Opening to Reform?
An Analysis of China’s Revised Criminal Procedure Law
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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
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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. 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.

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. 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.

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

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


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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. 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. The NPC responded the following July by passing seven major statutes, including the PRC's first Criminal Procedure Law (CPL).

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 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."9

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.

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

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

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reduced the period within which defendants in such cases could appeal their sentences from ten days to just three.\textsuperscript{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" (piaobu houzhen) and "supervised residence" (jianshi jiazu)\textsuperscript{11} or were undergoing psychiatric evaluations, the time limits in the CPL could be waived altogether.\textsuperscript{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

\textsuperscript{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].

\textsuperscript{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.

\textsuperscript{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].

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exercise of various rights by criminal defendants."\textsuperscript{13} After 1984, however, there were so 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.\textsuperscript{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 predominant 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.\textsuperscript{15}

\textsuperscript{13}Wang Miuyuan, "Xingshi binguo quansi yanjia" [Research on the Rights of Criminal Defendents], in Zou xiang quansi de shila [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.

\textsuperscript{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.

\textsuperscript{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
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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. 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.

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. The Chinese courts,

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...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 transparency in the trial process and checks on the broad discretion which the CPL grants the police in deciding whether to open investigations and the procuratorate in deciding whether to bring prosecutions.

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. 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.
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.
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number of interpretive or implementing rules. 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 flout the law when its vital interests are at stake, it also constantly exhorts state officials to "act according to law" (yifa banshi). 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" 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 responsibility between the police, procuratorate, and courts has been a major theme in the


23This has been a consistent theme of the CCP leadership going back to the late 1970s. See, e.g., Zhao Cangbi, "Zengqiang yazi ziian, yang 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 Speach at NPC Closing Published," Foreign Broadcast Information Service: China, March 18, 1996, at 24, 25.

24Zhang 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.

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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. 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. 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.

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. 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


26See Chapter II, Section B.

27See, e.g., Gao Hongjun, "Zhongguo gongmin quanli yishi de yanjiu" [The Gradual Progress of Chinese Citizens' Rights Consciousness], in Toward the Age of Rights, supra note 13, at 3; Xia Yong, "Xiaoming gongmin quanli de shengchan" [The Formation of Rural People's Public Law Rights], in id., at 659.
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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" (jiegut) with the rest of the world economically, so too should it bring its criminal justice system in line with practices common in other countries.

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. 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 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. 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.

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.

30See Chapter II, Section A.


35For 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, "Xingshui yu yijie yu zhengda" [The Great Significance of the...
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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.


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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.

38 See, e.g., Zhenghua renmin genghegu xingshi suongfa xiuwei 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 Fangzhe 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).
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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 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 Jiyan 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

39See supra note 14 and accompanying text.

40Author 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.

41Reform and Improvement, supra note 20.

42Author interview, Beijing, February 1995.

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

44Annotated Proposed Draft, supra note 38, at 1.
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general policy of seeking more outside, expert involvement in the legislative process. 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. 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.

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 comment' (zhengqi yijian gao) 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.

Given the significance of the CPL both as a basic law 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. 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

46See Qiao Shi weiyuanzhang zai di daijie quanguo renda changyuweihui 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 changweiyuanhui gonghao (1993), at 5, 8.

47Author interview, Beijing, January 1996.

48One 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 xingxi suongfa shiyi yan 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 investigatory 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.

49See Explanation and Application, supra note 47, at 3. See also Guanyu di daijie quanguo renda di san ci huiyi zhixian zhu fuzhuo fala weiyuanhui shenyi de daijie tiku de yulan shenju jiaoguo [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 changweiyuanhui gonghao (1993), at 132-33.

50The 1982 Constitution stipulates that "basic laws" (jiben fala) 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).

51According to CCP procedures, drafts of "important laws" (zhongyang fala) 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.
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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 NPCs 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.

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 decisions56 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

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


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


56See supra notes 10, 12 and accompanying text.

