LAWYERS COMMITTEE FOR
HUMAN RIGHTS

Opening to Reform?

An Analysis of China's Revised Criminal Procedure Law

DETENTION AND TRIAL

ACCESS TO COUNSEL

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Lawyers Committee for Human Rights
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INTRODUCTION

On March 17, 1996, China's national legislature approved sweeping revisions to the Criminal Procedure Law, the basic statute governing the Chinese criminal justice process. When they take effect on January 1, 1997, these revisions will mean major changes, at least on paper, in the way in which criminal cases in China are investigated, prosecuted, and tried.

The Chinese criminal justice system has long been plagued by violations of basic human rights. The Lawyers Committee for Human Rights' 1993 report, *Criminal Justice with Chinese Characteristics: China's Criminal Process and Violations of Human Rights*, detailed the many respects in which that system fails to meet international standards regarding the treatment of suspected criminals and the right to a fair trial. It found that while many human rights abuses in the criminal process in China are due to manipulation or circumvention of Chinese law, many others can be traced to the provisions of the Criminal Procedure Law itself.

This report examines the consequences of the reform of the Criminal Procedure Law for the protection of internationally-recognized human rights. The full impact of the revisions cannot of course be understood until they are observed in practice. Since the revisions are intended to change ingrained patterns of behavior by law enforcement officials, it seems likely that the gap between the law and the practice of criminal justice in China will actually grow wider, at least in the short term. Still, just as many of the past violations of human rights in the Chinese criminal process were attributable to deficiencies in the legal framework, so too must analysis of the consequences of the recent reforms begin with the law itself.

The report first reviews the background to the revisions, including the history of the Criminal Procedure Law, the factors leading to its revision, and the drafting process. It then analyzes the extent to which the revised Criminal Procedure Law meets international human rights standards. It finds that in four major areas — pre-trial detention, the right to counsel, prosecutorial determination of guilt and trial proceedings — the revisions appear likely to result in better protection of defendants' rights, although

they do not fully satisfy the requirements of international law. It also points to several other key issues where the revisions have meant little or no progress toward bringing the Chinese criminal justice process into conformity with international standards.

In light of both the positive aspects of the recent reforms and the numerous problems which remain to be addressed, the report recommends a multifaceted approach to promoting greater respect for human rights in the Chinese criminal justice system. It calls on international organizations, governments and human rights groups to monitor and critique Chinese law and practice and to insist on China's observance of international human rights norms. At the same time, it stresses the constructive role that outsiders, particularly legal professionals and academics, have played and can continue to play in expanding Chinese awareness of human rights protections in the criminal justice process.

The report was researched and written by Jonathan Hecht, Research Fellow in the East Asian Legal Studies Program at Harvard Law School. It is based on published Chinese materials as well as extensive interviews that Mr. Hecht conducted in 1995 and 1996 with Chinese judges, prosecutors, lawyers, legislative drafters and legal scholars. Mr. Hecht's research was supported in part by grants from the Ford Foundation and the John D. and Catherine T. MacArthur Foundation. John Ohnesorge, an SJD candidate at Harvard Law School, provided research assistance. The report was edited by George Black, Research and Editorial Director of the Lawyers Committee for Human Rights. The Lawyers Committee gratefully acknowledges the support of the Henry Luce Foundation without which the publication of this report would not have been possible.

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I. BACKGROUND TO REFORM

A. History of the Chinese Criminal Procedure Law

For more than thirty years after the Chinese Communist Party (CCP) took power in 1949, China's criminal justice system operated without a comprehensive legal basis. One of the first acts of the new government was to abolish the legal framework created by its Nationalist predecessor, including the Criminal Procedure Code.[1] During the initial phase of consolidating its rule and carrying out land reform and other priority policies, the CCP relied not on law but political campaigns, mass mobilization, and terror. In this general atmosphere, police enjoyed largely unrestricted powers to deal with crime and other deviant behavior.[2]

In the mid-1950s, however, the CCP began to regularize its rule and to recast its policy-making institutions and procedures in legal form. In 1954, the National People's Congress (NPC) adopted a constitution under which the NPC nominally wielded supreme law-making power and supervised a system of courts and procuratorates modeled on Soviet lines.[3] In that same year, the NPC also adopted statutes containing more detail on the organization and role of the courts and procuratorates as well as a set of regulations governing arrests and detentions.[4]

Shortly thereafter, work began on drawing up a comprehensive code of criminal procedure. Interrupted by the Anti-Rightist Campaign of

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[1]Common Program of the Chinese People's Political Consultative Conference, adopted September 29, 1949, art. 17.

[2]*See* Jerome A. Cohen, *The Criminal Process in the People's Republic of China, 1949-63: An Introduction* (Harvard University Press, Cambridge: 1968), at 9-10.

[3]Constitution of the People's Republic of China, adopted September 20, 1954.

[4]Law of the People's Republic of China for the Organization of People's Courts, adopted September 21, 1954; Law of the People's Republic of China for the Organization of People's Procuratorates, adopted September 21, 1954; Arrest and Detention Regulations of the People's Republic of China, adopted December 20, 1954.

1957, which struck particularly hard at legal professionals, these efforts resumed in 1962 and by April 1963 had resulted in a draft code of some 200 articles.[5] When the political winds shifted once again in the mid-1960s, the draft code was shelved. During the Cultural Revolution (1966-76), all the major legal institutions were paralyzed and some, such as the procuratorate and Ministry of Justice, were formally abolished. Countless numbers of people, including many leading Party and state figures, were subjected to arbitrary imprisonment, torture and death.

At its landmark plenum of December 1978, the CCP officially rejected the Maoist policy of taking "class struggle as the key link" in favor of a new emphasis on economic modernization. In part to serve its economic strategy and in part as a reaction to the excesses of the Cultural Revolution, the plenum also called for the rapid development of the country's legal system.[6] The NPC responded the following July by passing seven major statutes, including the PRC's first Criminal Procedure Law (CPL).[7]

Despite many flaws, the CPL marked a major step forward in the legal regulation of criminal justice in China. Based largely on the drafts prepared in the 1950s and 1960s, the CPL contained 164 articles covering all stages of the criminal process from initial detention through investigation, prosecution, trial, appeal and execution of sentence. In introducing the new law, the Chairman of the NPC's Legislative Affairs Commission, Peng Zhen, confirmed the CCP's view of criminal justice as a "tool of the proletarian dictatorship" when he stated that the CPL was designed to "ensure[] the dealing of accurate blows at counter-revolution

[5]*Xingshi susongfa xinlun* [A New Theory of Criminal Procedure Law], Zhang Zhonglin, ed. (Chinese People's University Press, Beijing: 1993), at 52-53.

[6]Communique of the Third Plenary Session of the Eleventh Central Committee of the Communist Party of China, adopted December 22, 1978.

[7]Criminal Procedure Law of the People's Republic of China, adopted July 1, 1979 [hereinafter 1979 CPL], trans. in *The Criminal Law and the Criminal Procedure Law of China* (Foreign Languages Press, Beijing: 1984).

and other criminal offenses in the interest of the people." However, reflecting the arbitrary treatment which he and many other leading Party figures endured during the Cultural Revolution, Peng also stressed the CPL's role in preventing "indiscriminate arrests and detentions, frame-ups, and encroachment on the personal rights and the democratic and other rights of the cadres and the masses."[8]

No sooner had the CPL become effective, however, than it encountered serious problems of implementation. Apparently unaccustomed to operating within a regularized legal framework, police, prosecutors, and judges found it difficult to carry out their functions within the time periods specified in the new law. In response, the Standing Committee of the NPC adopted two resolutions, one in February 1980 and the second in September 1981, authorizing provincial-level people's congresses to extend temporarily the periods specified in the CPL for completing the investigation, prosecution, trial and appeal of criminal cases.[9]

Then, in 1983, faced with a perceived upsurge in violent crime, the CCP initiated a major anti-crime campaign colloquially known as *yanda* or "strike hard." The NPC promptly moved to eliminate some of the procedural safeguards that Peng Zhen had highlighted in his 1979 address. For violent offenses such as murder, rape and armed robbery which "should be punished by death," the NPC deleted the CPL's requirement of at least seven days' advance notice of trial, thus effectively denying the accused any opportunity to prepare a defense. It also

[8]Peng Zhen, "*Guanyu qige falu caoan de shuoming*" [Explanation Concerning Seven Draft Laws], in *Xin zhongguo sifa jieshi daquan (zengbuben)* [Complete Compilation of Judicial Interpretations of New China (Enlarged Edition)], Liang Guoqing, ed. (China Procuratorate Press, Beijing: 1993), at 3, 6.

[9]Decision of the Standing Committee of the National People's Congress on the Question of the Implementation of the Criminal Procedure Law, adopted February 12, 1980; Decision of the Standing Committee of the National People's Congress Concerning the Question of the Time Limits for Handling Criminal Cases, adopted September 10, 1981.

reduced the period within which defendants in such cases could appeal their sentences from ten days to just three.[10]

Under the combined influence of *yanda* and continued complaints that the time limits in the CPL were unrealistically strict, the NPC in 1984 permanently extended the periods during which suspects could be held in custody during the investigation, trial and appeal of certain "major" or "complicated" cases. These same extensions were also permitted in all "major or complicated" cases in remote areas where transportation was deemed extremely poor. In cases where suspected criminals were subjected to less severe restrictions known as "taking a guarantee and awaiting trial" (*qubao houshen*) and "supervised residence" (*jianshi juzhu*)[11] or were undergoing psychiatric evaluations, the time limits in the CPL could be waived altogether.[12]

As one Chinese legal scholar has observed, this series of NPC decisions from 1980 to 1984 reflected a clear trend toward "expanding the power of the police and judicial organs and striving to make investigation, prosecution, and adjudication more convenient" while "restricting the

[10]Decision of the Standing Committee of the National People's Congress Concerning the Procedure for the Rapid Adjudication of Criminal Elements Who Seriously Endanger Social Order, adopted September 2, 1983 [hereinafter 1983 NPC-SC Decision].

[11]According to the 1979 CPL and subsequent regulations, "taking a guarantee and awaiting trial" and "supervised residence" were two forms of non-custodial detention applied to minor criminal suspects, major criminal suspects who posed no risk to society, and suspects who were pregnant, nursing an infant, or seriously ill. 1979 CPL, art. 40; Provisions on Procedures for the Handling of Criminal Cases by Public Security Organs, adopted March 1987 [hereinafter 1987 Public Security Procedures], art. 25. *See also infra* notes 92-93 and accompanying text.

[12]Supplementary Provisions of the Standing Committee of the National People's Congress Concerning the Time Limits for the Handling of Criminal Cases, adopted July 7, 1984 [hereinafter 1984 NPC-SC Decision].

exercise of various rights by criminal defendants."[13] After 1984, however, there were no further moves to amend the CPL. This is in sharp contrast to the substantive Criminal Law, also enacted in 1979, which has been the subject of ten NPC decisions since 1990 alone.[14] While the CPL may not have been subject to formal amendment between 1984 and 1996, dissatisfaction with the law mounted.

B. Factors Leading to the Revision of the CPL

As discussed below in Chapter II, certain of the amendments to the CPL adopted in March 1996 can be traced to particular causes or institutional actors. But an explanation of the overall movement toward revision of the CPL must take into account a large range of disparate, even conflicting, factors.

Throughout the 1980s and into the 1990s, the same concerns about combatting crime that motivated the 1983 and 1984 NPC decisions have continued to figure prominently in Chinese thinking about criminal justice. In the case of the Party leadership, it is difficult to distinguish whether its predominent concern is maintaining law and order or suppressing political dissent. But among the general population, there is a broadly held view that crime in China has increased markedly over the last fifteen years. *Yanda* has become a permanent feature of Chinese life[15]

[13]Wang Minyuan, "*Xingshi beigaoren quanli yanjiu*" [Research on the Rights of Criminal Defendents], in *Zou xiang quanli de shidai* [Toward the Age of Rights], Xia Yong, ed. (China University of Politics and Law Press, Beijing: 1995) [hereinafter *Toward the Age of Rights*], at 499, 521.

[14]Most of these decisions stipulate new or harsher penalties for offenses such as drug trafficking, pornography, tax evasion, etc. which have flourished in China's reform economy.

[15]For example, the first section of Supreme People's Court President Ren Jianxin's 1996 report to the National People's Congress is entitled "Strike Hard at Criminals Who Endanger Social Order, Severely Punish Corruption, Bribery, and Other Economic Crimes, Wholly Guarantee Social Stability." *Renmin ribao*, March

and the perceived requirements of "striking hard" are thus a powerful factor in any discussion of reform of the Chinese criminal justice process. In the years leading up to the revision of the CPL, law enforcement officials continually pressed the argument that they needed more latitude, particularly with regard to arrest and detention, to deal with the growing threat to public order.

This upsurge in crime is seen by most Chinese as a negative, if largely unavoidable, consequence of the policy of economic reform and opening to the outside world. With the liberalization of the economic system has come a breakdown in both traditional and totalitarian forms of social control. Chinese commentators point out that economic reform has also spawned new types and agents of crime — for example, cross-border crimes and corporate crimes — that were not within the contemplation of the drafters of the CPL in 1979.[16] They moreover suggest that it has become increasingly difficult to deal with both new and old types of crime through measures which rely on parts of the Chinese social structure (such as the work unit and the neighborhood committee) that have been fundamentally weakened by reform.[17]

The consequences of "reform and opening" have also meant new and often unsettling challenges for the major institutions charged with overseeing the implementation of the CPL. For example, the fiscal squeeze on most government bodies in China has made it difficult for local courts to find the resources to carry out the extensive pre-trial investigations which the CPL mandates.[18] The Chinese courts,

22, 1996, at 3 [hereinafter 1995 Court Work Report].

[16]*See, e.g.*, Chen Guangzhong, Chen Ruihua & Tang Weijian, "*Shichang jingji yu xingshi susong faxue de zhanwang*" [The Market Economy and the Prospects for Criminal Procedure Law], 5 *Zhongguo faxue* (1993), at 3, 4-5.

[17]*See, e.g.*, Wang Shangxin, "*Xingshi susongfa xiugai de ruogan wenti*" [Some Issues in the Revision of the Criminal Procedure Law], 5 *Faxue yanjiu* (1994), at 76, 76-78. *See also* Chapter II, Section A.

[18]*See* Chapter II, Section D.

procuratorates and police have likewise suffered the corrosive effects of another negative by-product of the reform era, corruption. This has spurred proposals for greater transparancy in the trial process[19] and checks on the broad discretion which the CPL grants the police in deciding whether to open investigations[20] and the procuratorate in deciding whether to bring prosecutions.[21]

A further important factor contributing to the decision to revise the CPL is the rapid development of the Chinese legal system since the December 1978 plenum. In a number of respects, the CPL lagged behind or even conflicted with subsequent laws as well as with the latest version of the Chinese Constitution, adopted in 1982.[22] In addition, the vagueness of many of the CPL's provisions meant that over time the police, procuratorate, courts and other bureaucracies issued a large

[19]*See* Chapter II, Section D.

[20]*See* Liu Genju, "*Xingshi li'an jiandu wanshan zhi wo jian*" [My Views on the Improvement of Supervision of Filing Criminal Cases], in *Xingshi susongfa de xiugai yu wanshan* [Reform and Improvement of the Criminal Procedure Law], Procedural Law Research Association of the China Law Society, ed. (China University of Politics and Law Press, Beijing: 1992) [hereinafter *Reform and Improvement*], at 219.

[21]*See* Chapter II, Section C.

[22]For example, the original CPL provided that "people's assessors" (*renmin peishenyuan*) should work alongside judges in trying most criminal cases. 1979 CPL, art. 105. In 1983, however, the Court Organization Law was amended to make the participation of "people's assessors" optional and, over time, their role has become limited to cases involving minors and other specialized matters. Law of the People's Republic of China for the Organization of People's Courts, adopted July 1, 1979, amended September 2, 1983, art. 10. The 1982 Constitution stated that the people's courts "independently exercise the power of adjudication and are not subject to interference by administrative organs, social organizations, or individuals." Constitution of the People's Republic of China, adopted December 4, 1982 [hereinafter 1982 Constitution], art. 126. Laws governing administrative procedure (1989) and civil procedure (1991) contained parallel provisions, but the 1979 CPL did not.

number of interpretive or implementing rules.[23] While these rules were only binding on the institution which issued them, they contained conflicts that could only be reconciled through interpretation or revision at the NPC level.

Beyond creating practical problems of harmonizing the CPL with other laws, the legal development that has occurred in China over the two decades also reflects a stronger desire, even among the CCP leadership, for enhanced rationality and regularity in governmental activities. While the CCP has time and again demonstrated its willingness to bend or flaunt the law when its vital interests are at stake, it also constantly exhorts state officials to "act according to law" (*yifa banshi*).[24] Moreover, it has sought to strengthen and professionalize key legal institutions by training thousands of new policemen, prosecutors and judges. While the police, procuratorate, and courts still act as "one fist"[25] in times of extremity (as defined by the CCP), this institutional development has resulted in far greater emphasis on differentiating their respective roles. As discussed in Chapter II, clearer demarcation of responsiblity between the police, procuratorate, and courts has been a major theme in the

[23]*See, e.g.*, Provisional Detailed Rules of the People's Procuratorate on Criminal Procuratorial Work, adopted July 7, 1980 [hereinafter 1980 Procuratorate Work Rules]; 1987 Public Security Procedures, *supra* note 11; Detailed Rules of the People's Procuratorate on Criminal Procuratorial Work, adopted October 10, 1991 [hereinafter 1991 Procuratorate Work Rules]; Detailed Provisions of the Supreme People's Court Regarding Procedures for Adjudication of Criminal Cases, adopted March 21, 1994 [hereinafter 1994 Court Procedures].

[24]This has been a consistent theme of the CCP leadership going back to the late 1970s. *See, e.g.*, Zhao Cangbi, "*Zengqiang fazhi gainian, yange yifa banshi*" [Strengthen the Concept of the Legal System, Act Strictly According to the Law], 4 *Hongqi* (1979), at 40. For a recent restatement, *see* "PRC: Qiao Shi Speech at NPC Closing Published," *Foreign Broadcast Information Service: China*, March 18, 1996, at 24, 25.

[25]Zhang Wuyun, "Smash Permanent Rules, Go 1,000 *Li* in One Day," 5 *Zhengfa yanjiu* (1958), at 60, cited in Cohen, *supra* note 2, at 17 n.42.

revision of the CPL, with generally positive implications for the protection of defendants' rights.

In addition to strengthening the major legal institutions, the CCP policy of legal development has also led to the revival and expansion of the Chinese bar.[26] The political campaigns of the 1950s and 1960s were particularly devastating to lawyers. When the CPL was promulgated in 1979, China had only a few thousand lawyers qualified to serve as defenders in criminal cases. By the mid-1990s, the number of lawyers in China was approaching 100,000.[27] This rapid growth of the bar has not only enhanced the practical possibility of defendants' obtaining legal assistance, but has also focused greater attention on the role of defense counsel in the criminal process.[28]

While it is difficult to assess popular attitudes toward law in China, there is evidence that the combination of economic reform, social change, and government-promoted mass legal education has stimulated greater rights consciousness among many Chinese.[29] In the area of criminal justice, a survey of both the popular press and specialized legal journals indicates broad resentment against abuses of basic rights such as arbitrary

[26]*See generally* William P. Alford, "Tasseled Loafers for Barefoot Lawyers: Transformation and Tension in the World of Chinese Lawyers," 141 *China Quarterly* (1995), at 22; Timothy A. Gelatt, "Lawyers in China: The Past Decade and Beyond," 3 *New York University Journal of International Politics and Law* (1991), at 751.

