The 2012 Revision of the Chinese Criminal Procedure Law: (Mostly) Old Wine in New Bottles

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In March 2012,1 after years of debate about criminal justice reform, the National People’s Congress (‘NPC’) of the People’s Republic of China (‘PRC’) passed a revision of the Criminal Procedure Law (‘CPL’). Just over six months earlier, publication of a draft CPL revision proposal sparked intense public debate over some of its controversial provisions during a one-month period of public consultation in September 2011. Now that the debate has largely receded and no longer revolves around influencing the outcome of the legislative process, this Occasional Paper offers an initial assessment of the impact of this 2012 revision, which is scheduled to take effect on 1 January 2013.

The paper focuses on a few key aspects of the CPL revision: compulsory measures (Part I), rules of evidence (Part II), criminal reconciliation (Part III); the death penalty review procedure (Part IV); and the impact of the legislation on criminal defence lawyers (Part V). Other important areas worthy of examination, such as juvenile criminal justice and rules on electronic surveillance, have been reserved for future discussion.

Part I: Compulsory measures

The five compulsory measures set out in the CPL may be divided into two basic types according to the degree to which they affect a person’s personal liberty. ‘Criminal detention’ and ‘arrest’ both involve deprivation of liberty, whereas ‘residential surveillance’ and ‘release on guarantee’ (sometimes translated as ‘bail’) pending further investigation involve restriction of liberty. Of the two restrictions of liberty, the conditions imposed in residential surveillance entail a tighter restriction than does release on guarantee.

The CPL establishes different time limits for each measure reflecting the varying levels of coercion. The normal period of criminal detention is set at three days, at which point police are required to seek approval for arrest from the procuratorate in order to continue holding a suspect in custody. Under “extraordinary circumstances,” that time limit may be extended to seven days. When the detainee is a “major suspect” accused of committing crimes in more than one location, committing offences on multiple occasions, or committing offences in league with others, the time limit for detention may be extended further to 30 days. In practice, however, it has become routine for police to delay request for arrest approval until the maximum 30 days in a wide variety of cases.

Once a request for arrest approval has been submitted, the procuratorate has up to seven days to render its decision. Until the somewhat stricter criteria established in the 2012 CPL, conditions governing the decision on arrest have been of relatively little significance, and approval of arrests was often a mere formality. Nevertheless, based on this extra level of scrutiny, once arrest is approved custody can continue for two months, though the CPL provides for extensions under various circumstances up to seven months.

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2. Criminal summons is excluded from this categorization because of its temporary duration.
3. CPL, Art. 89(1)
4. CPL, Art. 89(2) (1996 CPL Art. 69[2])
5. McConville, pp. 46–51
6. CPL, Art. 89(3) (1996 CPL Art. 69[3])
7. CPL, Art. 79
8. McConville, pp. 54–56
at which point the case would ordinarily need to be referred to prosecutors for indictment.\(^9\)

In contrast to the custodial measures of detention and arrest, the non-custodial measures of release on guarantee and residential surveillance impose longer time limits in exchange for more lenient conditions. Release on guarantee can last for up to one year, during which time the suspect cannot travel outside the city or county of residence.\(^10\) As will be discussed below, the CPL allows residential surveillance to be implemented in two distinct forms, depending on the location where it is being carried out. The ordinary form, as the name suggests, restricts freedom of movement by limiting targets to an area in and about their “domiciles” (zhuchu), during which time they may not leave their place of residence or meet with others without permission from the police unit enforcing the measure.\(^11\) Under certain circumstances, discussed below, residential surveillance may also be carried out in a “designated residence” (zhiding jusuo). Regardless of where residential surveillance is to be carried out, the measure may be imposed for up to six months—considerably longer than detention but shorter than release on guarantee.\(^12\)

**The public debate around ‘coercive measures’ (focus on ‘disappearance clause’)**

At the time that the draft amendment to the Criminal Procedure Law was made public in August 2011, some of its most controversial proposals involved clauses added to provisions governing the coercive measures available to law enforcement agents during the criminal process. Together, these clauses comprised a set of exceptional circumstances under which various forms of police custody could be carried out without obligation to notify a detainee’s family members. Had these provisions been enacted into law, they would have created an extensive dual-track system of detention under which

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9. CPL Art. 154, 156, 157, 160  
10. CPL Art. 69, 77  
12. CPL, Art. 77
rights and protections guaranteed to suspects in the majority of criminal cases could be restricted in cases allegedly involving state security offences, terrorism, or serious corruption. Although many of these exceptions were eventually struck from the amendment submitted for passage by the NPC, serious concerns remain.

The “disappearance clauses” of the CPL revision draft each followed a similar pattern. Upon the imposition of criminal detention, residential surveillance, or formal arrest, authorities would be required to notify family members except “when it is impossible to give notice” or when the case involved certain types of offences and “when notification has the potential to interfere with the investigation.” In the original draft, the exceptional category was defined slightly differently for each measure. For criminal detention and formal arrest, the formulation was expressed ambiguously as “cases involving crimes of endangering state security, terrorist activity, or other serious crimes.” For residential surveillance, the exception was more clearly defined: “cases involving crimes of endangering state security, terrorist activity, or major bribery.”

These provisions became an immediate subject of concern for lawyers, commentators, and other members of the public, who cited potentially “widespread secret arrest” as evidence of expanding police power and a “setback” in legal reform. By contrast, some legal experts challenged this characterization, arguing that, compared to the 1996 CPL—which for detention and arrest waived the notification requirement when notification was impossible or interfered with the investigation, and was completely silent on notification under residential surveillance—discretion to detain people without notification was in

13. 中华人民共和国刑事诉讼法修正案(草案)[Zhonghua Renmin Gongheguo Xingshi Susongfa Xiuzheng’an (cao’an)](Draft) Amendments to the Criminal Procedure Law of the PRC, 30 August 2011, Articles 36, 39. (See now, CPL Arts. 83, 91)
14. Ibid, Article 30. (See now, CPL Art. 73)
fact further restricted by limiting its use only to specific categories of offence.\textsuperscript{16}

These counterarguments did little to allay concerns, and secret arrest remained such a potent source of tension surrounding the legislation that changes were made to a second-reading draft reviewed by the NPC Standing Committee in late December. First, the exception clause was removed entirely from the arrest provision, meaning that investigators would be required to provide the families of all persons formally arrested with the cause and whereabouts within 24 hours, except when such notification was impossible. Second, a rather weak provision was added to the sections covering criminal detention and residential surveillance, to the effect that authorities must immediately notify family members “once the conditions of interfering with the investigation have disappeared.”\textsuperscript{17}

Ultimately, there would be further scaling-back of the “disappearance clauses.” Immediately following the second reading, Professor Chen Guangzhong of the China University of Political Science and Law, an eminent expert of criminal procedure who had been a participant in the early drafting process, commented to a newspaper reporter: “There's nothing frightening about not notifying the family for a 37-day criminal detention, but not notifying the family for a six-month residential surveillance is rather long.”\textsuperscript{18} When the draft amendment to the CPL was submitted to the NPC plenary session, it was revealed that the “disappearance clause” had been struck from the provision on residential surveillance but that it would remain for criminal detention in cases involving endangering state security or terrorism. This in practice means that

\begin{itemize}
  \item \textsuperscript{16} E.g., 陈建利 [Chen Jianli], “樊崇义：刑诉法修订不是历史的倒退” [Fan Chongyi: Xingsufa xiuding bushi lishi de daotui/Fan Chongyi: Revision of the Criminal Procedure Law is not Historical Regression], 南方都市报 [Nanfang dushibao], 11 September 2011, A-die-19.
  \item \textsuperscript{17} For a full discussion of the content of the second draft of the CPL amendment, see “刑事诉讼法修正案草案完成二审”[Xingshi susongfa xiuzheng’an cao’an wancheng ershen/Second Reading of Criminal Procedure Law Draft Amendment Completed], 中國人大 [Zhongguo Renda], 10 February 2012, available at http://www.npc.gov.cn/npc/zgrdzz/2012-02/10/content_1687790.htm (accessed 29 February 2012).
  \item \textsuperscript{18} 陈宝成[Chen Baocheng], “刑诉法修正案草案二审‘秘密逮捕’条款被取消”[Xingsufa xiuzheng’an caoan ershen, ‘mimi daibu’ tiaokuangan bei quxiao/Second Reading of Criminal Procedure Law Draft Amendment, ‘Secret Arrest’ Provision Eliminated], 南方都市报[Nanfang dushibao], 27 December 2011, A05.
\end{itemize}
suspects can be detained in a detention centre for cases involving these offences without notifying anyone for up to 38 days.\textsuperscript{19}

\textit{The ‘disappearance clause’ in its final form}

Critics of the “disappearance clauses” claimed a limited victory,\textsuperscript{20} but even when stripped of the notification exception, the provisions concerning residential surveillance—namely in its “non-residential” form—remain extremely problematic. This “non-residential” or “designated-residence” residential surveillance has been provided for in Article 73(1) of the CPL, which allows investigators to carry out residential surveillance in a place of their choosing “when there is no fixed residence” or “in cases involving offences of endangering state security, terrorism, or extremely serious corruption.” Although this decision requires approval from a higher-level procuratorate or public security organ, in practice such approval has been a mere formality.

The authorities are obligated to notify family members only that their relative has been taken into custody, with no information required regarding whereabouts or suspected charges. Notification may in theory facilitate securing the services of a defence lawyer, a right that is guaranteed to those placed under residential surveillance under Articles 73(3) and 33(2) of the CPL. However, defence lawyers are unlikely to gain easy access to a person under “non-residential” residential surveillance because Article 37(4) gives investigators discretion to withhold approval of lawyer-client meetings in cases involving state security offences, terrorism, or extremely serious corruption—the same categories that serve to define who may be held under this exceptional form of residential surveillance in the first place.

More fundamentally, the circumstances of residential surveillance in a “designated

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\item[19.] 中华人民共和国刑事诉讼法修正案(草案)[Zhonghua Renmin Gongheguo Xingshi Susongfa Xiuzheng'an (caoan)] (Draft) Amendments to the Criminal Procedure Law of the PRC], 8 March 2012, Articles 23 and 28. The maximum period of criminal detention is 30 days, at which point investigators must seek approval for formal arrest from the procuratorate. Decision on arrest must be made within seven days. If arrest is approved, then the authorities are obligated to notify the detainee’s family within 24 hours.
\end{enumerate}
\end{footnotesize}
residence” make it difficult to ensure that rights are protected. There are no regulations governing the conditions of the designated place in which this form of residential surveillance is carried out, other than specifying that it cannot be a “place of detention or place specially designated for handling cases.” The unregulated nature of the custodial environment creates the potential that this exceptional form of residential surveillance becomes an extreme form of *de facto* custodial detention beyond anything experienced in a detention centre, with the isolated nature of the custody creating a perfect environment for physical and psychological abuse. And, in fact, those who have been subjected to the measure describe such things as being guarded closely around the clock by as many as four guards, continuous interrogations and other sleep deprivation, beatings, denial of personal hygiene, threats and humiliation, use of restraints such as handcuffs for days on end, and being forced to sit or kneel in stress positions or confined to bed for extended periods of time. These inhuman and degrading treatments combine to create psychological and physical pressure intended to “soften up” detainees and make them more pliant for interrogation.

The CPL’s legitimization of designated-abode residential surveillance to detain political targets codifies an existing practice that was made possible thanks to vague prior legislation in the 1996 CPL and accompanying regulations. The legislation and commentary surrounding the measure makes quite clear that it was originally presented as an alternative to bail, but its “non-residential” form has evolved into an extraordinary, highly flexible form of *de facto* extended detention. Although lack of transparency in the Chinese law enforcement system makes it impossible to know exactly how frequently

21. CPL, Art. 73(1)
this form of detention has actually been used in relation to other coercive measures, anecdotal evidence suggests an increased frequency of use in recent years.

In its ordinary form, residential surveillance under the 1996 CPL was intended to be carried out by limiting a target’s freedom of movement to the area in and about his or her “domicile” (zhuchu). Designating a residence (zhiding jusuo) for residential surveillance was supposed to be possible only when a suspect has no “lawful domicile” in the city or county where the case is being handled. In practice, however, investigators have used designated residences to carry out residential surveillance even when the suspect possesses a place of residence that must, by any common-sense understanding, be considered “lawful.” The use of residential surveillance by police in Beijing to detain Liu Xiaobo (from December 2008 to June 2009) or Ai Weiwei (from April to June 2011) are perhaps two of the best known examples of this practice.

The ‘disappearance clause’ in the context of the ‘Jasmine Crackdown’

There was a series of relatively high-profile “disappearances” carried out by authorities in early 2011 against lawyers, activists, and bloggers in response to fears of a “jasmine uprising” modelled after the “Arab Spring.” Many of these “disappearances” were carried out in the name of residential surveillance, creating the impression that police in charge of political security have developed a preference for this measure over other forms of detention and helping to inform the negative public reaction aroused by the spectre of “secret arrests” under the then proposed “disappearance clauses” in the CPL.

Residential surveillance has long been recognized as a measure that is unpredictable in its

23. See 杨旺年[Yang Wangnian], “关于监视居住几个问题的探讨”[Guanyu jianshi juzhu jige wenti de tantao/Examination of several issues concerning residential surveillance], 法律科学(西北政法大学学报)[Falü kexue (Xibei Zhengfa Daxue xuebao)]114 (2001): 116–121.
application and impossible to monitor. The wording of the relevant provision in the 1979 CPL was so vague that police investigators routinely employed residential surveillance to hold suspects in guesthouses, detention centres, or makeshift holding cells inside police stations. In 1984 and 1991, the Supreme People’s Court reminded lower courts that carrying out “residential surveillance” in a manner that completely deprived suspects of their liberty was unlawful. Police regulations place some restrictions on the “designated residences” that may be used for residential surveillance, but, in practice, “non-residential” residential surveillance is often clearly a form of total detention even more strict than that carried out in a detention centre. In fact, the CPL even implicitly acknowledges this by for the first time providing, in Article 77, that time served under “designated-location residential surveillance” should be applied against any future penal incarceration—a practice that has heretofore been reserved for time spent in a detention centre.

The many practical problems that surround residential surveillance—and especially its tendency to become a form of “disguised detention” (bianxiang jiya)—led academic legal experts to propose substantial changes to the practice in previous legislative proposals,
ranging from outright abolition to elimination of its non-residential form or at least shortening the length of time under which designated-location residential surveillance could be carried out. But the CPL, instead of taking steps to abolish the measure or place further restrictions in an effort to curb this malignant tendency, actually embraces this flaw as a feature.

Implications for human rights: construction of a dual system?

Residential surveillance thus exhibits a dual nature in the CPL, one whose two sides are difficult to reconcile with one another. On the one hand, there is an effort to make the ordinary form of the measure more operationally attractive in the hope that it, along with an expanded use of release on guarantee, might help to reduce China’s extremely high pre-trial detention rate. On the other hand, the CPL formalizes residential surveillance as a special detention measure for dealing with offenders considered by the authorities to be among the most serious threats to national security. Authorizing such extraordinary detention measures in the name of a measure purportedly intended to reduce reliance on pre-trial custody detracts from the credibility of that effort and gives the authorities too much opportunity to conceal the real nature of their actions.

