Mike McConville

Criminal Justice in China

AN EMPIRICAL INQUIRY

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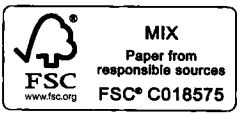

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This study arises out of a long-term research project which has had several homes and the support of many friends. The magnitude of the task set at the outset was ambitious enough but the project grew as the field work developed and became sustainable only with help, support and encouragement from many individuals and institutions.

The overall ambition of the research was to provide a rich description of China's criminal process in action in a way that would better inform those who have responsibility for its structuring and management, those who work in it on a daily basis and those interested in the process of law reform. The research set out to correct an over-emphasis upon purely procedural law by looking at the whole process and those engaged in it through a widespread empirical engagement with the system as it operates in everyday cases. It was and is intended to contribute to dialogues about China rather than in any way to foreclose discussion.

No research project can be comprehensive, the more so in a country as large as Mainland China, but empirical research can often provide an account that transcends the knowledge and experience held by individuals who work within the system by identifying interrelationships and, hopefully, picking out the principles and values that represent the glue that keeps the whole process together.

In many jurisdictions today, the process of reform of the law and its institutions and the questioning of existing arrangements has given more significance to research. The current project seeks to advance this process on the basis that a rational engagement with reform should proceed from a fuller understanding of the whole system and that a basic requirement of informed change is that the system itself should be self-aware. It is indeed difficult for those who work within a complex system to comprehend the whole and see how component parts inter-relate and interact and it is heartening that we received co-operation from so many working within China's criminal justice system. Much more needs to be done but we hope that this project will advance knowledge of China and act as a spur to others better placed to intervene in intelligent debates about the way forward.

This research attempts to offer a broad factual basis for better understanding a highly complex criminal justice system through recourse to empirical and verifiable data and, as will become clear, through giving prominence to the voices of those who work within it. We emphasize that our research is intended to give a holistic view of the system and to the views and opinions of those who work within it: the focus is not on individual or atypical criminal cases but on the routine everyday case that confronts the courts.

The origins of the project on which this book is based go back many years to days at Warwick Law School when Professor Geoffrey Wilson and I thought that it really was worth knowing more about China not for what we could get out of it by way of overseas student fees but because of the intellectual challenge posed by comparative scholarship which in our understanding sees law and the study of law as about the quality of life rather than confined to seeing it in terms of procedural technicalities or simply as one

method for settling disputes. Throughout the long years that have passed since then, Geoffrey and his wife Marcia encouraged me and gave me confidence that it could be done despite the inevitable and many setbacks along the way.

The core of the project has been primarily located at The Chinese University of Hong Kong, Faculty of Law under a team led by Professor Mike McConville having initially started life at the School of Law, University of Warwick, continued later at the School of Law, City University of Hong Kong. Each of these institutions has played a key role in helping the research and providing ancillary resources at times of need.

The individuals who provided constant support for the project at The Chinese University of Hong Kong were: Dr. Eric Wing Hong Chui (now based at the University of Hong Kong); Alice Chan Ka Yee; and Paul Leung Po Sang (now barrister-at-law in private practice in Hong Kong). Eric helped with the training of the researchers and provided general support at all stages. Paul provided all-round research assistance until he left to take up practice at the Bar. Alice has been with the project from the outset and undertook almost every task associated with a major field endeavour and did so with unflagging energy and good will.

I wish to thank all my colleagues at The Chinese University of Hong Kong: they have provided continuing and unstinting support throughout in all sorts of ways. Some require special mention. Professor Eva Pils was a constant source of knowledge and inspiration, and selflessly provided detailed comments on an early draft when she was under great time pressure herself. Eva has been an admirable colleague and a fountain of knowledge about Chinese law and this project owes a great debt to her. Professor Lutz-Christian Wolff continually updated me on developments in China and on the latest views of participants in various discussion forums and reassuringly said on many occasions, 'One day you will finish it'.

Nothing could have been achieved without the wonderful backroom support the Faculty of Law at The Chinese University has provided. Mrs. Diana Ying, Faculty Planning Officer, was always on hand to help and support in every way possible. John Bahrij, our Law Librarian, sought to help at every stage and was able to trace even the most obscure source. At an earlier stage, Helen Suen of The City University of Hong Kong also helped and gave support to the project.