57See Chapter II, Section A.
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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 (juehun), "taking a guarantee and awaiting trial" (pihuo huncheen), "supervised residence" (jianzhong jiahu), pre-arrest detention (jiulu) and arrest (dailu).44 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" (shuangong shencha). "Shelter and investigation" is based on administrative regulations, 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.45 Though the CPL preceded the enactment of the 1982 Constitution, it contained a similar

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 provision.41 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" (zhengzuo facei shiye yijing chaqing).42 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.43

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.44 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.45

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

441979 CPL, art. 39.
45Id., art. 40.
46In 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 tough way that virtually all defendants in criminal trials are arrested and detained. See also Xu Youjun, "Zhangguo singhui xuanzuo zu renquan" [China's Criminal Procedure and Human Rights], 2 Zhangguo fazai (1992), at 38, 41-42.
471979 CPL, art. 41.
48Id., art. 48.
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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 yandu 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 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

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66Notice 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.


691985 Public Security Notice, supra note 67, para. 3.

70Mu Yi, "Shewrng shencha jixu zhe gongdu" [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.

711985 Public Security Notice, supra note 67, para. 8.


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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. In the meantime, increasing numbers of Chinese legal scholars were calling openly for the abolition of "shelter and investigation" 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.

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


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possibility of drafting a separate law on "shelter and investigation." 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" and the Ministry of Public Security has begun to take steps to achieve its elimination in practice.

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 accommodates the specific concerns which purportedly

77Author interview, Beijing, January 1996.


79See, e.g., Mao Lei, "Gonganzhu zhaike buji buju guanzhu shizhi xingshi susongfa he xingcheng 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, "Gonganzhu xuei xingsifa he xingcheng chufafa" [Ministry of Public Security Studies Criminal Procedure Law and Administrative Penalties Law], Renmin ribao, March 27, 1996, at 3; Sun Baosheng, "Jijiu shouyong shencha wenti buzong zhiyi" [Solving the Problem of Shelter and Investigation is Not Open to Doubt], Fuzhi ribao, February 6, 1996, at 5.

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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 fenzui shishi). 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." 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. 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.

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. As discussed above, in 1984 the NPC authorized further two-month extensions, upon approval of the provincial-level procuratorate, in certain "major" or "complicated" cases and in parts of the country with poor transportation.

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." 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. 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.

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. During this period suspects who had been arrested would generally continue to be held in custody. In practice, however, this time limit could be evade if the procuratorate requested "supplementary investigation" by the police. Although the CPL

80Revised CPL, art. 60.
81Id., art. 61(6), 61(7).
82Id., art. 69(2).
83Id., art. 69(3).
841979 CPL, art. 92(1).
851984 NPC-SC Decision, supra note 12, arts. 1, 2.
86Revised CPL, art. 126.
87Id., 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.
881979 CPL, art. 92(2); Revised CPL, art. 125. There are no known instances where this procedure has been used.
891979 CPL, art. 97.
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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 be subjected to such measures95 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

90Id., art. 99.

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

921979 CPL, art. 38.

931987 Public Security Procedures, supra note 11, arts. 22-30.

94Revised CPL, art. 92.

95The 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).

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

97Id., art. 58(1).

981987 Public Security Procedures, supra note 11, art. 26; Revised CPL, art. 53.

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

100Id., art. 53.
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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. 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. 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 custodial detention period, the revised CPL imposes no such requirement.

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. 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. 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." 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

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101 1996 NPC Decision, supra note 12, art. 3; Revised CPL, art. 128(1).

104 Revised CPL, art. 128(2).

105 1996 NPC-SC Decision, supra note 12, art. 9; Revised CPL, art. 122.

106 Revised CPL, art. 74.
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NPC Decision, 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 "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." 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." 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.

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

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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." 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.

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. 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. 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" (weifu qingkuang) occurring during the investigation phase suggests that the only conceivable way

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


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.

111See supra notes 58, 99-100 and accompanying text.

112See supra note 108, art. 9(3) ("It shall not be the general rule that persons awaiting trial shall be detained in custody").