[27]*Zhongguo falu nianjian 1995* [China Law Yearbook 1995], China Law Yearbook Editorial Dep't, ed. (China Law Yearbook Publishing House, Beijing: 1995) [hereinafter *China Law Yearbook 1995*], at 1079.

[28]*See* Chapter II, Section B.

[29]*See, e.g.*, Gao Hongjun, "*Zhongguo gongmin quanli yishi de yanjin*" [The Gradual Progress of Chinese Citizens' Rights Consciousness], in *Toward the Age of Rights*, *supra* note 13, at 3; Xia Yong, "*Xiangmin gongfa quanli de shengcheng*" [The Formation of Rural People's Public Law Rights], in *id.*, at 659.

detention.[30] At the same time, as their familiarity with the outside world has increased, more and more Chinese have become painfully aware of the significant gaps that exist between the CPL and accepted international practice. Advocates of reform have argued that just as China is striving to "link up" (*jiegui*) with the rest of the world economically, so too should it bring its criminal justice system in line with practices common in other countries.[31]

If greater awareness of international practice has been an important stimulant to domestic efforts to revise the CPL, so has greater international awareness — and consequent criticism — of Chinese practice. Over the last ten years, international human rights NGOs have produced a series of analyses of the Chinese criminal justice system.[32] These reports have documented widespread abuses of fundamental rights, including torture, prolonged incommunicado detention, secret trials and denial of due process. While many of these abuses occur in contravention of Chinese law, the NGO reports have also shown the ways in which the

[30]*See* Chapter II, Section A.

[31]*See, e.g.*, Chen Guangzhong & Wang Hongxiang, "*Guanyu xiugai xingshi susongfa wenti de sikao*" [Thoughts on the Question of Revising the Criminal Procedure Law], 5 *Zhengfa luntan* (1991), at 2, 5; Chen Guangzhong, Chen Ruihua & Tang Weijian, "*Xingshi susong faxue yanjiu zhanwang (xia)*" [A Prospective on Criminal Procedure Law Research (Part Two)], 6 *Jiancha yanjiu* (1993), at 5, 9; Jiang Wei, Cheng Rongbin, Zhang Jianhua & Liu Chunling, "*Susong faxue yanjiu de huigu yu zhanwang*" [A Retrospective and Prospective on Procedural Law Research], 1 *Faxuejia* (1994), at 46, 51.

[32]*See, e.g.*, Amnesty International, *China: No One is Safe* (New York: 1996); Lawyers Committee for Human Rights, *Criminal Justice with Chinese Characteristics: China's Criminal Process and the Violation of Human Rights* (New York: 1993) [hereinafter *Criminal Justice with Chinese Characteristics*]; Human Rights in China, *Going Through the Motions: The Role of Defense Counsel in the Trials of the 1989 Protesters* (New York: 1993); Amnesty International, *China — Punishment Without Crime: Administrative Detention* (London: 1991) [hereinafter *Punishment Without Crime*]; Amnesty International, *China: Torture and Ill-Treatment of Prisoners* (New York: 1987).

Chinese legal system, including key statutes such as the CPL, either implicitly condones such practices or fails to provide adequate safeguards against them.

Whereas in the 1980s most countries paid relatively little attention to human rights in China, in the post-Tiananmen period China's human rights record has been subjected to much closer scrutiny in both multilateral and bilateral fora. In every year since 1989, the human rights situation in China, including the administration of justice, has been raised as a formal agenda item in the UN Human Rights Commission or its Sub-Commission on Prevention of Discrimination and Protection of Minorities or both.[33] In addition, a number of major western countries have issued critical assessments of the Chinese criminal justice system, some of them based on the findings of official human rights fact-finding missions.[34]

Each of the major issues addressed by the 1996 revision of the CPL has been the subject of controversy within China for many years, in some instances long before they attracted much attention abroad. There can be little doubt, however, that international pressure served to reinforce domestic reform efforts. Of course, no Chinese official will acknowledge that foreign criticism played a part in the revision process, but their statements reveal considerable sensitivity to China's international image.[35]

[33]*See* Ann Kent, "China and the International Human Rights Regime: A Case Study of Multilateral Monitoring, 1989-94," 17 *Human Rights Quarterly* (1995), at 1.

[34]*See, e.g., U.S. Department of State Country Reports on Human Rights Practices for 1994* (Washington, DC: 1995), at 555; Visit to China by the Delegation led by Lord Howe of Aberavon: Report (HMSO, London: 1993) [hereinafter *Howe Report*]; Report of the Australian Human Rights Delegation to China, 14-26 July 1991 (Department of Foreign Affairs and Trade, Canberra: 1991).

[35]For example, NPC Vice-Chairman Wang Hanbin has been quoted in the Chinese press as stating that the revisions to the CPL will help to refute "some Western countries' smears and slanders" against China in the area of human rights. *See* Zheng Wen, "*Xingsufa xiugai yiyi zhongda*" [The Great Significance of the

Foreign criticism in the post-1989 period has influenced the domestic debate on criminal justice in indirect ways as well. Over the course of the 1980s, China gradually became more engaged in international human rights diplomacy, joining the UN Human Rights Commission and acceding to treaties such as the Convention Against Torture, the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Child.[36] However, it was only in 1990, faced with the need to prepare a more coherent response to international censure, that the CCP lifted its informal ban on domestic research and publications on human rights. In the years since 1990, China has experienced an unprecedented upsurge in the number of conferences, articles and books devoted to introducing, analyzing and critiquing human rights theory and practice.[37]

Revision of the Criminal Procedure Law], *Fazhi ribao*, February 1, 1996, at 1.

[36]Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN General Assembly resolution 39/46, December 10, 1984, entered into force June 26, 1987 [hereinafter Convention Against Torture]; Convention on the Elimination of All Forms of Discrimination Against Women, UN General Assembly resolution 34/180, December 18, 1979, entered into force September 3, 1981 [hereinafter CEDAW]; Convention on the Rights of the Child, UN General Assembly resolution 44/125, November 20, 1989, entered into force September 2, 1990. China ratified CEDAW in 1980, the Convention Against Torture in 1988, and the Convention on the Rights of the Child in 1991. China is not a party to the two general human rights treaties, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights.

[37]*See generally* Zhou Wei, "The Study of Human Rights in the People's Republic of China," in *Human Rights and International Relations in the Asia Pacific Region*, James T.H. Tang, ed. (St. Martin's Press, New York: 1995), at 83. Recent publications on human rights have ranged from introductory texts to collections of international human rights treaties to analyses of Western human rights theories. *See, e.g.*, Pang Sen, *Dangdai renquan ABC* [The ABCs of Contemporary Human Rights] (Sichuan People's Press, Chengdu: 1992); *Guoji renquan wenjian yu guoji renquan jigou* [International Human Rights Documents and International Human Rights Institutions], Institute of Law, Chinese Academy of Social

One of the inevitable, if largely unintended, results of this scholarship is that Chinese awareness of the relevance of international human rights to criminal justice has increased significantly. Reference to international standards has become a legitimate form of argumentation employed within China, particularly among legal academics, to promote greater respect for the rights of criminal suspects and defendants. Again, official explanations do not cite international human rights standards as a factor behind the changes to the CPL, but there is no doubt that these standards have come to influence the thinking of important participants in the Chinese lawmaking process.[38]

C. Drafting the Revisions to the CPL

The factors leading to the revision of the CPL are thus many and varied. Some reflect domestic changes, both positive and negative, stemming from economic reform. Others reflect a growing awareness of the gap between Chinese and international practice and a heightened sensitivity to foreign criticism. Long-standing, powerful pressures for more effective crime fighting measures compete with newer, but increasingly vocal, advocacy of improved protection of basic rights.

Sciences, eds. (Social Sciences Documentary Press, Beijing: 1993); *Xifang renquan xueshuo* [Western Theories of Human Rights], Huang Nansen & Shen Zongling, eds. (Sichuan People's Press, Chengdu: 1994).

[38]*See, e.g., Zhonghua renmin gongheguo xingshi susongfa xiugai jianyi gao yu lunzheng* [Annotated Proposed Draft of the Revised Criminal Procedure Law of the People's Republic of China], Chen Guangzhong & Yan Duan, eds. (China Fangzheng Press, Beijing: 1995) [hereinafter *Annotated Proposed Draft*]. This annotated draft of a completely revised CPL was prepared by Chinese legal academics at the specific request of the NPC's Legislative Affairs Commission. *See infra* note 43 and accompanying text. It cites international human rights standards in arguing for the incorporation into the CPL of, among other things, the presumption of innocence (pp. 102-03), the defendant's right to counsel at all stages of the criminal process (pp. 147-48), and the exclusion of evidence gathered through torture (p. 171).

While these various factors helped shape both the general atmosphere in which the revision of the CPL was carried out and, as discussed in Chapter II, the resolution of specific contentious issues, they do not explain how the decision was made to move to the actual drafting process. Given the opacity of Chinese political and legislative institutions, it is hard to know with certainty how this decision was reached. However, it is possible to piece together some of the major elements of the story.

In the early stages, Chinese legal academics seem to have played an important role in crystalizing the issues and providing a rationale for the revision which decision-makers found persuasive in its own terms or useful in promoting their own views. The most prominent example of these academics is Professor Chen Guangzhong who, as of the early 1990s, was President of China University of Politics and Law and the country's leading criminal procedure scholar. At that time, active consideration was being given to a comprehensive revision of the Criminal Law which, as noted above, had already been the subject of numerous *ad hoc* amendments.[39] It was reportedly at official meetings on the Criminal Law that Professor Chen, among others, first pressed for a simultaneous revision of the CPL.[40]

In the late summer of 1991, in his capacity as Secretary of the Procedural Law Association of the China Law Society, Professor Chen organized a symposium on the revision of the CPL. In addition to legal scholars, the participants included legislative drafters from the NPC and members of research bodies under the Supreme People's Procuratorate and Supreme People's Court. Papers from the symposium, detailing

[39]*See supra* note 14 and accompanying text.

[40]Author interview, Beijing, February 1995. Although the idea of rewriting the Criminal Law predated by several years any consideration of revising the CPL, work on the CPL ultimately proceeded much more quickly. To date, the NPC has yet to take up a large-scale revision of the Criminal Law, though it has continued to pass supplementary provisions. *See, e.g.*, Decision of the Standing Committee of the National People's Congress on the Punishment of Crimes Disrupting Financial Order, adopted June 30, 1995.

specific reform measures, were published the following year.[41] At the end of 1992, with funding from China's National Social Sciences Fund, Professor Chen took the further step of forming a research team to carry out in-depth studies of foreign criminal procedure systems.[42]

In the spring of 1993, the Eighth NPC held its first plenary session. In addition to confirming a new, relatively reform-minded leadership, most notably Qiao Shi as Chairman and Tian Jiyun as First Vice-Chairman, the new NPC began to develop the legislative agenda for its five-year term (1993-98). In soliciting the views of the various bureaucracies, the NPC found considerable sentiment for revising the CPL. In the summer and fall of 1993, the Legislative Affairs Commission, the NPC's main law drafting body, organized a series of meetings at which a consensus was reached on the necessity and feasibility of revising the CPL, though differences of opinion remained on how extensive the changes should be.[43]

Since the NPC's legislative agenda is not made public, it is difficult to pinpoint the exact date when the revision of the CPL was incorporated into the five-year plan. However, it would appear that this occurred in the latter half of 1993. In October 1993, Professor Chen's research team was officially asked by the Legislative Affairs Commission to prepare a complete draft of a new CPL for the NPC's reference. Professor Chen's team forwarded its draft to the Legislative Affairs Commission in July of 1994. The following summer it was published together with more than three hundred pages of supporting analysis.[44]

The decision to charge Professor Chen's team with the task of preparing a draft CPL was in keeping with the new NPC leadership's

[41]*Reform and Improvement, supra* note 20.

[42]Author interview, Beijing, February 1995.

[43]Author interview, Beijing, January 1996. *See also* Jiang Wei, Cheng Rongbin, Zhang Jianhua & Liu Chunling, *supra* note 31, at 51.

[44]*Annotated Proposed Draft, supra* note 38, at 1.

general policy of seeking more outside, expert involvement in the legislative process.[45] By mid-1993, however, the government institutions and bureaucracies that make up the Chinese criminal justice system were also actively at work promoting their views. Although their materials are not publicly available, it appears that the Supreme People's Court and the Supreme People's Procuratorate prepared complete drafts of a revised CPL.[46] The Ministry of Public Security, which is responsible for police work, and the Ministry of Justice, which oversees Chinese lawyers and runs the country's prison system, provided written recommendations on issues within their respective jurisdictions. The Ministry of State Security, China's intelligence service, is believed to have participated only belatedly in the drafting process.[47]

The task of coordinating the input from these various sources fell to the Legislative Affairs Commission and, more particularly, its criminal law section. By the fall of 1995, the Commission had prepared a "draft for

[45]*See Qiao Shi weiyuanzhang zai di bajie quanguo renda changweihui di erci huiyishang de jianghua* [Chairman Qiao Shi's Talk at the Second Session of the Standing Committee of the Eighth National People's Congress], 4 *Zhonghua renmin gongheguo quanguo renmin daibiao dahui changwu weiyuanhui gongbao* (1993), at 5, 8.

[46]Author interview, Beijing, January 1996.

[47]One published account of the drafting process suggests that the Ministry of State Security was not actively involved in the inter-agency deliberations until early 1996. *See Zhonghua renmin gongheguo xingshi susongfa shiyi yu yingyong* [Explanation and Application of the Criminal Procedure Law of the People's Republic of China], Chen Guangzhong & Yan Duan, eds. (Jilin People's Press, Jilin: 1996) [hereinafter *Explanation and Application*], at 1-4. Although State Security officials exercise investigation powers akin to those of the police, they were reportedly less concerned than the Ministry of Public Security about many of the proposed changes to the CPL, such as those dealing with arrest and detention. Author interview, Beijing, January 1996.

comment" (*zhengqiu yijian gao*)[48] which, according to Chinese legislative practice, would then have been circulated back to the concerned bureaucracies as well as to provincial and perhaps even lower-level governments. This was likely followed by additional meetings, convened by the Legislative Affairs Commission, at which the various bureaucracies would have sought to hammer out their differences before the next version of the draft law was forwarded to the Standing Committee of the NPC for its formal consideration.[49]

Given the significance of the CPL both as a basic law[50] and as an integral part of the machinery by which the CCP seeks to maintain social order and preserve its own rule, the proposed revisions must at some point have been reviewed at the highest levels of the Party.[51] Since NPC Chairman Qiao Shi is one of the seven members of the CCP's top body, the Politburo Standing Committee, he would have taken the lead in reporting the results of the NPC's drafting work to other Party leaders for

[48]*See Explanation and Application, supra* note 47, at 3. *See also Guanyu di bajie quanguo renda di san ci huiyi zhuxituan jiaofu falu weiyuanhui shenyi de daibiao tichu de yi'an shenyi jieguo de baogao* [Report Concerning the Results of Deliberation of Motions Raised by Delegates and Handed Over to the Law Committee for Deliberation by the Presidium of the Third Session of the Eighth National People's Congress], 7 *Zhonghua renmin gongheguo quanguo renmin daibiao dahui changwu weiyuanhui gongbao* (1995), at 132-33.

[49]*See Explanation and Application, supra* note 47, at 3.

[50]The 1982 Constitution stipulates that "basic laws" (*jiben falu*) must be enacted and revised by the full NPC. Other laws may be enacted and revised by the NPC's Standing Committee. 1982 Constitution, *supra* note 22, arts. 62(3), 67(2).

[51]According to CCP procedures, drafts of "important laws" (*zhongyao falu*) must be reviewed by the Politburo or its Standing Committee before they are submitted to the NPC. It is not clear whether the term "important laws" is broader in scope than the "basic laws" referred to in the 1982 Constitution, but it certainly encompasses the CPL. *See* Murray Scot Tanner, "The Erosion of Communist Party Control over Lawmaking in China," 138 *China Quarterly* (1994), at 381, 399. The CCP's review of legislation is evidently conducted at a general level with little attention paid to individual articles or clauses. *Id.*, at 400.

their approval. The precise timing of the Party's review is impossible to determine, but most likely it occurred between the late fall, when the Legislative Affairs Commission finished incorporating the responses to its "draft for comment," and mid-December, when the draft revisions were first officially presented to the NPC Standing Committee.[52]

While the Party's approval would have fixed the general outlines and key principles of the revised CPL, the deliberations at the NPC between mid-December and passage of the revised law on March 17 were far from ritualistic. The December NPC Standing Committee session was apparently so fractious that a special meeting had to be convened the following month by NPC Vice-Chairman Wang Hanbin to see if common ground could be achieved.[53] At the next regular session of the NPC Standing Committee, in late February, a number of significant changes were made to the December draft, particularly with regard to detention, the system of "exemption from prosecution," and the right to defense in capital cases.[54] It is not known whether these late changes were submitted to the Party leadership for approval prior to the full NPC's taking up the draft revisions in March. But the personal involvement at this stage of senior figures such as Wang Hanbin, who is also an alternate member of the CCP Politburo, would have ensured that the final draft remained consistent with the Party's general guidelines.

[52]*See Explanation and Application, supra* note 47, at 3.

[53]*See* Zheng Wen, *supra* note 35, at 1; "PRC: Draft Punishment, Procedures Laws Revised," *Foreign Broadcast Information Service: China*, March 6, 1996 [hereinafter *Draft Laws Revised*], at 35, 36.

[54]*See Draft Laws Revised, supra* note 53, at 37.

II. ANALYSIS OF THE REVISIONS

The revisions to the CPL adopted by the NPC on March 17, 1996 were thus the culmination of nearly three years of officially-sanctioned drafting and several more years of advocacy by reform proponents. In the end, the NPC did not adopt an entirely new law but rather a 110-article decision ("1996 NPC Decision") containing amendments and additions to the 1979 CPL.[55] Still, the NPC's action results in sweeping change. Of the 164 articles in the original law, 70 have been amended and two eliminated, while 63 new articles have been added.

Although overall the revisions are quite substantial, they are unevenly distributed. Some parts of the CPL were heavily reshaped, including those dealing with arrest and detention, defense counsel, initiation of prosecution, and trial proceedings. But other parts of the law, such as those regulating investigations, evidence, appeal and review of death sentences, were left largely untouched. The final article of the amendments states that when the revised law takes effect on January 1, 1997, the 1983 and 1984 NPC Standing Committee decisions[56] will become invalid. As discussed below,[57] however, the 1984 Decision has been largely incorporated into the revised law.

This section presents an analysis of major revisions of the CPL in four areas of particular relevance to the protection of human rights: pre-trial

[55]*Quanguo renmin daibiao dahui guanyu xiugai "Zhonghua renmin gongheguo xingshi susongfa" de jueding* [Decision of the National People's Congress on the Revision of the "Criminal Procedure Law of the PRC"], adopted March 17, 1996, *Renmin ribao*, March 24, 1996, at 2 [hereinafter 1996 NPC Decision]. The full text of the revised Criminal Procedure Law was published in national newspapers in China on March 25, 1996. Criminal Procedure Law of the People's Republic of China, *Renmin ribao*, March 25, 1996, at 2 [hereinafter Revised CPL]. Unofficial translations appear in *Foreign Broadcast Information Service: China*, April 9, 1996, at 24; *BBC Summary of World Broadcasts: Asia-Pacific*, April 17, 1996, at S1.

[56]*See supra* notes 10, 12 and accompanying text.

[57]*See* Chapter II, Section A.

detention, the right to counsel, prosecutorial determination of guilt and the trial process. It then also looks at key human rights issues left unresolved by the revisions, including the presumption of innocence, administrative sanctions, the use of illegally-gathered evidence, the right to appeal and remedies for violations of procedural rights.

