

## THE RIGHT TO A FAIR TRIAL IN CHINA: THE CRIMINAL PROCEDURE LAW OF 1996

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*Over a decade ago, the promulgation of the 1996 Criminal Procedure Law drastically improved the criminal justice system in China by introducing some key rights and procedural safeguards for criminal defendants. Unfortunately, in practice many of the rights introduced lacked real substance. The reforms were intended to introduce aspects of the adversarial system of justice to the historically inquisitorial system, however the safeguards introduced lacked the necessary guarantees to ensure compliance and the right to a fair trial is still far from a reality for China's criminal defendants.*

### Introduction

Many of the reforms contained in the 225 articles of China's Criminal Procedure Law of 1996<sup>1</sup> were intended to introduce aspects of the adversarial system of justice to the prevailing system, which although not inquisitorial, *per se*, had the European civil law at its roots. Although the introduction of some important cornerstones of the adversarial system is laudable, the safeguards introduced lack the necessary guarantees to ensure compliance. The National People's Congress Standing Committee (the NPCSC) has scheduled a review of the Criminal Procedure Law of 1996 for this year and reform jurists in China have begun work on draft amendments to the Law. This article is intended to demonstrate the need for China to promulgate amendments to the Law to finally equip criminal defendants with the right to a fair trial. The article focuses on the four cornerstones of the criminal process intended to secure a fair trial: (1) the collection and admissibility of illegally obtained evidence; (2) the duty of disclosure placed on the prosecution and defendant's right to notice of all material evidence; (3) the defendant's right to competent and adequate legal advice and representation; and (4) the presumption of innocence.

### The Collection and Admissibility of Illegally Obtained Evidence

The Chinese leadership has historically been reluctant to provide procedural safeguards for criminal defendants as the general view is that such safeguards may allow the defendant to escape conviction through technical loopholes. This attitude, of not allowing technicalities to stand in the way of convictions, is illustrated by the failure of the Criminal Procedure Law to legislate effectively against the use of illegally obtained evidence in criminal trials.

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<sup>1</sup> 中华人民共和国刑事诉讼法 [Zhonghua Renmin Gongheguo Xingshi Susongfa] Criminal Procedure Law of the People's Republic of China (1996) [hereinafter Criminal Procedure Law].

Article 42 of the Criminal Procedure Law of 1996 provides that all facts that prove the true circumstances of a case shall be in evidence.<sup>2</sup> However, Article 43 forbids the extortion of confessions by torture and collection of evidence by threat, enticement, deceit or other unlawful means.<sup>3</sup> The missing safeguard is that the law fails to provide guidance on the question of admissibility when evidence illegally or improperly collected is challenged. Without direction judges have not felt confident that the Law actually requires them to exclude such evidence, and are reluctant to act with initiative. There have, however, been some steps forward. In April 2005, the Sichuan High People's Court, Procuratorate, and Public Security Bureau issued a "Joint Document Strictly Prohibiting Coerced Confessions Under Torture" which banned the use of illegally obtained evidence.<sup>4</sup> The provincial government also introduced the requirement that interrogations in major cases be taped. Whilst the ban has not been supported by other local governments, there has been some acceptance of the idea that interrogations should be recorded in serious cases, to safeguard against abuse. Further, in early 2006, the Supreme People's Procuratorate (the chief prosecutions office) mandated that by October 1, 2007, all procuratorate interrogations of criminal suspects in job-related crimes such as graft and dereliction of duty will be audio and video taped.<sup>5</sup>

Moves forward such as these, whilst improving conditions for some criminal suspects, are not sufficient to rectify the current imbalance. A uniform legislative directive that all evidence resulting from illegal investigations will be ruled inadmissible at trial must be introduced. If the trial judge is not required by law to consider the exclusion of potentially illegally obtained evidence and no direction is provided on when such evidence must be excluded, there is no real incentive placed on the prosecution not to try to rely on such evidence at trial.