There are at least three additional problems with using residential surveillance in this way. The first problem is the relatively vague manner in which national security and terrorist offences are defined in China’s Criminal Law and the flexible way in which they are employed in Chinese criminal justice practice. There is thus a real possibility that the extraordinary form of residential surveillance will continue to be used to deal with “speech crimes” or cases involving members of ethnic minorities with tenuous links to

hazy “terrorist” plots.

The second issue involves proportionality. It is unclear that even legitimate threats to China’s national security or public safety necessitate holding a suspect under such a strict regime of detention for a period as extended as six months, especially when one considers that the decision to employ designated-location residential surveillance can be made without any effective outside checks and that limits on information provided to family members and access to lawyers make it essentially impossible to take advantage of even the very weak remedy available to challenge the detention.31

Finally, when the degree, duration, and inability to challenge the abridgment of rights are considered together, this form of residential surveillance raises concern about the extent to which this extraordinary detention serves as a mode of punishment in and of itself, thereby posing a serious challenge to the presumption of innocence that is putatively guaranteed under Chinese law.32

That “non-residential” residential surveillance and waiver of notification of criminal detention in certain cases have been given the imprimatur of “law” makes them no more legitimate in the eyes of international human rights law, which strictly prohibits arbitrary detention and enforced disappearance.33 If China needs a regime of special detention to deal with legitimate threats to its national security and public safety—and that argument has not yet been made convincingly—then such a measure at a minimum ought to be established separately from residential surveillance, its duration should be substantially limited, and it should be subject to strict judicial review. Without this, these various provisions concerning coercive measures weaken considerably the CPL’s express claim to “respect and protect human rights.”

31. Article 36 of the CPL authorizes defence lawyers to “assist with petitions and complaints” and “request changes to coercive measures,” but there is currently no way to challenge a detention directly.
33. Universal Declaration of Human Rights, Article 9; International Covenant on Civil and Political Rights, Article 9; International Convention for the Protection of All Persons from Enforced Disappearances, Article 1.
Part II: Rules of Evidence

Reforming rules of evidence was among the goals of judicial reform spelled out by the Third Five-Years Reform Outline of the People’s Courts. Specific reform measures included introducing rules on verification of evidence, adopting uniform criteria on its admissibility, increasing the presence of live witnesses in court, including investigators and expert witnesses. The most notable step in this direction was taken with the adoption of the Rules Concerning Questions About Examining and Judging Evidence in Death Penalty Cases, and the Rules Concerning Questions About Exclusion of Illegal Evidence in Handling Criminal Cases. The 2012 revision to the Criminal Procedure Law has consolidated rules of evidence, and addressed each one of the points on the reform agenda.

Reforming the evidence regime

The new CPL sets forth the standard of proof required in criminal trials and rules on the burden of proof. It provides specifications on evidence examination, and the exclusion of illegally-obtained evidence. Finally, it tries to ensure the court appearance of witnesses. None of these measures are entirely new. The revision to the CPL has reorganized (systematized) secondary legislation on each one of these matters.

Under the 1996 CPL, the primary standard of proof required to reach a guilty verdict was “sufficient and reliable” (chongfen quesht). The 2012 CPL defines this standard stipulating that each one of the facts determining guilt must be corroborated by evidence;

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34 Article 1(2) 人民法院第三个五年改革纲要(2009-2013)[Renmin fayuan disange wunian gaige gangyao (2009-2013)/Third Five-Year Reform Outline of the People’s Courts (2009-2013)]

35 最高人民法院、最高人民检察院、公安部关于办理死刑案件审查判断证据若干问题的规定[Zuigao Renmin Fayuan, Zuigao Renmin Jianchayuan, Gong'anbu guanyu banli sixing anjian shenchang duexiao zhengju ruogan wentide guiding], 13 June 2010; 最高人民法院、最高人民检察院、公安部关于办理刑事司法程序若干问题的规定[Zuigao Renmin Fayuan, Zuigao Renmin Jianchayuan, Gong'anbu guanyu xingshi jisujianzhu ruogan wentide guiding], 13 June 2010.

36 Article 46, 1996 CPL.
each piece of evidence must be verified through legal procedure; the sum of evidence must establish facts beyond reasonable doubt (heli huaiyi).  The rules on the burden of proof, which existed in jurisprudence as well as judicial practice, have been codified under article 49.

The standard of proof in exclusion cases, not specified by the 2010 Rules, has been set to be the confirmation of or to the impossibility to rule out the use of illegal methods of evidence collection. The draft amendments instead set the standard less narrowly, to “the existence of points of grave doubt”, that could not exclude the possibility of illegal collection. Article 50 has codified the privilege against self-incrimination.

The exclusionary rule has been addressed explicitly. The definition of illegal evidence covers suspects’ and defendant statements obtained through torture; testimonies or victim’s statements obtained through violence, threats or other illegal means, and physical and documentary evidence gathered in violation of investigative procedure.

37 Article 53 CPL.
38 The original draft posed an exception for the crime of possession of property exceeding one’s lawful income, which was later removed from the code, thus responding to the long-standing criticism of the reversal of the burden of proof in these cases. See Article 48, 中华人民共和国刑事诉讼法修正案（草案）[Zhonghua Renmin Gongheguo Xingshi Susongfa Xizheng’an (cao’an)/(Draft) Amendments to the Criminal Procedure Law of the PRC], 30 August 2011. Article 395, 中华人民共和国刑法[Zhonghua Renmin Gongheguo xingfa/Criminal Law of the PRC], 14 March 1997. For a recent critique on the reversal of the burden of proof, see吕萍[Lü Ping], “试论巨额财产来源不明的证明责任”[Shi lun ju'e caichan laiyuan bumingzai de zhengming zeren/Some opinions on the burden of proof in cases of possession of property exceeding one’s legitimate income], 检察日报[Jiancha Ribao], 6 July 2011, at http://www.jcrb.com/procuratorate/theories/academic/201107/t20110706_568258.html.
39 Article 58.
40 Article 57, 中华人民共和国刑事诉讼法修正案（草案）[Zhonghua Renmin Gongheguo Xingshi Susongfa Xizheng’an (cao’an)/(Draft) Amendments to the Criminal Procedure Law of the PRC], 30 August 2011.
42 Article 54.
As in the 2010 Rules, pre-eminent emphasis is still placed on oral evidence, whereas physical and documentary evidence is to be excluded only if the methods of its collection are likely to impact judicial fairness, and only if investigators are unable to add what is missing, correct relevant mistakes or provide a “reasonable explanation”. Congruent with an approach that stresses substantive over procedural justice, the CPL does not adopt the fruits of the poisonous tree doctrine. Therefore, secondary evidence obtained through torture or unlawful searches and seizures is admissible at trial. The Code does not contain specific rules on the admissibility of hearsay evidence, statements by co-defendants, excited utterances, and all other kinds of evidence where admissibility is debated.

The following channels exist to filter illegal evidence, as power to exclude evidence belongs not just to courts, but to public security organs and prosecutors as well.

Public security organs have an obligation to exclude illegal evidence gathered during investigation. Exclusion can take place either at the stage of “cracking a case” (po’an), or at the end of investigation (zhenchazhongjie). Reports detailing the process and outcome of investigation are to be approved by public security bureau directors at or above the district level.43 The director has also the power to approve final summaries of investigation.44 In theory, the directors can refuse to approve either report if they believe evidence to have been collected through torture, threats, inducements deceit or other illegal means,45 because public security organs must gather evidence according to procedures that exclude the use of torture.46 In practice, reports received by public security directors will not mention the use of torture. There are indeed cases when torture can be suspected even on the face of the record. But a compelling need to meet relevant

44 Article 262, supra.
45 Article 54 CPL; Article 51 CPL.
performance indicators, a police culture whereby suspects are presumed guilty, and cases are constructed against the suspect, a code of silence about police torture or even a simple distraction caused by overwork can nullify existing rules.

The same obligation to exclude evidence has been placed on the procuracy. After receiving a police opinion to prosecute, prosecutors should examine and verify evidence, question the criminal suspect and the victim and hear their opinions on investigation. If, having examined evidence gathered by the police, heard investigators and questioned the defendant, prosecutors determine that evidence was obtained illegally, under the draft CPL they could issue a ‘cessation order’ (jiuzheng yijian), or suggest that the case be transferred to a different team of investigators. The latter option has been removed from the CPL, and it is doubtful whether investigators would comply with the cessation order given that it is not binding. The same procedure is to be followed whenever allegations of torture are raised by the defendant, his or her counsel or a third party by reporting a case (bao’an, jubao) or filing a formal accusation (konggao).

Under the 2010 Rules, the defendant or his counsel could file a motion to exclude evidence after receiving the bill of prosecution, during trial proceedings, immediately after the prosecutor’s speech or the court debate. If defendants could provide clues or

47 For instance, in one locality the criminal investigation squad had to ensure that arrest and prosecution would be approved in 90 per cent of the cases filed for investigation. 杨玉章[Yang Yuzhang], 《金水公安改革之路》(Beijing: Renmin Gong’an Daxue chubanshe, 2003): 319.
49 Article 54 CPL.
50 Article 251, 人民检察院刑事诉讼规则(RENMIN JIANCHAYUAN XINGSHI SUSONG GUIZE)/People’s Procuracy regulations on criminal procedure, 18 January 1999.
51 Article 258, supra.
52 Article 55 CPL.
54 Article 5, loc. cit.
evidence about the alleged torture,\textsuperscript{55} and if these were deemed sufficient by the judge, evidence had then to be verified in court before proceedings could continue. Court verification of evidence should have taken place in two stages. The first stage would have seen prosecutors presenting investigative materials and requesting the court to notify those who witnessed the interrogation and/or investigation to provide their testimony. If this evidence was not deemed sufficient to prove the legality of investigation, then the procuracy could have notified interrogators, who could have provided oral\textsuperscript{56} or written testimony.

This situation has in part changed. Under the 1996 Criminal Procedure Law, as amended by the 2010 Rules, no rule explicitly allowed the defendant to file a pre-trial motion to exclude evidence. Under the CPL, the court ‘may’ (\textit{keyi}) decide to hold a pre-trial conference, at which the exclusion of evidence, motions for recusal etc. would be discussed. National level rules on the pre-trial conference are not known to exist yet. However, it is possible that they will be set out by an implementing opinion of the Supreme People’s Court. At the moment of writing, the power to convene the pre-trial conference seems to rest with the court, and the convening of the conference is not mandatory.\textsuperscript{57} The defendant can invoke the exclusionary rule,\textsuperscript{58} but it is not clear when exactly the motion to exclude has to be filed. Verification of evidence should take place through a court debate.\textsuperscript{59} To make the debate more meaningful, measures to increase the presence of live witnesses should be taken. Key witnesses and expert witnesses will have a duty to appear in court under penalty of a maximum of 10 days detention.\textsuperscript{60} Witness protection measures,\textsuperscript{61} and the provision of travel subsidies\textsuperscript{62} are two measures introduced to favour compliance with this duty.

\textsuperscript{55} Article 6, \textit{ibid}.
\textsuperscript{56} Article 7, \textit{ibid}.
\textsuperscript{57} Article 182, CPL.
\textsuperscript{58} Article 56, supra.
\textsuperscript{59} Article 187, 188.
\textsuperscript{60} Article 62.
\textsuperscript{61} Article 63.
This does not mean that the CPL fully embraces the principle of orality. It is still possible for testimonies to be read in court in the absence of witnesses.\footnote{Article 190.} Witnesses are under duty to provide oral testimony only if the content of their written testimony is questioned and their testimony is essential to reach a decision on conviction and sentencing. Similarly, police officers are under a duty to testify only if they \textit{witnessed} criminal conduct by the defendant, and if their written testimony is disputed.\footnote{Article 187.} Generally speaking, investigators do not have a strict obligation to appear in court. They can be subpoenaed only if documentary evidence cannot prove the legality of investigation. This condition may be very difficult to meet in practice, if such documentary evidence includes a written explanation of the legality of investigation.\footnote{Article 54.} Moreover, there is no guarantee that the defendant will be allowed to confront the officer who allegedly carried out the torture because the public prosecutor can request to subpoena either the interrogator, or alternatively another officer (\textit{qita renyuan}), who may or may not have witnessed interrogation.\footnote{Article 57.} Rules concerning witness testimony by police officers put the defence at a disadvantage \textit{vis à vis} the prosecution. A defendant who denies involvement in a crime will be confronted by a police officer who will testify how the defendant engaged in criminal conduct. The defendant, however, cannot enjoy the same right to confront police officers who deny involvement in the crime of torture. This disadvantage has been reinforced by allowing the police to independently introduce their own witnesses to proceedings to which they are not a party.\footnote{Article 57.} In cases when the exclusionary rule is not invoked, but the court harbours doubts about the legality of evidence, proceedings can be adjourned to allow judges to conduct their own investigation.\footnote{Article 191.}

\textbf{Risks}

That the revision to the Criminal Procedure Law has improved the letter of the law is a fact that cannot be denied. However, the mere existence of better procedural rules is not a
sufficient condition to bring about compliance. Mechanisms to circumvent rules of evidence existed in organizational practices, and they still exist in criminal procedure.

Customary practices and activities that occur during the gathering and examination of evidence have not been challenged but further entrenched through their subsumption in the CPL. Neither the exclusionary rule nor the exclusion procedure are new. If the former was largely dormant, it is because exclusionary procedures elaborated by higher people’s courts at least since the mid-1990s sometimes allowed the use of tainted evidence. To cite just one example, courts in Shanghai could use physical evidence obtained through torture to rule out the existence of a forced confession. Empirical research has documented how these and various other mechanisms – which were codified by courts - are actually followed during adjudication. In 2010, some of them were included in the Rules Concerning Questions About Examining and Judging Evidence in Death Penalty Cases, and from there they were transposed in the CPL.

Aside from this, two other factors may further undermine the exclusionary rule. The first is alternative methods of case disposition, as summary procedure and out-of-court mediation (xingshi hejie). Summary procedure is already used in more or less 40 per cent of criminal cases. In the near future, it may become the preferred mean of case disposition, because the CPL has broadened its scope to potentially include most cases.

