
2. A Promise Unfulfilled: The Impact of China's 1996 Criminal-Procedure Reform on China's Criminal Defense Lawyers' Role at the Pretrial Stage (Part 1)

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INTRODUCTION

In many contemporary Western countries, the criminal procedure features procedural protections afforded to the accused, such as the right to counsel, the privilege against self-incrimination, exclusion of wrongly obtained evidence, abundant opportunities for pretrial discovery, and many more. In these countries, the public view with much horror the prospect of wrongly convicting an innocent person, and are hence committed to values besides the relentless pursuit of truth—most notably, the protection of a broad spectrum of basic human rights. However, much of what has been accepted as fundamental to a Western criminal justice system has only just entered public discourse in China. China has long been denounced for its poor human rights record. Human rights protection is especially inadequate in China's criminal justice system. The roots of this phenomenon are, on the one hand, a long-standing negative attitude toward criminal defendants embedded in the Chinese culture and, on the other hand, the criminal justice system's deference to the power of the State. Even though China's unprecedented economic development has brought forth rapid reconstruction of its legal landscape, China's criminal procedure remains an area dictated by old customs.

In 1996, China completed a major revision of its Criminal Procedure Law (CPL), which was originally enacted in 1979. Two key elements of the new CPL are the expansion of the role of criminal defense lawyers and the adoption of a more adversarial trial procedure.² The new CPL was heralded as an audacious reform undertaking that promised to afford the accused more procedural protections for the accused and to bring China's criminal procedure closer to international standards.

1. The research methodology for this paper includes interviews, field trips, and literature search. The author personally interviewed more than 50 people, including procuratorators from the Supreme People's Procuratorate and a number of provincial or county-level procuracies, prominent criminal defense lawyers in China, judges at provincial or district levels, as well as a large number of law professors from leading law schools and research institutions in China and in the United States. The author has also attended a number of criminal trials and visited several detention centers in China.

2. The exact definition of an adversarial model of trial procedure is still under intense academic debate. The distinctions between the adversarial and inquisitorial procedural models will be discussed in detail in Part III, Section 2 of this paper. For the majority of this paper, unless otherwise indicated, the term 'adversarial system' refers to the party-contest model of criminal procedure, and the term "inquisitorial system" refers to the official-inquest model of criminal procedure.

The profession of criminal defense, a product of Western civilization that was introduced to China at the beginning of the 20th century, has never taken a strong foothold in the Chinese culture. Even though the Chinese public is just as charmed by defense lawyers in American movies and TV series as many people are in Continental Europe, for a variety of cultural and ideological reasons which will be explored later in this paper, the revival of this profession after China's Cultural Revolution has not garnered much public support. Reflected in laws governing the work of criminal defense lawyers in China, prior to the 1996 CPL, they had few work-related privileges³ and their work was largely limited to presenting mitigating factors and pleading for a lenient sentence. However, after the 1996 revision, CPL now provides criminal defense lawyers with a series of work-related privileges and authorizes the involvement of defense lawyers from the beginning of the charging process, namely, the time from which the Procuratorate starts to examine the case for prosecution.

The pretrial stage—the focus of this article—is a critical stage for the accused not only because it leads to the Procuratorate's decision on whether to bring any charges, but also because thorough investigations and ample preparations by the defense during this period are crucial to the effectiveness of defense and hence the outcome of any subsequent criminal trial. However, the past four years have demonstrated that the 1996 CPL failed to bring about the kind of improvement envisioned by its drafters.

This paper aims to examine the impact of the 1996 CPL on the role of China's criminal defense lawyers at the pretrial stage—specifically, during the charging process—and to explore factors that may have contributed to the ineffectiveness of the new CPL. Major problems with the current status of criminal defense lawyers will be analyzed and suggestions for further reforms will be proposed at the end.

I. AN OVERVIEW OF THE 1996 CRIMINAL PROCEDURE REFORM

1. Historical Background and Guiding Principles for the 1996 Reform

a. China's economic development demands a modern legal system

The active building of China's legal system in the past two decades can be divided into two phases⁴. The first phase took place against the backdrop of the Culture Revolution. It was marked by the historic Third Plenary of the Eleventh Central Committee of the Chinese Communist Party (CCP) in late 1978, which officially established that a strong

3. The word 'privilege' here refers to work-related privileges, for example, the privilege to review the prosecutor's file on the accused, the privilege to maintain attorney-client privilege. People in the United States may view these tasks more as essential components of a criminal defense lawyer's job or basic responsibilities of a criminal defense lawyer than as 'privileges'. In China, however, since criminal defense as a profession is still at its nascent stage, these tasks are still in the process of being incorporated into the law as parts of a lawyer's job. Therefore, for a Chinese criminal defense lawyer who had to reveal what his client has told him upon request of the prosecutor or other state officials, the right to keep such information confidential is viewed more as a "privilege."

4. See generally, Albert Chen, *Toward a Legal Enlightenment: Discussions in Contemporary China on the Rule of Law*, 17 UCLA PAC. BASIN L.J. 125 (1999); Eileen Danahoe, *The Promise of Law for the Post-Mao Leadership in China*, 41 STAN. L. REV. 171 (1988).

legal system was imperative for China's economic development⁵. Law was viewed as a means to restore the stability and unity lost during the "lawless" years of the Culture Revolution⁶. During a period of intense rehabilitation, many important legal institutions were re-established and a series of new laws passed, among which was the PRC's first Criminal Procedure Law⁷. Chapter Four of the 1979 CPL prescribed the rules for legal representation during criminal proceedings, and hence reestablished the legitimacy of the institution of criminal defense lawyers.⁸

The Second phase of legal reform was marked by the birth of the phrase "the socialist market economy," which signified a major shift in China's economic policy. Following Deng Xiaoping's trip to southern China in 1992, the Chinese Communist Party decided at its 14th Party Congress that China from then on would move in the direction of a "socialist market economy,"⁹ completing a major shift in the country's dominating ideology. The shift in ideology tremendously liberalized the scope of legal reforms. During the first phase of legal reforms, China's legal academics, which constituted the major force behind most reform efforts, constantly found themselves constrained by the tenets of Marxism and the forbidden territories of political sensitivity¹⁰. The new economic regime introduced the concept of the "rule of law," a term that was widely used to describe the use of legal means to restrain the power of government, both procedurally and substantively. "Socialist market economy" was viewed as a "rule of law" economy that was predicated upon a more rule-oriented legal infrastructure.