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Others closely involved with the project at various stages were: Professor Carol Jones (who helped draft the initiating grant application and spent a great deal of time training individual researchers) and Professor Ian Dobinson (who assisted with the training of researchers as well as providing help and guidance on other aspects of the project) who were core members of the planning team. Both have been friends and colleagues and in that capacity have been unswerving in selflessly offering their support and advice on the many occasions where their help was needed. Professor Satnam Choongh (also at The Chinese University of Hong Kong) joined the project after the field-work was completed and was a great source of inspiration in the early write-up phase, providing initial drafts of a number of chapters and giving general support elsewhere.

The project was undertaken with the encouragement and advice of friends and partners from Mainland China. Their commitment to law reform in China is of long-standing and it has been a privilege to work alongside the leading academics in Chinese Criminal Procedure Law. None of this research could have been achieved without their help.

Special thanks go to our three researchers. Their efforts in the field were unyielding despite the novel challenges presented and the occasional obstacles placed in their path. As faithfully as they could, they implemented the research instruments and used ingenuity in adjusting to new environments. They took the novel challenges presented by fieldwork in China in their stride and stuck to their task whatever the difficulties encountered. Their work will, we hope, inspire others in Mainland China to undertake similar research projects so that information on the functioning of the Chinese legal process in general becomes richer.

In addition, we are grateful to those judges, prosecutors and lawyers who provided direct or indirect support to this research. In doing so, they wanted to assist in gaining a richer understanding of what they see as the real issues of the criminal justice system so that those who know China well can better address the problems they confront. We hope that they will fully appreciate our gratitude and understand that we are unable to mention their names and affiliations.

Among those who provided general and administrative support to the research are Eastman Chan and Stephanie Tam who have been a joy to work with as they struggled uncomplainingly with endless drafts, a task made more rather than less difficult by the invention of word-processing.

Our thanks also go to the whole team at Edward Elgar Publishing Ltd. In particular, Tim Williams was committed to the project as soon as it came to his notice and he has given unfailing support and displayed unflagging optimism throughout production of the book. John-Paul McDonald patiently answered all our questions and gave us latitude when it was most needed and Rebecca Hastie, Jack Webb, Emma Gribbon and Laura Seward helped see the manuscript through to completion.

All works of this kind depend upon the personal and moral support of those who are close to you. In this regard, I had the unqualified support, love and friendship of my late colleague Professor Chester L. Mirsky and his wife Gloria. They saw value in the enterprise and spurred me on whenever I met a problem or offered encouragement whenever I became dispirited. I am forever in their debt.

This book could not have been written without the love, understanding, forbearance, support and friendship of my wife, Sonia McConville. She has been at my side from the very beginning and showed unflagging support over the many years it has taken to see it through including acting as proof-reader and style-guide.

In a project of this kind and dealing with a subject that is fraught with all sorts of challenges, the usual disclaimers need reinforcing. The views expressed in this book are those of the project team alone and are not to be taken as the views of any others who have assisted in the project or have given support and encouragement to the research enterprise.

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1. Introduction

In this book, we examine from an empirical standpoint how the modern criminal justice process in China is functioning and the implications this might have for our understanding of system change. The political, economic and social transformations that have taken place in China over the last half century have had a major impact upon the methods, institutions and mechanisms used to deal with alleged criminal infractions. Although the period after the founding of the Republic in 1949 was marked by a state-driven, class-based ideology focusing episodically upon 'enemies' of the state and 'counter-revolutionaries' without the discipline of a system of criminal procedure, symbolized by arbitrary detentions, torture and summary justice[1] (at its height during the notorious Cultural Revolution, 1966–1976, when formal institutions themselves were abolished), from the introduction in 1979 of a Criminal Procedure Law and its successor in 1996 there has been a process of building formal criminal justice institutions and procedures which represent, at least to some degree, a break from the past and which outwardly resemble institutions and procedures in societies based on the rule of law. In this book we analyse the extent to which these changes to the formal legal structure have resulted in changes to the law in practice.

We begin by briefly describing the main features of China's criminal justice process, its institutions and its procedures as they bear upon public, as opposed to private, prosecutions.

