

# Realizing Justice: The Development of Fair Trial Rights in China

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## I. INTRODUCTION

China's criminal justice system is undergoing a period of great transformation, one that promises to afford broader rights protection to a greater number of its citizens. Recent legislation has sought to strengthen citizens' right to a fair trial. Increasingly, many government leaders have become more outspoken about the necessity to improve "respect and protection of human rights"<sup>1</sup> in the administration of justice. At the same time, the government has demonstrated its commitment to develop an effective indigent defense system by expanding the number of legal aid centers across the country, and by allocating more funds for services to the poor.<sup>2</sup> Continuing on this path, China's National People's Congress has announced that the Criminal Procedure Law will be amended later this year.<sup>3</sup> It is anticipated that reforms will significantly expand the role of criminal defense lawyers.<sup>4</sup> Now, more than ever before, lawyers have the opportunity to play a prominent role in safeguarding the rights of the most vulnerable members of society and guaranteeing equal access to justice for all Chinese citizens.

Despite these noteworthy advancements, many fundamental rights of the accused have yet to be realized. A primary reason for this is that China's criminal justice system lacks the financial resources and qualified personnel necessary to provide every accused individual with the full set of rights necessary for a fair trial. Although China continues to make steady progress in the development of its criminal justice system, its legal institutions lack the capacity to afford due process to the majority of accused individuals. There are far too few lawyers to meet the demands of an increasing number of persons accused of crimes. As a result, most accused persons will appear in court without counsel. The magnitude of this problem is intensified in emerging areas of the country where educating and retaining lawyers is difficult. Economic considerations also impact the number of lawyers willing or available to handle indigent criminal cases. While the number of qualified legal personnel is growing, there is a scarcity of well-trained lawyers, judges, prosecutors and police officials. Many lawyers have not graduated

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<sup>1</sup> Xiao Yang, *Yifa Baozhang Renquan Baozheng Wuzuide Ren Bushou Xingshi Zhuijiu* [Human Rights Pursuant to Law, Ensure Innocent People Won't Be Investigated for Criminal Responsibility], XINHUA NEWS, Dec. 16, 2004, available at <http://news.sina.com.cn/c/2004-12-16/18305242107.shtml>.

<sup>2</sup> See *infra* text accompanying notes 38.

<sup>3</sup> See *China to Revise Criminal Procedure Law, Read Insurance Law in 2007*, PEOPLE'S DAILY ONLINE, Feb. 28, 2007, [http://english.people.com.cn/200702/28/eng20070228\\_352836.html](http://english.people.com.cn/200702/28/eng20070228_352836.html).

<sup>4</sup> Amendments to the Criminal Procedure Law are expected to expand the rights of lawyers during the pre-trial stages of the case. Specifically, the rights currently afforded to lawyers during the trial stage will be provided at the prosecution examination stage, and those currently afforded to lawyers during the prosecution examination stage will be provided during the investigation stage. Conversation with Government Official, Mar. 2007.

college, and most have not benefited from professional legal training or supervision. Similarly, many judges, prosecutors and police officials are bereft of necessary legal training. Given these underlying conditions, rights abuses are likely to occur. However, China is cognizant of these problems and has made ever-increasing efforts to address and rectify them.

The purpose of this Article is to discuss China's ongoing efforts to guarantee that basic fair trial rights of the accused, including the right to counsel and the right to defend oneself, are fully respected, in conformity with both domestic law and relevant international standards and norms. Such analysis would be incomplete without taking into account the practical constraints that limit China's ability to implement human rights standards. China's legal system is still at an early stage of development, and accordingly is still struggling to realize the promise of the right to a fair trial. Inevitably, concepts of fairness evolve over time, the product of increased awareness and economic maturity. Drawing parallels to how notions of fair trial rights progressed over time in the United States, a nation that has had to confront many of the same issues as China in the development of its criminal justice system, this Article will examine some of the core factors that enable a country to effectuate a meaningful right to fair trial for its citizens.

An effective indigent defense system is necessary to guarantee the right to a fair trial. In order to ensure that the poor have equal access to justice, a nation must have a mechanism to provide counsel to the most vulnerable of its citizens. Recognizing this fact, this Article will address the key role that China's legal aid system has had on the advancement of rights protection, and how the continued development of legal aid will serve China's long-term interests. Finally, this Article will suggest how international organizations can play a large and complementary role in supporting the growth of rights protection through training and capacity building. In the end, international partnerships will flourish only if they are fully respectful of China's autonomy, and recognize that law reform initiatives must come from within.

In particular, this Article will spotlight the work of the non-governmental organization International Bridges to Justice ("IBJ"). The structure, knowledge and support that IBJ offers to China's criminal justice system is representative of some of the outstanding work now being performed in a wide range of areas by a talented roster of international organizations. In this Article, the experience of IBJ is being offered to show how international organizations in partnership with the Chinese government, can successfully implement programming which results in greater rights protection for China's citizens.

Founded in 2000 as the collaborative result of interested lawyers, academics, and business leaders, IBJ promotes the rule of law, good governance and equitable legal rights for all citizens by ensuring the effective implementation of existing criminal defense, justice and human rights legislation. Utilizing an innovative model, IBJ works in partnership with governments to professionalize indigent defenders, educate the greater criminal justice community, and support the implementation of human rights law. Consistent with this philosophy, in 2001, IBJ signed a Memorandum of Understanding with the National Legal Aid Center of the Ministry of Justice ("NLAC"), the governmental body responsible for administering legal aid. In close association with NLAC, IBJ has worked with legal aid centers, courts, prosecutors' offices and police departments throughout the country to promote greater rights awareness, train and

professionalize defense lawyers and other important actors in the justice system and build legal aid's capacity to deliver effective criminal defense services.

This Article focuses on the many positive trends in China's legal system. While there remain numerous obstacles with which China must contend, government reforms have provided the basic framework for the realization of rights protection for accused individuals. This offers a unique window of opportunity to effect lasting change in China's criminal justice system. The work of organizations like IBJ can significantly aid reforms by professionalizing the lawyers and other key actors who will be responsible for leading China to the next stage of its development.

The opinions contained in this Article are those of the authors. Much of the information presented is the product of the authors' experience and discussions with government officials, lawyers, judges, and prosecutors across the country. In the process of providing extensive training programs to lawyers and others in the justice community, IBJ has cultivated an understanding of Chinese criminal law and procedure, as well as an acute awareness of prevalent practice conditions. The authors' extensive fieldwork over the past two-and-a-half years afforded us the privilege of learning first-hand about the reality of indigent defense practice in China. The authors respect the privacy of those that have offered their opinions during various training sessions and meetings. The frank and open exchange of viewpoints would be inhibited if the confidentiality of sources were not maintained. For this reason, we have not revealed the identity of persons who have made comments, nor the places where conversations were held.

This Article addresses the following points. (1) China has a legal framework for implementation of key fair rights of the accused. (2) China has not yet implemented this framework, due to lack of structure, knowledge and systems. (3) China's legal aid system will play an important role in the long-term development of accused rights. (4) International organizations like IBJ can best assist the development of China's criminal justice system by working in partnership with the government to implement and develop key fair trial rights of the accused. These central issues will be discussed in a framework that addresses why the implementation of fair trial rights are important to the development of China's justice system.

## **II. THE RIGHT TO A FAIR TRIAL IN CHINA**

In sharp contrast to civil cases (in which a person faces the prospect of monetary damages), criminal cases have stark and often irreparable consequences. If convicted of a criminal offense, an individual may face the possibility of a long prison sentence, or in the most serious cases, death. The right to a fair trial is designed to protect an individual from an unlawful and arbitrary deprivation of his or her right to life and liberty of person.<sup>5</sup> Since trials involve

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<sup>5</sup> See Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., U.N. Doc. A/217A (1948) [hereinafter UDHR] art. 3 ("Everyone has the right to life, liberty and security of person."); International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, 6 I.L.M. 368 (in force 1976) [hereinafter ICCPR] art. 6 ("Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."), art. 9 ("Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are prescribed by law."). See also *Zhonghua Renmin Gongheguo Xian Fa* [Constitution of the People's Republic of

decisions of such enormous consequence, the accused should have the right to defend himself or herself at a fair and impartial proceeding, with the ultimate goal to ensure that only those who are guilty are convicted. Without adequate safeguards in place, a nation runs the risk that innocent people will be convicted, or that its citizens will suffer torture or other abuse by law enforcement.

The right to a fair trial is a fundamental right in all countries respecting the rule of law.<sup>6</sup> In 1948, it was affirmed as a basic human right in the Universal Declaration of Human Rights.<sup>7</sup> The Universal Declaration of Human Rights sets forth that anyone charged with a crime is entitled to a “fair and public hearing” with “all the guarantees necessary for his defense.”<sup>8</sup> Even more explicitly, the International Covenant on Civil and Political Rights (“ICCPR”), of which China is a signatory,<sup>9</sup> specifies that the right to a fair trial includes: the right to “legal assistance,” without payment if the suspect is indigent and as the “interests of justice so require,” the right to “adequate time and facilities for the preparation of [the suspect’s] defense and to communicate with counsel,” the right to be free from torture or other cruel, inhuman or degrading treatment or punishment, the right to be free from “arbitrary arrest [and] detention,” the right to examine witnesses at trial, and the right to appeal one’s conviction and sentence.<sup>10</sup>

In recent years, China has made significant strides towards guaranteeing its citizens the right to a fair trial. The 1996 amendments to China’s Criminal Procedure Law introduced many fair trial procedures to the criminal justice system, including: an expansion of the right to counsel,<sup>11</sup> a prohibition against the use of torture,<sup>12</sup> as well as provisions that create a more impartial judiciary.<sup>13</sup> In many respects, the 1996 reforms to the Criminal Procedure Law represent China’s

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China] (1982) [hereinafter Constitution] art. 37 (“Freedom of the person of citizens of the People’s Republic of China is inviolable.”).

<sup>6</sup> See UDHR art. 10,11. Although not binding on nations, the Universal Declaration of Human Rights represents a broad consensus of the international community on the fundamental rights of all human beings and “a common standard of achievement for all peoples and all nations.” *Id.*, pmb1.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> China has signed, but not yet ratified, the International Covenant on Civil and Political Rights. See Office of the United Nations High Commissioner for Human Rights, Ratifications and Reservations, International Covenant on Civil and Political Rights, <http://www.ohchr.org/english/countries/ratification/4.htm> (last visited Mar. 1, 2007).

<sup>10</sup> See ICCPR, art. 14(d), 7, 9(1), 14(3)(b), 14(3)(e), 14(5). The ICCPR also imposes the following fair trial standards on all nations who are parties to the treaty: the presumption of innocence (art. 14(2)), the right to prompt notice of the nature and cause of criminal charges (art. 14(3)(a)), the right to prompt appearance before a judge to challenge the lawfulness of arrest and detention (art. 9(3)), the right of equal access to a court (art. 14(1)), the right to a fair and public hearing by a competent, independent and impartial tribunal (14(1)), the right to a trial without undue delay (art. 14(3)(c)), the right to an interpreter (art. 14(3)(f)) and the right not to testify against oneself (art. 14(3)(g)).

<sup>11</sup> Previously, the right to counsel only attached at the trial stage. See JONATHAN HECHT, HUMAN RIGHTS FIRST (formerly the Lawyers Committee for Human Rights), OPENING TO REFORM: AN ANALYSIS OF CHINA’S REVISED CRIMINAL PROCEDURE LAW 36 (1996).

<sup>12</sup> See Zhonghua Renmin Gongheguo Xingshi Susongfa [Criminal Procedure Law of the People’s Republic of China] (1996) [hereinafter Criminal Procedure Law] art. 43 (“It shall be strictly forbidden to extort confessions by torture”).

<sup>13</sup> Under the original Criminal Procedure Law, courts were obligated to conduct a thorough pre-trial examination of all the evidence in criminal cases and had to determine that the facts of the case were clear and the evidence was ample before they could begin trial. See OPENING TO REFORM, *supra* note 11 at 51. If a court felt that a case was not ready for trial, they could return it to the prosecutor for further investigation. *Id.* at 51-52. Essentially, such process amounted to a determination of guilt prior to trial. Under the revised law, the court’s pre-trial role is now limited to determining whether the prosecutor has alleged sufficient facts to make out the crime charged and has provided a list

transition to a more adversarial based system, one in which the prosecution and defense play active roles in the pursuit of truth, and the judiciary serves a more neutral and independent role in administering the law. This amended law, and subsequent regulations and interpretations issued by the Ministry of Justice, Supreme People's Court and Supreme People's Procuratorate,<sup>14</sup> place a high level of importance on protecting the rights of the accused. Almost contemporaneous with the revision of the Criminal Procedure Law, China also promulgated the Law on Lawyers, which prescribes a lawyers' obligation to protect the rights and interests of his or her clients,<sup>15</sup> and to provide free legal representation to the poor.<sup>16</sup> More recently, in March 2004, the National People's Congress reemphasized China's commitment to the right to a fair trial by adding provisions to China's constitution designed to protect its citizens from unlawful deprivation of their liberty<sup>17</sup> and to guarantee respect and protection of human rights.<sup>18</sup>

Within the overall effort to develop and reform its criminal justice system, China has paid special attention to issues impacting upon the defense of children and other vulnerable persons. Newly implemented regulations require prosecutors to take special precautions to protect the rights of juvenile suspects. Specifically, these regulations require prosecutors to: notify a juvenile suspect's legal guardian to be present during any interrogation,<sup>19</sup> assist juveniles to obtain a legal aid lawyer if they cannot afford one,<sup>20</sup> and limit the circumstances under which a juvenile suspect can be held in pre-trial detention.<sup>21</sup> Along with this, China has mandated the establishment of specialized juvenile courts, so as to speed compliance with international and domestic laws protecting children.<sup>22</sup> As these courts mature, judges and other essential court personnel will become better equipped to deal with the unique issues involved in juvenile cases.

