

## China's Criminal Justice System: A Work in Progress

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On January 7, 2000, I left the United States for Beijing to begin three months of exchange with Chinese prosecutors about their criminal justice system and ours. As luck would have it, on the very day I left for China, the *New York Times* carried a front page headline about the Chinese criminal justice system entitled "In China's Legal Evolution, It's the Lawyers Who are Handcuffed." The article described a Chinese defense attorney who, as a result of not much more than mounting a vigorous defense on behalf of his client, found himself in jail on criminal charges of obstruction of justice. The headline suggested that, despite its boasts of legal reform, China was still a repressive regime that punished vigorous advocacy by lawyers on behalf of their clients. Rather than taking the appearance of the article as some form of omen, I saw it as framing a question that would come back to me over and over again while I was in China. Are China's efforts at legal reform real or are they illusory?

Looking at China's criminal justice system through Western eyes, it is easy to see only its deficiencies. The system is marked by long periods of investigatory detention, a high rate of confessions, and administrative penalties that are tantamount to incarceration without trial. Criminal suspects have no right to refuse interrogation, enjoy no presumption of innocence, and have no right to confront their accusers or compel the presence of witnesses to testify in their defense. The right to counsel is extremely limited in the investigatory phase of a case and, although there is a right to counsel at trial, that right is circumscribed by the absence of pre-trial discovery and the limited ability of the defense to conduct its own investigation.

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<sup>1</sup>This article represents the views of author alone and does not necessarily represent the position of the Department of Justice or the United States government.

While these are major deficiencies in the system, it should also be noted that China's current criminal justice system is only 20 years old and, during that relatively brief period, it has already undergone major reforms. In 1997, for example, reforms eliminated the practice of prosecution by analogy, by which a person could be charged with a crime if their conduct was analogous to other conduct specifically prohibited, even if the offense in question was not delineated in the criminal code. The 1997 reforms also abolished "shelter and investigation," whereby police could hold a suspect indefinitely while investigating the person's true identity. More certain time limits were also placed on the various forms of detention known as "compulsory measures."<sup>2</sup>

Additional significant reforms to the system can reasonably be expected in the next five to ten years. Many sophisticated legal experts both inside and outside the Chinese government are dedicated to reforming China's criminal justice system to bring it closer to international standards of fairness. As in many areas of reform, China is looking to the West, and in particular to the United States, to gather information about reforms that may be appropriate.

In May 2000, I returned to China for a week of meetings with legal scholars and government officials.<sup>3</sup> The topics included the presumption of innocence, the right to silence, the right to confront witnesses in person, pre-trial discovery, and other rights that most American law experts consider fundamental to our justice system.

My experiences in China this year, which included hundreds of interviews with Chinese prosecutors, judges, lawyers, and academics, convinced me that the sentiment in favor of reform is sincere and shared by a wide spectrum of legal experts both inside and outside the

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<sup>2</sup>For a detailed review and critique of the progress of reform in China's criminal justice system, see the Lawyers Committee for Human Rights publications: Timothy Gelat, *Criminal Justice with Chinese Characteristics* (New York: 1993); Jonathan Hecht, *Opening to Reform* (New York: 1996); Donald C. Clarke, *Wrongs and Rights* (New York: 1998). For an overview of China's criminal justice system before the Cultural Revolution, see Jerome A. Cohen, *The Criminal Process in the People's Republic of China, 1949-1963: An Introduction* (Harvard Univ. Press, Cambridge, MA: 1968).

<sup>3</sup>The conference was organized by Professor Paul Gewirtz and cosponsored by Yale University Law School's China Law Center.

government. The obstacles to reform, however, are also very real, and the lack of political consensus is only one of them.

The purpose of this article is to provide some context for an ongoing discussion of legal reform in the Chinese criminal justice system and, of course, to give one person's perspective on the issue. What follows is an overview of the Chinese system in the context of Chinese society today, a brief history, an analysis of the current criminal justice system, and the prospects for future reforms.

### **The rule of law**

China boasts one of the fastest growing economies in history. Even with an estimated 1.3 billion people, China is hurtling into the twenty-first century at breakneck speed, all the while changing from an orthodox communist society to what it calls a "socialist free market" system. This means people can no longer rely on the government to provide job security, housing, health care, and schooling. It also means that there are tremendous opportunities to make money for those equipped, inclined, and positioned to grab them. And with China's 20-year-old policy of *gaige kaifang*, awkwardly translated as "Opening Up and Reform," China is seeking to learn from the rest of the world to accelerate its growth and progress in every area.

As it moves toward a socialist free market economy, China is experiencing new types of crimes as well as crimes of a magnitude that did not exist under more totalitarian communist rule. Public corruption, economic crime, computer crime, narcotics trafficking, robbery, and murder are all more prevalent than they were 20 years ago. China's criminal justice system is burdened with the dual challenges of increased crime and the need for modernization.

In the legal field, as well as in other fields, China wants to take what it considers to be its rightful place as a leader of nations in the twenty-first century. This means bringing its justice system up to international standards of fairness, which will not be an easy task.

Since the end of the imperial era in 1911, China has struggled to create a workable legal system. The nation's legal institutions had very little opportunity to develop during much of the twentieth century amidst the chaos of civil wars, World War II, and disruptive political campaigns. The last and most chaotic of these political movements was the Great Proletarian Cultural Revolution, which began in the mid-1960s and lasted through much of the 1970s. During the Cultural Revolution, virtually all legal institutions were abolished. There were no courts, no prosecutors, no lawyers, and no law schools. Since the reform era began in 1979 under Deng Xiaoping, legal institutions have slowly been reestablished. Law schools reopened and judicial and procuratorial institutions were recreated.