Further, where a conviction is obtained on the back of illegal evidence, an appellate court may rescind the decision of a court of first instance, for violations of litigation procedures that may have hampered the impartiality of a trial<sup>6</sup> but has no power under the Criminal Procedure Law of 1996 to quash a conviction for miscarriage of justice and direct a verdict of acquittal. Where the court finds abuses have occurred, the best a defendant can currently hope for is that the appellate court will remand the case back to the lower court for retrial. Similarly, under Article 204, where a judgment is based on evidence which is later found to have been unreliable there may be ground for trial supervision but a conviction cannot be overturned and execution of judgment cannot be suspended.<sup>7</sup>

While fear that stringent procedural fairness will erode crime control and law enforcement continues to prevail in the PRC, the simple banning of the collection of evidence by illegal means will not be enough to ensure safe convictions. The rights of the defendant to a fair trial will continue to be sacrificed until illegally and improperly

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<sup>2</sup> *Id.* at art. 42.

<sup>3</sup> *Id.* at art. 43.

<sup>4</sup> CONGRESSIONAL-EXECUTIVE COMMISSION ON CHINA, 2006 ANNUAL REPORT fn. 144 (2006) available at <http://www.cecc.gov/pages/annualRpt/annualRpt06/CECCannRpt2006.pdf>.

<sup>5</sup> *Id.* at 58.

<sup>6</sup> Criminal Procedure Law, art. 191.

<sup>7</sup> *Id.* at art. 203.

obtained evidence is routinely challenged and, where legality cannot be established, excluded from admission in court.

The highly publicized 2003 case of Liu Yong, a triad gang leader, demonstrates the determination of the Supreme People's Court to avoid setting a precedent whereby illegally obtained confessions are utilized by the defense to undermine convictions. Liu was found to have been tortured in order to secure his confession and was therefore granted a two year reprieve at the second instance hearing of the Liaoning Higher People's Court. This ruling would most probably have saved him from the death sentence usually imposed for his crimes. However the Supreme People's Court intervened and after conducting an extremely rare third instance hearing into Liu's case, overturned the decision of the lower court. According to Article 10 of the Criminal Procedure Law,<sup>8</sup> the second instance trial is supposed to be the final hearing of the case and the extraordinary step taken by the Supreme People's Court in re-opening the matter for the third time and ordering Liu's immediate execution was an unprecedented one. According to Article 205 of the Criminal Procedure Law, a case can only be re-opened in such a manner where the Court believes there has been some definite error in the determination of the facts or application of the law.<sup>9</sup>

### **Duties of Disclosure**

In the PRC, the Public Security Bureaus and the Procuratorates act to prosecute criminal activity. The Public Security Bureaus investigate crimes, arrest and detain suspects, question witnesses and gather evidence. The Procuratorates approve arrests and prosecutions, conduct the investigation of serious cases,<sup>10</sup> and are responsible for initiating the public prosecution of crimes.

According to Article 96 of the Criminal Procedure Law, at the investigation stage of criminal proceedings a defense lawyer only has the right to be told the name of the offence under investigation.<sup>11</sup> However Article 37 of the Criminal Procedure Law provides that once the matter is handed over to the Procuratorate to assess the strength of the case for prosecution, a defense lawyer may apply to read and copy case files.<sup>12</sup> The law is currently silent as to what, in the interests of fair disclosure, those files should contain. The Supreme People's Procuratorate has construed the article narrowly.<sup>13</sup> Accordingly prosecution policy is to provide only the most formal documents such as the

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<sup>8</sup> *Id.* at art. 10.

<sup>9</sup> *Id.* at art. 205.

<sup>10</sup> These include embezzlement and bribery crimes, dereliction of duty by State functionaries, crimes against human rights (confession by torture, illegal detention, and illegal search) and crimes against democratic rights.

<sup>11</sup> Criminal Procedure Law, at art. 96.

<sup>12</sup> *Id.* at art. 37.