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of evidence to be presented, a list of witnesses, and photocopies or pictures of all major evidence, and therefore should open the trial. *See* Criminal Procedure Law at art. 150. Accordingly, greater emphasis is to be placed on the prosecutor and defense attorney's roles as advocates, leaving judges to be more impartial arbiters of the facts that they will learn at trial.

<sup>14</sup> After the Criminal Procedure Law was revised in 1996, a number of important regulations and interpretations that further defined the rights of accused persons were issued by China's judicial organs, including, Zuigao Renmin Fayuan Guanyu Zhixing Zhonghua Renmin Gongheguo Xingshi Susongfa Ruogan Wenti De Jieshi [Supreme People's Court Interpretation on Several Issues Regarding Implementation of the Criminal Procedure Law of the People's Republic of China], Guanyu Yangge Zhixing Xingshi Susongfa Qieshi Jiufang Chaoqijiya De Tongzhi [Joint Circular by the Supreme People's Court, Supreme People's Procuratorate and Ministry Regarding Implementation of the Criminal Procedure Law of the People's Republic of China on the Prevention of Extended Detention], and Gonganbu Guanyu Guanche Shishi Xingshi Susongfa Youguan Wenti de Tongzhi [Regulation of the Ministry of Public Security Regarding Implementation of the Criminal Procedure Law of the People's Republic of China].

<sup>15</sup> *See* Zhonghua Renmin Gongheguo Lüshi Fa [Law of the People's Republic of China on Lawyers] (1996) [hereinafter Law on Lawyers], (promulgated by the Standing Comm. Nat'l People's Cong., May 15, 1996, effective Jan. 1, 1997), art. 27

<sup>16</sup> *Id.*, art. 42.

<sup>17</sup> *See* Constitution, art. 37

<sup>18</sup> *Id.*, art. 33

<sup>19</sup> *See* Renmin Jianchayuan Banli Weichengnianren Xingshi Anjian De Guiding [Regulation of the Supreme People's Procuratorate on Handling Juvenile Criminal Cases] (adopted Dec. 28, 2006), art. 10. In 2002, the Supreme People's Court had also issued regulations on the handling of juvenile criminal cases, however these stated only that prosecutors *may* notify juvenile's legal guardians to be present during their interrogation, not that they *should*. *Id.*, art. 11.

<sup>20</sup> *Id.*, art. 15-16.

<sup>21</sup> *Id.*, art. 12-14.

<sup>22</sup> *See* Chinese Government's Official Web Portal, [http://english.gov.cn/2006-08/23/content\\_368586.htm](http://english.gov.cn/2006-08/23/content_368586.htm) (last visited May 2006).

As concern for rights protection for children has intensified, so too has the focus shifted from punishment to rehabilitation of juvenile offenders. Increasingly, China has looked for means to serve the best interests of juveniles and their communities; courts now have greater discretion to render non-incarcerative sentences.<sup>23</sup> In support of this, communities have begun to offer alternative sentencing schemes, ranging from juvenile rehabilitation centers that provide work and educational opportunities to community-based programs that allow juvenile offenders to return to their homes and continue to attend school. Some communities have even offered counseling services to young offenders.<sup>24</sup> Further, in an effort to decriminalize certain minor offenses involving children, China's Supreme People's Court has outlined the types of cases that courts should divert out of the criminal justice system.<sup>25</sup> All of this has helped lay a solid foundation for a more holistic type approach to handling and prosecuting juvenile crime.

China has also invested considerable time rethinking the framework for how it prosecutes and reviews cases that involve the most serious of punishments, the death penalty. Recently, China has enacted sweeping reforms pertaining to the procedure used in capital cases so as to ensure that its courts are not illegally or arbitrarily depriving individuals of their right to life. These reforms mandate that all appeals to high courts at the provincial, autonomous region or municipal level must be heard in open court, and that the Supreme People's Court review all death sentences before they are carried out.<sup>26</sup> Such changes are meant to curb appellate courts from conducting only cursory reviews of lower court files in capital cases without allowing the defense an opportunity to be heard. This new system is also being put into effect to make certain that death sentences are reserved for "only a small number of [China's most] serious offenders."<sup>27</sup> In order to guide and promote uniformity in the sentencing decisions of high and

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<sup>23</sup> See Zhu Zhe, *Punishment 'Should Fit the Criminal,'* CHINA DAILY, Mar. 14, 2007, available at [http://www.chinadaily.com.cn/china/2007-03/14/content\\_826941.htm](http://www.chinadaily.com.cn/china/2007-03/14/content_826941.htm) (citing Xiao Yang, President of the Supreme People's Court, making clear in his report to the NPC on Mar. 13, 2007 that judges may sentence juveniles to relatively shorter sentences).

<sup>24</sup> As Shen Deyong, Vice President of the Supreme People's Court, has stated "[j]udges have tried their best not to give the young offenders prison sentences ... and have made persistent efforts to educate them in a bid to ensure their healthy growth and smooth return to society." See *China's Juvenile Courts Convict Nearly 400,000 Minors in Seven Years*, CHINA DAILY ON-LINE, February 10, 2006, available at [http://english.people.com.cn/200602/10/eng20060210\\_241522.html](http://english.people.com.cn/200602/10/eng20060210_241522.html).

<sup>25</sup> See generally Zuigao Renmin Fayuan Guanyu Shenli Weichengnianren Xingshi Anjian Jutiwenti Yunyong Ruoganwenti Jieshi [Supreme People's Court Interpretation on Issues Regarding the Application of Law in Juvenile Criminal Cases].

<sup>26</sup> See Ling, Hu, *Appeals on Death Penalty in Open Court*, CHINA DAILY, Dec. 9, 2005, available at [http://www.chinadaily.com.cn/china/2006-12/29/content\\_770292.htm](http://www.chinadaily.com.cn/china/2006-12/29/content_770292.htm). See also Zhu Zhe, *Top Court Reviews All Death Sentences*, CHINA DAILY, Dec. 29, 2006, available at [http://www.chinadaily.com.cn/china/2006-12/29/content\\_770292.htm](http://www.chinadaily.com.cn/china/2006-12/29/content_770292.htm). In discussing the necessity that China's Supreme People's Court retains sole power to review all death sentences, Chief Justice Xiao Yang underscored China's deep respect for an individual's right to life: "A case involving a human life is a matter of vital importance. We can never be more careful in this regard." Zhao Huanxin and Xie Chuanjiao, *No Turning Back on Death Rule*, CHINA DAILY, March 15, 2007, available at [http://www.chinadaily.com.cn/china/200703/15/content\\_828064.htm](http://www.chinadaily.com.cn/china/200703/15/content_828064.htm).

<sup>27</sup> See *China Metes out Least Number of Death Sentences in '06*, CHINA DAILY, Mar. 15, 2007, available at [http://www.chinadaily.com.cn/china/2007-03/15/content\\_828775.htm](http://www.chinadaily.com.cn/china/2007-03/15/content_828775.htm) (quoting Liu Jiachen, political advisor to the Supreme People's Court).

intermediate level courts in capital cases, the Supreme People's Court is currently drafting guiding opinions on the use of the death penalty in particular types of cases.<sup>28</sup>

### III. TOWARDS IMPLEMENTATION OF KEY FAIR TRIAL RIGHTS

As illustrated by ongoing legislative reforms, China has affirmed its commitment to build a harmonious society through protection of the fair trial rights of accused persons. However, there still remains a large chasm between those rights that are promised in principle and those that are realized in practice. Necessarily, the logical question follows: how can these consequential fair trial rights be actualized? There are scholars who opine that China will not achieve significant rights protection for its citizens unless it further reforms its criminal laws. Many proponents of greater legislative reform theorize that China's criminal justice system will not move forward until it incorporates such principles as a presumption of innocence, a privilege against self-incrimination, or a rule which excludes illegally obtained evidence. While reforms could certainly assist in many respects, the mere passage of laws will not effect change. Since 1996, China has promulgated a number of laws that guarantee its citizens the right to counsel and the right to be free from torture, arbitrary arrest and detention, and that advance the right to defense by allowing lawyers a greater role in the criminal process. Despite the proliferation of laws meant to protect its citizens' right to a fair trial, China has been hindered by its inability to implement these provisions into practice.

The greatest obstacle that China faces in achieving lasting reform is not in legislating new laws, but in implementing them. Implementation of laws will entail not only institutional capacity building and training for legal professionals, but a redefinition of the roles of lawyers, judges, prosecutors and police officials within the criminal justice system. As China's criminal laws have evolved, the rights and obligations of the justice community have, too. However, little focus has been paid to the need to fully educate key actors on how to effectuate these new roles. China's capacity to bring about change will be directly related to its ability to cultivate an informed and professionalized justice community. Inherently, a strong and skillful defense bar will play a major part in this development. For China to fulfill the promise of any lasting reform, it must find a mechanism that will enable it to enforce the many good laws that it has wisely enacted. This will require sustained emphasis on building the capacity of relevant justice organs, and providing training and resources to the lawyers, judges, prosecutors and police who will be responsible for implementing the law.

China's continued development of a full-scale system of legal aid is one of the main strategies to address the problems that afflict its current criminal justice system. Comprehensive in its scope, legal aid has the vast potential to effectuate the rights of countless indigent accused persons. Yet, at present, the legal aid system is still developing. Few persons receive meaningful access to legal aid, and those that do will find that their lawyers are hindered by a number of obstacles that diminish their power to provide effective representation. In the following section, this Article will take inventory of the practical realities for indigent accused individuals. In particular, this commentary will scrutinize a number of issues affecting

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<sup>28</sup>Yuan Dingbo, Wang Doudou, *Zuigao Fa Zhengzai Zhiding Anjian Shiyong Sixing Zhidao Yijian: Yangge Kongzhi He Sheyong Xixing* [Supreme Court Brings Forth this Opinion on the Drafting of the Use of the Death Penalty: The Death Penalty should be Strictly Controlled and Cautiously Used], *FA ZHI* [Legal Daily], Mar. 2, 2007, at 5.

implementation of key fair trial rights. This analysis recognizes China's substantial achievements and the efforts of many dedicated individuals while it also makes recommendations on how China can improve enforcement of the rights of accused persons.

With assistance from the international community, China can obtain the guidance, tools, and professional resources it needs to advance implementation of its laws. Such respectful cooperation between China's criminal justice system and the international community will go a long way to affecting a change in practice, where implementation of the law and rights protection can flourish side by side. Experienced international organizations like IBJ can offer critical advice, training and resource development.

### **A. Right to Counsel**

Of all the rights that an accused person has, the right to be represented by counsel is the most fundamental, as it affects his or her ability to assert any other right he or she may have.<sup>29</sup> Lawyers protect the accused from abuse and arbitrary detention by invoking procedural rights. They uphold due process of law by equipping the accused with an adequate understanding of the nature of the allegations being made against him or her. Most importantly, a lawyer guarantees an accused's right to a defense by carefully analyzing the prosecution's evidence, and by offering evidence that tends to exculpate the defendant, or cast doubt upon his or her guilt.