The decentralization and deregulation that took place in this new wave of economic reforms allowed a variety of interests to flourish¹¹. At least in theory, interests of individuals and collectives no longer have to conform to that of the State. Thus, in the area of criminal procedure, discussions of the protection of individual rights was re-energized after a nadir in the aftermath of the 1989 student movement. In December 1993, the State Council approved the "Proposal on Further Reforms of the Lawyers by the Ministry of Justice."¹² The immediate implementation of this proposal completed the transition of definition of lawyers from "legal workers of the State" to "self-employed legal professionals." This transition had major significance for the development of criminal defense. In a criminal proceeding, the defense lawyer represents the interest of the accused, which is in direct opposition to that of the State. The old classification of lawyers as "State workers" was at odds with lawyers' responsibility as the legal representative of the accused. The change in definition resolved the conceptual difficulties and the potential conflict of interest on this issue, and was interpreted as a

5. Communiqué of the Third Plenary Session of the 11th Central Committee of the Communist Party of China, Xinhua Radio Broadcast, Dec. 23, 1978 (in English), *transcribed in* U.S. FOREIGN BROADCAST INFO. SERV. DAILY REP.: PEOPLE'S REPUBLIC OF CHINA, Dec. 26, 1978, at E4, E10 (No. 78-248).

6. Danahoe, *supra* note 4, at 173.

7. China's first Criminal Procedure Law was enacted in July 1979. Zhiming Zhang, *Lawyers in Contemporary China*, in *TOWARDS AN ERA OF RIGHTS*, 135, 147 (Yong Xia ed. 1995).

8. *Id.*

9. Albert Chen, *AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA*, 209 (rev. ed. 1998).

10. Chen, *supra* note 4, at 126.

11. Zhang, *Supra* note 7, at 151.

12. *Id.* at 154.

welcoming gesture from the Chinese government to further reforms in the area of criminal defense.

However, the fact that economic development served as a major force behind the legal reforms presaged the emergence of certain problems as the reforms proceeded. Unlike legal scholars who have serious interests in many fundamental issues concerning the function of law in a socialist society, the Chinese leadership's support for legal reforms was mainly motivated by a practical consideration:¹³ they had come to the realization that the establishment or the *appearance* of a modern and westernized legal system "implies legal certainty, rationalized market behavior, a stable atmosphere for direct foreign investments," and hence could allay the fear of arbitrary governmental action.¹⁴ Thus, the eagerness for legal reforms exhibited by the Chinese leadership was more a manifestation of its desire for faster economic development—because a modern legal infrastructure is conducive to the flow of foreign investment—than an equally willing embrace of underlying legal principles. One potential problem with this latent inconsistency between the intentions and actions of the leadership is that the leadership would be more eager with legal reforms that have direct impact on the economy, but less so with reforms that only touch on the economy tangentially, especially if the latter adversely affect other interests of the leadership. Therefore, the Chinese government has placed great emphasis on improving laws governing foreign investment or China's fledgling capital market, but has been far less enthusiastic about reforms pertaining to the criminal justice system, partly because the impact of such reforms on China's economic development seem minimal and ancillary, and partly because such reforms are perceived to undermine another important political objective of the government — crime control. These topics will be explored in detail in Part II.

b. Globalization of human rights protection in criminal proceedings

Another force behind China's CPL reform was the emergence of an international standard of human rights protection in criminal proceedings. The Preamble of the United Nations Charter places the protection of human rights as one of its principle goals.¹⁵ Since the accused in a criminal proceeding is particularly susceptible to human rights violations perpetrated by the government, the 1948 Universal Human Rights Declaration (UHRD) incorporated a number of articles pertaining specifically to the criminal justice system.¹⁶ Article 11 of UHRD established the importance of criminal defense by stating that "everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense."¹⁷ Between 1975 and 1990, the United Nations passed a series

13. CARLOS WING-HUNG LO, CHINA'S LEGAL AWAKENING: LEGAL THEORY AND CRIMINAL JUSTICE IN DENG'S ERA, 247-48 (Hong Kong Univ. Press. 1995).

14. Robb M. LaKritz, *Taming a 5000 Year-Old Dragon: Toward a Theory of Legal Development in Post-Mao China*. 11 EMORY INT'L L. REV. 237, 238 (1997).

15. U.N. CHARTER, preamble, available at <http://www.un.org/aboutun/charter/> ("to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small").

16. Universal Human Rights Declaration, available at <http://www.hri.ca/uninfo/treaties/1.shtml> (UHRD has rules on the prohibition against double jeopardy, the right to appeal, prohibition of arbitrary arrest and detention, etc.).

17. *Id.* art.11.

of conventions imposing minimum standards in criminal procedure.¹⁸ These conventions reflected a broad recognition of the value of human rights protection in the global community.

As China seeks integration into the global market, its leadership faces tremendous pressure to conform to international human rights standards. By 1997, China had signed seventeen international conventions regarding human rights, including the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.¹⁹ Talks were under way in 1997 about entering the International Covenant on Civil and Political Rights.²⁰ This Covenant is most explicit and specific about human rights protections in the administration of criminal justice. The principles established by the Convention include the presumption of innocence, prohibition against illegal searches and seizures, right to counsel, and prohibition against self-incrimination, etc.²¹ Even though it's not yet clear how much binding power these Conventions will have on the actions of the Chinese government, the Chinese government may feel compelled to translate at least some of these promises into legislative actions if only to uphold its own credibility in the eyes of the international community. Moreover, for people who are actively pushing for reforms of the criminal justice system, the signing of these Conventions could be used as a form of validation of their actions or as a shield to fend off potential political repercussions from opposition.

