

Proposals targeting Taiwan's defence lawyers are dangerously similar to mainland curbs, writes **Jerome A. Cohen** and **Yu-Jie Chen**

Under threat

The Chinese government's continuing attacks on human rights lawyers rarely make foreign headlines these days. Monitoring, intimidating, disbaring and prosecuting activist lawyers have become routine in mainland China. Even the tragic "disappearance" while in police custody of defence lawyer/political reformer Gao Zhisheng (高智晟) – now feared to be dead – hardly attracts attention.

It is also unremarkable for even non-political Chinese defence lawyers to suffer sanctions. The recent conviction of Beijing lawyer Li Zhuang (李莊) for allegedly counselling his client to lie and bribe witnesses would not have been noted abroad if the case had not involved Chongqing's (重慶) extraordinary campaign to suppress organised crime.

By contrast, the Taiwanese government's new interest in curbing vigorous defence lawyers does constitute "news". Although Taiwan's president Ma Ying-jeou recently used the island's Law Day to call for greater efforts to promote judicial reform and human rights, his Ministry of Justice has been moving in the opposite direction.

Last year, the ministry, concerned about the conduct of ex-president Chen

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Shui-bian's defence lawyers in its graft prosecutions against him, failed in its efforts to impose disciplinary sanctions against one of Chen's lawyers for supposed ethical violations. Now it is trying to introduce legislation to punish "obstructions of justice" that will inevitably restrict defence lawyers' activities.

The ministry has proposed to amend the criminal code in several ways that threaten the modified adversarial legal system that Taiwan adopted a decade ago. Instead of supporting the equal contest between prosecutors and defence lawyers on which that system is based, the ministry proposals, reflecting traditional Chinese distrust of defence lawyers, would subject Taiwan's lawyers to some of the same

dangers confronted by their counterparts on the mainland, including significant prison time. One amendment would punish anyone, including lawyers, for abetting defendants or others to "fabricate, alter, destroy or conceal" important evidence in criminal cases, even when their advice has been ignored and caused no harm.

Further, it would punish anyone for abetting defendants to make false statements concerning important facts in trial or investigation. Thus, if a court rejects the defendant's claim that his pre-trial confession was coerced by police, his lawyers might be prosecuted for having urged him to repudiate the confession. This sword of Damocles hangs over mainland lawyers, at times intimidating them from giving such advice, despite the prevalence of pre-trial torture.

Equally troublesome is the proposal to punish "illegitimate use" of important evidence outside of court. But what use is "illegitimate" and what evidence is "important"? The ministry has said the provision is meant, among other things, to prevent trial documents being revealed at press conferences. Yet this would prevent the freedom of speech and information to monitor the judicial process by the media and public.

Such restrictions that exist in other democratic societies are generally justified by the need to protect jury deliberations against media pressure, but Taiwan has no juries.

More problematic is the proposal to punish lawyers not only for contempt of court but also for contempt of prosecutors! Legal systems require effective and fair procedures for punishing refusal to heed reasonable court orders. But, in a system where lawyers and prosecutors are

supposed to be equal competitors to persuade a neutral judge, it is absurd to punish lawyers for failing to obey prosecutors. Ministry officials do not seem to realise that, under the new adversarial system, for most purposes prosecutors can no longer be regarded as part of the "judiciary". Their status and functions differ greatly from judges.

The proposals, not yet submitted to the legislature, have understandably aroused strong opposition from the legal profession. Although the ministry has stressed that the proposals are not targeted at lawyers, they will have an adverse impact on lawyers' defence work. If they are enacted, Taiwan is sure to be downgraded in the civil liberties ratings of non-governmental organisations such as Freedom House, a strong American supporter that last week criticised recent setbacks in the island's protection of criminal defendants' rights.



The ministry has cited no empirical studies to show existing laws and ethical rules are inadequate. The vague language of each proposed criminal prohibition is an invitation to abuse and confusion that would inhibit the robust defence-law practising that a fair justice system requires. Every country needs effective administration of justice. Yet, every country also needs vigorous lawyers to check abuses of the criminal process. If the ministry's proposals are enacted, the plight of Taiwan's defence lawyers may begin to resemble that of their mainland counterparts.

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