113The 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.

115Revised CPL, art. 76. See also Chapter II, Section E5.
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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. 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." 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 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." 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." In fact, it is apparent from the revised CPL that one of the principal functions of "taking a guarantee and awaiting

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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.\footnote{121}{Id., arts. 65, 69.}

B. Right to Counsel

The 1979 CPL provided that all defendants 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.\footnote{122}{1979 CPL, arts. 8, 26. The 1982 Constitution provides for the same right. 1982 Constitution, \textit{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. \textit{See} Wang Minyuan, \textit{supra} note 13, at 531. For the most recent available statistics, see \textit{China Law Yearbook 1995}, \textit{supra} note 27, at 1065, 1079.} In prosecutions brought by the procuratorate,\footnote{123}{Both the 1979 CPL and the Revised CPL provide for a separate class of prosecutions brought directly by the crime victim. \textit{See} 1979 CPL, arts. 126-28; Revised CPL, arts. 170-73.} 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.\footnote{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. \textit{See China Law Yearbook 1995}, \textit{supra} note 27, at 1079.} However, defense was never mandatory, even in these latter cases, since a defendant could always refuse the court-appointed defender.\footnote{125}{1979 CPL, art. 30. \textit{See also} Wang Hongxiang, "Wanshan lushi bianhu lifa de jidian yijian" [A Few Opinions on the Improvement of Legislation on Defense by Lawyers], in \textit{Reform and Improvement}, \textit{supra} note 20, at 127, 130-32.} The 1996 NPC Decision retains these provisions largely intact, though it adds language specifying the defendant's "economic difficulties"
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as one ground for the optional appointment of a defender. 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.

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. As discussed above, the 1983 NPC Decision eliminated the seven-day notice period for defendants facing the death penalty for certain serious crimes.

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, China had only a few thousand lawyers, by 1990 this figure had reached nearly 40,000. 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. 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." 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. Later that same year, apparently acting on the spirit of the Justice Ministry


126Revised CPL, art. 34(1).

127Id., arts. 34(2), 34(3).

1281979 CPL, art. 110(3).

1291983 NPC-SC Decision, supra note 10, art. 1.

130Provisional 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 enacted Lawyers Law. Lawyers Law of the People's Republic of China, adopted May 15, 1996 [hereinafter Lawyers Law], art. 33.


134Author interview, Beijing, March 1991.
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draft, Fujian Province enacted regulations which for the first time authorized Chinese lawyers to provide legal assistance to suspects in pre-trial detention.\textsuperscript{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.\textsuperscript{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

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...materials are transferred to the procuratorate for a decision to prosecute.\textsuperscript{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.\textsuperscript{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.\textsuperscript{139} In addition, in conducting its review of the case, the procuratorate is directed to "listen to" the opinions of defense counsel.\textsuperscript{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.\textsuperscript{141} Significantly, unlike the

\textsuperscript{135}Several Provisions of Fujian Province on Lawyers' Execution of Professional Duties, adopted August 31, 1991, art. 10. See also "Fujian sheng lushi zhiting zhizhou de lifa qude xin de tuo" [Fujian Province Legislation on Lawyers' Execution of Professional Duties Achieves New Breakthrough], 6 Zhongguo lushi (1991), at 31.

\textsuperscript{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.

\textsuperscript{137}Revised CPL, art. 33(1).

\textsuperscript{138}Id., art. 33(2).

\textsuperscript{139}Id., art. 36(1). "Litigation documents" (susong wenben) refer to such formal documents as the decision to investigate (li'an juding), 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" (shouhu) 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.

\textsuperscript{140}Revised CPL, art. 139.

\textsuperscript{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
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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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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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143 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.")

144 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.")
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Chinese law of a right to remain silent,\textsuperscript{149} means that there will continue to be a significant risk of coerced "confessions" before a lawyer even 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.\textsuperscript{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."\textsuperscript{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.\textsuperscript{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 yinwu).\textsuperscript{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" (Weijing renmin fayuan yifa panju, dui renhe ren bude queding you zui).\textsuperscript{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.\textsuperscript{155}

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

\textsuperscript{149}The revised CPL retains the language in the original law whereby suspects are required to answer investigators' questions "truthfully" (ruishi kuida). 1979 CPL, art. 64; Revised CPL, art. 93.