A. Pre-Trial Detention

The 1979 CPL authorized five different forms of pre-trial detention: compulsory summons (*juchuan*), "taking a guarantee and awaiting trial" (*qubao houshen*), "supervised residence" (*jianshi juzhu*), pre-arrest detention (*juliu*) and arrest (*daibu*).[58] The 1996 revisions affect all five. In addition, the revisions will indirectly lead to the elimination of a sixth form of pre-trial detention known as "shelter and investigation" (*shourong shencha*). "Shelter and investigation" is based on administrative regulations,[59] not the CPL, but it has been widely used by the police in conjunction with criminal investigations.

Under the 1982 Constitution, arrests can only be carried out in China with the prior approval of the procuratorate or court.[60] Though the CPL preceded the enactment of the 1982 Constitution, it contained a similar

[58]According to Chinese usage, only persons subjected to the last two of these measures, pre-arrest detention and arrest, are considered to be "in detention" (*zai ya*). As will be seen below, this is extremely significant because the CPL's limits on the length of detention only apply to such persons. *See infra* notes 106-107 and accompanying text. However, according to international standards, a "detained person" is "any person deprived of personal liberty except as a result of conviction for an offence." *See* Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment, General Assembly resolution 43/179, December 9, 1988 [hereinafter Body of Principles on Detention], para. 2(b). Since all of the so-called "coercive measures" (*qiangzhi cuoshi*) provided for in the CPL involve deprivation of personal liberty prior to conviction, they should properly be viewed as forms of pre-trial detention.

[59]*See infra* notes 66-69 and accompanying text.

[60]1982 Constitution, *supra* note 22, art. 37.

provision.[61] In order to obtain approval for an arrest, the investigating agency, usually the police, was required to show that the "principal facts of the crime have already been clarified" (*zhuyao fanzui shishi yijing chaqing*).[62] That the 1979 CPL set such a relatively high threshold for arrest is generally ascribed to the experience of the Cultural Revolution, when countless numbers of Chinese, including leading Party figures, were subject to arrest on no grounds whatsoever. There is no requirement in the CPL that all criminal suspects be arrested prior to prosecution and trial, but the vast majority apparently are.[63]

Under certain circumstances, such as where suspects were apprehended in the act of committing crimes or posed a flight risk, the 1979 CPL permitted the police to detain suspects prior to formal arrest.[64] After detention, the police had a maximum of seven days in which to apply to the procuratorate for permission to arrest. The procuratorate then had three days to decide whether or not to approve.[65]

In practice, faced with a relatively high arrest standard, a relatively short pre-arrest detention period, and pressure from superiors to "strike hard" at crime, the police increasingly took the easy way out and resorted to methods of detention outside the scope of the criminal process altogether. The most commonly applied measure was "shelter and

[61]1979 CPL, art. 39.

[62]*Id.*, art. 40.

[63]In 1994, for example, the procuratorate approved arrests of 629,331 criminal suspects and brought prosecutions against (or "exempted from prosecution") 678,156. *China Law Yearbook 1995*, *supra* note 27, at 1067. Even allowing for the fact that not all persons arrested in one year are prosecuted the same year, these figures demonstrate in a rough way that virtually all defendants in criminal trials are arrested and detained. *See also* Xu Youjun, "*Zhongguo xingshi susong yu renquan*" [China's Criminal Procedure and Human Rights], 2 *Zhongwai faxue* (1992), at 38, 41-42.

[64]1979 CPL, art. 41.

[65]*Id.*, art. 48.

investigation." Originally developed in the early 1960s as a means of rounding up migrants for return to rural areas, "shelter and investigation" appeared to have been abolished in 1980 when it was officially merged with two other non-criminal sanctions.[66]

With the start of the *yanda* campaign in 1983, however, "shelter and investigation" was resurrected. According to Ministry of Public Security regulations issued in 1985, "shelter and investigation" was to be applied only to "people suspected of wandering around committing crimes and people of criminal behavior who do not tell their real names or residence or whose origins are unclear."[67] In practice, however, it was used much more broadly. According to Chinese sources, as many as 80-90% of persons formally arrested in the years since the promulgation of the CPL were first subjected to "shelter and investigation."[68] Moreover, although Public Security regulations specified that the period of "shelter and investigation" was not to exceed three months,[69] this limit was routinely

[66]Notice of the State Council Concerning the Unification of the Two Measures of Forced Labor and Shelter and Investigation with Reeducation Through Labor, February 29, 1980.

[67]Notice of the Ministry of Public Security Concerning Strictly Controlling the Use of the Measure of Shelter and Investigation, July 31, 1985, in *Zhonghua renmin gongheguo gongan falu quanshu* [Complete Public Security Laws of the People's Republic of China], Jiang Xianjin et al., eds. (Changchun: Jilin People's Press, 1995), at 1372 [hereinafter 1985 Public Security Notice], trans. in 5 *Chinese Law & Government* (1994), at 38.

[68]Author interview, Beijing, January 1996; Zhang Xu, "*Lun shourong shencha de chulu yu daibu de gaige*" [The Way Out for Shelter and Investigation and the Reform of Arrest], 1 *Xiandai faxue* (1993), at 20.

[69]1985 Public Security Notice, *supra* note 67, para. 3.

violated. Chinese researchers have reported cases of people being held in "shelter and investigation" for as long as ten years.[70]

These widespread abuses stemmed from the fact that, as an administrative measure, "shelter and investigation" was subject to virtually no outside checks. Unlike a formal arrest under the CPL, "shelter and investigation" required no prior approval from the procuratorate. While Public Security regulations acknowledged a general supervisory role for the procuratorate with respect to "shelter and investigation,"[71] no specific mechanisms were ever developed to give this substance. After 1990, it became possible for detainees themselves to challenge "shelter and investigation" decisions under the Administrative Litigation Law,[72] but the effectiveness of administrative suits was severely constrained by detainees' ignorance of the law and lack of access to counsel.

Concerned that indiscriminate application of "shelter and investigation" was damaging the public image of the police, the Ministry of Public Security sought on several occasions to impose tighter controls on its use, but apparently without success.[73] It also tried to persuade the

[70]Mu Yi, "*Shourong shencha jixu zhengdun*" [The Urgent Need to Rectify Shelter and Investigation], 7 *Renmin Gongan* (1989), at 18, cited in *Criminal Justice with Chinese Characteristics*, *supra* note 32, at 70 n.264.

[71]1985 Public Security Notice, *supra* note 67, para. 8.

[72]Administrative Litigation Law of the PRC, adopted April 4, 1989. For examples of successful administrative suits against "shelter and investigation" decisions, *see Zhongguo shenpan anli yaolan (1993 zongheben)* [Essential Reading of Cases of Chinese Adjudication (1993 Comprehensive Edition)], Zhu Mingshan et al., eds. (Chinese People's Public Security University Press, Beijing: 1994), at 1139; *Zhongguo shenpan anli yaolan (1994 zongheben)* [Essential Reading of Cases of Chinese Adjudication (1994 Comprehensive Edition)], Zhu Mingshan et al., eds. (Chinese People's Public Security University Press, Beijing: 1995) [hereinafter *Essential Cases 1994*], at 1452.

[73]*See* 1985 Public Security Notice, *supra* note 67; Notice of the Ministry of Public Security Concerning the Immediate Conscientious Rectification of the Work of Shelter and Investigation, July 31, 1986, in *Zhonghua renmin gongheguo gongan falu*

NPC to enact a law on "shelter and investigation" and thereby place it on a more secure legal footing. However, these efforts also failed, reportedly due to broad opposition by the courts, procuratorate and the NPC itself.[74] In the meantime, increasing numbers of Chinese legal scholars were calling openly for the abolition of "shelter and investigation"[75] and foreign critics were citing it as a particularly blatant example of the failure of the Chinese criminal justice system to meet international human rights standards.[76]

There are some indications that in the early stages of revising the CPL, the Ministry of Public Security may have once again raised the

quanshu [Complete Public Security Laws of the People's Republic of China], Jiang Xianjin et al., eds. (Changchun: Jilin People's Press, 1995), at 1374; Notice of the Ministry of Public Security Concerning Further Controlling the Use of the Method of Shelter and Investigation, June 11, 1991, in *id.* at 1377; Notice of the Ministry of Public Security Concerning Resolutely Correcting Indiscriminate Use of the Method of Shelter and Investigation, February 15, 1992, in *id.* at 1379.

[74]*See Guanyu di qijie quanguo renda di si ci huiyi zhuxituan jiaofu falu weiyuanhui shenyi de daibiao tichu de yi'an shenyi jieguo de baogao* [Report Concerning the Results of Deliberation of Motions Raised by Delegates and Handed Over to the Law Committee for Deliberation by the Presidium of the Fourth Session of the Seventh National People's Congress], 7 *Zhonghua renmin gongheguo quanguo renmin daibiao dahui changwu weiyuanhui gongbao* (1991), at 67; Author interview, Beijing, February 1995.

[75]*See, e.g.*, Zhou Guojun, "*Guanyu shourong shencha cunfei zhi yanjiu*" [Research Regarding the Retention or Abolition of Shelter and Investigation], 1 *Zhengfa luntan* (1989), at 35; Yang Lianfeng & Wei Huaming, "*Guanyu jiang 'shourong shencha' naru xingshi qiangzhi cuoshi chutan*" [Preliminary Explorations Regarding the Incorporation of "Shelter and Investigation" into Criminal Coercive Measures], 5 *Faxue pinglun* (1989), at 29; Wang Xinxin, "*Shourong shencha yingyu feichu*" [Shelter and Investigation Should be Abolished], 3 *Zhongguo faxue* (1993), at 110; Zhang Jianwei & Li Zhongcheng, "*Lun feizhi shourong shencha*" [On the Abolition of Shelter and Investigation], 3 *Zhongwai faxue* (1994), at 55.

[76]*See, e.g., Punishment Without Crime, supra* note 32, at 5-14; *Howe Report, supra* note 34, at 42-43; *Criminal Justice with Chinese Characteristics, supra* note 32, at 67-71.

possibility of drafting a separate law on "shelter and investigation."[77] In the end, however, the extent of dissatisfaction was so great, particularly in other parts of the legal apparatus, that the decision was reached to abolish "shelter and investigation" altogether. Since "shelter and investigation" is not contained in the CPL, its elimination is not mentioned in the 1996 NPC Decision. However, official documents from the NPC session explicitly state that "shelter and investigation will no longer be retained as an administrative coercive measure"[78] and the Ministry of Public Security has begun to take steps to achieve its elimination in practice.[79]

While on the face of it the elimination of "shelter and investigation" may appear to be a major setback for the police, in other respects the 1996 NPC Decision accomodates the specific concerns which purportedly

[77]Author interview, Beijing, January 1996.

[78]*See* Gu Angran, "*Guanyu 'Zhonghua renmin gongheguo xingshi susongfa xiuzheng'an (cao'an)' de shuoming*" [Explanation Concerning the "(Draft) Amendments to the Criminal Procedure Law of the PRC"], in *Explanation and Application, supra* note 47, at 400, 401. The elimination of "shelter and investigation" has also been publicly confirmed in numerous press reports. *See, e.g.*, "New laws to protect the innocent," *China Daily*, March 23, 1996, at 4; "NPC session closes successfully," *China Daily*, March 18, 1996, at 1; Yan Jun & Zhang Weili, "*Xingsufa xiugai beishou gejie guanzhu*" [All Circles Play Close Attention to Revision of the Criminal Procedure Code], *Fazhi ribao*, February 3, 1996, at 1; Liu Songshan, "*Yange quanxian, qianghua zhiyue, wanshan fazhi, baohu renquan*" [Tighten Up Limits on Power, Strengthen Checks, Improve the Legal System, Protect Human Rights], *Fazhi ribao*, January 24, 1996, at 2.

[79]*See, e.g.*, Mao Lei, "*Gonganbu zhaokai huiyi bushu guanche shishi xingshi susongfa he xingzheng chufafa*" [Ministry of Public Security Convenes Meeting to Plan the Implementation of the Criminal Procedure Law and the Administrative Penalties Law], *Renmin ribao*, April 13, 1996, at 2; Yi Zhongli & Wu Tao, "*Gonganbu xuexi xingsufa he xingzheng chufafa*" [Ministry of Public Security Studies Criminal Procedure Law and Administrative Penalties Law], *Renmin ribao*, March 27, 1996, at 3; Sun Baosheng, "*Jiejue shourong shencha wenti burong zhiyi*" [Solving the Problem of Shelter and Investigation is Not Open to Doubt], *Fazhi ribao*, February 6, 1996, at 5.

gave rise to its use. First, the arrest standard has been relaxed. Rather than having to show that the "principal facts of the crime have already been clarified," under the revised CPL an arrest can be authorized if "there is evidence to prove the facts of the crime" (*you zhengju zhengming you fanzui shishi*).[80] Second, the provisions of the CPL on pre-arrest detention have been expanded to include the categories of persons to which "shelter and investigation" was meant to be applied in the first place: those who "do not tell their true name or place of residence or whose identity is unclear" and those "strongly suspected of wandering around committing crimes, of committing multiple crimes, or of forming bands to commit crimes."[81] Moreover, for suspects in the latter of these two categories, the period of pre-arrest detention has been greatly extended, from seven days to thirty.[82] The period within which the procuratorate must make its decision whether or not to authorize arrest has also been lengthened, from three days to seven.[83]

In addition to relaxing the arrest standard and increasing the scope and length of pre-arrest detention, the 1996 NPC Decision contains still other provisions granting the police greater leeway to hold suspects prior to trial. Under the 1979 CPL, once a suspected criminal had been arrested, the period of time during which he or she could be held in custody while the police carried out their investigations was generally limited to two months (including time spent in pre-arrest detention). In "complicated cases," this period could be extended an additional month with the approval of the procuratorate at the next higher level.[84] As discussed above, in 1984 the NPC authorized further two-month

[80]Revised CPL, art. 60.

[81]*Id.*, art. 61(6), 61(7).

[82]*Id.*, art. 69(2).

[83]*Id.*, art. 69(3).

[84]1979 CPL, art. 92(1).

extensions, upon approval of the provincial-level procuratorate, in certain "major" or "complicated" cases and in parts of the country with poor transportation.[85]

The 1996 Decision has formally incorporated the 1984 NPC Decision into the CPL while adding yet another circumstance where a two-month extension may be granted: in "major, complicated cases where the scope of the crime is broad and gathering evidence is difficult."[86] Moreover, the NPC Decision contains an entirely new provision allowing suspects to be held for a further two months — above and beyond all previous extensions — during investigation of all crimes punishable by sentences of ten years or longer.[87] Thus whereas the original CPL envisioned that suspects would be held for a maximum of three months during the investigation stage, the revised CPL permits detention for up to seven months. The revised CPL also retains the provision in the original law that in "extremely large or complicated" cases, indefinite extensions of these periods can be granted by the NPC Standing Committee upon the request of the Supreme People's Procuratorate.[88]

Under the 1979 CPL, once the police had completed their investigation and forwarded the case to the procuratorate, the latter had one month, extendable by a half-month in "major" or "complicated" cases, to decide whether to bring a prosecution.[89] During this period suspects who had been arrested would generally continue to be held in custody. In practice, however, this time limit could be evaded if the procuratorate requested "supplementary investigation" by the police. Although the CPL

[85]1984 NPC-SC Decision, *supra* note 12, arts. 1, 2.

[86]Revised CPL, art. 126.

[87]*Id.*, art. 127. This new extension was apparently added to the draft revisions only in late February 1996. *See Draft Laws Revised*, *supra* note 53, at 35, 37.

[88]1979 CPL, art. 92(2); Revised CPL, art. 125. There are no known instances where this procedure has been used.

[89]1979 CPL, art. 97.

required the police to complete this investigation in one month (during which, again, the suspect would usually continue to be held), it did not place any limit on the number of times "supplementary investigation" could be requested.[90] The revised CPL, while retaining the original time limits on the procuratorate's decision to prosecute, now provides that "supplementary investigation" may only be requested twice.[91]

Although the vast majority of criminal suspects in China are apparently held in police custody prior to trial, the 1979 CPL also authorized three forms of non-custodial detention: compulsory summons (*juchuan*), "taking a guarantee and awaiting trial" (*qubao houshen*), and "supervised residence" (*jianshi juzhu*). The original law gave little indication, however, how these measures were to be applied beyond the vague statement that they could be used "according to the circumstances of the case" (*genju anjian qingkuang*).[92] Regulations issued by the Ministry of Public Security in 1987 provided some additional details,[93] but they too were silent or ambiguous on many key points.

The 1996 NPC Decision incorporates and supplements the 1987 Public Security regulations and, in the process, creates some limited procedural safeguards against the abuse of non-custodial detention. Compulsory summons, under which the police may require a suspected criminal to appear for questioning, is now limited to twelve hours' duration. Moreover, the police are forbidden from effectively placing suspects in custody through repeated compulsory summons.[94]

New provisions on "taking a guarantee and awaiting trial" and "supervised residence" set out the types of suspected criminals who may

[90] *Id.*, art. 99.

[91] Revised CPL, art. 140(2), 140(3).

[92] 1979 CPL, art. 38.

[93] 1987 Public Security Procedures, *supra* note 11, arts. 22-30.

[94] Revised CPL, art. 92.

be subjected to such measures[95] and the specific limitations imposed on their freedom. Suspects who "take a guarantee and await trial" are not to leave their city or county of residence without police permission, while those under "supervised residence" are restricted to their homes or, if they have no fixed abode, to a designated location.[96] Since most suspects will presumably have a usual place of residence, this suggests the intention to curb the prior practice, particularly common in political cases, of using "supervised residence" as a means of holding suspected criminals under arrest-like conditions in Public Security or State Security "guest houses." Even more significant, for the first time the revised CPL imposes limits on the duration of these two forms of detention; "taking a guarantee and awaiting trial" is not to exceed one year and "supervised residence" is limited to six months.[97]

Whereas the original CPL provisions on "taking a guarantee and awaiting trial" only contemplated personal guarantees, the revised law permits the use of monetary guarantees as well.[98] Under the revised CPL, a suspect and his or her close relatives and legal representative all have the right to apply to "take a guarantee and await trial."[99] In no circumstances, however, are the police under an obligation to approve.[100]

[95] The revised CPL tracks the 1987 Public Security Procedures in providing that these two measures are mainly to be applied to persons suspected of minor crimes or who pose no risk to society. 1987 Public Security Procedures, *supra* note 11, art. 25(1), 25(2); Revised CPL, art. 51. The revised law also retains the provisions of the 1979 CPL concerning application of these measures to persons otherwise subject to arrest but who have serious illnesses or are pregnant or nursing an infant. 1979 CPL, art. 40(2); Revised CPL, art. 60(2).

[96] Revised CPL, arts. 56(1), 57(1), 57(2).

[97] *Id.*, art. 58(1).

[98] 1987 Public Security Procedures, *supra* note 11, art. 26; Revised CPL, art. 55.

[99] Revised CPL, arts. 52, 96(2).

[100] *Id.*, art. 53.

The 1996 revisions also make minor modifications to the procedures by which a suspect can seek to contest his or her detention. As under the original law, the revised CPL recognizes a suspect's right to demand release if his or her detention has exceeded the stipulated time periods. Whereas this previously only applied to pre-arrest detention, the revisions extend it to all five forms of pre-trial detention and allow lawyers to demand release on their client's behalf.[101] However, there is still no procedure for contesting the lawfulness of a detention order either when it is originally made or at any other point prior to the end of the stipulated time period.