While the concept of "rule of law" (*yifa zhiguo*) is now official policy of both the Chinese Communist Party and the government, it would be more accurate to describe the rule of law as a long-term goal. China's legal system is, in fact, very much a work in progress, as this survey of the criminal justice system intends to show.

### **Role and structure of the Procuratorate**

The Chinese agency responsible for prosecuting criminal cases is called *renmin jiancha yuan*, officially translated as the People's Procuratorate. The procuratorate's historical roots go back 2,000 years to imperial China. Chinese emperors employed an official with the title *Yu Shi*, often translated as "imperial censor" or "imperial secretary,"<sup>4</sup> who acted as the eyes and ears of the emperor and reported any misconduct or corruption by government officials. Gradually, this position evolved to the role of public prosecutor in cases involving crimes committed by government officials. The *Yu Shi* also exercised a supervisory role over the judiciary, ensuring that judges acted according to the law.

As presently constituted, the procuratorate is one of five branches of government operating under the authority of the National People's Congress and its standing committee. The other branches are the presidency, the State Council (headed by the premier), the judiciary, and the military. In theory, the procuratorate is charged with ensuring that the other civil branches of government, namely, the executive branch and the judiciary, act according to the law. In addition to its supervisory role over all aspects of civil government, the government's procurators are solely responsible for deciding whether someone should be formally arrested (*dai bu*) and formally charged (*qi song*).

In the United States, our system has led to the creation of at least 51 state-specific criminal codes and criminal procedures. Under China's central government model, the criminal justice system is more uniform throughout the country, with just one criminal code and one criminal procedure law.

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<sup>4</sup> See He Jia Hong and Waltz, John R. *Criminal Prosecution in the PRC and the USA: A Comparative Study*, at 109 - 123, for a detailed description of the history of the Procuratorate.

Like most Chinese government bodies, the procuratorate consists of a hierarchy, with the Supreme People's Procuratorate (SPP) at the top. The SPP handles matters in the Supreme People's Court and reports directly to the National People's Congress and its standing committee. Beneath the SPP are lower procuratorates that correspond to the lower levels of local government.<sup>5</sup>

These procuratorate offices interact according to hierarchy. China's criminal procedure law permits two trials and an appeal by either side from the verdict of the second trial. Generally, each successive proceeding must be brought at the next highest level. For example, a case initiated at the county level will be handled by the county procurator's office in the Basic People's Court of that county. If there is a second trial, it will be heard at the Intermediate People's Court, where the case will be handled by the city procuratorate. An appeal would be handled by the provincial procuratorate. Any further proceeding would be in the Supreme People's Court, with the prosecution represented by the Supreme People's Procuratorate.

The role of the Supreme People's Procuratorate is primarily policymaking, although it does handle appeals from the decisions of Provincial People's Courts. The SPP rarely handles trials—the last trial conducted by the SPP was that of the Gang of Four in 1979. The SPP also provides advice and guidance to the provincial procuratorates, maintains a publishing house, and has a website (at [www.jcrb.com](http://www.jcrb.com)) that is updated several times a day.

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<sup>5</sup>There are also special procuratorates for the military and for railway transportation.

The SPP also publishes non-binding interpretations of the law that guide procurators nationwide, while the Supreme People's Court (SPC) publishes binding interpretations and the Public Security Bureau (PSB) publishes advisory interpretations. These interpretations are important because Chinese legislation, particularly criminal legislation, is often vague. Determining what constitutes a criminal and capital offense can turn on interpretations of phrases such as "serious," "large amount," or "special circumstances."<sup>6</sup>

Second, China's legal system is a civil law system, as opposed to a common law system, with only statutory law, not case law. Judges' decisions are usually not accompanied by written legal opinions explaining their reasoning. Moreover, judicial decisions do not have any legally binding precedential effect on other cases. Thus, the interpretations by the SPP, the SPC, and the PSB are important guides for practicing procurators, lawyers, and judges.

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<sup>6</sup>For example, on April 28, 2000, the Supreme People's Court issued an interpretation of the term "serious" in the context of the offense of activities that "seriously disturb administrative order of the telecom market." The SPC defined "serious" as telecom business totaling one million RMB, or US \$120,773 and defined "extremely serious" as being in excess of 5 million RMB or US \$603,865.

Most criminal offenses in China are investigated by the Public Security Bureau, which is part of the executive branch of government.<sup>7</sup> Criminal offenses committed by government officials, employees, and agencies, however, are investigated directly by the Procuratorate.<sup>8</sup> The procuratorate's anti-corruption unit conducts investigations of bribery, embezzlement, and other public corruption. The procuratorate also has a government employees' misconduct unit, which investigates other criminal conduct committed by government workers in their official capacity. Cases of abuse of power, dereliction of duty, and police brutality are investigated directly by this unit of the procuratorate. In addition to these two units, each procurator's office also has units that handle "arrest approval" (usually reviewing *daibu* requests made by the police), criminal prosecution, citizen complaints, appeals and petitions, research, internal discipline, and administration.

Apart from the official structure of the government, the PRC also recognizes the leadership role of the Chinese Communist Party in all facets of government and society. In the criminal justice system, this fact manifests itself in the existence of party committees of political and legal affairs at all levels of government. Traditionally, the head of the committee has been the head of public security for the area, with the chief procurator and the chief judge beneath him. Thus, the Chinese Communist Party unquestionably still exercises institutional influence over the operation of the legal system in general and the criminal justice system in particular.