2. Major Changes in the Pretrial Procedure brought by the 1996 CPL

Against the domestic and international backdrops described above, the National People's Congress (NPC) took the lead in revising China's CPL, and the final product went into effect in 1996. One of the principal goals of this revision was to "strengthen the protection of the rights of the accused and to improve the status of the accused in a criminal proceeding."²² The 1996 CPL addressed this goal with the following three approaches: 1) the abolition of "shelter and detention" for the purpose of investigation;²³ 2) the adoption of a more adversarial trial procedure;²⁴ and 3) the expansion of the function of defense lawyers in criminal proceedings, especially at the pretrial stage.²⁵ This article focuses on the third approach regarding the role of criminal defense lawyers in the charging process.

18. Guangzhong Chen, *UN Standard in Criminal Justice and Reform of Chinese Law*, in THE UNITED NATIONS STANDARD AND CHINA'S LEGAL SYSTEM OF CRIMINAL JUSTICE, 56-61 (Guangzhong Chen & Daniel Prefontaine ed. al. 1998).

19. *Id.* at 69.

20. *Id.* China signed this Covenant in October 1998, but it has not yet been ratified by the National People's Congress.

21. Yuguan Yang, *On 'The International Covenant on Civil and Political Rights of United Nations'*, in NEW STUDIES ON PROCEDURE LAW—COLLECTION OF PAPERS CELEBRATING PROFESSOR CHEN GUANGZHONG'S 70TH BIRTHDAY (China Law Press, 2000).

22. QiuHong Xiong, TREATISE ON CRIMINAL DEFENSE, 54 (China L. Press, 1998).

23. Criminal Procedure Law of the People's Republic of China, art. 52, 96 (1996) (hereinafter 1996 CPL) [this should not be in footnote].

24. *Id.* Chpt. 2.

25. *Id.* art. 32-41.

Under old criminal procedures, the official involvement of defense lawyers would commence only seven days before the trial.²⁶ During the entire police investigation and charging process, the role of criminal defense lawyers was not defined by law. The legal recognition of lawyers as defense counsels is imperative to the securing of essential work-related privileges, such as the privilege to meet with the defendant or the privilege to review the case file. Therefore, because old criminal procedures were silent on the role of lawyers before the seven-day statutory period, lawyers had no legal basis to demand access to their clients or to review case files during the rest of the pretrial period, and the police or the Procuratorate could deny requests for access at will.

This situation led to two serious consequences. First, there were great disparities between the Procuratorate and the defense lawyer with respect to the amount of time available to them for trial preparation, and consequently, to the level of understanding of the facts and applicable laws of the case. Second, during the majority of the lengthy pretrial period (before the seven-day statutory date), the defense counsels had no legal guarantee that they would be able to meet with their clients, review the government's case, or carry out their own investigation. Therefore, the function of criminal defense lawyers was extremely limited at the pretrial stage, which led to poor performance during the trial. In most cases, defense lawyers did little in questioning the government's case against the accused. Rather, their main function was to offer mitigation after the government had presented its case and to plead for a more lenient sentence. Thus, the gap between the quality of criminal defense in China and that in Western countries was astonishing.

Drafters of the 1996 CPL tried to narrow this gap by authorizing the appointment of "defenders" at a time when the Procuratorate begins to examine the case for prosecution.²⁷ Three types of people can be appointed as "defenders" under the 1996 CPL: 1) lawyers; 2) people recommended by a public organization or a work unit to which the defendant belongs; and 3) guardians, relatives or friends of the defendant.²⁸ The significance of such authorization lies in the fact that the new CPL also grants "defenders," especially defense lawyers, a series of work-related rights and privileges essential to the performance of their defense work.²⁹ For example, Article 36 of the 1996 CPL states that counsel may meet and correspond with the accused, consult, extract and duplicate charging documents and technical materials.³⁰ Article 37 provides the

26. Criminal Procedure Law of the People's Republic of China, art. 151 (1979). Article 151 of the 1979 CPL provided that the People's Procuratorate has to deliver a copy of the charging document to the accused and inform the accused of the right to have legal representation at least seven days before the trial. In practice, few procurators would inform the accused of their rights earlier than the seven-day statutory date.

27. 1996 CPL, art. 33 (stipulating that the accused in a case of public prosecution has the right to have legal representation from the date the case is transferred to the Procuratorate for examination). The term "defender" is used here to include both defense lawyers and other qualified defenders who are not necessarily legal professionals.

28. *Id.* art. 32.

29. Defenders who are not lawyers may also meet and correspond with the accused, consult, extract and duplicate charging documents and technical materials, but they need the permission from the People's Procuratorate in order to do so. *Id.* art. 36. However, defenders who are not lawyers do not have the privilege to investigate the case. *Id.* art. 37.

30. *Id.* art. 36.

“defenders” with the right to collect evidence from witnesses or other related parties upon their approval.³¹

However, these rights are only available to people who are legally authorized to be “defenders.” Thus, because the statutory role of a “defender” is not available prior to the initiation of the charging process, even though one could obtain counsel assistance, those counsels are not “defenders” under the statute and hence not entitled to the aforementioned statutory rights until after the accused has been charged. In fact, the 1996 CPL distinguishes the scope of legal representation before and after the beginning of the charging process. For the period before the charging process, Article 96 of the 1996 CPL stipulates that lawyers at that stage can “provide [the accused] with legal advice and file petitions and complaints on his behalf.”³² This description basically reduces the function of counsel to a mere advisory role, and precludes more proactive activities that are central to the task of ‘criminal defense.’ Not surprisingly, Article 96 further spells out an extremely limited set of privileges for the lawyer at that stage, the lawyer “shall have the right to find out from the investigation organ about the crime suspected of, and may meet with the criminal suspect in custody to inquire about the case.”³³ Such language suggests that the 1996 CPL does not intend to sanction the participation of lawyers before the charging process and it only contemplates a very perfunctory role for the lawyers at that stage. It is not until the beginning of the charging process that lawyers are repositioned as “defenders” and their responsibilities are expanded to include “presenting, according to the facts and law, materials and opinions proving the innocence of the criminal suspect or defendant, the pettiness of his crime and the need for mitigated punishment or exemption from criminal responsibility, and safeguarding the lawful rights and interests of the criminal suspect or the defendant.”³⁴ Thus, based on the 1996 CPL, the defense function of a lawyer does not start until the lawyer becomes a “defender” at the beginning of the charging process, and a lawyer is extremely constrained in what he could do during the entire period of police investigation.