Overall, then, the provisions of the 1996 NPC Decision relating to pre-trial detention show some movement toward greater protection of the rights of suspected criminals. The elimination of "shelter and investigation" means one less "legal" way for the police to avoid altogether the time periods, procedural requirements, and supervisory mechanisms contained in the CPL. The new time limits and clearer procedures for the imposition of the non-custodial forms of detention are also an important improvement over the original law. Restricting the number of "supplementary investigations" which the procuratorate may order plugs a procedural gap that was often exploited to keep suspected criminals in custody for indefinite periods.

While these are welcome steps, in other respects the 1996 NPC Decision actually weakens restrictions on the use and length of pre-trial detention. As discussed above, the revised CPL contains numerous provisions extending the period an arrested suspect can be held in custody while the police conduct their investigations.[102] In addition, in some circumstances, such as when the police discover that the suspect is involved in another crime, the entire pre-trial detention period can "restart." Whereas the 1984 NPC Decision required that the police receive authorization from the procuratorate before "restarting" the

[101] 1979 CPL, art. 48(2); Revised CPL, art. 75.

[102] *See supra* notes 86-87 and accompanying text.

custodial detention period, the revised CPL imposes no such requirement.[103]

The revised CPL also contains an entirely new provision according to which the custodial detention period for suspects "who do not tell their true names and places of residence or whose identity is unclear" does not begin to be calculated until the suspect's identity has been clarified.[104] This language is drawn directly from the former regulations on "shelter and investigation." Although in theory the procuratorate's supervision of all aspects of the criminal process should allow the police less room to apply such provisions to suspects whose identity is obviously clear, this is another example of new flexibility under the revised CPL to extend pre-trial custodial detention.

In fact, beyond the welter of rules on extending the time limits on detention, the revised CPL also creates opportunities for the authorities to evade these limits altogether. The revised law incorporates the provision in the 1984 NPC Decision whereby the time during which suspects are undergoing psychiatric evaluation is excluded from the pre-trial detention period.[105] It also provides that where the investigation and decision to prosecute (as well as trial and appeal) cannot be completed within the specified time limits, the suspect may be subjected to "taking a guarantee and awaiting trial" or "supervised residence."[106] Although the non-custodial forms of detention are, from the suspect's point of view, preferable to remaining in custody and are themselves now subject to time limits, this provision reflects a continuation of the view that these measures do not constitute detention at all. Therefore, as under the 1984

[103] 1984 NPC-SC Decision, *supra* note 12, art. 3; Revised CPL, art. 128(1).

[104] Revised CPL, art. 128(2).

[105] 1984 NPC-SC Decision, *supra* note 12, art. 9; Revised CPL, art. 122.

[106] Revised CPL, art. 74.

NPC Decision,[107] they should not count against the stipulated periods for the police and procuratorate (as well as the courts) to complete their handling of criminal cases.

After accounting for both the positive and the negative aspects of the 1996 NPC Decision, China is still far from conforming with international standards on pre-trial detention. The core deficiency in the Chinese system is the enormous power that the police have to detain suspected criminals. International law requires that "[a]nyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power."[108] The CPL lacks any such procedure. The result is that the police continue to have largely unfettered discretion to hold suspected criminals for extended periods of time.

In fact, of the five forms of pre-trial detention under the CPL, the only one subject to any review by an institution other than the police is arrest, which must be approved by the procuratorate. The procuratorate is not "authorized by law to exercise judicial power," but its review of arrests is in any case far from "prompt."[109] As noted above, the 1996 NPC Decision has actually extended to a maximum of thirty-seven days the period during which some suspects may be held pending arrest authorization from the procuratorate.[110]

The revised CPL also fails to meet international standards regarding bail. The Body of Principles for the Protection of All Persons under any Form of Detention of Imprisonment, adopted by the United Nations

[107]1984 NPC-SC Decision, *supra* note 12, arts. 4, 5.

[108]International Covenant on Civil and Political Rights, General Assembly resolution 2200A (XXI), December 16, 1966, entered into force, March 23, 1976 [hereinafter ICCPR], art. 9(3).

[109]The United Nations Human Rights Committee has interpreted "prompt" to mean not in excess of "a few days." Human Rights Committee, General Comments, CCPR/C/21/Rev.1, May 19, 1989, General Comment 8, para. 2.

[110]*See supra* notes 82-83 and accompanying text.

General Assembly in 1988, states that "[e]xcept in special circumstances provided for by law, a person detained on a criminal charge shall be entitled . . . to release pending trial subject to the conditions that may be imposed in accordance with the law."[111] While the revised CPL provides that a detained suspect has the right to apply to "take a guarantee and await trial," he or she is never entitled to release, as the police retain complete discretion to approve or reject the application.[112]

A person subject to detention under the revised CPL is likewise denied the internationally-recognized right to bring a ***habeas corpus*** proceeding whereby a court can determine the lawfulness of the detention.[113] The only circumstance under which a suspect can seek release is when detention has exceeded the legally stipulated time periods. Prior to that point, he or she has no right to contest the lawfulness of the detention order itself.[114] The revised CPL is notably vague on the question of to whom the suspect should direct his or her demand for release, but there is no provision for any judicial role in reviewing the response. The general principle that the procuratorate is to notify the police to correct any "illegal circumstances" ***(weifa qingkuang)*** occurring during the investigation phase[115] suggests that the only conceivable way

[111]Body of Principles on Detention, *supra* note 58, art. 39. *See also* ICCPR, *supra* note 108, art. 9(3) ("It shall not be the general rule that persons awaiting trial shall be detained in custody").

[112]*See supra* notes 99-100 and accompanying text.

[113]The International Covenant on Civil and Political Rights provides that "[a]nyone who is deprived of his liberty by arrest or detention is entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful." ICCPR, *supra* note 108, art. 9(4).

[114]*See supra* note 101 and accompanying text.

[115]Revised CPL, art. 76. *See also* Chapter II, Section E5.

to force the release of a suspect held in detention beyond the maximum time period would be via the procuratorate.

The 1996 revisions also fail to bring the CPL into conformity with international law regarding a suspect's right to communicate with his or her family.[116] Although the revised CPL states that the police should notify a suspect's family within twenty-four hours of placing him or her in pre-arrest detention or under arrest, it did not alter the provisions by which the police may dispense with this requirement if it would "interfere with the investigation" or there is "no way to give notice."[117] Again, the only apparent check on police discretion in determining if such circumstances exist is the general oversight role of the procuratorate, though expanded access to counsel[118] may also mitigate the problem to some degree.

Finally, the non-custodial forms of detention under the revised CPL are contrary to the fundamental guarantee, expressed in the Universal Declaration of Human Rights, that "[n]o one shall be subjected to arbitrary arrest [or] detention."[119] Unlike pre-arrest detention and arrest, which in theory at least require a significant connection between the detainee and the alleged crime, the non-custodial forms of detention can be applied to any "suspect."[120] In fact, it is apparent from the revised CPL that one of the principal functions of "taking a guarantee and awaiting

[116]"[C]ommunication of the detained or imprisoned person with the outside world, and in particular his family or counsel, shall not be denied for more than a matter of days." Body of Principles on Detention, *supra* note 58, art. 15. Where "exceptional needs of the investigation" require, notification of family may be delayed, but only "for a reasonable period." *Id.*, art. 16(4).

[117]1979 CPL, arts. 43, 50; Revised CPL, arts. 64, 71.

[118]*See* Chapter II, Section B.

[119]Universal Declaration of Human Rights, General Assembly resolution 217A (III), December 10, 1948, art. 9. *See also* ICCPR, *supra* note 108, art. 9(1).

[120]Revised CPL, art. 51.

trial" and "supervised residence" is to allow the police to impose restrictions on people against whom evidence is insufficient to justify pre-arrest detention or arrest.[121]

B. Right to Counsel

The 1979 CPL provided that all defendents had the right to obtain a defense. This right of defense could be exercised either *pro se* or via a lawyer, relative, or other specified persons.[122] In prosecutions brought by the procuratorate,[123] the court could — but need not — appoint a defender for a defendant who had not engaged one him or herself. Only where the defendant was deaf, dumb, or a minor was such an appointment required.[124] However, defense was never mandatory, even in these latter cases, since a defendant could always refuse the court-appointed defender.[125]

The 1996 NPC Decision retains these provisions largely intact, though it adds language specifying the defendant's "economic difficulties"

[121]*Id.*, arts. 65, 69.

[122]1979 CPL, arts. 8, 26. The 1982 Constitution provides for the same right. 1982 Constitution, *supra* note 22, art. 125. Official figures suggest that in recent years roughly half of all criminal defendants in China have been represented by a defender. *See* Wang Minyuan, *supra* note 13, at 531. For the most recent available statistics, see *China Law Yearbook 1995*, *supra* note 27, at 1065, 1079.

[123]Both the 1979 CPL and the Revised CPL provide for a separate class of prosecutions brought directly by the crime victim. *See* 1979 CPL, arts. 126-28; Revised CPL, arts. 170-73.

[124]1979 CPL, art. 27. Official statistics indicate that in recent years roughly 3 percent of criminal defendants have been represented by a court-appointed defender. *See China Law Yearbook 1995*, *supra* note 27, at 1079.

[125]1979 CPL, art. 30. *See also* Wang Hongxiang, "*Wanshan lushi bianhu lifa de jidian yijian*" [A Few Opinions on the Improvement of Legislation on Defense by Lawyers], in *Reform and Improvement*, *supra* note 20, at 127, 130-32.

as one ground for the optional appointment of a defender.[126] It also broadens the category of defendants for whom the court should appoint defenders to include blind persons and defendants who may be sentenced to the death penalty.[127]

Under the 1979 CPL, however, the right to counsel only attached at the trial stage. Once the court determined that a case was ready to be heard, it was required to send the indictment to the defendant at least seven days prior to the start of trial. Only at this time was the defendant notified of his or her right to engage a defender or did the court appoint a defender on his or her behalf.[128] As discussed above, the 1983 NPC Decision eliminated the seven-day notice period for defendants facing the death penalty for certain serious crimes.[129]

Given the NPC's willingness in 1983 to sacrifice, in the name of *yanda*, even the minimal rights to counsel specified in the 1979 CPL, it is interesting that movement toward expanding the role of lawyers in the criminal process actually preceded by several years any serious discussion of revising the CPL. There seem to be a number of factors accounting for this. First, it quickly became apparent that permitting lawyers to become involved in criminal cases only a week (often less) prior to trial was making a mockery of the CPL's guarantee of a "right to obtain a defense." Second, the number of lawyers available to act as defenders began to grow. Whereas in 1980, at the time of the promulgation of the Provisional Regulations on Lawyers,[130] China had only a few thousand

[126]Revised CPL, art. 34(1).

[127]*Id.*, arts. 34(2), 34(3).

[128]1979 CPL, art. 110(3).

[129]1983 NPC-SC Decision, *supra* note 10, art. 1.

[130]Provisional Regulations of the PRC on Lawyers, adopted August 26, 1980. Although denoted "provisional," these regulations have served for many years as the basic legal standard concerning the qualifications, licensing, and powers of Chinese lawyers. On January 1, 1997, they will be superceded by the recently

lawyers, by 1990 this figure had reached nearly 40,000.[131] While there is no clear evidence that lawyers themselves lobbied for an expanded role in the criminal process, their growing numbers naturally gave rise to more consideration of their place in all areas of legal practice.[132] A final important, if intangible, factor was greater awareness of the function of defense counsel in foreign legal systems.

By the early 1990s, Chinese commentators had already concluded that "the majority of people in academic procedural law circles and engaged in the administration of justice have affirmed the need for lawyers to participate earlier in the criminal process."[133] In March 1991, Ministry of Justice officials involved in writing a new Lawyers Law confirmed that, under their proposed draft, defense counsel would indeed be permitted to act in criminal proceedings at an earlier stage.[134] Later that same year, apparently acting on the spirit of the Justice Ministry

enacted Lawyers Law. Lawyers Law of the People's Republic of China, adopted May 15, 1996 [hereinafter Lawyers Law], art. 53.

[131]*Zhongguo falu nianjian 1991* [China Law Yearbook 1991], China Law Yearbook Editorial Dep't, ed. (China Law Yearbook Publishing House, Beijing: 1991), at 955.

[132]The greater attention paid to defining the role of lawyers is reflected in the large number of provincial regulations passed in the late 1980s and early 1990s on the rights and duties of lawyers. *See, e.g.*, Several Provisions of Liaoning Province on Lawyers' Performance of Professional Duties in Accordance with Law, adopted July 20, 1986; Several Provisions of Tianjin Municipality on Lawyers' Execution of Professional Duties, adopted January 2, 1988; Several Provisions of Shanxi Province on Lawyers' Execution of Professional Duties, adopted September 16, 1990; Several Provisions of Beijing Municipality on Guaranteeing Lawyers' Execution of Professional Duties, adopted September 14, 1991.

[133]*Xingshi susong faxue yanjiu zongshu yu pingjia* [A General Description and Appraisal of Research in Criminal Procedure Law], Fan Chongyi, ed. (China University of Politics and Law Press: 1991) [hereinafter *Description and Appraisal*], at 102.

[134]Author interview, Beijing, March 1991.

draft, Fujian Province enacted regulations which for the first time authorized Chinese lawyers to provide legal assistance to suspects in pre-trial detention.[135]

If, by 1991, a consensus had been reached on lawyers' earlier entry into the criminal process, differences remained as to exactly when that entry should occur.[136] One proposal was that the lawyer's involvement should begin at the point when the police completed investigating the crime and forwarded the case materials to the procuratorate for a decision on whether to prosecute. Backers of this proposal argued that this would essentially put the defense lawyer on an equal footing with the procuratorate in preparing for trial. They opposed allowing lawyers to participate any earlier, however, on the grounds that it might interfere with the police investigation and encourage the suspect to be "uncooperative."

Advocates of deeper reform argued that it was precisely during the investigation phase that suspects were most in need of legal assistance. Lawyers' participation at this stage would not only facilitate preparation of the defense to be presented at trial, but also help the police to determine which cases did not merit further investigation, thereby saving judicial resources. Proponents of this view also spoke frankly of the need for greater oversight of investigation activities and argued that lawyers' early contact with suspects would cut down on torture, forced confessions, and other police abuses.

The 1996 NPC Decision appears to reflect a compromise between these two competing proposals. The revised CPL provides unambiguously that a suspect's right to counsel attaches from the day when the case

[135]Several Provisions of Fujian Province on Lawyers' Execution of Professional Duties, adopted August 31, 1991, art. 10. *See also "Fujian sheng lushi zhixing zhiwu de lifa qude xin de tupo"* [Fujian Province Legislation on Lawyers' Execution of Professional Duties Achieves New Breakthrough], 6 *Zhongguo lushi* (1991), at 31.

[136]For good summaries of the different points of view regarding the timing of lawyers' participation in the criminal process, see *Description and Appraisal*, *supra* note 133, at 102-09; Wang Shangxin, *supra* note 17, at 79-80.

materials are transferred to the procuratorate for a decision to prosecute.[137] It moreover states that within three days of receiving the case materials, the procuratorate must inform the suspect of his or her right to counsel.[138] The lawyer's powers at this stage include the right to read and copy "litigation documents and technical evaluation materials" related to the case and to meet and correspond with the suspect in custody.[139] In addition, in conducting its review of the case, the procuratorate is directed to "listen to" the opinions of defense counsel.[140]

Under the revised CPL, a suspected criminal may also seek legal assistance during the investigation phase. The right to counsel at this earlier stage attaches after the first time the suspect has been questioned or on the day the suspect has been subjected to one of the five forms of detention authorized under the CPL.[141] Significantly, unlike the

[137]Revised CPL, art. 33(1).

[138]*Id.*, art. 33(2).

[139]*Id.*, art. 36(1). "Litigation documents" (*susong wenshu*) refer to such formal documents as the decision to investigate (*li'an jueding*), the decision to arrest or apply other coercive measures, and the recommendation to indict. They do not include the testimony of witnesses or other specific evidence against the suspect. *See Explanation and Application*, *supra* note 47, at 57. Such evidentiary materials are not made available to defense counsel until the case is received by the court. Revised CPL, art. 36(2). The point at which the case is "received" (*shouli*) by the court is not defined in the CPL, but presumably occurs shortly before the court decides to bring the case to trial, which can in turn be as little as ten days before the trial actually begins. Revised CPL, art. 151(2). Thus even under the revised law, defense counsel will often have very little time to prepare a response to the details of the prosecution's case. *See infra* notes 206-208 and accompanying text.

[140]Revised CPL, art. 139.

[141]*Id.*, art. 96(1). It is not clear from the text at exactly what point on the day the suspect is subjected to detention his or her right to counsel will attach. Since the revised CPL provides that all suspects arrested or placed in pre-arrest detention must be questioned within twenty-four hours (arts. 71(2), 64(2)), it seems likely that for these suspects, too, access to counsel will come after the initial

provisions on the right to counsel once the case is transferred to the procuratorate, there is no requirement that the police inform a suspect of the right to counsel in the investigation phase.

The lawyer's role and powers in the investigation phase are also more limited than at later stages. The lawyer's role is to provide legal advice, file petitions and complaints, and, if the suspect has been arrested, apply for "taking a guarantee and awaiting trial." The lawyer also has the right to learn the nature of the crime of which his client is suspected and may meet with a detained suspect to learn the circumstances of the case.[142]

In an apparent bow to concerns that the lawyer's early involvement could compromise sensitive investigations, the revised CPL gives the police the right to block a suspect's access to counsel in cases involving "state secrets" (*guojia mimi*).[143] Even in those cases where suspects are allowed access to a lawyer, the police may, "according to the circumstances of the case and as necessary," require that officers be present at lawyer-client meetings.[144]

Thus, as with the rules on pre-trial detention, the impact of the 1996 NPC Decision on the right to counsel is mixed. On the one hand, the revisions have broken down the barriers to the involvement of lawyers at the pre-trial stage. Combined with changes in the trial process,[145] this should allow counsel to play a more active and, hopefully, effective role in presenting a defense. To the extent that lawyers are in fact able to

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questioning.

[142]*Id.*, art. 96. The limited nature of the lawyer's role in the investigation phase is further underlined by the fact that these provisions are not located in the revised CPL's section on Defense and Legal Representation (arts. 32-41) but in the section on Questioning Suspects (arts. 91-96).

[143]*Id.*, arts. 96(1), 96(2).

[144]*Id.*, art. 96(2).

[145]*See* Chapter II, Section D.

represent suspects during the investigation phase, this may result in some enhanced protections against police abuses.

But the revisions do not go far enough to bring China into compliance with international standards. The most glaring deficiency of the revised CPL is the discretion it grants the police to use "state secrets" as a justification for denying suspects access to a lawyer during the investigation phase. Given the expansive definition of "state secrets" in China,[146] and the largely unreviewable power of the police to invoke it, this provision has enormous potential to vitiate the progress that the 1996 revisions mark toward meeting the internationally-recognized right of all detainees to legal assistance.[147]

Even where the police do not cite "state secrets" to block suspects' access to counsel, the revised CPL is still deficient by international standards. As discussed above, the revised law is conspicuously silent on the obligation to give suspects immediate notice of their right to counsel in the investigation stage.[148] The denial of legal assistance until *after* the initial questioning by the police, combined with the absence under

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[146]*See* Timothy A. Gelatt, "Recent Development: The New Chinese State Secrets Law," 22 *Cornell International Law Journal* (1989), at 225.

[147]Body of Principles on Detention, *supra* note 58, art. 17(1). *See also* Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, September 1990, art. 1 ("All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them at all stages of criminal proceedings.")

[148]Body of Principles on Detention, *supra* note 58, art. 17(1) (a detained person shall be informed of his right to counsel "promptly" after arrest); Basic Principles on the Role of Lawyers, *supra* note 147, art. 7 ("Governments shall ensure that all persons are immediately informed by the competent authority of their right to be assisted by a lawyer of their own choice upon arrest or detention or when charged with a criminal offense.")