Anytime a government acts to deprive an individual of his or her life or liberty, it must provide him or her with the opportunity to defend himself or herself against the accusations. In prosecuting crimes, the state has superior resources; it can rely on law enforcement to collect evidence on its behalf, and its prosecutors have experience and knowledge about the intricacies of criminal law and procedure. Without counsel, an accused is at a decided and, most likely, insurmountable disadvantage. Ideally, in a fully balanced system, a competent lawyer acts to level the playing field. Justice demands that persons are only convicted based upon a sound review of the evidence - not because an accused person lacks the skill or expertise to assert a defense. As most criminal suspects are unaware of their rights and generally unsophisticated in the law, they require the assistance of counsel at every stage of the criminal process to protect their rights, and to present a cogent defense. This is especially true under circumstances in which the accused is facing the death penalty, or is otherwise vulnerable by reason of age or other infirmity. In the first United States Supreme Court case that recognized that persons charged with capital offenses have the right to counsel, Justice Sutherland stated:

Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with a crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without

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<sup>29</sup> See ANTHONY LEWIS, *GIDEON'S TRUMPET*, 109 (quoting then Justice of the Supreme Court of Illinois, Schaefer, *Federalism and State Criminal Procedure*, 70 Harv. L. Rev. 1, 8 (1956)).



it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.<sup>30</sup>

Chinese law permits any individual to hire a lawyer if he or she is accused of a criminal offense, yet, it requires the appointment of counsel only in special circumstances; specifically, to criminal suspects who are juveniles, deaf, mute, or blind or those who are charged with death penalty offenses.<sup>31</sup> In all other cases where the accused is financially unable to hire an attorney, the accused may, but need not, be appointed counsel.<sup>32</sup> Beginning in 1994, in recognition of the need to have full-time lawyers dedicated to the practice of indigent defense, China first began to develop a government system of legal aid. On December 16, 1996, the National Legal Aid Center of the Ministry of Justice was established to promote the development of government legal aid bodies nationwide and to, thereafter, monitor their operations. Since that time, China has established over 3,000 legal aid centers throughout the country.<sup>33</sup> These legal aid centers are responsible for providing legal services in civil, criminal and administrative cases.<sup>34</sup> The primary responsibility for providing legal aid in criminal cases is borne by the government, with support from university based, and nongovernmental legal aid providers. Under its guidelines, the Ministry of Justice, which regulates the legal profession, relies not only on full-time government legal aid lawyers to provide legal services to the poor, but also requires private lawyers to handle a certain number of legal aid cases each year.<sup>35</sup> Under this indigent defense scheme, the government provides case handling fees to lawyers in all legal aid cases.<sup>36</sup>

## 1. Access to Counsel

### a. Development in China

The vast majority of criminal defendants in China, as in other countries, are too poor to hire their own lawyer. In recognition of this, China has set about to establish a legal aid system with the purpose to promote equal access to justice and to safeguard the rights of the poor. Given the size and diversity of China, the onset of legal aid and its swift expansion was a monumental undertaking. The National Legal Aid Center has recently documented legal aid's development, detailing growth in the number of legal aid centers, personnel and cases handled from 1999-2005.<sup>37</sup> By the end of 2005 there were 3,129 legal aid centers located throughout the country, an over 150% increase from the 1,235 legal aid centers that were in operation in 1999.<sup>38</sup>

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<sup>30</sup> *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

<sup>31</sup> Criminal Procedure Law, art. 34.

<sup>32</sup> *Id.*

<sup>33</sup> See Zhongguo Falü Yuanzhu Nianjian [Yearbook of Legal Aid in China] [hereinafter Yearbook of Legal Aid in China], 98 (2005) (providing statistics in chart "1999 Nian Zhi 2005 Nian Quanguo Falü Yuanzhu Tongji Shuju" [Legal Aid Statistics and Analysis 1999-2005]). Statistics are not yet available for 2006; they are presently being collected by the National Legal Aid Center and will be published later this year.

<sup>34</sup> Falü Yuanzhu Tioli [Regulation on Legal Aid] [hereinafter Regulation on Legal Aid] (2003), art. 10-13.

<sup>35</sup> See Law on Lawyers, art. 42. China's private lawyers are generally mandated to handle two legal aid cases per year, as regulated by provincial or municipal-level justice departments (in some areas there is no stipulation about the number of cases), but there is no stipulation about what types of cases (i.e., civil or criminal) they must be.

<sup>36</sup> See Regulation on Legal Aid, art. 24.

<sup>37</sup> *Id.*

<sup>38</sup> Government funding to legal aid has also increased. See *supra* note 33, Yearbook of Legal Aid in China at 98.

This is an extraordinary development and one that has kept China on track to operate legal aid centers in all provinces, municipalities and every single county — 3,229 in all.<sup>39</sup>

With the establishment of legal aid, indigent defendants have begun receiving representation in criminal cases. But there is still a long way to go before all persons facing imprisonment can be guaranteed the right to counsel. China's legal aid system lacks the capacity to serve the needs of all its indigent accused. Though scores of legal aid centers have been opened across China, the new centers are far from fully operational. Few legal aid centers have sufficient material resources or personnel to adequately serve their communities. At the end of 2005, there were only 5,029 lawyers employed by legal aid.<sup>40</sup> Many legal aid centers have too few lawyers or no lawyers at all, so they must rely on private counsel or, in some cases, paralegals to handle criminal cases. Further, legal aid centers are not dedicated solely to the practice of criminal defense. There are, in a strict sense, no public defender offices in China. Legal aid centers are responsible for providing services in a multitude of cases in many practice areas; its lawyers have significant, competing demands on their time. Representing people accused of crimes is almost never popular or easy work, so many legal aid centers have bypassed potential controversy by electing to take on a higher percentage of civil cases. With civil cases, e.g., worker's compensation, employment compensation and property disputes, many lawyers feel that they have greater freedom to litigate, meet their clients and prepare their cases. And, most important for these lawyers, they are far more likely to receive public approval when they handle a client's civil claims. Finally, a wide majority of legal aid centers lack the financial resources or infrastructure necessary to handle a large number of indigent criminal cases.

Neither can the private defense bar meet the needs of all indigent accused persons. China just does not have enough lawyers to meet the growing demand. Though China's legal profession has grown rapidly, from approximately 5,500 lawyers in 1981<sup>41</sup> to over 120,000 lawyers today,<sup>42</sup> there are still not enough lawyers to serve China's 1.3 billion citizens. Acerbating this problem is that a majority of China's lawyers have moved to developed, metropolitan areas of the country to pursue more lucrative jobs. As a result, many emerging regions, especially in western China, are vastly underserved. Yunnan province, a poor province in southwest China of roughly the same size and population as California, illustrates this problem. The entire province has only 2,782 lawyers providing legal services for a population of 44 million people.<sup>43</sup> In sharp contrast, the state of California has 155,992 lawyers<sup>44</sup> which is more than the bar registration of all of China. Of comparable note, Guizhou, one of China's poorest provinces, with a population of almost 40 million, has only about 1,400 lawyers.<sup>45</sup> As emerging

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<sup>39</sup> See Chinese Administrative Divisions, last updated Dec. 31, 2004 at <http://www.xzqh.org/quhua/>.

<sup>40</sup> *Id.*

<sup>41</sup> RANDALL PEERENBOOM, HUMAN RIGHTS FIRST (FORMERLY THE LAWYERS COMMITTEE FOR HUMAN RIGHTS), LAWYERS IN CHINA: OBSTACLES TO INDEPENDENCE AND THE DEFENSE OF RIGHTS, 28 (1998).

<sup>42</sup> See *China's Lawyers Failing to Provide Nationwide Service*, Renmin Wang [People's Daily Online], July 10, 2006, [http://english.people.com.cn/200607/10/eng20060710\\_281725.html](http://english.people.com.cn/200607/10/eng20060710_281725.html) (quoting the President of the All-China Lawyers Association as stating there were 121,889 lawyers).

<sup>43</sup> Conversation with Government Official, Mar. 2007.

<sup>44</sup> See The State Bar of California, Member Demographics, updated Mar. 23, 2007, available at <http://members.calbar.ca.gov/search/demographics.aspx>. This number includes only active lawyers, not inactive, those unable to practice or judges.

<sup>45</sup> Conversation with Government Official, Mar. 2007.

regions struggle to retain enough lawyers to meet the needs of their residents, urban municipalities have attracted a large number of lawyers. Chongqing has about 3,500 lawyers; Beijing over 10,000. Even within developing regions, most lawyers are concentrated in large metropolitan areas. Most of Yunnan's lawyers, approximately 60%, work in Kunming.<sup>46</sup> Similarly, more than 700 of Guizhou's lawyers (or over 50% of the province's defense bar) work in Guiyang.<sup>47</sup> This has left many rural areas of the country bereft of any lawyers at all.

Even though the private bar has, to varying degrees, been relied upon by many regions that lack a sufficient number of legal aid lawyers to accept assignment on indigent accused cases, proportionally speaking, private lawyers handle very few cases. In 2005, China's approximately 115,000 private lawyers handled only 108,299 legal aid cases.<sup>48</sup> In comparison, around 5,500 legal aid staff<sup>49</sup> represented indigent accused individuals on 87,011 cases.<sup>50</sup> Given China's rapid development and need for qualified attorneys to work in civil practice areas, as well as lawyers' need to make a profit, very few lawyers have an incentive to accept assignment on indigent criminal cases. Besides providing insufficient economic compensation, criminal cases are generally viewed as unchallenging and a potentially high risk activity, in that too many restrictions are placed on lawyers' case conduct. Further, indigent defense is generally not a well-respected area of practice. Despite efforts by the government to educate the public,<sup>51</sup> most citizens have a poor understanding of the basic structure and operation of the criminal justice system. Therefore, defense lawyers are more likely to be criticized for the work that they perform; they are seldom appreciated for the valuable contribution they make to society. Since indigent clients are lacking in social standing, many attorneys feel no great call to do this work.<sup>52</sup> Without an established community of lawyers to support, promote and champion the work of indigent criminal defenders, it will be difficult to alter this prevailing attitude.

The country-wide shortage of lawyers has spurred an internal debate about how to meet the needs of China's poor. In a few, less developed regions of the country, jurisdictions have allowed paralegals — persons who have received some legal training, but have not passed China's unified judicial examination — to handle indigent criminal cases.<sup>53</sup> Some critics feel that employing paralegals in this way dilutes the quality of representation. Nonetheless, the urgency of the situation is so dire in so many remote regions of the country, that the presence of any legal advisor is preferable to having none at all. Guizhou Province, with little access to qualified lawyers, is the first province to set standards for and certify paralegal workers. For now, this seems the only viable option, since the entire province has only about 30 legal aid lawyers.<sup>54</sup> In order to maintain quality of service, Guizhou has standardized requirements for

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<sup>46</sup> *Supra* note 43. 1,677 lawyers work in Kunming.

<sup>47</sup> *Supra* note 45.

<sup>48</sup> *See supra* note 33, Yearbook of Legal Aid in China, at 105.

<sup>49</sup> *Id.*, 98-105.

<sup>50</sup> *See supra* note 33 at 102.

<sup>51</sup> The government regularly holds, and encourages others to hold campaigns to inform the public about their rights under the law. One such campaign, held yearly, is National Legal Publicity Day, a celebration of the adoption of the Constitution of the People's Republic of China. On this day, government entities, private individuals and organizations set up booths in community areas, distribute rights awareness materials, and consult with citizens.

<sup>52</sup> Conversations with lawyers and professors throughout China, Oct. 2004 to Mar. 2007.

<sup>53</sup> *See e.g.*, Guizhou Sheng Falü Yuanzhu Tiaoli [Guizhou Legal Aid Regulation], art. 2.

<sup>54</sup> *Supra* note 49.

paralegals. Local regulations require that paralegals have a two year or above college education with law specialization, undergo special training, and be full-time employees of a government legal aid center.<sup>55</sup> The system has grown rapidly since it was introduced in 2002. There are now over 400 paralegals working in Guizhou's approximately 90 legal aid centers.<sup>56</sup> This represents a potentially viable model for China, one that should be studied and considered as a temporary answer to severe attorney shortages in other jurisdictions.

Undoubtedly, given China's geographical vastness and enormous population, the government faces unique challenges to their mandate to provide legal services to the poor. While China has accomplished a great deal, it still has a lot of ground to cover before its indigent defender system has the capacity to cope with the large volume of cases that are processed through the criminal justice system each year. From January 1998 through September 2006, 6.2 million defendants were tried for criminal offenses;<sup>57</sup> however, only about 10% of all defendants received legal aid representation.<sup>58</sup> How effectively China will be able to develop, professionalize, and expand upon its legal aid system will largely determine its success in putting into action a workable indigent defense system. Before laws can affect meaningful change, there must be an organized system of professionalized defenders in place to give provisions full force and effect. International organizations can assist the government to build legal aid's capabilities by providing technical assistance and instruction on resource management and capacity building. Further, international organizations with extensive criminal defense experience, such as IBJ, can provide China with relevant models for improving the structure of criminal legal aid services.

Through training and resource development, IBJ assists local legal aid centers to develop their capacity to handle an increased number of criminal cases. Fundamentally, IBJ understands the demands of indigent defense practice; all of its trainers have experience as trial lawyers in public defender offices around the world. IBJ has utilized this expertise and knowledge of China's indigent defense system to develop a training plan that has assisted legal aid to cultivate high functioning lawyers able to manage increased caseloads with competence and commitment. As lawyers have progressed in their training, they have learned how to work more efficiently. More importantly, they have developed the enthusiasm and commitment to handle more cases. As illustration, research has shown that IBJ-trained pilot legal aid centers in Southeast China have increased their caseloads by an average of 27% since 2004.<sup>59</sup> These legal aid centers are also now taking on a greater number of discretionary cases, the vast majority of cases under Chinese law where legal aid representation is not mandatory. On average, since 2004, the centers have increased their representation of these cases by a substantial 33.5%.<sup>60</sup>

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<sup>55</sup> See requirements in Guanyu Guizhou Sheng Falü Yuanzhu Gongzuozhe Chengban Falü Yuanzhu de Shiwu de Tongzhi [Notice on Legal Aid Workers Handling Legal Aid in Guizhou Province].