From an Anglo-American perspective, the 1996 revision was a rather irresolute reform effort because it failed to allow the appointment of “defenders” during police investigation, the period during which human rights violations were most rampant. Nevertheless, in China, the 1996 CPL was received with much enthusiasm by lawyers and legal scholars at the time of its enactment. For an area that had persistently resisted change, the new CPL was a major victory and it signified the inception of a new era of procedure fairness. However, defense lawyers and legal scholars soon discovered that they have miscalculated the power of the new CPL as well as the recalcitrance of old guards and old customs. Serious problems began to surface during the implementation of the 1996 CPL.

II. MAJOR PROBLEMS DURING THE IMPLEMENTATION OF THE 1996 CPL

31. *Id.* art. 37.

32. *Id.* art. 96.

33. *Id.*

34. *Id.* art. 35.

1. Access to the Accused

Even though the 1996 CPL grants defense lawyers unlimited access to their clients, in practice, defense lawyers still face a variety of obstacles when they seek access to their clients. The criminal process in ancient China was very inquisitorial in nature, which means that judges took the primary responsibility of questioning defendants and witnesses to ascertain the facts. In addition, criminal procedure of the PRC was initially modeled after that of the former Soviet Union,³⁵ which also has a strong inquisitorial tradition. Thus, China's criminal procedure inherited many of the defining characteristics of an inquisitorial system, one of which was the heavy dependence on confessions. Today, such reliance remains largely the same. Some attributed this situation to the lack of modern investigative technology available to the police and the Procuratorate;³⁶ others blamed it on the inadequacy of a comprehensive system of proof that is capable of compelling witness cooperation in criminal proceedings.³⁷ In the absence of incriminating evidence from other sources, confession remains crucial to the strength of the Procuratorate's case.

There is a common fear among the procurators that counsel assistance would result in retraction of prior confessions by the accused. The incidence of retraction did rise significantly with increased participation of defense lawyers.³⁸ Many in practice and in academia believe that this increase is mainly a reflection of the prevalence of police misconduct during the investigation process.³⁹ The use of torture, prolonged detention, and other unlawful means to extract confession has long been a staple of the Chinese criminal process, subject to sharp criticism from both domestic and Western human rights advocates. Upon appraisal by the defense counsel of their legal rights, a large number of suspects claimed that their prior confessions were untruthful and that they were pressured to give such statements only to avoid further bodily harm. To a certain extent, the increased incidence of retraction could be interpreted as a positive sign that the newly furnished procedural protections were at work as purported, even though one could not rule out the possibility of a certain percentage of false claims. In the eyes of many procurators, however, these retractions were utterly unwarranted complications that unduly interfered with the performance of their public duties. The Procuratorate soon discovered that the system under the 1996 CPL harbored opportunities for reducing "interference" from defense lawyers.

Due to the inadequacy of the bail system, by the time the case is transferred to the Procuratorate, most often the accused has been confined to a detention center. Current regulations require defense lawyers to have the following documents in order to be granted access to the detention center: 1) an official Opinion issued by the Procuratorate regarding charges against the accused; 2) a Certification from the Procuratorate

35. *See generally*, CHEN RUIHUA, FRONTIER QUESTIONS IN CRIMINAL PROCEDURE, 27-29 (People's Univ. China Press, 2000).

36. Interview notes A.

37. China's first evidence law is currently in the drafting process. In the absence of compulsory measures to ensure witness collaboration, there is tremendous culture and social barrier to testifying in public, especially if the witness and the accused have prior relationships.

38. Interview note A.

39. *Id.*

identifying the defense counsel for the suspect; 3) lawyer's certification; 4) reference from the lawyer's firm; 5) power of attorney from the accused (if available).⁴⁰ Therefore, defense counsel would not be able to meet with his client until he obtains the Opinion letter and the Certification from the Procuratorate. In order to secure a confession from the accused, the procurators often use a variety of means to delay issuance of these documents until they have interrogated the criminal suspect.⁴¹ If a defendant has given the same confession twice—once before the police and once before the Procuratorate—it then becomes more difficult for the defense to challenge the confession on the ground of extortion by way of torture because the Procuratorate can argue that since it did not use any illegal means, the second confession should be voluntary and truthful.

In addition to the obstacles posed by the Procuratorate, the police also have incentives to prevent lawyers from meeting with their clients. The interest of the police is largely aligned with that of the Procuratorate—successful prosecution of criminals is a major consideration in performance evaluations within the police department. Therefore, the police are equally hostile to early involvement of defense lawyers and they also use different excuses to delay or deny lawyer-client meetings. In one case, defense lawyers' request to meet with their clients was denied fourteen times by the police staff at the detention center within a two-month period.⁴²

Another reason for the limited contact between the defense lawyer and accused is the lack of initiatives from defense lawyers themselves. A number of factors contributed to the lack of such initiatives. The first and foremost factor is the non-lucrative nature of criminal defense work. With the rapid development of China's new economy, especially the rise in foreign investments, most law firms are preoccupied with corporate transactions that bring in more abundant financial returns. There has been a severe shortage of lawyers who are willing to take on criminal matters. In April 1997, China instated a full legal aid program to ameliorate the shortage of criminal defense lawyers.⁴³ Under this program, when a court needs to appoint counsel for an eligible defendant, the court would authorize the local legal aid agency to appoint a lawyer for the defendant within three days.⁴⁴ Because there is no public defender system in China, most of these lawyers are from local law firms. Each law firm has to meet a certain quota of criminal cases every year.⁴⁵ For each case where counsel is appointed, the counsel would usually receive RMB150 from the Legal Aid Office, and another RMB150 from his own law firm.⁴⁶ Since detention centers are usually located in distant suburbs, a cab ride to the detention center could easily cost RMB100. Therefore, for court-appointed counsels, it is not financial profitable for them to arrange for additional meetings with their clients or to invest additional time and energy than the bare minimum required by the law.