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69 See Daum, op. cit.
70 Article 7(1), 77(1),
71 McConville et al, op. cit.
72 Such cases were 68.591 (17%) in 1998; 85.565 (18.40%) in 1999; 95.487 (19.88%) in 2000; 129.301 (22.68%) in 2001; 48.289 (8.98%) in 2002; 158.623 (28.27%) in 2003; 206.342 (33.67%) in 2004; 239.723 (36.60%) in 2005; 286.259 (39.99%) in 2006; 267.340 (37.59%) in 2007; 286.259 (38.12%) in 2008; 289.909 (38.66%) in 2009. Figures refer to the number of cases where a prosecutor was present in court. Therefore, the actual figure for cases tried under summary procedure may be higher, as prosecutors may not always be present in court.
73 Articles 208, 209. With the exception of death penalty cases. Even though this is not explicitly stated, Art. 209(4) can be interpreted as referring to them.
Defendants who agree to the use of summary procedure, by entering a guilty plea or a plea of no contest clearly waive their rights to file a motion to exclude, to have evidence displayed in court, to hear and cross-examine witnesses, to challenge evidence introduced by the prosecutor. Not only is cross-examination likely to become a mere formality; the most notorious problems of plea bargaining may soon surface in the Chinese criminal justice system too. Will prosecutors coerce pleas by overcharging defendants, and thus obtain convictions on the basis of weak or even illegal evidence? Will police have fewer incentives to abide by procedural rules on investigation, once they understand that evidence, regardless of how it was collected, will not be tested in court? Will unscrupulous or unenthusiastic lawyers pressure their clients to enter guilty pleas? Structural incentives to each one of these behaviours exist already, as the activity of the police, procuracy and courts is driven by performance indicators, and some lawyers may be driven by profit or self-preservation more than by ethical considerations.

Out-of-court mediation will induce the automatic lifting of each and every procedural guarantee, because by choosing this procedure the accused foregoes the right to a trial. The policies of “combining leniency and severity” (kuanyan xiangji), and “justice for the people” (sifa weimin) have lent legitimacy to alternative dispute resolution in criminal justice. Criminal justice “Confu-talk” however masks a concern about managerial efficiency. The will to ensure speedy processing of cases, cut criminal justice costs, to unburden courts – and ensure compensation thus avoid petitioning - in the case of criminal mediation can encourage a bifurcation of case disposition along lines very similar to those experienced by common and civil law countries alike. Should such an evolution of case disposition continue, in a not-so-distant future those due process rights existing in the CPL may not necessarily be enjoyed in practice by the majority of criminal defendants.

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74 Article 213.
75 Article 208(2).
76 Article 212.
77 Articles 277-279.
A second mechanism allowing bypassing the exclusionary rule is given by rules on the use of evidence collected through technical investigation, and by administrative law enforcement organs. Secret and technical investigation measures are still regulated by non-public departmental rules,79 with the CPL, the Police Law and the National Security Law making mere references to them. Evidence obtained through secret or technical investigation used to be withdrawn from prosecutors and judges, or be displayed to them under a different guise. Enhancing the formal legality of technical investigation has been of extreme importance, in light of the improvements in the evidence regime. The introduction of stricter rules on the admissibility of evidence could have induced the exclusion of all evidence gathered through police informers, undercover agents, eavesdropping, wiretapping, GPS tracking, electronic surveillance, etc. A consequence would have been the impossibility to approve arrests, indict a suspect or even make a finding of guilt whenever evidence obtained through such means could not be accessed or its provenance could not be ascertained. Other than these not insurmountable difficulties, defendants could have appealed against their convictions on ground these were based on evidence collected illegally, which they were not allowed to see or challenge. The inclusion in the CPL of rules on technical investigation rests largely upon these needs.

Technical investigation can be used in investigating allegations of crimes under chapters 1 and 8 of the Criminal Law, besides cases of terrorism, organized crime, drug-related crime “or other criminal cases that gravely harm society”80. Evidence collected through technical or secret investigation can be assessed outside of court by the judge, if it is

79 《刑事侦查工作细则》(Xingshi zhencha gongzuo xize/Detailed rules on the work of criminal investigation), 《刑事特情侦查工作细则》(Xingshi teqing zhencha gongzuo xize/Detailed rules on the work of criminal investigation in special circumstances), 公安部关于技术侦查工作的规定 (Gong’anbu guanyu jishu zhencha gongzuode guanling/Ministry of Public Security regulations on the work of technical investigation), Gong’anbu guanyu jiaqiang gong’an jiguang zhencha gongzuode yijian (Ministry of Public Security opinion on strengthening the work of technical investigation), 缉毒特情工作管理办法(试行) (Jidu teqing gongzuoguanli banfa - (shixing)/Measures on special circumstances in cracking down on drug cases), 公安部关于公安机关在敌对斗争中使用技术侦查手段的规定 (Gong’anbu guanyu gong’an jiguang zai didui douzhengzhong shiyong jishu zhencha shouduande guanling/Ministry of Public Security regulations on the use of technical investigation during the conflict against hostile forces), 狱内侦查工作细则 (yunei zhencha gongzuode xize/Detailed rules on investigation inside of prisons). For a brief discussion of this legislation see俞波涛 [Yu Botao], 秘密侦查问题研究 (Mimi zhancha wenti yanjiu) - Research on the problem of secret investigation) (北京: 中国检察出版社 [Beijing: Zhongguo Jiancha Chubanshe], 2008): 200-214.

80 Article 148.
believed that court examination may prejudice investigators’ personal security or “induce other grave results”. Defendants still enjoy a right to have this evidence displayed in court and to challenge it, but any discussion around evidence may take place *pro forma*, as the judge may have already found in favour of its admission. This problem could potentially affect all cases, as wiretapping and eavesdropping are common investigative techniques.

Evidence gathered by urban management officials, commission for discipline inspection, tax bureaux and other administrative law enforcement organs can be admitted at trial too. The imbalance of power between commission for discipline inspection and courts makes it difficult to believe that evidence produced by a party organ could be meaningfully challenged in court. The last-minute insertion of a trade secret disclosure exemption, obviously inspired by foreign legal models, may place private and foreign companies in the same position of disadvantage as any other suspect or defendant.

**Part III: Criminal Reconciliation**

*Background*

Articles 277 to 279 of the CPL provide statutory basis for a new ‘special procedure’, which allows the alleged victims and criminal suspects/defendants of certain crimes to ‘reconcile’ (*hejie*) to close criminal cases.

Article 277 stipulates the ‘requirements’ and ‘scope’ of cases eligible for this process. It *may* be initiated in suspected crimes under Chapters Four and Five of the Criminal Law arising from what is characterized as ‘disputes among the people’ which could lead to sentences of no more than three years’ imprisonment, and in negligent ‘crimes’ with the potential sentence of no more than seven years’ imprisonment. There is an exception for ‘malfeasance crimes’; and suspects/defendants who committed an intentional crime

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81 Article 152.
82 Article 52.
83 Article 52.
84 Chapter Four of the PRC Criminal Law is about ‘crimes infringing upon citizens’ rights of the person and democratic rights’; Chapter Five is about ‘crimes of property violation’.
within five years prior to the case at hand are excluded from this process.\footnote{Article 277.} In addition, in these cases, the suspect/defendant should have ‘regretted sincerely’ and ‘obtained the victim’s forgiveness through compensation, apology, and other methods’; the law also requires that mediation must be initiated on the basis of the victim’s (not both parties’) voluntariness.\footnote{Ibid.}

Article 278 articulates the public authorities’ role in this process: the Public Security Bureau, the People’s Procuratorate, or the People’s Court should hear the parties’ and other relevant people’s opinions, review the reconciliation with regard to its voluntariness and legitimacy, and produce reconciliation agreements.\footnote{Article 278 CPL.} Article 279 is about the outcomes of this process. It provides that the police may make suggestions on lenient disposal to the People’s Procuratorate; the prosecutor may also make such suggestions to the People’s Court or decide not to prosecute; the judge may give a lenient sentence to the defendant according to the law following a successful criminal reconciliation process.\footnote{Article 279 CPL.}

This revision means that reconciliation, which could only be used in ‘private prosecution (zisu) cases’\footnote{‘Private prosecution (zisu) case’, according to Article 170 of the 1996 CPL and Article 204 of the 2012 CPL, refers to cases ‘to be handled only upon complaint’, cases ‘for which the victims have evidence to prove that those are minor criminal cases’ and ‘cases for which the victims have evidence to prove that the defendants should be investigated for criminal responsibility according to law because their acts have infringed upon the victims’ personal or property rights, whereas, the public security organs or the People's Procuratorates do not investigate the criminal responsibility of the accused’. According to Article 172 of the 1996 CPL and Article 206 of the 2012 CPL, ‘the People’s Court may conduct mediation in a case of private prosecution’. See the translation of the 1996 CPL at http://www.cecc.gov/pages/newLaws/criminalProcedureENG.php} and ‘civil litigation collateral to criminal proceedings (xingshi fudai minshi susong)’\footnote{According to article 77 of the 1996 CPL and article 99 of the 2012 CPL, ‘if a victim has suffered material losses as a result of the defendant’s criminal act, he/she shall have the right to file an incidental civil action during the course of the criminal proceeding’. See the translation of the 1996 CPL at http://www.cecc.gov/pages/newLaws/criminalProcedureENG.php} under the 1996 CPL, is now legally allowed in public prosecution cases.
In fact, even before it was added in the revised CPL as a ‘special procedure’, this procedure, generally called ‘criminal reconciliation’ (xingshi hejie) and referred to as a ‘procedure for reconciliation among the parties in public prosecution cases’, had been widely used by the Public Security Bureau, the People’s Procuratorate and the People’s Court in China. From around 2004, it was practiced in the context of ‘pilot projects’ without clear statutory basis.

In criminal reconciliation, the victim and the suspect/defendant (‘the parties’) are expected to come together during one or more ‘criminal reconciliation meetings’ held and presided over by the official in charge. The official in charge is a police officer, prosecutor, or judge, depending on what stage in the criminal process the case is. During the meeting, it is expected that the parties will be able to sort out their differences through communication and open discussion. If an agreement, which normally involves the suspect/defendant paying compensation to the victim, can be reached, the officials may decide to exempt the suspect from criminal responsibility or reduce the defendant’s punishment. Typically, the official’s final decision to drop charges or give a lenient sentence will be made only after the suspect/defendant has fulfilled his commitment to pay compensation to the victim.

This wide use of ‘criminal reconciliation’ in China benefits from support of the Supreme People’s Procuratorate (SPP) and the Supreme People’s Court (SPC). In the ‘Opinions on Fully Implementing the Criminal Policy of Combining Severity with Leniency’ issued by the SPP in 2006 and the SPC in 2010 (the ‘Opinions’), criminal reconciliation was valued as a mechanism bringing ‘closure’ (an jie shi liao) to criminal cases, in particular in the sense of ‘preventing new petitioning related to judicial cases (she fa shangfang)’91. This

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91 ‘Petitioning’ (shangfang or xinfang) is a system established in the 1950s in China. It refers to a system where a citizen, legal person or any other organization reports facts, submits suggestions, or files complaints to the Xinfang (literally: ‘Letters’ and ‘Visits’) offices, which are established at all levels of administration and in all branches of the Party and State. ‘Petitioning related to judicial cases’ (she fa
is, according to the ‘Opinions’, ultimately helpful for promoting a ‘harmonious society’, a political goal set by the Chinese Communist Party in the fourth plenary session of the 16th National Congress in 2004.

Many Chinese scholars have interpreted criminal reconciliation positively. They have extolled its potential to empower the parties (giving them a certain degree of control over the criminal case), protect the parties’ rights (rights to a ‘voice’ in criminal justice processes and the victim’s rights to compensation), educate and ‘correct’ (jiaozheng) the suspect/defendant, as well as raise the efficiency of the criminal justice system in dealing with criminal cases. Lawyers have also tended to view the availability of criminal reconciliation as favourable to their clients in the sense of getting lenient disposals.

Nevertheless, judging from experience with criminal reconciliation until now, what this process has brought about in practice might be far less attractive than suggested by these scholarly assessments. Despite many positive comments, the practice of criminal reconciliation had also attracted much concern and criticism in China before it was included in the CPL. In general, concerns and criticisms revolved around three issues: the problem of unfairness to economically weak suspects and defendants; the problem of shangfang or she su shangfang) in a broad sense refers to the petitioning that concerns cased handled by the People’s Courts, the People’s Procuratorates and the Public Security Bureaux. In a narrow sense, it only refers to petitioning concerning cases handled by the People’s Courts (In some instances, what petitioners complain about is inaction on the part of these authorities, i.e. they complain that a case has not been handled properly). See: Carl F. Minzner, Xinfang: An Alternative to Formal Chinese Legal Institutions (2006) Vol. 42, Stanford Journal of International Law; 李银芳 [Li Yinfang], 李金富 [Li Jinfu], “涉法上访案件的成因及对策”[She fa shangfang anjian de chengyin ji duice] Reasons and Strategies of Petitioning Related to Judicial Cases http://www.dffy.com/fayanguancha/sh/200409/20040916085512.htm (accessed 8 February 2012)

92 See, e.g. 葛琳 [Ge Lin], 刑事和解研究 [Xingshi hejie yanjiu/Research On Criminal Reconciliation], Beijing, Zhongguo Renmin Gong’an Daxue chubanshe/The Chinese People’s Public Security University Press 2008, 301-302.

93 For example, lawyer Chen Deling based in Jiaxing city in Zhejing province delegating a defendant accused of robbery, rape and murder expressed her strong enthusiasm and appreciation on criminal reconciliation in this case on her blog. According to lawyer Chen, ‘a lighter sentence resulting from prompt compensation and the defendant’s remorse in criminal reconciliation is indeed for the best interests of my client’. See: 陈德玲 [Chen Deling], “死刑案件中举步维艰的刑事和解”[Sixing anjian zhong jubuwellijian de xingshi hejie/The Hard Criminal Reconciliation in Death Penalty Cases] http://blog.sina.com.cn/s/blog_51dd87c10100gkdg.html (accessed 19 March 2012). This was also the view expressed by most of the lawyers attending the seminar held by CRJ in February 2012.
potential power abuses by officials; and the obstacle it may produce for the offender’s re-integration.

**Unfairness to economically weak suspects/defendants**

Perhaps the most serious concern about criminal reconciliation in practice has been that what the parties actually talked about in ‘criminal reconciliation meetings’ was no more than the amount of compensation. In some ‘criminal reconciliation meetings’, the suspect/defendants did not even show up as they were still detained; yet because of an exclusive focus on compensation, this was not viewed by the officials as an obstacle to ‘reconciling’. The ‘criminal reconciliation meeting’ then became a mere bargaining process over the amount of compensation between the parties’ families. Compensation was also the most important, or even the only standard the officials would consider in making decisions for the suspect/defendant. Therefore, some comments on criminal reconciliation were along the lines of ‘if you have money, you will get a lenient sentence; if you are poor, you will go to prison’. Criminal reconciliation programmes have accordingly been criticized as unfair to the poor, since ‘the rich can pay money to avoid punishment’ (yi qian shu xing or pei qian jian xing). Compensation agreed upon in the context of criminal reconciliation has tellingly been called ‘reconciliation fee’ (hejie fei), and criminal reconciliation has been characterized as a ‘trade-off between money and [the victim’] rights’ (quan qian jiaoyi).

