decide it is necessary to do so.¹³¹

Under these circumstances, the defense mainly consists only of questioning and rebutting the evidence presented by prosecutors. This generally makes for a weak defense and results in inadequate consideration by the courts of the lawyers' efforts. Some commentators have partly attributed the ineffectiveness of defense lawyers to difficulties in collecting evidence.¹³²

3. Difficulties in Calling Witnesses and Cross-examining Evidence at Trial

Because lawyers have insufficient access to prosecution evidence and lack the means to collect their own evidence, lawyers must have an opportunity to examine the evidence presented during trial.

128. See 1996 CPL, *supra* note 17, art. 37.

129. See *supra* note 19.

130. See 1996 CPL, *supra* note 17, art. 37.

131. Article 15 of the Joint Provisions requires that the courts and procuratorates collect evidence upon request from lawyers, given that courts or procuratorates believe it "necessary." This provision leaves discretion to the courts or procuratorates to decide if they should collect evidence requested by lawyers.

132. Wang Weiping, *Xingshi Shenpan Hushi Lushi Bianhu Yijian De Yuanyin Ji Duice* [The Reasons and Counter-strategies of Lawyers' Defense Opinions Being Overlooked in Criminal Trials], SHANXI SHIDA XUEBAO [J. SHANXI NORMAL U.], No. 4, at 5-6 (1997).

Lawyers, however, have great difficulty in calling witnesses to testify on the stand.

The absence of witnesses during trial has been a long-standing problem in criminal cases in China. Prior to the enactment of the new CPL, witnesses were rarely called to the stand, and defendants had few chances to confront witnesses in cross-examination. The revisions aimed to change this situation by stipulating that witnesses shall be present and subject to cross-examination during the trial.¹³³ The SPC's Interpretation, however, states that with the court's permission, witnesses may be absent in the following four circumstances:

- a) the witness is a minor;
- b) the witness is suffering from serious illness or is physically incapable of being present at trial;
- c) the testimony of the witness will not affect the trial in a significant way; or
- d) for other reasons.¹³⁴

Complaints that witnesses, especially those who provide authorities with written testimonies, are seldom present for cross-examination were widespread among lawyers. Most witnesses are exempted from presence at trial by a decision of the court, even when lawyers have applied for their presence. In cases in which witnesses are called by the court, many witnesses ignore the court order and choose to stay away.

Although Chinese courts have subpoena powers, there is no legal penalty for the failure to comply with a court's subpoena. In most trials, the courts proceed only with written testimonies provided by prosecutors. Lawyers are often left with the only option of impeaching the written testimony.¹³⁵ In all three trials the Author observed, not a single witness was called. All the trials proceeded with prosecutors and judges reading written evidence and lawyers occasionally raising questions regarding the written testimony.¹³⁶ It should be noted that written testimonies do not need to conform to any formalities in which the opponent is given an opportunity to question the witness.

Some authorities attribute the failure to bring witnesses to the stand during trial to the ambiguity of the CPL because it does not stipulate which side should be responsible for guaranteeing the

133. See 1996 CPL, *supra* note 17, art. 47.

134. See Supreme People's Court, *Guanyu Zhixing Zhonghu Renmin Gongheguo Xingshi Susongfa Ruogan Wenti De Jieshi* [Interpretation on Several Issues Regarding Implementation of the PRC CPL] on June 28, 1998, art. 141 [hereinafter SPC Interpretation].

135. See *supra* note 19.

136. Author's record of trial observation.

presence of witnesses. One commentator insists that the laws or regulations should provide the resources and legal guarantees that can secure the presence of witnesses at trial.¹³⁷ Others suggest that there should be an appropriate legal penalty if witnesses refuse to attend.¹³⁸ Judges often cite safety concerns as an excuse for witnesses not being called to the stand.¹³⁹

In any event, this reality severely prejudices the role of defense lawyers and ultimately the rights of defendants. According to a recent article concerning a total of 293 criminal cases tried in Shenzhen courts from January to September 1997, only eighty-four cases involved actual witness testimony.¹⁴⁰ In these cases, the courts called a total of 129 witnesses to testify.¹⁴¹ Only sixteen witnesses, however, actually showed up.¹⁴² Another report states that as few as thirty percent of witnesses called by the courts were present at trial during the period from January to April 1997 in the entire Wuhan area.¹⁴³

Some scholars claim that the percentage of trials in which witnesses are present is below ten percent.¹⁴⁴ Among 166 criminal cases tried during the first quarter of 1997 in Maoming City, Guangdong Province, there were only twelve cases in which witnesses were present.¹⁴⁵ Shanghai's record was no better. From January to April 1997, only five out of 107 criminal cases tried by Yangpu District courts had witnesses take the stand.¹⁴⁶ Jingshan County court had a better record, as witnesses were present in twenty-seven percent of criminal cases during the first quarter of 1997.¹⁴⁷

Some localities were worse than others. One survey conducted by a district court in Henan province sheds some light on the severity

137. Research Department of the High People's Court of Jiangsu, *Xingshi Susong Zhengren Chuting Ruogan Wenti De Tangtao* [Discussion of Several Issues on Witness' Presence in Criminal Trial], *STUD. ADJUDICATION*, No. 2, at 4-6 (1998).