THE CHINESE CRIMINAL PROCESS IN OUTLINE[2]

Investigations into reported crime are conducted by the police (*Gong'an*) or Public Security Bureau (PSB). This is the body which is responsible for deciding whether an incident is or is not a crime and for collecting any and all evidence relevant to the resolution of the matter. If it is not considered a 'crime' the police may either take no further action or they may consider that some official action against an individual is still merited utilizing for this purpose various administrative powers described in more detail in Appendix 8 which include detention and 're-education through labour' (*laodong jiaoyang*).

If the police decide that the matter is a crime, they should file the case. They have

[1] The starting point of serious inquiry into China's criminal justice system is the pioneering work of Jerome Cohen (1968) who can rightly be said to be the father of the academic study of China's criminal justice system. As Cohen makes clear, there were significant differences in the state's position in regard to law and its institutions over this period which witnessed, among other things, the 'Anti-Rights campaign' and the 'Hundred Flowers Blooming' period. See also Lubman (1969).

[2] See Appendix 1.

powers to detain any suspect and carry out investigative actions such as search of the person or property and may seize relevant material or documentary evidence. If the police decide that it is necessary to detain the suspect, they may submit the case to the People's Procuratorate (*Renmin Jianchayuan*) and request approval to arrest. If arrest is approved, the police have powers to release the suspect or to detain the suspect (with maximum detention periods fixed by law) while evidence is collected.

Once a case goes forward for prosecution, it is handled by the Procuratorate. The Procuratorate has powers to interview the criminal suspect and, where they deem the evidence deficient, may ask the police to undertake 'supplementary investigation'. In the event of a prosecution, it is the responsibility of the Procuratorate to draw up a Bill of Prosecution detailing the charges levelled against the criminal suspect and to present the case to the People's Courts (*Renmin Fayuan*).

As set out in Table 1.1, less serious cases will be dealt with in a Basic Court.[3] Basic Courts are normally located in counties, municipal districts and autonomous counties. Crimes of a more serious character are heard in Intermediate Courts,[4] which are established in capitals or prefectures at the provincial level. Except in certain summary cases, the court sits as a collegial bench (*heyi ting*) and in theory reaches a decision collectively, although in practice the case will be handled by one of their number, referred to herein as the case-responsible judge (*chengban faguan*).[5] Additionally, there is in each court institution a presiding judge (*shenpanzhang*) who may also be the case-responsible judge in an individual case.

In major (*zhongda*) or complex (*yinan*) cases,[6] the case may be passed for advice or decision after the court hearing to the adjudication committee (*shenpan weiyuanhui*) which comprises the President of the Court, Vice-Presidents and the Heads of the Divisions[7] and senior judges. Where this occurs, the decision of the adjudicative committee must also in practice be approved by the head of the division and thereafter by the President of the Court. In practice, the case-responsible judge at the trial will, in this highly bureaucratic setting, defer to his or her superiors.

In parallel with the courts, the Chinese system has political-legal committees at each level. The Party's political-legal committee (*zheng-fa weiyuanhui*) supervises and directs the work of the police, procuratorate and the courts and can involve itself in law enforcement, court procedure and individual case adjudication. The political-legal committee is usually headed by the local chief of police and includes the deputy party-secretary in charge of political-legal affairs, the President of the court, the head of the procuratorate

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[3] Criminal courts in China are organized at four levels: Basic Court; Intermediate Court; Higher Court; and the Supreme People's Court. Except for the Basic Court, all courts have both original and appellate jurisdiction.

[4] The Court also has an appellate jurisdiction none of which are included in our study.

[5] Technically, power and responsibility is vested in the 'court' not in individual judges. For this reason, members of the court (such as presidents and division chiefs) have a legitimate right to take part in or review draft opinions before they are released.

[6] These will typically include cases involving the death penalty, corruption and bribery cases, economic crimes involving deceit or corruption, cases that might have a major social impact and politically-sensitive cases (including Falun Gong cases).

[7] Courts in China are organized into separate divisions to deal with different categories of case such as civil, criminal, economic and administrative.