40. *Id.*

41. *Id.*

42. *Final Decision on the First Case involving Lawyer's Privilege in the East Three Provinces—Lawyer's Meeting with Criminal Suspect Needs No Approval*, at http://chinalawinfo.com/fzdt/bg_jdft.asp?id={A8C3E647-03CD-436A-8FF7-A844F997018F}.

43. See Joint Notice from the Supreme People's Court and the Ministry of Justice on Criminal Legal Assistance Work (1997), reprinted in LATEST JUDICIAL EXPLANATIONS OF THE LAWS OF THE CRIMINAL JUSTICE SYSTEM.376 (China Univ. Law & Pol. 1999).

44. *Id.*

45. Interview note A.

46. *Id.* RMB150 is equivalent to US\$19.

Second, meetings with the accused often are unproductive. Even though current regulations do not require officer presence at these meetings, in practice, in almost all cases, meetings between the defense counsel and the suspect are under the watch of police officers or surveillance cameras.⁴⁷ Client-lawyer confidentiality, a crucial prerequisite for legal representation in Western criminal justice systems, has encountered staunch resistance in China. The non-confidential settings at these meetings make the accused fearful of the possibility of disclosing self-incriminating evidence to the government. Hence, defense lawyers often obtain little additional information from these meetings than what they would have learned from the Procuratorate.

The third factor that contributes to the lack of initiatives among defense lawyers is the difficulty in proving police or procuratorial misconduct. In addition to getting a first-hand account of the facts of the case, the main purposes of pretrial meetings also include appraising the accused of their legal rights and obligations, investigating police or Procuratorial misconduct during investigations, and seeking legal remedies for such misconduct. However, many defense counsels have learned from their experience that it is exceedingly difficult to successfully challenge police or procuratorial misconduct.⁴⁸ Some of the coercive means used by the police left no physical evidence on the accused.

For example, starvation and sleep deprivation are frequently used to compel confessions or other types of cooperation. Even if the coercive means did leave physical marks at the time of their commitment, the wounds most likely would have healed by the time defense lawyers met with their clients. Police often defended allegations of torture by attributing the injuries to inmate fights at detention centers.⁴⁹ For fear of police retaliation, few inmates would be willing to come forward and testify against the police. Even though there are no official statistics on the number of incidents in which the defense succeeded in pursuing a charge against the police with torture or other illegal conduct, most practicing attorneys and legal academics believe that the number is low.

For the reasons described above, defense lawyers, especially court appointed ones, have limited contacts with their clients prior to the trial. Such an outcome demonstrates that even if the law guarantees access to the accused, it may not be effective in practice if complementary measures are inadequate, such as the lack of sufficient financial assistance to court-appointed counsels, or if access is rendered meaningless by the lack of confidentiality in meetings resulting from such access.

2. Access to Files: Narrower Scope of Review by the Defense

Article 36 of the 1996 CPL provides defense lawyers with the right to review the Procuratorate's files. Article 36.1 states that "from the day the people's Procuratorate begins to examine a case for prosecution, defense lawyers may consult, extract and duplicate charging documents and technical materials."⁵⁰ It is unclear from the language

47. *Id.*

48. *Id.*

49. *Id.*

50. *Supra* note 30.

of the 1996 CPL what “charging documents” or “technical materials” entails. Soon after the enactment of the 1996 CPL, the Supreme People’s Procuratorate (SPP) issued its own regulations (the “1997 SPP Regulation”) to facilitate the implementation of the CPL.⁵¹ The 1997 SPP Regulation offers detailed explanation of many terms that are vaguely defined in the 1996 CPL. In fact, the SPP Regulation was meant to be a major “judicial” interpretation of the CPL.⁵²

The 1997 SPP Regulation stipulates that charging documents refer to documents that are procedural in nature. They include the decision to file a case, detention warrant, arrest warrant, search warrant, and other documents that are prepared for the taking of compulsory measures or other investigative and prosecutorial procedures.⁵³ Because these procedural documents generally do not state reasons for the granting of various permissions, they are of little use for the defense to appraise whether government actions are indeed supported by the facts of the case. The 1997 SPP Regulation further stipulates that technical materials refer to documents that record the conclusions of technical examinations, which include blood tests, psychological tests, and other examinations by qualified professionals.⁵⁴ Because these documents often contain conclusions only, and without detailed description of methodology or actual data from the tests performed, they are again of little value to the defense. Statements from witnesses and victims, or even the identities of those expected witnesses, as well as other evidentiary materials such as tangible objects, are excluded from the legally prescribed scope of document review by the defender. Therefore, the 1997 SPP Regulation practically excludes defense lawyers from reviewing any substantive materials in the Procuratorate’s files, thus preventing them from any meaningful evaluation of the strength of the government’s case during the charging process.

This is not the only problem with the defense’s right to review the file. Article 36.2 of the 1996 CPL deals with access to files once the case is transferred to the court. It states that the defense counsel could consult, extract and photocopy judicial documents “pertaining to the criminal acts in the case”.⁵⁵ There has been much debate among practitioners, legislatures and legal academics regarding the intended scope of document review at this stage. In practice, the scope of review has been limited to documents that have been submitted to the court prior to the trial.

Under the old CPL, the Procuratorate should submit the entire file and all the evidence on the accused to the court prior to the trial and defense lawyers could review everything that has been submitted to the court. This used to be, and to a certain extent still is, a characteristic practice in inquisitorial systems in the Continental Europe. Supporters of the Continental inquisitorial system have hailed such practice—namely, complete access to the government’s case by the defense—as a major advantage over the Anglo-American

51. Regulation by the Supreme People’s Procuratorate on the Implementation of the PRC Criminal Procedure Law (1997), *reprinted in* LATEST JUDICIAL EXPLANATIONS OF THE LAWS OF THE CRIMINAL JUSTICE SYSTEM 182 (hereinafter SPP Regulation).

52. In China, the SPP shares judicial interpretation power with the Supreme People’s Court. This subject will be explored in detail in Part III. Section 4.