Against this background of potentially unfair ‘reconciliations’, resentment in Chinese society about the increasing gap between the rich and powerful on the one hand, and ordinary people on the other, has intensified in recent years. From some recent high-

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95 葛琳[Ge Lin], ibid.
97 李洪江[Li Hongjian], ibid.
profile cases, the public gained the impression that this process and related practices had provided the rich and powerful with unmerited privileges. For instance, in a traffic accident related crime case in 2011, the suspect, a police officer’s son, infamously spat out the sentence ‘I dare you to sue me; my father is Li Gang’ suggesting that he thought he would be exempt from legal liability on account of his father’s power and influence.99

This nearly exclusive focus on compensation in criminal reconciliation has been defended as helping to address a long-standing problem with sentence enforcement, that is, usually decisions in civil litigation collateral to criminal proceedings imposing obligations upon criminal offenders to pay compensation to their victims cannot be enforced.100 By reducing punishment or dropping charges dependent on actually having paid compensation, the argument goes, this process could at least provide financial relief to victims (and/or their families), and thereby eliminate petitioning.101 However, the resolution to existing problems with sentence enforcement should not rely on compromising criminal justice. Reliance on a process that compromises justice, albeit in somewhat different ways from the ordinary criminal justice process, to resolve the problem of enforcing civil judgments can hardly be expected to improve the situation. It may also become an obstacle to addressing the problem of enforcing civil judgments. As noted by many scholars, the main reason leading to the difficulty in enforcing civil judgments is the weakness of the Court, which is largely due to the lack of judicial independence in China.102 This is also recognized as the result of the problematic

100 The proportion of victims who cannot get compensation on their loss in criminal cases is very large in China. For example, the enforcement situation is unsatisfactory even in developed localities such as Guangzhou and Shanghai – less than 30 per cent of the sentences containing compensation obligations can be enforced. See: 盛振宇[Sheng Zhenyu], 黄剑[Huang Jian], 刑事被害人国家救助制度构建[Xingshi beihairen guojia jiuzhu zhidu goujian/the Establishment of the System of State Assistance in Criminal Cases](2009)22, 人民检察[Renmin jiancha/People’s Procuratorate Semimonthly]21.
imposition of execution, which is administrative work, on the People’s Court, which should undertake judicial work only.\textsuperscript{103} Concerns are heightened by the fact that even though neither the rules of the CPL nor the rules and guidelines governing the pre-revision pilot projects allowed it, criminal reconciliation has in practice also been extended to death penalty cases.\textsuperscript{104} Giving the defendant opportunities to avoid the death penalty through criminal reconciliation has been praised as progress China has made in reducing the death penalty under the Party’s policy of ‘killing less, killing cautiously’ (\textit{shao sha, shen sha}).\textsuperscript{105} Nevertheless, if the payment of compensation by the victim can lawfully become a major consideration affecting the judge’s sentence in capital cases, this might reinforce the impression that life could also be ‘bought’ with money, and if you were too poor to afford compensation, you would have to face the death penalty. The support for the availability of this option as expressed by many people, in particular defendants and their lawyers, is understandable considering what a severe criminal justice system they are facing\textsuperscript{106}, and their support might be more the result of this flawed criminal justice system. Yet this goal, while understandable in individual cases, should not blind us to the patent injustice of a system discriminating against suspects/defendants unable to ‘buy themselves off’.

\textit{Potential power abuse and distortion of institutional roles}

\textsuperscript{104} 韩景瑋[Han Jingwei], “河南首次轻判故意杀人者, 法院推出刑事和解制度”[\textit{Henan shouci qingpan guyi sharenzhe, fayuan tuichu xingshi hejie zhidu}A Murderer Had A Lighter Sentence for the First Time in Henan Province, the Court Proposed Criminal Reconciliationon]: http://news.eastday.com/c/20091015/u1a4728228.html (accessed 24 February 2012)
\textsuperscript{105} 冯卫国[Feng Weiguo], “对我国现阶段死刑政策的若干思考”[\textit{Dui woguo xianjieduan sixing zhengce de ruogan sikao}Several Thoughts on The Death Penalty Policies Today]: http://article.chinalawinfo.com/article_print.asp?articleid=25174 (accessed 24 February 2012)
\textsuperscript{106} See, e.g. Dui Hua, a non-profit humanitarian organization, estimates that there are around 4,000 executions of death penalty in China every year. https://sna.etapesty.com/prod/view?emailAsPage.do?databaseId=DuiHuaFoundation&mallingId=22213781&personaRef=11073.0.152691&jobRef=2967.0.31681565&memberId=789166155&erRef=11073.0.152697&key=q2eacaf46787bfeefcaa24cf35264c7 (1 March 2012)
Criminal reconciliation may provide officials with an opportunity to abuse their power, which can lead to violations of the parties’ rights, especially given the fact that officials are themselves under pressure to use this programme. Under the promotion of the SPP and SPC, the successful conducting of criminal reconciliation cases has been made one of the ‘internal assessment criteria’ according to which the People’s Procuratorates/Courts nationwide will be judged, and even annual target quotas have been set for ‘reconciliated’ cases. The assessment criteria are connected directly with the officials’ bonuses and future promotion, decided upon in the annual ‘assessment exercise’ for them.

Under such circumstances, officials have strong incentives to ‘fulfil’ their targets, if necessary by putting pressure on the parties. The author learned in interviews with some parties that when they expressed their reluctance to participate in criminal reconciliation processes, the officials would ‘persuade’ them repeatedly, and seek to use people with influence over the parties such as the parties’ superiors to repeatedly ‘persuade’ them to ‘reconcile’. In this process, the parties were normally informed of the potential adverse outcomes they might encounter if they insisted on a normal criminal trial process. For instance, they might be told that there was little hope of getting compensation for the victim or that there would be a harsh sentence for the suspect/defendant. Therefore, it was extremely hard for them to say ‘no’. This problem is likely to become worse, now that the CPL requires only the victim’s voluntary participation as a precondition of initiating criminal reconciliation. That is to say, under the CPL, the officials may lawfully conduct ‘reconciliation’ even though the suspect/defendant refuses to participate. This is undoubtedly a serious infringement upon the suspect/defendant’s rights. It may be also very hard to reckon on such ‘reconciliation’, namely a process actually based on coercion (by public power), to achieve genuine reconciliation between the parties.

In addition, officials may directly use illegal ways to make the parties ‘reconcile’ and compensate. For instance, a lawyer disclosed that in a death penalty case he had

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107 From the author’s fieldwork and interviews in one People’s Court and four People’s Procuratorates in mainland China in 2008 and 2010.
108 Ibid.
109 Article 277 CPL.
represented, the judge simply kept detaining the defendant to ‘wait for’ any payment of compensation.\textsuperscript{110}

The presiding judge was very actively conducting mediation between the two parties. He had actually implied that as long as my client could compensate, he would not give the death penalty. However, very unfortunately, my client was really too poor to afford that. As a result, no agreement was reached in the first instance trial and my client is still detained at present – the case is now in the second instance trial phase - due to this issue. Yet his current detention has already exceeded the legally prescribed time limits.\textsuperscript{111}

Therefore, it seems that officials have used the existing problems of the Chinese criminal justice system to facilitate conducting criminal reconciliation mainly for ‘fulfilling’ their targets, and this has infringed upon the parties’ rights. To the parties, participation in criminal reconciliation may become a reluctantly ‘chosen’ option under the influence of overwhelming public power and in view of the problems with the normal procedure such as the difficulty of obtaining compensation with Court’s sentence.

Not only the roles of officials but also those of lawyers are potentially changed by ‘criminal reconciliation’ in ways that give rise to concern, as lawyers’ narratives about cases in which mediation and compensation are suggested or actually used to obtain lenient treatment illustrate. One lawyer’s account of criminal reconciliation cases that would qualify for criminal reconciliation reflects how lawyers may view their function and responsibility in this context.\textsuperscript{112}

\textsuperscript{110} From lawyer ‘C’’s talk at the seminar held by CRJ in February 2012.
\textsuperscript{111} According to Article 75 of the 1996 CPL and article 97 of the 2012 CPL, ‘the People’s Court, the People’s Procuratorate, or the Public Security Organ shall release the suspect or defendant when the compulsory measures adopted against him have exceeded the time limit prescribed by law, terminate the period for awaiting trial after obtaining a guarantor or for residential surveillance, or take different compulsory measures according to law’. See the translation of the 1996 CPL at \url{http://www.cecc.gov/pages/newLaws/criminalProcedureENG.php}
\textsuperscript{112} From the author’s interview with a lawyer in mainland China in 2010.
At first, the judge, or prosecutor or police would tell us about the possibility of criminal reconciliation and the benefits of it. After learning about this possibility, normally, we will give our clients suggestions on accepting criminal reconciliation, since I believe it is beneficial for them. The suspect/defendant could get lenient punishment and the victim could get compensation promptly. After all, getting those “concrete” benefits like money or a lighter sentence is much more significant for them, I believe.

Rather than challenging public power, the lawyers acted as ‘go-betweens’ to get their clients to accept the offer of ‘reconciliation’, and this further facilitated the officials’ ‘persuasion’.113 Although it was understandable considering the dilemma the lawyers might meet - the potential adverse results their clients might get if they ‘offended’ the officials and the fact that their clients were indeed hard to get compensation in the normal procedure, this process was an erosion of the adversarial and rights-centred conceptions of justice underlying earlier reform efforts.

Even though the CPL rules in Articles 277-279 do not allow for the use of criminal reconciliation in very serious cases, anecdotal evidence and an apparently widely shared perception among lawyers suggest that in effect, similar techniques are used in some of those cases. In yet another case potentially resulting in a death sentence, concerns about abuse and distorted roles were accordingly heightened.114

In a serious murder case, in which the defendant killed the victim soon after his release from twelve years’ imprisonment due to robbery, the defendant’s family proposed to pay one hundred thousand Yuan as compensation for reconciliation. The victim’s family did not want to take this offer at first and consulted with me. I told them that even though they did not take this offer, very likely, the defendant would still get a suspended sentence, yet it was impossible for them to get any compensation with the Court’s sentence. The victim’s family considered my

113 Ibid.
114 From lawyer ‘D’’s talk at the seminar held by CRJ in February 2012.
advice and finally agreed to reconcile and got the one hundred thousand Yuan. Nevertheless, because of this successful reconciliation, the defendant was sentenced very leniently with 15 years’ imprisonment. This upset the victim’s family very much, so that I had to try very hard to comfort them by telling them that 15 years is pretty much the same thing as a suspended death penalty sentence.

An obstacle to the offender’s reintegration

It follows from the above discussion that it is hard to rely on the criminal reconciliation process, which focuses on bargaining over compensation and offers so many opportunities for power abuses, to educate or ‘correct’ the suspect/defendant. Even though in some cases, especially those involving juvenile suspects/defendants, the officials holding and presiding over criminal reconciliation meetings have the idea of education and correction, this process may hurt the suspects/defendants more than it can help them.

Empirical research and widely available public reports extolling the virtues of this practice show that officials are inclined to make criminal reconciliation meetings public in order to ‘popularize laws’ and ‘educate the suspect/defendant as well as the public’. However, this is reminiscent of ‘public trial (gongshen) meetings’ and ‘public sentencing (gongpan) rallies’, which have long been criticized as infringing upon the defendant’s rights. This would very likely obstruct the juvenile offender’s correction and reintegration into society as it would result in stigmatization and labelling of the suspect/defendant subjected to such a process.

Conclusion

115 From the author’s interviews with the officials and the parties who participated in criminal reconciliation programmes in three selected locations in mainland China in 2008 and 2010. See also e.g. it was reported that in Xuzhou in Jiangsu province, Prosecutor Ming held meetings attended by the juvenile offender, members of the People’s Congress, the offender’s teachers and parents. 许驰[Xu Chi], 刘晓晗[Liu Xiaohan], “明广超:点亮失足少年心中的灯”[Ming Guangchao: dianliang shizu shaonian xinzhong de deng/Ming Guangchao: Lighting Up the Light in Juvenile Delinquent’s Heart]: http://js.jcrb.com/rwgs/201010/t20101014_454600.shtml (accessed 19 March 2012)
While a process based on unfairness and rights violation may temporarily suppress visible conflicts, it cannot bring ‘harmony’ as criminal justice is intended to do. Empirical study suggests that even though the case is closed and the compensation agreement is enforced, conflicts may continue to exist and the parties may still feel angry, hurt, or unsatisfied, and it may trigger out more contradictions in society. Confirming and codifying criminal reconciliation in the CPL, as well as regularly using reconciliation to resolve cases is one of the several signs that the Chinese judicial system is increasingly deviating from its Post-Mao Zedong liberal reforms. As a popular saying reads, the goal of the Chinese judiciary today has become ‘sealing a deal means stability; suppressing disputes means showing capability; covering up affairs means competence’ (“搞定就是稳定，摆平就是水平，没事就是本事”).116

Part IV: Influence of the CPL revision on the death penalty review procedure

1. Changes in the death penalty review procedure under the 2012 CPL

Only four provisions concerning the death penalty review procedure were contained in the 1996 Criminal Procedure Law (Articles 199-202). The 2012 revision has added two provisions so that there are now altogether six (Articles 235-240).117 The content of the revision concerns three aspects: one is the manner in which the Supreme People’s Court’s handles the review of death penalty cases, the second is the criminal defence’s participation in death penalty review, and the third is supervision of death penalty review process by the Supreme People’s Procuratorate. Compared to the changes concerning compulsory measures [in the investigation stage] or the law of evidence, the scope of revision [with regard to death penalty review’ is rather small. Below, the impact of each of these new provisions on the practice of death penalty review is discussed separately.

117 Two additional conditions in Articles 239 and 240.
(a) On the method of handling death penalty reviews by the Supreme People’s Court (SPC)

The new CPL stipulates: ‘When the Supreme People’s Court reviews a death penalty case, it shall decide whether or not it approves the death sentence. Where it disapproves, it may remand the case for a new trial or change the sentence.’ Apart from the rule that the SPC can alter the decision under review, other options mentioned here were already part of the Court’s practice.118

Prior to the present revision of the CPL, the SPC was allowed directly to change the decision under review only in two kinds of situation. Firstly, when a person had been given the death penalty for two or more crimes and the SPC found that, though the [lower court’s] finding of fact in the case was correct, the law did not warrant the death penalty for part of the crimes, it could change this decision, approving the death penalty for the other crimes. Secondly, in cases with two or more defendants, where the SPC found that the [the lower court’s] finding of fact in the case was correct but the death penalty was not warranted by law with regard to some of the defendants, it could change the decision [for those defendants] and approve the death penalty for those other defendants who should be sentenced to death.119

In the first of the two aforementioned situations, there would be no change to the result of the original decision and merely a change concerning part of the crimes [for which the

118 A responsible person from the Third Division of the SPC said that the SPC has now exercised its unified/concentrated power of death penalty review for over five years and that to a large extent the revisions of death penalty review procedure were a reflection and summing-up of five years of adjudication practice by the SPC. See 周斌 [Zhou Bin], “我国死刑复核案件提讯率达九成”[Woguo sixing fuhe anjian tishenlü da jiucheng/China’s interview rate in death penalty review cases reaches 90%], 法制日报 [Fazhi ribao/Legal Daily] 23 March 2012, p. 5. [Trans. NB: Citation changed to reflect print version of same article.]