<sup>13</sup> 人民检察院刑事诉讼规则 [Renmin Jianchayuan Xingshi Susong Guize] Supreme People's Procuratorate Rules on the Criminal Process for People's Procuratorates (1998) at art. 319.

detention and arrest notices. Summaries of evidence are generally excluded from any disclosure made.<sup>14</sup>

The Prosecution is not even under a duty to provide any exculpatory evidence to the defense. Without a mandatory duty of disclosure of all relevant materials including exculpatory evidence placed on the Procuratorate, the defendant cannot be said to have had access to a fair trial.

Further, the 1996 Law no longer allows the prosecutor to submit copies of the evidence to the court with the indictment when the case is transferred for trial, as was the practice under the 1979 Law. Now the prosecutor only provides a list of the evidence to be relied upon. The intent of the reform was to stop judges substantially reviewing the case before trial. However, in practice the defense lawyer is now unable to access copies of the prosecution evidence in preparation for trial.<sup>15</sup>

A further difficulty for defense lawyers arises from their recent status beyond “state legal workers” under the Lawyers’ Law of 1996.<sup>16</sup> The enactment of the Law and the creation of the All China Lawyers Association (a self governing professional body) has had adverse, as well as beneficial effects on the profession. As lawyers are no longer working for the government, defense lawyers often find it difficult to effect real cooperation from those government agencies and departments with access to internal documents relevant to the defense case. By contrast the Procuratorate and public security organs have the right to demand materials from individuals and units, under Article 45 of the Criminal Procedure Law.<sup>17</sup>

Article 191 of the Criminal Procedure Law of 1996 provides that an appellate court can rescind the judgment of a trial court where it finds a defendant had his rights under the law restricted to hamper the impartiality of his trial.<sup>18</sup> Where restrictions on access to materials are imposed by the Procuratorate, this article could, theoretically, be exercised to overturn an unfair conviction. In practice this seems unlikely while disclosure remains discretionary. Further, should the defendant successfully demonstrate his trial was not fairly conducted, the best he can currently hope for is a retrial since Article 191 does not allow for acquittal on appeal.

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<sup>14</sup> Jerome A. Cohen, *The Plight of China’s Criminal Defence Lawyers*, 33 HONG KONG L. J. 231, 239 (2003).

<sup>15</sup> Ping Yu, *Glittery Promise vs Dismal Reality: The Role of a Criminal Lawyer in the People’s Republic of China after the 1996 Revision of the Criminal Procedure Law*, 35 VAND. J. TRANSNAT’L L. 827, 847-49 (2002).

<sup>16</sup> 中华人民共和国律师法 [Zhonghua Renmin Gongheguo Lushifa] Lawyer’s Law of the People’s Republic of China (1996).

<sup>17</sup> Criminal Procedure Law, at art. 45.

<sup>18</sup> *Id.* at art. 191.

## **The Right to Competent and Adequate Legal Advice and Representation**

According to Article 125 of the Chinese Constitution<sup>19</sup> and Article 11 of the Criminal Procedure Law of 1996<sup>20</sup> a Chinese citizen has the right to a defense and the courts must enforce that right. However the right to a defense only comes into being once a prosecution is transferred for initiation of trial by the Procuratorate, it does not exist at the investigative stage. There is only a right to retain a lawyer, and not to start building a defense, at the investigative stage, but even the power of retention is withheld until the suspect is interrogated or has become subject to compulsory measures. There are five types of compulsory measures used to deny freedom of movement. These are preemptory writ, bail restrictions, residential surveillance, detention and arrest.

Preemptory writs are used to summon a suspect to appear for investigation. Such a writ may be issued after a suspect has failed to appear for interrogation by the Public Security Bureau. Once the writ has been issued the suspect is subject to immediate interrogation for up to 12 hours. A further writ cannot be issued, but after 12 hours a more severe form of compulsory measure may be taken to continue investigation.

Residential surveillance allows a suspect to be detained in his residence or a designated dwelling place for a maximum of six months. The suspect must seek permission of the Public Security Bureau to leave his residence or to meet with others. Failure to comply with the conditions of surveillance results in the suspect's arrest.