138. Li Yanhua and Zhou Changmiao, *Guanyu Woguo Xingshi Zhengren Chuting Zuozheng Zhidu De Sikao* [Thoughts on Witness Testimony System in Criminal Trial of Our Country], *STUD. L. & COM.*, No. 4, at 84-85 (1999).

139. Interview with Judges in Shanghai, Beijing, and Xian (July 1999).

140. Cui Ming, *Xingshi Susongfa Shishi Zhong De Wenti Yu Jianyi* [Problems and Solutions in Implementation of the Criminal Procedure Law], *XIANDAI FAXUE* [MOD. JURISPRUDENCE], No. 1, at 20-21 (1998).

141. *Id.*

142. *Id.*

143. Qi Wenyuan et al., *Xin Xingsufa Shishi Guocheng Zhong De Jige Wenti* [Several Problems with Implementation of the New Criminal Procedure Law], *FASHANG YANJIU* [STUDY ON LAW AND COMMERCE], No. 6, at 77 (1997).

144. Xiong Xuanguo, *Guanche Xingsufa Gaige Shenpan Gongzuo* [Implementing the Criminal Procedure Law and Reforming Trial Work], *Minzhu Yu Fazhi* [DEMOCRACY AND LAW], No. 17, at 26-28 (1997).

145. *Id.*

146. *Id.*

147. *Id.* at 27.

of the problem. Among 345 criminal cases tried by the People's Court of Nanguan District, Kaifeng City, Henan Province, there were 1,726 witnesses who should have been called to the stand.¹⁴⁸ Of these, only seven showed up in court.¹⁴⁹ This roughly represents 0.4 percent of all witnesses.¹⁵⁰

Professor Chen Guangzhong, China's leading criminal justice expert, recently provided an even more pessimistic national perspective. According to Professor Chen, witnesses are called to the stand in only one to five percent of all criminal cases.¹⁵¹ Witness safety appears to be the main reason for such low figures.¹⁵² Prosecutors are also reluctant to call witnesses, however, because they are concerned that the witnesses might retract their statements. It is safer for prosecutors to rely on the favorable written statement. Other witnesses are simply afraid of being harassed or detained by authorities if their testimony does not go well.¹⁵³

Attorneys and scholars in Shanghai and Beijing estimated that the percentage of cases in which witnesses were called to the stand and cross-examined was well below thirty percent, although the situation has been steadily improving in big cities such as Shanghai and Beijing.¹⁵⁴ All of them agreed that there was an urgent need to enact a national law regulating the conduct of witnesses, including provisions on providing witnesses with necessary resources and guarantees of personal safety.¹⁵⁵

G. *The Risk of Representing Defendants in Criminal Cases*

More pessimistically, lawyers in China can risk their careers and even their personal liberty as a result of confrontations with authorities in the course of representing their clients. The ACLA declared 1995 as "a disaster year for lawyers" (*lushi mengnan nian*), due to the high number of lawyers who were detained and convicted for merely doing their job.¹⁵⁶ Since the new CPL became effective, lawyers have been at an even greater risk than before. Lawyers are

148. *Xingshi Susong Zhengren Yuanhe Nan Chuting [Criminal Trial, Why Is It So Hard to Call Witnesses?]*, PEOPLE'S CT. DAILY, Apr. 23, 2000.

149. *Id.*

150. *Id.*

151. Interview with Professor Chen Guangzhong: The Verdict Should Be Invalidated Should the Key Witness Not Be Present, CHINA YOUTH DAILY (Aug. 25, 2000).

152. *Id.*

153. *Id.*

154. Interviews with lawyers in Shanghai and Beijing (Apr. 1999).

155. *Id.* For regulations on witnesses see Xiong Xuanguo, *Guanche Xingsufa Gaige Shenpan Gongzuo [Implementing the Criminal Procedure Law and Reforming Trial Work]*, MINZHU YU FAZHI [DEMOCRACY & L.], No. 17, at 27-28 (1997).

156. FANG CHONGYI ET AL., XINGSHI SUSONG FA ZHUANLUN [SPECIAL COMMENTARY ON CRIMINAL PROCEDURE LAW] 169 (1998).

now more likely to come into conflict with authorities because the new CPL provisions both expand the scope of their work at various stages of the proceedings and allow lawyers to become involved earlier in the process.