<sup>56</sup> *Supra* note 49.

<sup>57</sup> *China Convicts Nearly 99 Percent of Criminal Defendants: State Media*, Nov. 9, 2008 <http://jurist.law.pitt.edu/paperchase/2006/11/china-convicts-nearly-99-percent-of.php> (citing the People's Court Daily).

<sup>58</sup> Figure generated from comparing statistics of total number of cases handled from Jan. 1998 to Sep. 2006, *supra* note 62, with total number of cases handled by legal aid from 1999 to 2005, *supra* note 36, extrapolating out for 1998 and nine months of 2006.

<sup>59</sup> Statistical data on file with IBJ.

<sup>60</sup> *Id.*

At the same time, IBJ has begun to assist the government by working with prominent Chinese lawyers and universities to draft guidelines and standards for the handling of indigent criminal cases. Such guidelines will aid NLAC to establish standards for how legal aid lawyers across China should perform their work. The criteria will also help legal aid determine how to increase the output of various legal aid centers. In this regard, NLAC can set caseload standards, while it also improves the efficiency and quality of practice throughout the country.

### **b. Development in the United States**

In the United States, the right to counsel is enshrined in the Sixth Amendment to the U.S. Constitution. The Sixth Amendment holds, in part, that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.”<sup>61</sup> Despite this seemingly broad, inclusive language, for well over 100 years, this provision was construed as merely granting to a defendant the right to retain a private attorney. It did not mean that a poor criminal defendant had the right to a court-appointed attorney without cost. Early in the twentieth century a few cities began to establish legal aid centers for the provision of counsel to the indigent accused. The first government legal aid office devoted to the defense of the indigent, the Los Angeles County Public Defender Office was established in 1913.<sup>62</sup> But with legal counsel to accused largely remaining *pro bono* through the twentieth-century, the result was that many poor defendants went unrepresented in court.

It was not until 1932, when nine poor, illiterate young teenagers were convicted and sentenced to death for rape, in a case that clearly had denied them of any semblance of a fair trial that the United States Supreme Court began to concern itself with the right to counsel for indigent defendants.<sup>63</sup> Controversy emanated from the fact that the teens were black and the alleged victims white and it took place in Alabama, which was then openly discriminatory towards black persons. The defendants were immediately rushed to trial just over two weeks after the incident allegedly occurred and were denied any meaningful access to counsel. All nine were found guilty, despite weak and conflicting testimony that cast doubt that any rape had occurred. In overturning the conviction, the Supreme Court held for the first time that state courts were required to appoint counsel for indigent defendants in capital cases. In so doing, it found that the right to counsel was one of a “fundamental nature” in this type of case.<sup>64</sup>

The right to counsel steadily advanced throughout the twentieth century, as the country developed the resources and lawyers necessary to provide counsel to the poor. In 1942, the Supreme Court mandated states to provide counsel in “special circumstances,” as where the accused is incompetent, illiterate or charged with a complex or serious offense.<sup>65</sup> By that time, thirty states provided counsel as a matter of right in all felony cases.<sup>66</sup> But it was not until 1963 that the Supreme Court mandated counsel be provided to the poor in all felony cases. The issue was raised in the case *Gideon v. Wainright*.<sup>67</sup> The defendant in that case was convicted of a

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<sup>61</sup> U.S. CONST. amend. VI.

<sup>62</sup> Barbara Allen Babcock, *Inventing the Public Defender*, 43 Am. Crim. L. Rev. 1267, 1274 (Fall, 2006).

<sup>63</sup> *Powell v. Alabama*, *supra* note 30.

<sup>64</sup> *Id.* at 73.

<sup>65</sup> *Betts v. Brady*, 316 U.S. 455 (1942).

<sup>66</sup> See *GIDEON’S TRUMPET*, *supra* note 29 at 138.

<sup>67</sup> *Gideon v. Wainright*, 372 U.S. 335 (1963).

felony in a Florida court. He had defended himself after being denied a request for appointed counsel. At that time, the assignment of counsel in Florida was mandatory only in capital cases. The Supreme Court, in overturning his conviction, held that the right to counsel is a “fundamental right, essential to a fair trial.”<sup>68</sup> This ruling, though significant, was not novel as by that time, only five states had a policy against appointing counsel in non-capital cases.<sup>69</sup> Instead, it was noteworthy, as it impelled states to enforce a right which had, until then, been unevenly applied. Furthermore, it encouraged them to improve their systems of indigent defense delivery. The capabilities of such systems would be important as the circumstances under which indigent accused persons were entitled to appointment of counsel would continue to expand.<sup>70</sup>

While the United States had then, and still has, sufficient numbers of lawyers to provide counsel to all indigent accused, state and local governments still had to decide how to go about systematically providing and paying for counsel. Accordingly, states looked for means by which they could meet their obligations in a cost efficient manner. What evolved was a mixture of indigent defense delivery systems based on three primary models: 1) the establishment of state public defender offices with salaried staff; 2) the case-by-case appointment of private counsel; or 3) the contracting of private law firm or lawyers services.

In many ways, the development of the right to counsel in the United States has mirrored that in China. Early in its history, the United States, as China, relied on private counsel to provide *pro bono* representation to the poor. As the United States’ legal system developed, however, it became clear that this approach was not able to meet the needs of all indigent accused persons, nor was it an appropriate delivery system for a civilized society that guarantees to its citizens equal access to justice. Thus, the United States gradually began to fund appointment of counsel in capital cases and under other circumstances where the defendant was particularly vulnerable, much as China has now done. Only gradually did the United States move to provide counsel to all accused persons who face a loss of liberty.<sup>71</sup> As China’s legal professions grows, and it expands the capacity of its legal aid system, it will likewise develop the capability to meet its obligation to provide counsel to all indigent accused persons.

## 2. Effective Assistance of Counsel

The right to counsel extends beyond the act of simply providing counsel for the accused. While access to counsel is of utmost importance, the right to counsel would mean nothing unless counsel, either retained or appointed, were competent in his or her representation of the accused. Since defense lawyers are invested with such great responsibility, the life and liberty interest of a fellow human being, it is only fair to expect that they should be suitably skilled. The range of issues involved in criminal cases is so complex that the defense lawyer must have a certain requisite level of training and knowledge of the law. Those who handle the most serious cases, like capital cases, should be even more experienced and capable. Beyond this, a defense lawyer

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<sup>68</sup> *Id.* at 340 (recalling the rights guaranteed in *Betts v. Brady*).

<sup>69</sup> William M. Beaney, *The Right to Counsel: Past, Present and Future* 49 VA. L. REV. 1150, 1156 (1963).

<sup>70</sup> See *GIDEON’S TRUMPET*, supra note 29 at 138.

<sup>71</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963) (establishing the right to counsel in all felony cases); *In re Gault*, 387 U.S. 1 (1967) (recognizing right to counsel in juvenile delinquency proceedings); *Argersinger v. Hamlin*, 407 U.S. 25, 32 (1972) (extending right to counsel “to any criminal trial, where an accused is deprived of his liberty”).

must be committed to the ideal that he or she must provide his or her client with the best possible defense in every criminal case, regardless of the client's ability to pay for the lawyer's services.

The poor are no less deserving of adequate representation than those with means to hire a lawyer. Yet, too often, poor people accused of crimes are defended by lawyers who lack the skills, resources, and commitment to handle such serious matters. In order to meet its obligation to provide effective assistance of counsel to the indigent accused, China will need to strengthen its existing system of legal aid. Now that sufficient numbers of government legal aid centers have been established around the country, the government can concentrate on improving these centers' capacity to guarantee a high quality of services for indigent accused individuals.

### **a. Development in China**

In recent years, China has made considerable efforts to improve the effectiveness and quality of services provided by legal professionals. In the last twenty years, standards for lawyers and other professionals in the justice community have evolved considerably. New legislation has restricted entry into the legal profession. The Laws on Lawyers, Judges and Prosecutors were amended in 2001 to require all prospective lawyers, judges and prosecutors to pass a unified national judicial exam in order to qualify to practice.<sup>72</sup> Additionally, the amendments established minimum educational requirements to qualify for the national judicial exam.<sup>73</sup> Now, the requirement is four years of undergraduate university study, with exceptions made for those in remote counties that lack advanced educational facilities.<sup>74</sup> The exam is intended to promote a uniform standard of practice amongst all legal professionals as well as to increase the professionalism of the judiciary. China has also begun to promote the ethical conduct of judges and lawyers in accordance with the Laws on Judges and Lawyers.<sup>75</sup>

Although these are all positive advancements, China has yet to set in place standards and an oversight system for ensuring competent counsel in indigent criminal cases. In practice, legal aid cases are often assigned to any lawyer available to receive case appointment. These lawyers may receive little or no compensation for their time. Case handling fees are so minimal that lawyers are reluctant to do any work on the case. Many lawyers lack advanced skill in the area of criminal defense, and, in some cases, have no interest in indigent defense work. As a result, the poor are often represented by inexperienced lawyers who have no incentive to develop criminal defense skills. Sadly, most private lawyers with substantial criminal defense experience cannot afford to represent indigent accused persons while also supporting their diverse private practice.

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<sup>72</sup> See Law on Lawyers, art. 6; Zhonghua Renmin Gongheguo Faguan Fa [Law of the People's Republic of China on Judges ("Law on Judges")], art. 12 (promulgated by the Standing Comm. Nat'l People's Cong., Jun. 30, 2001, effective Jan. 1, 2002) [hereinafter Law on Judges]; see also, Jianchayuan Zhonghua Renmin Gongheguo Sifabu Gonggao [Decision of the Standing Committee of the National People's Congress on Revising the Law of the People's Republic of China on Procurators] (promulgated by the Standing Comm. Nat'l People's Cong., Jun. 30, 2001, effective Jan. 1, 2002) [hereinafter Law on Procurators].

<sup>73</sup> See Law on Lawyers, art. 6; Law on Judges, art. 9; Law on Procurators, art. 10.

<sup>74</sup> *Id.*

<sup>75</sup> See Zhonghua Renmin Gongheguo Faguan Zhiye Daode Jiben Zhunze [Code of Judicial Ethics for Judges of the People's Republic of China] (promulgated by the Judicial Comm. of the Supreme People's Court of China, October 18, 2001, effective Oct. 18, 2001), translated in <http://www.accci.com.au/code.htm> (last visited Apr. 1 2007); See also, Lushe Zhiye Daode He Zhiye Jiben Guifan [Standards for Lawyers' Professional Ethics and Practice Disciplines] (promulgated by the Chinese Institution of Lawyers, Mar. 3, 2002, effective Mar. 3, 2002).

China's development of its legal aid system will be critical to its ability to provide quality representation to the indigent accused. An institutionalized indigent defender system has a number of benefits over a system that relies primarily on the case-by-case appointment of private lawyers. Chiefly, it can guarantee a high quality of service, because a legal aid center can call upon a staff of lawyers experienced in handling criminal cases. With support from international organizations, China's government can improve upon its model by providing sustained, regular training to indigent defenders and by implementing a method of supervision of legal aid cases. Moreover, it can institute a continuing legal education program that offers training workshops, mentoring for junior defenders, and an array of support services and legal resource materials.

At present, NLAC is in the process of evaluating the training capacity of legal aid centers throughout the country, the professional abilities of its attorneys, and the minimum standards it must set for the handling of indigent criminal cases. This is an enormous undertaking, considering the number of legal aid centers, and the size and complexity of China. Support from the international community can assist China to establish an organized structure for legal aid, develop minimum operating standards for its lawyers and improve upon its training capacity.

To date, IBJ has co-sponsored more than 50 national, regional and local training events with the Chinese government, and provided support to many defender-related projects designed to encourage the provision of high-quality legal services in criminal cases. IBJ's methodology employs a unique format of community outreach, education, technical assistance, and training, as well as matching international and Chinese experts with local lawyers throughout the country. This type of collaboration has enhanced the capacity of the indigent defense bar, addressed the specific needs of participating localities, and contributed towards the development of a best practice model for criminal defenders. IBJ's training curriculum is tailored for China, in that its content is entirely based on the skills necessary for Chinese lawyers, given the realities of their practice. In addition to building lawyers' skills, IBJ's training program aims to instill lawyers with a sense of purpose about their work, and their vital role in the justice system.