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<sup>7</sup>Offenses involving state security, which foreign observers often refer to as political offenses, are investigated by a different organization, the Ministry of State Security. To the extent these are criminal cases, they are prosecuted by the procuratorate at the city level or higher. It is apparent that different rules apply to political offenses. An in-depth study of that system is well beyond the scope of this article.

<sup>8</sup>Communist Party members are also subject to strict disciplinary procedures carried out by the Party's disciplinary committee.

**Administrative incarceration: the *laojiao* system**

In analyzing China's criminal justice system, one must first ask what constitutes such a system. Under Chinese law, the police have the discretion to decide, without any judicial proceeding, to send a person to *laodong jiaoyang* (or *laojiao*) for "reeducation through labor" for up to three years. According to official sources, in 1997, some 230,000 people were held in such labor camps throughout China.<sup>9</sup>

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<sup>9</sup>See 1999 U.S. State Department, *Human Rights Report Concerning the PRC*, issued February 25, 2000, p. 8.



Under American law, when the state seeks to punish someone by depriving him of his liberty, it must act in accordance with the law of criminal procedure. The state must charge a person with a crime, convict him in a court of law, and a judge must impose a sentence. It is only in connection with a criminal charge that the state may take away a person's liberty. The United States also has administrative penalties. These, however, consist primarily of fines and debarment sanctions and definitely do not include jail.<sup>10</sup> By making *laojiao* an administrative, as opposed to a criminal, proceeding, China has, for a significant number of cases, bypassed the procedural protections of its own criminal justice system.

Among some foreign analysts, there is confusion between *laojiao*, or "reeducation through labor," and *laogai*, translated as "reform through labor." *Laojiao* is an administrative sanction imposed at the discretion of the police, whereas *laogai* is a form of criminal punishment that may be imposed only after a criminal conviction.

The Public Security Bureau can recommend to a *laojiao* committee that a person be sent to reeducation through labor. The committee then makes the final decision without a judicial proceeding, providing no meaningful opportunity for a person to challenge the decision outside the PSB. There is a right, of dubious effect, to challenge the decision in court after it has been imposed. This "judicial remedy" takes so long, however, that a person may serve his sentence before his case is even heard.

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<sup>10</sup>There are also constitutionally permissible procedures in the United States for civil commitments, which do restrict a person's liberty. A civil commitment, however, is not, strictly speaking, a punishment and, in any event, generally requires a judicial proceeding.

The Ministry of Justice, which also administers China's prisons, administers the *laojiao* camps. With the assistance of the SPP, I was able to visit such a facility in the city of Qingdao in March 2000.<sup>11</sup> The Qingdao *Laojiao* Camp houses about 200 male inmates. The officials refer to them as "students" and stress the educational nature of the institution, but it is clearly a prison, with bars on the windows and gates around the complex. Officials also stress the military style of living and education. About 14 "students" live in a room, kept in immaculate condition. The camp has a library and a recreation room, as well as a facility to host visiting families, where inmates can stay with their visiting relatives if they have earned the privilege through good behavior. Inmates can write letters and communicate with the outside by telephone, and they sometimes receive furloughs for important family events. If an inmate had a legitimate job before incarceration, his employer is required by law to take him back upon completion of the "sentence."

I was told that 60 percent of the "students" were being punished for minor offenses such as petty theft, fighting, shoplifting, or vandalism. *Laojiao* is also used for drug addicts who have failed a drug rehabilitation program and resume drug use, although there were no drug addicts in the facility I visited.

The labor component of the program is reportedly for educational purposes only; that is, to provide inmates with skills and work habits to enable them to make a living when they are released. They can learn auto repair, motorcycle repair, and other skills.

Most of the inmates were "sentenced" to one year; some to a year and a half; and a small number to three years. Those sentenced to more than one year were usually repeat offenders. According to the officials, they had only a 5 percent recidivism rate.

### **Seeking to change "reeducation through labor"**

Many legal professionals and scholars in China appear embarrassed that the *laojiao* system still exists, but a few defend the system. Some compare it to sending a person to a psychiatric hospital for a social or ethical disease rather than a mental illness. People also tend to explain *laojiao* as a way of dealing with petty crime like theft, fraud, gambling, prostitution, and drug addiction—you have one chance to be cured, and the next time you are caught you get sent to *laojiao*. If these offenses were treated as crimes, the system could not handle that many cases, they say. Besides, after someone completes a term of

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<sup>11</sup>The Qingdao *Laojiao* Camp was selected for my visit by the Chinese government as one example of "reeducation through labor" facility and, as such, its conditions are not necessarily typical.

reeducation through labor, they still have no criminal record. Thus, *laojiao* does not have the same adverse impact on their lives that a criminal conviction and jail sentence would have, they claim.

But other Chinese legal scholars have published articles denouncing the *laojiao* system and calling for its abolition. They point out that some criminal punishments requiring the entire judicial process are less severe than three years of reeducation through labor. Naturally, the international community is also highly critical of the *laojiao* system.

Procurators, defense lawyers, and academics all predict that "reeducation through labor," in its present form, will be scrapped within the next five years. Reform of the *laojiao* system is part of the National People's Congress' current five-year plan for legislative action, which is due to expire within the next two years.

While Chinese government officials seem to agree that the reeducation through labor system will be reformed, their concern is over what shape the reforms will take. They recognize that the lack of a judicial procedure is a serious problem, but providing a judicial proceeding may not be appropriate for every type of misconduct currently addressed by the *laojiao* system, they say.

Many reform proposals are being discussed. One with appealing simplicity is to bring all violations within the criminal law. Another possibility is that a class of violations, such as petty offenses, will be handled through a simplified judicial process while other conduct, such as drug abuse, will be handled administratively.