Table 1.1 Criminal jurisdiction of different level courts in China

Type of Court	Location	Criminal Jurisdiction
Basic People's Courts	In counties, municipalities, autonomous counties, and municipal districts. A basic people's court may set up a number of people's tribunals (*renmin fating*) according to the conditions of the locality, population and cases. Judgments and orders of these tribunals have the same effect as judgments and orders of the basic people's courts.	• All first instance ordinary criminal cases, except those that fall under the jurisdiction of courts at the higher levels as stipulated by the Criminal Procedure Law, other laws or decrees; • Minor criminal cases that do not need to be determined by trials; • Directing the work of the people's mediation committees.
Intermediate People's Courts	They are established in prefectures of a province and municipalities	• Cases of first instance as assigned by laws and decrees; • First instance cases transferred from the basic people's courts; • Appeals and protests against the judgments and orders of the basic people's courts; • First instance counter-revolutionary cases and cases endangering State security; • Cases punishable by life imprisonment or death penalty; Criminal cases in which the offenders are foreigners; and • Protests lodged by the people's procuratorates in accordance with judicial supervision procedures.
Higher People's Courts	Established in provinces, autonomous regions, and municipalities directly under the Central Government.	They have jurisdiction over first instance major criminal cases that 'pertain to an entire province (or autonomous region or municipality directly under the Central Government)'. Their jurisdiction includes: • First instance cases transferred from the lower courts; • Appeals and protests against the judgments and orders of the lower courts; • First instance cases as assigned by laws and decrees; and • Protests by the people's procuratorates in accordance with judicial supervision procedures.
Supreme People's Court	The highest court in China.	It has jurisdiction over first instance major criminal cases that 'pertain to the whole nation'. Its jurisdiction includes:

Table 1.1 (continued)

Type of Court	Location	Criminal Jurisdiction
		• Interpretation of laws; • First instance cases as assigned by laws and decrees; • Appeals and protests against the judgments and orders of the Higher People's Courts; • Protests by the Supreme People's Procuratorate in accordance with judicial supervision procedures; • Supervising the work of the lower courts; and • Approving death sentences.

Sources: Chapter 2 of the *Organic Law of the People's Court of the People's Republic of China*, and Chapter 2 of Part One and Article 199 of *the Criminal Law of the People's Republic of China*.

and the heads of other ministries or state bureaucracies, such as public security, state security and justice. The desirability of the continuation of the adjudicative and political-legal committees as China develops has been placed on the basis that 'there may still be a need for adjudication committees in courts where the level of [judicial] competence remains low, or for political-legal committees to ensure that judicial decisions keep with macro-level development goals and that the court has the resources and competence to provide an effective remedy in cases that are often the result of systemic shortcomings in the economy or social welfare system . . .' (Zhu Suli, 2010). Where the political-legal committee becomes involved, the decision-making is more complex and the ultimate decision may take the form of a directive.[8] As Ira Belkin (2007) succinctly put it: 'Suffice it to say that judicial, prosecutorial and police decisions in the criminal justice system in China are very much part of a larger political process that is extra-judicial and is not transparent.'

An adverse decision of the collegial bench may be the subject of an appeal (*shangsu*) by the defendant or a 'protest' (*kangsu*) by the procuracy to a court at the next higher level. Appeals and protests are heard by Higher People's Courts which are located in provinces, autonomous regions and municipalities directly under the Central Government.

Provision has been made for expediting first instance trials in certain cases. Summary Procedure, under which the trial will be conducted by a single judge, may be applied where the defendant is pleading guilty and the offence charged does not carry more than three years' imprisonment. Simplified Ordinary Procedure, which may be used in certain

[8] Randall Peerenboom (2010b) states that the intervention of the political-legal committee 'does not necessarily dictate the outcome of the case' but rather 'it recommends action to the court': p. 80. Our discussions with judges in China suggest rather that where the political-legal committee takes a view, that view is dispositive. No judge that we have spoken to has indicated that he or she would be able to disregard intimations from the political-legal committee whether framed as a recommendation or as a directive.

cases where the defendant is pleading guilty, allows the court (which normally is provided only with the 'major evidence' by the prosecutor) to read all evidence in advance of trial. These two trial forms are dealt with in greater depth in Chapter 8 *infra*.