Though China's lawyers are usually well-informed about legal theory, very few receive formal training in critical thinking, advocacy and negotiation skills during or after law school. Because they did not receive training in these skills, they are ill-equipped to carry them into practice. From the initial case assignment, lawyers are apt to accept the prosecution theory as indisputable fact and thus forego many viable defenses. Similarly, many lawyers are unfamiliar with advocacy skills such as direct and cross-examination and defense theory development as they have never participated in interactive training workshops that provide them the opportunity to learn and hone these skills.<sup>76</sup>

Many lawyers are also unclear about their roles within the criminal justice system and how to effectuate their clients' rights. These shortcomings stem from the fact that many lawyers lack the resources, or a community of experienced role models that will support and mentor them. Many of these lawyers work in isolated regions of the country where there are few other lawyers,

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<sup>76</sup> At a March 2007 training event in Northwest China, a lawyer discussed cross-examination techniques he had used in a recent trial. When questioned about how he had learned about these techniques, he stated that this was his first advocacy training he had never been taught cross-examination; he had learned it by watching an American movie.



and where even fewer practice criminal defense. Without a community of lawyers who will train or mentor them, they have become reliant on their relationships with the police and prosecution in their local regions and are largely passive in their roles as defense lawyers. As a case in point, a county legal aid lawyer from an isolated part of Southwest China remarked at a 2006 IBJ training workshop: “I work for the same government as the police and prosecutors. I cannot disagree with their positions; I must work together with them towards the same goal. If we all believe the accused to be innocent, there is much more that can be done to help him.”

IBJ is aiding the cultivation of a class of professionalized defenders by working with select groups of lawyers and legal aid centers from model pilot sites across the country. Such an approach will produce the future leaders of China’s defense community, those who are passionate about and skilled in defense work. These leaders will also help China realize the goals of China’s Criminal Procedure Law by seeing to the implementation of key fair trial right provisions. Already IBJ’s trainings are having an effect. After the lawyer from southwest China attended an IBJ workshop, where he received both substantive and practical defense training for the first time in his career, he changed his entire outlook about his role as a defender. For him, learning how to analyze a case in a critical way was transformative. Now, with sustained mentoring from IBJ, as a matter of course, he challenges the prosecution’s evidence and asserts defenses on behalf of his clients. In one case, he was successful in his defense of a client charged with murder. In the process, he saved his client from an almost certain death sentence.

#### **b. Development in the United States**

In the United States, the right to effective assistance of counsel developed gradually. Throughout the right to counsel line of cases, the Supreme Court addressed it as a related, supporting theme. Specifically, the Court made clear that appointment of counsel must be made in a manner that affords “effective aid in the preparation and trial of the case.”<sup>77</sup> In the United States, as it has in China, the issue became prominent with the development of the indigent defense system. As the burden of providing defense services to the poor grew, in many cases, the adequacy of defense declined-- both in the quality of lawyers, as well as the organizational structures in place for providing training, supervision and funding.

In providing mandated legal representation to clients, lawyers must practice under the various laws of the state in which they practice. In addition, lawyers are urged to follow accepted national standards issued by the American Bar Association and the National Association of Criminal Defense Lawyers. Standards and guidelines pertain to such issues as attorney performance, attorney eligibility, caseloads, conflict of interest, and administration of indigent defense systems. If they practice in a public defender office, lawyers may also be mandated to follow the standards of practice set by that particular office.

The United States has many examples of public defenders offices that have been able to provide quality representation to their indigent accused clients. These models have been successful because they provide ongoing training, supervision and support to their lawyers. A good model of supervision is critical to effective representation; many public defender offices have developed ways to ensure that new defenders can benefit from the expertise of their more

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<sup>77</sup> See *Powell v. Alabama*, *supra* note 30 at 69.

experienced colleagues. In these offices, new lawyers are matched with more senior lawyers who serve as their mentors and trial supervisors. The mentor is responsible for routinely meeting with the lawyer, discussing pending cases in detail, observing and critiquing trials, and reviewing all case files. These offices also regularly team up groups of lawyers with differing levels of experience so that they may brainstorm and help to prepare each others cases.

## **B. Right to Defense**

Everyone charged with a criminal offense has the right to defend himself or herself. China has incorporated this fundamental right into its Constitution, “[t]he accused has the right to defense.”<sup>78</sup> To ensure a person’s right to defense, China’s Criminal Procedure Law contains a number of essential fair trial guarantees, including the right to pre-trial access to counsel,<sup>79</sup> the right to disclosure by the prosecution of all material evidence,<sup>80</sup> the right to a judicial determination of guilt after a trial<sup>81</sup> at which the prosecution bears the burden of proof,<sup>82</sup> the right to confront and examine witnesses<sup>83</sup> and the right to present evidence.<sup>84</sup>

In practice, there are a number of obstacles that prevent this right from being fully realized. These problems include: 1) inadequate access to counsel and time to prepare a defense; 2) insufficient or untimely discovery of prosecutorial evidence; 3) insufficient safeguards to guarantee the defendant’s innocence until determined guilty in a court of law; 4) an inability to confront witnesses at trial; and 5) difficulty in collecting or presenting defense evidence. Each of these issues has a deleterious effect on the accused’s right to present a defense. To fully protect the right to defense, the criminal justice system must improve defense lawyers’ standing and ability to prepare and present evidence that demonstrates that the prosecution has not proven the defendant’s guilt, that the defendant is innocent or that his or her punishment should be mitigated.

### **1. Right to Early Access to Counsel**

In order to defend oneself, one needs adequate time to prepare a defense.<sup>85</sup> This necessitates early access to and meaningful opportunity to consult with counsel. If a defense lawyer is denied access to his or her client and sufficient time to prepare the case, there is little that he or she can do short of offering the client a superficial or perfunctory defense. The right to defense requires time for the lawyer and client to consult about the case, review the prosecution’s evidence, interview witnesses, confer with experts, as well as time to prepare evidence and arguments that support the defense theory. A client’s ability to obtain early access to counsel is thus inextricable from the client’s right to a defense, and inseparable from the right to a fair trial.

#### **a. Development in China**

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<sup>78</sup> Constitution, art. 125 (1982) (P.R.C.)

<sup>79</sup> *Id.*, art 33, 96.

<sup>80</sup> *Id.*, art. 45.

<sup>81</sup> *Id.*, art. 12.

<sup>82</sup> *Id.*, art. 162.

<sup>83</sup> *Id.*, art. 47.

<sup>84</sup> *Id.*, art. 157, *see also*, art. 37.

<sup>85</sup> *See* ICCPR, art. 14(3)(b).

In recent years, China has made significant strides towards guaranteeing a lawyers' ability to become involved in criminal cases pre-trial, and to meet with clients held in detention. The 1996 amendments to the Criminal Procedure Law specifically codified the right of lawyers to meet with their clients during the investigation and prosecution examination stages.<sup>86</sup> Further, regulations issued in 2005 aimed to expand the ability of indigent suspects to gain access to counsel pre-trial, requiring police and prosecutors to notify all criminal suspects of their right to apply for legal aid.<sup>87</sup> Criminal suspects who cannot afford to hire a lawyer can now make a request for legal aid as early as the investigative stage of their case.<sup>88</sup> To aid implementation of this provision, police and prosecutors are required to notify a legal aid center within 24 hours if a criminal suspect has made an application for their services.<sup>89</sup> The regulation also provides that both the police and the prosecutor's office should actively support the work of legal aid lawyers at the pre-trial stage. Specifically, both offices should inform a lawyer of the charges against his or her client, arrange for meetings between the lawyer and client, and assist the lawyer to file petitions and complaints, as well as apply for bail on the client's behalf.<sup>90</sup> Additionally, at the prosecution examination stage, the prosecutor's office should additionally assist lawyers to read and copy case materials, as well as to allow them to meet and correspond with their clients.<sup>91</sup>

Although a significant development, the promulgation of these new laws has not had its intended effect. Lawyers still have very limited and superficial access to their indigent clients prior to trial. Indeed, in a great many cases, lawyers still receive appointment to cases less than the required ten days before trial; in some instances judges attempt to appoint lawyers to represent an indigent defendant the very day of trial.<sup>92</sup> In the majority of criminal cases lawyers are not able to effectuate their right to timely appointment. A number of reasons exist. At the trial stage, a case will be assigned to a legal aid center rather than directly to an individual lawyer. On occasion, the legal aid center will delay assigning the case due to a lack of administrative capacity.<sup>93</sup> More often, courts will assign cases to legal aid less than ten days before trial.<sup>94</sup> One of the rationales is that the courts are waiting to see if a defendant will hire a private lawyer.<sup>95</sup> Another is that, in many cases, especially those involving juveniles, courts feel that the facts are so straight forward that there is no urgency to appoint an attorney much in advance of trial.<sup>96</sup> At the pre-trial stage, Chinese law places the burden on the accused to apply

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<sup>86</sup> See Criminal Procedure Law, art. 36, 96.

<sup>87</sup> See *Zuigao Renmin Fayuan Zuigao Renmin Jianchayuan Gong An Bu Sifa Bu Guanyu Xingshi Susong Falü Yuanzhu Gongzuo de Guiding* [Regulation of the Supreme People's Court, Supreme People's Procuratorate, Ministry of Public Security and Ministry of Justice on Regulation of Legal Aid in Criminal Matters]

<sup>88</sup> *Id.*, art. 4.

<sup>89</sup> *Id.*, art. 6.

<sup>90</sup> *Id.*, art. 16.

<sup>91</sup> *Id.*, art. 17.

<sup>92</sup> See Criminal Procedure Law, art. 34, 51. *Zuigao Renmin Fayuan Sifa Bu Guanyu Xingshi Falü Yuanzhu Gongzuo de Lianhe Tongzhi* [Joint Notice by the Supreme People's Court and the Ministry of Justice on Legal Aid Work in Criminal Litigation], (issued by the Supreme People's Court and the Ministry of Justice, Apr. 9, 1997), art. 5, (mandating that defenders must receive cases at least 10 days in advance of trial). Yet, in most areas of the country, as a matter of practice, legal aid receives assignment of cases just 3 days or less short of trial. In some instances, especially in cases the court considers of minor consequences, e.g., juvenile cases, lawyers receive notice of appointment the same day as trial. Conversations with lawyers throughout China, Oct. 2004 – Mar. 2007.

<sup>93</sup> Conversations with lawyers and professors throughout China, Oct. 2004 – Mar. 2007.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

for legal aid. The poor often possess very little practical knowledge about their procedural rights under the law, or about the availability and purpose of legal aid. Without such knowledge, they are unlikely to exercise this right. At an IBJ hosted round-table, a panel of judges, prosecutors, police, and defense lawyers held a discussion on the dearth of indigent accused individuals making requests for legal aid. Although one police officer said that his facility handed out printed forms explaining this right, the officer readily admitted that the information was provided without detailed explanation.<sup>97</sup> No mechanism was set in place to make sure that detainees were able to understand the information. As the officer explained, this absence of an adequate safeguard was a great problem, and one that he wished to work together with lawyers to resolve.

IBJ's series of round-table trainings serve an important goal: they bring together the justice community to find common ground on issues affecting local practice. In participating in these trainings, IBJ has found that there is no widespread polarization between members of the justice community on the issue of criminal justice reform – and certainly no greater than that experienced in other countries. As the above police officer's comments indicate, a great many in the justice community are open to discussing ways to effectuate the rights of the accused. But enhanced dialogue is only one part of the equation. Local communities also need a plan for action. Towards this end, in 2005, IBJ worked with the Program on Negotiation at Harvard Law School to create guidelines to assist lawyers to moderate future meetings and planning sessions.

A major reason that the law has not been properly implemented rests with the fact that lawyers, for the most part, have not been active about attempting to gain pre-trial access to indigent criminal suspects. Lawyers' reticence stems both from their concern about doing more work than they will be paid for in a case, and that they feel that any work on their part will not make a difference at this early stage. Both legal aid and private counsel receive case handling fees that are meant to cover their case related expenses, for example, travel, investigation and other costs related to case preparation. In reality, however, the remuneration that lawyers receive is too little to set forth a meaningful defense; around 300 – 800 RMB (approximately \$40 - \$100 USD) in most parts of the country, and 1000 RMB (\$130 USD) in Beijing. A related issue is that lawyers, typically, will not receive the case fee until after the case is completed. In the interim, lawyers must to pay, out of pocket, any case related expenditure.

Although lawyers' rights are limited by law at the investigation stage, there is still substantial work that can be done to prepare the client's defense. IBJ works to educate lawyers, police and prosecutors about the lawyers' important role during the pre-trial stages of the case. Even though the lawyer will not yet have access to the prosecutor's files, or be able to investigate the facts of the case, he or she can still: provide invaluable advice and counsel to his or her client; obtain all relevant facts and circumstances of the case known to the client; and begin to build an attorney-client relationship that will aid the lawyer's ability to lawfully advocate for the client's rights and interests. At the prosecution examination stage, lawyers can conduct independent investigations. Lawyers can also initiate substantive discussions with the prosecutor's office. In many instances, pre-trial discussion between prosecutors and lawyers aids the efficient administration of a case, in that it permits a lawyer to inform a prosecutor about facts and circumstances relevant to the case. These discussions can assist the prosecutor to determine the appropriate charge or whether the case should be outright dismissed.

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<sup>97</sup> Conversation with Police Officer in Southwest China, July 2006.