Chinese law of a right to remain silent,[149] means that there will continue to be a significant risk of coerced "confessions" before a lawyer ever gains access to his or her client. In addition, the provisions of the revised CPL whereby the police can insist that they be present at meetings between suspects and defense counsel violate relevant international norms on the confidentiality of the lawyer-client relationship.[150]

Despite allowing lawyers to participate earlier in the criminal process, the revised CPL still has no procedure for appointment of counsel prior to the trial stage. Thus it seems likely that large numbers of criminal suspects, including ones facing long prison sentences or even the death penalty, will be denied the benefits of early legal assistance and a well-prepared defense. This is not in keeping with international standards, according to which detained persons are entitled to appointed counsel throughout the criminal process "in all cases where the interests of justice so require."[151]

The revised CPL also fails to meet the international requirement that legal assistance be available without payment for all defendants unable to afford it.[152] In those instances where the court does appoint counsel for the defendant, the lawyer is to serve out of "legal aid duty" (*falu yuanzhu*

[149]The revised CPL retains the language in the original law whereby suspects are required to answer investigators' questions "truthfully" (*rushi huida*). 1979 CPL, art. 64; Revised CPL, art. 93.

[150]Body of Principles on Detention, *supra* note 58, art. 18(4) ("Interviews between a detained or imprisoned person and his legal counsel may be within sight, but not within the hearing, of a law enforcement official.")

[151]ICCPR, *supra* note 108, art. 14(3)(d); Basic Principles on the Role of Lawyers, *supra* note 147, art. 6. The right to legal assistance at all stages of criminal proceedings is especially emphasized in the case of persons charged with capital offenses. *See* Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, approved by the UN Economic and Social Council, May 25, 1984, annex para. 5.

[152]ICCPR, *supra* note 108, art. 14(3)(d).

yiwu).[153] But the defendant's economic difficulties in and of themselves only give rise to the optional appointment of counsel. Thus in the absence of some other avenue by which to obtain free legal assistance, many Chinese may find that they are unable to exercise their right to defense even at the trial stage.

C. Prosecutorial Determination of Guilt

In late February 1996, in one of the final changes to the proposed revisions, the NPC Standing Committee added the following language to the General Principles section of the CPL: "In the absence of a lawful verdict of the people's court, no person should be determined guilty" (*Wei jing renmin fayuan yifa panjue, dui renhe ren bude queding you zui*).[154] Following the 1996 NPC Decision, as a result of which this sentence became Article 12 of the revised CPL, a number of Chinese and foreign commentators suggested that China had thereby incorporated the presumption of innocence into its criminal justice system.[155]

In fact, in the course of drafting the revisions, proposals were made — and rejected — to add language to the CPL specifically providing for

[153]Revised CPL, art. 34. The revised CPL itself says nothing about how these obligatory services will be paid for. The new Lawyers Law affirms that criminal defendants who lack the means to pay for a lawyer are entitled to legal aid and that lawyers are obligated to provide such aid. It leaves to the Ministry of Justice the job of drafting regulations to implement the legal aid scheme. Lawyers Law, *supra* note 130, arts. 41-43. *See also "Gedi lushi jiji kaizhan falu yuanzhu gongzuo"* [Lawyers Everywhere Actively Undertake Legal Aid Work], *Fazhi ribao*, October 3, 1995, at 1.

[154]*See Draft Laws Revised*, *supra* note 53, at 37.

[155]*See, e.g.*, "PRC: Editorial Hails Amendments to Criminal Procedure Law," *Foreign Broadcast Information Service: China*, March 28, 1996, at 16, 17; *Explanation and Application*, *supra* note 47, at 5; David C. Buxbaum & Gordon C. Lin, "Criminal Law Regime Sees Progress After 17 Years," *China Law & Practice* (May 1995), at 54, 55.

the presumption of innocence.[156] Article 12 says nothing about the burden of proof, standard of guilt, or any other issue commonly associated with the presumption of innocence. It should be seen rather as a straightforward statement of functional responsibility: only a court — and no other individual or institution — can determine guilt.

The explanation for the inclusion of Article 12 lies in the fact that under the 1979 CPL a procedure did exist whereby an institution other than the courts could determine guilt. This procedure was known as "exemption from prosecution" (*mianyu qisu*). "Exemption from prosecution" originated in the mid-1950s as a method of concluding leftover cases against World War II collaborators with the Japanese.[157] Under the 1979 CPL, it was extended to all crimes for which the substantive Criminal Law either did not require criminal sanction or permitted the defendant to be "exempted from punishment."[158]

The power to apply "exemption from prosecution" lay with the procuratorate, which could use it as a third alternative to bringing a case to trial or dismissing it altogether. While decisions to "exempt from punishment" were often couched in terms of granting leniency to the

[156]*See* Chapter II, Section E1.

[157]*See* Bian Jianlin, *Xingshi qisu zhidu de lilun yu shijian* [The Theory and Practice of the Criminal Prosecution System] (China Procuratorial Press, Beijing: 1993), at 175-77.

[158]1979 CPL, art. 101. Under the Criminal Law, criminal sanction is not required if the "circumstances of the crime are minor." Criminal Law of the People's Republic of China, adopted July 1, 1979 [hereinafter Criminal Law], art. 32. "Exemption from punishment" (*mianchu xingfa*) can be granted in cases involving any of a number of mitigating circumstances, such as a physical deficiency, acting in self-defense, discontinuation of the criminal act, demonstration of remonstrance, etc. *Id.*, arts. 7, 16, 17(2), 18(2), 19(2), 21(2), 24(2), 25, 63. *See also* 1980 Procuratorate Work Rules, *supra* note 23, art. 22.

defendant, they conveyed a clear determination of guilt.[159] Since these decisions were publicly announced and also communicated directly to the defendant's place of work,[160] the social consequences were often devastating.

In the years after the CPL was enacted, the procuratorate used "exemption from prosecution" to conclude hundreds of thousands of criminal cases without trial. Typically as many as 10% of the cases pursued by the procuratorate ended in this manner.[161] Application of "exemption from prosecution" was particularly common in cases of economic crime (smuggling, "speculation," tax evasion, etc.) and corruption. In 1993, for example, roughly the same number of cases of economic crime and corruption concluded with "exemption from prosecution" (5,479 and 3,603 cases, respectively) as with trial (4,932 and 3,674 cases, respectively.)[162]

[159]The most recent regulations on the role of the procuratorate in the criminal process state unambiguously that "where the defendant's conduct *constitutes a crime*, but according to law it is not required to impose criminal sanctions or [it is permitted] to exempt from punishment," the procuratorate may make a decision to exempt from prosecution. 1991 Procuratorate Work Rules, *supra* note 23, art. 47 (emphasis added). *See also* Bian, *supra* note 157, at 173.

[160]1979 CPL, art. 102(1).

[161]In 1994, the latest year for which figures are available, the procuratorate brought to trial 385,271 criminal cases and applied "exemption from prosecution" to 44,250 cases. *China Law Yearbook 1995*, *supra* note 27, at 1067. In 1986, the number of cases brought to trial and concluded through "exemption from prosecution" were 257,219 and 31,386 respectively. *Zhongguo falu nianjian 1987* [China Law Yearbook 1987], China Law Yearbook Editorial Dep't, ed. (Law Press, Beijing: 1987), at 884-85.

[162]*Zhongguo jiancha nianjian 1994* [China Procuratorial Yearbook 1994], China Procuratorial Yearbook Editorial Dep't, ed. (China Procuratorial Press, Beijing: 1995), at 552-53.

Proponents of "exemption from prosecution," many of them associated with the procuratorate, pointed to several justifications for its use.[163] First, it was said to be a concrete manifestation of the Party's criminal justice policy of "differential treatment" (*qubie duidai*) and "combining punishment with leniency" (*chengban yu kuanda xiang jiehe*). In practical terms, this meant that it proved useful in inducing members of criminal gangs to implicate one another. Second, it saved judicial resources by avoiding trials. Finally, and perhaps most tellingly, "exemption from prosecution" had the advantage of being flexible in its application and therefore responsive to the immediate dictates of policy.[164]

Critics on the other hand argued that by usurping the role of the courts to adjudicate guilt or innocence, the procuratorate's use of "exemption from prosecution" was a clear violation of the constitutional separation of functions. In addition, they stressed how it rendered meaningless the criminal defendant's right of defense. "Exemption from prosecution" was a closed-door procedure invoked unilaterally by the procuratorate in which the defendant had no right to counsel, no right to see the procuratorate's evidence or to present contradictory evidence and

[163]For useful summaries of the views of both proponents and critics of "exemption from prosecution," see Bian, *supra* note 157, at 177-78, 181-83; *Description and Appraisal, supra* note 133, at 391-409; *Tingshen he mianyu qisu zhidu de gaige yu wanshan* [Reform and Improvement in the Systems of Trial Proceedings and Exemption from Prosecution], Xie Weimin et al., eds. (China Legal System Press, Beijing: 1994) [hereinafter *Trial Proceedings and Exemption from Prosecution*], at 141-341.

[164]One example of this "responsiveness" can be seen in the handling of corruption cases. As noted above, "exemption from prosecution" was a commonly used means of concluding such cases throughout the 1980s and early 1990s. In 1994, however, presumably in response to pressure to bring more corrupt officials to trial and thereby give a higher public profile to the Party's anti-corruption drive, its application in corruption cases fell dramatically. *See China Law Yearbook 1995, supra* note 27, at 1067.

no effective right to appeal.[165] As an unreviewable exercise of power by the procuratorate, "exemption from prosecution" was also rife with potential for abuse. Criminals with influence could pressure the procuratorate to allow them to avoid a court proceeding, while the procuratorate could use it to pin a guilty label on suspects against whom they lacked sufficient evidence to bring to trial.

Even before the decision was taken to revise the CPL, criticism of "exemption from prosecution" and the obvious abuses associated with it had led to modest reforms. Under regulations issued by the Supreme People's Procuratorate (SPP) in 1991, "exemption from prosecution" was not to be applied to corruption cases involving multiple defendants, a single defendant charged with multiple crimes, or subsidiary civil litigation. In addition, the defendant in such cases was accorded broader procedural protections, including the right to introduce new witnesses and new evidence and the right to appeal an "exemption from prosecution" decision to a higher-level procuratorate.[166]

In the course of developing the amendments to the CPL, "exemption from prosecution" was the subject of intense debate and controversy. The draft revisions presented to the NPC Standing Committee in December 1995 evidently incorporated the reforms in the SPP's 1991 anti-corruption regulations, broadened their application to include all types of criminal cases and added yet another, even more significant, limitation: "exemption from prosecution" could not be applied if the defendant insisted on his or her innocence.[167] In other words, the defendant could

[165]Under the 1979 CPL, the defendant's only avenue of redress against "exemption from prosecution" was to seek a review by the same procuratorate that rendered the original decision. 1979 CPL, art. 103.

[166]Provisions of the Supreme People's Procuratorate Concerning the Work of Exemption from Prosecution in Cases of Corruption or Taking Bribes, adopted December 26, 1991, arts. 6, 8, 22.

[167]*See* Liu Songshan, *supra* note 78.

effectively veto an "exemption from prosecution" decision and force the procuratorate to bring the case to trial.

Writing these provisions into the official draft did not, however, mean an end to the matter. Reports in mid-January suggested that with so many restrictions imposed on its use, "exemption from prosecution" had lost any real substance and would be struck from the CPL altogether.[168] However, official descriptions of the NPC Standing Committee session at the end of February indicated that some form of "exemption from prosecution" had been restored to the draft revisions. It was also at this stage that the first references appeared to the Article 12 language on the exclusive power of the courts to determine guilt.[169]

The revised law as approved in March 1996 reflects the difficulty of resolving these debates, which have been described as the "biggest headache" in the whole revision process.[170] The 1996 NPC Decision has eliminated from the CPL the term "exemption from prosecution." However, some vestiges of the measure have been retained, at least in cases where the "circumstances of the crime are minor" (*fanzui qingjie qingwei*), and moved to the article in the revised law concerning decisions not to prosecute.[171] Thus in cases of minor crimes for which the Criminal Law either does not require criminal sanction or permits the defendant to be "exempted from punishment," the procuratorate now has the discretion to decide "not to prosecute."

At this point it is too early to judge definitively the significance of this change. On the one hand, Article 12 would suggest that under the revised

[168]Author interview, Beijing, January 1996.

[169]*Draft Laws Revised, supra* note 53, at 37.

[170]Cui Min, *Zhongguo xingshi susongfa de xin fazhan — xingshi susongfa xiugai yantao de quanmian huigu* [The New Development of China's Criminal Procedure Law — A Comprehensive Review of the Deliberations on the Revision of the Criminal Procedure Law] (Chinese People's Public Security University Press, Beijing: 1996) [hereinafter *New Development*], at 132.

[171]Revised CPL, art. 142(2).

CPL no decision of the procuratorate can be considered a determination of guilt.[172] Moreover, the addition of the phrase limiting such decisions "not to prosecute" to cases where the "circumstances of the crime are minor" would indicate that the scope of its application is much narrower than "exemption from prosecution," which could be used regardless of the seriousness of the crime.

On the other hand, the limiting phrase itself describes the conduct in question as a "crime" (*fanzui*). There are also many similarities between the procedures to be followed in such decisions "not to prosecute" and those previously applicable to "exemption from prosecution." There is still no mention of a suspect's right to present witnesses or new evidence or of a right to counsel, though the fact that all suspects can now engage a lawyer after their case has been transferred to the procuratorate[173] suggests that defense counsel should be permitted to play some role in such proceedings.

The decision "not to prosecute," presumably including reference to the commission of a "minor crime," will still be publicly announced and directly communicated to the suspect's place of work.[174] Under a new article, the procuratorate can now also recommend non-criminal sanctions against the suspect or confiscation of his or her "illegal income" (*weifa suode*).[175] Finally, in perhaps the clearest indication that such a decision "not to prosecute" could carry serious negative connotations, persons

[172]A recently-published commentary by reform-minded legal academics likewise argues that discretionary decisions "not to prosecute" carry no implication of guilt. *Explanation and Application, supra* note 47, at 192.

[173]*See* Chapter II, Section B.

[174]Revised CPL, art. 143.

[175]*Id.*, art. 142(3).

subject to such a decision can still file an appeal, but, as before, only to the procuratorate which made the decision in the first place.[176]

While the precise significance of the substitution of the decision "not to prosecute" for "exemption from prosecution" will emerge from practice under the revised CPL, international law requires nothing less than the strict separation of prosecutorial and judicial functions.[177] It is fundamental to internationally-accepted notions of due process that the determination of all criminal charges be made by an "independant and impartial tribunal."[178] The revisions to the CPL have sharply limited the scope of "exemption from prosecution." If, however, the procuratorate is able to use the decision "not to prosecute" to achieve similar ends, even if only in cases of so-called minor crimes, then the 1996 NPC Decision will not have gone far enough to bring China into conformity with one of the most basic requirements of international law.

D. Trial Process

In his recent annual report to the NPC on the work of China's judiciary, Supreme People's Court President Ren Jianxin announced statistics showing that 99.65% of the people tried for criminal offenses in the Chinese courts in 1995 were found guilty.[179] This phenomenally high

[176]*Id.*, art. 146. The decision "not to prosecute" may also affect a suspect's ability to seek compensation for time spent in detention or other violations of his or her rights. *See infra* note 297 and accompanying text.

[177]Guidelines on the Role of Prosecutors, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, September 1990, art. 10.

[178]Universal Declaration of Human Rights, *supra* note 119, art. 10; ICCPR, *supra* note 108, art. 14(1).

[179]1995 Court Work Report, *supra* note 15, at 3. This figure includes a small percentage of cases (1.45%) in which the defendant was found guilty but "exempted from punishment."

conviction rate is quite evidently a point of pride for Court President Ren, but it is also a graphic demonstration that criminal trials in China are largely an empty formality, the conclusion of which is almost invariably preordained.

To foreign critics these scripted trials may seem like a perversion of the legal system, but in fact they are the logical, indeed the "appropriate," outcome of the procedures established under the 1979 CPL. Having received a case from the procuratorate, a court was only to begin the trial after it had conducted an examination and determined that the facts of the case were "clear" and the evidence was "ample."[180] To this end, the court was to carry out its own inquiry into the facts of the case as well as any mitigating or aggravating circumstances that might affect the sentence.[181]

Since the standard which the courts used to decide if a case was ready for trial — "the facts are clear and the evidence is ample" — was essentially the same as the standard for conviction,[182] what is surprising is not that virtually all criminal trials resulted in convictions, but that there were any acquittals at all. If a court felt that a case had not reached the point where it was ready for trial, it could return it to the

[180]1979 CPL, art. 108.

[181]1994 Court Procedures, *supra* note 23, art. 89.

[182]Interestingly, the 1979 CPL did not contain any explicit standard of conviction. *See* 1979 CPL, art. 120 (the court should render judgment as to whether the defendant is guilty or innocent "based on the facts and evidence that have been clarified and the relevant provisions of law"). In practice, a conviction was warranted if "the facts are clear and the evidence is reliable and ample" (*fanzui shishi qingchu, zhengju queshi chongfen*), the same standard applied by the procuratorate in deciding whether to bring a prosecution. *Id.*, art. 100. *See also Annotated Proposed Draft*, *supra* note 38, at 172-74; Xue Xitang, *Xingshi zhengju shijian yanjiu* [Practical Research on Criminal Evidence] (Law Press, Beijing: 1995), at 208. The revised CPL now makes this conviction standard explicit. Revised CPL, art. 162(1).

procuratorate for supplementary investigation.[183] In this way, before they were actually adjudicated, doubtful cases could be brought up to the standard required for conviction. Where the court felt a case did not require trial at all, either because no crime had been committed or because of various exculpatory circumstances, it could request that the procuratorate withdraw it altogether.[184]

In an additional feature of this "quality control" process, the judges conducting the pre-trial examination typically submitted their conclusions to the court leadership for approval.[185] This was not required under the terms of the 1979 CPL, but was a by-product of the court president's power to overrule any decision of the trial court with which he did not agree.[186] In difficult or important cases, instructions might be sought from the court's top decision-making body, the adjudication committee (*shenpan weiyuanhui*), or even from higher-level courts.[187] Thus before the parties even received notice of the trial, the outcome had already been ratified at all levels of the court system. In Chinese, this is expressed in the phrase *xianding houshen*: "decision first, trial later."

Given that the results of the trial were pre-determined, it is not surprising that the prosecutor and defense lawyer had little incentive to play active roles in the courtroom. Even if they wanted to participate, however, the 1979 CPL allowed them little opportunity to do so. Instead the law assigned the judge the lead in all phases of the trial proceedings, including questioning the defendant and witnesses and producing the

[183]1979 CPL, art. 108.

[184]*Id.*

[185]*See* Wang Shangxin, *supra* note 17, at 81.

[186]1979 CPL, art. 107; 1994 Court Procedures, *supra* note 23, art. 86(6), 86(7).

[187]Wang Shangxin, *supra* note 17, at 81. Seeking pre-trial instructions from the next higher court of course made the appeals process completely meaningless, since the court hearing the appeal would have indicated its preferred outcome even before the original trial began.

evidence and results of any expert evaluations.[188] Under these circumstances, it was of little consequence whether witnesses appeared in person and in practice most testimony was presented in written form.[189]

Criticism within China of the practice of "decision first, trial later" dates back many years.[190] Once the revision of the CPL was placed on the legislative agenda, proponents of reform became more vocal in expressing their critique, principally along two main lines.[191] First, they argued, the court should not substitute itself for the prosecution and the defense in the task of gathering and producing evidence. This violated the principle of differentiation of function and, as a practical matter, burdened the courts with the cost of carrying out extensive pre-trial investigations. In an era of rising prices and shrinking court budgets, this latter, quite practical, concern seems to have been a major factor behind local experiments with a more "adversarial" trial process.[192]

In addition, the court's leading role in the trial process tended to bring it into conflict with one or another of the parties. Since its pre-trial examination was heavily influenced by the materials submitted by the procuratorate, the court most often found itself confronting the defendant

[188]1979 CPL, arts. 114-16.