Mounting official hostility toward lawyers is another reason lawyers are at more risk in China today. Public security departments and prosecutors reportedly harass and intimidate lawyers. In the worst cases, lawyers are detained, beaten up, or even convicted for doing nothing more than vigorously representing their clients.¹⁵⁷ According to an MOJ official, in 1998 alone, more than one hundred lawyers were detained, prosecuted, or convicted under a variety of different charges.¹⁵⁸

According to another recent report, Hunan Province alone has observed around 120 incidents since 1996 in which lawyers were either harassed or had their liberty restricted since 1996.¹⁵⁹ Among these incidents, about twenty lawyers were detained or arrested on various criminal charges.¹⁶⁰ In Fujian Province, three lawyers were detained for allegedly tampering with evidence, suborning perjury, or engaging in bribery in 1999.¹⁶¹ Further, the ACLA section in charge of protecting lawyers' rights handled more than seventy cases in 1999 in which lawyers were deprived of their rights to defend their clients, restricted from investigating cases, or harassed.¹⁶²

H. Problematic Legal Provisions

Two troublesome clauses in Article 38 of the CPL potentially put defense lawyers in severe professional jeopardy.¹⁶³ One clause states that defense lawyers and other defenders are prohibited from assisting criminal suspects or defendants in concealing, destroying, or forging evidence and from helping defendants collude with each other.¹⁶⁴ The other states that defense attorneys or other defenders are prohibited from threatening or inducing witnesses to change their

157. See Tian Wenchang, *Lushi Weihe Buyuan Zuo Xingshi Bianhu?* [Why Are Lawyers Not Willing to Engage in Criminal Defense?], JIANCHA RIBAO [PROCURATORATE DAILY], Feb. 10, 1999, at 2.

158. *Id.*

159. Xiao Wenhui, *Lushi Weiquan Lu Mangmang* [Long Journey for Protecting the Rights of Lawyer], PEOPLE'S DAILY, Oct. 25, 2000, at 11.

160. *Id.*

161. *Fujian Lushi Shou Qingquan Shijian Yinqi Shehui Guanzhu* [The Incidences of Fujian Lawyers Being Violated Attracts Societal Attention] (Aug. 24, 2000) (China News Agency broadcast).

162. Xinhua News Agency, *Woguo Lushi Zhiye Huanjing Reng Xu Gaishang* [The Environment in which Our Country's Lawyers Are Practicing Law Is Still Needed to Be Improved Continuously] (May 21, 2000).

163. See 1996 CPL, *supra* note 17, art. 38.

164. *Id.*

testimony or commit perjury.¹⁶⁵ In addition, Article 306 of the Criminal Law of the People's Republic of China¹⁶⁶ provides that defenders or legal representatives may be subject to punishment for obstructing justice by forcing or inducing witnesses to commit perjury or change their testimony.¹⁶⁷

Reports say that the hostility of officials towards lawyers has become a major negative factor influencing the participation of lawyers in the criminal process. Commentators point out that prosecutors have been unable to adjust to the new provisions of the CPL concerning creating a more adversarial process in which confrontations between lawyers and prosecutors are, to some extent, legally required. Besides, prosecutors refuse to think of themselves as being on an equal footing with defense lawyers. As one report puts it:

Some public prosecutors could not come to terms with the fact that lawyers are equal to them [in the court process]. A few even regard the work of lawyers in legal defense as acts which help defendants evade criminal punishment. It is not easy to change their mentality and naturally this is reflected in their actions [seeking to blame lawyers].¹⁶⁸

Another lawyer attributes hostile official attitudes to the revision of the Lawyers Law, which redefines the role of lawyers as "professionals providing legal service to society" (*wei shehui tigong falu fuwu de zhiye ren yuan*).¹⁶⁹ Some people, he continues, believe that there is no need to protect lawyers because they are no longer "state legal workers" (*guojia de falu gongzuo zhe*).¹⁷⁰

Many legal scholars have criticized the provisions of the CPL and the Criminal Law (CL) on the crime of perjury by lawyers for creating an environment that is unfriendly towards the provision of legal counsel or defense services.¹⁷¹ One commentator pointed out that, as defined in the CL, the crime of perjury or assisting perjury could be committed by anyone involved in the criminal process, including prosecutors or even judges.¹⁷² The CL arbitrarily singles out defense

165. *Id.*

166. The Criminal Law of the People's Republic of China was promulgated on July 1, 1979, and amended on March 14, 1997, by the National People's Congress. Kelly A. Thomas, *Falun Gong: An Analysis of China's National Security Concerns*, 10 PAC. RIM L. & POL'Y J. 471, 472 (2001).

167. Criminal Law of the People's Republic of China, art. 306 (1996).

168. Hou Shuxian, *Lushi Ruhe Baohu Ziji [How Can Lawyers Protect Themselves?]*, ZHONGGUO LÜSHI [CHINESE LAW.], at 39 (1998).

169. Art. 2.

170. Li Shunyi, *Lushi Canyu Xingshi Susong De Fengxian Jiqi Fangfang [Risks and Why They Prevent Lawyers Participating in Criminal Litigation]*, ZHONGGUO LUSHI [CHINESE LAW.], No. 4, at 45 (1997).

171. *Id.* at 46. Many lawyers and scholars we interviewed also criticized Article 38 of the CPL and Article 306 of the Criminal Law.

172. Li Shunyi, *supra* note 170, at 45-46.

attorneys and other defenders and thus exerts a great deal of pressure on such lawyers.¹⁷³ Furthermore, the CL does not stipulate in detail what constitutes the crime of forging evidence or perjury under Article 306, leaving prosecutors wide discretion to prosecute lawyers and giving judges enormous latitude to find them guilty of such an offense.