\textsuperscript{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.')

\textsuperscript{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.

\textsuperscript{152}ICCPR, supra note 108, art. 14(3)(d).

\textsuperscript{153}See Draft Laws Revised, supra note 53, at 37.

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the presumption of innocence. 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. 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."

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 defendant, they conveyed a clear determination of guilt. Since these decisions were publicly announced and also communicated directly to the defendant's place of work, 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. 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.)

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156 See Chapter II, Section E1.


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 xingsfa) 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.

159 1979 CPL, art. 102(1).

160 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.

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Proponents of "exemption from prosecution," many of them associated with the procuratorate, pointed to several justifications for its use. First, it was said to be a concrete manifestation of the Party's criminal justice policy of "differential treatment" (qibu duidai) and "combining punishment with leniency" (chongban 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.

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 no effective right to appeal. 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.

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 anticorruption 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. In other words, the defendant could...

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163For 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; Tinghen he miangu yu zhidu de gaige yu manshan [Reform and Improvement in the Systems of Trial Proceedings and Exemption from Prosecution], Xie Wemin et al., eds. (China Legal System Press, Beijing: 1994) [hereinafter Trial Proceedings and Exemption from Prosecution], at 141-341.

164One 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.

165Under 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.

166Provisions 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.

167See Liu Songshan, supra note 78.
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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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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" (\textit{fanzui qingjie qingwei}), and moved to the article in the revised law concerning decisions not to prosecute.\textsuperscript{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

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CPL no decision of the procuratorate can be considered a determination of guilt.\textsuperscript{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" (\textit{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\textsuperscript{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.\textsuperscript{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" (\textit{weifa suode}).\textsuperscript{175} Finally, in perhaps the clearest indication that such a decision "not to prosecute" could carry serious negative connotations, persons

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\textsuperscript{168}Author interview, Beijing, January 1996.
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\textsuperscript{169}Draft Laws Revised, supra note 53, at 37.
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\textsuperscript{171}Revised CPL, art. 142(2).
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\textsuperscript{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.
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\textsuperscript{173}See Chapter II, Section B.
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\textsuperscript{174}Revised CPL, art. 143.
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\textsuperscript{175}Id., art. 142(3).
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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.\textsuperscript{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.\textsuperscript{177} It is
fundamental to internationally-accepted notions of due process that the
determination of all criminal charges be made by an "independent and
impartial tribunal."\textsuperscript{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.\textsuperscript{179} This phenomenally high

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\item[\textsuperscript{176}]
\textit{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. \textit{See infra} note 297 and accompanying text.

\item[\textsuperscript{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.

\item[\textsuperscript{178}]
Universal Declaration of Human Rights, \textit{supra} note 119, art. 10; ICCPR, \textit{supra}
note 108, art. 14(1).

\item[\textsuperscript{179}]
1995 Court Work Report, \textit{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."

\item[\textsuperscript{180}]
1979 CPL, art. 108.

\item[\textsuperscript{181}]
1994 Court Procedures, \textit{supra} note 23, art. 89.

\item[\textsuperscript{182}]
Interestingly, the 1979 CPL did not contain any explicit standard of conviction.
\textit{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 qushu chengfen), the same standard applied by the
procuratorate in deciding whether to bring a prosecution. \textit{Id.}, art. 100. \textit{See also}
Annotated Proposed Draft, \textit{supra} note 38, at 172-74; Xue Xiang, Xingshi zhengjiu
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).
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procuratorate for supplementary investigation. 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.

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. 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. 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. 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 standing houren: "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 evidence and results of any expert evaluations. Under these circumstances, it was of little consequence whether witnesses appeared in person and in practice most testimony was presented in written form.

Criticism within China of the practice of "decision first, trial later" dates back many years. 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. 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.