BACKGROUND TO 1996 CRIMINAL PROCEDURE LAW: THE 1979 CPL REFORMS

The introduction of a new Criminal Law (CL) and Criminal Procedure Law (CPL) in 1979 was seen by many as constituting a welcome break from a past marked, even discounting the Cultural Revolution, by arbitrariness in decision-making, torture of suspects and 'demonstration trials' in which the outcome had already been decided:[9]

> [B]efore the promulgation of the Criminal Law, we depended on criminal policies in convicting someone of crimes and meting out punishment. We made decisions at our discretion, and the work was strongly characteristic of rule by man. Under such circumstances, the promulgation of the Criminal Law put an end to an era in which there was no law to go by. . . .

Similarly, Wang Hanbin (1996), in welcoming the 1996 CPL reform stated:

> We have made significant amendments to the various stages of criminal proceedings, including investigation, prosecution, and adjudication. This is a major development toward protecting the legitimate rights of the parties concerned. The amendments accord greater protection to citizens' rights and interests under the criminal procedure system and are conducive to correctly meting out punishment for criminals. They address, in a more explicit, concrete, and scientific manner, the issues of how public security organs, procuratorates, and law courts should divide their responsibilities and cooperate and restrain each other.

The police, procuratorate and the courts became responsible for different stages of the criminal process, investigation, prosecution and trial working together under the principle of 'mutual co-ordination and restraint' (*huxiang peihe, huxiang zhiyue*).

The starting point of the criminal process was the apprehension of the suspect by the police. In the immediate past before the 1979 Criminal Procedure Law (CPL), the police powers in this regard were almost untrammelled and they were unrestricted as a matter of practice.[10] The 1979 CPL imposed a requirement that, in order to obtain approval for arrest from the prosecutor, the police had to satisfy a high standard namely to show (Article 40) that the 'main facts of the crime have been already clarified'. There was limited provision to detain 'an active criminal or major suspect' prior to arrest where, for example, the individual was in the process of committing a crime, was identified as having committed a crime by a victim or witness or there was a likelihood that he or she would destroy or falsify evidence (Article 41). Following such detention, the police had a maximum of seven days in which to apply to the procuratorate for permission to arrest

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[9] Zhang Huanwen, a National People's Congress Deputy, cited by Turack (1999), p. 50.

[10] During the Cultural Revolution (1966–1976) political mobilization through the 'mass line' dominated such that official agencies, including the police, were effectively destroyed. See, Cai Dingjian (1999a).

after which the procuratorate were given up to three days to decide whether or not to approve (Article 48). Additionally, once an arrest had been approved, the total period over which a suspect could be held in custody (including any period covered by pre-arrest detention) was limited to two months, extendable in 'complicated cases', by a further month only upon approval of the procuratorate at the next highest level (Article 92(1)).

Given such a relatively restrictive framework, however, the police continued the practice of widespread resort to detention by utilizing powers outside the 1979 CPL and not requiring the approval of the procuratorate, in particular, the administrative power of 'shelter and investigation' (*shourong shencha*).[11] Even this power, limited as it was to three months' detention, was routinely flouted and the police were able, without external supervision, to utilize detention in order to secure confessions. Further powers could be invoked 'according to the circumstances of the case' (Article 38, 1979 CPL) including 'taking a guarantee and awaiting trial' and 'supervised residence'. The objective of the police was to secure confessions under the prevailing ideology of 'leniency for confessions; harshness for resistance' (*tanbai congkuan; kangju congyan*).

On transfer of the case to the procuratorate, Article 97, 1979 CPL provided that the procuratorate had up to one month to decide whether to initiate a prosecution, extendable by two weeks in 'major' or 'complicated' cases. Throughout this time, the suspect would remain in custody and the detention could be further extended by the procuratorate requesting the police to undertake 'supplementary investigation'. Although such an investigation was time-limited to one month, no limit was placed upon the number of such requests that the procuratorate could make.

Following the initiation of proceedings against an accused and transfer of the case to the court, the court would constitute a 'collegial panel' to try the case. The opening of the hearing was not the occasion to inform the court about the charge and evidence: that had already occurred. In advance of trial, the collegial panel would meet to discuss the case and reach a decision on both the nature of the offence and sentence. 'It was normal practice in China that a case was decided before a trial and that those who tried the case might not have the power to make the decision' (He, 2009, p. 319).