119《最高人民法院关于复核死刑案件若干问题的规定》[Zuigao renmin fayuan guanyu fuhe sixing anjian ruogan wenti de guiding/SPC Regulation on Handling Death Penalty Review Cases], implemented since 28 February 2007, Articles 6,7.
death penalty was incurred]. In the second situation, the SPC could [indeed] change the death sentences of a portion of the defendants in a case involving multiple defendants.

This led to the following problem: in cases where there was only one defendant and where the SPC found that ‘the [lower court’s] finding of fact in the case was correct but the law did not warrant the death penalty,’ it could not directly change the decision. In death penalty cases in which the facts were unclear or the evidence insufficient, the SPC could not directly acquit the defendant(s) but could only remand the case to be retried. The 2012 revision has now clarified that the SPC can change the decision under review in all cases of death penalty review. This should count as progress. ‘Past judicial interpretations ruled that in cases of death penalty review, the SPC could not change the death sentence but could only, after rejecting application of the death penalty, pass responsibility for changing the decision on to the provincial-level court and the provincial-level court could then remand the case to be re-tried by the intermediate-level court. This led to some cases in which, though there remained doubts [as to the culpability of the defendant(s)] or a heavy sentenced should not have been given at all, the matter was disposed of by passing a death penalty “with reprieve” sentence or a sentence of life imprisonment. This was not conducive to adherence to the principle of acquitting in cases of doubt.’120 In accordance with the standards for assessing evidence in the CPL, the sentence ought to be changed to acquittal in all cases in which the evidence is insufficient or in which there is no evidence at all. Yet because the SPC could not directly change the decision, it could only remand the case to the local-level courts for retrial. Moreover, under the current criminal justice system, the obstacles to acquittal by local courts in such cases are very great. Firstly, the original decision to pass the death sentence very likely had undergone discussion by the [court’s] adjudication committee or even the [local] party committee’s political-legal committee [before being handed down] and, hence, for them to acquit now would be like administering a slap in their own faces. Secondly, an acquittal [in such a case] would trigger application of the systems for

120 张媛[Zhang Yuan], “把好死刑案件最后一道关口”[Bahao sixing anjian zuihou yidao guankou/Guard well the final gate in death penalty cases], 法制日报Fazhi ribao/Legal Daily, 2 December 2012, p. 3. [Trans. NB: Citation changed to reflect print version of same article.]
pursuing responsibility and state compensation in cases of wrongful conviction; and the officials from the police, procuracy and court involved would be negatively affected in terms of such things as their professional advancement and bonuses.\textsuperscript{121} Acquittals by the courts are extremely rare, and a change from an original death penalty sentence to an acquittal is truly ‘harder than climbing the sky.’ Moreover, it is very possible for such cases to involve criminal behaviour by [law-enforcement] personnel who handled the case; this further increases the difficulty of changing [the decision] to an acquittal. For instance, the personnel who handled the case may have perpetrated the crime of torture, the crime of violent extraction of evidence or the crime of misusing the law in adjudication.\textsuperscript{122} Lastly, in death penalty cases—especially in cases of homicide, rape and similarly vicious crimes—the police officers handling the case are on the one hand under enormous pressure to solve the case [po’an]. On the other, the moment they have solved it, those who have contributed to this success or their superiors will be ‘rewarded for meritorious service’ or even be promoted. This further increases the difficulty of correcting wrongful convictions. Apart from this, there are also [premature] media reporting [about ‘solved’ criminal cases], and the appropriation or use for own purposes of money or goods [allegedly] obtained in illicit ways.\textsuperscript{123} At their root, many death-

\textsuperscript{121} See for a discussion on the system of performance evaluation criteria McConville, Mike et al. (2011), China’s Criminal Justice: An Empirical Enquiry (Cheltenham and Northampton, Mass., 2011).

\textsuperscript{122} PRC Criminal Law Articles 247, 399.

\textsuperscript{123} As a reference, see 陈瑞华[Chen Ruihua], 留有余地的判决[Liuyou yudi de shenpan/Flexible verdicts: A type of judicial verdict that is worthy of reflection], 法学论坛[Faxue luntan/Legal Forum], 2010 no. 4, pp. 26-32, in which the author analyzes the external factors that have caused major cases of wrongful convictions. First, the public security organs will even before the court has announced a guilty verdict give ‘awards for meritorious service’ to those who performed with merit in solving cases, and this will be accompanied by public media coverage and propaganda (publicity?). Some local public security authorities hold so-called ‘public arrest rallies,’ in which they demonise the arrested and create facts that support an assumption of guilt. As a result, even if the procuracy or court discover that the facts of a case are unclear and evidence is insufficient, it is hard to challenge the assessment of the public security organs. Second, even before a judicial decision has become effective, the public security organs, procuracy and courts will already deal with any illicitly gained money or goods [taken in the process of crime investigation], either directly giving such money or goods to the financial department, setting their value off against the costs of handling the case, or else appropriating or using them for their own purposes. The third is that during annual year-end performance appraisals, the results of how the subsequent department [in the process] handle a case will be used to evaluate the performance of the earlier department’s personnel involved in the case. For example, the rate and number of arrests approved by the procuracy’s investigation oversight department is used as a standard in evaluating [police] investigators; the prosecuting department’s non-prosecution rate is used as a standard in evaluating investigators and arrest-approving personnel; the courts’ conviction rate is used as a standard in evaluating investigators, arrest-approving personnel and prosecutors; a higher court’s rate of remand for change of decision and decision-change rate are used as an
penalty cases are the result of torture, all of the key evidence has been fabricated and there may be countless flaws [in the case]. Yet under the influence of all of the aforementioned factors, in cases that have been remanded by the SPC due to non-approval [of the death penalty] for retrial, local-level courts just change the sentence, without providing any reasons, to death penalty ‘with reprieve’ or lifelong imprisonment—thereby dodging the death penalty review procedure. The unfortunate defendant is made the scapegoat and locked up in prison for a long term, and it is hard for him to obtain redress for this injustice. For instance, in the case of Yan Fufeng (闫福峰) in Xingtai (邢台), Hebei Province, the Xingtai City Intermediate People’s Court and the Hebei Province High People’s Court issued four consecutive death sentences in the course of eight years. In April 2008, the SPC decided not to approve the death penalty due to unclear facts and insufficient evidence in six aspects. Afterwards, the Xingtai City Intermediate People’s Court, without providing any new evidence or any new reasons, found in its decision that ‘the defendant Yan Fufeng should be sentenced to death, but in consideration of the specific situation in this case, non-immediate execution of the death sentence is allowed’—using terse phrase ‘in consideration of the specific situation in this case’ to dismiss all the doubts. In legal practice this is quite common. In this respect, the 2012 CPL’s provision giving power to the SPC to change decisions directly will be conducive to correcting this way of ‘when in doubt, change a death sentence to death “with reprieve”.’ But since adjudication is still not independent and the overall structure of administration-style adjudication has not been changed; since there

important standard in evaluating lower-court judges; and so on. The fourth is the state compensation system, which determines the so-called ‘authority obligated to pay compensation.’ This means that [the existence of] effective court decisions will be a major factor determining whether or not public security organs are deemed to have made wrongful detentions, whether procuratorial authorities are deemed to have made wrongful arrests and even whether or not lower-instance courts are deemed to have made ‘wrongful conviction decisions.’ A court acquittal will cause the public security and procuratorial authorities to assume state liability and may even mean that a police officer or procurator involved in handling the case will face ‘follow-up investigation into their responsibility’ and ‘being held responsible for a wrongful case.’

124 See 北京兴善研究所(CADP), 《中国死刑观察报告》[Zhongguo sixing guancha baogao/Survey report on the death penalty in China], forthcoming, expected 2012 (on file with author).

125 C. 范承刚[Fan Chenggang], “案情有疑点，判个死缓算了”[Anqing you yidian, pan ge sihuan suanle/If there are doubts about the case, just give a death penalty with reprieve sentence], 南方周末[Nanfang Zhoumo] 13 October 2011, p. 3.
has been no change in the aforementioned factors influencing the result in the adjudication of such cases, and no change in officialdom’s customary ways of influencing the review of death penalty cases by the SPC via ‘connections’ and ‘hidden rules’; and since the judicial culture in which officials mutually protect each other, would rather commit injustice than approve a release, and spare each other’s feelings, a big question mark remains with regard to whether the SPC will be able to judge cases strictly on the basis of the law and the evidence acquit in cases where the original death-penalty conviction was unsafe. Yet at least in cases where originally the death penalty with reprieve or lifelong imprisonment should have been given instead of a death sentence with immediate execution, the SPC may directly change the decision and need not remand the case for retrial [under the 2012 CPL].

A change of the decision by the SPC in death penalty cases is a classic example of the administration of justice and ought therefore to be characterised by things like openness, transparency, participation from different sides, directness of experience, and the exchange of arguments. Yet if there is no court hearing and merely an on-paper re-examination, this is contrary to legal principle. So, should the SPC hold public hearings when reviewing death penalty cases? This is something that legal academia has hoped to see for a long time, and many scholars have called for a three-instance trial system in death penalty cases to turn the death penalty review procedure into a form of court litigation. The drafts for the CPL revision showed some traces of these ideas. The revision draft at one point stated: ‘in cases when it does not approve the application of the

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126 滕彪[Teng Biao], “司法”的变迁[“Sifa” de bianqian/Transitions in administration of justice], 中外法学[Zhongwai faxue/Peking University Law Journal], 2002 no. 6. [Trans NB: Electronic version not available, so page numbers not immediately available].

127 陈卫东[Chen Weidong], 刘计划[Liu Jihua], 死刑案件实行三审终审制的构想[Sixing anjian shixing sanshen zhongshenzhi gaizao de gouxiang/Tentative thoughts on introducing a three-instance system in death penalty cases], 现代法学[Xiandai faxue/Modern Law Science] 2004 no. 4, pp. 64-68. [Trans NB: Chen and Liu article has its own English title: ‘Some ideas on reforming the system of the third instance as the final in capital cases’]. See also “就甘锦华案致最高人民法院死刑复核法官的紧急公开信”[Jiu Gan Jinhua an zhi zuigao renmin fayuan sixing fuhe faguan de jinji gongkaixin/Urgent Open Letter re Gan Jinhua to the SPC Justice Reviewing the Case] http://www.cadpnet.org/show.asp?ID=210, and周斌[Zhou Bin], “适度诉讼化改造让死刑复核更加公正”[Shidu susonghua gaizao rang sixing fuhe gengjia gongzheng/Moderate change toward litigative model to make death penalty review more just], 法制日报[Fazhi ribao/Legal Daily] 20 September 2011, p. 5.
death penalty, the SPC may remand the case for retrial or decide to change the decision
*bringing the defendant up before the Court* [tishen].’ Ultimately, the phrase ‘after trying
the case itself’ was dropped. This means that [under the 2012 CPL] the SPC may
change the decision without having held a court hearing and is not obligated itself to
bring the defendant in front of the court before changing the decision. It is as yet unclear
for what reason it was decided to drop this phrase, but one very likely reason is that the
Court lacks the required manpower. China has thousands of death penalty cases a year;
if there were a judicial panel hearing [for each final review] it would use up enormous
material and human resources, and it would probably be difficult for the current
contingent of death penalty review judges to shoulder that burden.

(b) On the participation of the criminal defence in death penalty review

Article 240 of the 2012 CPL reads: ‘When the SPC reviews a death penalty case, it shall
question the defendant; if the defence lawyer requests, it shall listen to his or her views.’

During the legislative debates, there was back-and-forth as to whether [the provision
would ultimately say] that SPC Justices ‘may’ or ‘shall’ question the defendant;
eventually, they opted for ‘shall’ [应当]. This, too, may be regarded as a minor effort
to weaken the character of death penalty review as administrative examination and
approval and strengthen its character as court litigation. The defendant is an important
participant in criminal litigation, and the death penalty review procedure is a life-and-
dead matter for him or her; if the Justices reviewing his or her death penalty do not even
undertake the effort of questioning the defendant, it will be very hard to prevent wrongful

128 中华人民共和国刑事诉讼法修正案（草案）[Zhonghua Renmin Gonghguo xingshi susongfa
xiuzheng’an (cao’an)/(Draft) Amendments to the Criminal Procedure Law of the PRC], 30 August 2011,
Article 85 (now 2012 CPL Article 239).
129 On the discussion of death penalty numbers see Teng Biao, ‘Chinese Death Penalty: Overview and
Prospects,’ *East Asia Law Review* Vol. 1 No. 2; also CADP [北京兴善研究所], ‘Survey report on the
death penalty in China,’ forthcoming, expected 2012 (draft on file with author).
130 杨华云[Yang Huayun], “死刑复核规定应当讯问被告人”[Sixing fuhe n圭guiding yingdang zunwen
beigaoren/Death penalty review provision to require questioning defendant], *Xin jing bao/Beijing
News* 14 March 2012, A05.
convictions. In the judicial practice of death penalty review, how high is the rate of cases in which the defendant is in actual fact questioned? According to comments by a responsible person from the Third Division of the SPC, the rate of death penalty review cases in which questioning [of the defendant] takes place has been consistently very high, rising to about 90%. According to this person, since taking back the authority to review death penalty cases, the SPC required that, except in cases in which it was permissible not to question the defendant because the judicial panel reviewing the case found that the death penalty could not be approved because of misapplication of the law or evident violation of procedures, defendants must on principle be questioned in all cases—especially in cases where the death penalty was approved.131 The revised law now says that the defendant ‘shall’ be questioned; this means that regardless of what kind of death penalty case is under review, whether or not there is a problem with the decision imposing a death sentence, and whether or not the application of the death penalty is approved, the defendant must be questioned in all cases.

Questioning of the defendant ought to be face-to-face and must not be replaced by video conferencing. The principle of direct oral evidence in criminal procedure requires judges to listen to the statements by defendants and witnesses personally and to access and examine the evidence directly. Video-conferencing greatly reduces the effectiveness [of the questioning] and violates the principle of direct oral evidence. Especially with respect to defendants who have been framed or wronged and who continue to be held in detention centres and remain under the control of local officials, [video-conferencing] does not help the Justices to learn the full truth about a case. ‘Use of video-conferencing in the past two years to question defendants at long distances has infringed upon the rights of death-row defendants.’132 Yet it remains to be seen whether video-conferencing will continue to be used for questioning after the 2012 CPL revision comes into effect, and a judicial interpretation is needed to provide further clarification.

131 周斌[Zhou Bin], ‘China’s interview rate in death penalty review cases reaches 90%’ supra n.119.
132 孙中伟[Sun Zhongwei], “死刑辩护律师眼中的新刑诉法修改”[Sixing bianhu lüshi yanzhong de xingsufa xiugai]/CPL Revision in the eyes of a death penalty defence lawyer], http://www.lawtime.cn/article/flfl4405954456890o92417.
The draft CPL revision at one point stated: ‘When the SPC reviews a death penalty case, it shall question the defendant and listen to the opinions of the defender [辩护人].’ By the time it was passed, this had been changed to ‘if the defence lawyer requests, it shall listen to his or her views.’ This raises three issues worth discussing.