53. SPP Regulation, art. 278.

54. *Id.*

55. 1996 CPL, art. 36.2.

adversarial system.⁵⁶ However, such practice has also been the target of relentless criticism for its prejudicial impact on the trial judge. Having seen the government's entire case before the trial, judges are likely to form pre-conceived opinions as to the guilt and innocence of the accused, and hence make it more difficult for the defense to challenge such pre-conceptions during the trial. In China, this problem had been particularly acute due to the nepotism between courts and the Procuratorate. Trials often became a formalistic run of the statutory procedures rather than a meaningful examination of evidentiary materials. Legal academics in China have long recognized this problem and mockingly referred to such practice as "judging first, trial second."

In an attempt to cure this defect and level the playing field for the defense and the Procuratorate, the 1996 CPL prescribes that only "major evidence" will be submitted to the court before the trial. Soon after the enactment of the 1996 CPL, disputes arose between the courts and the Procuratorate with regard to the meaning of "major evidence." The courts preferred a broad construction of the phrase, insisting that major evidence should include materials pertaining to the nature and details of the criminal acts involved in the case.⁵⁷ The Procuratorate, on the other hand, preferred a narrower construction.

Even though an extensive pretrial review of the government's case by the court offers the benefit of framing the court's first impression to the government's advantage, because everything that is submitted to the court is also accessible to the defense, the defense will be better prepared to counter the government's case during the trial. Thus, the Procuratorate insisted that major evidence should include critical incriminating materials only.⁵⁸ It shall be remembered that a central task of the 1996 revision was to convert the trial procedure to a more adversarial form. Therefore, from the standpoint of legislative intent, the drafters of the 1996 CPL may have intended to restrict the amount of evidence that a judge could be exposed to prior to the trial. Hence, the Procuratorate's interpretation of "major evidence" gained favor among various parties that had participated in the revision process.

In January 1998, a joint interpretation of the 1996 CPL was issued by the Supreme People's Court (SPC), SPP, the Police Department, the Ministry of National Security, the Ministry of Justice and the Legislative Affairs Commission of the Standing Committee of the National People's Congress.⁵⁹ Article 36 of the Joint Interpretation states that "major evidence" shall include the following: 1) main evidentiary materials of each category of evidence in the decision to prosecute; 2) main evidentiary materials among multiple categories of evidence of the same type; and 3) voluntary confession, withdrawal, failed attempt, self-defense, and other exculpatory or mitigating evidence.⁶⁰ By limiting the

56. *See generally*, JOHN H. LANGBEIN, *COMPARATIVE CRIMINAL PROCEDURE: GERMANY* (West Pub. Co. 1977).

57. Interview notes C.

58. Interview notes B.

59. Joint Regulation by the Supreme People's Court, Supreme People's Procuratorate, the Police Department, Ministry of National Security, Ministry of Justice, and the Legislative Affairs Commission of the Standing Committee of the National People's Congress on Issues regarding Implementation of the Criminal Procedure Law, *reprinted in* LATEST JUDICIAL EXPLANATIONS OF THE LAWS OF THE CRIMINAL JUSTICE SYSTEM 91 (hereinafter Joint Interpretation).

60. *Id.* art. 36.

types of evidence that is submitted to the court, the Joint Regulation also effectively narrowed the scope of evidence that the defense counsel was able to review before the trial.

Another issue worthy of attention is that the scope of major evidence is within the subjective judgment of the Procuratorate. Even though the drafters of the Joint Regulation took pains to define major evidence, they still left much room for procuratorial discretion. The dangers of subjectivity are especially serious with regard to exculpatory and mitigating evidence. There is no legal definition of exculpatory or mitigating evidence. Exculpatory evidence is generally understood as evidence that helps to establish the defendant's innocence; mitigating evidence is used to fine-tune the criminal penalty once the defendant is found guilty of the crimes charged, similar to mitigating factors in U.S. sentencing guideline. In practice, the question of what constitutes exculpatory evidence or mitigating evidence often becomes a subjective judgment. Even if there is no purposeful suppression of such evidence, the Procuratorate and the defense, by nature of their adversarial positions on a case, are likely to have different opinions as to what is exculpatory or mitigating in the specific case. A practical consequence of this situation is that the Procuratorate can easily leave out potentially exculpatory or mitigating evidence, thus precluding defense access to information that is beneficial to the accused.

Other than consulting materials that are open for review, defense lawyers have almost no other access to the Procuratorate's file before trial. In general, there is little direct contact between the Procuratorate and the defense lawyer during the charging process. The 1996 CPL requires the Procuratorate to take advice from the defense counsel.⁶¹ The legislative purpose for requiring such communication is to provide defense lawyers with the opportunity to report any alleged police misconduct to the Procuratorate, and to discuss with the Procuratorate whether there is sufficient evidence to bring charge. The subsequent SPP Regulation also requires the Procuratorate to contact the accused or his counsel by phone or in writing.⁶² However, compliance with this article has been extremely poor. The Procuratorate argued that such practice would only open doors for the defense to extract more information from the Procuratorate. Some procurators who did comply with this article were mainly motivated by the possibility of obtaining additional evidence from the defense, in their words, to convert defense counsels into "secondary procurators who will assist the procuracy in the pursuit of truth."⁶³

To a certain extent, the defense lawyers' access to files has worsened rather than improved after the 1996 revision. Before the 1996 CPL, even though many defense lawyers had only seven days to examine the Procuratorate's file, they did have access to the whole file. After the 1996 CPL, defense lawyers got involved earlier but their access to the government's file was significantly restricted. This situation has become especially problematic in combination with China's attempt to adopt a more adversarial trial procedure. The adversarial model as practiced in the United States and England has always viewed defense as suffering serious information disadvantage as compared to the

61. 1996 CPL, art. 139 [duplicate the language of the regulation here].

62. SPP Regulation, art. 221.

63. Interview notes B.

prosecution, and has developed a sophisticated discovery mechanism aimed at correcting for such disadvantages. Unfortunately, China's 1996 criminal procedure reform left out this key component of the Anglo-American trial procedure. We see here the perils of an isolated reform endeavor: when a segment of a foreign norm is transplanted alone, the new environment may alter the function of this singular transplant and render the intended benefit of the reform immaterial.