For a suspect to be detained by the Public Security Bureau, he must be suspected of having committed a crime or preparing to commit a crime, or have failed to give his true name and address or be of unknown identity.<sup>21</sup> He should be interrogated within 24 hours of detention. If after interrogation the Public Security Bureau wish to continue detention without arrest, the normal length of time should not exceed 14 days unless the suspect is suspected of having committed crimes in numerous locations or of being a member of a gang, in which case detention can continue for 37 days before arrest.

Once a suspect has been arrested, he may be detained for a period of 2 months although in certain cases the period can be extended to 7 months.<sup>22</sup>

Illegal detention has been an ongoing problem in China. The controversy over the detention of a farmer, Xie Hongwu, from 1974 to 2002, on a warrant issued for counter revolutionary crimes, led to the November 2003 issuance of a joint statement by the Supreme People's Court and the Supreme People's Procuratorate providing that detention of suspects by authorities of suspects without due process could lead to imprisonment of seven years for those officials found responsible.<sup>23</sup> Immediately following this

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<sup>19</sup> 中华人民共和国宪法 [Zhonghua Renmin Gongheguo Xianfa] Constitution of the People's Republic of China (1982) at art. 125.

<sup>20</sup> Criminal Procedure Law, at art. 11.

<sup>21</sup> *Id.* at art. 61.

<sup>22</sup> *Id.* at art. 127-28.

<sup>23</sup> Available at <http://www.lawinfochina.com/dispecontent.asp?db=1&id=3234>

announcement many officials were prosecuted, however by January 2004 the Supreme People's Court was satisfied the problem had been eradicated and announced that all such cases had been resolved. It is noteworthy that the end of 2003 had been stated to be the Court's official goal time for all such retrospective detention cases to be finalized.<sup>24</sup>

Under Article 96 of the Criminal Procedure Law of 1996, only after a suspect has been interrogated by an investigating body for the first time or placed under compulsory measures, may he appoint a lawyer to assist him to secure bail, to make procedural complaints on his behalf and seek details from police of the nature of the crime alleged.<sup>25</sup> In a preliminary version of the bill it was proposed that a suspect would have the right to a lawyer at any time when being questioned or detained by police, however this right was not adopted.<sup>26</sup> The reasoning behind the failure to adopt this right was that in theory, at least, no prosecutor-defendant relationship had yet been formed so during the period of investigation no access to a lawyer was necessary.<sup>27</sup>

Where a case involves state secrets, a lawyer may only be appointed to assist the suspect with the investigating body's permission. The Law, however, does not define "state secrets" and other regulations concerning "state secrets" provide no assistance in defining the concept. The allegation therefore is conveniently used to deny suspects access to a lawyer.<sup>28</sup> In 1998 several bodies including the Legislative Affairs Commission of the Standing Committee of the NPC, and the Supreme People's Court, issued Regulations Concerning Several Problems in the Implementation of the Criminal Procedure Law.<sup>29</sup> These were intended to stop the Public Security Bureaus from defining cases as involving state secrets when they did not. The Regulations issued recommend that access to a lawyer should be granted within 48 hours in most cases and within five days in serious cases.

Of serious concern is the NPCSC's passing of the Public Security Administration Punishment Law which took effect on March 1 2006.<sup>30</sup> This law replaced the 1987 Regulations on Public Security Administration Punishment. It was hoped that the legal working group of the NPCSC might significantly curtail the power of public security organs to impose punishment administratively when the Law was considered. Instead the Law introduced 165 new offenses for which administrative punishments can be imposed. The Law does however limit the period of detention allowed for multiple public security offenses to 20 days and emphasizes the requirement that evidence cannot be collected illegally. However, the public security bureaus, and not the procuratorates or the courts,

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<sup>24</sup> Statement from the Supreme People's Procuratorate website, available at: [www.spp.gov.cn](http://www.spp.gov.cn) (last visited August 14, 2003).

<sup>25</sup> Criminal Procedure Law, at art. 96.