(a) The change from ‘defender’ to ‘defence lawyer’ is based in the consideration that in death penalty review cases greater professional practical expertise and knowledge are required. But this view deserves further deliberation. There are so few criminal defence lawyers to begin with, not nearly enough to meet the needs generated by criminal cases. In China’s justice system, defence lawyers are of limited use. In criminal cases, especially in unjustly decided death penalty cases, a lawyer’s professional ethics, willingness to defend the rights of his or her client and ability to resist and fight unlawful behaviour on the part of the police, procuracy and court are more important than his or her level of professional expertise. There are some rights defenders and barefoot lawyers who do not possess a licence to practice law but whose role in criminal defence far exceeds that of a court-designated lawyer who just goes through the motions. In other words, a defender appointed by the defendant or their family in accordance with Article 32 (1) clause 3 CPL may in reality be of greater help than a lawyer appointed by the Court in accordance with Article 34 (3) CPL. Therefore, with a view to realities in China, differential treatment of defence lawyers and persons without a licence to practice law and excluding citizen [lay] defenders do not help to protect the rights of defendants.

(b) Adding the precondition ‘if the defence lawyer so requests’ to “shall hear the opinions of the defence lawyer” may appear as not making a great difference, since defence lawyers will definitely ‘so request’ if there are questions. However the real
difference is considerable, because without this limiting condition it would be the obligation of the Justice reviewing any death penalty case to hear a lawyer’s opinions, whereas with the addition of the condition lawyers must first request if they want their opinions to be heard. Moreover, there are no detailed provisions regarding the manner in which such requests are to be made or any time limitations or specifications about to whom the request should be made. In practice the role of the lawyer in death penalty review cases is similar to that of a petitioner, and it is very hard for the lawyer to get to see the reviewing Justice or indeed even to find out the responsible Justice’s name and contact details.\(^{135}\)

(c) At this phase [of the criminal process], the court will not allow the lawyer to access the case files or see the defendant. Therefore, any lawyers taking on the case only at the death penalty review stage will neither be able to see the defendant nor have any way of accessing the case files. They will therefore have difficulties learning anything about the case beyond what is contained in the decision, and the court in their decisions will always only adduce those facts and that evidence which support the decision.\(^{136}\)

Under these circumstances, even if the judge hears the lawyer’s opinions it will be hard for the lawyer to provide comprehensive and forceful arguments for the defence.

(c) On the supervision of death penalty review cases by the SPC

Article 240(2) of the 2012 CPL says: ‘In death penalty review cases, the Supreme People’s Procuracy may make suggestions to the Supreme People’s Court. The Supreme People’s Court shall notify the Supreme People’s Procuracy of the result of the death penalty review.’

This, too, may be regarded as a tiny step toward rendering death penalty review more like court litigation. Questioning the defendant and hearing the opinions of the lawyer

\(^{135}\) See CADP [北京兴善研究所], ‘Survey report on the death penalty in China’, forthcoming, expected 2012 (draft on file with author).

\(^{136}\) 郝俊波[Hao Junbo], “解读新刑诉法死刑复核方面存在的重大问题”[Jiedu xin xingsufa sixing fuhe fangmian cunzai de zhongda wenti]/An Analysis of major problems persisting with regard to death penalty review under the new CPL] [http://blog.sina.com.cn/s/blog_542d14060100zpef.html]
establishes a connection between the adjudicators and the defence, whereas hearing the opinions of the Supreme People’s Procuracy (SPP) establishes a connection between the adjudicators and the prosecution. The following points require further discussion.

(a) In court litigation the three sides—prosecution, defence, and adjudicators—appear at the same time in the same place, as opposed to ‘unilateral contact.’ They concurrently engage in cross-examination of the witnesses and oral discussion of the evidence. None of this can be done without a court hearing as part of the death penalty review process. That is to say, even though a small step has been taken with this revision to bring the review process closer to one of court litigation, it is still very far removed from a genuine litigation process or a three-instance adjudication system in death penalty cases.

(b) The SPC shall report the result of its review to the Supreme People’s Procuracy, but there is no requirement to notify the defender. This is also highly problematic. In practice, the lawyer more often than not only hears about the result of the review from the family of the death row defendant.

(c) The provisions are worded too simply and are not workable. For example, how does the SPP get to know that there are any current death penalty review cases [being handled by the SPC]? Can it access the files? Can it question the defendant? There are no rules governing this, and even less are there channels whereby the SPP could engage in argument with the defence before the Court. The main reason for the excessive simplicity of the wording of the provisions is that during the legislative process ‘it was difficult for all the sides to achieve consensus on this problem and, hence, to demand detailed rules was rather difficult.’ Scholars at one point proposed adding that ‘the SPC should safeguard the [right to] supervision by the SPP’— e.g. by notifying the SPP of major, difficult or controversial cases in a timely manner or by accommodating the SPP’s request to inspect the case files in any particular cases.137

2. Failure to address structural weaknesses in the death penalty review procedure

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137 周斌[Zhou Bin], “Moderate change toward litigative model to make death penalty review more just”, Supra n. 11.
China’s death penalty review procedure underwent several changes in the revision process before assuming its final form.\(^{138}\) The 2012 CPL revision has tried to render the procedure ‘moderately more like litigation, changing from the former closed model strongly bearing the character of mere administrative examination and approval to a model of participation by several sides,’\(^{139}\) but in reality very little to this effect has been achieved. There has been no mitigation of the root causes of the administrative examination-and-approval character of the death penalty review procedure, a character determined by the overall structure of criminal justice.

The characteristics of an ‘administrative examination-and-approval’ process are displayed in non-public court hearings, secretive, paper-based- and indirect review of case files and [mere] ‘re-examination’ of lower ranking courts’ assessments of fact. [In such a process] the opinions of the prosecution and the defence will generally not be heard, and, even if they are heard, there will be no adversarial arguments by the prosecution and defence in open court but rather informal, unilateral contact [with the prosecution or defence] or mere reading of [their] written submissions. Even if the defendant is questioned, it will not be a questioning of the defendant in open court but only questioning done in secret. Even if doubts concerning the evidence are discovered, the SPC will not order the prosecution and defence to engage in evidence-gathering and make submissions to the Court but rather have judges unilaterally engage in ‘investigation and evidence gathering’ on their own and decide on the value of the

\(^{138}\) On the historical evolution of death penalty review see CADP [北京兴善研究所], “Survey report on the death penalty in China”, forthcoming, expected 2012 (draft on file with author). Apart from the CPL the following judicial interpretations are of relevance to death penalty review procedure: the SPC’s Regulations on Several Issues Regarding Review of Death Penalty Cases[最高人民法院《关于复核死刑案件若干问题的规定》] and (Provisional) Interpretation on Several Questions Related to Implementation of the Criminal Procedure Law of the PRC[最高人民法院《关于执行<中华人民共和国刑事诉讼法>若干问题的解释（试行）》], as well as the SPC and MoJ’s Several Regulations on Fully Protecting Lawyer’s Professional Responsibility to Provide Defence in Accordance with the Law and Ensure Quality Handling of Death Penalty Cases[最高人民法院司法部《关于充分保障律师依法履行辩护职责，确保死刑案件办理质量的若干规定》], etc.

evidence by themselves.\textsuperscript{140} In sum, death penalty review is not an ‘adjudicative process’ involving adversarial exchange of arguments by the prosecution and defence as equals, and a decision by impartial adjudicators, but rather involves the adjudicator taking an absolutely dominant position that is hardly different from an ‘administrative examination-and-approval process.’ This administrative-approval characteristic exists to a greater or lesser degree also in first- and second-instance trial procedures. Some scholars attribute this to ideas and practices deeply embedded in Chinese criminal justice: the principle of prioritising substantive truth, a non-litigious mode of adjudication, and the practice of seeking court-internal administrative approval [for judicial decisions].\textsuperscript{141}

Going further, this is related to the underlying concepts and system of China’s overall administration of justice. The American scholar Herbert Packer has juxtaposed two kinds of value system potentially informing criminal procedure: the ‘crime control model’ and the ‘due process model.’\textsuperscript{142} China’s criminal procedure is a classic instantiation of the crime control model. The PRC’s first Criminal Procedure Law promulgated in 1979 is a codification basically orientated toward an administrative style of punishment premised on discovery of the facts and punishment of crime.\textsuperscript{143} Though there has been some progress toward an adversarial model and the protection of human rights following the revisions of 1996 and 2012, as a whole neither the underlying conceptions of criminal justice nor the design of the system have rid themselves of the ‘crime control’ model or the administrative style of punishment. Moreover, China is very far from having judicial independence, and the court-external forces of the Party Committees, the Political-Legal Committees, the government, the People’s Congresses and individual officials; as well as the court-internal forces of higher-ranking courts, the Court President, division head or adjudicative committee of the adjudicating court all have the potential to exert improper

\textsuperscript{140} 陈瑞华[Chen Ruihua], 中国刑事司法制度的三个传统[Zhongguo xingshi sifa zhidu de sange chuantong/Three traditions in Chinese Criminal Justice], 东方法学[Dongfang faxue/Oriental Law] 2008 no. 1, pp. 23-30. [NB: Translation of journal name comes from title page.]


\textsuperscript{142} 陈瑞华[Chen Ruihua], 中国刑事司法制度的三个传统

\textsuperscript{143} Herbert Packer, ‘Two models of the criminal process’, 113 University of Pennsylvania Law Review (1964) 1, pp. 1-68.
influence over judges’ adjudication of particular cases. China does not have an independent legal profession, either, and there is no reliable protection of lawyers’ professional safety, especially for criminal defence lawyers. China lacks media freedom and general elections, and there is no way of effectively supervising the judicial authorities, and so on.

It is only against this background that we can gain a deeper understanding of the 2012 CPL revision’s impact on death penalty review. Even if there had been provisions giving lawyers the right to access case files and meet defendants [at the death penalty review stage]; even if there had been provisions for the participation of the SPP and better rules of evidence; and even if new rules required court hearings for death penalty review and a three-instance adjudicative process, it would remain very doubtful that such rules could make a difference in reality. Without structural changes to the overall model of the justice mechanisms and system, mere [reliance on] provisions in the CPL to improve the quality of death penalty decisions, protect the rights of criminal defendants, and prevent wrongful convictions will be of extremely limited effect. Of course, members of the legal community—especially lawyers—will need to experiment and resist in each individual case to work out how to take maximum advantage of the space opened up by ‘progressive provisions’ and how to weaken as much as possible the negative effect of certain ‘regressive provisions.’

Part V: Impact on criminal defence lawyers

Many comments on the CPL revision emphasised its advantages for criminal defence lawyers, especially regarding their role in the pre-trial stage (when the overwhelming majority of suspects are under detention) and the change in their nominal status. Yet,

144 To quote Professor Chen Guangzhong [陈光中] of the China University of Political Science and Law[中国政法大学]: ‘In the area of criminal defence, the status of the lawyer as defender in the investigation phase has been clarified. There has also been an expansion of legal aid, an improvement of the system for client meetings and access to case files, and improvement of the system for [lawyers’] investigation and gathering of evidence, and a stipulation of lawyers’ duty to keep professional secrets.’

“推进刑诉制度民主化和科学化” [Tuijin xingsu minzhuhua he kexuehua/Promoting the democratization and scientific nature of the Criminal Procedure System], 法制日报[Fazhi ribao/Legal Daily]25 August
even if it is conceded that many of the most needed changes would far exceed textual edits to the CPL, an analysis of the post-revision situation does not justify this rhetoric. Changes fail to address some of the major existing problems in effective ways, due to lack of remedies for procedural rights violations. Lack of change perpetuates other problems; and the codification of a mechanism for settling criminal disputes rather than adjudicating them reflects an effort to redesign the criminal process in a way that further reduces the role of the defence. It is to be feared that criminal defence lawyers will remain marginalised and obstructed in the work that centrally defines their role, and will continue to be threatened by retaliation and persecution if they try to challenge systemic obstacles to playing that role in full.

**Continued pre-trial obstruction**

A frequently mentioned change is that lawyers at the pre-trial stage are now for the first time characterised as ‘criminal defence lawyers.’ Previously, they were characterised only as ‘representing’ (daili) their clients’ interests or ‘assisting’ (bangzhu) criminal suspects, giving state officials a chance to argue that they were not properly part of the criminal process at this stage at all. However, criminal defence lawyers’ nominal recognition will be meaningful only if real problems are likely to abate after the revision. The main problems faced under the pre-revision system have included the denial of timely access to clients, denial of access to case files, and uncertainty about whether or not lawyers are allowed to investigate cases on their own.

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146 In the Chinese discourse, these problems are often discussed as problems relating to the professional rights of defence lawyers; but it is important to keep in mind that these ultimately serve the human rights of criminal suspects and defendants – their access to criminal defence lawyers.
Regarding lawyers’ access to their clients, a variety of problems have arisen in the past. To give some examples, lawyers have had difficulties with obtaining a letter of appointment from the client or the client’s family, when the police have been unwilling to process such letters or obstructed their delivery to the lawyers. They have found themselves unable to discover where their client was held in cases where authorities withheld this information. Once a client has been ‘located’ in a police detention centre, permission to visit the client may be denied e.g. on the grounds that lawyers must first obtain local authorisation. If the lawyer eventually gets access, her meeting with the client may be monitored by the detention centre police officers (through physical presence or electronic monitoring), and during monitored meetings, the police may stop lawyers from discussing certain details of a case.

The pre-revision rules of the CPL and especially of the Law on Lawyers do not allow for any of the just-mentioned specific measures of obstruction, but it could be argued that they failed to ban them. By comparison, the 2012 CPL now provides explicitly for the possibility of family or friends to appoint defence lawyers and obligates the authorities to pass on the suspect’s request for a lawyer. Also, for the first time the CPL stipulates a time limit of 48 hours within which a meeting with the lawyer must be arranged. A requirement to obtain permission to meet suspects from the investigating authority is stated, but limited to cases of suspected crimes affecting state security, terrorist or major corruption crimes. Post-revision law also states that meetings between lawyer and suspect can be arranged on the basis of showing a lawyer’s licence, a letter confirming the lawyer’s employment by his or her law firm, and a letter of appointment or legal aid form. They also reiterate that the meeting must be unmonitored and that the lawyer and his client are allowed to discuss the case at hand. Even though the 2007 Law on

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147 It should be noted that as most suspects are detained, they are in need of expert support, especially because detention without charges has been routinely extended to 37 days through extensive application of rules originally intended to govern exceptions, giving opportunities for coercive interrogation.
148 CPL Article 5.
149 Article 37 CPL.
150 Article 37 CPL.
151 Article 37 CPL.
Lawyers already contained the same requirement, the police would frequently argue that the ‘Law on Lawyers’ only applied to lawyers, not to them.

