

***Empty Promises: Human Rights Protections and  
China's Criminal Procedure Law in Practice***

**A REPORT BY HUMAN RIGHTS IN CHINA  
MARCH 2001**

Human Rights in China (HRIC) is an international, non-profit organization founded by Chinese scholars in March 1989 with offices in New York and Hong Kong. HRIC monitors the implementation of international human rights standards in the People's Republic of China, carries out human rights advocacy and education among Chinese people inside and outside the country and assists victims of human rights violations in China. The group puts out regular press releases, a quarterly English journal, *China Rights Forum*, Chinese-language human rights education materials and books, and occasional reports. It also regularly submits information to U.N. bodies and conducts other international advocacy activities.

HRIC's mandate includes all rights recognized by international instruments, including both civil and political rights and economic, social and cultural rights. Its objectives are to facilitate the development of a grassroots human rights movement in China and to promote international scrutiny of China's human rights situation.

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## I. Introduction

More than four years have now passed since the revised Criminal Procedure Law (hereinafter “CPL”) entered into force in January 1997. While these revisions have been praised both inside China and internationally for making certain improvements to the human rights protections available to suspects and defendants caught up in China’s criminal justice system, doubts have been raised as to how much impact these reforms have had in practice.

Based on three years of observing the CPL’s operation in certain key areas related to rights protections and interviews with over sixty legal professionals, Human Rights in China (HRIC) concludes that the implementation of the CPL has departed substantially from both the letter and the spirit of the law. Our investigation shows that the authorities appear unwilling to allow the limited safeguards in the revised CPL significantly to protect rights in practice. Furthermore, they have refused to act, whether through enacting legislation or administrative rules, to remedy deficiencies in areas where further reforms are very evidently needed.

CPL provisions aimed at safeguarding rights have been either watered down by interpretative rules issued by law implementation agencies, or violated outright without the authors of the violations suffering any consequences. Loopholes and ambiguities in the CPL have been exploited to the full by law implementation authorities. In certain areas, the new CPL has actually resulted in greater limitations of key rights.

This is particularly so as regards certain aspects of the involvement of lawyers in criminal cases. As described in Section III of this report, lawyers now generally have less access to case information gathered by the prosecution than before, and they can face criminal penalties for engaging in vigorous defense of their clients. The role of lawyers in legal defense envisaged in the revised CPL has been severely diminished by various implementation measures.

As described in Section V, illegally-obtained evidence generally continues to be admissible in court, despite many years of criticism from legal scholars and human rights advocates pointing out how this contributes to endemic torture and ill-treatment of persons detained as part of the criminal process.<sup>1</sup> Proposals from both international and domestic scholars to establish an exclusionary rule in the CPL have so far been largely ignored, as have proposals to incorporate the right to remain silent and the right against self-incrimination into Chinese law.

Another element that hampers efforts to eliminate abuses is the long periods suspects and defendants can be legally held in detention virtually incommunicado, examined in Section IV. The extensive use of administrative detention, such as Reeducation through Labor (RTL), Custody and Education (C&E) and Custody and Repatriation (C&R), are at times employed by the police to avoid even the minimal rights safeguards in the CPL.<sup>2</sup>

A recent official report from the Standing Committee of the National People’s Congress (hereinafter “NPC Standing Committee”) confirmed many of the problems with implementation of the CPL mentioned in HRIC’s report, although unfortunately the full NPC report was not made

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<sup>1</sup> See Human Rights in China (HRIC), *Impunity for Torturers Continues Despite Changes in the Law: Implementation of the Convention Against Torture in the PRC*, April 2000; and Amnesty International, *Torture: A Growing Scourge in China—Time for Action*, February 2001.

<sup>2</sup> See Human Rights in China, *Not Welcome at the Party: Behind the “Clean-up” of China’s Cities—A Report on Administrative Detention under Custody and Repatriation*, September 1999, and *Detained at Official Pleasure: Administrative Detention in the PRC*, June 1993.

available to the public.<sup>3</sup> In September 2000, the NPC Standing Committee sent inspection groups to six province-level administrations (Tianjin, Inner Mongolia, Heilongjiang, Zhejiang, Hubei and Shanxi) to review the implementation of the CPL over the past three years. These inspections raised serious concern, particularly about three main areas of CPL implementation. First, they found various time limits on detention have been widely ignored. Second, torture has reached epidemic proportions, although both the CPL and the Criminal Law (hereinafter “CL”) prohibit it. Third, lawyers representing defendants or suspects in criminal cases encountered a great deal of difficulty in fulfilling their professional duties.<sup>4</sup>

However, HRIC believes that these problems are not merely to do with inadequate implementation of the CPL, as the NPC report indicates, but are intimately connected to serious institutional failings and lack of political will to address them. As detailed in Section II of this report, the Chinese Communist Party (CCP) continues to exercise day-to-day control over the entire law implementation apparatus in the country, severely compromising the possibility of establishing the judicial independence that is essential for fair and impartial adjudication of cases.

The impact of political control is most evident in the cases described in Section VI, which demonstrate how any pretense that persons have equal protection under the law is dispensed with when the case involves a politically-sensitive issue or defendant. Such discriminatory treatment is indicative of a consistent tolerance for legal exceptionalism at all levels of the system, a phenomenon which calls into question the entire project of establishing a rule of law in China.

Despite this relatively bleak picture, there have been some positive developments, particularly in the willingness of legal professionals to criticize the failings of the current system and call for change. On the official side, China has gradually reformed the style of trials from an inquisitorial to accusatorial model. This means judges play a more neutral role than they did under the old CPL, and the defense side is given more opportunity to challenge testimony and evidence. Recently, the courts made a brave move by stipulating that all trials, except those for which this is legally prohibited, should be open to the public and any trial violating the public trial rule shall be sent for retrial.<sup>5</sup>

The abuses described in this report are clear violations of international human rights standards, and undoubtedly result in many serious miscarriages of justice across the nation. With thousands of executions being carried out annually, for many people this is a matter of life and death. China is a party to various legally binding international treaties and has contributed to formulating a number of international standards that have normative status. HRIC joins with many legal scholars inside and outside China in urging the Chinese government to begin immediately to draft and enact legislation that addresses the concerns detailed in this report. In Section VIII we present a list of detailed recommendations to the Chinese authorities, and also urge the international community to do what it can to assist in the long and difficult process of bringing China’s criminal justice system into compliance with international standards.

Summaries of the five main sections of the report are presented below. They are followed by a Background section that is composed of two brief supplementary sections, the first outlining

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<sup>3</sup> See Hou Zongbin, “Problems in the Implementation of the Criminal Procedure Law that Cannot be Ignored” (*xingshi susongfa guanche shishi cunzai burong hushi de wenti*), Xinhua News Agency report, December 28, 2000.

<sup>4</sup> *Ibid.*

<sup>5</sup> See Supreme People’s Court: Several Rules on Strict Implementation of Public Trial System (*zuigao renmin fayuan guanyu yange zhixing gongkai shenpan zhidu de ruogan guiding*), issued on March 9, 1999.

issues involved in the preparation of this report and the second detailing regulatory developments since the implementation of the CPL.

## **A. Executive Summary**

### **-Judicial Infrastructure**

The institutional framework of China's criminal justice system has significantly tempered the impact of the 1996 amendments to the Criminal Procedure Law.

The power of the CCP continues to prevent the country's judiciary from developing a truly independent role. The Party is able to wield its influence on the judiciary in a number of ways, including the nomination of judges and prosecutors. Intervention in the judiciary's daily work is most directly exercised by the CCP through political-legal committees (*zhengfa weiyuanhui*) which are responsible for implementing Party policy in legal affairs.

Judicial independence and the impartiality of criminal justice are also compromised by the structure of the court system itself. For instance, adjudication committees continue to exist within every people's court and are mandated to review and decide "difficult, complicated, or major cases." The case review system, or the practice of subjecting cases and decisions for examination and approval by senior judges, also undermines judicial autonomy.

Finally, routine cooperation between the police, prosecutors and judges as well as consultation within different levels of the judiciary further militates against a criminal defendant's chances for a fair and impartial hearing or review.

Recently the authorities have claimed that they are taking steps to strengthen judicial independence in a number of ways, including by holding judges accountable for "wrongfully decided cases." However, in fact this latter measure merely increases pressure on judges to please their superiors. In sum, the efforts so far fail to recognize that the only way to bring about meaningful change to China's legal system is through substantial institutional reform guided by the principle of a true separation of powers.

### **-Role of Lawyers**

The 1996 CPL revisions were supposed to expand the rights of individuals suspected of criminal offenses by authorizing lawyers to provide more legal services at an earlier stage of criminal proceedings. However, defense lawyers have faced serious obstacles in bringing these amendments to life, because of both their inability to exercise the rights given to them under the new CPL and loopholes in the law itself.

For example, officials continue to deny requests for lawyer-client meetings. Even when approved, meetings are frequently limited in frequency and duration, or subjected to conditions that severely compromise meaningful consultation. According to research carried out by HRIC, lawyers are commonly held responsible for security during meetings with clients and further told what they can and cannot discuss. Attorney-client confidentiality is generally disregarded as meetings are often monitored, recorded, or held in public rooms.

Despite the promises of the new CPL, lawyers continue to experience difficulties in preparing a proper defense. In addition to limited access to detained clients, defense lawyers are restricted in

their ability to review evidence collected by the prosecution, have insufficient power to collect their own evidence, and are unable to cross-examine witnesses who have provided testimony but who fail to appear in court. Mounting official hostility towards lawyers has also greatly increased the risk of representing criminal defendants. Lawyers who undertake such work are often harassed and intimidated, and sometimes detained or even convicted of crimes, merely for actively defending the interests of their clients. Lawyers have consequently been reluctant to work in criminal defense, which has led to a disturbing decline in the number of criminal cases where defendants are represented by counsel.

To truly expand the rights of criminal suspects and defendants, China must also accord its lawyers the guarantee that they will be able to perform their professional duties without intimidation, harassment or unnecessary restraint.

### **-Pretrial Detention**

One of the most criticized aspect of the 1979 CPL was the huge discretion vested in officials to detain suspects without judicial review. In 1996, a number of important revisions to the CPL apparently brought China closer to eliminating arbitrary detention in its criminal process. The elimination of Custody and Investigation (*shourong shencha*, C&I), a type of indefinite administrative detention, from the practice of crime investigation was one example of a step in the right direction.

However, the pretrial detention currently prescribed in the CPL still falls far short of recognized international standards. For instance, an overwhelming majority continue to await trial in custody. Non-custodial detention such as “taking a guarantee and awaiting trial” (*qubao houshen*) remains the exception rather than the rule. Because the CPL does not specifically prohibit authorities from using different types of detention consecutively or in succession, detention may—and frequently is—prolonged beyond legal time limits.

Furthermore, legal recourse remains unavailable to individuals who want to contest the deprivation of their liberty, and there are virtually no legal or other consequences for officials who ignore or misuse the laws regarding pretrial detention. The extensive loopholes contained in the law itself and in interpretations issued by law implementation agencies allow the authorities enormous latitude to detain people for as long as they see fit.

Finally, the widespread use of extra-judicial measures to detain suspects indicates that China is still a long way from a system that protects the rights of suspects and defendants. Such practices effectively allow law implementation agencies to circumvent the minimal safeguards for the rights of defendants contained in the revised CPL. Indeed, the 1996 revisions to the CPL relating to pretrial detention were more a confirmation of the pre-existing system than a meaningful reform.

### **-Evidence**

Despite the 1996 revisions, the CPL fails to adequately protect critical procedural rights for criminal suspects and defendants. This oversight has cultivated an environment where torture is relied upon as a convenient tool to solve and prosecute crimes.

Although the use of torture to extract confessions has been prohibited in China, neither the CPL nor any other law expressly and unequivocally bars the use of confessions obtained through

torture in court proceedings. Current law only prohibits the conviction of an individual solely on the basis of a confession obtained through torture.

Since it obliges criminal suspects to answer all questions from the investigation authorities, the CPL effectively puts suspects and defendants at a greater risk of torture and ill-treatment. Even under the 1996 revisions, no criminal suspect may refuse to speak or decline to answer on the basis that he or she might help the prosecution's case. As many Chinese legal scholars have pointed out, the absence of the right to remain silent and the right against self-incrimination in Chinese law are key contributing factors in law implementation agencies' reliance on torture as a "crime solving" technique. In fact, many officials have objected to incorporating such rights into Chinese law on the grounds that they would hinder the state's ability to punish crimes and prosecute cases efficiently. However, without such procedural rights, China will not be able to effectively uphold the rights of persons accused of crimes.

### **-Discriminatory Practice**

Although Chinese law guarantees equal treatment for all citizens, substantial evidence suggests that a number of people in China are singled out for "special treatment" and are routinely denied many of the rights guaranteed under the CPL. These people include those who seek to form opposition parties, organize independent trade unions, ethnic minority activists and members of unregistered religious groups such as the recently-banned Falungong spiritual movement. Many of the principles and protections outlined in the CPL simply are not applied to these "politically disadvantaged" defendants.

Based on a detailed analysis of cases involving dissident defendants, HRIC concludes that the CPL is applied in a discriminatory fashion in politically sensitive cases, both by central and local authorities. For instance, dissident defendants are routinely denied the right to retain counsel. In some cases, authorities blatantly deny this right on the grounds that the case involves "state secrets." In other cases, lawyers are dissuaded from representing such clients by both political pressure as well as onerous regulations that govern the handling of such cases. These defendants are also denied a range of other rights including the right to family notification of arrest or detention, the right to a public trial, the right to present a defense and the right to appeal.

Such clear and consistent violations of procedural rights, committed by authorities across the country and sometimes evidently authorized at the highest levels of the power structure, call into question the leadership's commitment to equal protection of the law for all citizens.

### **-International Standards**

As this report makes clear, both as written and as implemented, the CPL still falls far short of international standards in a range of critical areas. China continues to flout the universally-recognized right to a fair trial despite its obligation to uphold this legal entitlement. Although the Chinese government pays lip service to the right to legal counsel and the right to equal treatment under the law, it fails to fully uphold these principles in practice. In fact, an alarming number of criminal suspects and defendants continue to face arbitrary detention, torture and violation of their due process rights without the prospect of any form of judicial review. Without an independent and impartial judiciary, there is little chance that the rights of those caught in China's criminal process will be protected. This raises concerns that individual rights continue to be disregarded in a China that has learned to "talk the talk" but still refuses to "walk the walk."

## B. Background

### Scope of the Report

Given the size of China and the huge variation in conditions across the country, together with the complexity of the issue at hand, it would be impossible to cover every aspect of the criminal justice system in detail in one report. This report focuses on the pretrial stages and some important trial issues, since they are the areas associated with some of the most pressing human rights violations.

We have encountered a number of difficulties in analyzing the impact of the reform of China's criminal justice system and the implementation of the CPL. First, the publication of statistics relating to the criminal justice system remains severely restricted, and those which are made public are scattered in a variety of different sources, including the annual reports of the Supreme People's Court (hereinafter "SPC") and the Supreme People's Procuratorate (hereinafter "SPP") and in the China Law Yearbooks. There is generally no way of assessing the accuracy of these statistics, since no information is given on how they are produced. In addition, China has not established a case reporting system, and court documents, including verdicts and other trial documents, are generally not made public. Although the SPC periodically publishes information on particular categories of cases, these are aimed at guiding judicial practice on specific issues and lack sufficient information for assessment. These are serious obstacles in studying the actual operation of the system in terms of cases.

There are enormous discrepancies in judicial practice among different localities, with law implementation depending largely on the particular legal and political environment of specific places. Given the fact that there is significant divergence from the letter of the law in its practice everywhere, our interviews and materials (see below), which concentrate the situation in some of China's largest cities, may actually reflect a *better* picture than one which covers the range of experience across the country. Finally, many new initiatives on CPL implementation have been taken by different authorities, and the CPL itself has been substantially revised through either interpretations issued by law implementation agencies or other regulatory documents, which further confuses an already complex picture.

The two primary sources of information for this report are official Chinese publications and our interviews with Chinese legal scholars and practitioners both inside and outside China. During the last three years, the legal press and professional periodicals have carried a large number of articles and reports on the implementation of the CPL, and these have been a major source of information. We also carried out a series of interviews with Chinese legal scholars, lawyers, judges, prosecutors and officials of legislatures in different areas during several visits to China.<sup>6</sup> These interviews provided first hand information on how the CPL has been implemented in some areas. We also have information from observation of several criminal trials in Beijing and Shanghai, which provided details on the reform of the court trial system. In addition, we have collected various official documents, both legally enacted and internally circulated, that shed light on the real picture of CPL implementation nationwide as well as in specific localities.

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<sup>6</sup> In total, a dozen judges from Shanghai, Beijing, Wuhan, Xian, Shenzhen were interviewed between the period of 1999 to 2000. The judges interviewed by HRIC were selected at random and represent all levels of the Chinese judiciary, including a judge from the Supreme People's Court. A total of 30 lawyers from Shanghai, Beijing, Wuhan and Xi'an were also interviewed between 1999 and 2000. In addition, over the same period of time, HRIC interviewed a total of around 20 legal scholars and several prosecutors.

In this report, we have translated the Chinese term “sifa jiguan” as “law implementation agencies.” This term, which incorporates the police, prosecutors and the courts, is often translated as “judicial organs,” but this creates confusion with the established English meaning of the words “judicial” and “judiciary” which are used to refer exclusively to courts. We will stick to that narrow sense of these latter two terms in this report.

We are grateful to the HRIC staff members and volunteers who have contributed to this report in a variety of different ways. The research for this report was funded by a grant from the Open Society Institute, without which this publication would not have been possible. HRIC is grateful for OSI's support for this project. Particular thanks go to OSI's Miriam Porter for her unstinting help. We would also like to thank the many scholars and legal practitioners who provided us with invaluable input, without which this report would not have been possible. It is a sad testament to the state of human rights advocacy relating to the PRC today that these people will have to remain nameless, as acknowledging their concern about the state of China's legal system in a report by a human rights organization could cause them to suffer political persecution.

### **Regulatory Developments after the CPL Entered into Effect**

Like many other Chinese laws, the CPL remains unacceptably vague on various important issues and leaves the law implementation agencies huge discretion. Thus, as is normal practice,<sup>7</sup> the various law implementation agencies have issued a series of detailed, and sometimes conflicting, rules on CPL implementation as outlined below. More information on the specifics of these rules is presented in the various sections of this report.

On December 20, 1996, the Supreme People's Court (below “SPC”) issued a document entitled Provisional Interpretation on Several Issues Regarding Implementation of the PRC CPL (hereinafter “SPC Provisional Interpretation”).<sup>8</sup> Later, the Supreme People's Procuratorate (below “SPP”) enacted Provisional Rules on Implementation of the PRC CPL (hereinafter “SPP Provisional Rules”).<sup>9</sup> After this, many local authorities, especially local public security departments, also issued their own rules or guidelines on CPL implementation, creating discrepancies among legal practices in different jurisdictions.<sup>10</sup> The Ministry of Public Security

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<sup>7</sup> In China, law implementation agencies have vast power to make detailed rules on the implementation of laws. The SPC and SPP have issued comprehensive implementation rules for virtually every major law passed by the NPC and its Standing Committee. To name a number of examples, the SPC enacted general rules on implementation of the General Principles of Civil Law, the Civil Procedure Law, the Administrative Litigation Law, as well as the Marriage Law.

<sup>8</sup> SPC: Provisional Interpretation on Several Issues Regarding Implementation of the PRC CPL (*guanyu zhixing zhonghua renmin gongheguo xingshi susongfa ruogan wenti de jieshi shixing*, hereinafter “SPC Provisional Interpretation”), discussed and passed by the SPC Adjudication Committee at its 867<sup>th</sup> meeting.

<sup>9</sup> SPP: People's Procuratorates' Provisional Rules on Implementation of the PRC CPL (*renmin jianchayuan shishi zhonghua renmin gongheguo xingshi susongfa guize shixing*, hereinafter “SPP Provisional Rules”), passed by the SPP Procuracy Committee at its 69<sup>th</sup> meeting on January 15, 1997.

<sup>10</sup> Such local regulations sometimes took the form of joint documents from several different authorities. For instance, in Xi'an, Shanxi Province, a joint document issued by the court, procuratorate and the public security department as well as the justice department, addressed a broad range of issues related to CPL implementation. See Several Opinions of the People's Procuratorate, the Intermediate People's Court, the Bureau of Public Security and the Bureau of Justice of Xi'an on Implementing the PRC CPL, Provisional (*xi'an shi renmin jianchayuan xian shi zhongji renmin fayuan xian shi gonganju xianshi sifaju guanyu shishi zhonghua renmin gongheguo xingshi susongfa ruogan yijian shixing*, hereinafter “Xi'an Opinions”),



(below “MPS”) has also promulgated several documents regulating the involvement of lawyers in criminal litigation during the early stages of criminal investigation.<sup>11</sup> Although stressing the importance of the new CPL by repeatedly issuing documents calling on lawyers to study the new law, the Ministry of Justice (hereinafter “MOJ”) remained an exception and did not provide any mandatory guidelines for lawyers. However, the All China Lawyers Association (hereinafter “ACLA”) published a document setting out standards for lawyers in criminal litigation.<sup>12</sup>

Although documents issued by the Chinese Communist Party (below “CCP”) are not generally cited in indictments and verdicts, and may often not even be publicly available, they are regarded as having valid legal authority. Occasionally it has been reported that the CCP Central Committee Political-Legal Committee issued comprehensive rules on various issues, including jurisdiction over certain cases and the transfer of cases among the courts.<sup>13</sup>

The ostensible intention of all these rules and interpretations was to address the CPL’s ambiguities, but in fact they have only caused further confusion. This, as well as the fact that certain rules in these implementing measures actually contradict CPL provisions and serve to curtail the rights of defendants, has been criticized strongly by legal practitioners and academics. Local authorities often went further in restricting procedural rights in their own interpretations of CPL provisions. Details of such conflicting provisions and their outcomes are described in the various sections of this report.

One of the most controversial areas in which interpretations placed a restrictive construction on the provisions of the CPL was that regarding the involvement of lawyers. Central and local implementation regulations severely restrict the access of lawyers to their clients and to the evidence gathered by prosecutors, thus undermining the significance of the CPL reforms. In various articles, legal academics and lawyers have protested these interpretations.<sup>14</sup>

Concerned that conflicting interpretations by law implementation agencies could diminish the impact of CPL reform, the MOJ proposed to the NPC Standing Committee Legal Affairs Working Committee (hereinafter “the Working Committee”) that official implementation rules be unified.<sup>15</sup>

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issued on February 28, 1997. It is unclear how many such regulations were promulgated and if they remain valid even after the Joint Provisions was enacted in 1998.

<sup>11</sup> One is the Rules on Lawyers’ Activities Participating in Criminal Litigation During the Stage of Crime Investigation (*guanyu lüshi zai zhencha jieduan canyu xingshi susong huodong de guiding*), issued by the MPS on December 20, 1996, which was largely replaced by detailed rules promulgated in 1998.

<sup>12</sup> Since the ACLA is theoretically a self-governing autonomous lawyers association, the legal status of this document is unclear. See Provisional Model Practice for Lawyers’ Participation in Criminal Litigation (*lüshi canyu xingshi susong ban’an guifang shixing*, hereinafter “Provisional Model Practice”), issued by the ACLA on November 6, 1997.

<sup>13</sup> The Central Political-Legal Committee: Notice on Several Issues in Implementation of the Revised CPL (*guanyu shishi xiugai hou de xingshi susongfa jige wenti de tongzhi*), Document No. 3, 1997 (*zhongzhengwei 1997 sanhao wenjian*). See Ke Chanxing, “Study on Several Issues Currently Existing in Criminal Litigation,” (*dangqian xingshi susong ruogan wenti yanjiu*) *Research And Debate (Yanjiu yu zhengming)*, No.5, 1997, p. 20-21. Zuo Weimin and Wu Weijun, “Study Hard to Achieve Perfection” (*wangmeihua zhuiqiu zhong de jiannan qiusuo*), *Chinese Jurisprudence (Zhongguo Faxue)*, No.1, 1999, p. 118. A number of legal scholars and judicial officials we interviewed confirmed that this Central Political-Legal Committee document is internal and it is not permitted to cite it in openly published materials.

<sup>14</sup> See discussion in Section III on the lawyer’s role in criminal trials.

<sup>15</sup> For the background on the enactment of this joint document, see Xue Chunxi And Zhao Jianji, “Uniform Rules: New Magic Weapon Allowing Lawyers to Participate in Criminal Litigation” (*tongyi guize lüshi*

As a result, one year after the CPL came into effect, a joint document issued by six central departments accommodating the concerns of various authorities was finally promulgated.<sup>16</sup> On January 18, 1998, the SPC, the SPP, the Ministries of Public Security, State Security and Justice, and the Working Committee enacted a comprehensive interpretation on certain sensitive and controversial issues.<sup>17</sup> These Joint Provisions address a broad range of concerns raised in the implementation of the CPL and clarify the conflicting or ambiguous parts of the rules which had been interpreted differently by the various authorities, such as the concept of “state secrets,” jurisdiction and time limits. To comply with the Joint Provisions, all major law implementation agencies amended their detailed rules or interpretations accordingly. The following is the list of the major provisions promulgated as a direct result of the Joint Provisions:

- MPS: Rules on the Process of Handling Criminal Cases by Public Security Departments (*gongan jiguan banli xingshi anjian chengxu guiding*, hereinafter the MPS Rules), on April 20, 1998, with a total of 355 articles.
- ACLA: Model Practice for Lawyers’ Handling Criminal Cases (*lüshi banli xingshi anjian guifang*, hereinafter the ACLA Model Practice), on April 25, 1998, with a total of 189 articles.
- SPC: Interpretation on Several Issues Regarding Implementation of the PRC CPL (*guanyu zhixing zhonghu renmin gongheguo xingshi susongfa ruogan wenti de jieshi*, hereinafter the SPC Interpretation), on June 28, 1998, with a total of 367 articles.
- The Central Military Commission (*zhongyang junwei*): Provisional Rules on the Implementation of the PRC CPL in Military Units (*guanyu jundui zhixing zhonghua renmin gongheguo xingshi susongfa zanxing guiding*), on July 13, 1998, with a total of 32 articles.
- SPP Rules on the Criminal Process for People’s Procuratorates (*renmin jianchayuan xingshi susong guize*, hereafter the SPP Rules), on December 16, 1998, with a total of 468 articles.

The revised CPL itself has only 225 articles, while the six detailed interpretations and rules listed above have a combined total of 1,459 articles, demonstrating the comprehensive and detailed nature of their provisions. Moreover, the process is not at an end, and many more interpretations are likely to be issued, further confounding the level of confusion and controversy surrounding the process of CPL implementation.<sup>18</sup>

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*canyu xingshi susong de xin fabao*), *Chinese Lawyer (Zhongguo lüshi)*, No. 4, 1998, p. 40 to 43, and No. 5, 1998 p. 37-39.

<sup>16</sup> *Ibid.*

<sup>17</sup> See, SPC, SPP, MPS, MSS, MOJ, and NPC Standing Committee Legal Affairs Working Committee: Provisions Concerning Several Issues in the Implementation of the CPL (*zuigao renmin fayuan zuigao renmin jianchayuan gonganbu guojia anquanbu sifabu quanguo renda changweihui fazhi gongzuo weiyuanhui guanyu xingshi susongfa shishizhong ruogan wenti de guiding*, hereinafter “Joint Provisions”), issued on January 19, 1998.

<sup>18</sup> Some recently-issued interpretations include one by the SPC on March 8, 1999, with regard to the issue of “public trials,” and one jointly issued by the SPC, SPP and the MPS on the issue of “taking a guarantee and awaiting trial” in August 1999.

## II. The Political and Legal Infrastructure of the Judiciary

The institutional features described below have had a profound effect on the criminal justice system and on every stage of China's criminal process. In summary, the judiciary in China falls far short of international standards on judicial independence.<sup>19</sup> This has substantially reduced the significance of the limited safeguards of rights incorporated into the revised CPL.

### A. Party Dominance

Although the "Open Door Policy" launched by Deng Xiaoping in the late 1970s has decentralized power, the CCP continues to dominate the state machine at all levels. The separation of powers and the concept of limiting state power are non-existent in China. In fact, China remains a Party-state, a dual system in which the CCP enjoys unchallengeable power and state organs act as instruments that merely implement the Party's policy.<sup>20</sup> Sometimes, the Party emerges as a state organ itself to carry out its own policies directly.<sup>21</sup> This is a long-standing practice: the CCP has exercised state functions since it came to power in 1949.<sup>22</sup> None of the four editions of China's Constitution have sought to limit the Party's power.<sup>23</sup> Neither is there any identifiable mechanism restricting state power or Party authority. Defined as a "leading party," in practice the CCP has paramount power over all aspects of society, from national defense to the private life of individuals.<sup>24</sup>

A few times during the mid-1980s, the idea of separating the function of the Party from that of the state became the subject of heated discussion. This, however, resulted in a panic among CCP cadres who feared losing their jobs. And in 1988, Zhao Ziyang, then CCP General Secretary, proposed "separation of Party and state" (*dangzheng fengkai*) and tried to withdraw the Party

<sup>19</sup> For international standards on judicial independence, see *Basic Principles on the Independence of the Judiciary*, passed by the United Nations General Assembly on November 29, 1985. The main elements of these standards are outlined in Section VII below

<sup>20</sup> Deng Xiaoping firmly rejected the idea of instituting a separation of powers system in China. Deng joked that the U.S. had three governments, and rejected the possibility of establishing a similar system in China. See *Deng Xiaoping's Selected Works*, Vol 3, p. 195, Beijing, 1988.

<sup>21</sup> The CCP and its central bodies occasionally issue documents jointly with state organs, such as the State Council, MPS, and SPC and SPP. In recent example, the CCP Central Secretariat and the State Council jointly issued a document entitled Rules on Leading Cadres Reporting Important Personal Matters (*guanyu lingdao ganbu baogao geren zhongda shixiang de guiding*) on January 31, 1997. According to the Rules, all leaders above deputy county chief should report their personal situation to the Party committee of the corresponding level, such as relatives who do business and their own marriages or those of their children involving foreigners.

<sup>22</sup> The practice of the Party performing state functions can be traced back to the early stages of its development. In the 1930s, when the CCP established its military base in Jiangxi Province, it administered the area largely through the Party system.

<sup>23</sup> China has enacted four constitutions since 1954. None of them addresses the issue of the limitation of state power. China amended the 1954 Constitution in 1975 and 1978. The current Constitution was enacted in 1982.

<sup>24</sup> One indication is that the Central Military Commission, one of four independent state organs in charge of military operations defined by the Constitution (1982), shares staff and offices with the CCP Central Military Committee under the model of "one office with two names" (*yitao bangzi liangge paizi*). The same phenomenon can be seen in the State Council. The Ministry of Supervision was formally merged with the CCP Central Discipline Inspection Committee in 1993. In 1999, the State Council further designated a number of its departments to be formally affiliated with the corresponding departments of the CCP Central Committee.

from the routine work of state functions. This short-lived initiative was labeled one of Zhao's "misdeeds" when he was purged from his top Party position in the crackdown on the 1989 student democracy movement.

Through various channels, the CCP can interfere with and control the judiciary at every stage of criminal proceedings. The political-legal committee (*zhengfa weiyuanhui*) is a functional branch of the Party committee at all levels. A hierarchy of such committees has been established throughout the Party system with the Central Political-Legal Committee directly under the CCP Central Committee at its apex. The responsibility of these committees includes supervision of judicial personnel, discussion of "important cases," reporting to the Party committee on trends in legal affairs and on implementation of Party legal affairs policy through the judiciary.<sup>25</sup> It is unclear how the committee system affects the routine work of the judiciary as a whole, since its operations are highly secretive. However, the high frequency of documents issued by the Central Political-Legal Committee suggests that it is deeply involved in judicial affairs. For instance, the Central Political-Legal Committee issued a comprehensive interpretation on the implementation of the CPL immediately before the CPL entered into effect, instructing all law implementation authorities and judicial organs to follow its rules.<sup>26</sup> Additionally, the Central Political-Legal Committee played a significant role in formulating the Joint Provisions.<sup>27</sup> On numerous occasions, the Committee has held conferences attended by representatives from all law implementation agencies, issued legal directives independently and jointly with the judiciary and periodically coordinated massive campaigns such as the "Strike Hard" Anti-Crime Campaign. Occasionally the Central Political-Legal Committee has directly interpreted law implementation issues, such as setting standards for the prosecution of crimes.<sup>28</sup> According to a senior prosecutor, the political-legal committee's work includes solving disputes among different law implementation agencies, monitoring law enforcement, as well as selecting candidates for judge and prosecutor positions.<sup>29</sup>

This points to the fact that the appointment of judges and prosecutors is completely at the discretion of the Party committees. According to the so-called principle of "the Party managing cadres" (*dang guan ganbu*), all judges and prosecutors, considered cadres in the Party's vocabulary, are nominated by the local Party committee with the assistance of the political-legal committees and the Party groups within the judiciary. The local people's congresses merely

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<sup>25</sup> See, CCP Document No.5, 1980. This states that the mandate of the political-legal committee is to liaise on and supervise all judicial work, assist the party committee in selecting and evaluating cadres in the judicial departments, develop and organize research and study of policy and law, organize Party internal joint office meetings to deal with major and difficult cases and organize and help to realize the measures of "comprehensive management of public security" (*zonghe zhili*).