In practice, lawyers often run into serious legal trouble because witnesses, defendants, or suspects change their testimony or statements after lawyers become involved, thus prompting suspicion among prosecutors that lawyers have suborned perjury.¹⁷⁴ After the CPL took effect, there were many occurrences of witnesses and defendants reversing their testimony and statements.¹⁷⁵ Some lawyers have been convicted merely for acquiring a different story from that given to officials.

For example, a perjury case in Jiangsu Province demonstrates how a lawyer can be trapped under Article 306 of the Criminal Law. Liu Jian was detained and prosecuted for illegally obtaining evidence, which resulted in a retrial.¹⁷⁶ In fact, defense lawyer Liu simply collected the full testimony of several witnesses and presented them to the court.¹⁷⁷ One of the witnesses had apparently altered his testimony from the original statement that he had given to the authorities.¹⁷⁸ According to prosecutors, it was the defense attorney who "induced" the witness to change the testimony; therefore, he committed the crime of "defender impairing testimony" (*bianhuren fanghai zuozheng zui*) under Article 306.¹⁷⁹ The prosecutors relied on two pieces of "evidence" in the indictment against Liu: first, the witness' testimony was changed; and second, this change was the result of Liu's "inducement."¹⁸⁰

Further, there is currently no judicial interpretation that effectively distinguishes "inducement" from a "leading question" (*yindao xing fawen*).¹⁸¹ Some commentators find the term "induce"

173. *Id.*

174. Interview with lawyers in Shanghai and Beijing (Apr. 1999).

175. Zou Gaoxiang et al., *Zhengcha Jieduan Jieru Yi Ge Ling Lushi Ganga De Huati* [Early Involvement in the Stage of Criminal Investigation: An Embarrassing Topic for Lawyers], NANFANG DUSHI BAO [S. URB. DAILY], Aug. 29, 1998, at 21.

176. Elisabeth Rosenthal, *China's Efforts to Overhaul Legal System Can Fall Short in Rural Areas, Young Lawyers Can Meet Resistance from Police, and Judges and End up in Jail*, PORTLAND OREGONIAN, Jan. 6, 2000.

177. *Bianhu De Daijia* [Report: The Cost of Defending], MINZHU YU FAZHI [DEMOCRACY & L.], No. 22, at 7-9 (1998).

178. *Id.*

179. *Id.*

180. *Id.*

181. Article 38 of the CPL uses the word of "induce." See 1996 CPL, *supra* note 17, art. 38. By contrast, the term "leading question" is only a tactic to question

used in Article 306 of the Criminal Law dangerously ambiguous. One commentator argues that there could be many reasons why a witness may give different testimonies at different times. One of the most likely reasons is that the first statement, particularly if given by a defendant, is false and obtained through torture. The mental hostility of prosecutors towards lawyers, however, means that their first inclination is to blame the lawyer.¹⁸² A lawyer in Shanghai told the Author that tension between defense attorneys and prosecutors is often high.¹⁸³ Any rebuttal of the prosecutor's accusations, whether challenging evidence or reasoning, could lead to potential trouble for the lawyer.¹⁸⁴

In another case in Tieling City, Liaoning Province, Ren Qingliang, a defense attorney in an arson case, was prosecuted for perjury and harboring defendants.¹⁸⁵ Ren's only crime was that he obtained testimony that gave the defendant an alibi and contradicted the prosecutor's evidence. It was not until the defendant was acquitted that Ren was set free.¹⁸⁶ On some occasions, lawyers have been held liable for the perjury of defendants. In Xinyang City, prosecutors detained two lawyers after they discovered a false statement, which was made by defendants rather than by the lawyers.¹⁸⁷

What troubles lawyers and legal scholars most is not that lawyers can be detained or convicted for illegal acts, but rather that they can be detained by their counterparts in a criminal trial while they are in the middle of conducting legal defense.¹⁸⁸ This undoubtedly sends a dangerous signal to all criminal lawyers that they are working in the midst of legal uncertainty. Because their opponents are the very ones who have the authority to determine whether they are behaving appropriately in conducting their defense,

witness or defendant, which by no means could be incriminated as "induce," as many lawyers argued. Interview with lawyers in Shanghai and Xian.

182. See Wang Longtian, *Zhengcha Jiguan Jujue Lushi Jieru Zhengcha Huodong De Sikao* [Thoughts on the Refusal of Crime Investigation Authorities to Permit the Involvement of Lawyers in Crime Investigation Activities], GONGAN DAXUE XUEBAO [J. PUB. SECURITY U.], No. 2, at 26-27 (1998).

183. Interview with lawyers in Shanghai, P.R.C. (July 1999).

184. Interview with lawyers in Shanghai, P.R.C. (June 1999).

185. See Chen Qiulan, *Lushi Wuzui Liaoning Sheng Lushi Ren Qingliang Baobi Zui An Beiwanglu* [An Innocent Lawyer: Memorandum on the Crime of 'Harboring' Committed by Ren Qingliang, A Lawyer from Liaoning Province], ZHONGGUO LUSHI [CHINESE LAW.], No. 12, at 17-18 (1997).