Will these clarifications and more detailed provisions in the 2012 CPL help to reduce police obstruction? Will, for instance, local detention centres let lawyers see their clients without a prior process of obtaining local authorisation, and cease monitoring client meetings? Lawyers have good reason to remain sceptical, for at least three major reasons. First, as some lawyers have pointed out, real changes will be hard to achieve as long as police power remains paramount and there is no fundamental change in power structures.152

Second, procedures created to address failure to comply with the relevant rules remain sketchy. Article 47 of the CPL provides that criminal defence lawyers or legal representatives who deem that the police, the People’s Procuracy, the People’s Court or their staff have infringed upon their procedural rights may bring complaints to the same-level or next higher level People’s Procuracy. The Procuracy shall (yìngdāng) investigate the matter in a timely manner and, if the complaint is based in truth, ‘notify the relevant authorities to correct [the mistake] (tóngzhì yǒuguān jíguān yǔyuì jiùzhēng).’ The only way in which this adds to options the defence already had to bring complaints is in the nebulous last clause. But it is left unclear what force such a notification would have, for instance, toward a police station subject to following the orders of the next higher police bureau, and what is supposed to happen if the ‘notification’ is not followed, and mistakes are not corrected. In a similar way, Article 115 of the CPL provides that in cases of overlong detention, failure to return bail money after release of their client, unjustified or abusive seizure of things as ‘evidence’, lawyers and other affected persons may lodge complaints with the People’s Procuracy. These complaints must lead to a ‘notification’ of the ‘concerned authority’ [requesting] ‘correction. However, in the first revision draft this provision (then Article 114) had contained the option of such complaints in cases where

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152 ‘As long as there is no change in the structure of the institutions [responsible for] criminal justice, as long as this structure is not readjusted, the investigating authority will continue to remain in control.’ Seminar of 13 February 2012. (J) [对于中国的刑事司法结构没有改变，缺乏调整，仍然只侦察机关（做主）].
‘the criminal defender or litigation representative had been obstructed in the lawful discharge of their professional responsibility.’ This clause was later dropped.

In these circumstances, the absurdity of the oft-cited comment that ‘as the police, the Law on Lawyers does not concern us; we only follow the CPL’\(^1\) is not a reason for great optimism that detention centres across the country will readily give access to lawyers now that they have been told to do so. On the contrary, it suggests that other similarly creative excuses may be found for continued obstruction. A lawyer reported, for instance, that the police had used the distinction between ‘public’ law, in the sense of publicly available rules that applied to everyone (gong fa) and ‘home’ law (jia fa) in the sense of rules they would apply to themselves, to explain why a clear legal rule would not be followed.\(^2\)

A third reason for scepticism about improvements to pre-trial access to lawyers in the 2012 CPL is that, as discussed above, the authorities are not obligated even to notify lawyers or families of the detention in cases of state security and certain other crimes; and in cases of extra-residential ‘residential’ surveillance, the suspect may effectively be disappeared for a period of up to six months.\(^3\) Article 37 of the CPL in its last subsection moreover effectively exempts cases of residential surveillance from the rule

\(^1\) As a later piece of legislation expanding the rights of the defence (and bringing statutory law more into conformity with China’s international obligations) the provision of the Law on Lawyers clearly takes precedence over the CPL. The National People’s Congress Legal Working Group had moreover publicly clarified that the new Law on Lawyers represented a revision (xiugai) of relevant provisions in the CPL and that the Law on Lawyers must consequently be applied. 梁三利[Liang Sanli], “新《律师法》与《刑事诉讼法》的立法性冲突及化解路径”[Xin “lüshifa’ yu ‘xingshi susongfa’ de lifaxing chongtu ji huajie lujing/The legislative conflict between the new Law on Lawyers and the Criminal Procedure Law and its resolution] , (2009) 南京师范大学学报[Nanjing Shifan Daxue xuebao/Nanjing Normal University Journal of Legal Studies] at http://www.lawlsl.com/ArticleShow.asp?ArticleID=65. Cp. also comments at seminar of 13 February 2012, ca. 18:00 on monitoring and relationship between lawyers’ law and CPL, at ca. 23:00.

\(^2\) Cp. comments at seminar of 13 February 2012.

\(^3\) Lawyers are not explicitly barred from meeting such suspects, but the law fails to stipulate expressly that lawyers must be told where their clients are held.
that the authorities must arrange for a client meeting within 48 hours; and it would allow
the authorities to grant meetings only with ‘authorisation’ in special cases. 156

A second problem in the pre-trial phase is that of accessing the case files (usually referred
to as yuejuanquan, the ‘right to read’ case files). According to pre-revision law, lawyers
are to be given access only to the ‘major documentation in the case’ and only from the
‘period of review for prosecution,’ that is to say, not during the investigation stage, but
after a case has been transferred to the People’s Procuracy for review of whether or not
the suspect will be publicly indicted. The CPL does not really change this. It does not
stipulate a right on the part of lawyers to access case files at an earlier stage. It also fails
to clarify that lawyers should be given access to all of or certain important parts of the
case files (Article 38). Lawyers frequently complain that they are shown too little of the
evidence they ought to get access to, and given too little time to prepare for trial.157

Article 38 now explicitly mentions lawyers’ right to ‘access, excerpt and copy (fuzhi,
emphasis added) the materials in the case.’ This is a welcome change, but it is far from
sufficient to address existing problems. It remains difficult for defence lawyers to access
evidence the prosecution does not wish to provide. The CPL provides that lawyers ‘may
apply’ for exonerating evidence to be made available ‘if they think that there is’ such
evidence;158 but there is no mention of whether the application must be granted or any
legal consequences for failure to provide such evidence; and the provision is therefore not
workable. Even if lawyers are allowed to read files, there is continued scepticism about

156 Article 37: ‘For meetings and communication with suspects held under residential surveillance,
subsection 1, 3, and 4 shall be applied.’ While understandably, subsection 2 could not have applied in such
cases so far as it related to police detention centres, the elimination of the 48 hour time limit was not
technically necessary and is worrying.

157 In Conversation with Lawyer Zhu Mingyong, for example, this defence lawyer reports about a
particularly (it is supposed) egregious case in the context of Bo Xilai’s ‘mafia crackdown’ that he and his
colleague were only given access to ‘a few loose papers, not even stapled together’ from a total of 109 file
folders of materials compiled by the prosecution. Later the lawyer was able to discover, he said, that
evidence supporting a set of facts exonerating his client Fan Qihang (樊奇杭) had been suppressed. Fan,
who had been tortured and ‘confessed’ to inciting murder, was executed. 何杨 [He Yang],
专访朱明勇律师—黑, 打 [Zhuanfang Zhu Mingyong lüshi – hei da/Conversation with Lawyer Zhu

158 Article 39 CPL.
how, for instance, refusals to let lawyers photocopy could be challenged.\textsuperscript{159} In this context, it is noteworthy that the law requires lawyers possessing evidence of their client’s innocence or lesser culpability to provide such evidence to the police and/or People’s Procuracy ‘in a timely manner,’\textsuperscript{160} even though they themselves will continue to be given documentation selectively and may only ‘apply for’ similar evidence to be provided to them.

A third pre-trial problem, intimately connected to problems occurring in the trial and post-trial phases, is that of independent investigation of their client’s cases by lawyers (\textit{diaocha quzheng quan}, the right to investigate and gather evidence). In this regard, the CPL has failed to improve the situation. Both pre-revision and post-revision, lawyers must obtain permission from the People’s Procuratorate or People’s Court as well as consent from the victim or victim’s family before they may seek evidence from the victim or victim’s family in the context of their independent investigation.\textsuperscript{161}

The argument about this issue has been long-standing. The investigating and prosecuting authorities unsurprisingly do not like to see the results of their own investigation challenged, and are not used to seeing their arguments forcefully challenged in court. It was therefore argued that criminal investigations were the prerogative of the State, or of public power, whereas lawyers were deemed to act in a merely private capacity. Against

\textsuperscript{159} As defence lawyer Tian Wenchang observed, commenting on the CPL revision, ‘in some places they may read fuzhi as meaning just zhaichao [excerpting] not actually fuyin [photocopying]….And if they just won’t let you photocopy, what are you supposed to do?’[\textit{Tian Wenchang fangtan: xingshi susongfa xiuzheng’an (caozhan) xiyoucanban}][\textit{Interview with [Lawyer] Tian Wenchang, Mixed feelings about the CPL Revision draft}]. 14 October 2011 at \url{http://www.legaldaily.com.cn/video/content/2011-10/14/content_3042803.htm?node=34668} (transcript available at \url{http://www.legaldaily.com.cn/index_article/content/2011-10/19/content_3050177.htm}, Part III on ‘The rights of criminal defence lawyers.’

\textsuperscript{160} Article 37 CPL; see also Article 15, \textit{SPC Judicial Opinion on Relevant Problems in the Application of the Criminal Procedure Law}. A [关于刑事诉讼法实施中若干问题的规定]: ‘If the defence lawyer applies for the People’s Procuracy or People’s Court to gather evidence, and if the People’s Procuracy or People’s Court consider that it is necessary to investigate and collect evidence, such investigation and collection of evidence shall be undertaken by the People’s Procuracy or People’s Court. The lawyer shall not be issued with a decision permitting him or her to investigate and the lawyer shall not be allowed to collect evidence or engage in investigation. See also Article 35 of the \textit{Law on Lawyers}; Tian Wenchang, \textit{ibid} (III).
this, some criminal defence lawyers pointed out that precisely because they acted in a private capacity, their powers were limited to the kinds of questions that, for example, any private person might ask another private person, who might of course refuse to answer.\(^{162}\) Other lawyers went so far as to suggest that lawyers should be explicitly recognised as possessing the authority to investigate and that witnesses ought to have a duty to provide testimony.\(^{163}\) By not changing the law on this issue the revision has consolidated the existing situation with regard to independent investigation,\(^{164}\) and done nothing to reduce the risk of witness intimidation or intimidation of lawyers themselves.

**Problems during the trial phase**

In addition to rules of evidence already discussed above, major changes potentially affecting the work of lawyers at trial stage concern the rules on witness appearance and the rules guiding the conduct of defendants in court. If effectual, these changes could alter the character of trial hearings and hence the role of the lawyer at trial. The rules requiring witnesses to appear in court (Article 187) and giving the court mechanisms for sanctioning failure to appear, especially, have by some been interpreted as progress, as has the rule against self-incrimination (Article 50); and not only the State but also many lawyers have welcomed the CPL rules on ‘criminal reconciliation (Articles 277-279).’

According to the view taken here, however, the changes just mentioned reflect a concern on the part of the State with improving the efficiency of the criminal trial process, but not necessarily its fairness or justice. Lawyers are supposed to serve the State’s concern for efficiency to the extent it regards them as useful; and to that extent they will be tolerated. Yet the system under the CPL may hinder expansion of their now so limited role at the trial stage by providing more opportunities to eliminate genuine, contested trials altogether.

\(^{162}\) [田文昌] (Ibid (III)).

\(^{163}\) [徐尉], “对刑事诉讼法第37条的规定的立法完善建议”[Dui xingshi susongfa di 37 tiao de guiding de lifa wanshan jianyi/Suggestion for improving Article 37 of the CPL], 20 September 2011 at http://www.jcrb.com/procuratorate/theories/academic/201109/20110920_721098_1.html.

\(^{164}\) In addition see the discussion of the implication of Article 115 in its final wording above.
As a study by McConville et al has shown, the majority of criminal defence lawyers appearing at trial are passive and compliant with the prosecution and the court. In several hundred ordinary and randomly chosen criminal trials in different locations, most defence lawyers largely focused on presenting pleas in mitigation, on occasion even in situations where arguments would have been clearly available to raise doubt about the facts as presented by the prosecution, or where there was a strong suggestion that the client was innocent. Compared to Common Law trials and continental European settings, the role of the Chinese criminal defence lawyer at trial is therefore at present marginal and largely supportive of the prosecution and the Court.

The 2012 CPL’s emphasis on strengthening mediation (‘criminal reconciliation’), discussed in an earlier section of this paper, reflects a wider trend away from adversarial court adjudication toward State-controlled mediation processes -- from the goal of justice, one might say, toward the goal of ‘harmony.’ In a criminal justice context this means that the State, the suspect or defendant and the victim are ‘persuaded’ to negotiate a settlement. This development in its basic tendency renders criminal defence unnecessary, because it makes the criminal process less adversarial and hence less contested. It normalises negotiated solutions to criminal cases that do not require lawyers at all or at most make use of lawyers who cooperate with the authorities, for example, by persuading clients to accept a criminal reconciliation settlement. Lawyers may have many reasons to welcome the availability of mediation and negotiation mechanisms; they may see them as means of achieving better results, or perhaps simply as a way of avoiding the harsh ordinary criminal justice process, for their clients. But by endorsing the use of criminal reconciliation and related mechanisms, lawyers run the risk of supporting a practice that transforms their function to one of ultimately dispensable ‘facilitation’ rather than crucially important ‘defence.’

166 McConville et al, ibid.
This leaves us with the question whether, in those cases in which no ‘criminal reconciliation’ process and no ‘settlement’ occur, more genuinely contested trial hearings are likely to take place in the future. To understand whether the CPL is likely to make a difference, we must consider the difficulties active, independent and forceful criminal defence lawyers have encountered in their work so far. Broadly speaking, these difficulties can be understood as obstructions intended to prevent lawyers from attending trial;\textsuperscript{167} intimidation, including physical assaults in or near the court building, to influence their behaviour in the courtroom;\textsuperscript{168} and obstruction in the courtroom. Direct courtroom obstruction has included, for instance, frequent interruptions from the presiding judge, instruction not to discuss certain legal aspects of the case, and psychologically stressful filming during the presentation of criminal defence statements (not allowed according to courtroom rules).\textsuperscript{169} Objection to such measures can have serious further consequences such as disbarment for lawyers.\textsuperscript{170} In addition, certain features of criminal trials have constituted indirect obstruction. The absence of prosecution witnesses from the trial – making it impossible to cross-examine witnesses and test evidence by forensic processes – has been one such feature, as has been ‘the fact that in almost all cases the prosecution will have extracted one or, frequently, more statements of confession from the defendant,’\textsuperscript{171} and that such statements are rarely

\textsuperscript{167} Cases have included the case of a lawyer told to return to Beijing because non-local lawyers would not be accepted. E.g. Voice of America (Mandarin Desk), “吉林610办公室阻挠律师依法辩护” [Jilin 610 bangongshi zunao lüshi yifa bianhu/A Jilin 610 Office obstructs lawyer’s lawful criminal defence], 13 September 2010 at http://www.voanews.com/chinese/news/china/20100913-lawyer-harrased-102769329.html.

\textsuperscript{168} E.g. in one case the lawyer was assaulted and robbed of his leather shoes at night in his hotel room, so that he had to appear in hotel slippers in court the next morning. 李静林[Li Jinglin](2011), “记我被抢的奇遇，真切感谢劫匪不贪财”[Ji wo beiqiang de qiyu, zhenqie ganji jiefei bu tancai/Recalling the experience of being robbed, deeply thanking my robbers for not going for valuables], 26 April 2011 at http://www.peacehall.com/news/gb/china/2011/04/201104260023.shtml. See also Ng Tze-Wei (2011-1), ‘Beaten lawyers await apology,’ South China Morning Post, 11 February 2011, conversation #7 2011-2.


\textsuperscript{170} In the much noted case of defence lawyers 刘巍[Liu Wei] and 唐吉田[Tang Jitian], for example, their leaving the courtroom in protest of such treatment eventually led to their disbarment. 何杨[He Yang], ibid.; CSCL, ibid.