<sup>26</sup> See, the Central Political-Legal Committee: Notice on Several Issues in Implementation of the Revised Criminal Procedure Law (*guanyu shishi xiugai hou de xingshi susongfa jige wenti de tongzhi*), Document No. 3, 1997 (*zhongzhengwei 1997 sanhao wenjian*). See, Ke Chanxin, "Study on Several Issues Currently Existing in Criminal Litigation" (*dangqian xingshi susong ruogan wenti yanjiu*), *People's Judicial Administration (renmin sifa)*, No.1, 1998 p. 20-21 and note 13 above.

<sup>27</sup> Xue and Zhao, "Uniform Rules....," see note 15 for reference.

<sup>28</sup> See, Letter No. 6 from the Central Political-Legal Committee in 1983 (*zhonggong zhongyang zhengfa weiyuanhui 83 liu hao han*), issued on March 29, 1983. This letter answered questions regarding the crime of receiving bribes and stated that receiving a bribe amounting to 2,000 *yuan* could be considered a crime, and another circular from 1994 prohibiting the resolution of business disputes by taking hostages. See, Central Political-Legal Committee Circular on Strictly Prohibiting Solving Economic Disputes by Taking Hostages (*zhonggong zhongyang zhengfa weiyuanhui guanyu yanjin yi kouya renzhi fangshi jieju jingji jiu fen de tongzhi*), September 12, 1994.

<sup>29</sup> Interviews with lawyers in Beijing and Shanghai, April 1999.

confirm the nominations.<sup>30</sup> Although the Judges Law (1995) and the Prosecutors Law (1996) provide limited protections to judges and prosecutors from arbitrary removal, the Party's single-handed nomination of judges and prosecutors remains largely unchanged.<sup>31</sup>

Job security for judges and prosecutors is far from satisfactory. The laws mentioned above do not provide any meaningful safeguards. Judges and prosecutors can leave their posts in "fault" or "no-fault" situations. The Judges Law provides a list of prohibited acts that would trigger removal of judges from their positions in a "fault" situation. Some loosely-defined acts, such as circulating expression damaging to the reputation of the country (*sanbu you sun guojia de yanlun*), participating in illegal organizations as well as demonstrating against the country, are among the most serious. There is also a catch-all clause embracing all other acts deemed to violate laws or discipline.<sup>32</sup> Again, there is neither a clear definition of what behavior should be considered under this clause nor an identifiable practice for determining such acts. In a "no fault" situation, a judge may be removed if he or she is assigned a job outside the court (*diaochu benyuan*). Meanwhile, a judge may also be dismissed if he or she is found to be unqualified. Yet there is no transparent process or standard for determining judicial competence.<sup>33</sup>

Finally, to ensure that law implementation does not stray from the Party line, the Party can intervene in the daily work of the judiciary through the political-legal committee. Ordinarily, the judiciary has the obligation to report its work to the political-legal committee, especially when it encounters a problem, such as divided opinions on certain matters. In some extreme cases, the political-legal committee can preside over a so-called "joint office meeting" (*lianxi bangong huiyi*) with representatives from the judiciary to deal with "major or difficult cases" (*zhongda yinan anjian*). It is reported that this form of interference with the judiciary has been on the decline over the past several years. But it is still sporadically used.

## B. Adjudication Committees and the Case Review System

The structure of the court system severely impairs the impartiality of the criminal justice system. Two major characteristics of the court system that directly affect criminal trials are the adjudication committee and the case review system.

### *Adjudication Committees*

According to the Organic Law of the People's Courts,<sup>34</sup> an adjudication committee should be

<sup>30</sup> In the mid-1980s, the Party began to raise the rank of leaders in the judiciary. According to several internal party documents, the presidents of the people's courts and the procuratorates should have the same rank as that of the deputy head of the administration at the same level. See CCP Central Personnel Department Document, (*zu tong zi*) 1987 No. 12, issued on April 13, 1987. See *Sifa Shouce (Judicial Handbook)*, Beijing, 1988, Vol. 5, p. 121. In an annex attached to this document, the presidents of the courts or chiefs of procuratorates were explicitly ranked as deputy heads of the administration at the same level. A recently issued Party document notes that nominating personnel to the courts and procuratorates is the business of the Party committees. See, CCP Central Committee Document No.4 (1995) Tentative Regulations on the Work of Selecting and Appointing Leading Cadres of Both Party and Government (*dangzheng lingdao ganbu xuanba renyong gongzuo zanxing tiaoli*) issued on February 9, 1995.

<sup>31</sup> *Ibid*, CCP Central Committee Document, No.4 (1995). Article 4 clearly states that the Regulations apply to the leading cadres in the courts and procuratorates.

<sup>32</sup> It is not clear what "discipline" means in this context. See Judges Law, Article 30.

<sup>33</sup> Judges Law, Article 13.

<sup>34</sup> The Organic Law of the People's Courts was promulgated by the National People's Congress on July 1, 1979 and amended by the NPC Standing Committee on September 2, 1983. Article 11 of the Organic Law provides: "The courts at all levels shall establish an adjudication committee, which operates according to

established within every people's court. The mandate of the adjudication committee includes discussing major or difficult cases (*zhongda yinan anjian*). However, the law fails to specify the procedure by which a case is subjected to discussion as well as what kinds of cases should be decided by the adjudication committee.

For a long time, there were no national rules or interpretations at all concerning the operation of the adjudication committees. This resulted in significant discrepancies in practice from place to place. It was not until 1993 that the Supreme People's Court issued guidelines on the work of the SPC's adjudication committee.<sup>35</sup> Since then, local people's courts began to enact their own rules regarding the operation of adjudication committees.<sup>36</sup>

The Criminal Procedure Law as amended in 1996 stipulates:

*With regard to difficult, complicated, or major cases, on which the collegial panel<sup>37</sup> has difficulty in reaching a final decision, it may request that the president of the court initiate a discussion within the adjudication committee. The decision made by the adjudication committee on the case shall be carried out by the collegial panel.<sup>38</sup>*

The SPC Interpretation (see Background section) specifies the type of cases that should be discussed by the adjudication committee:

*The following difficult, complicated, or major cases, on which the collegial panel has difficulty reaching a decision, should be submitted by the president to the adjudication committee for discussion, upon request of the collegial panel:*

1. when a death sentence may be imposed;
2. when opinion among the collegial panel is severely divided;
3. when a protest by the people's procuratorate is involved;

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the principle of the system of democratic centralism. The task of the adjudication committee is to summarize experience of adjudication, to discuss major or difficult cases, as well as to discuss other issues related to adjudication work.”

<sup>35</sup> Supreme People's Court Rules on the Operation of the Adjudication Committee of the Supreme People's Court (*zuigao renmin fayuan shenpan weiyuanhui gongzuo guize*, hereinafter “Operating Rules”), passed by the Adjudication Committee of the Supreme People's Court on August 20, 1993.

<sup>36</sup> Some commentators assert that the SPC's 1993 Operating Rules are the only standard for the work of the adjudication committees. See Chen Ruihua, “Blindspots for Justice: on the System of Adjudication Committees in the Courts” (*zhengyi de wuqu ping fayuan shenpan weiyuanhui zhidu*), *Beijing University Law Review*, Vol 1., No. 2, p. 387. However, it has been widely reported that many local courts enacted their own rules following the enactment of the SPC's Operating Rules. It is not entirely clear whether any such rules at the local level were issued before this. See Liu Yalin, “On the Mandate of Adjudication Committees With Regard to Discussion of Individual Cases” (*qianlun shenpan weiyuanhui taolun gean zhiquan*), *Studies on Theoretical Issues Regarding Trial Style Reform in China*, (*Zhongguo shenpan fangshi gaige lilun wenti yanjiu*), Xinhua Press, Beijing, 1999, p. 138-157.

<sup>37</sup> According to both the Organic Law of the People's Courts (Article 10) and the CPL (Article 147), cases before the the people's courts are to be tried by a collegial panel consisting of judges or a judge and people's assessors.

<sup>38</sup> CPL, Article 149. The Civil Procedure Law (Article 177) and the Administrative Litigation Procedure Law (Article 63) also stipulate that the president of the court may initiate discussion of cases that have already entered into effect.

4. when the case in question has a major influence on society; and
5. other cases needing a discussion and a decision by the adjudication committee.<sup>39</sup>

It is widely believed that the final category is a catch-all clause which leaves the door open for the court president to initiate discussion without having received a request from the collegial panel.<sup>40</sup>

In fact, local people's courts have substantially expanded the mandate of the adjudication committees. According to a senior judge of the Sichuan Higher People's Court, the rules of one higher people's court stipulate that all cases tried by that court as a first instance case must be discussed by the adjudication committee.<sup>41</sup> Other cases to be discussed include all cases involving the death penalty. One intermediate people's court requires discussion by the adjudication committee for cases involving foreigners, Taiwanese and Hong Kong people; cases involving crimes newly included in the revised Criminal Law; and for cases for which the local Party committee or the people's congress requests a report.<sup>42</sup> Many local people's courts further demand that all cases resulting in a decision (rather than mediation or withdrawal) should be submitted to the adjudication committee.<sup>43</sup>

Thus in practice due to the ambiguity of the rules virtually all cases may be subject to a discussion, and therefore a decision by the adjudication committee.<sup>44</sup> In the two decades since the 1979 CPL and the Organic Law were enacted, the adjudication committees have played a significant role in criminal trials, seriously impairing the independence of individual judges.

Many lawyers and judges we interviewed, however, suggested that revisions of the CPL were intended to limit the function of the adjudication committee by requiring that all discussion of cases by the adjudication committee be initiated by the collegial panel.<sup>45</sup> There are indeed some differences between the 1979 CPL and the revised CPL in this regard. While the current CPL notes that the process should be initiated by the collegial panel, the 1979 CPL allowed the president of the court to refer any case to the adjudication committee without needing a proposal from the collegial panel.<sup>46</sup> Nevertheless, there is no significant evidence to suggest that Article 149 has significantly weakened either the power of the president or that of the adjudication committee. Article 114 of the SPC CPL Interpretation still accords wide discretion to the court president to make referrals in its catch-all clause. Furthermore, the adjudication committees of local people's courts have expanded their mandate and strengthened their work, especially during specific thematic campaigns or towards the end of every statistical year.<sup>47</sup>

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<sup>39</sup> SPC CPL Interpretation, Article 114.

<sup>40</sup> Interview with judges in Shanghai.

<sup>41</sup> See Liu, "On the Mandate of Adjudication Committees..." p. 142, see note 36 for reference.

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

<sup>44</sup> Interview with judges in Shanghai.

<sup>45</sup> CPL, Article 149.

<sup>46</sup> Article 107 of the 1979 CPL stipulated: "The president may submit major and difficult cases to the adjudication committee for discussion whenever he or she determines this to be necessary..." By contrast, Article 147 of the revised CPL states that the collegial panel may request that the president initiate a discussion in the adjudication committee if it concludes that reaching a decision will be difficult.

<sup>47</sup> According to judges and prosecutors we interviewed, at the end of every year, judicial statistics are prepared. Hence, many judges and prosecutors rush to finish their case load. See also, Chen, "Blindspots for Justice..." see note 36.

One author provides a vivid picture of how busy the adjudication committee may be during such periods:

*During the Strike Hard Campaign or approaching the end of the year, the adjudication committee had to hold meetings continuously. Presiding judges lined up to report cases outside the office. The time for reporting cases for every judge was limited (because too many cases were pending for report), which reminded people of the scenario of patients lining up to see doctors.*<sup>48</sup>

The Supreme People's Court's initiation of major reforms of this system in 1996 sparked serious discussion in academic circles regarding the role of adjudication committees. Many scholars and judges suggested that the mandate of adjudication committees be limited, while others advocated their outright abolition.<sup>49</sup> However, there is no sign that the authorities intend any major reform of this system soon.

#### *Case Review System*

As many scholars and judges have pointed out, the administrative relationship between individual judges and their respective courts creates serious problems for maintaining judicial independence.<sup>50</sup> According to the CPL, the people's court should try cases independently.<sup>51</sup> However, it is common practice that individual judges routinely report cases to senior judges and the president of the court before a verdict is reached. To date, this case review system dominates judicial practice within every court.

According to a 1981 document issued by the SPC, the head of every chamber, court vice presidents and all senior judges have the power to veto decisions made by judges or the collegial panel.<sup>52</sup> Although the document requires only that major or difficult cases be submitted for approval, most courts in fact require that virtually all cases be subject to examination and approval by senior judges. This effectively results in a situation where "those trying cases have no power to make decisions and those making decisions do not try cases (*shen er bu pan bu shen*

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<sup>48</sup> See Ying Chunli, "Thoughts on Reforming the Adjudication Committee" (*shenpan weiyuanhui gaige shexiang*), *China Lawyer*, (*Zhongguo lishi*), No. 8, 1998.

<sup>49</sup> For an in-depth and lengthy discussion of the adjudication committee, see Su Li, "Examination and Consideration on the System of Adjudication Committees in the Basic Level Courts" (*jiceng fayuan shenpan weiyuanhui zhidu de kaocha ji sikao*), *Beijing University Law Review*, 1998, Vol. 1, No. 2, p. 320-364. See also Chen, "Blindspots for Justice...", see note 36.

<sup>50</sup> See Zhang Min, "Reforming the System of Administration-Style Trials and Realizing the Objective of Judicial Organs Trying Cases Independently" (*gaige xingzhenghua de shenpan jizhi shixian fadeng shenpan zuzhi duili shenpan*), *Studies on Theoretical Issues Regarding Trial Style Reform in China*, (*Zhongguo shenpan fangshi gaige lilun wenti yanjiu*), Xinhua Press, Beijing, 1999.

<sup>51</sup> CPL, Article 5.

<sup>52</sup> See, SPC Practice for Examining and Approving Cases (*zuigao renmin fayuan anjian shenpi banfa shixing*), issued on April 16, 1981, which required that judges submit cases along with all materials to the head of corresponding chambers or court vice presidents for approval. The case review system can be traced back to the early 1950s, when the courts required that all cases be submitted to head of chambers or presidents of the court for review.



*er pan* ).<sup>53</sup> It has recently been reported that the chief justice of the Supreme People's Court called for the use of this practice to be limited (but not abolished).<sup>54</sup>

Another form of internal review is found in the chamber affairs meeting (*tingwu huiyi*). Under this system, every case essentially goes through an examination by a panel of senior judges, usually including the vice president of the court, as well as the head and deputy heads of individual chambers.

In some local courts, this chamber affairs meeting is held once a week. The vice president who is designated as being in charge of (*fengguan*) a particular chamber presides and senior judges and the heads of different chambers participate. The individual judges (*chengbanyuan*) report the cases that they are working on and provide their opinions on the decision. The panel decides if it agrees or disagrees with the opinion of the presiding judges. Sometimes, the panel may decide to submit the cases to the adjudication committee if the members can not reach a conclusion.<sup>55</sup>

The judges interviewed for this report pointed out that chamber affairs meetings still play a role in many jurisdictions, though recently those advocating further reform have called for their abolition.<sup>56</sup> It is believed that many courts still rely on this form of adjudication due to a lack of confidence in the abilities of the average judge to try cases independently.

It is apparent that the case review system within every court has severely damaged the autonomy of individual judges as they are effectively prevented from issuing decisions without consultation with others. Justice in China's criminal process will never be achieved if this system continues to exist.

### C. Relationships Between Different Law Implementation Agencies

Another feature of China's legal system is that different branches of the law implementation apparatus work together in an "assembly line" fashion.<sup>57</sup> Cooperation in the fight against crime is overly emphasized to the detriment of rights safeguards. In China's criminal justice system, the

<sup>53</sup> See Chen Guangzhong et al, *United Nations Standards of Criminal Justice and China's Criminal Justice System (Lianheguo xingshi sifa zhunze yu zhongguo xingshi sifa zhidu)*, Law Press, Beijing, 1998, p. 94.

<sup>54</sup> See, Xinhua News Agency report, "China to Strengthen Judicial Reform and Implement the System of Public Trial Across the Board" (*zhongguo jiada sifa gai ge lidu jiang quanmian shishi gongkai shenpan zhidu*), December 2, 1998. The report cited Xiao Yang's speech at the National Conference of Presidents of Higher People's Courts in which he had called upon all courts to implement a public trial system.

<sup>55</sup> One informant for this report spent about six months in Yangpu District People's Court in Shanghai in 1990 and 1991, working with judges at the Economic Chambers and attending the Economic Chamber Affairs Meeting. The meeting was held every Wednesday morning. The presiding judges barely had time to report cases and the panel spent on average five minutes for each case. A fraction of the cases reported to the panel were brought to the adjudication committee. It was the practice for the Yangpu District Court that the majority of cases was referred to the adjudication committee through private channels or communication among senior judges.

<sup>56</sup> Interview with judges in Shanghai.

<sup>57</sup> This description was first introduced by Professor Herbert Packer more than 30 years ago. Packer described two models of the criminal process: the "Crime Control Model" and the "Due Process Model." In the "Due Process Model," the system is an obstacle course, in which one must pass an examination at every step. These obstacles provide safeguards for individual rights. On the other hand, under the "Crime Control Model," the work of different authorities resembles an assembly line. Efficiency is one of the most important values the system pursues. See, Herbert L. Packer, "Two Models of the Criminal Process," *113 University of Pennsylvania Law Review* November, 1964, p. 1-68.

criminal investigation authorities (i.e., the police), the prosecutors and the courts are ambiguously defined as checking *and* cooperating with one another.<sup>58</sup> It is not clear why the word “check” is used, since many documents, both Party-issued and legally-enacted, overwhelmingly stress cooperation rather than “checks and balances.” This is especially true when the law implementation apparatus implements a Party policy, such as the “Strike Hard” anti-crime campaigns or migrant round-ups in major cities for national holidays. In theory, each branch of the law implementation structure conducts its own work and activity. For instance, public security departments investigate crimes, the procuratorates prosecute criminals and the courts try cases. However, these three bodies collaborate in the resolution of an overwhelming majority of cases.<sup>59</sup> This does not necessarily mean that the three organs agree on all matters concerning fact-finding and culpability; rather, they reconcile most differences through internal methods.

Due to cooperation among the authorities, outcome of most cases is decided well before they are tried. The following two tables demonstrate the likelihood that different law implementation agencies will concur in decisions concerning criminal cases.

**Table 1: Criminal Conviction Rates in Different Jurisdictions in 1997**

Jurisdiction	Total prosecuted	Total found guilty	Total found innocent	Conviction rate
Nationwide	529,779	526,303	3,476	99.34%
Shanxi Province	10,415	10,294	121	98.83 <sup>60</sup>
Zhejiang Province	35,695	35,654	41	99.88% <sup>61</sup>
Jiangxi Province	64,620	64,202	418	99.35% <sup>62</sup>
Hubei Province	165,134	164,726	408	99.75% <sup>63</sup>
Hainan Province	4,018	4,005	13	99.68% <sup>64</sup>
Sichuan Province	-----	----	----	99.51% <sup>65</sup>
Guizhou Province	15,910	15,785	135	99.21% <sup>66</sup>
Qinghai Province	2,688	2,634	54	97.99% <sup>67</sup>

<sup>58</sup> See CPL, Article 7.

<sup>59</sup> See Table 1 and Table 2.

<sup>60</sup> These figures are from the *China Law Yearbook*, Beijing; 1998, p. 911.

<sup>61</sup> *Ibid*, p. 917-918.

<sup>62</sup> *Ibid*, p. 934. These figures cover 1993-97, including the year 1997.

<sup>63</sup> *Ibid*, p. 950. These figures cover 1993-97, including the year 1997.

<sup>64</sup> *Ibid*, p. 963.

<sup>65</sup> *Ibid*, p. 969. The report does not give the exact figures but the percentage of different categories as follows:

The rate of those sentenced to more than five-years' imprisonment, life, and death penalty	The rate of those sentenced to less than five-years' imprisonment, control, criminal detention.	The rate of those exempted from criminal penalty	The rate of those found innocent
41.72 percent	57.26 percent	1.02 percent	0.49 percent

<sup>66</sup> *Ibid*, p. 975.

<sup>67</sup> *Ibid*, p. 986.

Some might argue that high conviction rates are not uncommon and also occur in other countries.<sup>68</sup> The approval rate for arrest and prosecution in China sheds additional light on the above statistics.

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<sup>68</sup> See, US data in recent years. For instance, in US federal court in 1998, 87.4 percent of those prosecuted were convicted. See US Department of Justice, Bureau of Statistics: *Compendium of Federal Justice Statistics, 1998*, Washington: May 2000, p. 51. According to the same source, the majority were convicted through plea bargains. Located at: <http://www.ojp.usdoj.gov/bjs/abstract/cfjs98.htm>. However in the US, the plea bargain and prosecutorial discretion not to press charges play a significant role in the high conviction rate.

**Table 2: Approval Rates of Arrest and Prosecution by the People's Procuratorates<sup>69</sup>**

Year	Total arrests requested by the PSB	Total arrests approved by the PP	Total transferred for prosecution	Total approved for prosecution
1988	512,358	472,361 (92.19%)	383,922 <sup>70</sup>	381,202 (99.29%)
1989	596,763	548,960 (91.99%)	523,193 <sup>71</sup>	520,257 (99.43%)
1990	656,002	605,000 <sup>72</sup> (92.23%)	648,545 <sup>73</sup>	645,038 (99.46%)
1991	566,920	521,610 (92.01%)	551,463 <sup>74</sup>	548,283 (99.42%)
1992	2,793,875 <sup>75</sup>	2,568,250 (91.92%)	2,522,635	2,507,247 (99.39%)
1993	572,833	532,394 (92.94%)	----	479,860
1994	644,468	598,633 (92.89%)	----	570,693
1995	624,910	576,033 (89.38%)	593,444	591,390 (99.65%)
1996	----	673,733	----	770,704
1997	3,165,400 <sup>76</sup>	2,893,711 (91.42%)	2,833,499	2,807,861 (99.10%)
1998	675,338	582,120 (86.19%)	569,164	557,929 (98.03%)

It is not surprising that no significant change was seen in the numbers in 1997 and 1998, as the overall system remained essentially the same.<sup>77</sup>

The interrelationship between courts of different levels largely undermines, if not entirely

<sup>69</sup> The figures are all from the annual reports to the National People's Congress submitted by the Supreme People's Procuratorates unless otherwise indicated. The figures in parenthesis are the approval rate for arrest and prosecution. When the box is left blank this means that the number for the category is not available from the reports.

<sup>70</sup> This figure does not include the numbers exempted from prosecution (e.g., a guilty verdict rendered without any court hearing permitted under the 1979 CPL).

<sup>71</sup> This figure does not include the number of persons exempted from prosecution.

<sup>72</sup> The SPP's report does not give the last three digits of the total number.

<sup>73</sup> This figure includes the number of those exempted from prosecution, and is from the China Law Year Book (1987-1997), Beijing, 1998, p. 805.

<sup>74</sup> *Ibid*, p. 821.

<sup>75</sup> The figures in this row represent the total number for the previous five years. Every five years, the SPP provides the newly-elected NPC members with a report on the overall situation over the previous five years instead of only the last year.

<sup>76</sup> The figures for this year reflect the total for the previous five years.

<sup>77</sup> The 5.3 percent decline in the number of arrests approved between 1997 and 1998 may be attributed to a normal fluctuation over time. More importantly, the total percentage approved for prosecution remained at 99 percent and 98 percent respectively.

preempting, the chance of success for appellants. According to the law, the courts of higher levels supervise the work of lower courts, although there is no direct administrative relationship between them.<sup>78</sup> Communication between courts, especially courts of first instance and appellate courts within the same jurisdiction, is a widespread practice. Courts of first instance commonly discuss ongoing cases with higher courts both to obtain advice and to exchange opinions on particular matters. This is especially true when the opinions within the first instance court are divided and a final decision cannot be reached. Therefore, many judgments made in the first instance actually reflect or partially reveal the opinion of judges at the appellate level.<sup>79</sup> This obviously diminishes the hope defendants may have to reverse or partially correct judgments made at the initial trial. Since the law was revised, criminal procedure has been undergoing reform towards a more adversarial system, in which prosecution and defense argue their respective cases and the judge decides the outcome. The court and judge are also required to handle cases more independently. Nevertheless, inter-court communication remains virtually unchanged despite mounting criticism of it.<sup>80</sup>

The following table clearly shows the bleak prospects for appellants seeking to reverse verdicts against them. Generally, the reversal rates for appeals filed fluctuate between 10 percent and 13 percent. Given such statistics, it is no wonder that the majority of defendants choose not to appeal at all, with only about 13 percent appealing their cases to a higher court. This means that only around two percent of those convicted mounted successful appeals each year.

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<sup>78</sup> See The Organic Law of the People's Courts of the People's Republic of China (*zhonghua renmin gongheguo renmin fayuan zuzhifa*), Article 17.

<sup>79</sup> Usually, the judges consulted at the court of second instance are the judges who will hear any appeals of that category of cases.

<sup>80</sup> See, Luo Jiawen and Chen Gang, "The System of Internally Reviewing Criminal Cases Violates the Spirit of the Legislation" (*xingshi gan shenpan neipi you bei lifa jingshen*), *People's Procuratorate Daily*, July 30, 1999. Located at: [http://www.jcrb.com/html/1999/07/rmjc/rj199907\\_59.htm](http://www.jcrb.com/html/1999/07/rmjc/rj199907_59.htm).

**Table 3: Statistics on Appeals from 1988 to 1997<sup>81</sup>**

Year	Total first instance cases <sup>82</sup>	Total appeals <sup>83</sup>	Total upheld	Total reversed	Total withdrawn	Total sent for retrial	Other <sup>84</sup>
1988	312,475	46,430	33,884	6,603	2,160	N/A	3,783
1989	389,597	51,294	37,657	7,410	3,393	9,547	490
1990	457,552	57,048	41,682	8,579	2,506	3,730	550
1991	427,607	55,817	40,312	8,728	2,260	3,869	648
1992	424,440	55,579	39,402	9,424	2,277	3,897	579
1993	403,177	47,602	33,996	7,382	2,066	3,520	638
1994	480,914	52,579	37,819	7,852	2,275	3,810	823
1995	496,082	52,942	38,786	7,989	2,127	4,140	900
1996	616,676	67,087	48,948	9,917	2,521	4,614	1,087
1997	440,577	64,548	44,216	11,957	2,427	4,716	1,232

#### D. Recent Developments in Judicial Independence

The Courts have recently initiated some reforms, aimed at quieting the popular outcry against judicial corruption. One notable reform involves “holding judges accountable for wrongfully decided cases” (*cuoan zhuijiu zhi*), under which an individual judge may bear personal responsibility for judgments that they enter in trials. Since 1996, the Supreme People’s Court as well as the local courts began to implement this system in a drive to “accurately and impartially” carry out the law. In many jurisdictions, reversal of judgments or orders for retrial by appellate courts are considered “wrongfully decided cases” (*cuoan*) for the judge who issued the first decision. The penalties for “wrongfully decided cases” include warning, demotion, monetary punishment, or even dismissal.<sup>85</sup> Clearly this reform has a detrimental impact on an individual judge’s ability to carry out his or her duties in a professional and responsible way as it requires that judges decide cases not upon their own merits but according to what appellate judges might conclude.

According to the judges interviewed for this report, the reform also results in an inclination among judges to hand over cases to more senior judges or to seek a decision from the adjudication committee, thereby avoiding responsibility for “wrongfully decided cases.”<sup>86</sup>

The Supreme People’s Court designated the year of 1999 as “the year of quality adjudication” (*shen pan hiliang nian*). Judges at all levels were required to make an effort to bring the total

<sup>81</sup> All figures are from the *China Law Year book* (1987-1997), Beijing, 1998.

<sup>82</sup> All numbers in this column reflect the total number of cases completed in the court of first instance in the same year, and do not include those still in process.

<sup>83</sup> All numbers in this column reflect the total number of appeals resulting from trial in the court of second instance in the same year, and do not include those appeals still pending for trial.

<sup>84</sup> No explanation is given by the *China Law Yearbook* on what this number represents. It might mean that decisions in such cases were still pending.

<sup>85</sup> There are wide discrepancies among different jurisdictions on the definition of “*cuoan*” and punishments for them. It appears that this initiative has recently shifted to concentration on “illegal acts” by judges, however, many courts evaluate judges’ performance based upon a range of other elements including the percentage of cases reversed or sent for retrial.

<sup>86</sup> Interviews with judges in Shanghai, 1999.

percentage of reversals or retrial cases below 28 percent in economic cases.<sup>87</sup> It is not clear what percentage of “wrongfully decided cases” (*cuo an*) is tolerable in criminal trials. Nevertheless, judges in criminal cases are also under enormous pressure to avoid having the cases they decide reversed or sent for retrial. The ability to achieve this requires significant cooperation between judges at different levels. Consequently, many have feared that practices such as inter-court consultation and intra-court case review will either be reinforced or resumed.<sup>88</sup>

Other recent developments with regard to judicial independence include the renewed Party control over the judiciary as a whole under the Party’s anti-corruption initiative. Both the Supreme People’s Court and the Supreme People’s Procuratorate have reiterated their loyalty to the Party and its policy by openly upholding the Party’s policy concerning the management of judicial personnel. The Supreme People’s Court stated clearly in one recent document, hailed by many for its bold reform of trial style:

*[The SPC] will strictly adhere to the CCP Central Committee’s Decision on Further Strengthening Construction of the Political and Legal Cadre Corps (guanyu jinyibu jiaqiang zhengfa ganbu duiwu jianshe de jueyi). The Party groups of the higher people’s courts should actively take the initiative to cooperate with the local Party committees in expanding their capacity to manage cadres and help the Party groups of the lower people’s courts, and give full play to the principle of “the Party managing cadres” (dang guan ganbu) within the people’s courts at all levels.*<sup>89</sup>

However, it is noteworthy that in the last several years, confrontation between the different organs within the judiciary has increased and become more open. With the new CPL in place, many reforms have been tried. Judges and courts seem less afraid to reject protests by the procuratorates, while prosecutors increasingly oppose court judgments. Nevertheless, there is little evidence of any relaxation of the Party’s grip on judicial power, and cooperation among different law implementation agencies remains the primary theme of judicial work.

Many scholars and judges interviewed for this report stated that the current round of reforms are unlikely to bring about any significant changes in the legal system as long as corresponding institutional reforms are not initiated.

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<sup>87</sup> According to a senior judge in Fujian Province, this percentage was set by reference to the average percent of overall economic cases which had been reversed or returned for a new trial in 1999. See You Zhenghui: “Ratio and Judicial Impartiality” (*bilu yu sifa gongzheng*), *Procuratorate Daily (Jiancha Ribao)*, May 26, 1999, also available online at [www.jcrb.com.cn/pinglun1\\_files/h19990526\\_01.htm](http://www.jcrb.com.cn/pinglun1_files/h19990526_01.htm).

<sup>88</sup> *Ibid.* Interestingly, judges in many jurisdictions are required to try cases independently.

<sup>89</sup> See Section 30 of the Five-year Reform Program for the People’s Courts, issued by the Supreme People’s Court on October 20, 1999. This five-year program, covering 2000 to 2005, was issued by the Supreme People’s Court with the stated intention of reforming the form of court trials and the structure of the judiciary, and is widely regarded as a step towards creating judicial autonomy, if not independence.

### III. The Role of the Lawyer in Criminal Trials

According to the stipulations of the new CPL, lawyers can basically perform two different functions in the criminal process: provide legal counsel (*falü zixun*) and defense representation (*daili bianhu*). To safeguard the rights of defendants or suspects, the CPL allows attorneys to provide legal counsel to individuals being detained or questioned.<sup>90</sup> In contrast, the old CPL permitted attorneys to be involved in the process only after the cases were brought before the courts.<sup>91</sup> After cases are transferred to the prosecutor's office for prosecution, defendants have the right to hire lawyers to handle their defense.<sup>92</sup> Compared with the old provision, this represents a step forward.<sup>93</sup> While they are preparing a defense, lawyers can collect evidence, and have the right to check, take notes from and duplicate the evidence collected by prosecutors.<sup>94</sup> In addition, lawyers have the right to meet with their clients and maintain communication with them.<sup>95</sup> More importantly, lawyers have the right to defend their clients in court trials, including cross-examining witnesses<sup>96</sup> and appealing on behalf of their clients.<sup>97</sup>

The Lawyers Law of People's Republic of China (hereinafter "Lawyers Law") was promulgated in 1996 and took effect at the same time as the CPL.<sup>98</sup> A lawyer is defined under the Lawyers Law as "a professional who provides society with legal service" (*wei shehui tigong falü fuwu de zhiye ren yuan*) instead of "a state legal worker" (*guojia de falü gongzuo zhe*) as in the old provision.<sup>99</sup> It was hoped that this change would enable lawyers to work more independently and to provide more effective legal services. In addition, the Lawyers Law details the scope of legal services which a licensed lawyer can provide, and ensures that lawyers are protected by law while performing their legal duties.<sup>100</sup> Also, lawyers are legally required to provide legal aid to indigent people.<sup>101</sup>

However, the Chinese media has reported that lawyers involved in defending criminal cases encountered great difficulties when the CPL first entered into force. Often, during the early stages of investigation, lawyers could not obtain access to suspects held in custody by public security departments and procuratorates, although the CPL authorizes lawyers to meet with criminal suspects if the latter so request. Lawyers were usually required to obtain approval from the public

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<sup>90</sup> CPL, Article 96.

<sup>91</sup> 1979 Criminal Procedure Law, Article 110 (2).

<sup>92</sup> CPL, Article 33.

<sup>93</sup> The 1979 CPL provided defense attorneys with seven-days advance notice for the preparation of the defense. See 1979 CPL, Article 110.

<sup>94</sup> CPL, Article 36.

<sup>95</sup> *Ibid.*

<sup>96</sup> CPL, Article 156.

<sup>97</sup> CPL, Article 180.