The likelihood and extent of the reform of *laojiao* is inextricably tied to the prospects for further reform of criminal procedure in China. Making *laojiao* a criminal punishment will dramatically increase the workload of procurators and judges as well as the government's financial burden, which will lead some to resist reforms. There will also be resistance to the broadening of reform throughout the criminal process. The Chinese government is very sensitive to the criticism of the *laojiao* system both within and outside China and is searching for a solution that all interested parties find acceptable. The question, of course, is when the reform will take place and whether it will be significant enough to correct the injustices of the current system.

### **The criminal process in the PRC**

Before turning to the specific provisions of Chinese criminal procedure, it is worth noting some fundamental differences in approach between Chinese and American jurisprudence. First, from the Chinese perspective, whether or not someone has committed a crime is a matter of ascertainable fact. In contrast, the American system acknowledges the inherent weakness of human beings to ascertain objective truth. The goal of our system is to create a set of rules that help us come as close

as possible to determining the truth, but we acknowledge that some measure of uncertainty is inevitable. Thus, we have determined that all reasonable doubt should be resolved in favor of the accused.

In the American experience, there is a difference between factual guilt or innocence and legal guilt or innocence. Someone may be factually guilty of an offense but, unless twelve jurors unanimously agree that the prosecution has proven guilt beyond a reasonable doubt, the defendant is not guilty under the law. In some cases, the evidence may seem as plain as a videotape, but we leave it to a properly instructed jury to decide what facts have been proven.

From the Chinese perspective, at least as reflected in China's criminal procedure code, the facts are ascertainable and the rules of criminal procedure are simply a means by which those facts will be disclosed. Any rule that promotes conflict or detracts from the tribunal's ability to render an uncontested verdict is discouraged. This bedrock principle colors every facet of Chinese criminal justice.

*Preliminary investigation:* Chinese procurators report that the first stage in any criminal case is the preliminary investigation, which begins after a criminal activity is reported. Articles 84 and 85 of the Criminal Procedure Law (CPL) make clear that the police and the procuratorate should make provisions for receiving such reports, while CPL Article 84 specifically grants citizens the right and imposes the duty to make such reports.

*Filing a case:* A criminal case begins when the police or the procurator files a case. The standard for filing a case is somewhat vague and conclusory. CPL Article 83 provides that a case should be filed for investigation "upon discovering facts of crimes or criminal suspects." CPL Article 86 provides that if, after examining a citizen report or complaint and the materials associated with it, the responsible official "believes that there are the facts of a crime and that criminal responsibility should be investigated" then it shall file a case. If not, or, if "the facts are obviously incidental and do not require the investigation of criminal responsibility" then the case should not be filed and the complainant should be notified as to the reason.

Thus, even in setting the standard for filing a case, the Chinese CPL proceeds on the assumption that it is possible, even at this early stage, to ascertain whether "there are the facts of a crime." The CPL does not even entertain the possibility that there may be some evidence

of a crime and some evidence to the contrary, and thus a need to investigate further.<sup>12</sup>

"Filing a case" is both a symbolic and practical step. The act of filing provides some official acknowledgement that a crime has been committed. The practical significance is that only after a case is filed are investigators permitted to use the investigative techniques set out in the criminal procedure code, which include detention of the suspect.

The authority to decide whether to file a case is a powerful one. Refusal to file a case may result from an honest appraisal that insufficient evidence exists to prove the commission of an offense. There is at least the potential, however, for the police to decline to file a case for reasons of improper influence or outright corruption. To address that potential, the CPL provides some check against police authority in this regard. If the police refuse to file a case, the procuratorate may require the police to explain their decision. If the explanation is deemed inadequate, the procuratorate may direct the police to open a file (CPL, Article 87).

A private citizen also has the right to bring a criminal case directly to the People's Court. If successful, the case will result in criminal punishment for the defendant (CPL Article 88). A private citizen may also bring a civil case as a companion to a criminal case brought by the Procuratorate (CPL Article 77).

### **Compulsory measures: Forms of investigatory detention**

Once a case is filed, the investigating authority may use the full panoply of investigative techniques available. Among those techniques are what the Chinese Criminal Procedure Law refers to as "compulsory measures," which restrict the liberty of the "criminal suspect." The CPL

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<sup>12</sup>This is in contrast to the American system, which articulates a "probable cause" threshold for many actions taken by the state in the context of a criminal case, such as search and arrest warrants.

considers these compulsory measures to be investigative techniques (CPL Article 82).

These "compulsory measures" can take several forms. Chinese law and practice appear to have a presumption in favor of restraining the liberty of anyone suspected of a crime, usually by detention, even before criminal charges are filed. The investigating authority—usually the police or, when the suspect is a government official, the appropriate investigatory section of the procuratorate—generally has the right to determine whether a suspect should be incarcerated or released

*Compelled appearance:* The first "compulsory measure" addressed by the CPL is a compelled appearance or *ju chuan*. Once a case file is opened, the police may order the suspect to go to the police station for up to 12 hours of questioning. During this period, the suspect has no right to consult with anyone.

After the initial police interrogation, the suspect should be notified of his right to contact a legal representative and/or a family member. If the suspect has a legal representative, the police have a duty to notify that representative. During this stage, the representative (who can be either an attorney or a lay representative) has a right to be present but may only advise the suspect generally about the case and his rights.