186. *Id.*

187. Tian Xiuwen, *Xin Xingsufa Shixing De Diyi Ge Gongzuo Ri Fasheng Zai Xinyang Shi De Juliu Lushi Shijian* [The First Working Day after the New CPL Entered into Effect: An Incident of Detaining Lawyers Occurred in Xinyang City], FAZHI SHIJI [WORLD LEGAL SYS.], No. 5, at 6 (1977). (The lawyers were released after the intervention of members of the local people's congress.)

188. All of these lawyers, including Liu Jian and Ren Qingliang, were arrested immediately after the court recessed.

there is a strong incentive for lawyers to be extremely conservative in their work. As one lawyer stated, Article 306 of the Criminal Law and Article 38 of the CPL are like the sword of Damocles hanging over the heads of defense attorneys and other defenders, and nobody knows when it will fall.¹⁸⁹

Lawyers have occasionally been prosecuted under the pretext of other criminal charges, such as corruption or libel. In a recently tried case in Harbin City, Heilongjiang Province, Sun Shaobo, the head of a state-run law firm, was accused of the crime of graft because he deposited legal service fees in his personal bank account. Although he defended himself on the grounds that he was not state personnel defined under Article 93 of the Criminal Law, and therefore could not commit the crime of graft, the prosecutor insisted that he was on the state payroll and should be considered a state worker.¹⁹⁰ Reports said that Sun had previously offended prosecutors while defending criminal cases, and there was suspicion that his trial was a form of revenge by prosecutors.¹⁹¹ In any event, lawyers have rarely been charged with graft since the Lawyers Law redefined their role as "professionals providing legal service for society"¹⁹² and the new Criminal Law clarified the conception of "state personnel" in 1997.¹⁹³ It would not be surprising if Sun's prosecution was motivated by revenge because the crime of graft is one of the few in which prosecutors have independent power to investigate (*zizheng anjian*).¹⁹⁴

Another highly-publicized case occurred in Lianhua County, Jiangxi Province. He Xin, a well-regarded public defender with the Center for Indigent People of the Jiangxi Province Academy of Social Science, was sentenced to one-year's imprisonment for the crime of

189. Interview with lawyers in Shanghai and Beijing, P.R.C. (Apr. 1999).

190. For details, see the report on this case, FAZHI RIBAO [LEGAL DAILY], June 25, 1999, at 1. See also JIANCHA RIBAO [PROCURATORATE DAILY], Apr. 7, 1999, at 4.

191. *Id.*

192. The Lawyers Law, *supra* note 13, art. 2.

193. Article 93 of the revised Criminal Law stipulates:

The state personnel in this law refers to those assigned official duties in the state organs. Those working in state-owned companies, enterprises, non-commercial units, as well as people's groups and assigned official duties, those assigned specifically for official duties to state-owned companies, enterprises, non-commercial units, as well as people's groups, and those by other legal provisions assigned official duties, should be considered state personnel. The critical term here is "assigned official duties."

Id. Sun was not assigned any official duty while working as a lawyer.

194. See 1996 CPL, *supra* note 17, art. 18.

libel.¹⁹⁵ He Xin was accused by Li Chunting, the former president of the People's Court of Lianhua County, on the grounds that he circulated flyers accusing Li of illegal acts which the latter had firmly denied.¹⁹⁶

There was a lot of skepticism about the impartiality of the trial. First, He had a long history of agonizing the court by constantly appealing cases on his clients' behalf.¹⁹⁷ Second, He had been critical of the court president, including accusing him of corruption.¹⁹⁸ For this reason, He was deprived of the right to represent clients in this particular court for four years, despite the fact that there is no legal basis for a court to bar a particular lawyer's representation in its court. Finally, the trial involved many violations of legal procedure. For example, the court president, as a plaintiff in a private criminal lawsuit (*xingshi zisu anjian*), obtained the material accusing him of corruption, which according to the relevant provisions should be official secrets.¹⁹⁹

One recent case incriminating a lawyer further complicated the climate in which lawyers are practicing criminal law. Yu Ping, a criminal defense lawyer, was charged with "leaking state secrets" and sentenced to one year of fixed-term imprisonment by a local court of Henan Province on April, 28, 2001.²⁰⁰ Yu was the main defense lawyer for a defendant in a corruption case.²⁰¹ She was accused of inciting her associate to provide Zhu, the wife of her defendant, with a copy of excerpted materials obtained from the court.²⁰² Zhu allegedly studied the materials and arranged witnesses to provide false testimonies in the later hearings. It is arguable that Yu, as a defense lawyer, may have violated ethics rules by providing, via her associate, the court documents to defendant's wife.²⁰³ It is very problematic, however, to incriminate her under the charge of secrecy

195. See *Yidou Chongchong De Faguan Gao Lushi An* [A Case in Which A Judge Sued A Lawyer Arouses Suspicions], NAFANG ZHOUMUO [S. WEEKEND], Jan. 22, 1999, at 5.

196. *Id.* at 5.