<sup>98</sup> The Chinese authorities intended that the Lawyers Law would be passed after the CPL was promulgated (March 17, 1996), and enter into force at the same time (January 1, 1997). For details of the process of drafting the Lawyers Law, See Zhang Geng et al, *A Milestone in the Progress of the Chinese Lawyers System* (*zhongguo lüshi zhidu fazhan de lichengbei*), Law Press, Beijing, 1997, and Lawyers Committee for Human Rights, *Lawyers in China: Obstacles to Independence and the Defense of Rights* (New York, 1998).

<sup>99</sup> See, Article 1 of the Interim Regulations on Lawyers of the People's Republic of China (*zhonghua renmin gongheguo lüshi zanxing tiaoli*), passed by the NPC Standing Committee on August 28, 1980.

<sup>100</sup> See, Article 25 and Article 32.

<sup>101</sup> Article 42.



security departments or the procuratorate in order to be able to meet with their clients.<sup>102</sup> In most cases, lawyers were denied access to suspects either under the pretext of “state secrets,” or without any reason being given. On a few occasions, lawyers were granted such permission, but their meetings were held under the direct supervision of the authorities, with the personnel directly in charge of the investigation (*anjian chengban renyuan*) listening in on attorney-client conversations. In preparing their cases, lawyers found it very hard to obtain the necessary information from prosecutors, or to collect evidence on their clients’ behalf. Frequently, lawyers ran into serious trouble with prosecutors and public security personnel. In some cases, lawyers have been detained and even convicted of various crimes for doing nothing more than vigorously defending their clients and refusing to submit to official pressure. According to some official reports, the number of criminal cases in which lawyers presented a defense dropped sharply nationwide after the CPL took effect, a phenomenon that aroused public concern. According to one authoritative source, lawyers presented a defense in less than 30 percent of criminal cases.<sup>103</sup> Another commentary indicates that since 1997 close to 60 percent of criminal cases had no attorney participating.<sup>104</sup> This is corroborated by official sources that note that cases with legal defense account for only 30 percent of all cases tried during the first six months of 1997.<sup>105</sup>

Administrative control over lawyers has been strengthened, particularly during government-sponsored campaigns. Various sources indicate that justice departments across the country have issued executive circulars regulating legal services provided by lawyers. Most of these documents establish the case reporting system and approval practices that require lawyers and firms to report “major or difficult cases” (*zhongda yinan anjian*) to the local justice department either for filing or approval purposes. In 1999, the Beijing Municipal Justice Department formally established a “leading group” within its organizational structure to handle such reports.<sup>106</sup> This group mainly consists of chief officials from the justice department. All cases concerning state security as well as those involving celebrities or high ranking officials above director level (*ju yi shang lingdao ganbu*) must be reported. Lawyers handling such cases must report to and abide by decisions made by the leading group which may concern the substantive outcome of a case.<sup>107</sup>

### A. Involvement in the Early Stage of Criminal Investigation

The 1996 reform of the Criminal Procedure Law was hailed as the “most significant legislative development in China’s criminal justice system in nearly 20 years” because it expanded the rights of criminal suspects and defendants.<sup>108</sup> According to the revised CPL, crime suspects and defendants can now retain legal counsel upon being questioned or subjected to coercive measures

<sup>102</sup> Article 96 stipulates that only those cases involving state secrets require formal approval for lawyer-client meetings from the public security departments or people’s procuratorates.

<sup>103</sup> The statistics we obtained from different sources confirm each other. See Liu Jinxing, “Why Are Lawyers Unwilling to Defend Criminal Cases?” (*lüshi weihe buyuan zuo xingshi bianhu?*) *Procuratorate Daily (jiancha ribao)* April 7, 1999, p. 4.

<sup>104</sup> See, Gao Qiong, “Lawyers And Criminal Defense” (*lüshi yu xingshi bianhu*), from Fan Chongyi et al, *Special Commentary on the Criminal Procedure Law (xingshi susong fa zhuanlun)*, China Fangzheng Press, Beijing: 1998, p. 168.

<sup>105</sup> See, Zhang Gen et al, *The Ins And Outs of the Legal Aid System Coming into Birth in China (zhongguo falü yuanzhu zhidu dangsheng de qianqian houhou)*, China Fangzheng Press; Beijing: 1998, p. 36. The chief author is a former Vice-Minister of Justice.

<sup>106</sup> See the Rules of the Beijing Municipal Justice Department on Reporting Major Legal Matters by the Beijing Law Offices, *Jing Si Fa* (1999) No.7, issued on January 14, 1999.

<sup>107</sup> *Ibid.*, Articles 4, 5, 6.

<sup>108</sup> See, Lawyers Committee for Human Rights, *Opening to Reform? An Analysis of China’s Revised Criminal Procedure Law*, New York, 1996, p. 77-79.

by authorities.<sup>109</sup> At this stage of the proceedings, lawyers may provide the following services: give legal advice, petition or complain to authorities on behalf of their clients, arrange for bail under the provision of “taking a guarantee and awaiting trial” (*qubao houshen*), and check with authorities on the criminal charges under which their clients are being held in custody or questioned.<sup>110</sup> Lawyers may also meet with criminal suspects or defendants and learn the details of their cases from them.<sup>111</sup> However, there is ample evidence that lawyers have not been able to fulfill their duties either because the rules issued by public security departments and prosecutors impose extra restrictions on lawyers meeting with their clients, or because individual officers dealing with crime investigations have independently denied lawyers access to their clients.

A commentary from an author who works for the public security departments demonstrates why it is so difficult for lawyers to provide legal counsel at an early stage of the investigation:

*The main reasons [for the investigating authority to refuse to allow the involvement of lawyers] may be summarized as follows:*

- 1. Lawyers are hired by criminal suspects and regarded as opponents of the investigating authority; their early involvement is detrimental to the work of cracking down on the enemy and protecting the people.*
- 2. Lawyers provide criminal suspects with legal counsel and legal aid, which enable suspects to realize and master more knowledge and skills in self-defense; or [help them] carefully design their statements, so as to avoid critical issues about the crime and to evade legal punishment. All of these hinder the investigating authority in acquiring crucial evidence from the suspect's statement, therefore creating great difficulty for criminal investigations.*
- 3. Criminal suspects often refuse to confess or retract their earlier statement while waiting for the involvement of a lawyer since they hope to get the lawyer's help.*
- 4. The [authorities] believe that lawyers may [help suspects] destroy or conceal evidence after meeting with suspects and learning the details of their cases, which will cause extra trouble for the criminal investigation.<sup>112</sup>*

Given such an official mentality, the prospects for improving the current dismal situation regarding the early involvement of lawyers in the criminal process can only be described as bleak.

#### *Lawyers Need Approval for Meeting Clients*

According to official investigations, working conditions for defense attorneys soon after the entry into force of the CPL were disheartening. An ACLA survey undertaken from March to April 1997 found that lawyers were commonly limited, or even flatly denied, access to their clients while police were investigating the cases in question. In Huangshi City, Hubei Province, lawyers from 15 law firms accepted 108 cases in which legal counsel was requested. However, in only 30 of these cases did lawyers manage to meet with their clients. One law firm working on seven

<sup>109</sup> There are altogether five forms of coercive measures: compulsory summons (*juchuan*), taking a guarantee and awaiting trial (*qubao houshen*), supervised residence (*jianshi juzhu*), pre-arrest detention (*juliu*), arrest (*daibu*). See Section IV below for more information.

<sup>110</sup> Article 96.

<sup>111</sup> *Ibid.*

<sup>112</sup> See Wang Longtian, “Thoughts on the Refusal of Crime Investigation Authorities to Permit the Involvement of Lawyers in Crime Investigation Activities” (*zhencha jiguan jujue liushi jieru zhencha huodong de sikao*), *Public Security University Journal*, (*Gongan daxue xuebao*), No.2, 1998, p. 82-83.

cases was not allowed a single meeting between its lawyers and their clients.<sup>113</sup> In one province, during the period from January 1, 1997 (the date the CPL entered into force) to the beginning of 1998, authorities allowed only four requests from lawyers to meet with their clients during the investigation period.<sup>114</sup>

Many complaints have charged that lawyers were denied meetings with their clients under the pretext that the case involved “state secrets.” According to the CPL, in cases involving “state secrets” lawyers must obtain approval to meet with their imprisoned clients.<sup>115</sup> However, the CPL does not define the concept of “state secrets.” Neither do other regulations or laws concerning state secrets provide a clear-cut definition of this concept. Public security departments and procuratorates have a convenient tool for preventing lawyers from having contact with their clients in Item 6, Article 8 of the Law on Preservation of State Secrets of the People’s Republic of China (hereinafter “State Secrets Law”),<sup>116</sup> which specifically stipulates that details of the investigation of crimes are to be protected as “state secrets.” In addition, a MPS regulation states that all details of criminal investigations should be considered state secrets.<sup>117</sup> Under this provision, almost all criminal cases under investigation could be construed as involving state secrets, and therefore advance approval for meetings between lawyers and their clients in official custody can be required. It is not entirely clear to what extent such excuses are being used on a nationwide basis to refuse requests from lawyers for such meetings. One article indicated that from January to March 1997, in only one out of the 42 cases handled by an intermediate court in Henan Province was a lawyer allowed to see the suspect during the investigation period.<sup>118</sup> On at least one occasion, officials admitted that some public security departments were denying all requests from lawyers for meetings with their clients citing state secrets.<sup>119</sup> Another report said that during the first five months of the CPL’s implementation, lawyers in one city were denied meetings with their clients in 60 percent of all criminal cases.<sup>120</sup> In some cities, the percentage of such cases in which access was denied under the state secrets clause was close to 90 percent of all

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<sup>113</sup> Wang Ningjiang, “Lawyers’ Early Involvement Encountering Difficulties” (*lüshi tiqian jieru zaoyu kunnan*), *Democracy and Law (Minzhu yu fazhi)*, No. 19, 1997, p. 18.

<sup>114</sup> See Cui Min, “Problems and Solutions in Implementation of the Criminal Procedure Law” (*xingshi susongfa shishi zhong de wenti yu jianyi*), *Modern Jurisprudence (Xiandai faxue)*, No. 1, 1998, p. 19.

<sup>115</sup> Item 2 of Article 97.

<sup>116</sup> The PRC Law on Preservation of State Secrets was promulgated by the NPC in 1988.

<sup>117</sup> See Rules on State Secrets and Detailed Classification Levels for Issues in Public Security Work (*gongan gongzuo zhong guojia mimi jiqi miji juti fanwei de guiding*), issued by the MPS on October 17, 1989. Article 2(C)-11 states that all details of criminal cases under investigation should be considered “state secrets.”

<sup>118</sup> Zhou Guojun, “Correctly Appreciating the Relationship between Lawyers and the Accused and Guaranteeing Lawyers’ Rights to Participate in Legal Action” (*zhengque renshi lüshi yu bei zhuisuzhe de guanxi baozhang lüshi de susong quanli*), *Politics And Law Forum (zhengfa luntan)*, No. 5, 1997, p. 66.

<sup>119</sup> Guo Guanghua, “The Ministry of Public Security Requests that All Public Security Departments Strictly Guarantee Lawyers’ Early Involvement in Criminal Cases” (*gonganbu yaoqiu geji gongan jiguan jianjue baozhang lüshi tiqian jieru*), *People’s Public Security (renmin gongan)*, No. 4, 1999, p. 10.

<sup>120</sup> Shao Jianping, “Brief Analysis of Relationship between ‘State Secrets’ And Lawyers’ Early Involvement” (*qianxi lüshi tiqian jieru yu guojia mimi de guanxi*), *Contemporary Judiciary (dangdai sifa)*, No.2, 1999, p. 35.

criminal cases.<sup>121</sup> One lawyer complained that since the CPL entered into force, he had never had the chance to meet with a client during the investigatory phase.<sup>122</sup>

Interviews with Chinese lawyers and scholars reveal a concern that local officials have tended to treat all details concerning the investigation of crimes as state secrets. Therefore, in practice, any meeting with a criminal suspect under investigation requires formal approval from the authorities.<sup>123</sup> Apparently during the first six months of implementation of the revised CPL, requests from lawyers for meetings with clients in custody were generally denied under the state secrets rubric. Ironically, even minor crimes such as reckless driving can be considered as involving state secrets.<sup>124</sup>

Sometimes, lawyers' requests to visit their clients have been rejected for no reason at all. Some reports said that public security departments give no explanation when they decline to grant lawyers' applications to visit. In a few situations, lawyers were told that public security departments were too busy to make any arrangements for such meetings. We have information of two cases in which lawyers were informed that suspects did not want to see them and were given no chance to check with the suspects themselves.<sup>125</sup>

#### *Limitation on Number And Duration of Meetings Between Lawyers and Clients*

Even if they are allowed to meet with their clients during the investigatory phase, various restrictions have limited the legal services lawyers can effectively provide. Indeed, the regulatory environment sometimes renders attorney-client meetings virtually useless.

Prior to the CPL coming into effect, the MPS drafted implementation rules<sup>126</sup> that stated that meetings between lawyers and suspects, if approved, should ordinarily involve a one-time visit

<sup>121</sup> "New Practice of Jiangsu Province for Lawyers' Participation in Criminal Litigation" (*lüshi canyu xingsu jiangsu you xin changshi*), *People's Public Security (Renmin gongan)*, No. 17, 1997, p. 15.

<sup>122</sup> Wang Guangjing and Wang Longtian, "The Current Situation And Thoughts on Lawyers' 'Early Involvement'" (*lüshi tiqian jieru de xianzhuang ji sikao*), *Democracy And Law (Minzhu yu fazhi)*, No. 5, 1998, p. 30.

<sup>123</sup> Interviews with lawyers and scholars in Shanghai, Xi'an, Wuhan, and Beijing.

<sup>124</sup> See Zou Gaoxiang et al, "Early Involvement in the Stage of Criminal Investigation: An Embarrassing Topic for Lawyers" (*zhencha jieduan jieru yi ge ling lüshi ganga de huati*), *Southern Metropolis Daily (Nanfang dushi bao)*, August 29, 1998, p. 21.

<sup>125</sup> In Shanghai, a lawyer told us that he was informed that the suspect declined to see him though he had a written agreement to be present which the person signed before his arrest. The authorities did not give him a chance to check with his client. In another case in Xiamen, Fujian Province, the lawyer was informed that the suspect was unwilling to meet with him after he had been retained by the suspect's family and worked on arranging a meeting for more than a month. See Mu Liancai, "Thoughts on the Environment in Which Lawyers Are Practicing Criminal Procedure Law" (*dui lüshi caiyu xingshi susong zhiye huangjing de sikao*), *Chinese Lawyer (Zhongguo lüshi)*, No. 12, 1997, p. 10.

<sup>126</sup> Article 10 of the Interim Rules on Lawyers' Participation in Criminal Litigation (*lüshi canyu xingshi susong zanxing guiding*, hereinafter "MPS Interim Rules") states: "Upon request by a crime suspect and approval by the public security department, a lawyer may meet with him or her once and no more than twice if the circumstances of the case is complicated. The date and place of the meeting shall be decided by the authorities investigating the crime, and each meeting shall last no longer than 30 minutes." See conference report, "Criminal Defense: Indispensable Pillar for the Construction of a Judicial Justice System" (*xingshi bianhu goujian sifa gongzheng dasha buke qieshao de zhizhu*), *Chinese Lawyer (zhongguo lüshi)*, No.15, 1998, p. 18. The MPS Interim Rules were widely circulated for solicitation of opinions within the public security system. Most local public security departments made their own rules modeled on these draft trial rules, though the formal MPS Provisional Rules issued on December 20, 1996 dropped the time limits.

lasting no longer than 30 minutes. The rules further specify that such meetings should not be permitted more than twice.<sup>127</sup> Many authorities, including the public security departments and procuratorates, have reportedly enacted similar rules limiting the number and duration of meetings. In Guizhou, regulations set an even shorter duration for lawyer-client meetings to between ten and 20 minutes, while sometimes meetings were to be limited to only five minutes.<sup>128</sup> The provincial public security departments in Shandong and Zhejiang restricted meetings to a one-time consultation lasting no more than 30 minutes.<sup>129</sup> In accordance with a document jointly issued by several law implementation agencies in Xi'an, Shanxi Province, lawyers could only meet with imprisoned suspects once and for no more than one hour.<sup>130</sup> According to reports, most public security departments imposed limits on the number and duration of meetings either by enacting formal detailed rules or through issuing internally circulated notices.

Although the SPP Rules did not spell out any limit on the number and duration of lawyers' meetings with their clients in its custody, most local procuratorates in fact followed the exact same rules as the public security departments.<sup>131</sup> One report revealed that in early 1997, the courts had imposed the same type of restrictions on meetings between lawyers and defendants even after cases entered the trial stage, which obviously is in direct violation of the CPL.<sup>132</sup>

#### *Conditions of Meetings with Suspects*

Often characterized as an official right to "be present" at the lawyer-client meeting (*huijian zaichang quan*), officials insist on being present during meetings between lawyers and suspects. Most officials attending such meetings are those in charge of the criminal investigation in question.<sup>133</sup> Their presence naturally has a direct impact on the nature of the conversation. Moreover, some local officials installed video cameras or tape recorders to monitor the conversation between lawyers and suspects.<sup>134</sup> Lawyers and scholars also complain of the official practice of warning, "educating" and even intimidating suspects in front of their lawyers before the meeting begins. Some investigative authorities even suggest that officials should take advantage of such meetings to crack cases or obtain statements from suspects or defendants.<sup>135</sup>

<sup>127</sup> See Fang Chongyi et al, *Special Commentary on the Criminal Procedure Law (xingshi susong fa zhuanlun)*, China Fangzheng Press, Beijing, 1998.

<sup>128</sup> Wang, "Lawyers' Early Involvement...", p. 19, see note 113.

<sup>129</sup> See Xiao Zhou, "Judicial Interpretations of the CPL and Guaranteeing the Rights of Lawyers in Litigation" (*xingsufa sifa jieshi yu lishi susong quanli baozhang*), *China Jurisprudence (zhongguo faxue)*, No. 1, 1999, p. 132. Also see Wang Shujing, "Several Urgent Issues That Need to Be Solved Following the Lawyers Law Coming Into Effect" (*lushifa shishi hou jidai jiejie de jige wenti*), *Chinese Lawyers Newspaper (zhongguo lishi bao)*, May 24, 1997, p. 3.

<sup>130</sup> See the Xi'an Opinions, note 10.

<sup>131</sup> Article 127 of the fourth Draft of the SPP Provisional Rules and Article 130 of the Fifth Draft of the SPP Provisional Rules (for discussion) stipulated the same two-visit rule and 30 minute duration. However, the final version of the SPP Provisional Rules dropped these clauses and left the matter to the discretion of the people's procuratorates.

<sup>132</sup> See conference report "Criminal Defense...", p. 19, see note 126. Article 36 of the CPL specifies that lawyers may meet and correspond with defendants, while other defense representatives (*qita bianhuren*) need approval from the courts to meet with defendants. Article 30 of the Lawyers Law has a similar stipulation.

<sup>133</sup> Interview with lawyers in Shanghai, May 1999.

<sup>134</sup> Wang, "Lawyers' Early Involvement...", p. 19, see note 113.

<sup>135</sup> Guo Xiaobin, "On Reform and Development of the Work of Crime Investigation After the New Criminal Procedure Law Took Effect" (*lun xin xingshi susongfa shishi hou xingshi zhencha gongzuo de gaige yu fazhan*), *Study of Crime Investigation (Xingzheng Yanjiu)*, No. 1, 1998, p. 11.

In some localities, lawyers met with their clients under outrageous conditions. Detention centers generally do not provide sufficient space for lawyers to meet with detainees, and sometimes this has resulted in lawyers lining up to meet with suspects. For instance, in Changsha No. 1 Detention Center, there is only one visiting room for legal consultations, while the entire center has a population of more than a thousand detainees.<sup>136</sup> It is common that two meetings are held simultaneously in the same room.<sup>137</sup> In Shiyan City, Hubei Province, meetings are held in an outside yard, while in Xiangyang, there is a glass screen separating lawyers from suspects with a hole in the middle of the glass, so both sides have to speak loudly to make themselves heard.<sup>138</sup> One of the worst places is Ezhou, where lawyers and suspects meet in a metal cage without any chairs inside it. This makes it convenient for officials to monitor the conversation. Under such circumstances, lawyers are not likely to have long consultations with their clients.<sup>139</sup>

The authorities often attempt to censor the content of conversations between lawyers and suspects in advance. Some officials told lawyers they were only permitted to know what suspects had been charged with, while others insisted that any inquiry about details of the case concerned would jeopardize the official criminal investigation. To ensure that lawyer-client meetings did not damage the investigation, some officials required that the lawyer submit a written account of what they planned to talk about before holding a conversation with a suspect, and that the meeting be carried out exactly according to the written talking points.

In many detention centers, lawyers are given the responsibility of maintaining security and are required to bring a pair of handcuffs to put on the suspect during their meetings.<sup>140</sup> Furthermore, authorities take every opportunity to charge unreasonable fees for everything from the purchase of application forms (to apply for a meeting or for bail) to making photocopies of various documents.<sup>141</sup>

Some official public commentary on the work of lawyers during the criminal investigation phase further discounts the quality of the legal services they provide. One commentator from the Public Security Department of Zhejiang Province writes:

*Several points need to be noted [by the investigating authority] on answering questions from lawyers:*

- 1. Answers [to the lawyer's questions] should be always given by concealing in full the real direction of the crime investigation concerned;<sup>142</sup>*
- 2. Answers should only touch on the charges but not give any details of the facts, witnesses, documentary evidence, physical evidence, as well as other evidentiary materials;*

<sup>136</sup> See Deng Ruixiang, "Early Involvement: Gearing-Up Time Is Over" (*tiqian jieru, moheqi yi guo*), *People's Public Security (renmin gongan)*, No. 4, 1999, p. 8.

<sup>137</sup> *Ibid.*

<sup>138</sup> *Ibid.*

<sup>139</sup> Wang, "Lawyers' Early Involvement...", p. 19, see note 113.

<sup>140</sup> Zhou, "Correctly Appreciating...", p. 12, see note 118.

<sup>141</sup> Xia Lu, "Thirteen Difficulties that Lawyers Encounter in the Course of Criminal Defense And Suggestions to Improve Them" (*lüshi xingbian shisan nan de wenti ji gaijin*), *Chinese Lawyer (Zhongguo lüshi)*, No. 12, 1997, p. 6.

<sup>142</sup> In other words, officials should not make any indications that would allow lawyers/suspects from knowing anything regarding the stage of the investigation which would facilitate preparation of defense strategies.

3. *[Investigation personnel] should not answer any question related to the facts or charges yet to be verified.*<sup>143</sup>

Another official from the public security department of Jiangsu Province even more openly lays out prohibitions for lawyers:

*Lawyers are prohibited from holding private meetings with suspects...from learning the details of the whole case... from investigating or collecting evidence from others... from participating in official questioning of suspects.*<sup>144</sup>

#### *Pretrial Release: Taking A Guarantee and Awaiting Trial*

Although it is legally possible, lawyers have rarely succeeded in bailing out their clients during the crime investigation period.<sup>145</sup> The CPL allows lawyers to start the process of applying for “taking a guarantee and awaiting trial” (*qubao houshen*) after the formal arrest of a suspect is ordered.<sup>146</sup> However, lawyers’ petitions for taking a guarantee and awaiting trial are generally either quickly dismissed or left forever pending. Only on a very few occasions have lawyers managed, after a tortuous process, to get their clients out on bail under this measure. One commentator claimed that to his knowledge not a single application for bailing out suspects had been granted by the people’s procuratorates since the 1996 reforms.<sup>147</sup> In fact, pretrial release is an exception in China, which clearly conflicts with international standards on pretrial detention.<sup>148</sup>

The lawyers and legal scholars interviewed for this report complained that provisions concerning taking a guarantee and awaiting trial are often rendered meaningless. In practice, there is no set standard for deciding whether or not to grant such a request. This allows the determination to be made on an arbitrary basis. Among the small number of people released awaiting trial, very few gain release as a result of a lawyer’s application or a request from the suspect. Most are released on the initiative of the authorities.<sup>149</sup> Though the CPL stipulates the conditions for taking a guarantee and awaiting trial, public security departments and procuratorates usually do not consider a pre-trial release unless such a release becomes absolutely necessary.<sup>150</sup> According to a Shanghai lawyer, public security departments consider release of a suspect in only two situations: if the person’s detention will exceed the time limit for pretrial detention; or if the offenses in question are so minor that suspects are unlikely to be sentenced to any jail term.<sup>151</sup> Procuratorates are even more reluctant to release suspects. In the overwhelming majority of situations, suspects are not released until the investigation is over.<sup>152</sup> Prosecutors claim that all cases they investigate are either so complicated or serious that it is inappropriate to release suspects before the

<sup>143</sup> Yuan Zhongmin, “Brief Points on the Public Security Department’s Handling of Lawyers at the Stage of Crime Investigation” (*shi lun gongan jiguan zai zhencha jieduan du lüshi de jiedai*), *Study of Criminal Investigation* (Xingzheng Yanjiu), No. 1, 1998, p. 15.

<sup>144</sup> Yang Zongzheng and Xue Hongwei, “Thoughts on Several Issues Regarding Lawyers’ Early Involvement in Crime Investigation” (*guanyu lüshi jieru zhencha jige wenti de sikao*), *Public Security University Journal* (*gongan daxue xuebao*), No. 1, 1997, p. 37.

<sup>145</sup> CPL, Article 36.

<sup>146</sup> *Ibid.*

<sup>147</sup> Conference report “Criminal Defense...,” p. 17, see note 126.

<sup>148</sup> See, Section VII on International Standards.

<sup>149</sup> Interviews.

<sup>150</sup> *Ibid.*

<sup>151</sup> Interview with lawyers in Shanghai.

<sup>152</sup> *Ibid.*

investigation is complete. This explains why lawyers are unable to gain the release of their clients during the crime investigation period when cases are handled by prosecutors.<sup>153</sup>

#### *Joint Provisions by the Six Central Departments*

Due to concerns about the deteriorating environment for lawyers engaged in criminal defense, particularly at the early stage of criminal investigations, the MOJ coordinated a joint interpretation of the CPL.<sup>154</sup> Although many agreed that the various judicial interpretations set far too many restrictions on the power of lawyers, thus greatly diminishing their ability to represent defendants, it was not until January 19, 1998, one year after the CPL became effective, that the Joint Provisions were enacted.<sup>155</sup> The fact that the six central departments, including all major players in the implementation of the CPL, jointly interpreted a major law was an unprecedented event, but unfortunately the resulting regulations reflect a struggle for power and control among departments rather than well-reasoned judicial consideration. Major corrections in the Joint Provisions include some clarification of the concept of “state secrets,” setting time limits for approval of applications for lawyers to visit clients in cases involving state secrets and stipulating the rights of defendants in a clearer way. Nevertheless, the discretion of the authorities to handle the practicalities of visits by lawyers was largely left untouched. Although it has been reported that the situation of lawyers representing their clients has somewhat improved, there is no evidence that there have been any major changes in this regard following the joint interpretation. According to one report, lawyers were generally not positive about the new provisions since the reality they face does not even come close to the requirements set forth in the Joint Provisions.<sup>156</sup>

The lawyers and legal scholars interviewed for this report generally believe that any reforms will be ineffective unless the criminal process is made public and the CPL or relevant judicial interpretations clearly lay out the rights of suspects and defendants. As long as the law implementation apparatus, such as the public security departments and the procuratorates, have such enormous discretion regarding the early involvement of lawyers in the criminal process, there will be little room for improvement.<sup>157</sup>

### **Legal Defense**

Lawyers who are retained by suspects or defendants have a duty to defend their clients. The CPL requires that the people’s procuratorates notify suspects or defendants of their right to hire a lawyer within three days after the procuratorates receive cases from the public security departments to review for prosecution.<sup>158</sup> At this point, defense lawyers should have access to certain case materials collected by the prosecution.<sup>159</sup> Compared to the old provisions, this allows lawyers a much longer time to prepare their defense.<sup>160</sup> Both the CPL and the Lawyers Law specify that lawyers have the right to collect evidence about the case themselves.<sup>161</sup> After the case is transferred to the courts for trial, lawyers are allowed access to certain materials about the case

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<sup>153</sup> Interview with lawyers in Shanghai and Beijing, July 1999.

<sup>154</sup> See Introduction, Section B on regulatory developments.

<sup>155</sup> For details of the Joint Provisions, see Xue and Zhao, “Uniform Rules....,” note 15 for reference.

<sup>156</sup> See Zou, “Early Involvement...,” see note 124.

<sup>157</sup> Interview with lawyers and scholars in Shanghai and Beijing, April and May 1999.

<sup>158</sup> CPL, Article 33.

<sup>159</sup> CPL, Article 36.

<sup>160</sup> The 1979 CPL only required that the court notify defendants of the right to retain a lawyer at least seven days before trial. See, 1979 CPL, Article 110 (3).

<sup>161</sup> Article 30 of the Lawyers Law and Article 37 of CPL.



held by the authorities.<sup>162</sup> During trial, lawyers can cross-examine witnesses, review the evidence presented by prosecutors<sup>163</sup> and conduct legal defense on behalf of defendants.<sup>164</sup> However, in practice, lawyers frequently encounter obstacles in presenting a proper defense for their clients. These obstacles include: restricted access to evidence collected by prosecutors; insufficient power to collect evidence; and inability to cross-examine prosecution witnesses who have provided testimony but who do not appear in court. These issues will be examined in detail below.

*Access to Evidence Collected by Authorities*

Defendants and their legal counsel actually encounter more difficulties in gaining access to evidence collected by prosecutors now than before the CPL was revised. This greatly weakens their ability to prepare an effective defense.

The CPL's formulation of what case materials defense attorneys should be allowed access to is ambiguous. It states that in order to prepare their defense, lawyers have the right to "look up, make excerpts from and duplicate litigation documents and technical authentication documents" in the prosecutors' files, after the case is transferred to the procuratorate by the police for "review for prosecution" (*shencha qisu*).<sup>165</sup> However, the CPL does not clearly define "litigation documents" or "technical authentication documents." This lacuna leaves authorities with broad discretion to withhold evidence from lawyers. Although some commentators insist that all the major evidence related to the case should be included in the category of litigation documents, and therefore be accessible to lawyers,<sup>166</sup> in practice, lawyers have generally not been able to examine any of the evidence collected by the public security departments or the people's procuratorates. Furthermore, judicial interpretation on what constitutes "litigation documents" has firmly shut defense lawyers out from discovery of official evidence during the prosecution's review of the case. According to the SPP Rules:

*...Litigation documents refer to those legal litigation documents made specifically for filing for investigation, taking coercive measures, determining investigation methods, as well as initiating the prosecution review process, such as the document on filing for investigation (li'an jue ding shu), detention order (juliu zheng), the document approving arrest (pizhun daibu jue ding shu), the document deciding arrest (daibu jue ding shu), the arrest warrant (daibu zheng), and the opinion on prosecution of the crime (qisu yijian shu).<sup>167</sup>*

Moreover, an official SPP commentary expressly prohibits lawyers from accessing any of the evidence relating to a case, stating "...defenders can only look at the technical documents (*jishu xing ziliao*) and cannot examine the physical evidence, documentary evidence, witness testimony,

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<sup>162</sup> Article 36 of the CPL.

<sup>163</sup> CPL, Article 156.

<sup>164</sup> CPL, Article 157.

<sup>165</sup> CPL, Article 36.

<sup>166</sup> See Li Baoyue, "Commenting Again on Defense Lawyers' Right to Access Official Files" (*zai lun bianhu lüshi de yuejuan quan*), from Fang, *Special Commentary*, p. 161-163, see note 127 for reference.

<sup>167</sup> Article 319 of the SPP Rules on the Criminal Process for People's Procuratorates (*renmin jianchayuan xingshi susong guize*), passed on December 16, 1998.

victim's statement, defendant's statement or self-defense statement and other evidentiary materials such as crime-scene records and technical records."<sup>168</sup>

The revised CPL only requires that, after cases are transferred to the court for trial, prosecutors provide courts with a list of the evidence and of the witnesses and with copies of "major evidence."<sup>169</sup> By contrast, under the old CPL, prosecutors had to submit to the courts all evidence and related materials along with the indictment. If they did not do so, prosecutors ran the risk of the court deciding that the case should be dismissed or returned to the procuratorate for supplementary investigation.<sup>170</sup> This revision in the CPL was part of trial process reforms that prohibited judges from reviewing the substance of cases before trial, and instead, required that they decide the case based on the presentations made by both sides. But without some measures to balance the power of the prosecution, such as a mandatory discovery process, the reform has the effect of greatly weakening the position of the defendant at the trial stage.

The possibility that the "reform" would have such an outcome was not unforeseen. One commentator warned in 1996:

*The fact that prosecutors are only required to submit to the courts a list of the evidence and the litigation documents will have a negative effect on the right of defendants to discovery. This will definitely hinder defendants and their defenders from preparing a defense.*<sup>171</sup>

Many lawyers report that the rule allowing prosecutors not to submit their evidence to the courts effectively nullifies the right of lawyers to look at the documents and the evidence held by the authorities. It is common practice for prosecutors deliberately to withhold evidence from defendants during the prosecution review stage (*shencha qisu jieduan*) as well as during the trial phase (*shenpan jieduan*).<sup>172</sup>

Thus, lawyers are unable to obtain useful information at the prosecution review stage. When the case reaches court, defense lawyers are only allowed to look at the files deposited with the court,<sup>173</sup> which generally contain little more than what they have seen at the earlier phase.

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<sup>168</sup> The SPP Study Department of Law and Policy: Study Guideline on the Decision to Revise the Criminal Procedure Law of the People's Republic of China (*guanyu xiugai zhonghua renmin gongheguo xingshi susongfa de jue ding xuexi gangyao*), China Procuratorate Press, 1996, p. 207.