A Lawyer's primary responsibility is to protect his or her client's legal rights.<sup>98</sup> To encourage their active participation in the criminal process, IBJ has held a number of training sessions addressing the rights and responsibilities of lawyers during the pre-trial stages of a case. These trainings have led to innovative solutions to key obstacles to defense practice. In July 2005, legal aid lawyers participating in an IBJ training program in Southeast China negotiated an agreement with the prosecutor's office, wherein prosecutors would call legal aid as soon as they received a serious or complex case. More recently, IBJ facilitated an arrangement with a local police department in Southwest China granting defense lawyers access to all juvenile suspects during the investigation stage. Additionally, the parties are working on a future addendum that would allow defense lawyers to be present at interrogation sessions involving juveniles.

### **b. Development in the US**

In the United States, there are procedures in place to protect a criminal suspect's right to early access to counsel. Generally, the police are required to bring a suspect to court within forty-eight hours of their arrest.<sup>99</sup> At that time, indigent persons will be arraigned, or formally charged with a crime, in front of a judge and receive appointment of counsel. Whenever a lawyer enters a case, he or she is generally free to meet with his or her client and to investigate the case – even if the police or prosecutor has not yet begun his or her investigation. To advance the defense and protect the client's rights, the lawyer will also make an application for bail on the client's behalf. Skilled and dedicated lawyers will want to investigate their cases as early as possible. Such investigation will include not only speaking with all witnesses in the case, but visiting of the crime scene, consulting with expert witnesses and visiting with the defendant's friends and family. Lawyers will also meet with their clients, as early and as often as possible, to discuss the case, all viable strategies, and update their client regularly about the progress of the case. Finally, lawyers will research all relevant law and prepare their defense strategy.

Besides guaranteeing a defendant's right to prepare a defense, the assignment of counsel at arraignment offers some protection against coercive police tactics. Because arraignments of defendants must generally happen within the first forty-eight hours after the arrest, the police have a limited time frame to conduct their interrogations.<sup>100</sup> In practice, however, by the time they arrive in court, many suspects have already been interrogated and made statements to the police. Despite the fact that police are required to inform persons in custody of their so-called *Miranda* warnings, or their right to an attorney and right to remain silent and not answer any

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<sup>98</sup> At a May, 2006 IBJ training event in Southeast China that involved lawyers and prosecutors, each discussed the reasons that they were not responsible for ensuring that the accused had pre-trial access to counsel. The lawyers stated that Chinese law clearly placed the burden on the prosecution and police to inform the accused of their right to counsel. The accused was then required to ask for counsel, if they so desired. The lawyer had no role in the process unless a formal application for legal aid was made. The prosecutors, on the other hand, said that the police were primarily responsible for informing the accused of their right to counsel. If the police did their job of advising suspects of their right to counsel during the pre-trial investigation stage, it was unnecessary for the prosecutors to replicate it, besides, the prosecutors were too overburdened with other work to inform every suspect of their right to counsel.

<sup>99</sup> In the United States, arrest is not a formal procedure requiring prior approval from the prosecutor; rather it refers to circumstances under which the police detain an individual to answer for a criminal offense.

<sup>100</sup> See *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991) (setting definite time limits on interrogations).

questions, many suspects will waive these rights and choose to speak with the police.<sup>101</sup> Though the *Miranda* warnings were intended to curb coercive police methods of obtaining confessions, torture and other illicit tactics still occur.<sup>102</sup> Beyond such instances of abuse, there are other practical and psychological reasons that suspects waive their *Miranda* rights. In some cases, suspects feel that they can convince the police of their innocence, or diminished responsibility for a criminal offense, and then go home. Sometimes, police will convince a suspect to waive his rights through deliberate deception, for example, falsely telling the suspect that a witness has identified him or her as having committed a crime. More often, police are trained to develop a rapport or personal relationship with the suspect, luring him or her into a false sense of security.

In many instances, by the time of arraignment, it is too late for lawyers to prevent against abuses that may occur during interrogation, or the danger that suspects will falsely confess. Accordingly, some defender offices and lawyers have developed innovative methods to obtain pre-trial access to indigent criminal suspects. Some public defender offices and volunteer lawyer networks provide free phone consultations or station visits for anyone held at a police station.<sup>103</sup> Others achieve early access to clients by locating their offices in the communities that they serve, and by engaging in outreach and public education activities that encourage residents to obtain the assistance of counsel as soon as they are suspected of a crime or taken into police custody.

Of course, lawyers can be limited by their time availability and resources. Very few defendants will have the money to retain a team of lawyers to devote themselves exclusively to his or her case. A frequent concern is that the poor have different outcomes in their cases than those who can afford to retain counsel because public defenders have too many cases and are underpaid. Given such pressures, lawyers may not always meet with their clients, or investigate and prepare their cases as well as they should. To rectify this situation and guarantee a high quality of service in indigent cases, public defenders offices and bar associations have established maximum caseload guidelines.<sup>104</sup> These standards were set in recognition of the fact that if a lawyer has a caseload that is prohibitively high, there is no way that he or she can perform his or her job effectively. Public defender offices also continuously seek ways to increase funding for case expenditures by, for example, lobbying state and local governments.

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<sup>101</sup> The *Miranda* warnings (“You have the right to remain silent. If you give up the right to remain silent, anything you say can and will be used against you in a court of law. You have the right to an attorney. If you desire an attorney and cannot afford one, an attorney will be obtained for you before police questioning.”) emanate from the Supreme Court case of *Miranda v. Arizona*, 384 U.S. 436 (1966). They were designed to protect a suspect’s privilege against self-incrimination. The police are generally required to give the warning to persons in custody before interrogating them. If the *Miranda* warning is not given before questioning, or if police continue to question a suspect after he or she indicates a desire to consult with an attorney before speaking, statements by the suspect generally are inadmissible.

<sup>102</sup> See *Conclusions and Recommendations of the United Nations Committee against Torture : United States of America*. 15/05/2000.A/55/44, paras.175-180. (Concluding Observations/Comments), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/59a7a114139ef798802568e3004e289e?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/59a7a114139ef798802568e3004e289e?Opendocument).

<sup>103</sup> See e.g., Neighborhood Defender Service of Harlem, available at <http://www.ndsny.org/>; First Defense Legal Aid, available at <http://www.first-defense.org/>.

<sup>104</sup> For information on numerical caseload limits see e.g., the National Association of Criminal Defense Lawyers, Standards for the Defense, Standard 13.12, Workload of Public Defenders (The caseload of a public defender office should not exceed the following: felonies per attorney per year: not more than 150; misdemeanors (excluding traffic) per attorney per year: not more than 400; juvenile court cases per attorney per year: not more than 200; Mental Health Act cases per attorney per year: not more than 200; and appeals per attorney per year: not more than 25) at [http://www.nlada.org/Defender/Defender\\_Standards/Standards\\_For\\_The\\_Defense#thirteentwelve](http://www.nlada.org/Defender/Defender_Standards/Standards_For_The_Defense#thirteentwelve).

## 2. Right to Disclosure of Prosecution's Evidence

The purpose of discovery laws is to ensure that persons accused of crimes will have timely access to the evidence against them. In the investigation of a case, the police or prosecutor generate numerous statements, reports and other evidence that bear significance. It is critical that the accused's lawyer have access to this information in order to properly defend against the charges. Under China's Criminal Procedure Law, it is not until the prosecution transfers a case for trial that it is required to turn over its evidence to the court.<sup>105</sup> At this point, the lawyer may then consult, take notes of or copy the evidence.<sup>106</sup>

### a. Development in China

Under Chinese law, defense counsel is entitled to receive only limited discovery at the pre-trial prosecution-examination stage.<sup>107</sup> Not until the prosecutor files charges with the court will they transfer all the "major evidence" in the case.<sup>108</sup> At this point, the lawyer can go to the court to get copies of all evidence the prosecutor has placed in the court file.<sup>109</sup>

Prosecutors have an enormous advantage over the defense, since they do not have to hand over discovery until just ten days before trial.<sup>110</sup> Adding to this tactical advantage is the fact that the prosecution always has a superior ability to investigate and prepare its cases, while the defense will encounter severe restrictions. At this point, discovery is often of little value to the defender. Without the time to review, the defense cannot use or defend against the evidence. Additionally, many prosecutors withhold evidence from the court file that they deem is neither important, nor exculpatory to the defense. A determination on their part that such material is not useful to the defense is, many times, reflective of their biased view of the evidence; they may be unaware that certain evidence could be useful to the defense. While the defense has the right to make an application to the court, requesting that the prosecution provide timely discovery, supplement any missing discovery, or even that the court conduct further investigation in the case, lawyers have little experience on how to make such applications.<sup>111</sup> Likewise, most defenders are without the skill to negotiate with prosecutors over the handing over of discovery.

A significant portion of IBJ's training curriculum is focused on issues related to lawyers' pre-trial preparation. Trainees learn about the types of evidence in criminal cases, and the legal strategies by which lawyers can obtain such evidence from the prosecutor in a timely fashion. Just as important, lawyers are instructed on a wide-range of investigation techniques and resources that they can employ. IBJ encourages defense lawyers to consider their clients as one of the most useful resources in developing investigation leads and learning about the facts and

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<sup>105</sup> Criminal Procedure Law, art. 150.

<sup>106</sup> *Id.*, art. 36.

<sup>107</sup> During the pre-trial investigation stage, defense counsel is not entitled to disclosure of any evidence in the case, rather has only the right to be informed of the crime for which his or her client is being investigated. *Id.*, art. 96.

<sup>108</sup> *Id.*, art. 150.

<sup>109</sup> *Id.*, art. 36.

<sup>110</sup> Occasionally, especially in more underdeveloped areas of the country, prosecutors do not transfer evidence to the court until the day of trial. Conversations with lawyers throughout China, Oct. 2004 – Mar. 2007.

<sup>111</sup> *See* Criminal Procedure Law, art. 159.

circumstances of a case. The development of such case strategy enables the lawyer to incorporate any late stage discovery into a cohesive theory of defense.

To assist the resolution of discovery related issues or other pre-trial practice concerns, IBJ often holds joint trainings with judges, prosecutors and lawyers. These forums allow the parties to discuss ways in which they can improve practice. A highly accomplished prosecutor at one IBJ workshop advised lawyers that they were an important part of the process, and that they should utilize all the power vested in them by the criminal laws to defend their clients.

## **b. Development in the US**

In the United States, the prosecutor has the duty to disclose to the defense all evidence that is material to the case.<sup>112</sup> Additionally, the prosecutor is required to turn over all discovery upon request where the evidence is material either to the defendant's guilt or to punishment.<sup>113</sup> The prosecutor also has an obligation to disclose exculpatory evidence – even if that evidence is known only to the police.<sup>114</sup> This imposes a solemn duty on the prosecutor to review police investigatory files and disclose anything that tends to prove the innocence of the defendant.<sup>115</sup>

Under federal law and in select states, including New York, discovery of most witness statements and other reports is not required until very late in the criminal process, the very moment of trial (and sometimes in the middle of trial).<sup>116</sup> In practice, a lawyer's ability to obtain discovery will depend on the culture of the prosecutor's office, the lawyer's individual relationship with the prosecutor, and the nature of the case. Since it is common for some prosecutors to provide the defense with little or no pre-trial discovery, lawyers have become very adept at pursuing other means to investigate and prepare their cases. Primarily, these methods involve meeting with the defendant as soon and as often as possible before trial and conducting extensive independent investigation of the case. Investigations that lawyer's undertake are typically extensive, and will usually include: attempting to interview any and all witnesses in the case, visiting the scene of the crime, taking pictures and measurements, and obtaining all important records or other material relevant to the case or the client's state of mind. In this way, the lawyer will be as familiar with his or her case as possible, and once discovery is received, the lawyer will be able to quickly incorporate it into the theory of the defense.

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<sup>112</sup> See *United States v. Bagley*, 473 U.S. 667 (1985) (holding that prosecution's nondisclosure of evidence constitutes constitutional error only if the evidence is material in the sense that its suppression might have affected the outcome of the trial).

<sup>113</sup> See *Brady v. Maryland*, 373 U.S. 83 (1963) (finding that the prosecution's withholding of evidence violated the Due Process Clause).

<sup>114</sup> See *Kyles v. Whitley*, 514 U.S. 419 (1995) (reaffirming the prosecution's responsibility to produce evidence favorable to defense).

<sup>115</sup> *Id.*

<sup>116</sup> Federal procedural rules require much less pre-trial discovery of witness statements than those of many states. Under 18 U.S.C. § 3432, federal prosecutors are required to provide defense counsel with the names of potential witnesses three days prior to trial only in treason or death penalty cases. See U.S.A. Federal Rules of Criminal Procedure, Rule 16. In New York, the prior statements, criminal convictions and/or pending criminal cases of any witness do not need to be turned over until after the conclusion of the witness's direct examination at a pre-trial hearing. If a witness does not testify until trial, that same information does not need to be turned over until after the jury has been sworn but before the prosecution's opening argument (for prosecution witnesses), or before the defendant's direct case begins (for defense witnesses). See N.Y. CRIM. PROC. LAW art. 240 (2005).