197. Li complained that he always appealed whatever the judgment was. *Id.* at 6.

198. *Id.*

199. *Id.*

200. *Zhongguo Shouli Zaizhi Lushi Yin Xielou Guojia Mimi Bei Panxing* [The First Case in Which A Lawyer Was Sentenced for Leaking State Secrets in Our Country], LEGAL DAILY, May 14, 2001, at 2. For the details of the case, see also Yin Jianzhang, *Zielu Guojia Mimi Zui: Quanguo Shouli Lushi Shexian Zielu Guojia Mimi An Tingshen Jishi* [The Crime of Leaking State Secrets: Tale of Adjudication of the First Case of Leaking State Secrets by A Lawyer in Our Country], ZHONGGUO LUSHI (CHINESE LAW.), No. 2001, at 39-42.

201. *Id.* at 39.

202. *Id.*

203. According to lawyers interviewed in Shanghai and Xian, Chinese lawyers are required not to provide materials to any body other than defendants. Interviews with lawyers in Shanghai and Xian, P.R.C. (July 1999).

violations. It is also not clear by which standard the court materials were ascertained as "state secrets."

According to the official report, the justification for the charge was that the materials transferred to defendant's wife made it possible for the defendant's wife to conduct a series of "counteractions" including perjury against the authorities.²⁰⁴ In turn, this perjury caused the trial to be delayed twice and resulted in negative influence in the locality.²⁰⁵ It, however, is legal and important for defendant and lawyer to have sufficient information and time to prepare a defense.

Even according to Chinese law, all materials registered with the courts should be fully accessible to defendants and their lawyers.²⁰⁶ Why could the wife of the defendant—who has a vital interest in the trial—not have access to such materials? There might be some justifications for denying access by the wife or any other person to the materials if those materials involved legitimate state secrets. The materials in question, however, did not appear to be any sort of state secret. Of course, Zhu's act to instigate perjury is certainly a crime and punishable; nevertheless, it should not incriminate Yu, the defense lawyer, in any way unless there is direct evidence suggesting her commission of perjury too. Obviously in Yu's case, the court was frustrated by the delays in trial and punished Yu for facilitating such delays under the rubric of state secrecy violation.

The cases against lawyers mentioned above demonstrate why lawyers are reluctant to be involved in criminal defense work, as well as their unwillingness to confront the authorities. This situation clearly damages the interest of defendants, and thus the aim of the reformed CPL to provide more human rights protections.

I. *The Reactions of Lawyers and the Future Impact*

Legal scholars generally insist that it is necessary for lawyers to protect themselves in criminal litigation. Some suggest that at least two lawyers should be present during the process of deposing witnesses, which could prevent the authorities from incriminating lawyers later if a witness changes his or her story.²⁰⁷ To avoid "inducing" defendants or suspects to change their statements, a

204. See Yin, *supra* note 200, at 39.

205. *Id.*

206. See 1996 CPL, *supra* note 17, art. 36.

207. See Zhao Ziyun, *Xingshi Anjian Zhong Lushi Tiqian Jieru Ruogan Wenti De Yanjiu* [Studies on Several Issues of Lawyers' Early Involvement in the Criminal Process], ZHONGGUO LUSHI [CHINESE LAW.], No. 12, at 13 (1997); see also Hou Shuxiang, *Lushi Ruhe Baohu Ziji* [How Can Lawyers Protect Themselves], ZHONGGUO LUSHI [CHINESE LAW.], No. 9, at 40 (1998).

lawyer suggests:

There must be two lawyers present [while meeting with suspects]. The record of the meeting must include the details of all the questions posed by the lawyer and the legal advice they provide, and should be signed by suspects. By so doing, lawyers will be able to protect themselves if the suspects later reverse their statements.²⁰⁸

Even this careful approach, however, may not avoid problems because lawyers do not have access to the prosecution's evidence during the criminal investigation phase. Further, when lawyers meet clients, they do not know what suspects have already told prosecutors, which creates difficulties in identifying any changes in testimony. Lawyers have to be extremely cautious when they have conversations with their clients. Some lawyers we interviewed insisted that they have to protect themselves not only from prosecutors but also from their clients.²⁰⁹

To avoid any possible legal trap, some propose that lawyers may obtain testimony by letter (*fa han diaocha quzheng*)²¹⁰ or have relevant people present whenever they depose witnesses.²¹¹ One lawyer proudly declared that he had sent out around thirty letters and finally acquired a witness's written testimony.²¹² Under such circumstances, it is no wonder that the Model Practice for Lawyers' Handling Criminal Cases (*lushi banli xingshi anjian guifang*), issued by the All China Lawyers Association on April 25, 1998, states that lawyers may invite relevant people to be present during documentation of the evidence with witnesses (*quzheng*).²¹³

The hostile environment and the frequent reports about lawyers being caught up in serious legal problems have greatly discouraged lawyers from participating in criminal defense and have caused a substantial decline in the number of criminal cases in which defendants are represented by lawyers.²¹⁴ To protect the rights of lawyers and ensure that defendants can be adequately represented in criminal trials, the ACLA passed the Rules on the Committee of

208. See Zhao, *supra* note 208, at 13.

209. Interviews with lawyers in Shanghai and Beijing, P.R.C. (July 1999).

210. *Lushi Zuotan Xingshi Bianhu Nandian Jiaodian Ji Redian* [Lawyer's Symposium: Difficulties, Focuses, as well as Hot Issues in Criminal Defense], LUSHI YU FAZHI [LAW. & LEGALITY], No. 10, at 38 (1997) [hereinafter The Report on Lawyer's Symposium].