<sup>169</sup> Article 150, CPL.

<sup>170</sup> Article 108 of the 1979 CPL stated: "After reviewing the cases submitted for public prosecution, the people's courts shall decide to hear those cases if the facts of the case are clear and *the evidence is sufficient* [to prove a crime has been committed by the defendant]; with regard to those cases in which major facts are unclear and the evidence is not sufficient, [the people's court] may return them to the people's procuratorate for a supplementary investigation; as to those cases that do not merit a sentence, [the people's court] may request that the people's procuratorate withdraw the prosecution." This provision forced prosecutors to submit all available evidence in order to avoid cases being returned for supplementary investigation or dismissed.

<sup>171</sup> See Wang Minyuan, "Comments on and Description of the Criminal Procedure Law Revision in Our Country" (*woguo xingshi susongfa xiugai shuping*), *Jurists (Faxue jia)*, No. 4, 1996, p. 50.

<sup>172</sup> Interviews with lawyers.

<sup>173</sup> Although the CPL does not specify what materials lawyers can have access to during the trial stage, judges and prosecutors universally assume that lawyers can only look at, excerpt from, as well as duplicate the materials deposited with the courts, obviously excluding any possibility of checking on materials held by the prosecutor's office. Some commentators suggest that the law should require that lawyers have access to prosecution evidence which has not been submitted to the courts. See Li Yin, "On the Legislative

Lawyers are thus left in the dark on how to prepare a defense. Considering that prosecutors have a disproportionate advantage in collecting evidence and that lawyers are given a short time period to prepare their defense, many scholars insist on the adoption of a discovery process which would allow lawyers access to all evidence collected by prosecutors and public security departments and all evidence which will be presented at trial.<sup>174</sup> In some localities, experiments are being tried with the use of discovery procedures under the sponsorship of the courts. For instance, Yantai People's Intermediate Court experimented with this system and allowed defense lawyers access to the prosecution's evidence. Prosecutors were obviously critical of this experiment.<sup>175</sup> However, there is no sign that the Chinese authorities will formally establish a rationally-mandated discovery system any time in the near future.

*Limitations on the Right of Lawyers to Collect Evidence*

Another significant change in the CPL is that the right of lawyers to collect their own evidence is severely impaired. According to the CPL, lawyers may collect evidence from witnesses, units (*dan wei*), or other individuals with their consent. Furthermore, lawyers must obtain permission from the people's procuratorates or the courts, as well as the consent of victims, in order to collect evidence from victims or witnesses provided by victims.<sup>176</sup>

This certainly represents a setback in terms of the ability of lawyers to prepare a case. Although the old CPL did not elaborate on the power of lawyers to collect evidence, the Interim Regulations on Lawyers<sup>177</sup> provided some guarantees on collecting evidence to supplement official evidentiary materials. Article 7 of the Interim Regulations stipulated:

*During participation in litigation, lawyers have the right, under the relevant provisions, to investigate cases and obtain related materials from the units and individuals in question. Lawyers may meet and maintain correspondence with defendants in custody, while acting as defenders.*

*All units and individuals concerned have an obligation to cooperate with lawyers when lawyers are engaging in the above-mentioned activities.*

Some local regulations also provided lawyers with safeguards for securing evidence. For instance, a Shanghai regulation, promulgated in 1995, provided:

*Lawyers shall present a letter of introduction from their law office and a lawyer's license while investigating and collecting evidentiary materials relating to the legal matter or cases in question from units and individuals. Unless laws*

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Flaws in and Improvements to the Current System of Criminal Evidence" (*shi lun xianxing xingshi zhengju zhidu de lifa quexian ji wanshan*), *Legal Science (Falü kexue)*, No. 1, 1999, p. 123. For a general summary of the scholarly discussion on the discovery system, see Wang Minyuan and Zhu Changli, "General Commentary on Study of the Criminal Procedure Law," *CASS Journal of Law (Faxue jia formerly Studies in Law)*, No. 1, 1999, p. 145-146.

<sup>174</sup> *Ibid.* The discovery system is also translated as "xianxi zhidu," which means "advance knowledge system."

<sup>175</sup> "Confrontation as well as Cooperation, Prosecutors and Defense Lawyers Get in Touch before Trial: Yantai Experiment in 'Discovery of Evidence'" (*ji you duikang you you he zuo kongbian shuangfang tingqian shidu jiechu yantai changshi zhengju kaishi*), *People's Procuratorate Daily (Renmin jiancha ribao)*, December 22, 1999. Located at: [http://www.jcrb.com/html/1999/12/22/e19991222\\_01.htm](http://www.jcrb.com/html/1999/12/22/e19991222_01.htm)

<sup>176</sup> CPL, Article 37.

<sup>177</sup> Interim Regulations on Lawyers (*lüshi zanxing tiaoli*), promulgated by the NPC Standing Committee on August, 26, 1980.

*or regulations stipulate otherwise, those units or individuals shall assist lawyers and provide them with the relevant materials.*<sup>178</sup>

Some may argue that individuals or institutions, especially litigation adversaries, are not legally obliged to cooperate with lawyers in many other criminal justice systems. However, considering that Chinese lawyers lack access to officially-collected evidentiary materials and are generally unable to summon witnesses to testify in court, such a revision has undoubtedly further diminished the ability of lawyers to effectively represent their clients at trial.

An alternative for lawyers seeking favorable evidence is to apply for a court order to secure the evidence in question. Under the CPL, lawyers may apply to the court requesting the collection of certain evidence if they believe that the evidence in question is critical to the case and they are not able to obtain it on their own.<sup>179</sup> However, courts often dismiss such applications by ruling that the evidence in question is unnecessary or insignificant.<sup>180</sup> There is no recourse for lawyers if a court decides to reject their applications for official collection of evidence. Prior to the enactment of the Joint Provisions on January 19, 1998, such applications from lawyers often failed. In most cases, the courts indiscriminately dismissed such applications. In other cases, the courts issued lawyers with permission to investigate (*zhunxu diaocha zheng*) and let them collect the evidence themselves. This practice directly contravened the CPL which requires that the court itself collect evidence if a lawyer's application has been granted.<sup>181</sup> This situation has not improved despite the Joint Provisions' requirement that the courts abide by the CPL and collect the evidence on the lawyer's behalf if they decide the evidence is necessary for the case.<sup>182</sup>

Under such circumstances, the defense in many cases consists only of questioning or rebutting the evidence presented by prosecutors. This generally makes for a weak defense and results in the lawyers' efforts not being given adequate consideration by the courts. Some commentators have attributed the ineffectiveness of defense lawyers to difficulties in collecting evidence.<sup>183</sup>

#### *Difficulties in Calling Witnesses and Cross-examining Evidence at Trial*

Since lawyers have insufficient access to prosecution evidence and lack the means to collect their own evidence, it becomes critically important for them to have an opportunity to examine the evidence presented during trial. However, lawyers have great difficulty in calling witnesses to the stand to testify.

The absence of the witnesses at trial has been a long-standing problem in criminal cases in China. Prior to the enactment of the new CPL, witnesses were rarely called to the stand, and defendants had few chances to confront witnesses by cross-examining them. The revisions aimed to change this situation by stipulating that witnesses *shall* be present and be subject to cross-examination

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<sup>178</sup> Article 28 of the Measures for the Management of Lawyers in Shanghai (*Shanghai lüshi guanli banfa*), issued by Shanghai Municipal People's Government, on December 23, 1994, and entered into force on February 1, 1995.

<sup>179</sup> CPL, Article 37.

<sup>180</sup> Interviews with lawyers in Shanghai and Xi'an, July 1999.

<sup>181</sup> CPL, Article 37.

<sup>182</sup> Article 15 of the Joint Provisions requires that the courts and procuratorates collect evidence upon request from lawyers, given that courts or procuratorates believe it "necessary." This provision leaves discretion to the courts or procuratorates to decide if they should collect the evidence requested by lawyers.

<sup>183</sup> Wang Weiping, "The Reasons for Lawyers' Defense Opinions Being Overlooked in Criminal Trials and Counter-strategies" (*xingshi shenpan hushi lüshi bianhu yijian de yuanyin ji duice*), *Journal of Shanxi Normal University (Shanxi shida xuebao)*, No. 4, 1997, p. 5-6.

during the trial.<sup>184</sup> However, the SPC Interpretation states that with the court's permission, witnesses may be absent in the following four circumstances:

- a) *the witness is a minor;*
- b) *the witness is suffering from serious illness or is physically incapable of being present at trial;*
- c) *the testimony of the witness will not affect the trial in a significant way;*
- d) *for other reasons.*<sup>185</sup>

Complaints that witnesses, especially those who provide authorities with written testimony, are seldom present for cross-examination during trial were widespread among lawyers. Most witnesses are exempted from presence at trial by a decision of the court, even when lawyers have applied for their presence. In cases where witnesses are called by the court, many witnesses ignore the court order and choose to stay away. Although Chinese courts have subpoena powers, no legal penalty has been set for not complying with a court's subpoena. In most trials, the courts proceed only with written testimony provided by prosecutors and leave lawyers no choice but to focus on contradicting the written testimony.<sup>186</sup> In all three trials the authors observed, not a single witness was called. All the trials proceeded with prosecutors and judges reading written evidence and lawyers occasionally raising questions regarding the written testimony. There are no requirements stipulating that written testimony should conform to any formalities, such as being given under oath or in a setting where the opposing side has an opportunity to question the witness.

Some attribute the failure to bring witnesses to the stand during trial to the ambiguity of the CPL, since it does not stipulate which side should be responsible for guaranteeing the presence of witnesses. One commentator insists that the laws or regulations should provide the resources and legal guarantees that can secure the presence of witnesses at trial.<sup>187</sup> Others suggest that there should be an appropriate legal penalty if witnesses refuse to attend.<sup>188</sup> Judges often cite safety concerns as an excuse for witnesses not being called to the stand.<sup>189</sup> In any event, this reality severely prejudices the role of defense lawyers and ultimately the rights of defendants. According to a recent article concerning a total of 293 criminal cases tried in Shenzhen courts from January to September 1997, only 84 cases involved witness testimony. In these cases, the courts called a total of 129 witnesses to testify. However, only 16 witnesses actually showed up.<sup>190</sup> Another report states that as few as 30 percent of witnesses called by the courts were present at trial during the period from January to April 1997 in the entire Wuhan area.<sup>191</sup>

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<sup>184</sup> CPL, Article 47.

<sup>185</sup> Article 141 of the SPC Interpretation.

<sup>186</sup> Interviews with lawyers.

<sup>187</sup> Research Department of the High People's Court of Jiangsu, "Discussion of Several Issues on Witnesses' Presence in Criminal Trials" (*xingshi susong zhengren chuting ruogan wenti de tangtao*), *Studies in Adjudication (Shenpan yanjiu)*, No. 2, 1998, p. 4-6.

<sup>188</sup> Li Yanhua and Zhou Changmiao, "Thoughts on the Witness Testimony System in Criminal Trials in Our Country" (*guanyu woguo xingshi zhengren chuting zuozheng zhidu de sikao*), *Studies in Law and Commerce (Fashang yanjiu)*, No. 4, 1999, p. 84-85.

<sup>189</sup> Interview with judges in Shanghai, Beijing and Xi'an, July 1999.

<sup>190</sup> See Cui, "Problems and Solutions...", p. 20-21, see note 114.

<sup>191</sup> Qi Wenyuan, Yao Li and Zou Bin, "Several Problems with Implementation of the New Criminal Procedure Law" (*xin xingsufa shishi guocheng zhong de jige wenti*), *Studies in Law And Commerce (Fashang yanjiu)*, No. 6, 1997, p. 77.

Some scholars claim that the percentage of trials in which witnesses are present is below 10 percent.<sup>192</sup> Among 166 criminal cases tried during the first quarter of 1997 in Maoming City, Guangdong Province, there were only 12 cases in which witnesses were present. Shanghai's record was no better. From January to April 1997, only five out of 107 criminal cases tried by Yangpu District courts had witnesses take the stand. Jingshan County court had a better record, as witnesses were present in 27 percent of criminal cases during the first quarter of 1997.<sup>193</sup>

Some localities were worse than others. One survey conducted by a district court in Henan Province sheds some light on the severity of the problem. Among 345 criminal cases tried by the Nangan District People's Court, Kaifeng City, Henan Province, there were 1,726 witnesses who should have been called to the stand. Of these, only seven showed up in court. This represents only around 0.4 percent of all witnesses.<sup>194</sup>

Professor Chen Guangzhong, China's leading criminal justice expert, recently provided an even more pessimistic national perspective. According to Professor Chen, witnesses are called to the stand in only one to five percent of all criminal cases. The main reason cited by the authorities for this low rate is concern about witness safety.<sup>195</sup> However, prosecutors are also reluctant to call witnesses out of concern that the witnesses might retract their statements. It is much safer for prosecutors to rely on favorable written statements. Some witnesses are afraid of being harassed or detained by authorities if their testimony does not go well.<sup>196</sup>

Attorneys and scholars interviewed in Shanghai and Beijing for this report estimated that the percentage of cases in which witnesses were called to the stand and cross-examined was well below 30 percent, although the situation has been steadily improving in big cities such as Shanghai and Beijing.<sup>197</sup> All of them agreed that there was an urgent need to enact a national law regulating the conduct of witnesses, including provisions on providing witnesses with necessary resources and guarantees of personal safety.<sup>198</sup>

### C. The Risk of Representing Defendants

Lawyers in China can risk their careers and even their personal liberty as a result of confrontations with authorities in the course of representing their clients. The ACLA declared 1995 as "a disaster year for lawyers" (*lüshi mengnan nian*), due to the high number of lawyers who were detained and convicted for merely doing their job.<sup>199</sup> Since the new CPL came into effect, the degree of risk for lawyers has actually increased. Lawyers are now more likely to come into conflict with authorities because the new CPL provisions both expand the scope of their work at various stages of the proceedings and allow them to become involved earlier in the process. Mounting official hostility toward lawyers is another reason they are at more risk in

<sup>192</sup> See Xiong Xuanguo, "Implementing the Criminal Procedure Law and Reforming Trial Work" (*guanche xingsufa gaige shenpan gongzuo*), *Democracy and Law (Minzhu yu fazhi)*, No. 17, 1997, p. 26-28.

<sup>193</sup> *Ibid.*, p. 27.

<sup>194</sup> "Interview with Dan Bo: At Criminal Trial, Why Is It So Hard to Call Witnesses?" (*xingshi susong zhengren yuanhe nan chuting*), *People's Court Daily (Renmin fayuan ribao)*, April 23, 2000.

<sup>195</sup> "Interview with Professor Chen Guangzhong: the Verdict Should be Invalidated Should the Key Witnesses not be Present," (*Guanjian zhengren bu chuting panjue yindang wuxiao*) *China Youth Daily (Zhongguo qingnian bao)*, August 25, 2000.

<sup>196</sup> *Ibid.*

<sup>197</sup> Interviews with lawyers in Shanghai and Beijing.

<sup>198</sup> *Ibid.* For regulations on witnesses, see Xiong, "Implementing the CPL...", p. 27-28, see note 192.

<sup>199</sup> Fang, *Special Commentary*, p. 169, see note 127 for reference.

China today. Public security departments and prosecutors reportedly harass and intimidate lawyers. In the worst cases, lawyers are detained, tortured, or even convicted of crimes for doing nothing more than vigorously representing their clients. According to a MOJ official, in 1998 alone more than 100 lawyers were detained, prosecuted, or convicted under a variety of different charges.<sup>200</sup>

According to a recent report, in Hunan Province alone there have been around 120 incidents in which lawyers were either harassed or had their liberty restricted since 1996.<sup>201</sup> Among these incidents, about 20 involved lawyers being detained or arrested on various criminal charges.<sup>202</sup> In Fujian Province, three lawyers were detained for allegedly tampering with evidence, suborning perjury, or engaging in bribery in 1999.<sup>203</sup> According to an ACLA leader, in 1999 the ACLA section in charge of protecting lawyers' rights handled more than 70 cases in which lawyers were deprived of their rights to defend their clients, prevented from investigating cases, or harassed.<sup>204</sup>

#### *Problematic Legal Provisions*

Two clauses in Article 38 of the CPL potentially put defense lawyers in severe professional jeopardy. One clause states that defense lawyers and other defenders are prohibited from assisting crime suspects or defendants in concealing, destroying, or forging evidence and from helping defendants collude with each other. The other states that defense attorneys or other defenders are prohibited from threatening or inducing witnesses to change their testimony or commit perjury. In addition, Article 306 of the 1997 Criminal Law of the People's Republic of China<sup>205</sup> provides that defenders or legal representatives may be subject to punishment for obstructing justice by forcing or inducing witnesses to commit perjury or change their testimony.

Reports say that the hostility of officials towards lawyers, which has accompanied the change in the lawyer's role in criminal defense, has become a major negative factor influencing the participation of lawyers in the criminal process. Commentators point out that prosecutors have been unable to adjust to new provisions in the CPL concerning the creation of a more adversarial process in which confrontation between lawyers and prosecutors is, to some extent, legally required. Besides, prosecutors refuse to think of themselves as being on an equal footing with lawyers. As one report puts it:

*Some public prosecutors have not come to terms with the fact that lawyers are equal to them [in the court process]. A few even regard the work of lawyers in legal defense as acts which help defendants evade criminal punishment. It is not easy to change their mentality and naturally this is reflected in their actions [seeking to blame lawyers].<sup>206</sup>*

<sup>200</sup> See Tian Wenchang, "Why Are Lawyers Not Willing to Engage in Criminal Defense?" (*lüshi weihe buyuan zuo xingshi bianhu?*), *Procuratorate Daily (Jiancha ribao)*, February 10, 1999, p. 2.

<sup>201</sup> Xiao Wenhui, "Long Journey Towards Protecting the Rights of Lawyers" (*lüshi weiquan lu mangmang*), *People's Daily (Renmin ribao)*, October 25, 2000, p. 11.

<sup>202</sup> *Ibid.*

<sup>203</sup> China News Agency wire, "The Incidence of Fujian Lawyers' Rights Being Violated Attracts Society's Attention" (*fujian lüshi shou qinquan shijian yinqi shehui guanzhu*), August 24, 2000.

<sup>204</sup> Xinhua News Agency, "The Environment in Which Our Country's Lawyers Are Practicing Law Still Needs Further Improvement" (*woguo lüshi zhiye huanjing reng xu gaishang*), May 21, 2000.

<sup>205</sup> The PRC Criminal Law was promulgated on July 1, 1979, and amended by the NPC on March 14, 1997.

<sup>206</sup> Hou Shuxian, "How Can Lawyers Protect Themselves?" (*lüshi ruhe baohu ziji*) *Chinese Lawyer (Zhongguo lüshi)*, No. 1998, p. 39.

Another lawyer attributes hostile official attitudes to the revision of the Lawyers Law, which redefines the role of lawyers as “professionals providing legal service to society” (*wei shehui tígong fǎlǚ fúwù de zhīyè rěnyuán*).<sup>207</sup> Some people, he continues, believe that there is no need to protect lawyers since they are no longer “state legal workers” (*guójia de fǎlǚ gōngzuozhě*).<sup>208</sup>

Many legal scholars have criticized the above-mentioned provisions of the CPL and the Criminal Law on the crime of perjury by lawyers for creating an environment inimical to the provision of legal counsel or defense services.<sup>209</sup> One commentator pointed out that as defined in the CL, the crime of perjury or assisting perjury may be committed by anyone involved in the criminal process, including prosecutors or even judges. Yet the CL arbitrarily singles out defense attorneys and other defenders as liable for this crime and thus exerts a great deal of pressure on defense lawyers.<sup>210</sup> Furthermore, the CL does not stipulate in detail what constitutes the crime of forging evidence or perjury under Article 306, leaving prosecutors wide discretion to prosecute lawyers, and giving judges enormous latitude to find them guilty of such an offense.

In practice, lawyers often run into serious legal trouble simply because witnesses or defendants/suspects change their testimony or statements after lawyers become involved, thus prompting suspicion among prosecutors that lawyers have suborned perjury.<sup>211</sup> After the CPL took effect, witnesses and defendants reversing their testimony and statements became a frequent occurrence.<sup>212</sup> Some lawyers have been convicted merely because they have discovered a different story from that officials are presenting.

For example, a perjury case in Jiangsu Province demonstrates how a lawyer can be trapped under Article 306 of the Criminal Law. Liu Jian was detained and prosecuted for inducing key witnesses to reverse their testimony at trial, which resulted in a retrial. In fact, what Liu, as a defense lawyer, had done was simply to collect the full testimony of several witnesses and present them to the court. One of the witnesses had apparently altered his testimony from the original statement he had given to the authorities. According to prosecutors, it was the defense attorney who “induced” the witness to change his testimony, therefore committing the crime of “defender impairing testimony” (*bianhuren fanghai zuozheng zui*) under Article 306.<sup>213</sup> The prosecutors relied on two pieces of “evidence” in the indictment against Liu: first, that the witness’ testimony had changed; and second, that this change was the result of Liu’s “inducement.” There is currently no judicial interpretation which effectively distinguishes “inducement” from a “leading question” (*yindao xing fawen*).<sup>214</sup> Some commentators find the term “induce” used in Article 306 of the Criminal Law dangerously ambiguous. One commentator argues that there may be many reasons why a witness may give different testimonies at different times. One of the most likely reasons is that the first statement, particularly if given by a defendant, is false and obtained through torture. But the mental hostility of prosecutors towards lawyers means that their first

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<sup>207</sup> Article 2.

<sup>208</sup> See Li Shunyi, “Risks and Why They Prevent Lawyers Participating in Criminal Litigation” (*lǚshī cānyù xíngshì sùsòng de fēngxián jīqī fāngfāng*), *Chinese Lawyer (zhongguo lǚshī)*, No. 4, 1997, p. 45.

<sup>209</sup> *Ibid.*, p. 46. Many lawyers and scholars we interviewed also criticized these provisions.

<sup>210</sup> *Ibid.*, p. 45-46.

<sup>211</sup> Interview with lawyers in Shanghai and Beijing, April 1999.

<sup>212</sup> See Zou, “Early Involvement...,” see note 124.

<sup>213</sup> Elisabeth Rosenthal, “In China’s Legal Evolution the Lawyers are Handcuffed,” *The New York Times*, January 6, 2000. See also “Report: The Cost of Defending” (*bianhu de daijia*), *Democracy and Law (Minzhu yu fazhi)*, No. 22, 1998, p. 7-9.

<sup>214</sup> *Ibid.*



inclination is to blame the lawyer.<sup>215</sup> A lawyer in Shanghai told the authors that tension between defense attorneys and prosecutors is often high. Any rebuttal of the prosecutor's accusations, whether challenging evidence or reasoning, may lead to potential trouble for the lawyer.<sup>216</sup>

In another case in Tieling City, Liaoning Province, Ren Qingliang, a defense attorney in an arson case, was prosecuted for perjury and harboring defendants. His only crime was that he obtained testimony which gave the defendant an alibi, and contradicted the prosecutor's evidence. It was not until the defendant was acquitted that Ren was set free. He had not been convicted of any crime.<sup>217</sup>

On some occasions, lawyers have been held liable for perjury committed by defendants. In Xinyang City, two lawyers were detained by prosecutors after they discovered a false statement, which was later proven to have been made by defendants rather than by the lawyers.<sup>218</sup>

What troubles lawyers and legal scholars most is not that lawyers can be detained or convicted for illegal acts, but rather that they can be detained by their counterparts in a criminal trial while they are in the middle of conducting legal defense.<sup>219</sup> This undoubtedly sends a dangerous signal to all criminal lawyers that they are working in a climate of legal uncertainty. Since their opponents are the very ones who have the authority to determine whether they are behaving appropriately in conducting their defense, there is a strong incentive for lawyers to be extremely conservative in their work. As one lawyer stated, Article 306 of the Criminal Law and Article 38 of the CPL are like the sword of Damocles hanging over the heads of defense attorneys and other defenders, and nobody knows when it will fall.<sup>220</sup>

Lawyers have occasionally been prosecuted under the pretext of other criminal charges, such as corruption or libel. In a recently-tried case in Harbin City, Heilongjiang Province, Sun Shaobo, the head of a state-run law firm, was accused of the crime of graft because he deposited legal service fees in his personal bank account. Although he defended himself on the grounds that he was not state personnel as defined under Article 93 of the Criminal Law, and therefore could not commit the crime of graft, the prosecutor insisted that he was on the state payroll and should be considered a state worker. Reports said that Sun had previously offended prosecutors while defending criminal cases, and there was suspicion that his trial was a form of revenge by prosecutors.<sup>221</sup> In any event, lawyers have rarely been charged with graft since the Lawyers Law

<sup>215</sup> See Wang, "Thoughts on the Refusal....," p. 26-27, see note 112.

<sup>216</sup> Interview with lawyers in Shanghai.

<sup>217</sup> See Chen Qiulan, "An Innocent Lawyer: Memorandum on the Crime of 'Harboring' Committed by Ren Qingliang, Lawyer from Liaoning Province" (*lüshi wuzui liaoning sheng lüshi ren qingliang baobi zui an beiwanglu*), *Chinese Lawyer (zhongguo lüshi)*, No. 12, 1997, p. 17-18.

<sup>218</sup> Tian Xiuwen, "The First Working Day after the New CPL Entered into Effect: An Incident of Detaining Lawyers Occurred in Xinyang City" (*xin xingsufa shixing de diyi ge gongzuo ri fasheng zai xinyang shi de juliu lüshi shijian*), *Legal System World (Fazhi Shijie)*, No 5, 1997, p. 6. The lawyers were released after the intervention of members of the local people's congress.

<sup>219</sup> In all the cases mentioned above, the lawyers, including Liu Jian and Ren Qingliang were arrested immediately after the court recessed.

<sup>220</sup> Interview with lawyers in Shanghai.

<sup>221</sup> For details see "Account of the Arrest of Sun Shaobo, a Well-known Lawyer" (*Zhuming lüshi Sun Shaobo beibu qianhou*), *Western China Urban Daily (Huaxi dushi bao)*, January 28, 1999, at 16. See also "What Befell a Harbin Lawyer" (*Bingcheng lüshi shi zenme zai de*) *Procuratorate Daily (Jiancha Ribao)*, April 7, 1999, p. 4. Also available at: [http://www.jcrb.com.cn/jbhg/1999/html/1999/04/07/E19990407\\_01.htm](http://www.jcrb.com.cn/jbhg/1999/html/1999/04/07/E19990407_01.htm). Sun was found guilty of graft and sentenced to 11 years of fixed-term imprisonment by the court of first instance on February 16, 2000, but the judgment was reversed by the court of second instance and Sun was released on

redefined their role as “professionals providing legal service for society”<sup>222</sup> and the new Criminal Law clarified the concept of “state personnel” in 1997.<sup>223</sup> It would not be surprising if Sun’s prosecution was motivated by revenge since the crime of graft is one of the few in which prosecutors have independent power to investigate (*zizheng anjian*).<sup>224</sup>

Another highly-publicized case occurred in Lianhua County, Jiangxi Province. He Xin, a well-regarded public defender with the Center for Indigent People of the Jiangxi Province Academy of Social Science, was sentenced to one year’s imprisonment for the crime of libel.<sup>225</sup> He Xin was accused by Li Chunting, the former president of the Lianhua County People’s Court, on the grounds that he circulated flyers accusing Li of illegal acts which the latter had firmly denied. There was much skepticism about the impartiality of the trial. First, He had a long history of antagonizing the court by constantly appealing cases on his clients’ behalf.<sup>226</sup> Second, he had been critical of the court president, including accusing him of corruption. For this reason, He was deprived of the right to represent clients in this particular court for four years, despite the fact that there is no legal basis for a court to bar a particular lawyer from the right of representation. Finally, the trial involved many violations of legal procedure. For example, the court president, as a plaintiff in a private criminal lawsuit (*xingshi zisu anjian*), obtained the material accusing him of corruption, which according to the relevant provisions should be official secrets.<sup>227</sup>

The cases against lawyers mentioned above demonstrate why lawyers are reluctant to be involved in criminal defense work, as well as their unwillingness to confront the authorities. This clearly damages the interests of defendants, and thus calls into question the promise of the reformed CPL to provide more human rights protections.

#### *The Reactions of Lawyers*

Legal scholars generally insist that it is necessary for lawyers to protect themselves in criminal litigation. Some suggest that at least two lawyers should be present during the process of deposing witnesses, which may prevent the authorities from incriminating lawyers later if a witness changes his or her story.<sup>228</sup> To avoid “inducing” defendants or suspects to change their statements, a lawyer suggests:

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June 14, 2000, more than 600 days after he was first detained on October 20, 1998. Another report on the case is “Lawyer Sun Shaobo Found Not Guilty” (*Lüshi Sun Shaobo wuzui*), *Legal Daily (Fazhi ribao)*, June 14, 2000, at 3.

<sup>222</sup> Article 2 of the Lawyers Law.

<sup>223</sup> Article 93 of the revised Criminal Law stipulates: “The state personnel in this law refers to those assigned official duties in the state organs. Those working in state-owned companies, enterprises, non-commercial units, as well as people’s organizations [*renmin tuanti*] and assigned official duties, those assigned specifically for official duties to state-owned companies, enterprises, non-commercial units, as well as people’s groups, and those assigned by other legal provisions official duties, should be considered state personnel.” The critical term here is “assigned official duties.” Sun was not assigned any official duty while working as a lawyer.

<sup>224</sup> CPL, Article 18.

<sup>225</sup> “A Case in Which A Judge Sued A Lawyer Arouses Suspicions” (*yidou chongchong de faguan gao lüshi an*), *Southern Weekend (Nanfang zhoumo)*, January 22, 1999, p. 5.

<sup>226</sup> Li complained that He always appealed, whatever the judgment was.

<sup>227</sup> See note 225

<sup>228</sup> See Zhao Ziyun, “Studies on Several Issues Regarding Lawyers’ Early Involvement in the Criminal Process” (*xingshi anjian zhong lüshi tiqian jieru ruogan wenti de yanjiu*), *Chinese Lawyer (zhongguo lüshi)*, No. 12, 1997, p. 13. Also see, Hou, “How Lawyers Can Protect Themselves,” p. 40, see note 206.

*There must be two lawyers present [while meeting with suspects]. The record of the meeting must include the details of all the questions posed by the lawyer and the legal advice they provide, and should be signed by the suspect. In this way, lawyers will be able to protect themselves if the suspects later reverse their statements.*<sup>229</sup>

But even this careful approach may not avoid problems since lawyers often have not had access to the prosecution's evidence during the crime investigation phase. Thus, when they meet clients, lawyers often do not know what suspects have already told prosecutors, which makes it impossible to identify any changes in testimony. Lawyers have to be extremely cautious when they have conversations with their clients. Some lawyers we interviewed insisted that they have to protect themselves not only from prosecutors but also from their clients.<sup>230</sup>

To avoid any possible legal trap, some propose that lawyers may obtain testimony by letter (*fa han diaocha quzheng*),<sup>231</sup> or have relevant people present whenever they depose witnesses.<sup>232</sup> One lawyer proudly declared that he had sent out around 30 letters and finally acquired a witness' written testimony.<sup>233</sup> Given this background, it is no wonder that the ACLA's Model Practice states that lawyers may want to invite relevant people to be present when they collect evidence from witnesses (*quzheng*).<sup>234</sup>

The hostile environment and the frequent reports about lawyers being caught up in serious legal troubles have greatly discouraged lawyers from participating in criminal defense and have caused a substantial decline in the number of criminal cases in which defendants are represented by lawyers.<sup>235</sup>

To protect the rights of lawyers and ensure that defendants can be adequately represented in criminal trials, the ACLA passed the Rules for the Committee to Safeguard Lawyers' Legal Rights While Practicing Law (hereinafter "Safeguard Rules")<sup>236</sup> and formally established a sub-committee on safeguarding lawyers' rights in March 1998.<sup>237</sup> According to the Safeguard Rules, the ACLA and its local subordinates are to establish sub-committees to deal with cases in which lawyers' legal rights and interests are violated. Although the sub-committees were expected to take a strong position on protecting lawyers, it appears that they only publicize cases and attempt to influence the local government in order to rescue lawyers in trouble.<sup>238</sup>

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<sup>229</sup> *Ibid.*, Zhao, p. 13.

<sup>230</sup> Interviews with lawyers in Shanghai and Beijing.

<sup>231</sup> See, "Lawyers Symposium: Difficulties, Focuses and Hot Issues in Criminal Defense" (*lüshi zuotan xingshi bianhu nandian jiaodian ji redian*), *Lawyer And Legality (Lüshi yu fazhi)*, No. 10, 1997, p. 38.

<sup>232</sup> See Deng Ruixiang, "Lawyers Should Raise Their Awareness of Self-protection" (*lüshi ying qianghua zìwò bāohù yìshì*), *Chinese Lawyer (zhongguo lüshi)*, No. 5, 1997, p. 37.

<sup>233</sup> Conference report "Criminal Defense...", p. 38, see note 126.

<sup>234</sup> Article 56.

<sup>235</sup> See Tian, "Why are Lawyers not Willing...?" see note 200.

<sup>236</sup> Passed by the ACLA Standing Committee at its Eighth Meeting of the Third Congress on November 22, 1997.

<sup>237</sup> See special report, "We Are Walking on the Broad Road—Interview with Ren Jishen, President of the Third Congress of the All China Lawyers Association," *People's Daily (Renmin ribao)*, April 21, 1999, p. 11.

<sup>238</sup> Article 3 of the Safeguard Rules stipulates the mandate of the committee as "coordinating..., aiding... proposing...to solve the issue with other governmental departments."