Prior to the 1997 reforms, the time limit for holding a suspect for interrogation was 24 hours. However, the police routinely initiated a new 24 hour period as soon as the previous one expired, rendering the time limit meaningless and permitting unlimited interrogation.<sup>13</sup> One of the reforms introduced in 1997 provided that "a criminal shall not be detained under the disguise [sic] of successive summons or forced appearance" (CPL Article 92). Thus, under current law, if the police choose to hold a suspect beyond the initial twelve-hour period they must use another compulsory measure—*ju liu*, or detention.

*Detention:* Detention, governed by Article 61 of the CPL, provides that the police may detain a suspect if he or she:

- 1) is preparing to, in the process of, or discovered immediately after committing a crime;
- 2) is identified as having committed a crime by a victim or an eyewitness;
- 3) is found with criminal evidence on his/her person or residence;
- 4) attempts suicide or escape after committing a crime;

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<sup>13</sup>Prior law also permitted a form of detention known as "*shou rong shen cha*," or "shelter and investigation." Under this rubric, the police could detain a suspect indefinitely on the ground that his identity was unclear.

- 5) is likely to destroy or falsify evidence or tally confessions;
- 6) does not provide true name and address and identity is unknown; and
- 7) is strongly suspected of committing crimes from one place to another, repeatedly, or in a gang.

By setting conditions that must be met before a suspect may be detained, the CPL gives the impression that detention of criminal suspects is less than automatic in China. However, according to the Chinese criminal law experts I interviewed, an estimated 90 percent of suspects are detained during investigation.

The length of permissible investigatory detention is not easily gleaned from the CPL. According to CPL Article 69, the police must seek the procuratorate's approval of *daibu* (commonly translated as "formal arrest") within three to seven days of the initial detention. But in major cases, this time limit may be extended to 30 days. The procurator then has seven days within which to render a decision. If approval is denied, the police may seek review but must release the detainee. Thus, the police, on their own authority and without any opportunity for review by an outside agency, can easily subject anyone to incarceration for up to 37 days.

According to criminal defense attorneys, the police sometimes extend the 30 detention period by initiating an investigation into a new offense once the initial 30 days is about to expire. Any investigation of a new offense triggers a new 30-day clock (CPL Article 128). There are also questions about how strictly the time limits that do exist are enforced. Official Chinese news media have, in recent years, reported cases in which the police have violated the time limits for detention and have identified police compliance with the law as a serious issue that needs to be addressed.

*Formal arrest:* After the initial three to 37 day period of detention expires, the only way investigators can lawfully continue detaining a suspect is by obtaining permission to "formally arrest," the suspect. Technically, only the Chief Procurator can approve a formal arrest. In practice, however, each procurator's office has a special section designated to handle *daibu requests from* investigators.

According to CPL Article 60, to approve a formal arrest, the procuratorate must find that: 1) "there is evidence to support the facts of a crime;" 2) the "criminal suspect or defendant could be sentenced to a punishment of not less than imprisonment;" and 3) "such measures as allowing him to obtain a guarantor pending trial or placing him under residential surveillance would be insufficient to prevent the occurrence of danger to society." Exceptions are to be made for suspects or defendants who are seriously ill, pregnant, or nursing babies.

The time limits for holding a person in custody under formal arrest are governed by several different provisions of the Criminal Procedure Law. According to CPL Article 124, "the time limit for holding a suspect in custody during investigation shall not exceed two months" unless the case is complex, in which case the time period may be extended an additional month. Reading this provision alone might lead one to conclude that the absolute limit on investigatory detention is three months, but that would be incorrect.

According to CPL Article 138, once the case is transferred from the police to the procuratorate for prosecution, the procuratorate has one month to decide whether to prosecute, a period that can be extended one-half month in a complex or major case. However, if the procuratorate cannot make a decision within this time, or if it decides that further investigation is warranted, it can send the case back to the police for further investigation. In that case, the police have up to an additional month to complete their investigation. If the procuratorate decides to bring the case after the second presentation by the police, it is conceivable that four months will have passed by the time that decision has been made.

Even after the second presentation, the procuratorate may decide that further investigation is warranted, although it may not send the case back more than twice. Thus, a total of up to seven and a half months may pass before a decision to prosecute is made. A seven and a half month period of investigatory detention, during which time the suspect is held in custody, but not charged with a crime, is therefore permissible under Chinese law.<sup>14</sup>

*Other measures: Bail and house arrest:* The 1997 amendments to the Criminal Procedure Law allow for two other measures short of detention: release on bail<sup>15</sup> and "residential surveillance."<sup>16</sup> Within 24

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<sup>14</sup>There are also additional provisions that can extend the time a suspect is in custody. Article 122 excludes from consideration the period of time a suspect's mental illness is under verification. Article 128 permits the clock to restart if a new offense is discovered, and permits the clock to be suspended if a criminal suspect does not tell his true name and address and his identity is unknown.

<sup>15</sup> "*Qu bao hou shen*" literally means, "seeking a guarantor while awaiting trial."



hours of detention, the police must notify the suspect's family, lawyer, or representative. These representatives may then apply for bail or home detention on the suspect's behalf.

The decision to allow a suspect out on bail or house arrest is made by the investigating agency, typically either the police or the procuratorate. The Chinese system of bail places a great deal of risk on the guarantor. If the suspect does not appear as required, the guarantor not only forfeits whatever property has been posted as security but may also be subject to arrest. A suspect may be on bail awaiting trial for up to 12 months or under house arrest for up to six months (CPL Article 58).

### **Interrogation and other investigative techniques**

According to one defense attorney, the basic method of investigation in China is for the police to interrogate a suspect and then investigate whether the suspect's information is true or false. After the investigation, the police may resume interrogation of the suspect and, if necessary, investigate further.

