

Attacks on the Access to Legal Advice and What it Means for the Rule of Law: Warnings from China and England

“As long as the world shall last there will be wrongs, and if no man objected and no man rebelled, those wrongs would last forever.”

- Clarence Darrow

by the Rule of Law and Lawyer Independence Advisory Committee, February 2016

To ensure that the rule of law is protected, everyone must have access to legal advice from an impartial advisor. To make informed decisions, people have to be entitled to retain legal advice from those who are trained to counsel and represent them. That being the case, in societies where the rule of law is valued, lawyers have to be free to represent unpopular people – murderers, tax evaders, even terrorists – without themselves being identified with the crime or the cause, or targeted for advising or representing such persons.

The United Nation’s Basic Principles on the Role of Lawyers states “lawyers shall not be identified with their clients or their clients’ causes as a result of discharging their functions.” The same principles require that “governments shall ensure that lawyers are able to perform all of their profession functions without intimidation, hindrance, harassment, or improper interference.”¹

Of late, these principles have not been upheld in China. Prominent human rights lawyer Li Heping, who has over the last seven or eight years been a frequent target of harassment and intimidation by Chinese security, has simply disappeared from sight. Pu Zhiqiang, another lawyer, was detained and held by authorities for 19 months. He was convicted after a one-day trial on December 14, 2015 for “picking quarrels and provoking trouble.” The verdict by the Chinese courts resulted in the loss of Pu’s licence to practise.

As recently as mid-January 2016, 38 Chinese lawyers, who had been held in secret locations since July 2015, were formally arrested, many of them on charges of “suspicion of subverting state power.” Why were they arrested? Reports are that some were arrested simply because they had represented ethnic dissidents in the Uighur region of China. Some are accused of “politicizing ordinary legal cases to attract international attention”.²

¹ United Nations Basic Principles on the Role of Lawyers

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfLawyers.aspx>

² China formally arrests 38 secretly held human rights lawyers for subversion. *The Globe and Mail* January 12, 2016

These recent arrests sparked condemnation from legal organizations around the world. Human Rights Watch, in a letter signed by twenty leaders of various national bar organisations and other groups, has written to the Chinese government condemning their actions.³ Some government representatives have commented as well. For example, the US ambassador to China called on China to recognize the detained lawyers as “partners, not enemies, of the government.”⁴

While China professes to operate under the rule of law, violations of the basic international principles on the role of lawyers (such as those outlined above) stretch such assertions to the breaking point. The rule of law cannot exist in a state where legal experts are detained, jailed, and convicted for representing people or causes contrary to state policies or political ends. The rule of law binds the state to operate within its laws. The state cannot be allowed to intimidate lawyers for representing people who challenge the laws of the state by detaining, arresting or jailing on charges of subverting state power. If a citizen wants to challenge the legal authority of the state governed by the rule of law to do something, that person must be permitted to do so, and is entitled to seek legal advice to that end. Moreover, a person must be able to obtain advice to defend themselves when the state alleges that its law has been broken. Otherwise, a simple charge becomes tantamount to a conviction.

While a lawyer’s professional obligations⁵ include a duty to the state to maintain its integrity and its law, and not to aid, counsel or assist any person in any way contrary to the law, those professional obligations do not prevent a lawyer from acting for a person who wants to challenge the authority of the state in passing such laws. Whether any particular law is valid is ultimately something for an independent court to rule on. Whether the state is correct in charging an individual with a crime is also something that people have a right to require an independent court to decide. This is how government and state authority is held to account in a legal, as opposed to a political, sense. A lawyer may or may not agree with his or her client’s cause or position, but the lawyer must be free to advise and represent such clients, no matter how odious the client or unpopular the cause.

China, however, does not appear to be alone in its difficulties in recognizing the Basic Principles on the Role of Lawyers. Perhaps somewhat surprisingly, some of those same difficulties have recently arisen in England, albeit on a much less draconian level, despite England’s long history with the principles underlying the rule of law.

In 2004, British troops engaged in an intense fight with Iraqis during one of the confrontations in that challenging part of the world. A number of Iraqis were killed by the British, and a number were taken prisoner. Allegations of mistreatment of the Iraqi

³ Letter, Human Rights Watch, January 18, 2016

⁴ *ibid*

⁵ See Chapter 2 of the *Code of Professional Conduct*

nationals by British troops surfaced. A commission of inquiry known as the Al-Sweady inquiry was set up after the British courts had criticised the Ministry of Defence for not conducting an investigation into the allegations arising from the confrontation.⁶ High Court judges had accused the Ministry of “lamentable behaviour and serious breaches of its duty of candour.”⁷ Near the end of the inquiry, claims of the unlawful deaths were dropped. The Inquiry Report concluded that murder allegations were “wholly without foundation and entirely the product of deliberate lies, reckless speculation and ingrained hostility.”⁸ Although the serious allegations were unfounded, the Inquiry Report did note that other less serious allegations of ill-treatment by the military did exist, although they were relatively minor compared to the serious allegations. Iraqis were mistreated, but not murdered. Some claims brought on behalf of clients against the military have been reported by the firm representing the clients to have been successful.⁹