### 3. Right to Presumption of Innocence

#### a. Development in China

While China has yet to expressly recognize the presumption of innocence,<sup>117</sup> it does place a burden on the prosecution to prove the defendant's guilt at trial.<sup>118</sup> Additionally, Chinese law prohibits the conviction of any defendant based solely on the basis of his own confession; in order to convict, the prosecutor must provide other sufficient and reliable evidence of the defendant's guilt.<sup>119</sup> By enacting these provisions, China has indicated its support for the principle that the defendant should not be compelled to prove his own innocence. Yet, inconsistent with this viewpoint is the fact that Chinese law does not recognize a privilege against self-incrimination. On the contrary, when interrogated, suspects are obligated to "state the circumstances of [their] guilt or explain [their] innocence" and answer any relevant questions.<sup>120</sup> Further, defendants must testify and be subject to cross-examination at trial.<sup>121</sup> Amongst the legal community, there is widespread support to revise the Criminal Procedure Law to include a privilege against self-incrimination. However, it is still unclear whether or not such a right will be incorporated into the revisions scheduled for October 2007.<sup>122</sup> Though there is broad consensus that the law must provide stronger protection against tortured or otherwise illegally obtained confessions,<sup>123</sup> many in law enforcement believe that it would be difficult to investigate or solve crimes if suspects were not required to answer their questions. Moreover, many judges believe that the defendant's testimony is critical to a trial's search for truth.

The standard of proof at trial is that "the facts are clear and the evidence is reliable and sufficient."<sup>124</sup> The defendant may be found innocent outright or by reason of insufficient evidence.<sup>125</sup> The defendant has no right to remain silent. Though the defendant enjoys no privilege against self-incrimination, Chinese law provides that a defendant cannot be found guilty and sentenced to criminal punishment if there is only his statement but no other evidence to support the conviction.<sup>126</sup> Further, that oral confessions should not be depended upon,<sup>127</sup> courts, prosecutors and police must gather various kinds of evidences that can be used to prove the guilt or innocence of crime suspects and defendants and the gravity of the crimes.<sup>128</sup>

One of the most important concepts that a trial lawyer needs a clear understanding of is the prosecution's burden of proof. More specifically, the lawyer must be able to determine

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<sup>117</sup> Chinese law does provide that "No one may be found guilty until lawfully judged so by a People's Court." Criminal Procedure Law, art. 12.

<sup>118</sup> *Id.*, art. 162.

<sup>119</sup> *Id.*, art. 46.

<sup>120</sup> *See* Criminal Procedure Law, art. 93.

<sup>121</sup> *See Id.*, art. 155.

<sup>122</sup> Conversation with Government Official, Mar. 2007.

<sup>123</sup> It is expected that the new code will include articles that provide the rudiments of an exclusionary rule for some illegally obtained evidence, and/or provisions that will more firmly deal with the issue of unlawful interrogations. *Id.*

<sup>124</sup> Criminal Procedure Law, art. 162.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*, art. 46.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*, art. 43.

whether the prosecution is able to meet their burden. Too often, defense lawyers mistake their role as defense attorneys and defer to the prosecution. As described previously, a critical part of IBJ's training is to help lawyers learn how to analyze the prosecution's case. Only in this way, will lawyers become persuasive in their argumentation to the court.

### **b. Development in the United States**

The presumption of innocence is the principle that one is innocent until proven guilty. This presumption means not only that the prosecutor must convince the judge or jury of the defendant's guilt, but also that the defendant is not required to say or do anything in his own defense. If the prosecutor cannot convince the trier of fact that the defendant is guilty, the defendant must go free. The presumption of innocence is not recognized in the U.S. Constitution, or in any federal statute; instead, it is a product of common law, legal customs and values whose roots can be traced to England and later articulated by U.S. courts.<sup>129</sup> In 1895, the U.S. Supreme People's Court reinforced this law, by stating that a defendant could not be convicted unless the judge or jury was instructed that the defendant was presumed innocent.<sup>130</sup>

The presumption of innocence, as a principle, is at times hard to for judges or juries to honor in practice. When a judge or juror sees a defendant at a criminal trial, they may often wonder about "what they did", as opposed to "what they are accused of doing". It is human nature to believe that the defendant would not have been arrested and charged with a crime if he or she hadn't done something wrong. So, defense lawyers are faced with the reality that they must overcome a bias against the defendant. That is why good defense lawyers will spend countless hours developing a compelling defense, while aiming to humanize the defendant. Lawyers must also be prepared to remind the court of its duty to apply the presumption of innocence, and to find the defendant not guilty if the prosecutor has not proven his or her guilt.

## **4. Right to Confront Witnesses and Evidence**

### **a. Development in China**

Under right of law, the accused may confront all witnesses that appear in court. Specifically, the Criminal Procedure Law states that "the testimony of a witness may be used as a basis in deciding a case only after the witness has been questioned and cross-examined in the courtroom by both sides, that is, by the public prosecutor and victim as well as the defendant and defense counsel, and after the testimonies of the witnesses on all sides have been heard and verified."<sup>131</sup> In reality, however, witnesses rarely appear to testify in criminal cases, and are thus not subject to cross-examination.<sup>132</sup> Shortly after this provision was added to the Criminal Procedure Law, the Supreme People's Court issued an interpretation that states with the court's

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<sup>129</sup> See *Coffin v. U.S.*, 156 U.S. 432 (1895) (establishing the presumption of innocence of those accused of crimes).

<sup>130</sup> *Id.* at 453.

<sup>131</sup> Criminal Procedure Law, art. 47.

<sup>132</sup> *Miranda inspires reform call*, Renmin Wang [People's Daily Online], Mar. 16, 2007, [http://english.people.com.cn/200703/16/eng20070316\\_358183.html](http://english.people.com.cn/200703/16/eng20070316_358183.html) (quoting a deputy to the National People's Congress, Jiang Deming, saying "[f]igures show that less than 8 percent of criminal witnesses appear in court"). Even lower numbers are quoted in developing regions. At a March, 2007 training workshop involving lawyers from throughout Northwest China, lawyers agreed that witnesses did not appear in 98% of all of their criminal cases.

permission, witnesses may be absent in the following circumstances: 1) the witness is a juvenile, 2) the witness suffers from a serious illness or is otherwise physically incapable of being present at trial; 3) the testimony of the witness will not affect the trial in any significant way, or 4) on other reasonable grounds.<sup>133</sup> In practice, this encompasses almost any case that courts encounter. Instead of calling witnesses, prosecutors submit written witness statements as evidence.<sup>134</sup> Moreover, when defense lawyers request the court to subpoena witnesses, these applications are denied, or when allowed, are ignored by witnesses.<sup>135</sup> Although Chinese courts have subpoena power, there is no legal penalty for witnesses' failure to comply with a court's subpoena.<sup>136</sup>

Without an ability to confront one's accusers, the defense is placed at a severe disadvantage; the defendant is unable to test the reliability or credibility of any witness. Though this is a significant flaw, one that has been much discussed by China's government, academics and larger justice community, it is beyond China's current means for witnesses to be required to appear in every case. In the absence of a formal plea bargaining system,<sup>137</sup> all criminal cases must go to trial. Courts are not equipped financially, nor do they have time to allow witnesses to testify in each and every case. Such a requirement would put a stranglehold on the courts. In practice, however, the notion is beginning to evolve that certain types of cases or situations should require the presence of lay or expert witnesses, i.e., serious or complex cases involving such crimes as homicide, or cases where there is a dispute over a witness' testimony. Such a focus is based on a critical case method, where certain cases involve issues that are so critical as to merit a higher level of scrutiny.<sup>138</sup> Conversely, many proponents also wish to expand the types of cases where the evidence of guilt is overwhelming and the accused readily confesses to his crime that can be disposed of through a simplified trial procedure, known as summary procedure.<sup>139</sup> Already, large cities are implementing new provisions that require courts to

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<sup>133</sup> Zuigao Renmin Fayuan Zhixing Zhonghua Renmin Gongheguo Xingshi Susong Fa Ruogan Wenti de Jieshi [Judicial Interpretation by the Supreme People's Court on Several Issues Concerning the Implementation of the Revised Criminal Procedure Law], art. 141.

<sup>134</sup> See Criminal Procedure Law, art. 157. (statements of witnesses who do not testify should be read out in court).

<sup>135</sup> See *Id.*, art. 37 (A lawyer may request the court subpoena witnesses to testify).

<sup>136</sup> See Zheng Jianfeng, Zhengren Buchuting Xingan Nan Shenli Zhuangjia Huyu Wanshan Zhengren Chuting Zuozheng Zhidu [Experts Suggest Improving the System of Subpoening Witnesses as it is Difficult if Witnesses Don't Appear for Trial], Fazhi Ribao [Legal Daily], Nov. 15, 2005, available at [http://www.legaldaily.com.cn/misc/2005-11/15/content\\_219302.htm](http://www.legaldaily.com.cn/misc/2005-11/15/content_219302.htm).

<sup>137</sup> In reality, most Chinese trials involve an informal guilty plea, rather than a full inquiry into all of the facts of a case. Though a "bargain" has not been entered with the prosecutor in the case, in essence, when the defendant admits his guilt and requests leniency from the court (something that happens in the vast majority of cases), the defendant is engaging in "sentence bargaining" with the judge. In many jurisdictions in the United States, defendants will engage in a similar procedure, deciding to plead guilty in front of a judge, even when they do not know what sentence they will receive, because they know that they will get a harsher sentence if they contest the facts of the case at trial.

<sup>138</sup> See Charles J. Ogletree, Jr., *Access to Justice: The Social Responsibility of Lawyers: The Challenge of Providing "Legal Representation" in the United States, South Africa, and China*, 7 WASH. U. J.L. & POL'Y 47 (2001) (opining, in the context of assigning counsel, the critical case model proposes a more limited right to counsel. It would provide counsel to those who have the greatest need).

<sup>139</sup> Summary procedure is currently available in cases "where the defendants may be lawfully sentenced to fixed-term imprisonment of not more than three years, criminal detention, public surveillance or punished with fines exclusively, where the facts are clear and the evidence is sufficient, and for which the People's Procuratorate suggests or agrees to the application of summary procedure" See Criminal Procedure Law, art. 174. In the interests of resolving a larger number cases more efficiently and encouraging courts to impose more non-incarcerative sentences, amendments to the Criminal Procedure Law will likely expand upon this procedure. Conversation with Government Official, Mar. 2007.

subpoena witnesses and pay for all relevant costs.<sup>140</sup> For example, the Beijing No. 1 Intermediate People's Court recently announced that witnesses should appear in cases where, among other reasons, evidence is disputed, inconsistent or challenged as unlawfully obtained.<sup>141</sup>

IBJ focuses on the basic, universal skills, common to all defense lawyers around the world, which lawyers can integrate into their daily practice. Most of IBJ's participants have a very rudimentary knowledge of cross-examination techniques. Though in China, witnesses rarely appear at trial, criminal cases frequently involve co-defendants. Therefore, Chinese defenders will often have the opportunity to cross-examine co-defendants in criminal cases. With regard to evidence, IBJ teaches lawyers how to make appropriate and informed applications to the court, while likewise providing lawyers with the tools to effectively challenge the prosecution's case through the use of physical and demonstrative evidence. Even in the absence of live witness testimony, the defense must do anything it can to challenge the prosecution's case. If left with nothing else, defense lawyers can still impeach the written statements of witnesses as internally inconsistent, inconsistent with other evidence, unreliable or insufficient.

### **b. Development in the United States**

The U.S. Constitution states that a defendant has the right to "be confronted with the witnesses against him."<sup>142</sup> Principally, this means that criminal defendants have the right to be put in the presence of their accusers in open court, face-to-face, in front of the judge or jury. This right is intended to give defendants the opportunity to cross-examine witnesses against them, as well as to provide the judge or jury with an opportunity to observe the demeanor of and make inferences regarding the reliability of those witnesses.<sup>143</sup> Though it is now well settled law that testimonial evidence cannot be introduced unless the defense has an opportunity to cross-examine the witness against him or her, this was not the case until just three short years ago.<sup>144</sup> Notwithstanding, the seemingly bright-line rule contained in the Constitution, in 1980, the U.S. Supreme Court held that when a witness is not present to testify at trial, his statement may nonetheless be admitted into evidence if he is unavailable to testify and his statement bears adequate "indicia of reliability."<sup>145</sup> In 2004, the Court overruled this previous decision, holding that while the purpose of the confrontation clause is to ensure reliability of evidence, it requires

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<sup>140</sup> See Li Gang, Balei Zhengren Chuting Zuozheng Xiangguan Feiyong Fayuan Maidan [When Eight Types of Witnesses Testify in Court, the Court will Pay Costs], BEIJING QINGNIAN BAO [Beijing Youth Daily], Mar. 20, 2007, at 1.