The court had to try the case unless there was not 'clear and sufficient evidence' to support the prosecution: if that happened, the court would remand the case to the procuratorate for supplementary investigation. Where it considered that no criminal punishment was necessary, the court could ask the prosecutor to withdraw the case. In cases where there was any doubt or uncertainty, a people's court could undertake its own inquest, examination, search, seizure, crime scene visit and expert evaluation. In short, it was the judge who, through pre-trial investigation, decided on the facts and the law. 'As a matter of law, no court would open a court session if the collegial panel was not certain about the facts, the offence and the sentence' (Fu, 1998, p. 32).

The result was: 'verdict first, trial afterwards (*xian ding hou shen*)'.[12] But, as we have noted, the verdict itself was not necessarily the verdict of the court. The collegial panel

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[11] See, for a fuller account and sources, Hecht (1996a), pp. 20 ff.

[12] Various popular sayings encapsulated this arrangement. 'The police cook the rice, the prosecutor delivers the rice and the court eats it.' Another, on the same lines: 'The prosecutor reads the paper, the defendant's lawyer reads the paper, and the judge has already made up his mind.'

was a subordinate institution and cases were commonly discussed with the adjudication committee or after referral by the Presiding Judge or Head of the Unit through consultation with a higher court. In cases which were considered sensitive, Party officials and other political figures would need to be consulted or would determine the decision through the political-legal committee.

It follows that there was limited role for the defence lawyer because a challenge to the case was not simply a challenge to the investigator or the prosecutor but to the court which had already formed a concluded view before the trial. The role of the defence lawyer (then a state employee) was to plead mitigating circumstances or help 'educate' defendants as to the error of their ways. If the lawyer wished to argue innocence, this could be done generally only with the prior permission of the government (Gelatt, 1991). In 1983, the Standing Committee of the National People's Congress promulgated a 'decision' (the so-called 'September 2 Decision') which effectively took away a defendant's right to a lawyer in death penalty cases by abolishing the requirement to notify the defendant of the institution of trial. Defence lawyers were subject to harassment by the government and, in 1983, were extraordinarily made part of the prosecution team in the 'strike hard' (*yanda*) campaign against crime (on 'yanda' campaigns, see Tanner, 1999 and Trevaskes, 2007a). The malign influence this had on the public image of defence lawyers continued for some years.

By virtue of Article 110, 1979 CPL, under which the Bill of Prosecution would be delivered to the defendant 'no later than seven days before the opening of the court session' and the defendant informed of the right to appoint counsel, lawyers could not be involved in a case until a week before the trial at the earliest. In practice, lawyers often had far less time to prepare: whatever the complexity of the case or the volume of documentation involved,[13] lawyers were not accorded access to the records of the collegial panel (which had already determined the offence and punishment) or to evidence uncovered by the court's investigation. There was no concept of pre-trial disclosure: the duty on the prosecution being to deliver the file and evidence to the court. Occasionally informal meetings occurred between lawyers and prosecutors to identify issues in dispute and, where there was convincing counter-evidence, the prosecutor and judge could be saved from public embarrassment by withdrawing the case.

Under the 1979 CPL, the trial judge was the dominant figure who opened the session, announced the subject matter of the case and introduced the participants. After the prosecutor read out the Bill of Prosecution (including the facts, the offence and the punishment sought), the trial judge questioned the defendant (the prosecutor could also question the defendant with the permission of the judge). By Article 116, 1979 CPL the judge and prosecutor questioned any witnesses or read out testimony of those witnesses not in court, read out conclusions of expert witnesses and documentary evidence. In the absence of prosecution witnesses (the norm), there was little the defence could do.

By Article 115 of the 1979 CPL, the parties and defence lawyers could ask the case-responsible judge to question the witnesses or expert witnesses or ask permission to put their own questions directly. The court was empowered to stop defence questioning if it

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[13] Provision was made to allow a lawyer to apply for delay of the trial in complex cases where the time was inadequate but these were rarely granted: Zhou (1994) cited in Fu Hualing (1998).

considered this irrelevant. The court additionally had, by virtue of Article 117, discretion whether to allow the defence to call its own witnesses.