The British government, however, has taken offence at “spurious claims lodged against brave service men and women in Iraq.”¹⁰ It has publicly criticised lawyers who had advanced the claims. In Parliament, a government member called on the lawyers “to apologise for traducing the reputations of soldiers concerned and for causing costs to the taxpayers.”¹¹ Recently, the British government has vowed to end the “industry of claims against the armed forces” and to “strengthen investigative powers and penalties against (law) firms abusing the system”¹² even though some lesser allegations of misconduct were in fact established.

Two firms in particular have been criticised about their dealings with the matter. At least one of the firms is currently the subject of investigation by the Solicitors Regulation Authority, which is the Law Society of England and Wales’ regulatory arm. This is the appropriate place to investigate alleged lawyer misconduct or incompetence. Instead, the government’s action calling for lawyers to apologise – before knowing if the lawyers acted unethically – sounds vaguely and disturbingly like something from the Cultural Revolution. No one, least of all the military or the state, is above the law. If British troops have committed acts that could result in damages, or have otherwise breached the law, those who suffered at their hands are entitled in a state that professes the rule of law to try its claims before the court. The British government’s comments have the unfortunate effect of sounding like efforts to intimidate lawyers who bring claims.

Lawyers of course are no more above the law than anyone else. The oath all lawyers (at least, those in BC) subscribe to promises that they will not promote suits upon frivolous

⁶ Al-Sweady inquiry stalled as Iraqi families drop claims of unlawful deaths, *The Guardian*, March 20, 2014.

⁷ *ibid*

⁸ Report of the Al-Sweady Inquiry, (December 2014) Volume 2, p. 974

⁹ Law firm referred to disciplinary tribunal over Al-Sweady inquiry, *The Guardian*, January 5, 2016

¹⁰ Cameron vows to end “industry” of claims against armed forces” *The Gazette* (UK) January 22, 2016

¹¹ “When governments shame lawyers” *The Gazette*, (UK) December 19, 2014

¹²Footnote 9, above.

pretences. Lawyers cannot deceive courts or tribunals by offering false evidence or by misstating facts, and in argument to the judge or address to the jury should not assert a personal belief in the justice or merits of a client's cause.¹³ It's probably best if they refrain from such bold assurances in public statements as well, lest they become confused with their client's cause or conduct.

But let us look more closely at the implications of these comments from the British government as reported in the British press. Ought a lawyer to be forced to apologise for bringing a claim that turns out to be false? If a client has fabricated a claim, is the lawyer to be blamed? Shouldn't the lawyer be entitled to the government's protection, rather than condemnation, for ensuring that a platform exists for the rule of law to operate on? If the lawyers are found to have misconducted themselves by a dispassionate, independent regulator, there will be time enough for remonstrance and apology. Until then, the government should not baldly criticise lawyers for what amounts to doing their jobs. Otherwise, lawyers could be dissuaded from advancing difficult claims involving unsavoury or unpopular clients. Had Mr. Roncarelli not been able to find a lawyer to bring his action against Premier Duplessis (and it must be remembered that he did have difficulty in finding one because of fears lawyers at the time had about taking on such a case), the rule of law would have suffered tremendously in Canada.¹⁴

There is no question that England and China are very different countries. England has not proposed arresting or imprisoning lawyers for bringing claims against the armed forces. Even so, the English government's comments about lawyers in connection with the Al-Sweady inquiry show that basic principles can get lost. All governments must be expected to abide by their international obligations. Governments should not identify lawyers with their client's causes. They must guarantee their legal profession can perform duties free of intimidation, harassment, or improper interference. They should not, therefore, arrest and jail lawyers who bring actions against state interests. Nor should they publicly castigate lawyers, even if those actions turn out to have been based on false evidence, before knowing whether the lawyers have acted unethically. If there is cause for concern, the matter should be referred to an independent regulator for investigation. China clearly does not adhere to this requirement and lawyers representing unpopular causes in that country are placed in a very dangerous personal situation. The English, of all nations, should understand this, and yet....

¹³ *Code of Professional Conduct for British Columbia* Rule 2.1-2(c)

¹⁴ See *Roncarelli v. Duplessis* [1959] S.C.R. 121