## IV. Pretrial Detention and Investigation of Crimes

Pretrial detention was reformed under the 1996 CPL. Although the time limits for various forms of detention were actually increased in the revised CPL,<sup>239</sup> this was seen as a trade off for the elimination of Custody and Investigation (*shourong shencha*, C&I)<sup>240</sup> a form of administrative detention which had long been used to avoid legal procedures. However, it is interesting to note that no formal document explicitly stated that C&I was to be abolished. Only an interpretation on revising the CPL by Gu Anrang, a top figure in the NPC Standing Committee's drafting work, mentions the elimination of this measure. Also, an internal document issued by the MPS in 1996 requires public security organs at all levels to cease using C&I by the end of October of that year.<sup>241</sup>

Pretrial detention is more clearly defined and limited in some respects under the revised CPL. For instance, legal counsel may initiate a process to review detention that exceeds the time limits<sup>242</sup> and suspects may apply to change custodial measures to non-custodial measures while awaiting trial.<sup>243</sup> The CPL ended the practice that allowed an imprisoned person to be detained under the device of endless supplementary investigation.<sup>244</sup> It has been reported that the central authorities have strengthened supervision of detention exceeding time limits, and have ordered administrative discipline for local leaders who have allowed detention beyond stipulated time limits.<sup>245</sup>

However, in the early stages of the CPL's implementation, crime investigation authorities, especially public security departments, complained that restrictions on coercive measures prescribed in the CPL have impeded crime investigation. As one article put it:

*In some areas, quite a few people complained that these measures [restrictions on the power of officials] "were not suitable for our national circumstances" (bu fuhe guoqing), were "excessively ahead of the times" (guoyu chaoqian), or "were in an urgent need of being revised again." In some other localities, those aware that the law must be carried out are much more pragmatic, and they are studying hard and are eager to find "loopholes" and "dead corners" of the CPL, trying to formulate "counter-strategies."<sup>246</sup>*

<sup>239</sup> See below and Lawyers Committee for Human Rights, *Opening to Reform? An Analysis of China's Revised Criminal Procedure Law*, New York, October 1996.

<sup>240</sup> For details on C&I, see Human Rights in China, *Detained at Official Pleasure*, New York, 1993; Lawyers Committee for Human Rights, *Criminal Justice with Chinese Characteristics*, New York, 1993; for official documents on C&I in English, see *Chinese Law and Government*, September-October issue, 1994, M.E. Sharpe, New York.

<sup>241</sup> Section 3 of the MPS Notice Regarding Issues on Implementing the Criminal Procedure Law (*gonganbu guanyu guanche zhixing xingshi susongfa youguan wenti de tongzhi*), issued on June 13, 1996.

<sup>242</sup> Article 75 states that suspects, defendants and their legal representatives, including family members, legal counsel and defenders, have the right to request the release of suspects or defendants, upon finding that their detention has exceeded stipulated time limits.

<sup>243</sup> Article 52 states clearly that suspects and their families may apply for "taking a guarantee and awaiting trial" while they are detained. Article 96 stipulates that lawyers retained by suspects may apply for similar changes on their behalf.

<sup>244</sup> According to the old CPL, an individual could be legally locked up forever if prosecutors initiated a supplementary investigation process that triggered a recount of the time limit for detention. See 1979 CPL, Article 99 and Article 108.

<sup>245</sup> See, "Four Prohibitions" (*sitiao jinling*) issued by the Central Political-Legal Committee in 1998.

<sup>246</sup> Guo, "On Reform..." p. 10, see note 135.

This mentality, in part, explains the regularity with which crime investigation authorities deviate from the legal provisions on coercive measures, such as pretrial detention and non-custodial measures.

Despite the improvements made in the new CPL, the pretrial detention prescribed in the CPL far from satisfies international standards articulated in the ICCPR and other international documents.<sup>247</sup> The overwhelming majority of people awaiting trial in China are in custody, and non-custodial measures are used only as an exception for people awaiting trial. The duration of pretrial detention, which may extend to more than eight months, is unacceptably long. With special permission, detention may be extended indefinitely.<sup>248</sup> Furthermore, warrantless detention (which does not require approval from prosecutors) can legally last up to 37 days,<sup>249</sup> which is much longer than the universally-accepted standard.<sup>250</sup> China does not provide legal recourse for imprisoned persons to challenge decisions on pretrial detention before a court. Although many scholars have called for the establishment of a process similar to the system of *habeas corpus* in common law countries,<sup>251</sup> the Chinese authorities have so far demonstrated no desire to legislate on this issue.

Despite the long periods of detention allowed under the law, detention of people in excess of time limits (*chaoqi jiya*) in outright violation of the law remains endemic. Officials in charge of crime investigation have yet to suffer any legal consequences for holding people beyond the legally-mandated time limits. Neither are there any legal remedies for those subjected to illegal detention, such as compensation or the inadmissibility at trial of evidence obtained through lengthy illegal detention. Detention exceeding stipulated time limits merits serious attention. Many provinces have revealed that a large number of people are being detained in excess of time limits. Nationwide statistics are also worrisome. The table below partially reflects the situation during 1999.

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<sup>247</sup> See Section VII on International Standards.

<sup>248</sup> CPL, Article 125.

<sup>249</sup> CPL, Article 69.

<sup>250</sup> See Section VII on International Standards.

<sup>251</sup> See Chen, *United Nations Standards...*, p. 77, see note 53 for reference. The authors suggest that “a *habeas corpus* system with Chinese characteristics” be established.

**Table 4: Statistics for 1999 from the Provincial People's Procuratorates on People Detained in Excess of the Time Limits \***

Provinces	Numbers found	Numbers Corrected
Chongqing	3,444	3,203
Fujian	--	2,826
Gansu	--	922
Guangdong	--	10,559
Hainan	--	1,253
Henan		9,952
Hubei	--	3,602
Hunan	3,793	4,025
Jilin	1,533	--
Liaoning	2,352	--
Qinghai	34	--
Zhejiang	746	734
National		74,051**

\* All statistics come from the annual reports of the provincial people's procuratorates to the annual meetings of the provincial people's congresses held in 2000.

\*\* This number comes from the SPP report to the NPC on March 10, 2000.

It is important to note that these numbers only reflect cases publicly reported by some provincial procuratorates. Since there are virtually no legal remedies for those detained in excess of the time limits, thousands of incidences may have gone unreported and unnoticed.<sup>252</sup> Moreover, indefinite detention remains legally possible in the CPL if certain special procedures are triggered.<sup>253</sup> Therefore, the already loosely-defined time limits often become meaningless in curbing arbitrary detention in the criminal process.

### A. Overview of Pretrial Detention

According to the CPL, there are altogether five types of pretrial detention: coercive summons, criminal detention, arrest, obtaining a guarantee and awaiting trial and supervised residence. These may be further divided into two categories: custodial detention and non-custodial detention. According to international human rights instruments, detention refers to all forms of deprivation of personal liberty.<sup>254</sup> Therefore, the non-custodial coercive measures defined in the CPL also fall under the category of "detention" and should be viewed accordingly.<sup>255</sup>

<sup>252</sup> Many lawyers and judges interviewed suggested that the national number was actually much higher than these official figures.

<sup>253</sup> Article 128 of the CPL allows indefinite detention of those suspects whose identity is unclear to the authorities.

<sup>254</sup> See section on "Use of Terms" in the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (below "Principles on Detention"), U.N. Doc A/43/49, passed by the UN General Assembly on December 9, 1988.

<sup>255</sup> *Ibid*, "detained person" means any person deprived of personal liberty except as a result of conviction for an offence.

*Coercive Summons (juchuan)*

Coercive summons is a measure by which authorities may forcibly take in a suspect for questioning for a period as long as 12 hours.<sup>256</sup> All three law implementation agencies (public security departments, prosecutors and courts), may apply this measure.<sup>257</sup> According to interpretations issued by these agencies, a person held under this measure must be present at a designated (though undefined) place. Although the CPL itself does not specify what type of place this must be, it need not necessarily be a police station.<sup>258</sup> The CPL does not specifically limit the number of times coercive summons may be used to prolong a person's detention. Apparently, the CPL does not consider coercive summons as full-scale detention but rather, as a coercive measure, even though those under official questioning may be confined to a specific place for as long as 12 hours. According to some reports, some public security department personnel repeatedly reapplied the coercive summons measure to the same person without discontinuing questioning.<sup>259</sup>

A similar administrative form of detention, called "taking in for questioning" (*liuzhi panwen*) and defined in the PRC People's Police Law (hereinafter "Police Law"), stipulates that police have the power to detain people for questioning for as long as 24 hours, with a possible extension of an extra 24 hours.<sup>260</sup> There is no apparent legal differentiation between "*liuzhi panwen*" and "*juchuan*" in terms of crime investigation. Therefore, these two methods can be conveniently manipulated or abused by officials. Some reports suggest that officials have employed these two measures in turn as a means to hold suspects in custody for a longer time period.<sup>261</sup> Some have strongly opposed such administrative measures and have advocated limits on time periods people can be held in custody using these measures. One article suggests that the time limit for the Police Law should not be longer than the coercive summons (i.e., not exceeding 12 hours).<sup>262</sup> Others have proposed that there should be at least a 24 hour break between two coercive summonses,<sup>263</sup> since some police officers use this measure consecutively despite the prohibition against unlawful

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<sup>256</sup> Article 50 of the CPL.

<sup>257</sup> Articles 63-65 of the SPC Interpretations, articles 32-36 of the SPP Rules and articles 60-62 of the MPS Measures stipulate the detailed practices in applying this measure.

<sup>258</sup> See Article 35 of the SPP Rules and Article 60 of the MPS Measures.

<sup>259</sup> Chen Guangzhong et al, *Study on the Issues of Implementation of the Criminal Procedure Law*, (*xingshi susongfa shishi wenti yanjiu*), China Legal System Press, Beijing, May 2000, p. 83-84.

<sup>260</sup> Article 9 of the Police Law provides: "In order to maintain public security order, people's police may, upon showing an official identification, question and examine those who are suspected of breaking laws or committing crimes at the scene. Police may take them in for further questioning upon finding the following situations:

1. they are accused of crimes;
2. they are suspected of committing crimes at the scene;
3. they are suspected of committing crimes and their identification is unclear;
4. they are carrying items that are suspected to be stolen.

The duration of such questioning shall last no more than 24 hours after the suspects are taken into custody, while under certain special circumstances and upon being approved by a public security department of above county level, lasting no more than 48 hours..."

<sup>261</sup> Some commentators warned that the maximum detention using a combination of *liuzhi panwen* and *juchuan* could be 60 hours. See Wang Ting, "How Does Law Enforcement Work Fit in the Revised Criminal Procedure Law?" (*gongan zhifa gongzuo ruhe shiyong xiugai hou de xingshi susongfa*) *Fujian Public Security (fujian gongan)*, No. 5, 1997, p. 14.

<sup>262</sup> See Li Yonghong: "Perfecting Legislation on Administrative Coercive Measures Limiting Citizens' Personal Liberty" (*xianzhi gongmin renshen ziyou de xingzheng qiangzhi cuoshi ji lifa wanshan*), *Jurisprudence (faxue)*, No. 9, 1997, p. 35.

<sup>263</sup> Chen, *Study on the Issues of Implementation of the CPL*, p. 84, see note 259.

detention through the use of consecutive coercive summonses stipulated in the CPL, albeit somewhat ambiguously. Currently, the CPL does not limit the number of times coercive summons may be used nor does it specify how long authorities must wait between the use of consecutive coercive summonses.<sup>264</sup>

*Criminal Detention (juliu)*

According to the CPL, crime investigation authorities may detain people without a warrant under certain emergency circumstances.<sup>265</sup> The duration of criminal detention is usually limited to ten days, and may be extended to 14 days.<sup>266</sup> The time limit can be further prolonged for up to 37 days if those detained are suspected of committing crimes repeatedly (*duoci zuoan*), in conjunction with others (*jiehuo zuoan*), or roaming around committing crimes (*liucuan zuoan*).<sup>267</sup> This lengthy duration of warrantless arrest was intended to incorporate the function of C&I, a form of administrative detention widely used to hold criminal suspects in custody prior to formal arrest before the CPL was revised, into the criminal process.<sup>268</sup>

However, public security departments have reportedly applied the maximum 37 day period to all pre-arrest detention indiscriminately.<sup>269</sup> Although the duration of warrantless arrest is unjustifiably long by international standards, it seems that both academics and law implementation officers largely agree that it is appropriate for China.<sup>270</sup>

Criminal detention has reportedly been misused in several ways. First, officials have deliberately detained suspects without satisfying requirements prescribed by the CPL. The CPL stipulates that only those falling into one of seven categories may be detained without a warrant, but this is frequently disregarded.<sup>271</sup> Second, the 37-day time limit, aimed at the three types of suspects

<sup>264</sup> Article 92.

<sup>265</sup> Article 61 of the CPL lists the seven situations under which the public security departments may detain people without obtaining advance approval from prosecutors. See note 272 below.

<sup>266</sup> Article 69 of the CPL.

<sup>267</sup> *Ibid.*, second paragraph.

<sup>268</sup> In fact, except for a brief explanation in the NPC's statement on revision of the CPL, there is no official pronouncement formally abolishing C&I. See Gu Angran, *Explanations on the Draft of the "Revised Criminal Procedure Law of the People's Republic of China"* (*guanyu zhonghua renmin gongheguo xingshi susongfa xiuzhengan caoan de shuoming*), presented at the Fourth Meeting of the Eighth NPC, on March 12, 1996. Gu was the chief of the Legal Working Committee under the NPC Standing Committee and responsible for drafting the law.

<sup>269</sup> See, "Strictly Abiding by the Law and Avoiding Blind Spots" (*yange zhifa zouchu wuqu*), *People's Public Security (renmin gongan)*, No.19, 1997, p. 13. According to the scholars we interviewed in Shanghai and Beijing, public security departments largely considered the time limits for all pre-arrest detention to extend to one month and seven days.

<sup>270</sup> The lawyers and scholars we interviewed seemed not to object to this lengthy period of detention. However, some scholars expressed concern about potential abuse of such detention. Some even pointed out that it was not in line with international standards. See Fang, *Special Commentary*, p. 295, see note 127 for reference.

<sup>271</sup> Wang Yue et al, "Situations When Application of Criminal Detention Deviates from the Law Should Not Be Overlooked" (*shiyong xingshi juliu zhong de piancha bu rong hushi*), *People's Procuratorate (Renmin jiancha)*, No. 3, 1999, p. 55-56. These seven categories are outlined in Article 61 which provides: Public Security organs may first detain an active criminal or a major suspect under any of the following circumstances: 1) If he is preparing to commit a crime, is committing a crime, or is discovered immediately after committing a crime; 2) If he is identified as having committed a crime by the victim or by an eyewitness on the scene; 3) If he is discovered to have criminal evidence near his person or at his residence; 4) If after committing the crime, he attempts to commit suicide or to escape, or if he is a fugitive; 5) If he may possibly destroy or fabricate evidence, or collude with others to make false



listed above, is routinely applied to all suspects, especially to migrants from rural areas.<sup>272</sup> Third, criminal detention has been used for consecutive terms as a means to detain people beyond the stipulated time limits. In one example, a suspect surnamed Yu was incarcerated under the criminal detention measure three times within four months. Each time the duration of criminal detention was about to expire, for three days the suspect's status was changed to "supervised residence for a short period of time," and after this period ended, he would again be criminally detained.<sup>273</sup>

#### *Arrest (dai bu)*

Arrest is considered the most serious coercive measure at the pretrial stage. Article 60 of the CPL allows authorities to formally arrest a suspect if "there is evidence suggesting her or his commission of a crime and such crime merits a sentence of fixed-term imprisonment," and that without detention she or he will pose a threat to society. Compared to the old provisions, the CPL relaxes the requirements for arrest, making it much easier for officials to arrest a suspect. This caused a huge increase in arrests after the CPL came into effect. Under the old CPL, investigation authorities repeatedly complained that the legal requirements for arrest were so rigid that they had to seek alternatives to arrest in the administrative system, principally C&I.<sup>274</sup>

To arrest a suspect, crime investigation authorities must seek approval from prosecutors. Prosecutors and courts may, on their own initiative, decide to arrest suspects when cases are handled directly by them.<sup>275</sup> Nevertheless, all arrests have to be executed by the public security departments no matter which authority issues the arrest order.<sup>276</sup>

#### *Non-custodial Detention*

In addition to the types of custodial detention discussed above, the CPL stipulates two types of non-custodial detention. One is called "obtaining a guarantee and awaiting trial" (*qubao houshen*) and the other is "supervised residence" (*jianshi juzhu*).

"Obtaining a guarantee and awaiting trial" has been incorrectly characterized as analogous to the bail system found in common law countries. In fact, it is different from the bail system at least in two respects. First, it is not designed to protect a defendant's right to be free from arbitrary

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confessions; 6) If he does not reveal his true name and address or if his identity is unclear; 7) If there is strong suspicion that he is a person who goes from place to place committing crimes; who repeatedly committed crimes; or who has collaborated with others to commit crimes.

<sup>272</sup> Wang Yue et al, "Bias in the Application of Criminal Detention Should Not Be Overlooked" (*Shiyong xingshi juliu zhong de piancha burong hushi*), *People's Procuratorate (Renmin jiancha)*, No. 3, 1999, at 56. Also available at: [http://www.jcrb.com.cn/html/1999/03/rmjc/rj199903\\_56.htm](http://www.jcrb.com.cn/html/1999/03/rmjc/rj199903_56.htm). In this article, the author pointed out that the public security departments generally treat migrants as one of three main types of criminal suspects.

<sup>273</sup> Wang, "Situations....," p. 56, see note 271.

<sup>274</sup> In the old CPL, the legal requirement for arrest included that there was evidence clearly proving that the major criminal acts had been committed by the suspect (Article 40). As one scholar put it, "(In the past) it was virtually impossible to clarify the facts of major crimes within seven days after the suspects were detained; therefore, public security departments were forced to turn to C&I, an administrative coercive measure, which caused many problems." See Symposium "Pen Talk on Implementation of the Criminal Procedure Law" (*xingshi susongfa guanche shishi bitan*), *Public Security University Journal (gongan daxue xuebao)*, No. 3, 1997, p. 18.

<sup>275</sup> See Article 59 of the CPL, prosecutors and courts may decide to make an arrest while investigating crimes.

<sup>276</sup> *Ibid.*

detention.<sup>277</sup> Rather, it is an alternative to those coercive measures that fully strip a defendant of liberty. Second, there is no opportunity for judicial review in this measure. In other words, whether or not a request for obtaining a guarantee will be granted is entirely subject to the discretion of the law implementation agency concerned.<sup>278</sup> Authorities are not legally obligated to consider bail for a suspect or defendant. By contrast, international human rights norms mandate consideration by an independent court.<sup>279</sup> The wording of the CPL on this measure sheds some light on the nature of this non-custodial detention. According to Article 51 of the CPL:

*People's Courts, People's Procuratorates, as well as public security departments may apply the measures of obtaining a guarantee and awaiting trial or supervised residence under the following situations... (emphasis added)*<sup>280</sup>

It is clear that the CPL establishes no mandatory bail provision. Application of such a measure is an official *option* rather than a defendant's *right*. This also explains why there are only a small number of cases in which either "obtaining a guarantee and awaiting trial" or "supervised residence" is granted. Indeed, such non-custodial measures are mostly employed in cases handled directly by prosecutors, such as those involving corruption and the dereliction of duty.<sup>281</sup>

In addition, the CPL mandates that all three authorities, namely the police, prosecutors and the courts, may apply the measure of "obtaining a guarantee and awaiting trial" to the same suspect or defendant. All three authorities can apply the measure for one year under their own rules; therefore, a suspect or defendant may be put under the measure for three years altogether. Scholars call upon coordination among these three organs to guarantee that the entire time limit for the measure does not exceed one year. Nevertheless, there has been no indication that authorities have abided by the one-year time limit.<sup>282</sup>

Similar ambiguities are seen in the application of "supervised residence" (*jianshi juzhu*). The CPL sets forth the same terms for both "supervised residence" and "obtaining a guarantee and awaiting trial." The only apparent difference between the two measures involves the terms of treatment. Under "supervised residence," a suspect is subjected to much stricter official control. He is not allowed to leave his residence without permission, and is required to obtain official approval for meeting with people other than those who live with him. Initially, even lawyers were required to obtain approval from the crime investigation authority in order to meet with their clients who were subject to this measure. With the promulgation of the Joint Provisions in 1998, lawyers were finally allowed to visit freely clients held under supervised residence.<sup>283</sup>

<sup>277</sup> As in other countries like the United States, this right is guaranteed in China's Constitution in Article 37 which states, "Freedom of the person of citizens of the People's Republic of China is inviolable."

<sup>278</sup> The CPL stipulates that all three law implementation organs have independent power to decide if a "taking a guarantee and awaiting trial" is appropriate when the case is being handled by the organ in question.

<sup>279</sup> Article 9(3) of the ICCPR stipulates: "It should not be a general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial...". It is interesting that the SPC Interpretations does generally require that the court approve defendants' applications for "obtaining a guarantee and awaiting trial," when all conditions have been "satisfied." See, Article 68 of the SPC Interpretations.

<sup>280</sup> Article 51.

<sup>281</sup> Interviews with lawyers and judges in Beijing, Shanghai, Wuhan and Xi'an, July 1999.

<sup>282</sup> Chen Guangzhong, et al, *Study on the Issues of Implementation of the Criminal Procedure Law*, p. 88-89.

<sup>283</sup> Article 24 of the Six Department Rules states: "Criminal suspects and defendants under supervised residence can meet with their counsel without needing to obtain approval."

Prior to the 1996 CPL revisions, some scholars criticized the law for being too vague on the nature and scope of supervised residence, and argued that it should be incorporated into arrest or other types of detention so as to avoid it being used as a disguised form of solitary confinement.<sup>284</sup> However, instead of removing it, the CPL put new restrictions on its application by specifying the place of detention as the person's "residence" and limiting the time period to a maximum of six months. Under the old CPL, one might be incarcerated in a designated place for an indefinite time.<sup>285</sup> However, in reality, as some commentators have pointed out, the situation of those under "supervised residence" has not changed much as a result of the revisions. It is common practice that authorities continue to hold suspects in custody in *de facto* solitary confinement at a "designated place" other than their residences, in violation of the law.<sup>286</sup>

## B. Arbitrariness of Pretrial Detention Under the CPL

The provisions of the old CPL on pretrial detention were among its most frequently criticized aspects, since they allowed officials enormous discretion to detain suspects without any kind of judicial involvement. The fact that the police could hold people virtually indefinitely under a form of administrative detention called Custody and Investigation (C&I) increased the arbitrariness of this system. Advocates of making pretrial detention less arbitrary had long argued that C&I should be eliminated.<sup>287</sup> In the end, the revision of the CPL did involve the elimination of C&I, as well as some extension of limitations on the use of other types of pretrial detention. Although the CPL revisions did not explicitly mention C&I (as it had not been formally incorporated into the 1979 version),<sup>288</sup> to comply with the spirit of 1996 revisions, in the middle of that year the MPS issued an internal document formally abolishing C&I, asking all public security departments to cease their use of this measure before the revised CPL took effect on January 1, 1997.<sup>289</sup>

These revisions should have been a message to crime investigation authorities that they should exercise restraint in their use of coercive measures. However, information about the response of law enforcement agencies to these changes raised doubts that the arbitrariness of pretrial detention would be brought under control with the abolition of C&I. In fact, many local officials immediately turned to alternatives to replace this measure.

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<sup>284</sup> See Chen Guangzhong and Yan Duan, *Proposed Draft of Revisions to the Criminal Procedure Law of the People's Republic of China and Commentary on Them* (*zhonghua renmin gongheguo xingshi susongfa xiugai jianyi gao yu lunzheng*), China Fangzheng Press, 1995, p. 200.

<sup>285</sup> It was a common practice before 1996 that many were held in solitary confinement under supervised residence since the old CPL did not specify the terms of custody. For example, Wei Jingsheng, a veteran dissident, was detained under this measure for 20 months before he was sentenced to prison in 1997.

<sup>286</sup> Article 57 requires that the supervised residence be carried out at the residence of suspects and only in a designated place when suspects have no fixed residence.

<sup>287</sup> See Chen Guangzhong and Yan Duan, *Interpretation and Application of the Criminal Procedure Law of the People's Republic of China* (*zhonghua renmin gongheguo xingshi susongfa shiyi yu yingyong*), Jining People's Press, 1996, p. 77-78.

<sup>288</sup> For an examination of this complex situation, see Donald C. Clarke, "One step back permits two steps forward: legal authority expands through administrative fiat in the recent law reforms," *China Rights Forum*, Fall 1996, pp. 8-11.

<sup>289</sup> Section 3 of the Notice of the Ministry of Public Security Regarding Issues of Implementing the Criminal Procedure Law (*gonganbu guanyu guanche zhixing xingshi susongfa youguan wenti de tongzhi*), issued on June 13, 1996.

*The Official Mentality and the Arbitrariness of Pretrial Detention*

The elimination of C&I initially put more pressure on authorities. In some localities, officials have repeatedly complained that the new time limits have taken a toll on crime investigation.<sup>290</sup> Although the revised CPL imposes new limitations on the power of crime investigation authorities, the fundamentals of the criminal process, especially the way that investigation is conducted, remain largely unchanged. Many officials still believe that lengthy detentions will lead to “break throughs” in cases, uncovering hitherto unknown crimes. As one commentator put it:

*There is no doubt that many still stick to the old methods in conducting investigations... it is imperative under the new circumstances to reconsider some investigation strategies, such as “investigating crimes from crimes” (yi an cha an) and “squeezing out the remains of crimes” (ji qing yu zui).<sup>291</sup>*

The first of these methods means that officials expand their mandate to investigate the case in question to cover all other possible crimes the person under investigation has committed. The presumption is that detainees will have either committed, or know of, other crimes aside from the ones under investigation. Widely used by the authorities, the second method means that officials continue to investigate crimes committed by suspects other than the crimes admitted by suspects or known to officials. Again, officials obviously assume that the suspects under investigation have not yet revealed all the details of the crimes in question, including some unknown to officials. Under both investigation strategies, officials rely on lengthy detention, sometimes involving torture, to extract confessions from suspects. Clearly C&I was the perfect method for authorities in conducting such investigations since it was outside the formal criminal justice process and essentially free from any mandatory time limits.<sup>292</sup>

*Problematic Rules on Time Limits*

The new CPL contains loopholes that allow officials, who have generally remained hostile to the newly enacted limitations on their powers, to ignore the time limits on detention under certain circumstances. Pretrial detention is generally limited to two months after arrest. Article 124 of the CPL, however, allows authorities to extend post-arrest pretrial detention by an additional month with permission from the procuratorate of an immediately higher level. Furthermore, Article 126 lists four situations under which such detention can be prolonged for an additional two months with approval from provincial level procuratorates. Article 126 stipulates:

*If investigation of any of the following types of cases cannot be concluded within the period specified by Article 124 of this law, the period may be extended by two months with the approval of or decision by a provincial, autonomous regional or municipal people’s procuratorate:*

- 1. A major and complicated case in a remote region with very poor transport facilities;*
- 2. A major criminal gang case;*
- 3. A major, complex case in which the suspect’s crimes have been committed at various locations;*

<sup>290</sup> Interviews with lawyers and scholars in Shanghai and Beijing, July 1999.

<sup>291</sup> Guo, “On Reform...,” p. 12, see note 135.

<sup>292</sup> Although the internal documents generally required that detention under C&I not exceed three months, the regulations allowed for flexibility subject to official discretion, which essentially allowed for virtually indefinite detention under this measure. See *Criminal Justice with Chinese Characteristics*, see note 240.

4. *A major and complicated case involving a broad spectrum of crimes for which evidence is difficult to obtain.*

It is important to note that those four situations actually expand the application of the previous provisions, and permit the provincial procuratorates to prolong pretrial detention for as long as they see fit.<sup>293</sup> Moreover, Article 127 permits the authorities to extend detention by two more months if the investigation in question has not been completed after the two-month extension prescribed by Article 126 and the alleged crimes may merit a sentence of more than ten years' imprisonment.

None of these exceptions is subject to any judicial review. The decision to initiate an extension is entirely at the discretion of the procuracy. Detailed rules on implementing the CPL issued by the SPC and the SPP contain no procedure to review the legality of time limit extensions either before or after they have been initiated.<sup>294</sup>

If the procuratorate decides that “for a given reason, the case is unfit for adjudication” for a relatively long period, Article 125 stipulates that the time limit on detention may be extended indefinitely with permission from the NPC Standing Committee upon request from the SPP. This measure is obviously aimed at dealing with sensitive cases, such as high-profile cases involving dissidents or high-ranking officials. Again, there are no stipulated procedures for *ex post* or *ex ante* judicial review.

The CPL allows crime investigation authorities to hold suspects beyond stipulated time limits without higher-level approval in two situations. First, officials may continue to detain a suspect indefinitely as long as his or her real identity is unknown.<sup>295</sup> Second, the period of detention may be recounted if a “new major crime” (*lingyou zhongyao zuixing*) is discovered in the process of investigation.<sup>296</sup> However, no details are given in the CPL on what may constitute “new major crimes.” One interpretation defines them as follows:

*New major crimes refer to those major crimes different in nature from the crimes for which the suspects were arrested, or major crimes with the same nature as those charged at the time of arrest but in which the circumstances are serious enough to affect the specific charges or sentencing.*<sup>297</sup>

This provision obviously invests officials with huge discretion to decide when to extend detention in the absence of approval from a superior authority.

<sup>293</sup> These are contained in a 1984 NPC Standing Committee Decision on time limits for pretrial detention, which allowed the authorities to extend detention for two extra months under two situations. One is “if the cases involved are complicated and serious in the remote areas where transportation is rather inconvenient.” The other is if “the cases involve a major group or organized crimes.” See NPC Standing Committee, Supplementary Decision on the Time Limits for Handling Criminal Investigation (*guanyu xingshi anjian banan qixian de guiding*), issued on July 7, 1984. Article 124 of the CPL adds two more situations under which the time limits can be extended: one is if “it is a major and complicated case involving (suspects) roaming around committing crimes”, and the other is if “it is a major, complex case involving many aspects which presents difficulties in gathering evidence.”

<sup>294</sup> Under the detailed procedures for reviewing prosecution materials in the SPC Interpretations, there is no reference to any procedure for the extension of time limits, while the SPP Rules does not require the prosecutors to present the court with the documents regarding time limit extensions.

<sup>295</sup> CPL, Article 128

<sup>296</sup> *Ibid.*

<sup>297</sup> *Ibid.*

Although the practice is inconsistent with the CPL, officials can “reset the clock” even when the “new major crimes” are the same as the crimes originally charged, but only involve different “circumstances” (*qingjie*).<sup>298</sup> CPL provisions allow for the time limit for investigating complicated crimes to be prolonged if certain procedures are followed, but the clock may not be reset merely to discover new details of a crime.<sup>299</sup> Some lawyers have suggested that this procedural device has been misused, however, this has not yet become a major subject of complaints.<sup>300</sup> Considering that other time limit extensions require superior approval, it would not be surprising if this measure became a favorite device for officials since it can easily be manipulated. Overall, the measures regarding recounting of detention time limits are very ambiguous, and can essentially be applied at official pleasure. This has a serious negative impact on any hope that the CPL revisions might curb arbitrary detention.

As one commentator concluded three years ago, the revisions in the CPL concerning pretrial detention were more a confirmation of the already-existing system than any advance in the protection of the rights of defendants.<sup>301</sup> To be sure, the CPL’s provisions on pretrial detention represented a compromise, reflecting both the public’s demand for rights protection and the official desire for convenience in crime investigation.

### C. Use of Extra-judicial Detention in Crime Investigation Widespread

There is ample evidence that crime investigation authorities prefer to use extra-judicial measures to detain suspects when they are either under time pressure in the course of normal criminal procedures or when they are handling cases involving officials.

As discussed above, the CPL has generally accommodated official demands for more time to handle cases. Yet many officials continue to find it difficult to comply with even these loosely-framed time limits. They often turn to administrative detention for extra time to detain suspects. A number of vaguely defined administrative measures are amenable to such abuse.

First, police may hold a suspect detained on the spot while patrolling for up to 48 hours. This “stop-frisk” detention, or “taking-in for questioning” (*liuzhi panwen*), is authorized by the Police Law (see above). Since the Police Law does not specify that this measure can only be employed in the process of official patrolling, police may use it at any time. Some prosecutors reported that on occasion police deliberately use it together with the other coercive measures prescribed in the CPL, such as the coercive summons, in order to keep crime suspects in official custody as long as possible.<sup>302</sup>

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<sup>298</sup> *Ibid.*

<sup>299</sup> CPL, Articles 124, 125, 126, and 127 provide that under certain circumstances, the detention of a suspect may be extended following a proper procedure, while awaiting trial. For discussion of this issue, see Zhang Lizhao, “Two Issues Concerning Application of Recalculating Detention Periods” (*chongxin jisuan jiya qixian shiyong zhong de liange wenti*), *Hebei Legal Science (Hebei faxue)*, No. 1, 1999, p. 33-34.

<sup>300</sup> Interview with lawyers and scholars in Shanghai, July 1999.

<sup>301</sup> See Wang Mingyuan, “Comments on Revision of our Country’s Criminal Procedure Law” (*woguo xingshi susongfa xiugai shuping*), *Jurists (Faxue jia)*, No.4, 1996, p. 47.

<sup>302</sup> See, Questions & Answers, “Could Coercive Summons and Taking-in for Questioning Be Used in Turn?” (*xingshi juchuan yu liuzhi panwen nengfou hebing shiyong*), *People’s Procuratorate Daily (Jiancha ribao)*, August 12, 1999. Located at: [http://www.jcrb.com.cn/jbhg/1999/html/1999/08/12/C19990812\\_04.htm](http://www.jcrb.com.cn/jbhg/1999/html/1999/08/12/C19990812_04.htm).