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

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188 1979 CPL, arts. 114-16.
189 Wang Shangxin, supra note 17, at 81.
189 See e.g., Xiang Yintang, "Xiangp houhen youhei fusi" [Sentence First, Trial Later is Contrary to the Legal System], Guangming Ribao, August 23, 1988, at 3; Li Shaoping, "Gai 'standing houhen' we 'xianhen houdui" [Change 'Decision First, Trial Later' to 'Trial First, Decision Later'], 2 Fasue yanjiu (1990), at 39.
190 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 13-138.
190 Author interview, Beijing, February 1995. See also Zhang Xiping & Liu Jian, "Xingshi shenpan: Biai 'jiuwenshi' we 'konghianshi' — Shanghai Xuhui fayuan de jiji jiantou" [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.
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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\textsuperscript{193} and the system of recusal.\textsuperscript{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,\textsuperscript{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.

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\textsuperscript{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. \textit{Id.}, art. 111(3). The revised law contains the same provisions with minor changes in terminology. Revised CPL, arts. 11, 152.

\textsuperscript{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.

\textsuperscript{195}See, e.g., \textit{Explanation and Application}, supra note 47, at 9.

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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.\textsuperscript{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.\textsuperscript{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 photographs or photographs of the major evidence, then it should open the trial.\textsuperscript{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,\textsuperscript{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

\textsuperscript{196}1979 CPL, art. 107.

\textsuperscript{197}Revised CPL, art. 149.

\textsuperscript{198}\textit{Id.}, art. 150.

\textsuperscript{199}\textit{Id.}, arts. 153, 156, 158.
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the prosecutor and defense counsel. Combined with the new provisions permitting lawyers to participate earlier in the criminal process, 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.” International law acknowledges exceptions to the basic rule of “fair and public” hearings for reasons of “national security in a democratic society,” but the Chinese concept of “state secrets” is so broad that it has the potential to swallow up the

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general principle. 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. 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. This will have a serious negative impact on the internationally-recognized right to receive adequate time for the preparation of one’s defense. 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. In addition, it is only at this point that appointed counsel becomes available. Where defendants entitled to appointed counsel — including those facing the death penalty — have not engaged one at an earlier stage, their court-appointed 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.

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

205Some 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.

206Revised 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.

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

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

209Revised CPL, art. 151(2); 1979 CPL, art. 110(2). See also supra notes 126-128, 151 and accompanying text.
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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.\textsuperscript{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.\textsuperscript{211} This is contrary to international standards, which provide that the defendant is entitled to obtain witnesses under the same conditions as the state.\textsuperscript{212}

The revised CPL also fails to ensure the defendant’s internationally-recognized right to examine the witnesses against him or her.\textsuperscript{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;\textsuperscript{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.\textsuperscript{215}

\textsuperscript{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. \textit{Id.}, arts. 45, 110.

\textsuperscript{211}\textit{Id.}, art. 159.

\textsuperscript{212}ICCPR, \textit{supra} note 108, art. 14(3)(e).

\textsuperscript{213}\textit{Id.}

\textsuperscript{214}Revised CPL, art. 49.

\textsuperscript{215}\textit{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.

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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 “independent and impartial tribunal.”\textsuperscript{216} The Chinese Constitution, however, speaks not of judicial independence (\textit{sifa duli}) but of the “independent exercise of the power to adjudicate” (\textit{duli xingshi shenpanquanz}).\textsuperscript{217} This formulation accommodates 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.\textsuperscript{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.\textsuperscript{219} It seems inevitable therefore that the court

\textsuperscript{216}Universal Declaration of Human Rights, \textit{supra} note 119, art. 10; ICCPR, \textit{supra} note 108, art. 14(1).

\textsuperscript{217}1982 Constitution, \textit{supra} note 22, art. 126.

\textsuperscript{218}Revised CPL, art. 147(6); 1979 CPL, art. 105(5).