<sup>26</sup> Zhang Yong, *Recent Developments in Chinese Criminal Justice*, 8 ASIA PAC. L. R. 77, 85 (2000).

<sup>27</sup> *Id.*

<sup>28</sup> See Ping Yu, *supra* note 15 at 836.

<sup>29</sup> Article 9 of Regulations on Certain Problems in Implementing the Criminal Procedure Law (promulgated by the Supreme Peoples Court, Supreme Peoples Procuratorate, Ministry of Public Security, Ministry of State Security, Ministry of Justice, and NPC SC Legal System Work Committee, January 19, 1998).

<sup>30</sup> 中华人民共和国治安管理处罚法 [Zhonghua Renmin Gongheguo Zhian Guanli Chufa Fa] Public Security Administration Punishment Law of the People's Republic of China (2006).

retain the right to determine cases and impose penalties such as Re-education through Labor (involving up to four years detention without judicial review) for such vague crimes as holding an undesirable political or religious viewpoint.

While the investigation is ongoing, the lawyer may meet with the suspect for an interview at the discretion of the investigating body and provided an investigator may be present at the interview.<sup>31</sup> A lawyer who meets with a suspect in detention must comply with the rules of the detention house. The investigator who is present at the meeting is usually the person in charge of the investigation in question.<sup>32</sup> The investigator will determine the date, time and place of the meeting. Such a meeting, if allowed, would normally only occur once during the investigation and for a period of no more than 30 minutes,<sup>33</sup> while the investigative process usually takes months and sometimes years to conclude.

Only once the Procuratorate has begun to review the case for prosecution does the suspect have the right to a lawyer to assist with his defense. Only a person who is a minor, physically or mentally disabled, a foreigner, or liable to life imprisonment may secure legal assistance at any earlier stage of proceedings. A person who is a foreigner may also only appoint a Chinese lawyer to act in his defense. On appointment, a lawyer may meet the client held in custody for interview, communicate with him by letter, and collect evidence from witnesses and other bodies, with their consent. However, a victim or his witnesses may not be approached by the defense lawyer, hoping to collect statements or other materials to assist with their case, unless the Procuratorate or the Court and also the witnesses themselves have first agreed. Should the defense lawyer wish to have the victim or other witnesses called to give evidence at the trial, he will need to first seek permission of Court. The defense lawyer may also access the prosecution case files<sup>34</sup>

Since 1996, defense lawyers at trial have been entitled to question witnesses when they are present at the trial,<sup>35</sup> present evidence and argue submissions based on the defense theory of the case. However, despite judges being advised to give defense lawyers a fair hearing, negative attitudes towards criminal lawyers are still common and a lawyer who represents his client too vigorously risks court detention. Article 35 of the Lawyer's Law of 1996 prohibits various forms of misconduct by trial lawyers including the fabrication of evidence.<sup>36</sup> Of even greater concern to lawyers is Article 306 of the Criminal Code. Under Article 306 lawyers may be charged by the Procuratorate with perjury should they insist on presenting evidence contrary to the Prosecution's case.<sup>37</sup> A lawyer who, for example, encourages his client to challenge a coerced confession at trial risks prosecution.

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<sup>31</sup> Criminal Procedure Law, at art. 96.

<sup>32</sup> See Ping Yu, *supra* note 15 at 838.

<sup>33</sup> See Cohen, *supra* note 14 at 237.

<sup>34</sup> Criminal Procedure Law, at art. 37.

<sup>35</sup> Most witnesses are exempted, however, from appearance at the Court even where a lawyer has requested their presence. Further, if a subpoena is issued requiring a witness to attend court there is no penalty for failing to appear. See Ping Yu, *supra* note 15 at 850.

<sup>36</sup> Lawyer's Law, *supra* note 16 at art. 35.

<sup>37</sup> 中华人民共和国刑法 [Zhonghua Renmin Gongheguo Xingfa] Criminal Law of the People's Republic of China (1979) at art. 306.