<sup>141</sup> Specifically, witnesses in the following eight types of cases should appear to testify at trial: 1) witnesses whose testimony is disputed; 2) investigators who can testify to disputed evidence regarding searches, interrogations, and other activities, witnesses involved in such searches or interrogations, and witnesses and investigators who testify in court regarding related issues; 3) expert witnesses whose testimony is disputed; 4) witnesses whose testimony is disputed regarding whether there is an issue of the defendant's voluntary surrender, meritorious performance, self-defense, criminal attempt, discontinuation of a crime, or other circumstances bearing on sentence mitigation; 5) investigators whose testimony is relevant to whether illegal activities such as torture occurred; 6) important witnesses whose testimony is inconsistent; 7) new witnesses; and 8) witnesses who voluntarily choose to testify. *See Id.*

<sup>142</sup> U.S. CONST. amend. VI.

<sup>143</sup> See Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. PUB. L. 381, 384-387 (1959).

<sup>144</sup> See *Crawford v. Washington*, 541 U.S. 36 (2004) (providing that if hearsay statements are testimonial then they are inadmissible unless the declarant is available for cross-examination).

<sup>145</sup> See *Ohio v. Roberts*, 448 U.S. 56 (1980) (articulating standards for confrontation clause).

reliability to be determined in a particular manner, through cross-examination.<sup>146</sup> An important aspect of the decision was the Court's concern that too much discretion had previously been given to judges who "could not always be trusted to safeguard the rights of the people."<sup>147</sup>

In the United States, cross-examination is considered one of the most effective means to ascertain truth at trial. Good lawyers undergo vigorous training to become adept at this skill. An effective cross-examination illustrates to the court whether or not the witness is accurate and credible. Cross-examination can also expose the underlying prejudices, biases, or motives that may have led a witness to misstate or distort the truth or lie. However, the right of cross-examination also has limits. Courts may restrict defendants from delving into certain areas on cross-examination. For example, defendants may be denied the right to ask questions that are irrelevant, collateral, confusing, repetitive, or prejudicial. Also, defendants may be prevented from pursuing a line of questioning solely for the purpose of harassment.

## 5. Right to Present Witnesses and Evidence

### a. Development in China

Chinese law generally permits the accused to present evidence in his or her defense,<sup>148</sup> however, the defense encounters many obstacles to its ability to gather and offer material evidence. Though the law provides that lawyers may, "with the consent of witnesses or other units and individuals concerned, collect information relevant to the case,"<sup>149</sup> lawyers rarely conduct an independent investigation into the facts of criminal cases. Defense lawyers state a number of reasons for this. Since lawyers routinely receive their cases just days before trial, their opportunity to investigate is curtailed. Even if they have the time to investigate, they can only interview the alleged victim upon the consent of the prosecutor or the court.<sup>150</sup> Such permission is rarely sought, and less often given. Defense lawyers are also concerned that they will be prosecuted for perjury should they uncover evidence which contradicts the prosecution's evidence.<sup>151</sup> Finally, in those instances where the defense is able to collect evidence, they face challenges getting it admitted in court. Judges often disregard defense evidence as irrelevant to the trial proceeding, or reject it as unreliable.<sup>152</sup>

To help resolve issues associated with the defendant's access to and ability to collect evidence, IBJ works with local communities to develop practical solutions. Primarily, IBJ focuses on the training of lawyers, providing them with the skills and substantive legal knowledge necessary to improve their practice. IBJ encourages lawyers to think more creatively

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<sup>146</sup> See *Crawford v. Washington*, *supra* note 144.

<sup>147</sup> *Id.*

<sup>148</sup> Criminal Procedure Law, art. 35, 157.

<sup>149</sup> *Id.*, art. 37.

<sup>150</sup> See *Id.*

<sup>151</sup> Article 306 of the Criminal Law states, "if, in criminal proceedings, a defender ... destroys or forges evidence, helps any of the parties destroy or forge evidence, or coerces a witness or entices him into changing his testimony in defiance of the facts or give false testimony, he shall be sentenced..." Regardless of whether it is likely that a legal aid or other indigent defender would be charged for defending cases that are neither noteworthy nor sensitive, this law has had a strong chilling effect on defense lawyers willingness to conduct independent investigations in criminal cases.

<sup>152</sup> Conversations with lawyers and professors throughout China, Oct. 2004 – Mar. 2007.

about their cases, and to utilize the law as a tool to defend their clients. In conducting workshops, trainers illustrate how the particular lines of questions at trial can bolster the effectiveness, credibility and clarity of the defendant's testimony. IBJ also cultivate lawyers' advocacy skills, so that they will be better able to persuade courts to allow them to introduce defense evidence. Even though China's lawyers face many challenges, the belief underlying IBJ's programming is that they should not lose all hope, and become disinterested, passive observers.

### **b. Development in the United States**

The Sixth Amendment to the U.S. Constitution states that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to have compulsory process for obtaining witnesses in his favor.”<sup>153</sup> In the United States, the defendant has the right to present relevant, probative evidence in defense of criminal charges.<sup>154</sup> Compulsory due process also affords the accused with the right to subpoena witnesses, documents, and other evidence for their defense free of charge.<sup>155</sup> And, of course, defendants have the right to testify on their own behalf.

The defendant's right to present evidence is central to his or her right to a defense. A defense lawyer may provide witness testimony, documents or other evidence relevant to the case. This may include evidence that establishes a defendant's alibi, lack of intent or other defense to the charges, for example testimony or other evidence that establishes that the defendant acted in self-defense. The defense may also introduce evidence that rebuts the prosecution's case, or illustrates that a prosecution witness has a particular bias or motive to lie. Resourceful lawyers will attempt to offer all the evidence that they can to show, among many things, that the defendant is innocent, guilty of a lesser offense, or that his actions are mitigated in some way.

In practice, lawyers are very careful to consider whether to offer any evidence at trial; many just rely on their ability to confront, and cast doubt upon, the prosecution's evidence. Often, lawyers are concerned that the court may not believe their witnesses. A witness may be truthful, and still not be believed because they are nervous about testifying, or poor at explaining themselves. Additionally, putting on evidence comes with a risk: that the judge or jury will shift the burden of proof onto the defense. Instead of evaluating the prosecution's case, to see if they have proved the allegations, they may shift their attention onto the defense and demand proof or explanation. Before deciding whether or not to present evidence, a lawyer will carefully review its case to determine the pros and cons.

## **IV. ESSENTIAL ROLE OF LEGAL AID IN RIGHTS PROTECTION**

Since the vast majority of persons accused of crimes are unable to afford to retain private counsel, the development of legal aid is a critical step in the overall creation of a fair and just criminal justice system. Legal aid's mission is to ensure that the same quality of legal services is provided to every man, woman, and child, regardless of their financial circumstances; the mere fact that someone is poor should never act as a barrier to justice. Indigent criminal defenders,

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<sup>153</sup> U.S. CONST. amend VI.

<sup>154</sup> U.S. CONST. amend. VI.

<sup>155</sup> *Washington v. Texas*, 388 U.S. 14 (1967) (extending defendant's right to witnesses in the Sixth Amendment to states through the Fourteenth Amendment).

whether legal aid or privately employed, champion the cause of the weak and voiceless, and in the process protect their fundamental human rights. Many who are charged with a criminal offense have spent their lives being marginalized, discriminated against and abused. Indigent defenders take on the plight of those individuals whose lives and circumstances would otherwise be ignored and they fight for justice, compassion, and for truth. The work is not glamorous, and it is too often thankless, but it is one of the greatest services that a lawyer can provide to society. It commands and deserves the respect and support of the government, the criminal justice system and the broader community.

The development of the legal aid system in China is the most logical and effective means to guarantee the rights of its citizens. With support from government, private and international organizations, legal aid can develop the capacity and structure to competently defend a significant number of indigent accused persons. This will require an infusion of resources, human, financial and material as well as a standardization of operating procedures. To ensure a high quality of service, the central government through NLAC, and local justice departments and lawyers associations will have to implement indigent defense standards and a cohesive supervisory system that allows experienced lawyers to mentor the work of more junior lawyers.

As legal aid develops, it will need to rely more heavily on government legal aid centers to handle indigent criminal cases and to promote a standard of quality in their communities. Though many private lawyers believe that legal aid lawyers are not sufficiently qualified, or independent to provide effective representation to the poor, they agree that it is not practicable to rely long-term on the services of the private bar to meet this need.<sup>156</sup> Private lawyers have far too many demands on their time, and many of them lack specialized knowledge of criminal laws and procedures. In addition, the fees for handling indigent criminal cases are so low that private lawyers are not willing, nor can they afford to handle a significant number of cases.

In the near future, legal aid must focus on improving its image and its standing in the community. This effort requires legal aid to take measures to improve the quality of service that it provides, as well as to maintain a standard of practice for the representation of all indigent defendants. This should include a supervision and mentorship structure for cases handled by legal aid and private lawyers in their community.<sup>157</sup> In order to maintain the support of the criminal justice community, legal aid must also be clear about its role: their fundamental duty to provide zealous advocacy on behalf of their clients. That legal aid lawyers receive their salary from the government does not lead to the conclusion that they cannot be independent of influence, or that they cannot be completely devoted to the defense of the rights of their clients. In the United States public defenders are often salaried by the government, yet they have proven themselves to be strong, independent actors committed only to the interests of their clients.

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<sup>156</sup> Conversations with lawyers throughout China, Oct. 2004 – Mar. 2007. The opinion of Chinese lawyers regarding the lack of independence of public counsel was shared by American lawyers at the inception of the public defender system; however, many were quick to point out the flaws in this argument. There is nothing inherent in the public defender system that should limit the independence of lawyers as they are not politically appointed and they are ethically required to provide a vigorous defense to their clients. See Barry Siegal, *Gideon and Beyond: Achieving an Adequate Defense for the Indigent*, 59 J. OF CRIM. L., CRIMINOLOGY, & POLICE SCIENCE 73, 77 (1968).

<sup>157</sup> As a reference, China can research similar public defender models around the world, such as the Committee for Public Counsel Services (“CPCS”) in Massachusetts, U.S., which oversees the provision of legal representation to all indigent persons; not just those represented by the public defender office, but also those by private counsel.

In order to expand their role and effectiveness, legal aid lawyers must also take the initiative to form coalitions with judges, prosecutors, police, the private bar, and community groups to resolve systemic problems affecting the defense of the poor. Such coalitions will be optimally equipped to resolve obstacles, and to build consensus for solutions. By building strong partnerships and educating all members about their role in the criminal justice system, legal aid lawyers can address and affect change both in the disposition of their individual clients' cases and in the systematic issues that affect the administration of the justice system as a whole. Greater understanding among all members of the community will help resolve contentious issues by providing a structure for collaboration and problem-solving. It will also allow all the vital actors in the criminal justice system to build a community of practice, one based on respect for one another's respective roles and committed to achieving greater implementation of law.

## V. CONCLUSION

China continues to develop a strong legal framework to provide its citizens basic rights. Moreover, there is an emerging consciousness on issues related to the rights of the accused, especially in cases that affect the most vulnerable, such as death penalty or juvenile cases. Despite these achievements, China has not yet guaranteed its citizens many fair trial rights.

As maintained throughout this Article, legislative reforms alone will not speed the pace of China's development. There must also be a sustained emphasis on the building of structure, knowledge and systems necessary to implement criminal justice reform. International organizations can act as a catalyst for change by offering their expertise and experience in a wide variety of disciplines. However, for such cooperation to be successful, the international community must take into consideration China's present economic and practical realities. Additionally, they must engage the essential institutions and actors within China that are responsible for the enforcement of its laws and the protection of the rights of its citizens.

Over the past six years, IBJ has worked with China's government to provide extensive training and support to lawyers and other key actors in the justice community. This program has produced a revitalized class of lawyers that are fully skilled and ready to provide increased access to effective counsel. At the same time, IBJ is equipping China's legal aid centers with the capability to establish a uniform standard of practice, as well as the facility to effectively respond to the needs of the community. Finally, IBJ fosters a productive dialogue between lawyers and the greater criminal justice community in order to ensure an environment conducive to change.

China's legal aid system is poised to make a tremendous impact on the development of the accused's rights. Already, it has in place a large network of legal aid centers in almost every county across China. Many of its offices are located in regions where there are no private lawyers. More than ever, China's government is strongly committed to a more effective and efficient indigent defender system. Each year, it provides more support and funding to legal aid, as well as a more open political and legal environment for its lawyers. With a proper focus on the professionalization of lawyers, there is strong indication that legal aid will play a leading role in improving the implementation of laws designed to protect the accused. As one legal aid lawyer who has participated extensively in IBJ's programming recently commented, "*Now is an*



*ideal time for lawyers to be more involved in indigent criminal cases as the government is promoting a harmonious society that focuses on the protection of human rights.*"<sup>158</sup>

The realization of meaningful rights development will depend not only on the vision of China's leaders, but increased action on the part of its citizens. IBJ's experience demonstrates that by working within the system, utilizing existing laws, and focusing on the education of lawyers and other professionals within the justice community, change is not only possible, but probable. The authors are confident that the men and women with whom they have worked, the legal aid lawyers, criminal justice actors, professors and government officials intent on realizing equal access to justice will make the good decisions that will bring about meaningful change.

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<sup>158</sup> Conversation with lawyer in Southeast China, Mar. 2007.