\textsuperscript{219}Under the new Judges Law, for example, the court president chairs the “examination and evaluation committee” (\textit{kauping 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,
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... 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, which can then either remand the case for retrial or substitute its own verdict. 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.

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. China is a signatory to international treaties, such as the Convention on the Rights of the Child, which explicitly incorporate this principle. It has also written the presumption of innocence into the basic laws that will govern the...
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the need to incorporate the principle openly in domestic law.\textsuperscript{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.\textsuperscript{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.\textsuperscript{233} At all prior stages of the process, the term "suspect" (fanzui xiangyiren) is now used. In addition, by lowering the arrest standard, the revisions weaken

\begin{itemize}
\item \textsuperscript{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." \textit{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. \textit{See supra} notes 154-156 and accompanying text.
\item \textsuperscript{233}1996 NPC Decision, \textit{supra} note 55, para. 34.
\end{itemize}

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the implication that all persons subject to arrest are guilty.\textsuperscript{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 without any right to bail or \textit{habeas corpus}.\textsuperscript{235} The non-custodial forms of detention can be applied without any showing of cause whatsoever.\textsuperscript{236} The CPL still recognizes no right to remain silent,\textsuperscript{237} no exclusion of illegally-gathered evidence,\textsuperscript{238} and no right not to testify against oneself.\textsuperscript{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.\textsuperscript{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

\begin{itemize}
\item \textsuperscript{234}See \textit{supra} note 80 and accompanying text.
\item \textsuperscript{235}See \textit{supra} notes 111-114 and accompanying text.
\item \textsuperscript{236}See \textit{supra} notes 119-121 and accompanying text.
\item \textsuperscript{237}See \textit{supra} note 149 and accompanying text.
\item \textsuperscript{238}See Chapter II, Section E3.
\item \textsuperscript{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.
\item \textsuperscript{240}United Nations Human Rights Committee, General Comments, CCPR/C/21/Add.3, April 12, 1984, General Comment 13, para. 7.
\end{itemize}
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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. 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. 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

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defendant. 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." 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. 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

241See supra note 183 and accompanying text.

242Official 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 zizhigao renmin fayuan sifa jiexi quanji [Complete Collection of Judicial Interpretations of the Supreme People's Court of the People's Republic of China]. Research Dept 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).

243Id., 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 fajian bu neng chengli de wuzai panju).

244Id., 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.

245See supra notes 71-72 and accompanying text.
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"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. "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.

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. Since 1990, there have been reports of "reeducation through labor" decisions being overturned in suits under the Administrative Litigation Law, 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...

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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. However, this will have no impact on "reeducation through labor," which has been ratified by the NPC.

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. 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...

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246Decision 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.

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


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

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


252Id., art. 9(2).

253See supra note 246.

2541979 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.
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according with lawful procedures.\textsuperscript{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" (\textit{ducu}) the police to take corrective steps.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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 disinscentive to torture, but was also mandated by the terms of the

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Convention Against Torture, to which China had become a party in 1988.\textsuperscript{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.\textsuperscript{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.\textsuperscript{262}

The result is even heavier reliance on the procuratorate to raise and seek correction of illegal actions occurring during criminal investigations.\textsuperscript{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.

\textsuperscript{255}1979 CPL, art. 52, 96(5); 1991 Procuratorate Work Rules, supra note 23, arts. 58-64.

\textsuperscript{256}1991 Procuratorate Work Rules, supra note 23, art. 60.

\textsuperscript{257}1994 Court Procedures, supra note 23, art. 45.

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

\textsuperscript{259}See Annotated Proposed Draft, supra note 38, at 168-72.

\textsuperscript{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").

\textsuperscript{261}Revised CPL, art. 43.

\textsuperscript{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 (\textit{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.

\textsuperscript{263}Revised CPL, arts. 76 (review of decision to arrest), 137(5) (review of decision to prosecute).
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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. 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.

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%. The latest figures indicate that this trend has continued. In 1994, the appeal rate was barely over 10%.