> Given the fact that a case was decided before the trial, the trial could only be a ritual, with the parties knowing that any input would be too little and too late. (Fu, 1998, p. 39)

Most defence lawyers at this time worked in state-owned firms and were government employees: their status was low and their motivation lower.

THE CRIMINAL PROCEDURE LAW, 1996

The 1996 Criminal Procedure Law (CPL) was introduced at a time of optimism over the direction of the reform of criminal justice in China with Chinese academics and others persuaded that reform was indeed moving in the direction of greater transparency, an enhancement of the role of the defence and prosecution lawyers and a removal of the 'decision first' thinking that had marked the earlier era.[14] It was understandable, therefore, that the rays of hope in the 1996 CPL would attract particular interest from commentators. Writing of the 1996 CPL, Fu Hualing (1998) provided an early overview of the changes that were introduced:[15]

> In many respects the [CPL] introduces important changes to the previous procedures and significantly redistributes the existing division of powers within the criminal justice system. It restricts police power and the prosecution's discretion. It enhances the position of the court and differentiates the roles of judges. It also offers more protection for the rights of the accused and enhances the position of defence lawyers in the criminal process in substantive and procedural aspects. Consequently criminal lawyers are expected to play a more active and meaningful role in criminal law. (p. 31)

Similarly, Carol Jones (2005), in reviewing developments from 1949 to 1999, underlined the advances made but sounded a warning about what was happening in practice:

> The 1996 CPL did introduce a number of improved due process rights and made the trial system more adversarial. It abolished 'verdict first, trial second' (a person could be convicted only *after* a trial). It also enabled legal representation at an earlier stage in the criminal process, gave lawyers a bigger role at trial and made the initial stages of the process (where the suspect was in police custody) more transparent and accountable to law. However, since 1997, the number of defendants being represented by a lawyer has declined, mainly because of the harassment lawyers experience when they try to use their new powers. (p. 201)

The promise was that China had taken the first step towards the introduction of an 'adversary' system of trial. As Amanda Whitfort (2007) put it:

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[14] In addition to the 1996 CPL, other major reforms to the Chinese criminal justice system at this time included the Judges Law (1995), Procurators Law (1995), Police Law (1995), Administrative Penalty Law (1996) and the Criminal Law (1997).

[15] The quotation omits the reference to Article 12 of the 1996 CPL which provides that no one is guilty of a crime without a people's court rendering a judgment according to law.

> Many of the reforms contained in the 225 articles of China's Criminal Procedure Law of 1996 were intended to introduce aspects of the adversary system of justice to the prevailing system, which although not inquisitorial, *per se*, had European civil law at its roots (citation omitted).

As Jonathan Hecht (1996a) noted at the time of its passing, the 1996 CPL, whatever the motivations and intentions underlying it (as to which see, Hecht, 1996a and Fu, 1998), had an impact in at least four major areas of the criminal process: pre-trial detention; the right to counsel; prosecutorial determination of guilt; and the trial process.

So far as police detention powers are concerned, the 1996 CPL imposed some restrictions. The powers of the police to 'take a guarantee and await trial' and 'supervised residence' were restricted to certain types of criminal and time limits were imposed (one year limit on 'taking a guarantee and awaiting trial' and six months limit on 'supervised residence': Article 58(1)). Further, by omitting mention of 'shelter and investigation' from the 1996 CPL, the power was formally abolished. However, the new law extended police pre-arrest detention powers in ways which effectively restored them by other means. For example, Article 61, 1996 CPL provided that the police could detain individuals who 'do not tell their true name or place of residence or whose identity is unclear' as well as to individuals who the police 'strongly suspected' of wandering around committing crimes or forming bands to commit crimes. Further, the circumstances justifying a two month extension of pre-arrest detention was extended by Article 126 to include 'major, complicated cases where the scope of the crime is broad and gathering evidence is difficult', and, by Article 127, an additional two months (giving a total of seven months) could be added for any crime punishable by ten years or longer.