Second, Re-education through Labor (RTL) still remains a preferred option for police to detain suspects since it is entirely at the discretion of the public security department. By invoking this measure, the public security departments may punish those suspects whose guilt officials are unable to prove through normal procedures. Informants said that on some occasions officials had used RTL as an alternative to detain suspects who were being held purely for criminal investigation purposes.<sup>303</sup>

Scholars and lawyers have advocated the abolition of RTL or its incorporation into the criminal justice system because it is a form of arbitrary detention under international human rights standards. RTL is also in conflict with Chinese domestic law. As one commentator points out:

*It is a rare situation among modern countries operating under the rule of law to punish those who have not been convicted through normal judicial procedures using a penalty such as RTL, which is labeled an administrative punishment but in fact is a criminal penalty. This is also in serious conflict with the UN criminal justice standards.*<sup>304</sup>

Most agree that RTL, if kept, should at the very least be brought under judicial supervision. Some argue that it is an out-dated method of state control and should be eliminated completely.<sup>305</sup> The Administrative Punishment Law, promulgated in 1996, clearly stipulates that coercive measures restricting individual liberty may only be authorized by laws passed by the NPC or its Standing Committee. The Legislation Law, promulgated by the NPC in March 2000, has a similar clause prohibiting any coercive measures arbitrarily enacted by state organs other than itself and its Standing Committee. RTL is authorized solely by administrative orders passed by the State Council. For this reason, RTL was recently put on the agenda of the NPC Standing Committee for “reform,” but it seems unlikely that the government will eliminate this measure in the near future.<sup>306</sup>

Third, the Party disciplinary committees and the supervision departments of governments at all levels regularly employ a measure known as “solitary confinement for investigation” (*geli shencha*, SCI) in anti-corruption campaigns. Under SCI, cadres may be detained and investigated by a Party body. In fact, SCI has long been a favorite measure for the Party, and was widely used in the lawless era of the Cultural Revolution. Liu Shaoqi, then president of the country, and many of his colleagues, including Deng Xiaoping, were put under SCI.

It was not until 1979 that the PRC, through both separate regulations and its first ever Criminal Procedure Law, began to define the authority of crime investigation and stipulated that the power to restrict individual liberty may only be vested in certain authorities.<sup>307</sup> According to several

<sup>303</sup> Interviews with lawyers in Shanghai and Beijing, April 1999.

<sup>304</sup> See Chen, *United Nations Standards...*, p. 483, see note 53 for reference.

<sup>305</sup> Shen Fujun, “Thoughts on Abolishing the System of RTL” (*guanyu feichu laodong jiaoyang zhidu de sikao*), *Jurisprudence (Faxue)*, 1999, No.7, p. 18-20. See also Song Yafang, “Problems Regarding RTL and Solutions to them” (*laodong jiaoyang cunzai de wenti jiqi duice*), *Zhengzhou University Journal (Zhengzhou daxue xuebao)*, 1998, 11, p. 38-39.

<sup>306</sup> According to the most recent official figures, cited by Chinese officials at an EU-China experts seminar in Paris associated with the human rights dialogue, there are currently 260,000 people held in RTL. See Human Rights in China, *Reeducation Through Labor: A Summary of Regulatory Issues and Concerns*, February 2001.

<sup>307</sup> China promulgated the Regulations on Arrest and Detention and the CPL in 1979.

official interpretations, SCI was formally abolished with the 1979 CPL's enactment. However, during many national and local campaigns launched on the instructions of the Party, such as the "Strike Hard" Anti-Crime Campaign and the anti-corruption campaigns, Party officials have employed extra-judicial coercive measures.

At one point, SCI was officially denounced: a 1991 SPC document clearly stated that SCI was unacceptable.<sup>308</sup> However, when the Party discipline committees formally merged with the supervision departments in 1993 to consolidate their efforts in cracking down on corruption within the Party and the government, SCI was reinstated as legitimate.

SCI is now generally known as "shuang gui" (two designateds),<sup>309</sup> which means that the Party authorities or supervision departments have the power to interrogate corruption suspects at a "designated" place and a "designated" time. The primary authoritative documents on this measure are the 1997 Administrative Supervision Law (hereinafter "ASL") and the 1994 Party document, "CCP Disciplinary Organs' Working Regulations on Case Investigation." The ASL stipulates:

*While investigating activities involving violation of administrative discipline, supervision departments may, considering the specific circumstances, take the following measures:...*

*(3) Summon those suspected of having committed violations of administrative discipline to a designed place at a designated time for explanation of the matters under investigation, but [officials] should not detain them in any form [using this means].<sup>310</sup>*

The 1994 CCP document has a similar provision:

*"Whoever knows the details of cases under investigation has an obligation to provide testimony. The [Party's] investigation group has the following authority to investigate cases...:*

*3. request that the persons concerned give an explanation at a given place and at a given time..."<sup>311</sup>*

One recent official report cited a speech by Wei Jianxing, the Party Politburo member in charge of the work of the Central Discipline Inspection Commission, as follows:

*As Wei Jianxing pointed out, an internal Party document requires that "relevant people give an explanation of the matters in question at a designated place and at a designated time..." The Party discipline committees and the administrative*

<sup>308</sup> SPC Research Department Telephone Response to a Question on Whether the Time Period for Solitary Confinement for Investigation Can Be Offset Against the Term of Sentence (*zuigao renmin fayuan yanjiushi guanyu geli shencha riqi kefou zhedi xingqi wenti de dianhua dafu*), issued on December 17, 1991.

<sup>309</sup> *Shuanggui* is also known as "liangzhi" or "lianggui." The former comes from the ASL, since it uses the term "at a designated place and a designated time" (*zhiding shijian he zhiding didian*). The latter comes from the term used by the CCP Central Discipline Inspection Commission, which refers to "at a given place and at a given time" (*guiding didian he guiding shijian*). See notes following.

<sup>310</sup> ASL Article 20(3), promulgated by the NPC Standing Committee on May 9, 1997.

<sup>311</sup> CCP Central Discipline Inspection Commission, "CCP Disciplinary Organs' Working Regulations on Case Investigation" (*Zhongguo gongchandang jilü jiancha jigou anjian jiancha gongzuo tiaoli*), issued on January 28, 1994, Article 28.



*supervision departments are authorized to execute this important power by both Party documents and state law.*<sup>312</sup>

The ASL vaguely prohibits officials from using this measure as an alternative to formal detention; but there is ample evidence that many senior officials are actually initially held in the custody of the Party discipline committees and government supervision departments under SCI. For instance, Lan Xihai, a deputy mayor of Laixi City, Shandong Province, was detained on January 28, 1998, by the local Party discipline committee for allegedly engaging in corruption and was put in criminal detention on February 1, 1998.<sup>313</sup> More recently, Ma Xiangdong, deputy mayor of Shenyang City, was taken into custody by the Central Discipline Inspection Commission Working Group for gambling in Macao.<sup>314</sup> Interestingly, official media avoided direct mention of the measure when covering the Ma story, and only referred to SCI as “a measure described by the ‘two documents’.”<sup>315</sup>

The primary targets of SCI are reportedly ranking officials. Lawyers and scholars alike have suggested that one advantage of employing such a measure is more effective investigation of corruption.<sup>316</sup> Since suspected officials often have great influence over local politics as well as local law enforcement, investigating any malfeasance on their part through normal criminal procedure risks ruining the case. A corruption case involving a group of senior officials in Zhanjiang City, Guangdong Province, provides a good example. The city Party boss together with more than one hundred local officials allegedly participated in the smuggling of contraband. The CCP Central Discipline Inspection Commission had to send a special task force to investigate the case and detained one hundred and five officials under SCI.<sup>317</sup>

Sometimes, SCI has been applied to police officers. In one case involving a number of policemen, a local police chief named Jiang Hua was detained for twelve days under SCI by the Party discipline committee of Jianou City, Fujian Province.<sup>318</sup>

SCI is clearly inconsistent with current Chinese law, notably the CPL and the Administrative Punishment Law (APL). The CPL clearly stipulates that all detentions related to crime investigation must be decided by the law implementation agencies and executed by the public security departments. The APL also requires that all coercive administrative measures limiting individual freedom must be legislated by laws passed either by the NPC or its Standing

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<sup>312</sup> See “Wei Jianxing Stresses Strengthening Investigation Work And Severely Punishing Corruption at the National Conference on Experience Sharing on Party Discipline and Supervision Work” (*Wei Jianxing zai quanguo jijian jiancha jiguan bangongzuo jingyan jiaoliu hui shang qiangdiao qieshi jiaqiang ban’an gongzuo yanli chengchu fubai fenzi*), *People’s Daily (Renmin ribao)*, October 14, 1999, p. 1.

<sup>313</sup> See “Was Lan Xihai Wrongfully Treated as ‘Corrupt’?” (*Lan Xihai shouhui an shifou yuan’an?*) *Southern Weekend (Nanfang zhoumo)* August 21, 1998, p. 10.

<sup>314</sup> People detained under the same measure include Ma’s senior aides. Ma was accused of engaging in favoritism in exchange for gambling funds. See Xinhua News Agency, “Deputy Mayor of Shenyang City Arrested for Alleged Corruption” (*shenyang shi fu shizhang shexian tanwu bei daibu*), November 26, 1999.

<sup>315</sup> *Ibid.*

<sup>316</sup> Interviews with lawyers in Shanghai and Beijing, July 1999.

<sup>317</sup> According to a Chinese Internet news agency citing a Hong Kong newspaper, *Sing Tao Daily*, a total of 105 officials had been arrested by November 3, 1998. See <http://www.nanhai.gd.cn/news/szxw/corruption.htm>

<sup>318</sup> Liu Jianhua, “Thoughts on an Investigation of a Case in Which Anti-gambling Officials Were Themselves Under Investigation” (*chadu fang bei shencha de diaocha yu sikao*), *People’s Daily (Renmin ribao)*, August 10, 1998, p. 4.

Committee.<sup>319</sup> Apparently aware of SCI's conflict with the detention measures prescribed in the CPL, a member of the Chinese People's Political Consultative Conference (CPPCC), a political consultative body, proposed to legalize SCI formally through national legislation by explicitly according the Party the authority to detain its own cadres.<sup>320</sup> It is not clear whether or not his proposal has been considered or accepted; however, the Party leaders' speeches and current practice appear to favor the continued use of SCI.<sup>321</sup>

The exact number of people held under SCI has not been made publicly available. The number, however, is certainly significant. According to official statistics, there were more than 80,000 people prosecuted for corruption in 1997 alone. Many more people were investigated and possibly victimized by SCI before the investigations of the Party system had been formally completed. The Party discipline committees and the government supervision departments usually only transfer to the law implementation agencies those cases deemed, in their judgment, to be punishable under the Criminal Law. Having gone through the Party investigation system, a significant number of cases have ended short of criminal prosecution. By simply pronouncing the guilty decision already rendered by the Party, the judiciary is reduced to a mere tool of the Party. SCI obviously has two purposes: to keep such investigations under the Party's control and out of the public eye while effectively addressing the public outcry over growing corruption.

Other administrative methods include Custody & Repatriation (C&R), which is often employed to detain migrants. Some persons suspected of having committed minor criminal offenses have also been held under this measure, and some legal scholars suspect that in certain cases the measure is now used by police in the same way as C&I was in the past.<sup>322</sup>

In short, extra-judicial detention has been widely employed either to circumvent time limits prescribed by the CPL or simply for official convenience in handling crime investigation. Such practices are not only intolerable because they clearly violate international human rights standards, but also because they effectively allow law implementation agencies to circumvent the minimal safeguards for the rights of defendants contained in the revised CPL.

## V. Illegally-Obtained Evidence, Torture and The Right to Remain Silent

According to a Chinese government study, incidents of torture that were officially investigated by the SPP almost quadrupled from 1990 to 1997.<sup>323</sup> Although official statistics on the total number of torture cases in China have never been published, scholars and lawyers estimate that there are thousands of cases every year.<sup>324</sup> Many acts of torture take place in the course of the criminal process. The reasons for this are clearly linked to systemic defects in the CPL, such as the admissibility of illegal evidence at trial, the lack of the right to remain silent and the lack of protections against self-incrimination.

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<sup>319</sup> Article 9 of the APL.

<sup>320</sup> Xia Zhongnie submitted a proposal to revive the Party internal measure of SCI at the Ninth CPPCC held in March 1999.

<sup>321</sup> "Wei Jianxing Stresses Strengthening Investigation Work..." see note 312.

<sup>322</sup> *Not Welcome at the Party*, p. 20, see note 2 for reference.

<sup>323</sup> Wang Gangping, ed., *The Crime of Tortured Confession (Xingxun bigong zui)*, Beijing: People's Procuratorate Press, 1997, p. 9.

<sup>324</sup> Interviews with lawyers in Shanghai and Beijing, April 1999.

The question of whether evidence gathered through illegal means, including coerced confessions, statements, documents and physical evidence should be admissible at trial has long been a focus of academic debate.<sup>325</sup>

Although both the 1979 and 1996 versions of the CPL prohibit the use of torture to extract confession, albeit ambiguously, neither provides clear rules on the admissibility at trial of illegally-obtained evidence.<sup>326</sup> In practice, the Chinese judiciary accepts evidence gathered through illegal means. Many scholars attribute the widespread use of torture in criminal investigations to the admissibility of illegally-gathered evidence, especially confessions. They advocate the enactment of rules excluding all evidence obtained through illegal means, including evidence other than confessions.<sup>327</sup> However, some insist that an exclusionary rule would hamper efforts to crack down on crime and would therefore be inappropriate for China.<sup>328</sup>

Not surprisingly, the incidence of torture has been rising over the past several years as the CCP has pursued forceful anti-crime campaigns. Substantial evidence indicates that there is a strong connection between ambiguous evidentiary rules and the occurrence of torture. As various scholars have suggested, there are at least three issues that should be addressed if the use of torture in China is to be reduced and eventually eliminated. These are: the admissibility of illegally-obtained evidence at trial; establishing a rule against self-incrimination, as well as the right to remain silent; and effective mechanisms for victims of torture to seek redress.<sup>329</sup>

The view that all illegal evidence should be inadmissible is gaining force in recent debates within China. Still, some crime investigation authorities continue to insist that a total prohibition on illegal evidence would be unrealistic, at least for the time being. Also, scholars remain divided on whether China should establish the rule against self-incrimination and the right to remain silent, both considered appropriate measures to help eliminate forced confessions.<sup>330</sup>

### A. Lack of Exclusionary Rules in the CPL and CL

The CPL stipulates that there are seven categories of evidence:

1. physical and documentary evidence

<sup>325</sup> See Chen, *United Nations Standards...*, p. 266-270, see note 53 for reference.

<sup>326</sup> See Article 32 of the 1979 CPL and Article 43 of the 1996 CPL.

<sup>327</sup> See *Studies on Evidence (Zhengju xue)*, Qunzhong Press, Beijing, 1983, p. 70, a law textbook for institutions of higher education. See also Wang Guozhong: "Thoughts on Constructing a Rule Excluding Illegal Evidence in our Country" (*jiangou woguo feifa zhengju paichu guize de gouxiang*), *People's Procuratorate (Renmin Jiancha)*, No. 10, 1999. Located at: [http://www.jcrb.com.cn/html/1999/10/rmjc/rj199910\\_18.htm](http://www.jcrb.com.cn/html/1999/10/rmjc/rj199910_18.htm).

<sup>328</sup> See Chen, *United Nations Standards...*, p. 266-270, see note 53 for reference.

<sup>329</sup> See Ma Haijian and Li Bingtao, "Procedural Instrumentalism and the Use of Torture to Extract Statements" (*Chengxu gongju zhuyi yu xingxun bigong*), *Journal of the Public Security University (Gong'an daxue xuebao)*, No. 1, 1997, p. 63-65.

<sup>330</sup> "Capital's Jurists Discuss 'Right to Remain Silent'" (*shoudu faxuejia yantao chenmoquan*), *People's Procuratorate Daily (Renmin jiancha ribao)*, October 27, 1999. According to this report, the legal scholars attending a conference on the right to remain silent agreed that China should not quickly incorporate this right into the CPL. Not surprisingly, the conference was convened by the magazine "People's Procuratorate," run by the Supreme People's Procuratorate. See also Mao Lei, "Is Silence Golden: Various Opinions on Right to Remain Silent" (*chenmo shi jin zhongshuo fengyun chenmoquan*), *People's Daily (Renmin ribao)*, December 15, 1999, p. 10.

2. witness testimony
3. victim statements
4. confessions and defense statements from suspects or defendants
5. conclusions of [forensic] evaluations (*jianding jielun*)
6. records and descriptions of crime scenes
7. video or audio materials<sup>331</sup>

The Chinese judiciary divides the above types of evidence into two general categories: statements and other evidence. In principle, the judiciary recognizes the harm of illegally obtained confessions or other statements (*kougong*) and prohibits the extraction of confessions through torture. According to the SPC Interpretation, all statements obtained through torture or other illegal means should not be admissible at trial.<sup>332</sup> The SPP Rules has similar provisions.<sup>333</sup>

However, neither the CPL, the SPC Interpretation nor the SPP Rules prohibit acquiring evidence illegally. Moreover, the SPP Provisional Rules state that illegally-gathered evidence other than statements may be used in some circumstances:

*Illegally-obtained physical evidence and documents may be used as evidence supporting public indictment if they are legally verified as proving the criminal acts in question...*<sup>334</sup>

The SPP Rules, issued on January 18, 1999 to replace the 1997 SPP Provisional Rules, omits this paragraph, but it appears that evidence obtained through illegal means is still used in practice. This can be seen from the following passage from a recent authoritative book by senior prosecutors:

*Physical evidence, if verified as proving the truth of a case, may be used in the prosecution of crimes. Since the physical evidence is irreplaceable and irreproducible, as a method of fighting crime [we] should not simply exclude evidence obtained through illegal means.*<sup>335</sup>

Although it bans the collection of evidence through illegal means, the MPS Rules says nothing about the validity of illegally obtained confessions and other evidence.<sup>336</sup> Scholars have seriously criticized this intentional omission by MPS and have suggested that it may result not only in inconsistencies in handling illegal evidence between different branches of the law implementation apparatus, but also in encouraging torture to coerce confessions.<sup>337</sup>

While Chinese law leaves open the issue of the admissibility of illegal evidence, opinion on the matter among legal scholars can be divided into three major camps. Some scholars believe in the primacy of legal evidence and argue that all types of illegal evidence should be banned no matter how crucial to the case.<sup>338</sup> Other legal scholars believe that all evidence should be measured

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<sup>331</sup> Article 42 of the CPL.

<sup>332</sup> Article 61 of the SPC Interpretation.

<sup>333</sup> Articles 160 and 265 of the SPP Rules.

<sup>334</sup> Article 233 of the SPP Provisional Rules.

<sup>335</sup> Chen Guoqing, *Application and Interpretation of the Rules of the People's Procuratorates on Criminal Procedure (Renmin jianchayuan xingshi susong guize shiyi yu shiyong)*, Beijing, Police Officer Education Press, 1999, p. 277-278.

<sup>336</sup> Article 51 of the MPS Rules.

<sup>337</sup> See Chen, *United Nations Standards...*, p. 266-270, see note 53 for reference.

<sup>338</sup> *Ibid.* p. 61-62.

against the truth. Any evidence, either legally or illegally collected, may be used at trial as long as it can be verified as true.<sup>339</sup> Finally, another group of scholars maintain that all illegal evidence should be banned with a number of exceptions under which a compelling public interest necessitates the use of the evidence in question. These scholars cite other legal systems, such as that of the United States, to justify such exceptions.<sup>340</sup> However, the NPC appears unwilling to take up this matter.

As amended in 1997, the Criminal Law prohibits two acts which may result in coerced statements: one is the crime of extracting confession through torture (*xingxun bigong zui*) and the other is that of extracting testimony through coercive means (*baoli quzheng zui*).<sup>341</sup> Neither provision, according to the lawyers we interviewed, has proved sufficient to curb the practice of torture.<sup>342</sup>

## B. Exclusion of Confessions or Statements Obtained Through Torture

Chinese law not only allows illegal evidence to be used at trial, but also permits confessions or statements obtained through torture to be admissible in court in certain circumstances, despite provisions prohibiting the use of torture to extract statements from suspects, defendants and witnesses. In fact, the CPL and related judicial interpretations have very clearly failed to eliminate the practice of extracting confessions or statements through torture. Various official reports confirm that collecting evidence through torture has reached epidemic proportions in recent decades. The central government and Party authorities have repeatedly issued decrees and orders to crack down on torture.<sup>343</sup>

Neither the CPL nor the CL expressly and unequivocally exclude the use at trial of confessions obtained through torture. Instead, the current law only prohibits the conviction of persons solely on the basis of a confession obtained through torture. Close examination of the wording of these rules sheds some light on their limited effectiveness in eliminating the practice of coercing confessions or statements.

Article 43 of the CPL only states:

*...The use of torture to coerce statements and the gathering of evidence by threats, enticement, deception, or other unlawful methods is strictly prohibited.*

The CPL does not address the admissibility of these confessions or statements. On the other hand, Article 61 of the SPC Interpretations stipulates:

<sup>339</sup> *Ibid.*

<sup>340</sup> *Ibid.* See also Sun Xiaofu, "On the Effectiveness of Illegal Evidence from the Perspective of Illegality of the Evidence Collection Process: The Outlook for Establishing an Exclusionary Rule in Our Country" (*Cong zhengju yunxing xingwei de shifangxing kan feifa zhengju de xiaoli guanyu woguo sheli zhengju paichu guize de zhanwang*) *Studies in Law And Commerce (Fashang yanjiu)*, No. 5, 1997, p. 68-69. Proposing the establishment of an exclusionary rule, Sun cites the Public Safety exception under the Miranda Rule, the "Inevitable Discovery" exception and the "Independent Source" exception as potential models. For details on US evidentiary rules and theories, see Joseph G. Cook and Paul Marcus, *Criminal Procedure* (third edition), Matthew Bender & Company; New York, 1992, p. 416-456.

<sup>341</sup> CL Article 246.

<sup>342</sup> All lawyers and judges we interviewed in China and elsewhere agreed that the provision of the CL regarding these two crimes were a good means of curbing such offenses but not enough to effectively control it. Interviews with lawyers in Shanghai and Beijing, April 1999.

<sup>343</sup> For details, see HRIC, *Impunity for Torturers...*, see note 1 for reference.

*Collecting evidence through illegal means is strictly prohibited. If statements from witnesses or victims, or confessions from defendants are proved to have been obtained through torture, threats, inducement or deception, such statements shall not be used as a basis for conviction.*

The wording of the SPC Interpretations does not clearly exclude evidence obtained through torture from admission at trial. In fact, some people suggest that a confession itself may be used provided it is corroborated by other legal evidence.<sup>344</sup> Additionally, the SPC Interpretations set up a further hurdle for those alleging torture. They must prove both that the torture occurred and that the confession was a result of the torture. Since prisoners and detainees are usually isolated from the outside world, it is difficult for them to produce solid evidence of torture absent visible physical injuries. With only their word against that of the prosecution, torture victims are unlikely to have their claims accepted. In fact, a Shanghai judge told HRIC that judges rarely give credence to a defendant's claim to have been tortured, and that evidence is almost never rendered inadmissible based on such a claim.

Even worse are the provisions contained in the SPP Rules. As mentioned above, an earlier version of the SPP Rules specifically allowed the use of illegal evidence,<sup>345</sup> and the latest version, some scholars have claimed, still leaves the door open for illegal evidence although this clause on the admissibility of illegal evidence was deleted.<sup>346</sup>

Article 265 of the SPP Rules reads:

*Upon determining that the investigating officers have used illegal means to obtain a confession from a criminal suspect, a statement from a victim or witness, people's procuratorates shall propose that they rectify the situation and in the meantime, request that the investigation authority reinvestigate and collect evidence again by appointing new personnel. People's procuratorates may investigate or collect evidence on their own initiative if necessary.*

The SPP Rules evidently allow officials to "cure" illegally-obtained confessions or statements. Unfortunately, the Rules fail to spell out under what circumstances the authorities may reinvestigate and recollect statements, and thereby cure the illegality. The SPP Rules clearly fail to live up to the spirit of exclusionary rules.

The MPS Rules are even more vague on this issue, only generally prohibiting the use of torture in the course of collecting evidence while remaining silent on the issue of the validity of statements obtained through torture.<sup>347</sup> Scholars suggest that the ambiguity of the rules enacted by the SPC, SPP and MPS has caused chaos in judicial practice on the question of the admissibility of illegally-gathered evidence, especially confessions and statements obtained by torture.<sup>348</sup>

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<sup>344</sup> As discussed above, some authorities believe that illegal evidence, including statements obtained through torture, can be used as evidence as long as it proves the facts at issue.

<sup>345</sup> Article 233 of the SPP Provisional Rules.

<sup>346</sup> Fan Dehao, "On Several Legislative Issues on Evidence in the Criminal Process" (*guanyu xingshi susong zhengju lifa de jige wenti*), *Applied Law (Falü shiyong)*, Supreme People's Court, No. 174, September, 2000. The author believes that the SPP Rules allows for rehabilitation of the confession or statement obtained by torture.

<sup>347</sup> Articles 51 and 189 of the MPS Rules.

<sup>348</sup> Li Xuekuang et al, "On the Validity of Illegal Evidence in the Criminal Process" (*Lun xingshi susong zhong feifa zhengju de xiaoli*), *Politics And Law Forum (Zhengfa luntan)* 1 (2000): 76-77.

As a long-standing policy, Chinese authorities have relied heavily on confessions during crime investigation. Many believe that the confession is the “king of all evidence” (*zhengju zhi wang*).<sup>349</sup> In fact, Chinese laws encourage investigation authorities to produce oral statements from either criminal suspects or defendants. Article 93 of the CPL stipulates that the criminal suspect has an obligation to answer all questions from investigating personnel according to the facts, although he or she may refuse to answer questions unconnected to the case. More than 80 percent of all criminal cases tried by the courts involve confessions from defendants, according to various sources. Some estimate that the real figure is above 90 percent.<sup>350</sup>

The official reliance on confessions is highlighted in the following statement:

*In most cases, the consumption of time and resources for crime investigation can be significantly reduced by extracting confessions through torture and forcing some real criminals to confess what really happened when they committed crimes. Sometimes, it is impossible to crack cases without confessions. This is the “positive side” of torture. In other words, torture can enhance the efficiency of crime control in a certain sense.*<sup>351</sup>

Such official attitudes towards confession certainly make possible the occurrence of torture in crime investigation and even actively encourage its use. As a noted criminal procedure expert has said, "Using substantial amounts of evidence derived from torture and other illegal means (especially the accused person's confession) remains, as before, a principal basis for proving cases."<sup>352</sup>

Many scholars agree that the lack of an exclusionary rule is one of the principal reasons for the prevalence of torture in China. As one commentator noted:

*[In practice] crime investigators often extract a confession of guilt or details of a crime through torture or other coercive means... which further demonstrates that the failure of the CPL to address the exclusion of illegal evidence is largely to blame for the [widespread reliance on] torture.*<sup>353</sup>

This commentator goes on to suggest chopping down the “poisonous tree” to get rid of the use of its “fruit” as evidence in court.<sup>354</sup> Another scholar commented:

*Now that [the CPL and the CL] prohibit the collection of evidence through illegal means, there must be corresponding provisions excluding the [admission]*

<sup>349</sup> Zhang Li, “On the Rules Governing Evidentiary Statements” (*Lun caixing kougong de zhengju guize*), *Politics And Law Forum (zhengfa luntan)* 1 (1999): 42, and in the same issue of this journal, Zhou Guojun, “Discussion of Several Issues on the Prohibition of the Use of Torture to Extract Statements” (*Yanjin xingxun bigong ruogan wenti tantao*): 85.

<sup>350</sup> Interviews with lawyers in China, July 1999.

<sup>351</sup> Lin Zhaohui, “The Practice of Extracting Confessions through Torture and Restrictions on it” (*Lun xingxun bigong de cunzai ji xianzhi*) *People’s Procuratorate (Renmin jiancha)* 11 (1998): 20-21.

<sup>352</sup> Cui Min, *New Progress in China’s Criminal Procedure Law: A Comprehensive Review of Research on and Discussions of Revisions to China’s Criminal Procedure Law (Zhongguo xingshi susongfa de xin fazhan: xingshi susongfa xiugai yantao de quanmian huigu)*, China People’s Republic Security University Press, Beijing, 1996, p. 216.

<sup>353</sup> Zhou, “Discussion of Several Issues...,” 93, see note 349 for reference.

<sup>354</sup> *Ibid.* Referring to the doctrine in American jurisprudence which established the principle that evidence derivatively obtained by other tainted evidence should also be deemed inadmissible at trial.

*of that [same] illegally obtained evidence. Otherwise, the stipulations prohibiting the use of torture to extract confessions are merely empty words.*<sup>355</sup>

Professor Cui Min, an influential criminal procedure specialist at China People's Public Security University, echoed these sentiments, stating that as long as illegally-obtained evidence is admissible, "The clause 'extorting confessions by torture is strictly forbidden' essentially exists in name only."<sup>356</sup>

Other academics and practitioners, however, believe that confessions obtained by torture are a legitimate and necessary weapon in the fight against crime. Police investigation scholar Du Jingji argued that an exclusionary rule is impractical, since it would permit too many criminals to escape legal sanctions:

*As a result of four years of research and study on criminal investigation work, this author believes that in contemporary judicial practice, the number of real crimes solved through the illegal criminal practice of tortured confession is far, far greater than the number of false cases it creates. This is an objective truth that we cannot contradict.*<sup>357</sup>

Not surprisingly, torture in crime investigation has been widespread despite the government's pro forma prohibition of torture and collecting evidence through illegal means. As many scholars correctly point out, without an exclusionary rule, China will not be able to curb and eventually eliminate the practice of extracting statements or confessions through torture.<sup>358</sup>

### **C. Related Rules: the Right to Remain Silent and the Right Against Self-Incrimination**

Many scholars also attribute the prevalence of torture to the lack of any right to remain silent or right against self-incrimination in Chinese law. As one commentator points out:

*[The absence of the right to remain silent in the CPL] has fostered the practice of extracting confessions through torture or inducement, and also requires that defendants incriminate themselves.*<sup>359</sup>

Many lawyers we interviewed support this view and believe that a defendant's obligation to answer questions, as prescribed by the CPL, put them at greater risk of torture and other ill-treatment.<sup>360</sup> One scholar asserts that denial of the defendant's right to remain silent and to avoid self-incrimination in the CPL stem from political considerations.

<sup>355</sup> Ma and Li, "Procedural Instrumentalism...", 37-38, see note 329 for reference.

<sup>356</sup> Cui, *New Progress...*, see note 352 for reference.

<sup>357</sup> Du Jingji, "A Preliminary Discussion of the Causes of Torture to Extract Confessions and Policies to Deal with It" (*Qianlun xingxun bigong de chansheng jiqi duice*), in Wang Huaixu, ed., *Research and Practice of Investigation and Interrogation (Zhencha xunwen yanjiu yu yingyong)* (Beijing: China People's Public Security University Press, December 1998), 374.

<sup>358</sup> Zhou, "Discussion of Several Issues...", 85, see note 349 for reference.

<sup>359</sup> Jiang Tao et al, "Do I Have the Right to Remain Silent? My Views on the Criminal Suspect's Right to Remain Silent" (*Wo youquan baochi chemo fanzui xianyiren chenmoquan zhi wojian*), *Chinese Lawyer (Zhongguo lishi)* 2 (1998): 53.

<sup>360</sup> Interviews with lawyers in Shanghai and Beijing.



*[One of the main reasons that China has not incorporated the right to remain silent into law is] that its highly-centralized political and social management systems have no tolerance for any idea that an individual's interest may be put above the state's need to punish crimes. It is considered even more intolerable for criminal suspects or defendants, who have already been restrained by state power, to be able to challenge state power.*<sup>361</sup>

Some who oppose incorporating the right to remain silent and the right against self-incrimination into Chinese law insist that China cannot afford to have such rights. They believe that the right to remain silent will not resolve current problems in judicial practice, such as extracting confessions by torture. Additionally, they fear that with such rights in place, the cost of the criminal process will significantly increase. Finally, many believe that the requirement for defendants to answer questions is suitable for China's national circumstances" (*fuhe zhongguo guoqing*).<sup>362</sup>

Despite such opposition, a majority of legal scholars believe that China should incorporate the rights to remain silent and against self-incrimination into law. Scholars have cited international instruments such as the "Beijing Rules," a set of standards on juvenile justice adopted by the UN in 1985,<sup>363</sup> to justify adopting the right to remain silent.<sup>364</sup> Others base their views on the International Covenant on Civil and Political Rights (ICCPR), which requires that a suspect or defendant not be compelled to testify against himself or to confess [to being] guilty."<sup>365</sup>

In summary, the CPL, as revised in 1996, fails to address critical issues like the exclusion of illegal evidence, the right to remain silent and the right against self-incrimination. This has led to the continuation of the use of torture in crime investigation. Scholars and legal practitioners have repeatedly called upon the government to enact such rules. However, the NPC has failed to put these issues on its legislative agenda. According to the current legal structure, the judiciary, namely the Supreme People's Court and the Supreme People's Procuratorate, possess extensive rule-making power through their interpretation of law. Unfortunately, they have failed to use this to address these issues. The Ministry of Public Security, the primary crime investigation authority, is also empowered to issue detailed rules in order to implement laws and regulations correctly and efficiently. However, it has not enacted rules that grant these rights to defendants and suspects, neither has it made any serious effort to abide strictly by existing loosely-defined rules against extracting confessions through torture. Inevitably, torture and ill-treatment remain a major social problem that severely diminishes the credibility of the government.