There are of course many possible explanations for defendants' reluctance to appeal. For one thing, appeals are generally unsuccessful, in part no doubt due to the fact that the higher court has frequently reviewed and approved the sentence prior to the original trial. 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" (kansu) lodged by the procuratorate. In practice, however, the courts have found myriad ways to circumvent this restriction. The NPC was presented with proposals to plug some of the more gaping loopholes, 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.

5. Remedies

International law recognizes that in order to safeguard fundamental rights, everyone must have an effective remedy against violations of those rights. 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

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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.
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.
269 See supra notes 185-187 and accompanying text.
270 1979 CPL, art. 137(1).
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.
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rights or personal dignity. 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. As discussed earlier, the suspect has no direct remedy for a detention that is illegal or inappropriate from its inception. 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.

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. 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.

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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. 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." 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, the revised CPL retains the language in the original law restricting the grounds for remand to improprieties occurring at the original trial.

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. 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. As discussed above, the procuratorate is specifically

271 1979 CPL, art. 10(3).
272 Revised CPL, art. 75.
273 See supra note 101 and accompanying text.
274 Revised CPL, art. 146. See also supra note 176 and accompanying text.
275 1979 CPL, art. 108; 1994 Court Procedures, supra note 23, art. 87(10).
276 See supra note 198 and accompanying text.

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

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, 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. The only available remedy at the appeals stage is remand for a new trial. If the procuratorate discovers or is alerted to police

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misconduct, it may issue a “notice of illegality” (wei fa tongzhi shu) and seek corrective measures or order supplementary investigation. 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. 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.

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. This is not a problem, for example, in claims for wrongful pre-arrest detention (cuowu

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 (kangwu) against a trial court decision where it believes violations of procedural rights have affected the “correct adjudication” of the case. Id., art. 76(3).

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 subdivisions 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.

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).
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julu), 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.

396Id., 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.

397State 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 newspapers298 and widely distributed through

298See supra note 55.
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Both academic and practice-oriented commentaries on the revised law and its application are beginning to appear. The legal bureaucracies have undertaken to organize retraining courses for judges, prosecutors and police. However, given China's size and population, the scope of the efforts that will be required is huge. 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.

See, e.g., 2 Zhonghua renmin gongheguo zhi gao renmin fayuan gongbao (1996), at 39; 1-2 Zhonghua renmin gongheguo zhi gao renmin jiansuyuan 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.


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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. The pressure which the Chinese leadership is constantly exerting on the criminal justice system to serve the ends of yanda ("strike hard") 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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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. 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 entered into the domestic Chinese discourse on criminal justice. 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.

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. 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.
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sense of professional identity. 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. 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.

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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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.

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.

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

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

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

*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.

*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.

*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.

*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.
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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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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

316Universal 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.

317Body 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.

318ICCPR, 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.

319Body 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.

320ICCPR, 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.

321See Chapter II, Section C.

322See Chapter II, Section E2.

323ICCPR, 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.

324Universal 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.
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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 courts’ seeking instructions from higher courts prior to rendering their verdicts should be ended.\(^{328}\)

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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 national 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.

\(^{325}\)ICCPR, supra note 108, art. 14(3)(b) ("In the determination of any criminal charge against him, everyone shall be entitled . . . [to] 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.

\(^{328}\)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 ("Every person 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:

- the right to be free from torture, summary execution, abduction and "disappearance";
- 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.

The Committee conducts fact-finding missions and publishes reports which serve as a starting point for sustained follow-up work within three areas: with locally-based human rights lawyers and activists; with policymakers involved in formulating U.S. foreign policy; and with intergovernmental organizations such as the United Nations, the Organization of American States, the Organization of African Unity and the World Bank.

The Committee's Refugee Project seeks to provide legal protection for refugees including the right to dignified treatment and a permanent home. It provides legal representation, without charge, to indigent refugees in the United States in flight from political persecution. With the assistance of hundreds of volunteer attorneys, the Project's staff also undertakes broader efforts — including participation in lawsuits of potential national significance — to protect the right to seek political asylum as guaranteed by U.S. and international law.

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