211. See Deng Ruixiang, *Lushi Ying Qianghua Ziwo Baohu Yishi* [Lawyers Should Raise Their Awareness of Self-protection], ZHONGGUO LUSHI [CHINESE LAW.], No. 5, at 37 (1997).

212. See Symposium, *supra* note 63, at 38.

213. See *Lushi Banli Xingshi Anjian Guifang*, [All China Lawyer Association: Model Practice for Lawyers' Handling Criminal Cases] [hereinafter the ACLA Model Practice], issued on April 25, 1998, art. 49.

214. See Tian Wenchang, *Lushi Weihe Buyuan Zuo Xingshi Bianhu?* [Why Are Lawyers Not Willing to Engage in Criminal Defense?], JIANCHA RIBAO [PROCURATORATE DAILY], Feb. 10, at 2 (1999).

Safeguarding Lawyer's Legal Rights During Practicing Law²¹⁵ (Safeguarding Rules) and formally established a sub-committee on safeguarding lawyers' rights in March 1998.²¹⁶

According to the Safeguarding Rules, ACLA and its local subordinates should establish a sub-committee to deal with cases regarding violations of lawyers' legal rights and interests.²¹⁷ Although the sub-committees were expected to take a strong position on protecting lawyers, it appears that they only publicize cases and exert influence over the local government in order to rescue the lawyers in trouble.²¹⁸

IV. CONCLUSION: AN UPHILL JOURNEY

Universally recognized international standards require that all persons facing a criminal charge, including suspects or defendants, be adequately represented by legal counsel.²¹⁹ For instance, Article 14 of the International Covenant on Civil and Political Rights (ICCPR) requires that all persons "have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing."²²⁰ Furthermore, the Basic Principles on the Role of Lawyers (Principles on Lawyers) stipulates:

All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials.²²¹

215. The Rules on Committee of Safeguarding Lawyer's Legal Rights During Practicing Law was passed by the ACLA Standing Committee at its Eighth Meeting of the Third Congress on Nov. 22, 1997.

216. See Special Report, *We Are Walking in the Broad Road—Interview with Ren Jishen, President of the Third Congress of All China Lawyer Associations*, PEOPLE'S DAILY, Apr. 21, 1999, at 11.

217. See *supra* note 215.

218. Article 3 of the Safeguarding Rules stipulates the mandate of the committee as "coordinating . . . , aiding . . . proposing . . . to solve the issue with other governmental department."

219. The Human Rights Committee has stated that "all persons who are arrested must immediately have access to counsel." (Concluding Observations of the Human Rights Committee, Georgia, UN Doc. CCPR/C/79 Add. 75, ¶ 27 Apr. 1 (1997)).

220. China signed the ICCPR in October 1998, but has not yet ratified the treaty. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171.

221. Basic Principles on the Role of Lawyers, in *Human Rights: A Compilation of International Instruments*, Vol. I. (Passed at the Eighth U.N. Congress on the Prevention of Crime and the Treatment of Offenders, Aug. 27-Sept. 7, 1990. U.N. Doc. A/CONF.144/28/Rev.1, at 119.)

More specifically, suspects are entitled to: (1) retain a lawyer upon arrest or upon being charged with a criminal offence;²²² (2) have prompt access to the lawyer of their choosing, usually no later than forty-eight hours from the time of arrest or detention;²²³ and (3) their communications with lawyers should be effected in full confidentiality.²²⁴

The Principles on Lawyers advises that legal counsel should be ensured the following conditions: (1) they should be able to perform all of their professional functions without intimidation, hindrance, harassment, or improper interference;²²⁵ (2) they should not suffer any punishment for any actions taken in accordance with their duties;²²⁶ (3) they should have access to appropriate information, files, and documents in the government's control or possession;²²⁷ and (4) the confidentiality of all communications and consultations with their clients should be respected.²²⁸

By repeatedly allowing its public security departments and local procuratorates to deny requests for attorney-client meetings, China has obviously failed to "ensure that all persons arrested or detained . . . have prompt access to a lawyer."²²⁹ By neglecting to protect defense attorneys from arbitrary detention or conviction, China has also failed to uphold the guarantee that lawyers "shall not suffer, or be threatened with, prosecution or administrative . . . or other sanctions for any action taken in accordance with recognized professional duties."²³⁰ By turning a blind eye to the difficulties lawyers currently face in preparing a defense, China overlooks its duty "to ensure lawyers access to appropriate information, files and documents . . . to enable lawyers to provide effective legal assistance to their clients."²³¹

Although the Principles on Lawyers is not formally binding, it reflects widely accepted standards on the components of the right to a fair trial. In addition, China is obligated to uphold the right to a fair trial.²³² Indeed, the effective assistance of legal counsel obviously affects an individual's ability to present a defense of criminal charges filed against him. Although the current CPL provides for a greater role for lawyers in the criminal process, the environment in which

222. *Id.* at 5-6.

223. *Id.* at 7.