[189]Wang Shangxin, *supra* note 17, at 81.

[190]*See, e.g.*, Xiang Yintang, "*Xianpan houshen youbei fazhi*" [Sentence First, Trial Later is Contrary to the Legal System], *Guangming Ribao*, August 23, 1988, at 3; Li Shaoping, "*Gai 'xianding houshen' wei 'xianshen houding'*" [Change 'Decision First, Trial Later' to 'Trial First, Decision Later'], 2 *Faxue yanjiu* (1990), at 39.

[191]For useful summaries of the various views on the reform of the trial process, see *Description and Appraisal*, *supra* note 133, at 432-46; *Trial Proceedings and Exemption from Punishment*, *supra* note 163, at 3-138.

[192]Author interview, Beijing, February 1995. *See also* Zhang Xiping & Liu Jian, "*Xingshi shenpan: Bian 'jiuwenshi' wei 'kongbianshi' — Shanghai Xuhuiqu fayuan de jiji tansuo*" [Criminal Adjudication: Changing from 'Inquisitorial Style' to 'Adversarial Style' — Shanghai Xuhui District Court's Active Explorations], in *Trial Proceedings and Exemption from Prosecution*, *supra* note 163, at 69.

or defense counsel. But in the small number of cases where it took an independent approach, it could also end up at odds with the prosecutor. In either circumstance, this detracted from the court's ability to project for itself an image as an arbiter.

The second major criticism of "decision first, trial later" was that it greatly limited the role of the trial court, which was reduced to announcing a decision made by others. Since those deciding the case were not those who heard it, the possibility of error naturally increased. In addition, the separation of trial and decision clearly negated several of the central principles of the CPL, including the requirement of an open trial[193] and the system of recusal.[194] As a practical matter, it also meant that corruption and other forms of influence could be brought to bear on those behind the scenes with real decision-making power.

In response to these criticisms and related practical considerations, the 1996 NPC Decision makes sweeping changes to the trial process. These changes have sometimes been described as introducing more common law adversarial elements into a previously inquisitorial system,[195] but their real aim is two-fold: to differentiate more clearly the judge's function from that of prosecutor and defense lawyer and to give a greater role to the trial court itself.

[193]The 1979 CPL provided that all criminal cases were to be tried in public unless they involved state secrets or the personal affairs of individuals, or the defendant was a juvenile. 1979 CPL, arts. 8, 111(1), 111(2). In those instances where cases were not to be tried in public, the court was to announce in court the reason for the closed trial. *Id.*, art. 111(3). The revised law contains the same provisions with minor changes in terminology. Revised CPL, arts. 11, 152.

[194]Under the 1979 CPL, criminal defendants and other parties had the right to request recusal of judges, prosecutors, investigators, and other judicial personnel whose personal or professional backgrounds created conflicts of interest. 1979 CPL, arts. 23-25, 113. The revised law retains these provisions largely intact. Revised CPL, arts. 28-31, 154.

[195]*See, e.g., Explanation and Application, supra* note 47, at 9.

Toward this latter end, the provisions of the CPL on the powers of the trial court have been revised. Under the original law, whenever the court president felt that a case was "important" or "difficult," he could take it out of the hands of the trial court and bring it to the adjudication committee for decision.[196] Under the revised CPL, the general principle is established that after hearing and deliberating a case, the trial court should reach a verdict. "Difficult, complicated, or important" cases should only be referred onward if the trial court itself finds it difficult to reach a verdict and asks the court president to put the matter before the adjudication committee.[197]

To enhance the importance of the trial and curtail the practice of seeking pre-trial approval of verdicts, the amendments also eliminate the requirement that the court carry out a pre-trial inquiry into the substance of the case. Now in order to open a trial, the court need only conduct a procedural review of the case. Specifically, if the court determines that the indictment presents the facts of the crime charged and is accompanied by a list of the evidence and the witnesses and photocopies or photographs of the major evidence, then it should open the trial.[198] The court's former power to return a case to the procuratorate for either supplementary investigation or dismissal has been eliminated.

Since the substance of the criminal case is no longer to be reviewed by the court ahead of time, this must now occur at the trial itself. Although it retains residual power to conduct investigations and question the defendant and witnesses,[199] under the revised CPL the court takes a decidedly less active role in the trial proceedings. The burden of presenting the evidence and arguing the case is now principally borne by

[196]1979 CPL, art. 107.

[197]Revised CPL, art. 149.

[198]*Id.*, art. 150.

[199]*Id.*, arts. 155, 156, 158.

the prosecutor and defense counsel.[200] Combined with the new provisions permitting lawyers to participate earlier in the criminal process,[201] this will hopefully mean that defendants will be able to present a more effective defense at trial. With the courtroom proceedings accorded some real purpose, the open trial provisions of the CPL have potential to take on more meaning as well. Under the old system, even so-called "open" trials were nothing more than the ritual acting out of decisions that had already been taken in closed, pre-trial proceedings.

Although these are significant improvements over the original law, in many respects the trial process under the revised CPL still falls short of international standards. First, the revised law continues to permit closed trials in cases involving "state secrets."[202] International law acknowledges exceptions to the basic rule of "fair and public" hearings for reasons of "national security in a democratic society,"[203] but the Chinese concept of "state secrets" is so broad that it has the potential to swallow up the

[200]*Id.*, arts. 155-60. It should be noted that the revised CPL also provides for new summary trial procedures (*jianyi chengxu*) under which the role of prosecutor and defense counsel would be considerably more limited. *Id.*, arts. 174-79. At the initiative or with the consent of the procuratorate, these summary procedures can be applied to cases where "the facts are clear and the evidence is ample" and the possible sentence is three years' imprisonment or less. *Id.*, art. 174(1). While the ostensible aim of these new procedures is to increase judicial efficiency, some observers have suggested that they may be used to restrict or eliminate political dissidents' right to counsel and to present a defense. *See* Human Rights Watch/Asia, *China: The Cost of Putting Business First* (New York: 1996) [hereinafter *The Cost of Putting Business First*], at 22.

[201]*See* Chapter II, Section B.

[202]Revised CPL, arts. 11, 152(1); 1979 CPL, arts. 8, 111(1). The revised CPL does, however, now explicitly state that violation of the open trial principle is grounds for the appeals court to vacate a conviction and remand the case for retrial. Revised CPL, art. 191(1).

[203]ICCPR, *supra* note 108, art. 14(1).

general principle.[204] In addition, even in public trials under the revised CPL, it remains to be seen how much latitude (and ability) judges will have to make decisions on motions concerning evidence and other issues.[205] If such decisions are taken behind closed doors, the open trial principle will be significantly devalued.

Second, under the revised CPL, notice of trial will still come quite late: ten days prior to trial rather than seven under the original law.[206] This will have a serious negative impact on the internationally-recognized right to receive adequate time for the preparation of one's defense.[207] For one thing, it is only at the point when the court gives notice of trial that defense counsel has full access to the evidence against his or her client and other details of the prosecution's case.[208] In addition, it is only at this point that appointed counsel becomes available.[209] Where defendants entitled to appointed counsel — including those facing the death penalty — have not engaged one at an earlier stage, their court-assigned counsel will face the near-impossible task of familiarizing themselves with all the case materials and preparing for trial in the course of a few short days.

[204]*See* Gelatt, *supra* note 146; *Criminal Justice with Chinese Characteristics*, *supra* note 32, at 48-52.

[205]Some Chinese legal scholars have expressed their doubts that trial judges will have the authority or competence to make such rulings independently. Author interview, Beijing, January 1996.

[206]Revised CPL, art. 151(2); 1979 CPL, art. 110(2). On the positive side, the 1996 revisions do not incorporate the 1983 NPC-SC Decision, which eliminated the notice of trial for certain violent crimes. *See supra* note 10 and accompanying text. Therefore the court must now give notice to all criminal defendants at least ten days prior to trial.

[207]ICCPR, *supra* note 108, art. 14(3)(b).

[208]Revised CPL, art. 36(2). *See also supra* note 139 and accompanying text.

[209]Revised CPL, art. 151(2); 1979 CPL, art. 110(2). *See also supra* notes 126-128, 151 and accompanying text.

Even where the defense lawyer is well prepared and active at the trial stage, he or she will not have a status equal to that of the prosecutor. Despite the introduction of elements of the adversarial system, the revised trial process is still tilted toward the state. The ability of defense counsel to gather evidence from other parties is considerably more limited than that of the police or procuratorate.[210] Even at the trial stage the defense must still obtain the court's approval to call new witnesses, introduce additional physical evidence or seek further expert evaluations.[211] This is contrary to international standards, which provide that the defendant is entitled to obtain witnesses under the same conditions as the state.[212]

The revised CPL also fails to ensure the defendant's internationally-recognized right to examine the witnesses against him or her.[213] As noted earlier, it has been a common practice in Chinese criminal trials for testimony to be given in written form rather than in person. This ruled out any possibility of cross-examination by the defense. The revised CPL does add a new article on the safety of witnesses which appears designed to encourage more direct evidence,[214] but it retains unchanged the provision in the original law permitting the use in court of transcripts rather than the live testimony of witnesses and experts.[215]

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[210]In order to collect evidence from other parties, the defense must obtain their consent or apply to the court or procuratorate to act on its behalf. Revised CPL, art. 37. By contrast, all persons and institutions have a duty to comply with requests from the police and procuratorate for evidence. *Id.*, arts. 45, 110.

[211]*Id.*, art. 159.

[212]ICCPR, *supra* note 108, art. 14(3)(e).

[213]*Id.*

[214]Revised CPL, art. 49.

[215]*Id.*, art. 157; 1979 CPL, art. 116. As in the original law, the revised CPL sets out the general principle that a witness' testimony — but not the witness him or herself — must be presented in court and subjected to questioning by both prosecution and defense before it can be used as a basis for deciding a case.

Most important, while the revamped trial proceedings have the potential to enhance considerably the role of the trial court, they in no way herald China's acceptance of independence of the judiciary. International law requires that all criminal charges be determined by an "independant and impartial tribunal."[216] The Chinese Constitution, however, speaks not of judicial independence (*sifa duli*) but of the "independent exercise of the power to adjudicate" (*duli xingshi shenpanquan*).[217] This formulation accomodates political control over the selection of judges and the general parameters of judicial work, though not, in theory, over the disposition of individual cases.

Moreover, the "independent exercise of the power to adjudicate" pertains to the court system as a whole, not to individual judges or tribunals. The new rules on referring cases to the adjudication committee attempt to structure the relationships within the judiciary in a way that is more favorable to the trial court, but the court president retains considerable power over the judges under his authority. Under the revised CPL, the court president still chooses the chief judge of the trial court and can serve in that position himself if he deems the case sufficiently important.[218] He also has effective control over judges' career prospects as well as many practical aspects of the conditions under which they work and live.[219] It seems inevitable therefore that the court

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Revised CPL, art. 47; 1979 CPL, art. 36.

[216]Universal Declaration of Human Rights, *supra* note 119, art. 10; ICCPR, *supra* note 108, art. 14(1).

[217]1982 Constitution, *supra* note 22, art. 126.

[218]Revised CPL, art. 147(6); 1979 CPL, art. 105(5).

[219]Under the new Judges Law, for example, the court president chairs the "examination and evaluation committee" (*kaoping weiyuanhui*) within each court. One of the main functions of this committee is to carry out the annual work appraisals on which judges' promotions, salaries, training opportunities, rewards, and penalties are all based. Judges Law of the People's Republic of China,

president will continue to exercise significant influence in individual trials as well as the ability to take cases out of the hands of the trial court and put them before the adjudication committee.

If, in spite of all these constraints, a trial court manages to decide a case in a manner different from that favored by the court president or higher-level authorities, the latter will still have ways of "correcting" the situation. Under both the original and the revised CPL, the procuratorate can "protest" (*kangsu*) an unfavorable verdict to the next higher court,[220] which can then either remand the case for retrial or substitute its own verdict.[221] Alternatively, under the system of "adjudication supervision" (*shenpan jiandu*), either the court president or a higher-level court can reopen a case in which the verdict has already become legally effective.[222]

E. Key Issues Left Unresolved by the Revisions

1. *Presumption of Innocence*

One of the most basic elements of internationally-recognized due process is the right of everyone charged with a criminal offense to be presumed innocent until proved guilty.[223] China is a signatory to international treaties, such as the Convention on the Rights of the Child, which explicitly incorporate this principle.[224] It has also written the presumption of innocence into the basic laws that will govern the

adopted February 28, 1995, arts. 22, 46, 47.

[220]1979 CPL, art. 130; Revised CPL, art. 181.

[221]1979 CPL, art. 136; Revised CPL, art. 189.

[222]1979 CPL, art. 149; Revised CPL, art. 205.

[223]Universal Declaration of Human Rights, *supra* note 119, art. 11; ICCPR, *supra* note 108, art. 14(2).

[224]Convention on the Rights of the Child, *supra* note 36, art. 40(2)(b)(i).

administration of justice in Hong Kong and Macao after they revert to Chinese sovereignty.[225]

By contrast, China's domestic laws on the criminal process make no provision for the presumption of innocence. Technically, Chinese law recognizes no presumption of either guilt or innocence. Rather, the guiding principle at all stages of the process is "taking the facts as the basis and the law as the criterion."[226]

A number of Chinese commentators, including important figures in the NPC, have claimed that despite the absence of an explicit statement of the presumption of innocence, the spirit of the principle pervades the Chinese criminal process.[227] They have suggested that the standard of proof in criminal cases — "the facts are clear and the evidence is reliable and ample"[228] — requires the court to clarify the "objective truth" and therefore exceeds the standard of "beyond a reasonable doubt" applied in common law countries like the United States.[229] They also point out that the CPL requires the state to gather all evidence proving guilt or innocence and that a guilty verdict cannot be reached solely on the basis of the defendant's confession.[230]

If these views constitute the mainstream Chinese position on the presumption of innocence, there have long been other voices arguing for

[225]Basic Law of the People's Republic of China for the Hong Kong Special Administrative Region, adopted April 4, 1990, art. 87(2); Basic Law of the People's Republic of China for the Macao Special Administrative Region, adopted March 31, 1993, art. 29(2).

[226]1979 CPL, art. 4; Revised CPL, art. 6.

[227]The Chairman of the NPC Legislative Affairs Commission, Gu Angran, is reportedly one of those who hold this view. Author interview, Beijing, January 1996.

[228]Revised CPL, art. 162(1). *See also supra* note 182 and accompanying text.

[229]*Annotated Proposed Draft*, *supra* note 38, at 173.

[230]1979 CPL, art. 35; Revised CPL, art. 46.

the need to incorporate the principle openly in domestic law.[231] Presumption of innocence was thus a lively subject of debate in the course of drafting the revisions to the CPL. Prominent legal academics in particular lobbied hard for writing the principle into the CPL, pointing among other things to China's international obligations under the Rights of the Child Convention.[232] In the end, however, their views were not adopted.

On the positive side, the 1996 NPC Decision does make an important symbolic change in language. Whereas the 1979 CPL referred uniformly to the "defendant" (*beigaoren*), the revised law only uses this term in describing proceedings subsequent to the decision to prosecute.[233] At all prior stages of the process, the term "suspect" (*fanzui xianyiren*) is now used. In addition, by lowering the arrest standard, the revisions weaken

[231]For an analysis of competing Chinese views on the presumption of innocence in the 1950s and the early post-Mao period, *see* Timothy A. Gelatt, "The People's Republic of China and the Presumption of Innocence," 73 *Journal of Criminal Law & Criminology* (1982), at 259. For examples of recent positive assessments of the principle, see Xu Wumin, "*Zai lun wuzui tuiding de kequxing*" [Another Discussion of the Desirability of the Presumption of Innocence], 7 *Faxue* (1988), at 11; Zhang Lingjie, Zhang Tao & Wang Minyuan, "*Lun wuzui tuiding*" [On the Presumption of Innocence], 4 *Faxue yanjiu* (1991), at 34, Chen Cengxia, "*Lun 'zuiyi congwu' yuanze*" [On the Principle of 'Assuming Innocence Where Guilt is in Doubt'], 3 *Faxue pinglun* (1992), at 36.

[232]*See, e.g., Annotated Proposed Draft, supra* note 38, at 102-07. This proposed draft CPL, prepared by legal academics at the request of the NPC, contained the following principle: "Prior to a determination of guilt made by a judicial organ in accordance with legal procedures, all persons should be presumed innocent." *Id.*, at 5 (draft art. 10). Contrast this with Article 12 of the Revised CPL: "In the absence of a lawful verdict of the people's court, no person should be determined guilty." As discussed above, Article 12 is a statement of functional responsibility, not the presumption of innocence. *See supra* notes 154-156 and accompanying text.

[233]1996 NPC Decision, *supra* note 55, para. 34.

the implication that all persons subject to arrest are guilty.[234] As discussed above, they also strengthen certain procedural rights usually associated with presumption of innocence, particularly the right to counsel and the right to a fair trial.

On balance, however, the 1996 NPC Decision resulted in little movement toward genuine acceptance of the presumption of innocence. Many other key rights that give substance to the presumption continue to be severely restricted or completely absent. Suspected criminals may still be subjected to long pre-trial detention with no right to bail or *habeas corpus*.[235] The non-custodial forms of detention can be applied without any showing of cause whatsoever.[236] The CPL still recognizes no right to remain silent,[237] no exclusion of illegally-gathered evidence, [238] and no right not to testify against oneself.[239]

Most important, the 1996 NPC Decision failed to achieve a clear-cut resolution of the issue at the heart of the presumption of innocence: the burden of proof. The essence of the presumption is giving the defendant the benefit of the doubt.[240] The argument that the CPL embodies the spirit of the presumption tends to confuse the burden of proof with the burden of producing evidence. The revisions of the trial process reinforce

[234]*See supra* note 80 and accompanying text.

[235]*See supra* notes 111-114 and accompanying text.

[236]*See supra* notes 119-121 and accompanying text.

[237]*See supra* note 149 and accompanying text.

[238]*See* Chapter II, Section E3.

[239]Trial proceedings under both the original and the revised CPL list questioning of the defendant as the first matter of business after the prosecutor has read the indictment. 1979 CPL, art. 114; Revised CPL, art. 155.

[240]United Nations Human Rights Committee, General Comments, CCPR/C/21/Add.3, April 12, 1984, General Comment 13, para. 7.

the prosecution's duty to gather and produce all relevant evidence, but they do not affect the quantum of proof required to convict. The standard of proof is of course relevant to this latter question, but it does not of itself indicate how cases which fail to reach that standard should be disposed of.

It is this core problem — how to handle the "hard" cases — which remains inadequately addressed by the revised CPL. As discussed above, the original law gave the court the power to return to the procuratorate for supplementary investigation cases it felt were not ready for trial, that is, where the evidence was insufficient to warrant a conviction.[241] In practice, this meant that a suspect could end up being held in detention for an extended (indeed, technically unlimited) period while the case passed back and forth between the court and procuratorate. Then in late 1989, the Supreme People's Court issued an interpretation permitting the courts in such cases to end the cycle of supplementary investigations and directly enter a verdict of not guilty.[242] This seemed to bring China very close to recognizing that where the state could not carry its burden of proof, the case should be resolved in favor of the defendant.