3. Right to Investigation by the Defense

Article 37 of the 1996 CPL provides that "upon approval by the witness or other relevant unit or individuals, the defense lawyer may collect from them materials related to the case, or they may ask the People's Procuratorate or the People's Court to collect such evidence, or they may ask the court to notify the witness to testify at trial."⁶⁴ Article 36 provides that collection of materials from the victim has to be sanctioned by the People's Procuratorate or the People's Court, and receive further approval from the victims or their relatives.⁶⁵ Thus, rather than giving defense lawyers the right to investigate, the law merely made it permissible for defense lawyers to investigate the facts. In contrast, investigations conducted by the courts and the Procuratorate are accorded with solid legal backing. Article 45 states that "the People's Courts, People's Procuratorate and the public security organs shall have the authority to collect evidence from the parties and individuals concerned."⁶⁶ Moreover, the CPL requires the concerned parties and individuals, including the accused, to provide 'truthful evidence.'⁶⁷ Thus, in comparison to the Procuratorate's pervasive investigative power, the right to investigate by the defense is merely a somber mockery.

Testifying publicly against an acquaintance is still viewed with much distaste in the Chinese society. In addition to the usual concerns about interruption of work and possibilities of retaliation, people are also worried about being cast unfavorably as ones who betray friends or families and are therefore untrustworthy. Even though the traditional social web that once connects individuals with one another has largely broken down due to shrinking family sizes, enhanced job mobility and increased commercialization, the social stigma attached to being a prosecutorial witness continues to persist. The probability of cooperation is even slimmer with victims and their relatives due to the double approval requirements of the new CPL. In addition, there have been a great number of cases involving torture or prolonged detention of witnesses by the police or the Procuratorate for purposes of obtaining the desired testimony.

Paradoxically, even though the Chinese government is known for its formidable coercive power over its citizens, the Chinese courts have not been authorized to use coercive means to compel witness appearance at trials. Proposals for empowering the courts to compel witness appearance have been obstructed at the legislative level. On one hand, the legislature is seriously concerned about the tremendous government resources required for complementary measures such as witness protection programs. On the other hand, the majority of the legislators has not fully comprehended the truth-seeking value

64. 1996 CPL, art. 36.

65. *Id.*

66. *Id.* art. 45.

67. *Id.*

of cross-examinations and therefore lack the political will to tackle this challenging problem. In more than ninety percent of current criminal proceedings, there is no live witness participation.⁶⁸ Witness testimony is usually presented in the form of either the Procuratorate or the defense reading a copy of statement signed by the witness. Therefore, in addition to limited investigative power before the trial, defense lawyers have no opportunity to cross-examine witnesses at trial either.

In many Western countries, defense lawyers' investigative power also has no legal guarantees and witness cooperation might be difficult to achieve. For example, in the United States, most witnesses who have spoken to police, prosecutor, or grand jury would have been advised not to discuss their testimony with the defense. The defense can do nothing effective to break the wall of silence before the trial. If he should try, he runs the risk of being charged with tampering with witness.⁶⁹ However, the United States has amended the adverse consequences of this deficiency by using a combination of pretrial discovery and compulsory measures during the trial. Once again, China doesn't have these complementary measures and defense lawyers are left haplessly with a vacuous right to investigate.

4. Increased Incidence of Criminal Prosecution of Defense Lawyers

An unexpected development spawned by the 1996 criminal procedure reform was the increase in the incidence of criminal prosecution of defense lawyers. Even though this article has devoted lengths to detail the failure of the 1996 CPL to significantly expand the function of criminal defense lawyers during pretrial proceedings, the limited expansion that did result has ironically exposed defense lawyers to a disproportionately greater danger of criminal prosecution. Article 38 of the 1996 Criminal Procedure provides:

[D]efense lawyers and other defenders shall not help the criminal suspects or defendants to conceal, destroy or fabricate evidence or to tally their confessions, and they shall not intimidate or induce the witnesses to modify their testimony or give false testimony, or conduct other acts to interfere with the proceedings of the judicial organs.⁷⁰

The 1996 CPL further stipulates that whoever violates the above provisions will be investigated for legal responsibilities.⁷¹ A related provision in the Chinese Criminal Code, Article 306, specifies the legal consequences of such violations: depending on the gravity of the violations, in most cases, defenders will be sentenced to less than three years in prison or be subject to detention; however, in severe cases, defenders may receive up to seven years of prison sentence.⁷² The task of investigating and prosecuting crimes under Article 306 falls in the province of the People's Procuratorate, which is China's constitutionally designated judicial supervisory organ. Since the statute is unclear as to what constitutes fabricating evidence or interfering with the judicial process,

68. Interview notes C.

69. Abraham S. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*. 69 Y.L.REV. 1149, 1182 (1960).

70. 1996 CPL, art. 38.

71. *Id.*

72. Chinese Criminal Code, Art. 306.

the Procuratorate has great latitude in enforcing this provision. A defense lawyer could be easily accused of these charges if a defendant or a witness changes his story after meeting with the defense lawyer.

A further complication in the situation is the fact that after the implementation of the 1996 CPL, because the new procedure demands the Procuratorate to play a more active role during the trial, the People's Procuratorate started using conviction rates as a measure of the successfulness of investigation and prosecution.⁷³ Even though the purpose of this measure is to drive the procuratorators from their old, passive mode of trial participation to an aggressive, contest mode of trial participation, in practice, it has provided more incentives for the Procuratorate to use their supervisory power to thwart advances by the defense.

Since 1996, the number of defense lawyers being prosecuted under Article 306 of the Criminal Code has escalated, and the most frequent accusation in such cases has been "distortion or fabrication of evidence."⁷⁴ Due to the sensitive nature of this issue, there is no official tally of the incidence of such prosecutions. However, an unofficial survey by the All-China Lawyers' Association revealed that since 1996, there have been more than 100 lawyers who were subject to criminal prosecution while acting in their capacity as defense lawyers.⁷⁵ The Association acknowledged that this survey was far from complete and it estimated that more than 200 defense lawyers have been subject to various types of persecution since 1996, including arrest, detention, education through labor, and criminal prosecutions.⁷⁶

Undoubtedly, in some of the 200 plus cases, the defense lawyers did commit illegal activities in violation of Article 306 of the Criminal Code. However, it has been widely observed that the Procuratorate often use their broad discretion under Article 38 of the CPL and Article 306 of the Criminal Code to retaliate against defense lawyers who have successfully undermined the strength of the government's case.⁷⁷ Even though the official procedure requires a full investigation by the supervisory division of the Procuratorate to establish sufficient evidentiary basis for the arrest or prosecution of defense lawyers, in reality, defense lawyers were often arrested right after the trial without any incriminating evidence, and hence the infamous practice of "arrest first, investigation second" by the Procuratorate and the police.⁷⁸ In a few extreme cases, the

73. Chen, *supra* note 35, at 538.

74. Mark O'Neill, *Tortured for defending fair justice: an eminent lawyer was detained on the mainland for 26 months for carrying out his duty*, S. CHINA MORNING POST, Feb. 12, 2001, at 17.