Dozens of lawyers have been reported detained, harassed and prosecuted under the Code.<sup>38</sup>

In the widely publicized case of Chen Guangcheng, a blind lawyer and activist, the so called “barefoot lawyer”<sup>39</sup> was subjected to repeated beatings and held under detention in his home after he exposed Shandong province authorities forcing late stage abortions on women, in an effort to control the local birth rate. Chen was convicted of intentionally damaging property and organizing a mob to disrupt traffic. He was sentenced to four years and three months imprisonment. Chen’s appointed lawyers, Xu Zhiyong, Li Jinsong and Zhang Lihui, were detained on the eve of Chen’s trial, on the accusation of theft. Xu was beaten and held for 22 hours and only released after the trial had finished. Li and Zhang were released but denied access to the trial. In protest of his lawyers’ treatment Chen refused to speak at his trial. The court stated that Chen’s silence would be taken as an acceptance of the prosecution case. Two court appointed lawyers, appointed an hour before the trial commenced to act for Chen, made no submissions on his behalf.<sup>40</sup>

In another internationally reported case, defense lawyer Ma Guangjun served 210 days imprisonment after being convicted under Article 306 of fabricating evidence. He had produced seven witnesses who supported the alibi defense proffered by his client at a rape trial. After police interrogation, each of the defense witnesses changed their testimony, and in 2003 Ma was prosecuted for fabricating evidence. Only after an investigation by the Inner Mongolia Lawyers Association was Ma’s conviction overturned and his release secured.<sup>41</sup>

As long as lawyers must remain circumspect in presenting their client’s cases to the best of their ability, the criminal defendant will continue to be inadequately represented. With no sanctions for inadequate representation and an added incentive not to upset the court and the public security bureaus with a vigorous defense there can be no guarantee that a defendant will receive a fair trial. There have been repeated motions to the NPC to abolish Article 306 and it is to be hoped that this may finally occur when amendments to the Criminal Law are considered by the NPCSC in August this year.

Even the All China Lawyers Association’s efforts to protect its members have compromised their autonomy. In March 2006 the Association issued a Guiding Opinion on Lawyers Handling Collective Cases.<sup>42</sup> This directive advises lawyers handling sensitive cases or cases involving more than 10 defendants to submit themselves to the guidance of the local judicial administration. Cases involving large numbers of defendants generally relate to class action type challenges made to government policies. Lawyers who act for such groups are often those most in need of external assistance, yet

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<sup>38</sup> See Cohen, *supra* note 14 at 245.

<sup>39</sup> The term is used in China to denote a person who performs the role of a “lawyer” in assisting others but who has no formal legal training.

<sup>40</sup> Josephine Ma, *Four Years in Jail for Blind Activist*, SOUTH CHINA MORNING POST, Aug. 25, 2006.

<sup>41</sup> Jian Fa, *Independence called for Lawyers*, 47 BEIJING REVIEW No. 42, Oct. 21, 2004.

<sup>42</sup> Available at <http://www.chineselawyer.com.cn/pages/2006-5-15/s34852.html>

the Guidance Note provides that contact with foreign organizations and the media is expressly discouraged in such cases. Locally issued guidance notes placing similar restrictions on lawyers' independence have also been issued by justice bureaus in Nantong, Guandong, Henan, Shenyang and Shenzhen.<sup>43</sup>

Such interference in lawyers' work is now deemed necessary as simple harassment has failed to stop lawyers such as Zheng Enchong who acted on behalf of evicted residents against local government in Shanghai. After intimidation tactics failed, Zheng was eventually prosecuted for leaking state secrets to an international human rights group and sentenced to 3 years imprisonment. His licence to practice law was also revoked by the Ministry for Justice.

Reluctance in China to take criminal defense work is further enhanced by the practice of many lawyers in touting themselves as "connection specialists." Lawyers can provide the crucial link between local government and foreign parties wishing to invest in China. By fostering close connections with government, lawyers seek to gain access to privileged policies and internal documents which facilitate the deals of their commercial clients. In also acting for criminal clients, lawyers may place these financially important ties in jeopardy, for little remuneration and great personal risk.