Rather than writing this principle into the CPL, however, the 1996 NPC Decision creates a separate category of not guilty for those cases where the evidence is insufficient to substantiate the charges against the

[241]*See supra* note 183 and accompanying text.

[242]Official Reply of the Supreme People's Court Concerning the Question of How to Apply the Law in Pronouncing and Declaring Not Guilty Verdicts in Publicly Prosecuted Cases of the First Instance, November 4, 1989, para. 3, in *Zhonghua renmin gongheguo zuigao renmin fayuan sifa jieshi quanji* [Complete Collection of Judicial Interpretations of the Supreme People's Court of the People's Republic of China], Research Dep't of the Supreme People's Court, ed. (People's Court Press, Beijing: 1994), at 790. This principle was subsequently incorporated into the 1994 Court Procedures, *supra* note 23, art. 127(2).

defendant.[243] This verdict is to be used as a third alternative to a straight guilty verdict and a verdict of not guilty "on the basis of the law."[244] Viewed positively, it provides a way of bringing to a close cases which previously remained unresolved for extended periods of time, much to the detriment of the detained defendant. The clear implication of this new type of verdict, however, is that defendants found not guilty on grounds of insufficient evidence are somehow *less* not guilty. Taken together with the absence or limitation of other key rights, it leaves China still far from full acceptance of the presumption of innocence.

2. *Administrative Sanctions*

As discussed above, one of the main sources of dissatisfaction with "shelter and investigation" was that, as an administrative measure, it was not subject to any effective external checks.[245] With the elimination of "shelter and investigation," detention of suspected criminals is now to take place according to the procedures and subject to the oversight mechanisms contained in the CPL.

However, the 1996 NPC Decision has no effect on another administrative measure commonly employed in China as a substitute for formal criminal punishment. This is the system of "reeducation through

[243]Revised CPL, art. 162(3). The precise language is "[where] the evidence is insufficient and the defendant's guilt cannot be determined, [the court should] declare a verdict of not guilty due to insufficient evidence and inability to establish the crime which is charged" (*zhengju bu zu, bu neng rending beigao ren you zui, yingdang zuochu zhengju bu zu, zhikong de fanzui bu neng chengli de wuzui panjue*).

[244]*Id.*, art. 162(1), 162(2). A recently published commentary on the revised CPL suggests that a verdict of not guilty "on the basis of the law" is appropriate when the court finds that the alleged criminal act either did not occur, does not constitute a crime, or was not committed by the defendant. *Explanation and Application, supra* note 47, at 221.

[245]*See supra* notes 71-72 and accompanying text.

labor" (*laodong jiaoyang*).[246] "Reeducation through labor" in theory applies principally to people who commit minor offenses that do not rise to the level of crimes, but it has also been widely used against political dissidents.[247] "Reeducation through labor" lasts from one to four years and is carried out under conditions largely indistinguishable from prison camps. According to official statistics, there were 178,377 inmates in such "reeducation through labor" facilities in 1994.[248]

As a non-criminal sanction, "reeducation through labor" is subject to none of the procedural constraints set out in the CPL. "Reeducation through labor" decisions are made by administrative committees dominated by the police. Persons subject to these proceedings have no right to counsel or to a hearing, let alone a judicial determination of their obligations.[249] Since 1990, there have been reports of "reeducation through labor" decisions being overturned in suits under the Administrative Litigation Law,[250] but these appear to represent a tiny fraction of the total number of such cases.

On the same day that it approved the revisions to the CPL, the NPC also passed a new law regulating administrative sanctions, including

[246]Decision of the State Council Regarding the Question of Reeducation through Labor, approved by the Standing Committee of the National People's Congress, August 1, 1957; Supplementary Provisions of the State Council on Reeducation through Labor, approved by the Standing Committee of the National People's Congress, November 29, 1979; Provisional Measures on Reeducation through Labor, adopted January 21, 1982.

[247]*See, e.g., Punishment without Crime, supra* note 32, at 38-48; *Criminal Justice with Chinese Characteristics, supra* note 32, at 71-76.

[248]*China Law Yearbook 1995, supra* note 27, at 1078.

[249]Provisional Measures on Reeducation through Labor, *supra* note 246, arts. 11, 12.

[250]*See, e.g., Essential Cases 1994, supra* note 72, at 1455.

"reeducation through labor."[251] This statute is principally designed to demarcate the powers of different levels of government to stipulate administrative sanctions and to clarify the procedures to be followed in imposing them. Among other things, it states that administrative sanctions which involve deprivation of personal liberty must be based on laws passed by the NPC.[252] However, this will have no impact on "reeducation through labor," which has been ratified by the NPC.[253]

3. *Use of Illegally-Gathered Evidence*

The 1979 CPL contained no provision barring the use of illegally-gathered evidence. It mandated that the courts, procuratorate and police should gather evidence "according to legal procedures" and specified as illegal the use of such methods as torture, threats, enticement and fraud.[254] But it did not create any standard or mechanism for excluding evidence gathered by such methods.

Instead, the 1979 CPL placed on the procuratorate the principal burden of supervising the legality of criminal investigations. In reviewing both decisions to arrest and decisions to prosecute, the procuratorate was to determine whether or not the investigation had been conducted in

[251]Administrative Penalties Law of the People's Republic of China, adopted March 17, 1996.

[252]*Id.*, art. 9(2).

[253]*See supra* note 246.

[254]1979 CPL, art. 32. The Criminal Law provides specific penalties for the use of torture to coerce a statement. Criminal Law, *supra* note 158, art. 136. It also sets out sanctions for causing injuries in the course of an unlawful detention and subjecting prisoners to "serious" corporal punishment and abuse. *Id.*, arts. 143, 189. For a critique of these provisions as inadequate to curb torture and physical abuse of detainees and prisoners, *see* Amnesty International, *China: Torture and Ill-Treatment* (London: 1993), at 4-6.

accordance with lawful procedures.[255] Again, however, there was no requirement that a finding of illegal actions lead to exclusion of any evidence so gathered. If the procuratorate discovered that a police investigation involved illegal acts, it was simply to issue an oral or written notice to that effect and "supervise and urge" (*ducu*) the police to take corrective steps.[256]

In 1994, however, the Supreme People's Court (SPC) issued rules on criminal adjudication providing that statements of witnesses, victims, or defendants gathered through torture, threat, enticement, or fraud could not be used as evidence.[257] Although they did not extend to physical evidence or to evidence gathered by other illegal means, the SPC's 1994 rules created the first procedural basis for excluding illegally-gathered evidence. At the same time, the SPC directed appellate tribunals to review the legality of actions at all stages of the criminal process and to remand for retrial all cases marred by the use of inadmissible evidence.[258]

During the drafting of the revisions to the CPL, proponents of stricter control over investigation activities cited the 1994 SPC rules to bolster their case for some form of exclusionary rule.[259] While willing to consider a "national security" exception to a blanket ban on illegally-gathered evidence, they insisted that all evidence gathered through torture must be excluded. They argued that this was not only necessary to create a disincentive to torture, but was also mandated by the terms of the

[255]1979 CPL, art. 52, 96(5); 1991 Procuratorate Work Rules, *supra* note 23, arts. 58-64.

[256]1991 Procuratorate Work Rules, *supra* note 23, art. 60.

[257]1994 Court Procedures, *supra* note 23, art. 45.

[258]*Id.*, arts. 155(3), 162(5). The grounds for remand appear to include the use of any illegally-gathered evidence (*yong feifa fangfa shouji zhengju de*), but presumably this was actually directed against evidence gathered through the specific illegal methods listed in Article 45.

[259]*See Annotated Proposed Draft, supra* note 38, at 168-72.

Convention Against Torture, to which China had become a party in 1988.[260]

Ultimately, however, the 1996 NPC Decision made no significant changes to the CPL's rules on illegally-gathered evidence. The revised law retains the prohibition on torture and other illegal means of gathering evidence, but provides no mechanism for its exclusion.[261] The standard for remand on appeal has been broadened, but the use of tainted evidence is not listed as sufficient grounds for a new trial.[262]

The result is even heavier reliance on the procuratorate to raise and seek correction of illegal actions occurring during criminal investigations.[263] As noted earlier, however, this in no way ensures that any evidence gathered as a result of such actions will be excluded at trial. It is conceivable that the SPC might be able to restore some of the spirit of its 1994 rules in implementing regulations under the revised CPL. However, the 1996 NPC Decision represents a clear failure to bring China into compliance with the Torture Convention and make the exclusion of illegally-gathered evidence a basic principle of the Chinese criminal process.

[260]Convention Against Torture, *supra* note 36, art. 15 ("any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings").

[261]Revised CPL, art. 43.

[262]*Id.*, art. 191. This omission is all the more notable because the revised CPL incorporates most of the other grounds for remand enumerated in the 1994 Court Procedures. Article 191 is also expressly limited to illegal circumstances occurring during the original trial (*di yi shen renmin fayuan de shenli*), suggesting that the appeals court cannot remand on the basis of any illegal acts in the investigation or prosecution stages. *See infra* notes 283-284 and accompanying text.

[263]Revised CPL, arts. 76 (review of decision to arrest), 137(5) (review of decision to prosecute).

4. *Right to Appeal*

In contrast to its fundamental reshaping of the trial process, the 1996 NPC Decision makes only minor modifications to the existing system of appeals. The revised CPL includes a new article confirming the general rule that appeals should be heard in open court rather than via written motions.[264] As noted in the prior section, it also expands the grounds for remand. Finally, the revised law specifies that upon remand, the lower-level court should organize a new tribunal to hear the retrial.[265]

However, none of these changes address the fundamental problem in the appellate process in China: the reluctance of defendants to appeal. Chinese researchers have documented the steady decline in appeal rates since the CPL first became effective. Whereas early on most defendants appealed unfavorable verdicts, by the mid-1980s, the appeal rate had fallen below 20%.[266] The latest figures indicate that this trend has continued. In 1994, the appeal rate was barely over 10%.[267]

There are of course many possible explanations for defendants' reluctance to appeal. For one thing, appeals are generally unsuccessful,[268] in part no doubt due to the fact that the higher court has frequently

[264]*Id.*, art. 187.

[265]*Id.*, art. 192. The 1979 CPL had no such requirement, with the result that remands were often heard by the same judges who presided over the original trial. *See* 1979 CPL, art. 139.

[266]Wang Minyuan, *supra* note 13, at 535-36.

[267]*China Law Yearbook 1995*, *supra* note 27, at 1065-66.

[268]Published statistics on appeals are hard to analyze, but the available figures for 1994 suggest that over 75% of appeals resulted in no change in the verdict. Of the 25% of the cases where the appeals court either entered a new verdict or remanded for retrial, a substantial, but indeterminate, number actually resulted in a heavier sentence. *Id.*, at 1066.

reviewed and approved the sentence prior to the original trial.[269] But an even more substantial disincentive is the possibility that the outcome of an appeal will be more unfavorable to the defendant than the original verdict.

In theory this should not happen. The 1979 CPL clearly stated that courts should not impose heavier sentences upon appeal except where their review was occasioned by a "protest" (*kangsu*) lodged by the procuratorate.[270] In practice, however, the courts have found myriad ways to circumvent this restriction.[271] The NPC was presented with proposals to plug some of the more gaping loopholes,[272] but chose not to accept them. As a result, criminal defendants in China will continue to experience significant curtailment of their internationally-recognized right to appeal.[273]

5. *Remedies*

International law recognizes that in order to safeguard fundamental rights, everyone must have an effective remedy against violations of those rights.[274] The 1979 CPL provided that participants in the criminal process had the right to lodge complaints (*tichu konggao*) against actions of the police, procuratorate, or courts which infringed their procedural

[269]*See supra* notes 185-187 and accompanying text.

[270]1979 CPL, art. 137(1).

[271]*See* Wang Minyuan, *supra* note 13, at 535-36 (listing five specific avenues of circumvention). *See also* Margaret Y.K. Woo, "The Right to a Criminal Appeal in the People's Republic of China, 14 *Yale Journal of International Law* (1989), at 118, 137-41.

[272]*See Annotated Proposed Draft*, *supra* note 38, at 326-29.

[273]ICCPR, *supra* note 108, art. 14(5).

[274]Universal Declaration of Human Rights, *supra* note 119, art. 8.

rights or personal dignity.[275] However, the 1979 CPL actually created very few avenues by which a criminal suspect or defendant could seek a remedy for rights violations. Moreover, the effectiveness of those remedies which did exist depended on the discretion of state officials.

The 1996 NPC Decision makes no fundamental change in this regard. During the investigation phase, a suspect's sole direct remedy is to demand release if his or her detention has exceeded the legally-stipulated time limits.[276] As discussed earlier, the suspect has no direct remedy for a detention that is illegal or inappropriate from its inception.[277] At the prosecution stage, a suspect can seek reconsideration of a decision "not to prosecute" a minor crime, but only by the same procuratorate which made the initial determination.[278]

At the trial stage, the remedies for violations of defendants' rights are in some respects more limited under the revised CPL than under the original law. The old system of pre-trial examination included inquiry into the legality of actions in the investigation and prosecution stages. If the court discovered serious illegalities which could influence the "correct" adjudication of the case, it could return the case to the procuratorate for supplementary investigation.[279] Under the new, simplified pre-trial procedure the defendant will likely not have an opportunity to raise such issues. In any event, the courts are no longer authorized to return cases to the procuratorate unless, presumably, they fail to meet the minimal formal requirements for trial.[280]

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[275]1979 CPL, art. 10(3).

[276]Revised CPL, art. 75.

[277]*See supra* note 101 and accompanying text.

[278]Revised CPL, art. 146. *See also supra* note 176 and accompanying text.

[279]1979 CPL, art. 108; 1994 Court Procedures, *supra* note 23, art. 87(10).

[280]*See supra* note 198 and accompanying text.

The appellate court is now empowered to remand cases for retrial if it discovers any of a number of irregularities, including violation of the open trial principle.[281] It can also order a new trial where the defendant's procedural rights have been abridged or other acts have occurred contrary to legal procedures, but only if the circumstances are serious enough that they might "influence fair adjudication."[282] However, unlike the 1994 SPC rules, which permitted the appeals court to inquire into the lawfulness of actions at all prior stages of the process,[283] the revised CPL retains the language in the original law restricting the grounds for remand to improprieties occurring at the original trial.[284]

Given the paucity of direct remedies and the limits of the courts' power to review official acts in the pre-trial phase, a suspect's or defendant's principal means of seeking a remedy is precisely what the revised CPL states: lodge a complaint.[285] The law does not indicate to whom complaints should be lodged, but presumably they should first be directed to the agency responsible for the violation or its administrative superior. If the suspect or defendant fails to get a satisfactory response, then the next step would be to seek the help of the procuratorate.

The procuratorate's role as the institution primarily responsible for ensuring that all criminal proceedings are carried out in accordance with the law has now been enshrined in the General Principles section of the revised CPL.[286] As discussed above, the procuratorate is specifically

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[281]Revised CPL, art. 191.

[282]*Id.*, art. 191(3), 191(5). This language is a modest improvement over the 1979 CPL, which only allowed remand if the procedural irregularities rose to the level of influencing "correct" adjudication. 1979 CPL, art. 138.

[283]1994 Court Procedures, *supra* note 23, art. 156(3).

[284]Revised CPL, art. 191; 1979 CPL, art. 138.

[285]Revised CPL, art. 14(3).

[286]*Id.*, art. 8.

empowered to review the legality of police actions at the point when it reviews decisions to arrest and decisions to prosecute.[287] It is also authorized to raise and seek correction of any procedural violations occurring in the courts' handling of criminal cases.[288]

However, neither the CPL nor any other law provides a mechanism by which the procuratorate can be forced to carry out its responsibilities as legal watchdog. Thus the procuratorate has unfettered discretion to decide whether and how to act in response to a suspect's complaint that his or her rights have been violated. This becomes particularly problematic when the violator is the procuratorate itself,[289] since the other legal institutions do not have the authority to compel the procuratorate to act or to investigate such matters themselves.

It is also important to note that violation of a suspect's rights, no matter how serious, never leads automatically to the termination of the proceedings against him or her. The remedy for a detention that exceeds the legal time limits is either release or a change in the type of detention.[290] The only available remedy at the appeals stage is remand for a new trial. If the procuratorate discovers or is alerted to police

[287] *Id.*, arts. 76, 137(5); 1979 CPL, arts. 52, 96(5). *See also* 1991 Procuratorate Work Rules, *supra* note 23, arts. 58-64.

[288] Revised CPL, art. 169; 1979 CPL, art. 112(2). *See also* 1991 Procuratorate Work Rules, *supra* note 23, arts. 90-92. The procuratorate can also activate the appeals process by "lodging a protest" (*kangsu*) against a trial court decision where it believes violations of procedural rights have affected the "correct adjudication" of the case. *Id.*, art. 76(5).

[289] The greatest potential for this arises in cases of corruption, official misconduct, etc. where the procuratorate, rather than the police, has the authority to conduct the initial investigation. Revised CPL, art. 18(2). In theory, the procuratorate has created internal checks on its own investigators by delegating to different sub-divisions the responsibility for investigations and for decisions to arrest or prosecute. *See* 1991 Procuratorate Work Rules, *supra* note 23, arts. 20(2), 43, 61.

[290] Revised CPL, art. 75. The reference to a change in type of detention most likely means moving a suspect from custodial to non-custodial detention.

misconduct, it may issue a "notice of illegality" (*weifa tongzhi shu*) and seek corrective measures[291] or order supplementary investigation. [292] It may also refuse to approve an arrest or to bring a prosecution where the police have acted illegally, but at no time is the procuratorate obliged to dismiss a criminal matter altogether solely as a result of infringement of a suspect's or defendant's rights.

In addition to directly or indirectly pursuing a remedy, victims of rights violations occurring in the criminal process are now also able to seek compensation for damages under a new State Compensation Law.[293] It is still too early to say how the compensation system will work in practice. In the first year since the law became effective on January 1, 1995, the Chinese courts only heard 197 compensation cases.[294]

On its face, however, the State Compensation Law suffers from two defects that seem likely to limit its effectiveness as a means of recourse against official misconduct in the criminal process. First, before compensation can be awarded, the law requires confirmation (*queren*) that the violation complained of is in fact compensable.[295] This is not a problem, for example, in claims for wrongful pre-arrest detention (*cuowu*

[291] *Id.*, art. 76; 1991 Procuratorate Work Rules, *supra* note 23, art. 60.

[292] Revised CPL, arts. 68, 140(2).

[293] State Compensation Law of the People's Republic of China, adopted May 12, 1994 [hereinafter State Compensation Law]. The 1982 Constitution provided for the right to compensation for damages caused by state agencies or officials. *See* 1982 Constitution, *supra* note 22, art. 41(3). However, specific procedures for seeking compensation, particularly from law enforcement and judicial officials, were lacking until the passage of the State Compensation Law.

[294] 1995 Court Work Report, *supra* note 15, at 3. According to the same source, 54 of these cases resulted in compensation, but it is not known how many involved rights violations in the criminal process. *Id.* Not all claims for compensation under the State Compensation Law will necessarily lead to litigation, but the numbers still suggest that the new law is not being widely used.

[295] State Compensation Law, *supra* note 293, art. 20(1).

juliu), since the procuratorate's decision not to approve arrest serves to confirm the illegality of original police action. Likewise, if a police officer is formally charged and convicted of mistreating a detainee, the court's verdict serves to confirm the victim's right to compensation.