224. *Id.* at 8.

225. *Id.* at 16.

226. *Id.*

227. *Id.* at 21.

228. *Id.* at 22.

229. *Id.* at 7. International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 14(3)(b), 999 U.N.T.S. 171.

230. *Id.* art. 16(c).

231. *Id.* art. 21.

232. Art. 10 of the Universal Declaration of Human Rights, GA Res. 217A (III), Dec. 10, 1948 [hereinafter UDHR]. The UDHR is generally considered declarative of customary international law which is binding upon states.

lawyers work remains highly unsatisfactory according to international norms.

In sum, the revision of the CPL in 1996 seemingly represents a progress reflecting a series of enlightened measures accumulating during the past two decades of legal reform. Both the legal culture and the political reality, however, have undermined this critical reform a great deal. Efforts have been made by legal scholars, lawyers, and reform-minded officials at various occasions to voice their concerns and urge for improvements. There is indeed some initiatives that have been raised by different authorities in various areas, such as on-going drafting of the evidence law by the Standing Committee of National People's Congress, which would certainly improve the chance of defense lawyers to cross-examine witnesses at trial.²³³ Some local courts or procuratorates continue to experiment with devices allowing a limited right to remain silent for suspects and defendants. Information revealed from one recent national conference²³⁴ with regard to criminal defense lawyers provides us with a very positive prospect. Nevertheless, there is no sign that any major significant reforms will be launched any time soon.

Many lawyers and scholars blame the political structure for the current problems hindering lawyers, and therefore suspects and defendants, from exercising their procedural rights. Recently, a professor from Beijing University voiced his concern that any progressive reform could not be put to work without reforming the fundamental system. "[W]ithout overhauling current power structure," he said, "without achieving certain degree of judicial independence and freedom of media or press, those beautiful words contained in the current CPL would never come true."²³⁵ Many scholars echo his concern. It is indeed the overall political structure that should be blamed most for the failure of the CPL revision in 1996.

In the contemporary power structure, the Chinese judiciary has a lower status than other organizations, such as prosecutors and

233. Some local courts have long been experimenting on evidence rules. For example, the High People's Court of Beijing issued comprehensive interim rules regarding handling of evidence by the courts, which was set to take effect on October 1, 2001. Article 21 explicitly requires that all witnesses but those otherwise legally excused be present at trial to be cross-examined.

234. The Conference was held in a suburb of Beijing on December 8-9, 2001. The Author was invited to the conference and was astonished by the openness and honesty of the participants. Lawyers openly criticized the prosecutors and public security personnel for creating obstacles for lawyers to participate in criminal defense. It was to the Author's surprise that senior prosecutors attending the conference frankly admitted such difficulties, expressed their sympathies, and vowed to improve, in spite of criticism.

235. See a speech by a professor from Beijing University Law School on the Conference on Justice and Criminal Defense in Beijing, Dec. 12-13, 2001 (on file with the Author).

public security departments. In most cases, the presidents of People's Courts enjoy less political influence than the chief prosecutors and the chief of public security departments within the party system. In addition, there is a political-legal committee set up within every CCP committee that is supposed to coordinate the party's legal policy as well as help with the appointment of legal personnel such as the president of the court and chief prosecutor.²³⁶ On many occasions, the political-legal committee might interfere with the work of the judiciary, if it deems such interference necessary. The difficulties that Chinese criminal defense lawyers have run into are mostly related to this political structure.

Professional lawyers are likewise not able to practice independently. The Ministry of Justice and its local subordinates have authority to "manage" lawyers.²³⁷ The way to "manage" lawyers includes organizing lawyers to study the legal policy of the government and the party and overseeing the lawyers' work. Compared to their counterparts in the court, lawyers lack the resources and power to safeguard their own liberty and interests.

With the recent entry into the WTO, China certainly needs to renovate its legal system in order to integrate into the world system. The question, however, is whether China will be able to be internationalized only at the business level without touching its political structure. Many remain skeptical. It is very hard to imagine that WTO rules, which are indeed closely related to trade acts, will be enforced fairly by a highly politically biased legal system.

Many believe that the upcoming CCP's National Congress will decide the direction of China's political reform for the next few years, even decade. Few, however, foresee radical changes or immediate effects of any dramatic reforms. To criminal defense lawyers, improving their practicing situations without seriously reforming the current system means merely a rocky road ahead. The humorous words of a leading scholar given to a recent conference may well reflect the mentality of most criminal defense lawyers: "Let's hope the best but prepare for the worst."²³⁸

236. See *Human Rights in China: Empty Promise: Human Rights Protection and China's Criminal Procedure Law in Practice, March 2001*, at 10-11.

237. Article 4 of the Lawyers Law states: "State Council administration department for judicial affairs should supervise and guide lawyers, law firms and lawyers associations in accordance with laws." However, the Law does not spell out how the justice departments supervise or guide lawyers. Besides, the Law also empowers the justice departments to approve lawyers licenses (article 11) and discipline those lawyers who violate the law or other ethics rules (articles 45 to 48). For the English translation of the Lawyer Law, see *supra* note 13.

238. See *supra* note 235.