This process may illuminate one reason that China's Criminal Procedure Law permits such long periods of investigative detention. If, in fact, investigations usually proceed this way, then any reform that eliminates or substantially shortens the permissible period of investigatory detention will have to be accompanied by police training in other effective means of investigation.

*Interrogation of a criminal suspect:* All criminal suspects must be interrogated within 24 hours of detention or arrest. Interrogation conducted pursuant to a forced appearance is limited to 12 hours. Two investigators must be present during interrogations and a written statement must be prepared and signed by the suspect. When interrogating a criminal suspect, the investigators must first ask "whether or not he committed any criminal act and let him state the circumstances of his guilt or innocence; then they may ask questions" and the suspect must answer truthfully (CPL Article 93).

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<sup>16</sup>"*Jian shi ju zhu*" literally means under supervision and watch while living at home and is analogous to house arrest.

The right to remain silent is not explicit in Chinese law and is currently a topic of heated debate among legal scholars and government officials. Some officials defend the current system, saying that it does not require a subject to answer but instead requires only that any response be truthful. They further note the law prohibits coerced confessions. Other experts point out, however, that these views are not consistent with the practice of criminal law in China where, in fact, there is no protected right to remain silent. A group of Shanghai lawyers is reportedly calling for the adoption of a Miranda-type rule in China requiring the police to “read suspects their rights, provide for the right against self-incrimination, and for suspects to be represented by a lawyer after their arrest.”<sup>17</sup>

Critics of the Chinese criminal justice system also cite its heavy reliance upon confessions. Many conversations I had with procurators confirmed that obtaining a confession was, in fact, an important component of a criminal investigation.

A suspect may hire a lawyer only after the initial interrogation. At this stage, the lawyer's role is limited to providing the suspect with legal advice and filing petitions and complaints on his behalf. The lawyer may not yet assist the suspect in preparing a defense. If the case involves "state secrets," a vague and elastic concept under Chinese law,<sup>18</sup> then the suspect may need the approval of the investigating authority before hiring a lawyer.

*Searches and other investigative methods:* Investigators are authorized to conduct searches without judicial approval or the approval of any outside agency and without reference to any standard of proof

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<sup>17</sup>South China Morning Post, July 19, 2000.

<sup>18</sup> Two recent cases illustrate the elasticity of this concept. In one case, a Xinjiang businesswoman, Rabiya Kadeer, was convicted of disclosing state secrets when she mailed published newspaper articles about the Xinjiang separatist movement to her dissident husband in the United States. In another case, Song Yongyi, a U.S. permanent resident, a researcher and librarian at Dickinson University, was charged with disclosing state secrets when he gathered materials concerning the Cultural Revolution for his research.

indicating the presence of evidence of a crime. Other investigative techniques expressly sanctioned by the CPL include the questioning of witnesses, inquests and examinations, seizure of evidence, and expert evaluation. Chinese law prohibits the use of torture, threats, enticement, or deceit to obtain evidence (CPL Article 43). The procurators I questioned indicated that, although they had the authority to conduct wiretaps and mail searches, such methods were used infrequently and required high-level approval within the agency conducting the investigation. There is no requirement of judicial approval.

I also questioned procurators about the use of undercover techniques, informants, and accomplice testimony. With few exceptions, they felt that using any undercover technique was tantamount to entrapment. They also rarely used the testimony of one criminal to convict another, in part, because they were loath to provide leniency in exchange for cooperation. One procurator explained that the police might use undercover techniques if illegal products such as drugs or pirated compact discs were offered for sale to the public. In those circumstances, a police officer, posing as a member of the public, might make an undercover purchase.

### **Initiating a criminal prosecution**

After gathering evidence, the investigators (either the PSB or the procuratorate) submit the evidence to the procuratorate section in charge of approving prosecutions. At this stage, the suspect is entitled to consult with his or her attorney fully and confidentially.

The standard of review for the procuratorate is "whether the facts and circumstances of the crime are clear, whether the evidence is reliable and sufficient, and whether the charge and the nature of the crime is correctly determined" (CPL Article 137). The procurator must also decide whether it is a case in which "criminal responsibility should not be investigated," although it is not clear what this means in practice.<sup>19</sup>

In making these determinations, the procurator must interrogate the suspect and his or her representative, and consult with the victim and his or her representative. If, during this review, the procurator discovers that any illegal method was used during the investigation, the procurator may refer the conduct of the investigator to the appropriate disciplinary authority. If the misconduct rises to the level of a criminal offense, it is referred to the appropriate section of the procuratorate for criminal investigation (CPL Article 76).

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<sup>19</sup> The procurator is also charged with ensuring that all crimes and all criminals have been charged, ensuring that the investigation was lawfully conducted, and ascertaining whether the case has incidental civil actions.

As for the effect on the matter at hand, if the evidence, although unlawfully obtained, is nevertheless reliable, it will be used. In other words, there is no "fruit of the poisonous tree" doctrine. Although Article 43 of the CPL strictly forbids extorting confessions by torture and prohibits collecting evidence by threat, enticement, deceit, or other unlawful means, there is no procedure for the suppression of unlawfully obtained evidence.

Once the procurator decides to initiate prosecution, the case comes under the jurisdiction of the appropriate level of the People's Court.

*Pre-trial procedures:* There are no judicial pre-trial procedures to speak of in the Chinese Criminal Procedure Law. Before the 1996-97 amendments took effect, there was actually more pre-trial discovery than there is now. One goal of the 1997 amendments to the CPL was to ensure neutrality of judges in the trial process and to eliminate the phenomenon of "first decide [the case], then have a trial." To accomplish that reform, the law eliminated the procedure of the judge reading the evidence at trial. As a further means of ensuring the judge's neutrality, the law also eliminated the requirement that the procurator file all his evidence with the court before trial. The rules were changed so that the procurator's office merely had to file in court an exhibit list, a witness list, and copies of what they had determined was "major evidence" (CPL Article 150).