If, however, in the same case of torture, the procuratorate does not initiate a formal prosecution against those responsible, the power to confirm rests with the agency from which compensation is sought, i.e., the alleged torturers themselves. Moreover, the only avenue of appeal against a decision not to confirm is to seek reconsideration by that same agency.[296]

The second major flaw stems from the law's adoption of the principle of "no compensation to the guilty" (*youzui bupei*). This means that no compensation is due, for example, to a defendant who serves a longer sentence than his or her crime warrants or who is held in prison beyond the term of the sentence. It also allows the courts to use the provisions of the CPL on "minor" offenses to release a defendant but deny him or her the right to seek compensation for time spent in pre-trial detention.[297]

Chinese jurists and legal scholars concerned about these and other weaknesses in the State Compensation Law had hoped that the revised CPL would provide some mechanism for expanding the availability of compensation for violations of rights in the criminal process. One proposed improvement would be to authorize the courts to confirm compensability in cases of torture or physical abuse. However, the 1996 NPC Decision fails to address this issue.

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[296]*Id.*, art. 20(2). Knowledgeable Chinese sources could point to no known cases where victims of torture have received compensation under the new law. Author interview, Beijing, January 1996.

[297]State Compensation Law, *supra* note 293, art. 17(3). The same reasoning would presumably block claims for compensation from suspects "exempted from prosecution," since they too are deemed guilty, albeit without a trial. *See* Chapter II, Section C. It remains to be seen whether this will now likewise apply under the revised CPL to suspects with regard to whom the procuratorate makes a decision "not to prosecute" because the circumstances of their crimes are "minor." *See supra* notes 171-176 and accompanying text.

III. Conclusions and Recommendations

The 1996 NPC Decision is the most significant legislative development in China's criminal justice system in nearly 20 years. However, many other steps need to be taken before the reforms contained in the Decision can be realized in practice. In the months leading up to the effective date of the revised CPL — January 1, 1997 — the Chinese legal bureaucracies will be drafting and issuing detailed implementing regulations. The impact of these regulations is likely to be particularly great in those areas where the revised CPL breaks new ground, including the role of defense counsel, legal aid and trial procedures. In addition, they may clarify important issues, such as the scope and significance of discretionary decisions "not to prosecute" and the courts' power to exclude illegally-gathered evidence, which were left vague in the revised law itself.

Obviously, the extent to which the 1996 NPC Decision is given practical effect will also depend on many factors beyond the letter of the CPL and its implementing regulations. Chinese police, prosecutors, and judges will all need to relearn their roles in the criminal justice process. Chinese lawyers will likewise need new skills as well as appropriate incentives and guarantees if they are to provide more active assistance to criminal defendants. Large-scale public education will be required to inform Chinese citizens about the revised CPL and their rights and obligations thereunder.

All of these efforts will in turn depend heavily on the commitment of public resources. There are some early indications that the Chinese government recognizes that additional measures must be taken if criminal justice reform is to go beyond the formalistic legislative stage. For example, the texts of the 1996 NPC Decision and the revised CPL have been published in major newspapers[298] and widely distributed through

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[298]*See supra* note 55.

official channels.[299] Both academic and practice-oriented commentaries on the revised law and its application are beginning to appear.[300] The legal bureaucracies have undertaken to organize retraining courses for judges, prosecutors and police.[301] However, given China's size and population, the scope of the efforts that will be required is huge.[302] Thus even if the Chinese government makes a comprehensive commitment to the full and accurate implementation of the revised CPL, it seems likely that, in the short term at least, criminal cases will be handled inconsistently in different courts in different parts of the country.

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[299]*See, e.g.*, 2 *Zhonghua renmin gongheguo zui gao renmin fayuan gongbao* (1996), at 39; 1-2 *Zhonghua renmin gongheguo zui gao renmin jianchayuan gongbao* (1996), at 9. These official gazettes are the principal means by which the courts and procuratorates communicate major legal and policy developments to judges and prosecutors throughout the country.

[300]*See, e.g., Explanation and Application, supra* note 47; *New Development, supra* note 170; Huang Yuntai, "*Xingshi susong zhidu de zhongda gaige*" [A Major Reform of the Criminal Procedure System], 2 *Zhongguo faxue* (1996), at 29; Xie Youping, "*Lixiang yu xianshi: ping xiugai hou de 'xingshi susongfa'*" [Ideal and Reality: Analyzing the Revised "Criminal Procedure Law"], 2 *Xiandai faxue* (1996), at 9; He Weifang, "*Xingshi shenpan chengxu: xin jinbu*" [The Criminal Trial Process: New Progress], 7 *Baike zhishi* (1996), at 32.

[301]*See, e.g.*, Guo Guanghua & Tian Jun, "*Guanche 'liang fa' yingjie xin de tiaozhan — gonganbu guanche 'liang fa' huiyi ceji*" [Greet the New Challenge of Implementing the "Two Laws" — Sidelights on the Ministry of Public Security Conference on Implementing the "Two Laws"], 9 *Renmin gongan* (1996), at 18; Chen Weidian, "*Nuli xuexi, renzhen zhunbei, yingjie 'jueding' de shishi*" [Study Hard, Prepare Conscientiously, Greet the Implementation of the "Decision"], 5 *Renmin jiancha* (1996), at 6.

[302]China has roughly 150,000 judges, an equal number of prosecutors, and over 850,000 police officers. *See Zhongguo falu nianjian 1992* [China Law Yearbook 1992], China Law Yearbook Editorial Dep't, ed. (China Law Yearbook Publishing House, Beijing: 1992), at 859 (judges); *China Law Yearbook 1995, supra* note 27, at 1068 (prosecutors); *Zhongguo falu nianjian 1993* [China Law Yearbook 1993], China Law Yearbook Editorial Dep't, ed. (China Law Yearbook Publishing House, Beijing: 1993), at 946 (police).

In fact, if past history is any guide, the Chinese government will not necessarily abide by the revised law at all times, particularly in politically sensitive cases. The detentions and trials of political dissidents after the 1989 Tiananmen incident provided ample evidence of the government's willingness to manipulate or circumvent the legal process when it sees its vital interests at stake.[303] The pressure which the Chinese leadership is constantly exerting on the criminal justice system to serve the ends of *yanda* ("strike hard")[304] increases the chances the revised CPL will be given short shrift in ordinary criminal cases as well.

Still, the 1996 NPC Decision demonstrates that China has begun to reorient its basic approach to criminal justice away from a dominant preoccupation with social control toward a somewhat greater concern for the protection of defendants' rights. It also sets a stricter standard against which the government's actions, including those that contravene the revised CPL itself, can be judged. Perhaps most significantly, some of the specific reforms contained in the Decision — elimination of "shelter and investigation," expansion of the right to counsel, limits on non-judicial

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[303]*See, e.g., Criminal Justice with Chinese Characteristics, supra* note 32; Asia Watch, *Rough Justice in Beijing* (New York: 1991). This pattern persists to the present in the harassment and extra-legal detention of dissidents who have completed their jail sentences. *See* Patrick E. Tyler, "Chinese Aide, Released from Prison, Is Still Held in Isolation," *The New York Times*, September 10, 1996, at A7.

[304]In fact, within weeks after the passage of the 1996 NPC Decision, the CCP ordered the opening of a new phase in the "strike hard" campaign. *See* Ren Jianxin, "*Zai gonganbu yanda gongzuo huiyishang de jianghua (zhaiyao)*" [Speech at Ministry of Public Security Work Conference on Striking Hard (Summary)], 9 *Renmin gongan* (1996), at 4. In the months since, more than 1000 criminals have been executed, some reportedly after highly abbreviated legal proceedings. *See The Cost of Putting Business First, supra* note 200, at 8; George Wehrfritz, "Crime: You Die, I Live," *Newsweek*, July 22, 1996, at 67; Brian Palmer, "One Strike and You're Out," *U.S. News & World Report*, September 2, 1996, at 45. Since the revised CPL is not yet in effect, its expanded procedural protections do not apply to these defendants. However, the same campaign mentality and top-down pressure for results which characterize the current anti-crime drive may pose a major obstacle to the faithful implementation of the revised law after January 1, 1997.

determinations of guilt and establishment of a more transparent trial process — give hope of a trend toward greater incorporation of international human rights norms into the Chinese criminal justice system.

The key question for the future is how to encourage this trend. The sober truth is that, while the 1996 NPC Decision marks important progress toward bringing the Chinese criminal justice process into conformity with international norms, it cannot obscure the many respects in which China still does not meet those standards. Moreover, as noted above, the enactment of changes in the written law does not ensure that they will be carried out in practice.

External pressure clearly played a role in shaping key elements of the 1996 NPC Decision.[305] This demonstrates that continuous monitoring and evaluation of the Chinese criminal justice system is critically important not only in identifying and challenging violations of fundamental human rights but also in creating a base of knowledge about Chinese law and practice from which to promote China's compliance with international norms. Multilateral human rights bodies, governments, nongovernmental human rights groups and academic experts should redouble their efforts to keep the international community informed about China's achievements and failings in human rights protection.

At the same time, additional energy and resources must be committed to programs of international exchange and technical assistance that will help strengthen the case within China for further reforms. One of the most striking features of the 1996 NPC Decision is the degree to which international human rights norms and foreign legal experience have

[305]This is most clear in the case of "shelter and investigation." *See supra* notes 66-79 and accompanying text. Subsequent to the 1996 NPC Decision, one Ministry of Public Security official candidly cited the international controversy over "shelter and investigation" as one reason for its elimination. *See* Guo Guanghua, *"Jin yibu wanshan 'xingsufa' de zhongda jucuo"* [A Major Step in the Further Improvement of the "Criminal Procedure Law"], 9 *Renmin gongan* (1996), at 16, 17.

entered into the domestic Chinese discourse on criminal justice.[306] This increased familiarity with international practice is a direct result of legal exchanges dating back to the late 1970s as well as China's more recent willingness to engage in dialogue on human rights issues. Foreign law schools and legal research institutes should build on these existing linkages in order to help their Chinese counterparts improve their capacity to teach and conduct research on human rights, particularly in the criminal justice field.[307]

Through their scholarship and publications, these academic centers can be expected to play an important role in expanding awareness of international human rights among both policy-makers and the general public in China. However, there is also a need to work directly with the institutions that make up the criminal justice system. Several of the major reforms in the 1996 NPC Decision reflect a clearer differentiation of function among the police, procuratorates, and courts.[308] Further movement in this direction should be promoted by assisting these institutions to develop training programs which strengthen their members'

[306]*See supra* notes 31, 36-38 and accompanying text.

[307]Since the early 1990s, research centers on human rights have been established at a number of Chinese academic institutions, most notably Wuhan University School of Law and the Institute of Law at the Chinese Academy of Social Sciences. The Institute of Law has been particularly active in international exchange. In early 1996, China University of Politics and Law created a research institute focusing specifically on criminal justice reform.

[308]The elimination of "shelter and investigation," for instance, can be seen as plugging one gap by which the police circumvented the procuratorate's sole authority to approve arrests. Limiting "exemption from prosecution" likewise checks the procuratorate's intrusion on the courts' power to adjudicate guilt or innocence. The reform of the trial process will, among other things, mean a clearer differentiation of the roles of judge, prosecutor, and defense counsel.

sense of professional identity.[309] While it is unlikely in the short term that political influence can be eliminated altogether from the Chinese legal system, the 1996 NPC Decision suggests that a stronger sense of professional identity may contribute to the development of more checks and balances in the criminal justice process.

Building on the revised CPL's expansion of the right to counsel, particular attention should be focused on enhancing the capacity of the Chinese bar to provide effective services to criminal defendants. Chinese lawyers who are retooling their skills to take a more active role in the criminal process can learn much from their counterparts elsewhere in the world. Foreign lawyers and bar associations should seek opportunities to contribute to professional development programs in China.[310] Their experiences will likewise be highly relevant to China's efforts to flesh out the details of the expanded legal aid system called for under the revised CPL and the new Lawyers Law.[311]

All of these various types of external involvement should be directed explicitly or implicitly toward encouraging China to bring its criminal justice process into full compliance with international human rights standards. Specific areas where the Chinese government needs to adopt further reforms include the following:

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[309]The United Nations Development Programme has recently provided funds to strengthen China's premier judicial training institute, the China Training Center for Senior Judges (*Zhongguo gaoji faguan peixun zhongxin*). The procuratorate has an analogous institution, the China Procuratorial Management Institute (*Zhongguo jianchaguan guanli xueyuan*), which has received support from, among others, the Ford Foundation.

[310]The Ministry of Justice runs a system of in-service training centers for lawyers similar to those administered by the courts and procuratorates. Professional development opportunities for Chinese lawyers are also provided through the national bar association (the All-China Lawyers Association), local bar associations, and a growing number of law school-based training programs.

[311]*See supra* notes 126-127, 153 and accompanying text.

1) All forms of detention and arrest ("coercive measures" under the CPL) should be subject to prompt judicial review. Police discretion to hold suspected criminals without prompt judicial review should be eliminated.[312]

2) Anyone subject to any form of detention or arrest should have the right to bring a *habeas corpus* proceeding to challenge that detention or arrest.[313]

3) A genuine system of bail should be established. Subject to reasonable exceptions, anyone awaiting trial should be entitled to release on bail.[314]

4) Detainees' right to communicate with their families should be fully respected. Police discretion to dispense with notification of detainees' families should be eliminated.[315]

5) The grounds for the non-custodial forms of detention under the CPL ("supervised residence" and "taking a guarantee and

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[312]ICCPR, *supra* note 108, art. 9(3) ("Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power.") *See supra* notes 108-110 and accompanying text.

[313]ICCPR, *supra* note 108, art. 9(4) ("Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.") *See supra* notes 113-115 and accompanying text.

[314]ICCPR, *supra* note 108, art. 9(3) ("It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial.") *See supra* notes 111-112 and accompanying text.

[315]Body of Principles on Detention, *supra* note 58, art. 16 ("Promptly after arrest and after each transfer from one place of detention or imprisonment to another, a detained or imprisoned person shall be entitled to notify or to require the competent authority to notify members of his family or other appropriate persons of his choice.") *See supra* notes 116-117 and accompanying text.

awaiting trial") should be clearly specified to avoid their indiscriminate and arbitrary use.[316]

6) All suspects should be given notice of their right to counsel immediately upon detention or arrest. Police discretion to restrict suspects' access to counsel on grounds of "state secrets" should be eliminated.[317]

7) All suspects and defendants without the means to pay for a lawyer should be entitled to free legal assistance. Inability to afford a lawyer should give rise to mandatory rather than merely optional appointment of counsel.[318]

8) The confidentiality of lawyer-client communications should be strictly respected. Police discretion to be present at lawyer-client meetings should be eliminated.[319]

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[316]Universal Declaration of Human Rights, *supra* note 119, art. 9 ("No one shall be subject to arbitrary arrest, detention, or exile.") *See supra* notes 119-121 and accompanying text.

[317]Body of Principles on Detention, *supra* note 58, art. 17(1) ("A detained person shall be entitled to have assistance of a legal counsel. He shall be informed of his rights by the competent authority promptly after arrest and provided with reasonable facilities for exercising it.") *See supra* notes 146-148 and accompanying text.

[318]ICCPR, *supra* note 108, art. 14(3)(d) ("In the determination of any criminal charge against him, everyone shall be entitled . . . to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.") *See supra* notes 152-153 and accompanying text.

[319]Body of Principles on Detention, *supra* note 58, art. 18(4) ("Interviews between a detained or imprisoned person and his legal counsel may be within sight, but not within the hearing, of a law enforcement official.") *See supra* note 144 and accompanying text.

9) All determinations of criminal responsibility should be made after a public hearing before an independent tribunal. All sources of interference with judicial independence should be eliminated.[320]

10) Prosecutorial discretion to make de facto determinations of guilt through decisions "not to prosecute" should be sharply limited and subject to judicial oversight.[321] Administrative sanctions such as "reeducation through labor" which circumvent the formal criminal justice process should be eliminated.[322]

11) The grounds for closing trials to the public should be clearly specified and conform to the requirements of international law.[323]

12) All suspects and defendants should be presumed innocent until proven guilty. Any invidious distinction between defendants found not guilty "on the basis of the law" and those found not guilty "due to insufficient evidence" should be eliminated.[324]

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[320]ICCPR, *supra* note 108, art. 14(1) ("In the determination of any criminal charge against him . . . everyone shall be entitled to a fair and public hearing by a competent, independent, and impartial tribunal established by law.") *See supra* notes 216-222 and accompanying text.

[321]*See* Chapter II, Section C.

[322]*See* Chapter II, Section E2.

[323]ICCPR, *supra* note 108, art. 14(1) ("The Press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the Parties so require, or to the extent necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.") *See supra* notes 202-204 and accompanying text.

[324]Universal Declaration of Human Rights, *supra* note 119, art. 11(1) ("Everyone charged with a penal offense has the right to be presumed innocent until proved guilty.") *See* Chapter II, Section E1.

13) All defendants should be given adequate time to prepare their defense at trial. Appointed counsel should be made available at all stages of the criminal process rather than shortly prior to trial.[325]

14) Statements gathered through torture should be strictly inadmissible as evidence.[326]

15) Defendants should have the opportunity to cross-examine adverse witnesses and the right to call witnesses under the same conditions as the state. The practice of permitting the use of transcripts rather than the live testimony of witnesses should be discontinued.[327]

16) Defendants' right to appeal should be strictly safeguarded. Loopholes in the CPL which permit courts to impose heavier penalties on appeal should be eliminated. The practice of lower

[325]ICCPR, *supra* note 108, art. 14(3)(b) ("In the determination of any criminal charge against him, everyone shall be entitled . . . [t]o have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing.") *See supra* notes 206-209 and accompanying text.

[326]Convention Against Torture, *supra* note 36, art. 15 ("Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.") *See* Chapter II, Section E3.

[327]ICCPR, *supra* note 108, art. 14(3)(e) ("In the determination of any criminal charge against him, everyone shall be entitled . . . [to] examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.") *See supra* notes 210-215 and accompanying text.

courts' seeking instructions from higher courts prior to rendering their verdicts should be ended.[328]

17) Remedies for violations of suspects' and defendants' rights should be strengthened. Official discretion to refuse to investigate and remedy such violations should be sharply curtailed.[329]

It would not be realistic to think that all of these additional reforms will necessarily be adopted in the near future. They are likely to come only incrementally, and only if there is significant internal and external pressure on Chinese authorities. Some reforms, such as the independence of the judiciary, would require fundamental changes in Chinese political thinking and governmental structures. As the 1996 NPC Decision demonstrates, however, it is equally unrealistic to assume that, short of such fundamental changes, China cannot improve the protection of human rights in its criminal justice system.

The precise nature and timing of future reforms will ultimately be determined by Chinese themselves. Outsiders can, however, play a constructive role through careful monitoring and critique of Chinese law and practice, consistent advocacy of China's observance of international standards and imaginative programs to expand the range of information available in China on human rights and criminal justice. The progress achieved in the 1996 NPC Decision suggests that, in conjunction with internal factors, such external efforts can exercise a positive influence on legal reform in China. They need to be sustained and expanded if they are to contribute to the further systemic changes required to ensure full respect for international human rights in the Chinese criminal justice process.

[328]ICCPR, *supra* note 108, art. 14(5) ("Everyone convicted of a crime shall have the right to conviction and sentence being reviewed by a higher tribunal according to law.") *See* Chapter II, Section E4.

[329]Universal Declaration of Human Rights, *supra* note 119, art. 8 ("Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.") *See* Chapter II, Section E5.

Since 1978, the Lawyers Committee for Human Rights has worked to protect and promote fundamental human rights. Its work is impartial, holding each government to the standards affirmed in the International Bill of Human Rights, including

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- the right to be free from arbitrary arrest, imprisonment without charge or trial, and indefinite incommunicado detention; and
- the right to due process and a fair trial before an independent judiciary

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