In the 1990s only 20 to 30 percent of persons accused of crimes had legal representation. In China criminal defendants are represented by a wide variety of people. These include not only lawyers but often relatives and work colleagues. China is not without a legal aid scheme; China's first Legal Aid center was launched in Guangzhou in 1995. The introduction of national Legal Aid legislation, in September 2003, has gone further towards ensuring that criminal suspects who cannot afford legal representation have

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<sup>43</sup> Human Rights in China, August, 2006: Setbacks for the Rule of Law: Lawyers under Attack in China (2006), <http://hrichina.org/public/contents/article?revision%5fid=30434&item%5fid=30425#is> (citing the Nantong City Bureau of Justice which issued the *关于进一步加强加强对律师办理重大案件指导工作的意见 Opinion on Further Strengthening the Guidance of Lawyers Handling Major Cases* on February 18, 2004; the Guandong Municipal Bureau of Justice and the Guandong Lawyers Association which issued the *关于加强对律师代理重大群体性敏感案件监督指导的通知 Guiding Supervisory Notice on Strengthening Lawyers' Work in Handling Major Sensitive and Collective Cases* on September 10, 2004; the Henan Provincial Bureau of Justice which issued the *关于加强对律师办理重大、敏感、群体性案件指导监督的意见 Guiding Supervisory Opinion on Strengthening Lawyers' Work in Handling Major Sensitive and Collective Cases* on April 10, 2006; the Shenyang City Bureau of Justice which issued *沈阳市律师承办重大疑难敏感案件请示报告的若干意见 Specific Opinions on Reporting and Requesting Instructions by Lawyers When Handling Important, Difficult, or Sensitive Cases* in April 2006; and the Shenzhen Municipal Bureau of Justice which issued the *深圳市司法局关于律师代理群体性敏感案(事)件管理的暂行规定 Provisional Regulation on Lawyers' Work in Handling Sensitive and Collective Cases* on June 29, 2006).

access to legal assistance. Official Chinese statistics state that about 3 percent of all cases heard by courts in 2005 involved some measure of legal aid.<sup>44</sup>

### **The Presumption of Innocence**

Despite proclamations to the contrary, the Criminal Procedure Law of 1996 does not provide for any formal acceptance of the presumption of innocence. The wording of several articles has been changed from the previous 1979 Law to try to indicate a new acceptance of the presumption. Previously, a person under investigation or undergoing trial was defined as a “criminal” but under the 1996 Law he has become a “suspect” during investigation and a “defendant” at trial. While Article 12 provides that no person is guilty of a crime without the judgment of a People’s Court,<sup>45</sup> Article 162 provides three possible judgments may be handed down by the Court: guilty, proven innocent and insufficient grounds to secure a conviction, therefore deemed innocent.<sup>46</sup> This third verdict stems from the traditional Chinese refusal to acquit a defendant in the event that a conviction cannot be secured for technical reasons. The historical attitude, which still exists under the 1996 law, is that the investigating body finds the “truth” of the case and that the court should accept and verify that finding wherever it can. Article 35 specifically provides that the role of the defense lawyer is to present materials and opinions proving the innocence of his client.<sup>47</sup> In 2005, criminal courts of first instance in China found 844,717 defendants guilty and acquitted only 2,162.<sup>48</sup>

A further reason judges avoid a finding of innocence or insufficient evidence is that under Chinese law, if a judge does not convict the defendant, he must compensate him. A judge who is required to make an order for compensation is considered, by the Judicial Committee overseeing the judiciary, to have handled the trial incompetently. A prosecutor who fails to get a conviction may also be required to compensate the defendant<sup>49</sup> and will face professional repercussions for his inability.