In a classic case of the rule of unintended consequences, this "reform" set back the judicial process by virtually eliminating the defense's only opportunity to see the prosecution's evidence before trial. Under the old system, the defense could view the evidence filed with the court. Now there is virtually nothing to see, and the defense tends to be surprised by the prosecution's evidence at trial.

*Lack of a simplified procedure:* The current Chinese Criminal Procedure Law does not provide for a simple alternative to a trial when the facts are uncontested.<sup>20</sup> The lack of an available simplified procedure for resolving uncontested cases is an obstacle to reform. To the extent that China wishes to enhance its trial procedures, such reforms will place burdens on China's limited judicial, prosecutorial, and legal resources. Unless a mechanism is established for handling uncontested cases fairly and more efficiently, a strong argument can be made that

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<sup>20</sup>A summary procedure is available for non-serious offenses; that is, offenses for which the maximum sentence is not more than three years (CPL Articles 174-179). According to unofficial Chinese sources, even this procedure is not often used.

reforms such as requiring in-person testimony create significant additional burdens.

### **Adjudication and trial procedures**

Trials are generally conducted before a tribunal of three decisionmakers, made up of at least one professional judge, who may or may not have received legal training, and two citizen “assessors,” or, in some cases, three professional judges.<sup>21</sup> Cases are decided by majority vote.

Trials begin with the court questioning the defendant about his identity, status, and the basic progress of the case to that point. The defendant is also given an opportunity to request the recusal of the judges and the prosecutor. The prosecutor then reads the charges and the court asks the defendant for a response. The defense attorney and the victim also have a right to question the defendant.

The prosecutor then reads off each piece of evidence and the court asks the defendant and his lawyer if they have any opinion concerning the evidence. If the prosecutor calls a witness, or if the victim is a party to the case, then the defendant and the defense attorney may each question the witness and the victim, and the victim may question the defendant.

After the prosecution has presented its evidence, the defense presents its evidence. Then the prosecution, the defendant, the victim (if any), and the defense attorney all have an opportunity to argue the case. The defendant is given the last opportunity to speak. Finally, the judicial panel retires briefly and returns to announce a verdict and sentence.

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<sup>21</sup>Article 147 provides that cases heard by the Higher People's Courts or the Supreme People's Court may consist of an odd-numbered panel of between three and seven decisionmakers.

Obtaining live testimony from witnesses is apparently difficult and, in any event, is permitted but not required. A recent survey conducted by the China University of Law and Politics in one district of Shanghai revealed that witnesses testified in person in only 5 percent of all cases. Moreover, written witness statements may be read into the record even if there has been no opportunity for the defense to cross-examine the witness.<sup>22</sup>

## **Sentencing**

The court generally reaches a verdict and announces a sentence as part of the same trial proceeding. This makes for a difficult defense argument. On one hand, the defense may want to contest the facts. On the other, the defense does not want to appear to have anything but a remorseful attitude so as to receive more lenient treatment in the likely event of a conviction.

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<sup>22</sup>Article 47 seems to prohibit this practice. Article 47 provides that: "The testimony of a witness may be used as basis for deciding a case only after the witness has been questioned and cross-examined in the courtroom by both sides" . . . In practice, however, very few witnesses testify in person.

The standard of proof at trial is "the facts are clear and the evidence is reliable and sufficient."<sup>23</sup> The defendant may be found innocent outright or by reason of insufficient evidence (CPL Article 162). Observers have commented that the latter verdict means that the burden of proof is on the procurator.

Procurators do have the authority to request an adjournment mid-trial to obtain additional evidence. Judges may also, on their own, adjourn the trial and conduct their own investigation outside the courtroom. In difficult cases, the court may consult with the chief judge, who may turn the case over to the judicial committee for decision.

Thus, the Chinese Criminal Procedure Law has no concept of a trial as a proceeding to assess credibility and determine the truth based upon an open court evaluation of all the evidence. The lack of such a principle is demonstrated by the fact that: 1) witnesses are not required to appear in person; and 2) the ultimate decisionmakers may be authorities who did not personally preside at trial and hear the evidence, namely the chief judge of the court and the judicial committee. The standard of proof, which brooks no uncertainty, the lack of a requirement for live testimony, the lack of a right to silence, coupled with long periods of pre-charge incarceration and the opportunity for those who did not hear the evidence to make a decision, all make trials into less a search for the truth than an opportunity to eliminate all conflict before trial.

*The death penalty:* As noted above, at the conclusion of the trial, the court announces both the verdict and sentence. Chinese sentences can be extremely harsh by Western standards. For example, Chinese law authorizes the death penalty as a punishment for a host of crimes in addition to murder. The Chinese Criminal Law authorizes the use of the death penalty in no fewer than 35 articles, ranging from homicide to rape to narcotics trafficking to embezzlement, bribery, and financial fraud.

*Compensation:* Another manifestation of the principle that runs throughout the Chinese system—that objective truth is ascertainable and it is the responsibility of the police, the procurators, and the court to ascertain it—is the Compensation Law. Chinese law provides for compensation to be paid to a defendant for any period of incarceration found to have been unlawful by virtue of the defendant's subsequent acquittal. There is no notion that the procedures are designed to allow a fair determination of the truth by allowing each side to attack the other's evidence. Instead, the truth is considered knowable, and it is the

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<sup>23</sup>This is the official translation. A more accurate translation is that "the facts of the case are clear, the evidence is accurate and complete."

responsibility of the police and prosecutors to determine the truth and present it in court.