75. Hongyin Wang et. al., *Thoughts on the Establishment of an Immunity Regime for Criminal Defense Work*, at <http://www.chineselawyer.com.cn/article/show.php?cId=895>.

76. *Id.*

77. *E.g.*, *Lawyers behind bars*, S. CHINA MORNING POST, Jan. 29, 2000, at 1 (the article cited two cases in which defense lawyers were arrested on charges of falsifying evidence when they found evidence to prove their clients' innocence);

78. *E.g.*, Fuhai Du, *Criminal Prosecution due to Defense Work Reflects the Lawyers' Professional Difficulties*, LEGAL SERVICE TIMES, March 8, 2002, at 7, available at <http://www.chineselawyer.com.cn/article/show.php?cId=910>. The article cited a 2000 case in the City of Ha'erbing. On September 28, 2000, upon completion of a public trial of a criminal organization, East Ocean Dragon, at the Intermediary People's Court of Ha'erbing, the Ha'erbing People's Procuratorate recommended the establishment of a criminal case against the defense lawyer, Dedong Ding, on the basis of obstruction of

procuratorators on the case interrupted the trial proceeding and ordered the defense lawyer to be arrested on the spot.⁷⁹

In most of these retaliatory prosecutions, the alleged criminal violations by defense lawyers lacked factual basis. According to a survey by the All-China Lawyers' Association, between 1999 and January 2002, the Association received fifteen appeals from defense lawyers who were prosecuted for perjury or obstruction of justice.⁸⁰ Among these fifteen appeals, there was only one case in which the lawyer's certificate to practice was revoked. In four of the fifteen cases, no conclusion has been reached till this day as to the guilt of the accused; three of these four arrests took place in 1997, which means that the attorneys have been imprisoned for five years without a conviction. In the remaining ten cases, the lawyers were found not guilty and released;⁸¹ a few lawyers received monetary compensation under the State Compensation Law.⁸²

Many scholars and practitioners believe that the high error rate in the fifteen cases surveyed by the All-China Lawyers' Association is representative of the overall picture—that prosecution of defense lawyers was often the results of arbitrary and capricious actions by the Procuratorate as a form of retaliation. Chinese Minister of Justice Gao Changli admitted publicly in 1999 that “incidents of interfering with or attacking and persecuting lawyers who are legally practicing law are quite common in China today, and some of these have been rather grave.”⁸³

Once arrested, the lawyers often found themselves in the most precarious circumstances. In many cases, they had difficulty finding attorneys who were courageous enough to act on their behalf to fight the vengeful resolve of the Procuratorate; even if they did find counsel assistance, their defense counsels often had extremely limited access to the government's files, which rendered effective defense almost impossible.⁸⁴ In some cases, defense lawyers were tortured or forced to sign statements of confession, and thrown into jail without trial.⁸⁵ Those defense lawyers who were fortunate enough to get their names cleared often eventually had to endure prolonged detention or imprisonment before regaining their freedom.

In one extreme case, two lawyers were imprisoned for 10 years before their convictions were reversed based on insufficiency of evidence.⁸⁶ During the 10 years of imprisonment, these two lawyers took 526 appeals to different governmental organs, including the Supreme People's Court, the Supreme People's Procuratorate, the National People's Congress, the Department of Justice, and the Political and Law Committee of the Communist Party's central committee, and appellate review of their case finally took

justice. Immediately thereafter, the Ha'erbing Security Bureau (the local police department) issued an arrest warrant of Dedong Ding and handcuffed him at the attorney's stand in the court.

79. Interview notes, Chen Ruihua.

80. Du, *supra* note 78.

81. One of these lawyers is Shaobuo Sun, a renowned defense attorney. He had been in detention for 597 days before being found not guilty and released. *Id.*

82. *Id.*

83. *Trying times as defense Lawyers build a fair case*, S. CHINA MORNING POST, May 6, 1999, at 10.

84. Interview notes A and C. *See also*, *Lawyers behind bars*, *supra* note 77.

85. *E.g.*, O'Neill, *supra* note 74; *Lawyers behind bars*, *supra* note 77.

86. *Id.*

place under mounting pressures from these different directions.⁸⁷ Even though the Lawyer's Associations were often the first place to which appeals were taken, due to their non-governmental status, they were often powerless in protecting their members from malicious official persecution.⁸⁸

5. Summary

Many legal academics that participated in the drafting of the 1996 CPL have lamented over the outcome of this once-promising endeavor. Five years after its enactment, the 1996 CPL has clearly failed to effectuate the drafter's original intention to enhance defense lawyers' functions at the pretrial stage. Defense lawyers have expressed much anger and frustration over the adverse impact of the 1996 CPL. In Part II to be published in the next English issue of the *Perspective*, Chapter III of this article seeks to identify some key factors that contributed to the failure of the new CPL, and Chapter IV of the article proposes some suggestions that could potentially improve the status of defense lawyers.

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87. *Id.* The ordeal of these two lawyers were not unique. For similar accounts, see O'Neill, *supra* note 77. O'Neill reported the imprisonment of one of the best-known lawyers in Henan province, Kuisheng Li. Li was detained for 26 months and tried multiple avenues of appeal. During Li's detention, Li's original client died mysteriously 6 days before a court appearance.

88. *See e.g.*, comments from Director of the Beijing Lawyers' Association, in *Lawyers behind bars*, *supra* note 77.