Articles 140(2) and (3), 1996 CPL significantly altered the power of the procuratorate to extend an arrested person's stay in custody by repeated recourse to requests to the police for 'supplementary investigation' by limiting such requests to a maximum of two. On the other hand, the period within which the procuratorate had to decide whether or not to authorize arrest was extended from three to seven days (Article 69(3)).

The former practices under which courts themselves engaged in pre-trial investigation by remanding the case to the procuratorate for supplementary investigation (Article 108, 1979 CPL) and had their own power to discover facts (Article 109, 1979 CPL) were abolished in a reform that was seen to shift the burden of investigation and the adduction of evidence away from the court to the procuratorate:

> These changes shift the burden of leading evidence from the court to the procuratorate. Accordingly, the procuratorate alone will be responsible for the validity of the evidence, and the court will no longer examine the evidence prepared by the procuratorate before trial. If this procedural reform is faithfully executed, judges may become neutral arbitrators, who decide a case according to whatever evidence is given in court. (Fu, 1998, p. 44)

For many commentators, the 1996 CPL enhanced the position of the court in criminal proceedings and thus allowed defence counsel to play a more active and meaningful role. It was considered that the 1996 reform had altered the dynamics of the trial so that in future the prosecution would bear the burden of proof (He, 2009, p. 304; and Zhang and Hao, 2005, pp. 97–99).

In cases in which the prosecution decides to institute a prosecution, the new law changed the position with regard to the transfer of evidence. The former practice under

which all evidence was transferred to the court was considered to create such bias in the mind of the judges that there could not be a fair trial: the 'first impression', it was said, 'would be the strongest'. Accordingly, Article 150, 1996 CPL provided that the prosecution would not transfer all the evidence but instead the court would try a case where a Bill of Prosecution includes the alleged criminal facts and has attached a list of evidence, names of witnesses and photocopies or photographs of the 'major' evidence.

The 1996 CPL was also seen, by virtue of Article 149, to increase the powers of the collegial panel. Under Article 149, a collegial panel has the right and duty to render a decision after trial. If the panel is unable to make a decision on a complex and important case after a trial, it should submit the case to the adjudication committee for consideration and decision. This was seen (Fu, 1998) to effect two important changes: the collegial panel itself, not the President of the court, is to initiate the process of referring a case to the adjudication committee for decision; secondly, such a referral occurs only after a trial is completed:

> The reform of trial procedures will improve the quality of legal representation before and during a trial. Right to counsel is extended to the investigative stage. . . . At the investigative stage, an accused may retain a lawyer to provide legal consultancy. At the prosecution and trial stages, a defendant may retain a lawyer for criminal defence. (Fu, 1998, p. 44)

At the investigative stage, by virtue of Article 96, 1996 CPL a lawyer can be a legal 'representative', represent the suspect or lodge a complaint and to apply for bail (a provision subsequently amended by an Interpretation so that a lawyer could, in theory, represent a client following the first police interrogation); at the prosecution or trial stage, a lawyer has the right to read and copy case files, interview witnesses and the victim.[16]

THE IMPACT OF THE 1996 CPL: THE PROMISE

There is no question that the introduction of the 1996 CPL was seen by many commentators as ushering in the start of a new era in Chinese criminal justice by introducing some concepts familiar to Western jurisdictions and more clearly resembling an adversarial than an inquisitorial trial model.[17] Professor Randall Peerenboom (2006) provided an overall assessment of the reforms in this way:

> One of the most significant reforms in criminal law was the transition from an inquisitorial system to a more adversarial system in the mid-1990s. In an inquisitorial system, a judge or prosecutor carries out the pre-trial investigation; detention periods tend to be long, with little role for the lawyer, who is often limited to brief visits with the accused after the initial questioning; at trial, the judge actively pursues the truth by questioning witnesses and overseeing the production of evidence. The process is structured as a search for truth conducted by impartial officers of the state. In contrast, in an adversarial system that process is structured as a contest between the parties. Judges are not involved in police investigation; lawyers play a much larger role both

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[16] These rights, as we shall see, have been formally extended by the 2007 Lawyers Law.

[17] It is interesting to note that in 1992, Italy also sought to incorporate adversarial features into its then 'pure' inquisitorial system in order to increase transparency and improve efficiency. For an early evaluation of the problems involved, see Pizzi and Marafioti (1992).