\textsuperscript{171} McConville et al, 2011, p. 317.
successfully challenged at trial. In addition, authorities’ screening court hearings from the public scrutiny they ought to receive may also undermine criminal defence.\(^{172}\) As the just-mentioned obstructive measures to control lawyers in the courtroom are not legal, the CPL could not reduce such practices, but it could have explicitly outlawed (some of) them, and has failed to do so.

If the new provisions on witnesses and experts translate into higher rates of presence at trial by witnesses and experts, this ought to alter the dynamics of criminal trials in favour of a more contested and more credible process. Rules clearly requiring appearance in court by witnesses and experts may also serve to make trials more open and contested.\(^{173}\) However, the effectiveness of such rules depends on whether witnesses will be called, a decision that continues to rest with the Court. While the current revision provides that the judge ‘may’ seek the parties’ (and other trial process participants’) ‘opinions’ on the question of whether witnesses should be heard in a pre-trial hearing,\(^{174}\) this is a mere option at the disposition of the judge. Moreover, it is left unclear how the failure to have heard crucial witnesses at trial is to affect the further process or the safety of a conviction in the event of appeals or retrials.\(^{175}\) More widely, while investigating and prosecuting authorities have been tasked with finding incriminating as well as exonerating evidence (a provision that had already been included in Article 43 of the 1996 CPL), there is still no rule explicitly requiring that all crucial evidence be fully presented at trial.

Revisions affecting the position of the defendant appear too weak to make a significant difference to the position of the defence. The new Article 50 of the CPL now states that criminal suspects and defendants must not be forced to incriminate themselves. However,

\(^{172}\) As has been documented in some cases, criminal trials that have attracted public interest may not be genuinely public even though they might officially be called public trials, for instance because persons planning to attend were house arrested or detained, or because courtrooms were packed so that ‘no more seats were available.’

\(^{173}\) Cp. Article 187 CPL.

\(^{174}\) Article 182 CPL.

\(^{175}\) The provision of Article 59 CPL requires that there must be an opportunity to contest evidence at trial, but leaves us to guess at what the consequences of its breach might be.

[第五十九条：证人证言必须在法庭上经过公诉人、被害人和被告人、辩护人双方质证并且查实以后，才能作为定案的根据。法庭查明证人有意作伪证或者隐匿罪证的时候，应当依法处理.]
Despite persistent calls for its excision, Article 118 of the CPL (formerly Article 93), will continue to require criminal suspects at the earlier investigation stage to ‘answer truthfully’ to questions related to the case. Reported resistance to its excision on the part of Public Security and Procuracy is telling. It is well known that criminal suspects are at high risk of coercive interrogation, and for reasons set out earlier, these risks will continue to exist. What would therefore be desirable to protect them against the possibility of using their earlier self-incriminating statements in court would be a rule barring the use of written confessions recanted at trial, or at least heightening the level of required scrutiny in such cases. For example, it should be required at least in cases where confession has been retracted that audio-recordings of the defendant’s interrogation be fully presented at trial. As long as no such rule is enacted, it is unlikely that defendants will have more voice in the criminal process, or have an effective right to silence. Criminal defence lawyers will in such cases have little chance of an effective defence.

**Continued risks of retaliatory prosecution and persecution**

As professional participants in criminal justice processes who have no share in public power, lawyers who openly challenge the Party-State authorities expose themselves to the reach of punitive and vindictive measures – of being treated as State ‘enemies.’ The CPL has reflected awareness of generic bias against lawyers and sought to remove such bias in the context of rules on evidence-tampering. However this is unlikely to reduce the real risks lawyers face themselves of ‘retaliatory’ criminal prosecutions on charges of tampering with evidence. Criminal defence lawyers singled out as ‘stability control targets’ or themselves suspected of ‘national security’ crimes, in particular, remain at or are even at heightened risk of being targeted by measures to control or silence them.

One of the key provisions that has thus far served as the basis for retaliatory criminal prosecution of lawyers is Article 306 of the Criminal Law (CL). It provides for criminal punishment of lawyers who falsify or suppress evidence or instruct their clients to falsify

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or suppress evidence. In practice this translates into a risk of prosecution of the lawyer if defence witnesses give evidence that is different from their statements they gave to the police. Another provision of the CL, Article 307, addresses non-lawyers and stipulates different rules for charges against them, creating bias. The main problem with Article 306 CL has been the targeting of lawyers in a retaliatory fashion for trying to challenge the prosecution’s evidence e.g. by producing witness statements contradicting those of the prosecution, or challenging the reliability of confessions. It is for this reason that in an uncharacteristically high number of cases lawyers detained on Article 306 charges were later not publicly indicted. 177 Notable recent cases of retaliatory prosecution have included that of Lawyer Li Zhuang (convicted under Article 306) 178 and the ‘Beihai Lawyers case.’ In both cases, lawyers were tried on Article 306 charges for stating that their client(s) in an earlier trial had been tortured, despite evidence indicating that the client(s) had in fact been tortured, and despite the fact that the lawyers said they had merely truthfully stated what their client(s) had told them. 179

177 To quote, ‘An All China Lawyers’ Association officer, who asked not to be named, said in the 10 years after the clause was introduced in 1997 at least 200 lawyers had been detained under clause 306. At least half were proven innocent or not prosecuted, but those convicted faced jail terms and were disbarred for life.’ Ng Tze-wei, ‘Until clause goes, defence lawyers are just decoration,’ South China Morning Post 7 July 2011 at http://topics.scmp.com/news/china-news-watch/article/Until-clause-goes-defence-lawyers-are-just-decoration; 毛立新[Mao Lixin], “律师伪证罪的追诉程序探析”[Lüshi weizhengzui de zhuisu chengcu tanxi/Analysis of the handling of crimes of falsification of evidence by lawyers], 30 August 2011 at http://www.dffy.com/faxuejieti/ss/201108/24975.html. See also Ran Yunfei, ‘When Chinese Criminal Defense Lawyers Become the Criminals,’ (32) Fordham International Law Journal (2009) 986, available at http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2152&context=ilj.

178 Li Zhuang, criminal defence lawyer for a co-defendant of Fan Qihang’s, who also argued that his client had been tortured, and was later charged with an Article 306 CL offence for having induced his client to claim falsely that he had been tortured. There were strong reasons to believe that Li Zhuang’s client had in fact been tortured, but Li Zhuang was convicted. His conviction triggered vocal protest from parts of the legal profession and academia, even though persons close to this case hold the opinion that general public opinion has remained against Li Zhuang due to the ‘bad press’ he had domestically Author conversations December 2011. See e.g. 徐凯[Xu Kai], “李庄案第三季前传”[Lizhuang an disanj qianzhuan/Prequel to Third Phase of the Case of Li Zhuang], 财经网[Caijingwang/Caijing Net], 14 December 2011 at http://www.chinaelections.org/newsinfo.asp?newsid=219686; see also http://www.wyzxss.com/Article/view/201107/247560.html, http://www.360doc.com/content/11/1109/19/349878_163133783.shtml, http://www.china-review.com/cat.asp?id=23560.

179 For further information on the Beihai Lawyers case, see 谌彦辉[Chen Yanhui], “内地现律师组团打官司”[Neidi lüshi zutuan daguansi/The phenomenon of lawyers’ litigation teams emerges in Mainland], 9 January 2012 at http://big5.ifeng.com/gate/big5/news.ifeng.com/shendu/fhzk/detail_2012_01/09/11851698_0.shtml; 韦文浩[Wei Wenhao], “北海律师案息而未决”[Beihai lüshi an xuan’erweijue/Beihai lawyers: case
In reaction to persistent criticisms from lawyers and academics, the CPL was changed to reflect the view that it would be unfair to single out lawyers as particularly likely offenders. Its Article 42 now states that it is illegal ‘for defence lawyers or any other person’ to falsify or suppress evidence or induce others to do so. In effect, it acknowledges that other people could tamper with evidence, too, even though it stays shy of mentioning officials as potential offenders. (The more explicit change to ‘police or procuracy’ was reportedly rejected on the formalistic ground that the provision in question was contained in a section on ‘criminal defence.’) This change appears merely cosmetic; it does nothing to reduce the risks to lawyers. Their risk would not have been reduced even if the revision had referred to ‘the police and procuracy’ rather than ‘any other person.’

As a result of the CPL revision, moreover, lawyers suspected of any crime now face harsher compulsory measures such as have been discussed in Part I above, and are especially at risk if suspected of any of the several ‘national security’ crimes associated with political opposition in exercise of their professional rights and their right to freedom of expression. The ‘Jasmine’ crackdown of 2011, discussed above, serves as an illustration of how forced disappearance can be used to victimise lawyers. Just days after the revision was passed one of the prominent lawyers detained under Article 306 CL charges in the ‘Beihai Lawyers’ case,’ Yang Zaixin, was taken into ‘residential surveillance’ by the police, after having been held in pre-trial detention for the maximum

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180 Article 42 CPL.

181 Professor 陈卫东[Chen Weidong] was quoted as saying this in “刑诉法修改:权力与权利的博弈”[Xingsufa xiugai: quanli yu quanli de boyi/CPL Revision: contest between power and rights], 南方人物周刊[Nanfang Renwu Zhoukan] 13 September 2011 at http://nf.nfdaily.cn/nfrwzk/content/2011-09/13/content_29780011.htm.
amount of time available to the authorities. The police told Yang’s defence lawyer and colleague that the location where Yang was held could not be disclosed (wu ke fenggao). Under the new rules, if the police could find a justification for extra-residential surveillance, e.g. by declaring Yang a national security crimes suspect, there would still be no explicit requirement to disclose the location of extra-residential surveillance and no time limit within which to arrange for a lawyer to see him. To the extent that it provides a normative basis for such measures, this development resonates with the general sense that a ‘dual track’ and ‘bifurcated’ system is being created to deal with ordinary cases on the one hand, and ‘special’ cases of suspects and defendants viewed as enemies on the other. Lawyers are doubly affected by this trend.

The choice between being co-opted and being marginalised

Empirical studies of ordinary trial processes and accounts of the extraordinary efforts made to stop human rights lawyers from presenting forceful defences in unusual and exceptional trials have given the impression of a marginalised and embattled legal profession. Lawyers who refuse to be co-opted have been viewed with suspicion and enmity, and at times persecuted. The CPL has failed to reverse this trend. Perhaps with a view to preventing high profile criminal injustice cases, the revision acknowledges defence lawyers as actors that may in some cases help to prevent wrongful convictions; but this change suggests clearly only that the State envisages the prevention of visible, discoverable injustice. It shows insufficient concern for preventing injustices that the investigating and prosecuting authorities and the courts could cover up.

In the months before enactment of the CPL, lawyers were vocal in criticising what they regarded as major shortcoming and failures of the proposed revision.

183 A number of suggestions and comments submitted by rights defenders and lawyers to the NPC; some of these comments and suggestions have been made public. For a partial list see 中华全国律师协会 [Zhonghua quanguo lüshi xiehui/All China Lawyers’ Association], “律师界关于《刑事诉讼法修正案（草案）》的意见”[Lüshijie guanyu xingshi susongfa xiuzheng’an...
their changing professional self-understanding and confidence, but was probably also due to the fact that they saw the constraints under which they had to operate would continue to make fair criminal trials difficult, and saw more and more of their professional colleagues suffer persecution at the hands of the State.

If lawyers cooperate under the new rules, their situation may appear improved, because the CPL now explicitly approves of negotiating ‘reconciliation’ settlements on behalf of their clients. If more such solutions can be reached in ordinary cases, criminal justice may come to be less harsh than it is now; it may lead to fewer convictions based in coerced confessions, for instance. But it would not therefore be likely to lead to more just outcomes if suspects and defendants as well as victims could be bullied into ‘settling’ cases that ought to be tried fairly. Moreover as criminal defence lawyers’ safety and success within the system will continue to depend on their willingness to avoid antagonising the State, they will face the choice between being mere marginalised facilitators whose task is viewed as ‘protecting social stability,’ and being genuine criminal defence lawyers committed to protecting the rights of their clients.

**Conclusion**

In the months leading up to passage of the 2012 Criminal Procedure Law amendments, there was considerable debate within the Chinese public about whether proposed revisions represented positive progress or negative regression. The preceding discussion of some of the changes that have been introduced in the final legislation suggests that there is truth in both assessments.
Whether one looks at the level of the legislative text or at the reality of the criminal process, there are undeniably areas of significant positive change. Key elements of the liberal legal reform project begun some thirty years ago have been incorporated into the 2012 CPL revision, including improved rules of evidence, limited progress towards protection of the right to silence, and slight improvements in the status and rights given to defence lawyers.

While acknowledging these positive developments, one must not lose sight of more troubling aspects of the CPL revision—including provisions that point unambiguously toward expansion of police powers in the name of targeting terrorism and perceived threats against national security. Even though it has been argued that the expansion of investigative and detention powers has taken place within more clearly circumscribed bounds and that these provisions will only affect a relatively small minority of individuals, several sections in this paper have argued that it would be wrong and risky to accept uncritically any clear distinction between ‘ordinary’ and ‘political’ cases in the Chinese criminal process. This ambiguity, combined with the consistent failure to incorporate meaningful remedies and sanctions into the law as a check against abuse or non-compliance, creates the real possibility that expansion of police power may in real-world practice threaten any liberal progress made at the textual level.

The 2012 CPL’s simultaneous movement toward limits on public authority in some areas and strengthening of the police state in others reflects profound divisions on the part of its authors as to the role of criminal procedure. Though the notion that procedural law exists primarily to protect the rights of individuals from encroachment by agents of the state is one that is gaining ground, the idea that procedure ought to serve the interests of crime-control and socio-political stability remains strong in China. Legislators have tried to paper over these distinct notions of criminal procedure by emphasizing the imperative to find balance between them, but despite incorporating rights-protecting language and measures into the CPL, the law remains firmly oriented towards efficiency and maintenance of law and order.
Between now and the time the new CPL provisions take effect on 1 January 2013, the Supreme People’s Court, Supreme People’s Procuracy, and Ministry of Public Security will each be developing their own interpretations and regulations, and these institutional rules will significantly shape the way the CPL is implemented. Perhaps some of the deficiencies detailed above will be addressed by these implementation rules; however, if history is any guide, this may actually create additional opportunities for law-enforcement and judicial institutions to expand their powers further at the expense of rights. The opportunity to do so is even greater because, in contrast to the formal legislative process (which at least included a period of public consultation during which proposals could be scrutinized and debated) the drafting of implementation rules is expected to be conducted behind closed doors, and to be in part a power struggle between different groups influencing legislation.

But it would be too simple to ascribe the more repressive, illiberal provisions of the 2012 CPL or its accompanying implementation rules solely to interventions by law enforcement and judicial interests, since it is well known that ‘social management’ and ‘stability preservation’ also reflect the broader interests of the party leadership and the Chinese political system as a whole. For this reason, any hope of establishing a truly rights-protecting criminal justice system in China will need to await more fundamental political and institutional changes.