However, some local authorities have echoed public concerns. Regarding the rights to remain silent and against self-incrimination, Shuncheng District Procuratorate in Fushun, Liaoning

<sup>361</sup> Sun Changyong, "The Right to Remain Silent and the Criminal Process in China" (*Chenmoquan yu Zhongguo xingshi susong*), *Modern Law Science (Xiandai faxue)* 4 (2000): 18.

<sup>362</sup> *Ibid.*, 20-21.

<sup>363</sup> See United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) adopted by the Seventh Congress on the Prevention of Crime and Treatment of Offenders, Milan, Italy, August 26-September 6, 1985, U.N.Doc. A/Conf./121/22/Rev.1 (1986). According to the Beijing Rules, juvenile offenders shall have "the right to remain silent." See, General Principles 7(1), Part One.

<sup>364</sup> Chen Guangzhong and Zhang Jianwei, "International Standards on Criminal Justice and Criminal Justice Reform in Our Country" (*Xingshi sifa guoji zhunze yu woguo xingshi sifa gaige*), in *Special Collection on Criminal Procedure (Xingshi susongfa zhuanlun)*, ed. Fang Chongyi, et al, (Beijing: China Fangzheng Press, 1998), 24.

<sup>365</sup> Sun, "The Right to Remain Silent...." 19, see note 361 for reference. Also see ICCPR Article 14 (3)g.

Province, issued a detailed rule on confessions in August 2000.<sup>366</sup> Under this very limited rule—which did not apply to cases of manslaughter, murder, official corruption, or those where there were no witnesses to the crime—a defendant’s confession of guilt is not considered evidence, but the prosecutor may include a defendant’s defense in his/her file. This rule essentially renders confessions from defendants irrelevant in determining whether or not to prosecute a particular crime. This practice was called “Zero Confession” (*ling kougong*) and hailed by the media as the first step in establishing the right to remain silent.

Reducing the weight accorded to confessions in prosecuting crimes would certainly discourage torture to extract confessions, and thus curb the use of torture for this purpose. Unfortunately, the extensive reporting of this experiment reflected “the hopes of scholars and the media,” according to one legal scholar, rather than a real shift in official thinking.<sup>367</sup> Some scholars questioned the legality of “Zero Confession,” arguing that it violated the CPL by excluding the voluntary confessions the law allows, not to mention the interests of victims.<sup>368</sup> The Zero Confession rule was eventually withdrawn because higher authorities were “dissatisfied,” according to a Shuncheng prosecutor.<sup>369</sup>

Such official attitudes are particularly disappointing when the severity of the problem of torture in China is considered. It has become clear that China will not succeed in curbing the practice of torture, either for extracting confession or for other purposes, unless the lack of an exclusionary rule, the right to remain silent and the right against self-incrimination are appropriately addressed.

## VI. Discriminatory Practice: Unequal Implementation of the CPL<sup>370</sup>

Despite the fact that both China’s 1982 Constitution<sup>371</sup> and its Criminal Procedure Law<sup>372</sup> stress equal treatment for every citizen, the implementation of the CPL demonstrates that not everyone is treated equally in the country’s criminal process.

Substantial evidence demonstrates that a small group of marginalized people have been singled out for “special treatment” since the CPL’s promulgation in 1997. Some of these people have been blatantly deprived of the right to retain counsel when they are detained for questioning or on a criminal charge, as specifically provided for in the revised CPL. Some defendants are unable to pay for legal counsel because their bank accounts or personal assets have been frozen or confiscated.<sup>373</sup> Still others have been held *incommunicado* with no notification given to their

<sup>366</sup> “Liaoning: Judiciary Shocked by the Rules on Zero Confession in the Cases Handled by Chief Prosecutors” (*Liaoning zhusu jianchaguan banan lingkougong guize zhengdong sifajie*) *Liaoshen Evening News (Liaoshen Wanbao)*, September 6, 2000. Located at: <http://202.99.23.208/GB/channel1/11/20000906/220196.html>.

<sup>367</sup> Antony Kuhn, “China Balks at the ‘Right to Remain Silent’,” *Los Angeles Times*, January 21, 2001.

<sup>368</sup> Fan Zhongbing, “Questioning the Zero Confession Rule” (*Zhiyi ling kougong guize*), *Procuratorate Daily (Jiancha ribao)*, January 8, 2001, available online at: <http://202.99.23.208/GB/shehui/46/20010108/373324.html>.

<sup>369</sup> Kuhn, “China Balks,” see note 367.

<sup>370</sup> The source of all information cited in this section is Human Rights in China, unless otherwise indicated.

<sup>371</sup> Article 33 of the Constitution states that citizens of the People’s Republic of China are all equal before the law.

<sup>372</sup> Article 6 of the CPL also unequivocally stipulates: “...the law is equally applicable to all citizens, and no special privilege whatsoever is permissible before the law.”

<sup>373</sup> Funds are frozen usually on the basis that the defendant has received humanitarian aid from abroad or

families regarding their arrest or detention. At trial, some of these people have had their right to present a defense either severely limited or completely abrogated. The principle of a public trial, which has been recently been vigorously promoted by the Supreme People's Court, is generally not applicable to members of these "special groups." Most politically sensitive cases are tried *in camera* either under the pretext that they involve "state secrets"<sup>374</sup> or through the careful selection of audiences. Such defendants often find it impossible to retain competent legal representation, and at the same time are prevented from presenting an adequate defense. Although the courts may appoint defense counsel in these cases, lawyers usually avoid representing such clients due to the hostile political environment. Without a lawyer of their own choosing, many believe that they are better off representing themselves. However, those who venture to do so often find themselves interrupted by the bench and prohibited from speaking on certain key issues relating to their defense. Finally, the right to appeal is entirely devoid of effective force for this politically disadvantaged group. In an overwhelming majority of cases, appeals in these cases fall on deaf ears and are rejected in summary fashion.

Unlike the vast majority of ordinary defendants, the fate of these people is generally decided by Party authorities rather than a judicial panel. For instance, it has been a long-standing CCP policy to resolve cases of official corruption outside of the normal criminal process. Reports reveal that some high-ranking officials charged with corruption have been first held in custody by the Party's discipline committee under the measure known as "solitary confinement for investigation" (*geli shencha*).<sup>375</sup> Generally, the Party discipline committee hands the case over to the procuratorates if it decides that the case merits prosecution. Like other politically sensitive defendants, Party officials are not assured equal treatment in the criminal process. Although this usually means they are treated more leniently by the courts, high-ranking officials are sometimes subjected to disproportionate penalties for their crimes.

Those most likely to suffer such discriminatory treatment are people considered politically dangerous by the Chinese authorities. They include people who seek to form opposition parties like the China Democracy Party (CDP) or to organize independent trade unions, minority activists and those individuals who call upon the government to reconsider its judgment on the 1989 democracy movement, such as Jiang Qisheng and Li Hai. Some belong to unofficial religious groups, such as underground church pastors or Falungong followers. High-ranking Party officials suspected of corruption may also become victims of such "special" treatment.

Although people are subjected to discriminatory treatment for various reasons, all such cases share a similar feature: they are all deemed by the authorities to be too politically important to be dealt with according to normal criminal procedure. These cases demonstrate that the Party apparatus, local or central, has played a major role in the process or directly taken over control of cases from the judiciary, which then becomes merely a rubber stamp legitimating the Party's decisions.

## A. Pretrial Rights Grossly Violated

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from domestic sources.

<sup>374</sup> Article 152 of the CPL stipulates that those cases involving "state secrets" shall not be tried in public.

<sup>375</sup> It is not clear whether there is a national policy authorizing the Party discipline committee to detain high-ranking officials. However, reports on such incidents state that the officials in question were held under "solitary confinement for investigation" (*geli shencha*). Most cases were transferred to the procuratorates for prosecution only after the Party committees finished their investigation. See Section IV(c) for more information.

Pretrial rights are important guarantees against official abuse of power for those brought into the criminal process. However, politically-marginalized people in China are unable to enjoy many of these rights. They are often prevented from retaining the counsel of their choice and sometimes are completely deprived of other procedural rights.

#### *Families Not Notified of Arrest or Detention*

The CPL provides that families or work units shall be notified within 24 hours of the arrest or detention of an individual. Further, they shall be made aware of the reason for arrest as well as the place where the person is being detained.<sup>376</sup> However, the families of political dissidents, many of whom lack work units, are almost invariably deprived of this right. The families of many dissidents have to wait weeks or months before receiving information concerning the arrest or detention of their family members. The cases described below are a few illustrations of this problem.

Jiang Qisheng, a veteran dissident who was a key participant in the 1989 student movement, was detained on May 18, 1999, but his wife was notified of his arrest only a month later. Xu Wenli, another prominent dissident, was taken away on November 30, 1998, without any charge. According to his wife, He Xintong, the authorities did not notify her of the reason for his detention or where he was being detained. She managed to speak to officials in charge of Xu's case, but when she inquired about his whereabouts their only answer was "no comment." It was not until 4:30pm on December 18, 1998, that she was suddenly informed by officials that her husband would be tried three days later.

Fang Jue, a former senior official who had publicized a proposal for democratic reform in China, disappeared suddenly in July 1998. Upon discovering his apartment in a state of disarray, Fang's sister, Liu Jing, guessed that he had been arrested. Although she reported his disappearance and demanded an official investigation as to his whereabouts, she received no reply or assistance from the authorities. Two months later, authorities requested that Liu Jing send her brother some daily necessities. This request was the first official acknowledgement of Fang's detention. But Liu was still not told the reasons for her brother's detention, whether any charges had been filed, or the place of his detention. Fang was convicted of "illegally doing business" on June 10, 1999.

Unfortunately, provisions of the CPL may be used to justify such stonewalling of dissident families. Both Articles 64 and 71 of the CPL allow officials not to contact families for two reasons. One reason is if such notification could hinder an on-going investigation. This should mean that the authorities fear that providing information to families may lead to the escape of other potential suspects or the destruction of evidence. The second reason is that it is impossible for the authorities to notify families. However, in the cases we have monitored, refusal to notify families has not been based on such concerns or obstacles. Generally no reason has been given at all for the authorities' failure to notify families in these cases. Therefore, these omissions should be characterized as violations of the CPL.

#### *Right to Legal Counsel during Pretrial Detention*

As discussed above in Section II, the revised CPL allows defense lawyers to become involved earlier in the criminal process. Upon being detained or questioned by the authorities, individuals have the right to legal counsel.<sup>377</sup> However, HRIC is unaware of *any* political dissident who has been informed of this right or allowed access to a lawyer upon being detained or questioned by

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<sup>376</sup> Article 64 states that the families or work units shall be informed of the criminal detention of defendants or suspects within 24 hours of the detention. Article 71 has a similar provision on arrest.

<sup>377</sup> Article 96, for details see the discussion of the lawyer's role in Section III.

authorities. Our research indicates that during the past four years, there has been no case where a dissident was notified of this right and allowed to retain a lawyer to advise him or her upon arrest or detention. On the contrary, political dissidents and politically marginalized people have regularly been denied any legal assistance even if they have specifically reminded officials that they have a right to seek counsel under the CPL.

Song Yongyi, a Chinese scholar and librarian who lives in the United States, was stripped of his right to retain a lawyer. Song, on the first night of his August 1999 detention, reportedly told authorities that he wished to speak to a lawyer. His request was simply ignored. Officials told his family that he did not wish to hire legal counsel. Luckily, Song's case generated huge international attention and he was able to retain a lawyer after he was formally arrested.

The Joint Provisions (see Section II) provide that a family may retain a lawyer for a suspect or defendant. In Song's case, his elder brother managed to hire a lawyer for him in Beijing. But the lawyer was never able to meet or speak with him, or to provide any assistance. Officials claimed that Song's case involved "state secrets" and that this justified his being deprived of this right.

As mentioned above in Section II, "state secrets" has become a convenient excuse for the authorities to deny suspects pretrial legal assistance. However, the reality is that due to official pressure, most dissidents and their families are not even able to locate a competent lawyer willing or able to provide meaningful legal assistance.

The case of Lin Hai, the first "Internet dissident" in China, provides a good example. On March 25, 1998, Lin was arrested and charged with "instigating subversion of state power" for sending a list of e-mail addresses to an overseas Internet magazine called "VIP Reference." The Chinese authorities regard this magazine as a "hostile overseas force." Lin Hai's wife, Xu Hong, managed to find a lawyer in Shanghai to provide him with legal advice. However, the authorities refused to let the lawyer meet with him, stating that the meeting required approval since it involved "state secrets." Shortly thereafter, Xu received a call from an officially-designated "public interest" lawyer, who claimed that he had already met with Lin Hai. According to the lawyer, the only thing he was allowed to do during the meeting was to explain to Lin Hai the charge brought against him. Additional discussion was cut short by the state security police who were present throughout the meeting. Lin was sentenced to a two-year fixed term imprisonment on April 20, 1998, and released on September 23, 1999.

#### *No Chance of Pretrial Release*

The CPL allows for pretrial release of suspects or defendants, as mentioned above in Section III. The two forms of pretrial non-custodial detention, known as "obtaining a guarantee and awaiting trial" and "supervised residence," are entirely subject to official discretion. In the case of dissidents, these measures are often employed expressly to avoid the detention time limits established by the CPL.

In no known case has a dissident been released on the legal basis that his or her detention was not necessary according to the circumstances.<sup>378</sup> In the limited number of pretrial releases that HRIC has observed, such "release" was even worse than official detention.

Dissidents detained under supervised residence have generally been held *incommunicado* in solitary confinement. "Supervised residence" is supposed to refer to a lower-level of detention

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<sup>378</sup> Article 51 of the CPL.

where a suspect or defendant awaiting trial has his or her freedom restricted but is not entirely deprived of personal liberty.<sup>379</sup> For dissidents, the reality is generally in stark contrast to the agreed understanding of this term. Song Yongyi was held under this measure after the expiration of his one-month criminal detention.<sup>380</sup> In his case, “supervised residence” amounted to being locked in the basement of the Beijing State Security Bureau under a 24 hour surveillance.

Other victims of this practice include Zhu Zhengming, a member of the CDP. On July 14, 1998, Zhu’s family was told that he had been put under “supervised residence” together with two fellow CDP members. However, his family could not visit him and had no idea where he was being detained.

## B. Access to Defense Lawyers and Preparation of Defense Case

Access to legal counsel is internationally recognized as an essential component of a fair trial.<sup>381</sup> Having sufficient time to prepare one’s defense is also an important right provided by many international human rights documents.<sup>382</sup> However, in China dissidents rarely enjoy such rights. Most cannot retain a lawyer of their choice due to official pressure or harassment. Some are lucky enough to retain a lawyer but find it difficult to get the lawyer to defend them fully. For instance, many lawyers are reluctant to present a not-guilty defense, but prefer to simply ask the court for leniency. Lawyers representing people facing politically-motivated criminal charges generally risk more than they would in ordinary cases. Authorities have sometimes issued documents requiring all lawyers to obtain official approval before they can agree to represent clients in politically-sensitive cases.

### *Scarcity of Lawyers*

All the lawyers we interviewed in China expressed concern about representing political dissidents. One lawyer told HRIC that he would not even think of taking the risk of representing dissidents in Shanghai. He pointed out the dilemma every lawyer inevitably faces in this kind of situation: if you choose to represent your client properly, future cooperation with officials may be impossible.<sup>383</sup> Normally, lawyers are required to report on their handling of cases to the local justice department or the lawyers’ association. Lawyers are often not completely free to defend their clients in the way they see fit.

An internal document issued by the Beijing Municipal Justice Department on January 14, 1999, indicates that on a broad range of legal matters, lawyers must report to and obtain approval for certain decisions from the Justice Department.<sup>384</sup> According to the document, all cases involving

<sup>379</sup> For details, see Section IV on “Pretrial Detention.”

<sup>380</sup> Article 69 of the CPL states that pre-arrest detention can not last longer than one month.

<sup>381</sup> See, Article 14 (3)d of the ICCPR.

<sup>382</sup> Article 14 (3)b of the ICCPR states: “[Everyone is entitled] to have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing.” Furthermore, the Draft Declaration on the Right to A Fair Trial and A Remedy, prepared by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, clearly stipulates: “The accused has a right to adequate time for the preparation of a defense appropriate to the nature of the proceedings and the factual circumstances of the case.” See, Article 52(c), U.N.Doc. E/CN.4/Sub.2/1993/24/Add.1.

<sup>383</sup> Interviews with lawyers in Shanghai and Beijing.

<sup>384</sup> The Municipal Justice Bureau: the Reporting System Concerning Major Legal Matters Handled by the Law Firms in Beijing (*Beijingshi sifaju guanyu Beijingshi lüshi shiwusuo chengban zhongda falü shiwu qingshi baogao de zhidu*), issued on January 14, 1999.

crimes of “endangering state security” must be reported to the department, and lawyers must obtain prior approval to represent such clients.<sup>385</sup>

Another circular concerning the Falungong spiritual group, issued by the same authority on July 29, 1999, requires that all cases regarding the Falungong be reported to the Beijing Municipal Justice Department. No legal service may be provided to Falungong clients without official approval.<sup>386</sup>

Other local regulations require that if a lawyer intends to present a not-guilty plea on a client’s behalf, he or she must first discuss this within the firm to which he or she belongs.<sup>387</sup> (All lawyers must belong to a firm of at least three people, or else they are not allowed to practice.)<sup>388</sup> This puts an extra burden on lawyers and prevents them from handling cases independently. Many lawyers told us that they disliked subjecting their own cases to the collective will under this rule.<sup>389</sup> Such measures create a collective responsibility which dims hopes of defendants enjoying quality legal representation.

Such local regulatory measures further exacerbate the scarcity of lawyers available to defend clients in politically-sensitive cases. Under such circumstances, it is no wonder that many dissidents have great difficulty retaining lawyers.

In the CDP cases tried in December 1998, all defendants found it difficult to engage a lawyer. Among the three CDP leaders put on trial, only Xu Wenli was represented, by a court-appointed lawyer. Wang Youcai and Qin Yongmin could not find lawyers willing to defend them and had to waive their rights to legal counsel. Liu Xianbin, a CDP member tried on August 6, 1999, managed to retain two lawyers from Chongqing City on August 1, 1999. However, the lawyers later decided to withdraw from the case due to the tremendous pressure exerted on them by the state security departments, leaving him without legal counsel at trial.

The case of Wang Ce, a veteran dissident who advocated political reform in China, provides another example. Wang Ce was put on trial for “financially assisting others to endanger state security” on January 27, 1999. His court-appointed lawyer refused to present a not-guilty defense, leaving him without any other choice but to waive his right to legal representation. No other lawyer in Hangzhou, Zhejiang Province, would take on his case. After his wife made numerous attempts to find a different attorney, Wang Ce had to defend himself at trial.

The table at the end of this section shows how difficult it is for dissidents in China to obtain legal counsel of their choice. Of the 36 dissidents listed, only ten managed to hire a lawyer of their own choosing, while ten did not have any legal counsel at all. Others either had counsel appointed by the court or such information was not available. Moreover, in a number of cases lawyers were

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<sup>385</sup> *Ibid*, Article 4 (1).

<sup>386</sup> Notice of the Beijing Municipal Justice Bureau Lawyer Section Providing that All Law Firms and District Justice Bureaus Should Report Legal Counseling And Legal Representation of Falungong (*Beijingshi sijafu lüguanchu guanyu duiyu falungong wenti zixun daili jinxing huibao de tongzhi*), issued on July 29, 1999.

<sup>387</sup> Article 28 of Several Rules on Lawyers’ Practice in Anhui Province, passed by the Anhui Province People’s Congress Standing Committee on March 26, 1999, stipulates: “A lawyer’s decision to defend a client on a not guilty plea shall be discussed collectively by the firm to which he belongs.”

<sup>388</sup> For more information on this point, see Lawyers Committee for Human Rights, *Lawyers in China*, see note 98.

<sup>389</sup> Interviews with lawyers in Shanghai and Beijing, July 1999.

intimidated by the authorities and refused to defend their clients fully, instead only appealing to the court for leniency.

#### *Obstacles to Preparing a Defense*

Our research indicates that almost none of the defendants in politically-sensitive cases was given adequate time or conditions to prepare a defense. Most dissidents are locked up for long periods of time before trial; however, none of them were allowed to utilize this time to work on their case. During most of the time they spend in detention before trial, dissidents are either not officially charged, or are not allowed to retain legal counsel.

Generally, dissident defendants have from several days to at most a couple of weeks to prepare a defense. By contrast, prosecution authorities often have several years to collect evidence and build their cases.

Several cases illustrate the practical impact of this problem. On August 2, 1999, Liu Xianbin was notified that his trial was to open on August 6. This gave him only four days to prepare a defense. Similarly, Wang Youcai, Qin Yongmin and Xu Wenli were all given only a few days' advance notice that they would be put on trial. These defendants had insufficient time to prepare any meaningful defense. Additionally, Wang and Qin could not retain lawyers.<sup>390</sup>

While insufficient time certainly results in significant disadvantage for political defendants, official non-cooperation creates an even greater obstacle. Officials, prosecutors and judges often prove entirely unwilling to cooperate with defense lawyers and defendants. They simply do not provide information that is needed to present a defense. Beijing lawyer Mo Shaoping, while representing Fang Jue during his first trial on March 22, 1999, complained that he was only permitted to review two of 19 records of interrogations of his client by the police. Mo was warned by the judge not to mention at trial "irrelevant content" that he had learned from the interrogation records. This irrelevant information most likely concerned a conversation between Fang Jue and officials regarding some evidence that possibly exonerated Fang.

Defendants and their lawyers are often pressured or intimidated by officials. Before trial, the lawyer representing Chen Zengxiang, a Shandong Province-based dissident accused of "leaking state secrets," was briefed by the state security personnel on Chen's background and warned that he should not enter a not-guilty plea on Chen's behalf. Wang Wenjiang, a CDP member and lawyer from Liaoning Province, who was prohibited from representing CDP founder Wang Youcai, was briefly detained when he attempted to attend the latter's trial.

Sometimes court staff simply neglect to notify defense lawyers of trial dates, leaving defendants in helpless situations. For instance, the lawyer for Yang Tao, a dissident tried ostensibly for tax evasion, was not notified of the first hearing on November 17, 1999. Yang was eventually sentenced to a four-year fixed term of imprisonment on January 5, 2000, on the same charge.

### **C. Trial Stage**

Many dissidents were deprived of various rights at trial which they should have enjoyed under the CPL.

#### *Public Trial*

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<sup>390</sup> See "China's Actions Contravene Covenant," *Toronto Star Newspapers*, December 30, 1998, edition 1.



A public trial is considered an essential element of an impartial judicial proceeding. Both the UDHR and the ICCPR note that this principle is crucial to a fair trial.<sup>391</sup> Chinese laws also stress the importance of a public trial.<sup>392</sup> The SPC has also recently reaffirmed this principle by stating that those criminal cases that are not tried publicly may be declared mistrials.<sup>393</sup>

In politically sensitive cases, however, the public trial principle has rarely been observed. Many defendants whose only offense was to express their political opinion have been denied the right to a public trial. The judiciary sometimes spuriously claims that the case involves “state secrets” as a way of preventing unwanted members of the public from attending trials. For instance, Chen Zengxiang was tried *in camera* on October 20, 1998, on the grounds that his case “involved state secrets.” Although he was not charged with any secrets crimes, Wang Youcai, one of the first three CDP leaders sentenced by Chinese courts, was tried in closed court on December 17, 1998, and the verdict was announced publicly four days later. Many other dissidents have been tried *in camera*, despite the fact that they are not facing secrets charges. These include: Tong Shidong and Liao Shihua, two key CDP figures in Hunan province who were sentenced respectively to ten years and six years imprisonment on January 3, 2000. Fan Yiping who helped veteran dissident Wang Xizhe escape from China, was tried secretly on July 21, 1998.

Some dissidents have officially been tried “in public,” but in practice people who wanted to attend were barred from observing. Among the cases that HRIC has reviewed, it is apparent that courts often label proceedings a “public trial” when they are actually *in camera* hearings.

On November 9, 1999, Wu Yilong, Zhu Yufu, Xu Guang and Mao Qingxiang, all CDP members in Zhejiang Province, were tried by the Hangzhou Intermediate People Court. Although the court room’s observation section had the capacity for an audience of more than 70 people, the court only allowed seven family members to observe the trial. Others who wanted to attend were held back by a security cordon three blocks away from the court house by a group of guards. The judge gave no explanation as to why other people, especially the media, were not allowed to observe this “public trial.”

According to officials, Qin Yongmin was tried in public. However, Qin’s brother was reportedly the only non-official person in the courtroom.

Sometimes, even spouses of the defendants have been barred from their “public trials.” The audiences of such trials consist of officials or others who are specially brought in so that the authorities may claim that the proceeding was a “public trial.” Qi Yanchen is a writer who posted a number of articles on the Internet calling for democratic reform in China. He was arrested and charged with the crime of “endangering state security.” The Canzhou District People’s Court of Hebei Province put up a flyer stating that Qi Yanchen would be tried “publicly” on May 30, 2000. Nevertheless, Qi’s wife was not allowed to attend the hearing. Another example is Gao Hongming, a CDP member in Beijing. Only after the trial had already commenced did Gao’s wife receive notice that the trial would be open to the public. Every member of the audience present at Gao’s trial was reportedly an official.

Rebiya Kadeer, a successful Uighur woman entrepreneur in Xinjiang Autonomous Region, was charged with “illegally providing intelligence to individuals overseas.” She was tried on March

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<sup>391</sup> See UDHR, Article 11 and ICCPR, Article 14(1).

<sup>392</sup> See Article 11 and Article 152 of the CPL.

<sup>393</sup> See Supreme People’s Court: Several Rules on Strict Implementation of the Public Trial System (*zuigao renmin fayuan guanyu yange zhixing gongkai shenpan zhidu de ruogan guiding*), issued on March 8, 1999.

10, 2000. Although it was a “public trial,” none of her family members were able to attend. It was reported that only a dozen officials were present and none of them were Uighur.<sup>394</sup>

#### *Defense Curtailed*

Deprived of many of their rights before trial, dissident defendants can only hope for a fair trial. Not surprisingly, defendants find that the atmosphere of the hearing is hostile from the start. Arguments presented by defense lawyers are often ignored by the judges. According to the CPL, every defendant has right to defend himself and should be given a chance to make a final statement. But the majority of dissident defendants are interrupted by the judge in making their final statements or their statements in self defense are cut short to speed up the process.

Lawyers for Zha Jianguo, a Beijing CDP member, complained to the court of second instance that the trial court simply ignored their defense without any explanation. The defense lawyers made a lengthy statement to explain their opinions on both determination of the facts and application of the law. They pointed out that the accusations were not sound, and therefore, should not have been supported by the court. However, according to the lawyers, without explaining its reasoning, the court of first instance bluntly rejected the defense lawyer’s arguments. The court justified this by stating, “The court found that the defense by lawyers was without factual or legal merits, therefore, it was not considered by this court.” No reason was given as to why the judges reached this decision. This case does not appear to be an aberration. For instance, the lawyer representing Rebiya Kadeer was reportedly not even allowed to speak during the trial.<sup>395</sup>

Defendants’ own legal arguments have been even more poorly received by the courts. In most cases, courts have restricted defendants to speaking only on matters raised by prosecutors. If they diverge from this prescription, they risk being promptly cut off by the judges. Many dissidents who have tried to present their own cases have faced such treatment. Xu Wenli prepared for his defense and made his final statement at trial. The judge interrupted him many times, stopped him in the middle of his final statement, and accused him of speaking of “irrelevant matters.”

At trial, Zhu Yufu, a Zhejiang CDP member, was reading his written defense when he was interrupted by the court. He insisted on his right to make a statement; however, the court ordered the guard to take away his written statement without letting him finish reading it. He was accused of “propagandizing against the government” by reading his final statement. The three co-defendants in this case were also prohibited from completing their defense arguments.

#### *No Remedy on Appeal*

In all the cases studied by HRIC, no dissident defendant has ever successfully appealed a conviction or sentence. Many appeals are quickly dismissed. According to the lawyers and scholars we interviewed, cases involving dissidents are usually decided by the local or central Party leadership. As discussed above, it is nearly impossible for courts to overturn a Party decision.

In one case on which we have information, conflicting decisions have been rendered by different authorities. Hua Di, a physicist who worked at Stanford University, was arrested and tried on March 22, 1999. He was sentenced to 15 years in prison on the charge of “leaking state secrets.” However, the Higher People’s Court of Beijing reversed the decision of the first instance court and ordered a retrial on March 16, 2000, stating that the facts were unclear and the evidence was insufficient. Eventually on November 23, 2000, Hua was convicted again and given a ten-year

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<sup>394</sup> World Brief, *Detroit News*, March 12, 2000, p. 9.

<sup>395</sup> *Ibid.*

sentence. His appeal of the second conviction is currently pending.<sup>396</sup> This case sets an unique precedent.

Given the negligible likelihood of reversal, dissidents' right to appeal is essentially meaningless. Some dissidents waive the right simply to protest against the injustice of the system. Qin Yongmin decided not to appeal his conviction, stating that he "disdained" the system that had treated him so unfairly. To our knowledge, this lack of faith in the system is shared by many dissident defendants who have little hope for reversals of their convictions.

In short, dissident defendants are extremely vulnerable in the criminal process. These cases make abundantly clear that in China, political exigency always prevails over due process. Dissidents have virtually no chance of challenging prosecution evidence, let alone of being found not guilty of the charges against them. Unless China changes its policy of discrimination against dissident defendants, it can not be said to truly respect the rule of law.

The following table represents a fraction of the politically-disadvantaged people who have been tried and convicted after the revised CPL came into effect. Many more lesser known individuals have been subjected to the same type of discriminatory process. However, their cases have escaped public attention. Thus the discriminatory implementation of the CPL is much more extensive than the numbers here would indicate.

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<sup>396</sup> See "Stanford Researcher Convicted and Sentenced Again in China," *The New York Times*, Section A, p. 4, February 3, 2001.

**Table 5**  
***Procedural Rights of Dissidents***  
***Under the Revised CPL***

<b>Name</b>	<i>Date of sentence</i>	<i>Sentence</i>	<i>Charges</i>	<i>Pretrial legal advice</i>	<i>Legal representation at trial</i>	<i>Public trial</i>	<i>Self-defense</i>
<b>An Jun</b>	4/19/00	4 years	Inciting subversion of state power	N/A	Legal counsel	Only family members allowed to attend	Interrupted repeatedly by judge
<b>Chen Zeng-xiang</b>	10/20/99	7 years	Leaking state secrets	Denied	No legal counsel	Tried in camera	Interrupted by judge
<b>Chen Zhong-he</b>	7/07/00	7 years	Inciting subversion of state power	N/A	Legal counsel	N/A	N/A
<b>Fang Jue</b>	6/10/99	4 years	Illegally doing business	Denied	Legal counsel	Only sister allowed to attend	Interrupted by judge
<b>Fan Yiping</b>	7/21/98	3 years	Organizing the smuggling of people across the border	N/A	N/A	Tried in camera	N/A
<b>Gao Hong-ming</b>	9/02/99	8 years	Inciting subversion of state power	Denied	Court-appointed legal counsel	Only family members allowed to attend	Interrupted repeatedly by judges
<b>Gao Qin-rong</b>	4/28/99	13 years	Receiving bribes	Denied	N/A	Tried in camera	N/A
<b>Guo Shao-kun</b>	3/24/99	2 years	Disturbing social order	Denied	Legal counsel	Only family members allowed to attend	Interrupted repeatedly by judge
<b>He Zhaohui</b>	8/24/99	10 years	Illegally providing intelligence to people overseas	Denied	N/A	Tried in camera	N/A

<b>Hua Di</b>	11/23/00	10 years	Leaking state secrets	Denied	Legal counsel	Tried in camera	N/A
<b>Huang Qi</b>	2/12/01 (First Hearing)	Second trial pending	Inciting splitting the nation	Denied	Court-appointed legal counsel	Tried in camera	N/A
<b>Jiang Qi-sheng</b>	12/27/00	4 years	Inciting subversion of state power	Denied	Legal counsel	Only wife allowed to attend	Interrupted repeatedly by judge
<b>Rebiya Kadeer</b>	3/10/00	8 years	Illegally providing intelligence to people overseas	Denied	Legal counsel	Tried in camera	Not allowed to represent self
<b>Li Bifeng</b>	8/24/98	7 years	Fraud	Denied	Legal counsel intimidated by officials	N/A	Interrupted by judge
<b>Liao Shihua</b>	12/22/99	3 years	Inciting subversion of state power	Denied	No legal counsel	Tried in camera	Interrupted by judge
<b>Lin Hai</b>	1/20/98	2 years	Inciting subversion of state power	Denied	Court-appointed legal counsel	Tried in camera	N/A
<b>Liu Shizun</b>	2/26/00	6 years	Inciting subversion of state power	Denied	Legal counsel intimidated by officials	Only sister allowed to attend	Interrupted repeatedly by judge
<b>Liu Xianbin</b>	8/06/99	13 years	Inciting subversion of state power	Denied	No legal counsel	Only wife allowed to attend	Interrupted by judge
<b>Liu Xianli</b>	5/10/99	4 years	Inciting subversion of state power	N/A	No legal counsel	Tried in camera	N/A

<b>Mao Qing-xiang</b>	11/09/99	8 years	Inciting subversion of state power	Denied	Court-appointed counsel unwilling to present not guilty plea	Only family members allowed to attend	Interrupted by judge
<b>Qi Yanchen</b>	5/30/00	4 years	Inciting subversion of state power	Denied	N/A	Public, but even family barred	N/A
<b>Qin Yongmin</b>	12/21/98	12 years	Subversion of state power	Denied	No legal counsel	Only brother allowed to attend	Interrupted repeatedly by judge
<b>Tong Shidong</b>	1/03/00	10 years	Inciting subversion of state power	Denied	Legal counsel	Tried in camera	Interrupted by judge
<b>Wang Ce</b>	1/27/00	4 years	Financially assisting others to endanger state security	Denied	No legal counsel	Tried in camera	Interrupted by judge
<b>Wang Wen-jiang</b>	12/06/00	4 years	Inciting subversion of state power	Denied	No legal counsel	Only family members allowed to attend	Interrupted by judge
<b>Wang Youcai</b>	12/21/98	11 years	Subversion of state power	Denied	Court-appointed legal counsel	Tried in camera	Interrupted by judge
<b>Wang Zechen</b>	12/06/00	6 years	Inciting subversion of state power	Denied	Court-appointed legal counsel	Only wife allowed to attend	Interrupted by judge
<b>Wu Yilong</b>	11/09/99	11 years	Inciting subversion of state power	Denied	No legal counsel	Only family members allowed to attend	Interrupted by judge
<b>Xiao Shichang</b>	7/07/00	5 ½ years	Inciting subversion of state power	Denied	No legal counsel	N/A	N/A
<b>Xu Wenli</b>	12/21/98	13 years	Subversion of state	Denied	Court-appointed	Only family	Interrupted repeatedly

			power		legal counsel	members allowed to attend	by judge
<b>Xu Guang</b>	11/09/00	5 years	Inciting subversion of state power	Denied	No legal counsel	N/A	N/A
<b>Yang Tao</b>	1/05/00	4 years	Evasion of taxes	Denied	Lawyer was not notified of date of trial at the first hearing	N/A	N/A
<b>Zha Jianguo</b>	8/02/99	9 years	Inciting subversion of state power	Denied	Court-appointed legal counsel	Only family members allowed to attend	Interrupted by judge
<b>Zhang Shan-guang</b>	12/27/98	10 years	Illegally providing intelligence to people overseas	Denied	Legal counsel	Tried in camera	Interrupted by judge
<b>Zhao Chang-qing</b>	9/98 (no specific date given by official)	3 years	Disturbing social order (family not notified of charges)	Denied	N/A	N/A	N/A
<b>Zhu Yufu</b>	11/09/99	7 years	Inciting subversion of state power	Denied	Court-appointed counsel unwilling to present not guilty plea	Only family members allowed to attend	Interrupted by judge

## VII. International Standards

Article 10 of the Universal Declaration of Human Rights (UDHR) establishes that “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.” The provisions of the UDHR are generally considered declarative of customary international law which is binding upon all nation states. Therefore, China is legally obligated to respect and promote the right to a fair trial for all of its citizens. To make the right to a fair trial truly meaningful, a number of other rights and conditions must also be observed. These are discussed below.