### **Prospects for reform**

While working in China, I met many intelligent, well-educated, open-minded professionals who seemed sincerely interested in reforming their system to make it better and fairer. Such individuals can be found within the procuratorate, the courts, and the government, as well as in academia.

It is true that Chinese authorities suppress political dissent and organized religion to the extent that the Chinese Communist Party finds them to be a threat to its authority. Nevertheless there is also an official policy of encouraging reform. Thus, while challenges to the Communist Party are not tolerated, many people are working within the existing political structure in China to accelerate the speed and broaden the scope of legal reform.

Some reforms have already made a significant mark on the system. The 1997 reform of the Criminal Procedure Law, for example, provides that only someone found guilty by a court may be considered guilty of an offense. Under prior law, procurators could declare someone guilty but decline to bring a formal prosecution in court. In a related matter, the law now makes clear that it is the prosecution's burden to prove guilt, because if there is insufficient evidence, the Court must acquit.

In addition, the 1997 reforms introduced the concept of an adversarial system in which it was the prosecutor's responsibility (rather than the court's) to bring the evidence to court and prove the defendant's guilt. The former practice of permitting the judge to preview the evidence and form an opinion of guilt and punishment before trial was eliminated.

Other reform proposals that were not adopted in 1997 are still having an influence on the direction of legal reform. For example, Chinese legal scholars have written articles criticizing the reeducation through labor system and calling for its abolition or reform. The legal community is also discussing the promulgation of a new criminal evidence law. The proposals include many reforms that American lawyers would not consider strictly evidence law issues because they also touch upon basic criminal procedure. These include:

- 1) the presumption of innocence;
- 2) the burden of proof;
- 3) the right to silence during interrogation and trial;
- 4) compelling witnesses to testify in person in court;
- 5) the suppression of illegally seized evidence and the "fruits of the poisonous tree;"



- 6) expert witnesses; and
- 7) meaningful pre-trial discovery.

While the timing and scope of reform is far from certain, the fact that these issues are being discussed openly is a major development in China's legal reform process.

In addition to these important procedural issues, other legal reform issues that are more institutional in nature are also being discussed. Many of these issues go to the independence of the judiciary and its decisionmaking process.

One of the problems in China's legal system is ensuring that reforms enacted by the National People's Congress are, in fact, carried out at all levels. To that end, there are proposals to reform the way courts and the procuratorates are funded and the way judges and procurators are appointed and promoted. The current system, under which local governments control the funding, appointment, and promotion of local courts, judges, and procurators, makes local judges and procurators beholden to local governments and has led to a serious problem of local protectionism. One proposal is to place the funding burden and the appointment authority on the next highest level of government.

Another issue pertains to the influence of individuals and entities over a verdict, even if those individuals and entities have not heard the evidence at trial. One proposal is to eliminate the influence of chief judges and law committees and to prevent a court from contacting a higher court before it renders a verdict.

On the other hand, there are also political factions in China that would like to bring the courts under even tighter governmental control. One proposal that almost became law would have given the National People's Congress, through its standing committee, the authority to overturn any decision of any court that it deemed to be incorrectly decided.

Although there is a fair amount of academic debate about issues of law reform, the freedom to express one's opinions is far from absolute. Last year, one legal scholar wrote an article criticizing China's system of rewarding army officers with judgeships. The author was criticized, and he later issued a retraction.

## Looking ahead

Such political pressure is but one of several obstacles to future reforms of the criminal justice system in China. First, of course, is the question of political will and lack of consensus. Traditionally, the police have been more powerful than the procuratorate and the procuratorate more powerful than the judiciary. Virtually every proposed reform would work to reverse that trend by circumscribing the power of the police and ultimately placing more power in the hands of the procuratorate and the judiciary. If the *laojiao* system is abolished,

for example, and all violations of law are brought within the criminal justice system, then the procuratorate and the courts will have the power to check the authority of the police in a much broader range of cases than they do now. One can, therefore, expect some political opposition to any proposed reform in this area.

Another obstacle to reform is a very practical one. Every proposed reform exacts a cost. If China requires witnesses to appear in person, there will be costs involved in protecting witnesses and assuring their presence, as well as the costs of longer, more expensive trials.

Third, although the number of qualified legal experts in China is growing, there is still a shortage of trained legal talent throughout the system. Most procurators are not even college graduates, let alone law school graduates. The same is true of judges and lawyers. Moreover, trained legal specialists face strong economic incentives to apply their talents in more lucrative fields such as international trade and finance, as opposed to criminal law. Any significant legal reform is bound to make the job of prosecuting, defending, and judging cases more difficult, complicated, and challenging. Without sufficient numbers of trained legal experts, any legislative reform will be futile.

Fourth, any significant legal reform will mean that in some cases guilty people will go free. It is not clear whether China is ready to pay the cost of due process with the acquittal of guilty criminals.

Finally, corruption represents perhaps the biggest obstacle to reform. During the last session of the National People's Congress, Premier Zhu Rongji identified the fight against corruption as a key government priority. Corruption is also the number one political issue on the minds of the Chinese people. All the reforms in the world will be of no effect if the system is corrupt and lacks the confidence of the people.

Despite uncertainty surrounding the speed and shape of reform, one fact remains clear: there will be reform. The reforms may be deemed insufficient when measured against American standards of due process, but when compared to the arbitrariness and anarchy of the Cultural Revolution, they are quite significant. China now has a 20-year tradition of legal reform, with many new reforms on the drawing table. Thus the criminal justice system is very much still a work in progress.