The Procuratorate will not initiate a prosecution without having confidence in gaining a conviction. Previously, under the 1979 Criminal Procedure Law, the courts would adjourn the case and refer the matter back to the Procuratorate for continuous reinvestigation until a conviction could be assured. Under Article 108 of the old law, a trial could not begin until the Collegial Panel (a Panel of experienced judges who would review the evidence pre-trial) were satisfied that the facts of the crime were clear and the evidence sufficient. This procedure naturally drew strong international criticism. Under the 1996 Law, a matter can be adjourned for reinvestigation only twice (and further

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<sup>44</sup> CONGRESSIONAL-EXECUTIVE COMMISSION ON CHINA, 2005 ANNUAL REPORT 30-31 (2005) *available at* <http://www.cecc.gov/pages/annualRpt/annualRpt05/CECCannRpt2005.pdf>.

<sup>45</sup> Criminal Procedure Law, at art. 12.

<sup>46</sup> *Id.* at art. 162.

<sup>47</sup> *Id.* at art. 35.

<sup>48</sup> 最高人民法院工作报告[Zui Gao Renmin Fayuan Gongzuo Baogao] Supreme People’s Court Work Report (Mar. 20, 2006).

<sup>49</sup> 中华人民共和国国家赔偿法 [Zhonghua Renmin Gongheguo Guojia Peichang Fa] State Compensation Law of the People’s Republic of China (1994) at art. 15.

investigation should take no longer than one month) before the defendant can be declared innocent on the basis of insufficient evidence.<sup>50</sup> In reality, where further investigation has been prohibited, the Procuratorate simply changes the criminal case number and begins the investigation again.<sup>51</sup>

As for the right to silence, there is no protection of this fundamental safeguard under the 1996 Law. Article 155 provides that both the public prosecutor and the judge may interrogate the defendant at trial.<sup>52</sup> Conversely, the Prosecution will usually present their entire case through witness statements, without making the victim or other witnesses available for cross examination.

## **Conclusion**

While reforms to the laws of criminal procedure in China have begun to redress the inadequacies of the past, the procedural changes promulgated cannot currently be relied upon to guarantee a fair trial for the defendant. If the system for securing a conviction in China is ever to become truly reliable, a fundamental shift in attitude towards the defendant must be affected. This cannot be achieved without routine challenges to unfair practices and real consequences when those procedures are flouted. The introduction of some key rights is a step in the right direction but further safeguards are necessary to ensure an effective rebalance of China's criminal justice system.

Changes to the law have initiated the pendulum swing from the inquisitorial to the adversarial but reformers still have a long march ahead. Whilst the International Covenant on Civil and Political Rights (ICCPR) requires the exclusion of oral admissions obtained under duress, significant pressure exists from criminal justice institutions to continue to allow the admissibility of illegally obtained evidence and written confessions.<sup>53</sup> The Public Security Bureaus maintain that the 1996 Law has already seriously undermined their ability to investigate crime and to maintain public order. To understand the challenges faced by Criminal Procedure reformists in China the law must be placed in the context of a society which traditionally has valued public order and social stability over the protection of human rights.

In the lead up to China's ratification of the ICCPR, the NPCSC has recently announced it will discuss the amendment of the Criminal Procedure Law this October.<sup>54</sup> To facilitate this discussion the Supreme Peoples' Court and the Supreme Peoples' Procuratorate will deliver reports on improving trial supervision and prosecution and promoting fair justice. It is to be hoped that any amendment to the Law will provide a better framework for synthesizing the concerns of the Chinese government for public order with the improved protection of human rights.

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<sup>50</sup> Criminal Procedure Law, at art. 165(2), 166.

<sup>51</sup> Professor Yang Jianrong, October 2003, International Symposium on Criminal Defense Strategies.

<sup>52</sup> Criminal Procedure Law, at art. 155.

<sup>53</sup> International Covenant on Civil and Political Rights, art. 14(3)(g), G.A. Res. 2200A (XXI), U.N. GAOR, Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

<sup>54</sup> Chinese Congress Web, Timetable for Discussion: China's Laws (Mar. 1, 2007), <http://www.npc.gov.cn/zgrdw/english/news/newsDetail.jsp?id=220105&articleId=358662>.