### *Independence of the Judiciary*

Competent, independent and impartial courts are a fundamental component of the right to a fair trial. Despite the enactment of recent reforms, judicial independence in China remains a distant objective rather than a present reality. Firstly, judicial independence presupposes a separation of powers in which the judiciary is institutionally protected from influence or interference from the other branches or powers of government.<sup>397</sup> In China, the Communist Party continues to wield excessive control over judicial affairs through political-legal committees (*zhengfa weiyuanhui*) whose work includes discussing important judicial cases and implementing Party policy on legal issues.

The Basic Principles on the Independence of the Judiciary (hereinafter “Principles on the Judiciary”) establishes some fundamental standards that promote judicial independence. Although not formally binding, these principles are intended to help states act in a manner consistent with universal standards of behavior. For instance, the Principles on the Judiciary instruct that a judiciary can only be independent if it is allowed to “decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.”<sup>398</sup> Chinese courts regularly collaborate with political-legal committees, the police and prosecutors and therefore fall far short of this standard.

China has recently sought to address problems within its judiciary. Unfortunately, these reforms have further weakened prospects for the rule of law in China. For example, the new measure of “holding judges accountable for wrongfully decided cases” (*cuoan zhuijiu zhi*) seeks to hold individual judges personally liable for “wrongfully decided cases,” a category which remains inadequately defined. Significantly, the Principles on the Judiciary state that “judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.”<sup>399</sup>

Like many others in Chinese society, judges lack many basic rights. In the case of judges, however, such violations directly impact judicial independence and the rule of law. The Judges Law, for instance, leaves China’s judges vulnerable to removal from the bench for politically unpopular decisions and/or a range of vaguely defined acts. This may be subject to abuse by the CCP, which already exercises a tight grip upon the judicial system. It also conflicts with the

<sup>397</sup> *What is a Fair Trial? A Basic Guide to Legal Standards and Practice* (hereinafter “Lawyers Committee Guide”) (Lawyers Committee for Human Rights; New York: March 2000), p. 14.

<sup>398</sup> Principle 2 of the Basic Principles on the Independence of the Judiciary (hereinafter “Principles on the Judiciary”), UN General Assembly resolution 40/32, November 29, 1985 and resolution 40/146, December 13, 1985.

<sup>399</sup> *Ibid*, principle 16.



Principles on the Judiciary which reaffirm that members of the judiciary, like other citizens, should be entitled to freedom of expression, belief, association and assembly.<sup>400</sup>

*Right to Legal Counsel*

Universally recognized international standards require that all persons facing a criminal charge, including suspects or defendants, be adequately represented by legal counsel.<sup>401</sup> For instance, Article 14 of the ICCPR requires that all persons “have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing.”<sup>402</sup> Furthermore, the Basic Principles on the Role of Lawyers (hereinafter “Principles on Lawyers”) stipulates:

*All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials.*<sup>403</sup>

More specifically, suspects are entitled to: 1) retain a lawyer upon arrest or upon being charged with a criminal offence;<sup>404</sup> 2) have prompt access to the lawyer of their choosing, usually no later than 48 hours from the time of arrest or detention;<sup>405</sup> and 3) their communications with lawyers should be effected in full confidentiality.<sup>406</sup>

The Principles on Lawyers advises that legal counsel should be ensured the following conditions: 1) they should be able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference;<sup>407</sup> 2) they should not suffer any punishment for any actions taken in accordance with their duties;<sup>408</sup> 3) they should have access to appropriate information, files and documents in the government’s control or possession;<sup>409</sup> and 4) the confidentiality of all communication and consultations with their clients should be respected.<sup>410</sup>

By allowing its public security departments and local procuratorates repeatedly to deny requests for attorney-client meetings, China has failed to “ensure that all persons arrested or detained [...] have prompt access to a lawyer.”<sup>411</sup> By neglecting to protect defense attorneys from arbitrary detention or conviction, China has failed to uphold the guarantee that lawyers “shall not suffer, or be threatened with, prosecution or administrative [...] or other sanctions for any action taken in

<sup>400</sup> *Ibid*, principles 8 and 9.

<sup>401</sup> The Human Rights Committee has stated that “all persons who are arrested must immediately have access to counsel.” (Concluding Observations of the Human Rights Committee, Georgia, UN Doc. CCPR/C/79 Add. 75, April 1, 1997 para 27).

<sup>402</sup> China signed the ICCPR in October 1998, but has not yet ratified the treaty.

<sup>403</sup> Basic Principles on the Role of Lawyers, in *Human Rights: A Compilation of International Instruments*, Vol. I. Passed at the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, August 27-September 7, 1990. U.N.Doc. A/CONF.144/28/Rev.1, p. 119.

<sup>404</sup> *Ibid*, Sections 5 and 6.

<sup>405</sup> *Ibid*, Section 7.

<sup>406</sup> *Ibid*, Section 8.

<sup>407</sup> *Ibid*, Section 16.

<sup>408</sup> *Ibid*.

<sup>409</sup> *Ibid*, Section 21.

<sup>410</sup> *Ibid*, Section 22.

<sup>411</sup> *Ibid*, Section 7. Also, Article 14(3)(b) of the ICCPR .

accordance with recognized professional duties.”<sup>412</sup> By turning a blind eye to the difficulties lawyers currently face in preparing a defense, China overlooks its duty “to ensure lawyers access to appropriate information, files and documents [...] to enable lawyers to provide effective legal assistance to their clients.”<sup>413</sup>

Although the Principles on Lawyers is not formally binding, it reflects widely accepted standards on a critical dimension of the right to a fair trial which is an obligation that China is legally required to uphold.<sup>414</sup> Indeed, the effective assistance of legal counsel obviously affects an individual’s ability to present a defense of criminal charges filed against him. Although the current CPL provides for a greater role for lawyers in the criminal process, the environment in which lawyers work remains highly unsatisfactory according to international norms.

### *Pretrial Detention*

Although the CPL was reformed with a view to eliminating the arbitrary nature of pretrial detention, the practices currently prescribed by the reformed CPL continue to violate international norms covering this issue in a number of ways.

Firstly, pretrial detention remains the rule rather than the exception in China. This is at odds with international standards which state that those awaiting trial should generally not be detained. The ICCPR articulates this general principle in Article 9(3): “It shall not be the general rule that persons awaiting trial shall be detained in custody.” This view is also adopted by the United Nations Standard Minimum Rules for Non-custodial Measures (hereinafter “Tokyo Rules”) which assert, “Pre-trial detention shall be used as a means of last resort in criminal proceedings.”<sup>415</sup> Contrary to these principles, an overwhelming majority of criminal suspects in China are held in detention while awaiting trial.

Chinese officials have sought to justify this situation by arguing that pretrial release, or other measures restricting official power, do not fit the country’s “national special circumstances” (*bu fuhe guoqing*).<sup>416</sup> Further, authorities claim detention is a necessary component of investigation. However, the Human Rights Committee only recognizes a few circumstances that justify detention before trial. These include: detention to prevent flight, interference with evidence, or the recurrence of crime as well as detention to prevent a clear and serious threat to society that cannot otherwise be contained.<sup>417</sup>

As an alternative to detention, the Tokyo Rules advise that a wide range of non-custodial measures be available to individuals subjected to the criminal justice system. China’s CPL only provides for two types of non-custodial detention: “taking a guarantee and awaiting trial” (*qubao houshen*) and “supervised residence” (*jianshi juzhu*). However, both of these measures fail to exemplify the objectives of non-custodial detention. That is, instead of avoiding unnecessary

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<sup>412</sup> *Ibid*, Section 16(c).

<sup>413</sup> *Ibid*, Section 21.

<sup>414</sup> Article 10 of the Universal Declaration of Human Rights (UN General Assembly resolution 217A (III), December 10, 1948 [hereinafter “UDHR”]). The UDHR is generally considered declarative of customary international law which is binding upon states.

<sup>415</sup> Rule 6.1 of the United Nations Standard Minimum Rules for Non-custodial Measures (hereinafter “Tokyo Rules”), General Assembly resolution 45/110, 14 December 1990.

<sup>416</sup> Guo, “On Reform...,” p. 10, see note 135.

<sup>417</sup> *Human Rights and Pre-trial Detention, A Handbook of International Standards relating to Pre-trial Detention, Professional Training Series* (hereinafter “Handbook of International Standards”), No. 3, (United Nations; NY: 1994), p. 14-15.

detention, these measures have actually been used in some cases to hold people in arbitrary detention. For instance, “supervised residence” has been used by authorities in some cases to hold suspects in solitary confinement for up to three years.<sup>418</sup> Additionally, the decision to impose such measures is not subject to review by a judicial authority as required by international authorities.<sup>419</sup> As stated above, the police, the prosecutors and the courts are all independently empowered to apply “taking a guarantee and awaiting trial” and “supervised residence.”

Secondly, the duration of pre-arrest and pretrial detention in China continues to exceed acceptable norms. According to the revised CPL, investigation authorities may criminally detain suspects without approval from the procuratorate for ten days with a possible four-day extension. In some cases,<sup>420</sup> detention is allowed for up to 37 days. This contravenes UDHR Article 3 which guarantees the individual right to liberty and security of person, and Article 9’s prohibition on arbitrary detention.<sup>421</sup> Disregarding CPL guidelines, public security departments have indiscriminately applied the maximum 37 day detention period to all types of cases. CPL time limits on detention are effectively meaningless because officials repeatedly “reset the clock” by changing an individual’s holding status and by consecutively applying different types of detention. In short, pre-arrest detention in China overwhelmingly remains a form of arbitrary detention.

Pretrial detention is similarly problematic. The revised CPL generally limits pretrial detention to two months after arrest. However, a web of loopholes within the CPL allows detention before trial to extend in some cases to more than eight months if not indefinitely. This undermines the guarantee provided in Article 9(3) of the ICCPR that “anyone arrested or detained on a criminal charge...shall be entitled to trial within a reasonable time or to release.” Although “reasonable time” is subject to interpretation, the Human Rights Committee has implied that a six-month limit on pre-trial detention is too long to be compatible with Article 9(3).<sup>422</sup>

As it is practiced in China, pretrial detention is not subject to any form of judicial review, contrary to the recommendations of international law.<sup>423</sup> Article 9(4) of the ICCPR states that “anyone who is deprived of his liberty by arrest or detention shall be 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.” The application and the extension of detention in China remain subject to the discretion of non-judicial officials. There is no judicial oversight of the process<sup>424</sup> and there is no mechanism for detained individuals to challenge the deprivation of their liberty.<sup>425</sup> This system clearly violates the established right to challenge one’s

<sup>418</sup> Members of the Human Rights Committee have advised that “a national system whose only alternative to confinement before trial was supervised release, which was granted only in certain circumstances, and which had no provision for bail, did not conform to the requirements of Article 9(3) of the ICCPR.”

<sup>419</sup> Rule 3.5 of the Tokyo Rules.

<sup>420</sup> Cases involving individuals suspected of committing crimes repeatedly, in conjunction with others, or of roaming around to commit crimes. See discussion of pretrial detention in Section IV.

<sup>421</sup> Article 9 of the UDHR provides: “No one shall be subjected to arbitrary arrest, detention or exile.”

<sup>422</sup> Official Records of the General Assembly, Forty-fourth Session, Supplement No. 40 (A/44/40), vol. I, para. 47 (Democratic Yemen), as cited in *Handbook of International Standards*, para. 85, p. 17, see note 417.

<sup>423</sup> Article 8 of the UDHR provides: “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”

<sup>424</sup> The Tokyo Rules stipulate that: “Decisions on the imposition of non-custodial measures shall be subject to review by a judicial or other competent independent authority.”

<sup>425</sup> Principle 32 of the Principles on Detention provide that “a detained person or his counsel shall be entitled at any time to take proceedings according to domestic law before a judicial or other authority to

detention before a judicial authority.

Finally, various types of administrative detention continue to be practiced in China. These include: “taking-in for questioning” (*liuzhi panwen*), “reeducation through labor,” (hereinafter “RTL”) “solitary confinement for investigation” (*geli shencha*) and “custody and repatriation” (hereinafter “C&R”). Usually initiated by the police, these measures fall outside of judicial control and review. They are applied indiscriminately against specific populations such as migrant workers or corruption suspects. Administrative detention is also frequently abused by officials who seek to circumvent detention time limits or expeditiously punish those whose guilt cannot be proved through normal judicial procedures.

The UN Center for Human Rights (now known as the Office of the High Commissioner for Human Rights) has outlined general guidelines for the application of administrative detention in the event it must be used. These guidelines stipulate that:

*The law which authorizes administrative detention should be formulated specifically, with precise guidelines and criteria as to when detention is appropriate. These criteria should limit detention to persons who pose an extreme and imminent danger to security.*

*All persons arrested under an administrative detention order should be served with a copy of that order, which should clearly indicate the reason they are being detained. Persons detained should have the right to appear in court, with legal counsel, within days after their arrest in order that the court may determine the necessity of continued detention...*<sup>426</sup>

Administrative detention as practiced in China clearly does not meet such standards. The fact that such forms of detention are permitted under Chinese law does not mean that they can be considered as “lawful” under international law. Indeed, types of detention such as RTL and C&R are inherently arbitrary, lacking in proper judicial protections, discriminatory in character and effect and commonly associated with torture and ill-treatment.<sup>427</sup>

#### *Illegally-obtained Evidence*

It is an established international norm that no person shall be compelled to testify against himself or to confess guilt.<sup>428</sup> The right to remain silent and the prohibition on self-incrimination aim to prevent any form of coercion, whether direct or indirect, physical or mental, and whether before or during the trial, that could be used against the accused.<sup>429</sup> The exclusion of evidence obtained by such means is also intended to discourage such acts.<sup>430</sup> As discussed above, the absence of these provisions in Chinese law has led to the widespread use of torture against criminal suspects

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challenge the lawfulness of his detention in order to obtain his release without delay, if it is unlawful.” See note 254 for reference.

<sup>426</sup> *Handbook of International Standards*, p. 43, see note 417.

<sup>427</sup> See *Human Rights in China, Not Welcome at the Party*, see note 2.

<sup>428</sup> Article 14(3)(g) of the ICCPR. See also, Article 8(2)(g) and 8(3) of the American Convention on Human Rights, November 22, 1969; Articles 55(1)(a) and 67(1)(g) of the Statute of the International Criminal Court, approved on July 17, 1998.

<sup>429</sup> *Lawyers Committee Guide*, p. 20, see note 397.

<sup>430</sup> Article 15 of the International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter “ICAT”) provides that “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.” See also, Human Rights Committee General Comment No. 13, April 12, 1984, para. 14.

and defendants.

China ratified the Convention Against Torture in 1988 and is, therefore, legally obligated to uphold its provisions. The foremost obligation is to refrain from engaging in torture which is defined as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining [...] information or a confession, punishing [...] or intimidating or coercing.”<sup>431</sup> Under these provisions, “no exceptional circumstances whatsoever, whether a state of war, or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”<sup>432</sup> In other words, the protection against torture is a non-derogable right that can not be lessened or taken away under any circumstances. China’s use of torture for efficient crime investigation is, therefore, clearly prohibited under law.

Under the Convention Against Torture, China is also obliged to take effective legislative, administrative, judicial and other measures to prevent acts of torture in any territory under its jurisdiction.<sup>433</sup> Practically, this means clarifying ambiguous evidentiary rules that have encouraged the use of torture. More specifically, it means amending current rules and laws to clearly prohibit the admission and use a trial of confessions obtained through torture, as well as other illegally-obtained evidence, in any and all forms.

#### *Discriminatory Application of the CPL*

Article 7 of the UDHR states that “all are equal before the law and are entitled without any discrimination to equal protection of the law.” China clearly violates this principle in its discriminatory application of the CPL. As discussed above, members of certain groups, such as dissidents, are regularly denied a range of rights accorded to other criminal suspects. These include: the right to have one’s family notified;<sup>434</sup> the right to legal counsel;<sup>435</sup> the right to pretrial release;<sup>436</sup> the right to prepare a defense;<sup>437</sup> the right to a public trial;<sup>438</sup> and the right to appeal.<sup>439</sup> Because the guarantee of equal treatment is also provided for in China’s domestic laws,<sup>440</sup> China

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<sup>431</sup> Article 1(1), ICAT.

<sup>432</sup> Article 2(2), ICAT.

<sup>433</sup> Article 2(1), ICAT.

<sup>434</sup> Article 64 of the CPL. See also, Rule 92 of the Standard Minimum Rules for the Treatment of Prisoners (hereinafter “Standard Minimum Rules”) UN Economic and Social Council resolution 663 C (XXIV), July 31, 1957 and resolution 2076 (LXII), May 13, 1966, which states “an untried prisoner shall be allowed to inform immediately his family of his detention and shall be given all reasonable facilities for communicating with his family and friends, and for receiving visits from them...”

<sup>435</sup> Article 14(3)(d) of the ICCPR states “In the determination of any criminal charge against him, everyone shall be entitled [...] in full equality: [...] to defend himself in person or through legal assistance of his own choosing; [...] to have legal assistance assigned to him...”

<sup>436</sup> Article 9(3) of the ICCPR states “...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...”

<sup>437</sup> Article 14(3)(b) of the ICCPR states “In the determination of any criminal charge against him, everyone shall be entitled [...] in full equality: to have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing.”

<sup>438</sup> Article 10 of the UDHR provides “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”

<sup>439</sup> Article 14(5) of the ICCPR provides “Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.”

<sup>440</sup> Article 33 of the Constitution states “All citizens of the People’s Republic of China are equal before the law”; Article 6 of the CPL states, “...The law is equally applicable to all citizens, and no special privilege

is undeniably obligated to remedy this disparate treatment.

#### *The Right to Family Notification*

Article 64 of the CPL provides that families or work units shall be notified within 24 hours of the arrest or detention of an individual. According to this provision, they shall be made aware of the reason for the arrest or detention as well as the location of detention. International standards also uphold this protection. For instance, the Human Rights Committee has indicated that detaining an individual for an extended period of time without allowing them to communicate with family or legal counsel may violate provisions prohibiting torture, inhuman, cruel and degrading treatment.<sup>441</sup> Consequently, the Standard Minimum Rules on the Treatment of Prisoners (hereinafter “Standard Minimum Rules”) provide that “an untried prisoner shall be allowed to inform immediately his family of his detention and shall be given all reasonable facilities for communicating with his family and friends...”<sup>442</sup> If a detainee is moved to another facility his family must be notified of that change.<sup>443</sup> In sum, a detainee cannot be denied the right to communicate with his family “for more than a matter of days.”<sup>444</sup> China clearly flouts these protections by contacting families of dissident defendants weeks or months after their arrest or detention.

#### *The Right to a Public Hearing*

A public trial is an essential element of a fair trial. In practice, a public trial means that information regarding the time and venue of a hearing is publicized and that interested members of the public, including journalists, are permitted to attend. Chinese and international law equally uphold this right which notably belongs to both the individual defendant as well as to the general public.<sup>445</sup>

China, however, has regularly denied this right to certain types of defendants. In cases involving dissidents, officials have relied on the concept of “state secrets” to shield proceedings from public scrutiny. According to international norms, the public may only be excluded from court proceedings under certain circumstances. These include, among other reasons, the preservation of public order or national security.<sup>446</sup> However, the term “public order” has been interpreted in this context to “relate primarily to order within the courtroom” and the term “national security” has been understood to concern the preservation of *military* secrets.<sup>447</sup> “State secrets” is an undefined concept that is regularly abused by Chinese officials. Most cases in China labeled as “involving state secrets” do not, however, have anything to do with military secrets, but relate to the expression of political dissent. Such cases should not be exempt from public hearing.

#### *The Right to Prepare a Defense*

The right to prepare a defense is clearly linked to the right to counsel, discussed above. The right

whatsoever is permissible before the law.”

<sup>441</sup> Human Rights Commission resolution 1997/38 para. 20 stating that “prolonged incommunicado detention may [...] itself constitute a form of cruel, inhuman or degrading treatment” as cited in Lawyers Committee Handbook, fn. 48, p. 10. Provisions against inhuman treatment include Article 7 and Article 10(1) of the ICCPR.

<sup>442</sup> Rule 92 of the Standard Minimum Rules. See also Principle 16 of the Principles on Detention, see note 254.

<sup>443</sup> *Ibid.*

<sup>444</sup> Principle 15 of the Principles on Detention, see note 254.

<sup>445</sup> *Lawyers Committee Guide*, p. 12, see note 397.

<sup>446</sup> Article 14(1) of the ICCPR.

<sup>447</sup> *Lawyers Committee Guide*, p. 13, see note 397.

to prepare and present a defense is established in Article 14(3)(d) of the ICCPR which provides that everyone shall be entitled, in the determination of a criminal charge against him "...to defend himself in person or through legal assistance of his own choosing." This right implies that a defendant's legal counsel will be allowed to provide effective legal assistance, freely exercise his/her professional judgment and advocate in favor of the client.<sup>448</sup> In China, lawyers in sensitive cases are regularly prevented from freely defending their clients. Indeed, many lawyers are so constrained by political pressures that they refuse to present a not guilty defense. Additionally, lawyers and defendants alike are routinely interrupted and/or ignored by the courts.

The ability to defend oneself at trial is further eroded by the insufficient time given for adequate legal preparation. Article 14(3)(b) of the ICCPR provides that everyone is entitled "to have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing." Adequate time and facilities for the preparation of defense applies both to the defendant as well as to his/her legal counsel. In many cases, dissident defendants have had as little as a few days to prepare their defense. Although the definition of "adequate time" depends on the nature of the proceedings including the complexity of the case,<sup>449</sup> the Human Rights Committee has generally found that notice issued three days before the start of a trial gave insufficient time to prepare a defense.<sup>450</sup>

China has clearly applied its domestic law in a discriminatory fashion by withholding a number of rights set forth in the CPL from certain classes of people. Selective application of the CPL effectively renders all its reforms meaningless. Furthermore, it is a violation of both domestic and international law.

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<sup>448</sup> Principle 6 of the Basic Principles on Lawyers. Also, *Lawyers Committee Guide*, p. 18, see note 397.

<sup>449</sup> *Ibid*, p. 16.

<sup>450</sup> *Handbook of International Standards*, para. 165, p. 38 see note 417.

## VIII. Recommendations

Four years after its institution, China's revised Criminal Procedure Law remains seriously deficient in basic protections for the rights of criminal suspects and defendants. Although the 1996 revisions to the CPL brought about some positive changes, China has generally failed to fulfill its promises for greater protection of rights in a number of key areas. Human Rights in China recognizes the difficulties inherent in bringing about extensive reforms to the Chinese legal system, as well as establishing legal norms and a legal culture that protects individual and group rights. Pervasive corruption, for example, is a difficult problem which challenges reform efforts. However, it remains the Chinese government's obligation to address such issues honestly while upholding the letter and spirit of the revised CPL. Many Chinese experts have suggested ways in which this may be done. A number of the following recommendations, including institution of the right to remain silent, the right against self-incrimination and reforms of China's detention practices, take up suggestions voiced by some legal scholars and practitioners within China. HRIC urges the immediate adoption of these recommendations in order to improve protection of the rights of criminal suspects and defendants in China:

### To the Chinese Government:

#### Structural Reforms

- 1. Eliminate the Chinese Communist Party's role in judicial activities:** (a) Local and central CCP committees should be prohibited from playing any role whatsoever in the adjudication of legal cases. (b) CCP political-legal Committees should be abolished. (c) The NPC and its Standing Committee should establish the principle of judicial independence in the Constitution and in national legislation. (d) China should immediately prohibit the CCP from interfering in crime investigation. All CCP powers related to crime investigation, such as detaining and interrogating suspects, should be abolished.
- 2. Strengthen judicial independence:** (a) Judges should be appointed through an established and transparent process. They should have adequate job security and be free from interference from other government branches. No judge should be removable except according to pre-determined procedures and with written explanation. (b) China should abolish the system of Adjudication Committees and allow judges to render decisions independently and strictly according to the law. (c) China should eliminate the intra-court case review system, which impinges upon the autonomy of individual judges, and therefore compromises the impartiality of the judiciary. (d) China's inter-court consultation system should be abolished to further judicial independence and to protect the right to appeal.
- 3. Make the criminal process more transparent:** (a) The right to a public trial should be strictly observed. Practices such as the official selection of public audiences or barring particular groups of people from court proceedings should be eliminated. (b) Revise current practices to guarantee the media access to all stages of the criminal process, including communication with detainees as well as attendance at trial.
- 4. Protect detainees against arbitrary detention:** (a) Establish a procedure such as *habeas corpus* or *amparo* by which anyone deprived of his or her liberty by arrest or detention shall be entitled to institute proceedings before a court, in order that the court may decide



without delay on the lawfulness of the detention and order his or her release if the detention is found to be unlawful. (b) Identify certain specific crimes (the penalties for which are so minor) that pretrial detention would in all cases be inappropriate.

5. **Develop alternatives to detention:** (a) Implement a meaningful bail system that would include an assessment of the defendant (by a body independent of the police and prosecution) and minimum controls to ensure the return of the defendant to stand trial. (b) Develop a supervised release program with several stages of intervention, ranging from release on recognizance to detention. A variety of conditions could be included such as: required presence at a residence except during working hours; required check-ins by telephone or in person on an hourly, daily or weekly schedule; and/or spot checks by officials.

### Procedural Reforms

1. **Ensure all detainees have access to lawyers and family members:** (a) Defendants and suspects should be granted the unconditional right to at least one phone call immediately after being taken into custody. Telephones that detainees can use at low cost should be installed at all places of detention. Officials should not unreasonably limit a detainee's ability to use the telephone. (b) Provide detainees with writing instruments and paper and the opportunity for face to face contact with visitors once or more often per week. Pretrial detainees should not be limited in the number of letters they may send at their own expense. Those who lack funds for postage should have the opportunity to pass letters to visitors as an alternative to posting them. (c) Visits with family members should take place with the minimum restrictions compatible with the good order of the place of detention and the need to avoid destruction of evidence.
2. **Uphold the right to effective legal counsel:** (a) Meeting between lawyers and defendants/suspects should be fully confidential and subject to no unjustified limitation. Limits on the number and duration of attorney-client meetings should be completely abolished. (b) To guarantee a lawyer's effective representation of defendants, Article 38 of the CPL and Article 303 of the CL which relate to the criminal liability of lawyers must be abolished or, at the very least, significantly modified. (c) Lawyers should have the right to access all officially-collected information on the case before trial. (d) China should implement an adequate and fair discovery system.
3. **Uphold the right to prepare and present a defense:** (a) Defendants should be granted adequate time and facilities to prepare a defense. (b) Authorities should be prohibited from deliberately concealing official information from a defendant and his or her legal counsel. (c) China should enforce the CPL's provisions concerning witnesses. All witnesses should be called to trial and subjected to cross-examination. No case should be permitted to proceed without witnesses formally present at trial. (d) The defense should have equal opportunity to make full presentations before the court. Judges should not intervene in statements or presentations by defendants unless intervention is absolutely necessary to maintain court order or assist in a fair trial.

### Legislative Reforms

1. **Strictly enforce the principle of equal protection:** (a) China must ensure that all

citizens are treated equally under the CPL. Discriminatory treatment based upon sex, political, religious, ethnic, or social status should be altogether abolished in the application of the CPL. (b) China should take the necessary legislative steps to ban discriminatory application of the CPL. Legislation should empower the judiciary to conduct a review of cases involving discrimination, rectify discrimination and provide compensation to victims where appropriate.

2. **Revise the CPL to more adequately protect the rights of defendants and suspects:** (a) Revise the CPL to incorporate the right to remain silent and the right against self-incrimination. Article 93 concerning the obligation of defendants or suspects to answer questions by investigation personnel should be abolished. (b) All law enforcement personnel should be legally obligated to notify suspects and defendants of these rights, and failure to do so should carry legal consequences. Failure to observe this right should result in the inadmissibility at trial of any statement or confession obtained from the suspect or defendant.
3. **Revise laws allowing for indefinite pretrial detention:** (a) Revise Article 125 and Article 128 which allow for the indefinite detention of defendants and/or suspects. (b) Enact legal consequences for the violation of such time limits. (c) All confessions or statements resulting from detention exceeding stipulated time limits should be rendered null and void. (d) Individuals detained in contravention of these limits should be given compensation by the state.

## **Training**

1. **Establish training programs on due process principles:** (a) Educate law enforcement authorities, including the police, prosecutors and judges on the principles of due process. Training programs should be implemented throughout the system, from the highest to lowest authorities. (b) In accordance with Article 10 of the Covention Against Torture, ensure that information regarding the prohibition against torture is included in law enforcement personnel training, as well as information about China's obligations under the Convention.
2. **Establish public education programs on due process rights:** Educate the Chinese public about the rights and protections provided for in the 1996 CPL. At a minimum, the public should be informed of: (i) the right to an attorney upon questioning or detention; (ii) the legal time limits on detention; (iii) the right to prepare and present a defense.

## **To the International Community:**

1. International agencies and government aid programs should make strengthening due process rights and the structures that protect these rights a priority in their projects in China. Donors are encouraged to consult a wide range of actors in identifying programs and in conducting initial project assessments, including affected groups and individuals, professionals not involved in the supported program and human rights non-governmental organizations. Furthermore, donors should allocate funding to monitoring of rights protections in the criminal justice system and to advocacy to address the deficiencies that result in rights abuses. Reporting on project impact in these areas should be an established aspect of supported programs.

2. Government delegations visiting China should raise the issue of individual rights in the criminal process, express concern over the discriminatory application of China's CPL and specifically discuss the abrogation of rights for dissident defendants and other politically disadvantaged groups.
3. Foundations and private funding agencies involved in legal exchanges and training programs are encouraged to incorporate human rights issues and concerns into their work, either directly in programs, or in other indirect opportunities and contacts with Chinese legal scholars, government or official bodies.
4. The United Nations Working Group on Arbitrary Detention should conduct a review of the implementation of the CPL's provisions on detention with a view to recommending additional steps China may take to eliminate arbitrary detention.
5. The United Nations High Commissioner for Human Rights should initiate support for legal training programs in China with a view to improving the implementation of the CPL, as it agreed to do in its Memorandum of Understanding with China in November 2000.

**To the Legal Community:**

1. Foreign legal scholars and practitioners visiting or working in China are encouraged to raise the issue of due process rights with their Chinese counterparts and discuss the standards and norms observed in their home countries with a view to sharing information, promoting awareness and facilitating change from within the Chinese legal community.
2. Those involved in law exchange programs with China, such as between law schools or involving visiting law teachers, are encouraged to inform themselves about human rights conditions in China as part of program planning and orientation. Exchange programs and visiting law teachers should incorporate human rights issues and concerns, both in relevant curriculum or program activities and discussions, and in contacts with Chinese legal scholars, students, or government or official bodies.
3. Chinese legal scholars and practitioners are encouraged to continue researching due process issues and advocating for substantive legal change and reform.