УДК 343.13(510)

LILING YUE
Professor, Dr. of Law,
China University of Political Science and Law[1]

ЮЄ ЛІЛІНГ,
професор, доктор юридичних наук,
Китайський університет політології та права

THE DEVELOPMENT OF CHINESE CRIMINAL PROCEDURE LAW

Summary: The article is dedicated to questions of the development of criminal procedure legislation of China in modern history. The main provisions of Criminal Procedure Codes of PRC of 1979, 1996, 2012 are highlighted. Changes in the economic and social spheres of China that lead to changes in criminal procedure are pointed out. Accent is placed on the most important and controversial parts of the 2012 reform — investigative procedures and defense in criminal procedure.

Keywords: criminal procedure; criminal procedure code; legal reform; China; PRC.

Introduction. Although China was one of the world's earliest civilizations and has one of the world's oldest legal traditions, the modern history of China's criminal procedure law is relatively short. The latest major development of the area is the Criminal Procedure Code of 2012. This research is focused both on the development of Chinese criminal procedure law in general, as well as on the establishment of key innovations of each of the reforms of the Criminal Procedure Code of the People's Republic of China.

Discussions. In China today we generally begin our discussions with the Criminal Procedure Code (hereinafter CPC) of 1979.The founding of the People's Republic of China in 1949 began an important new era in Chinese history. In its early days the People's Republic made several attempts to develop a Criminal Procedure Code. There were extensive discussions and a number of draft codes[2]. Ultimately, however, the process of consideration was interrupted by a period of turmoil that has come to be known as the "Cultural Revolution". This period of turmoil is generally dated as 1966-76.

China emerged from the Cultural Revolution with a new group of leaders. One of the new leadership's goals was to re-establish the rule of law and create a modern legal system. Pursuit of these important goals led to the adoption of new codes in almost every important area of the law. The leading role in this enormous

[1] Professor Yue was al member of the study group that produced the discussion draft and the framework for 1996 revision of the Chinese CPC. She was also an important participant in the discussions resulting in the CPC of 2012.

[2] The two main drafts were made in 1957 and 1963.

undertaking fell on the Legislative Affairs Commission of the NPC (hereinafter NPC). After extensive discussion the NPC on 1 July 1979, adopted a CPC[1].

The Modern Era Begins: The Criminal Procedure Code of 1979. The 1979 CPC contained only 164 articles. When this code was drafted, China was still in the process of rebuilding its legal institutions. Because little attention was paid to the legal system during the Cultural Revolution, it was necessary to reconstruct both the legal profession and the legal academy. Because many legal scholars had been exiled to rural areas during the Cultural Revolution (so that they could be "corrected through labor"[2]), restarting the law schools required the restoration of many professors to their former positions. In order to restart a functioning criminal justice system the government found it necessary to revive and rebuild the role and profession of prosecutor[3]. Following the civil law tradition, particularly the legal system of the former Soviet Union, the 1979 Code adopted an inquisitorial model of criminal procedure. The 1979 Code created a framework for criminal procedure and some basic rights for defendants.

Great Step Forward: The CPC of 1996. The end of the Cultural Revolution brought tremendous change to the economic, social, and political life of China. The new policy of continuous "open-up reform" greatly altered the daily life of the people and the political ideology. Although this new reform era brought significant benefits, it also had some drawbacks. Crime, for example, increased greatly [1]. Drug offenses that had largely disappeared during the Cultural Revolution because the country was closed to the outside world began to re-emerge in a big way. The new economic policies that China was now following brought in addition to economic progress new types of crime. The opening of the stock market, for example, resulted in new kinds of offenses as well as economic progress. The Supreme People's Court and the Supreme People's Procuratorate did a marvelous job of implementing the CPC of 1979 working out many problems and promulgating a great many rules, decisions, and judicial interpretations[4]. While fully supporting the huge task of implementing the new 1979 code, the government to its credit quickly realized that additional revisions would be needed.

In addition to the rapidly changing economic and political situation that emerged at the end of the Cultural Revolution, other factors played an important role in encouraging a revision of the CPC of 1979. One of the most important was the re-establishment of a Chinese community of legal practitioners

[1] This new code became effective on 1 January 1980.

[2] In pinyin, a form of Chinese that uses Western letters instead of Chinese characters, this is called "lao dong gai zao."It has been abolished by the Standing Committee of National People's Congress on December 28 ,2013.

[3] Chinese prosecutors are also known as "procurators." The Chinese Prosecution Service is an independent agency, not a part of the Chinese Ministry of Justice. The Constitution authorizes prosecutors to prosecute most criminal cases, investigate crimes committed by civil servants, and to provide oversight throughout the legal system, including such things as police investigations, the execution of punishments, and civil proceedings.

[4] The Standing Committee of the N P C promulgated three major decisions supplementing the CPC of 1979: (1) Decision on the Issues Related to the Verification of Capital Punishment Cases (10 June 1981); (2) Decision on Procedures Related to the Speedy Trial of Criminals who Seriously Endanger the Social Security (20 September 1983) (initiating the "Strike Hard" campaign), and (3) Supplementary Regulations on the Time Limit of Handling Criminal Cases (7 July 1984).

and scholars. In the mid-1970s when the CPC of 1979 was being developed, many of China's most respected legal scholars were still in the process of moving from the countryside (where they had been assigned to do manual labor during the Cultural Revolution) to their former professorial work. Although legal education in China resumed in 1977, few law schools existed at that time and the students who had been admitted to these schools were just beginning their studies. As law schools began to re-emerge, a few law reviews resumed the publication of scholarly articles. Around this time a few scholars and students went to other countries to study. This helped to re-introduce the study of comparative law. Although some of these developments came too late to influence the CPC of 1979, all played a major role in the discussions that followed adoption of the new code.

It was not until 1978 that the legal profession itself resumed the practice of law. In the years that followed the profession developed rapidly. Although there were only a few thousand lawyers in the whole of China at the beginning, by the end of 1996 there were 100,148 attorneys and more than 10,000 law firms. [2, p.1071] Although much of the work that these lawyers and firms did focused on economic matters, the legal profession also played an important role in the criminal justice system. In 1998, for example, Chinese lawyers defended nearly 250,000 criminal cases. In part because a bar examination had been introduced during this period[1], the quality of legal profession began to improve. The rapid growth of law firms and the legal profession had a number of important effects. It made legal assistance more accessible to criminal defendants, played a role in encouraging change in the legal profession, and encouraged lawyers to seek to enhance their role in the criminal justice process.

Another important factor in the growing realization of the need to update the CPC of 1979 was China's increasing involvement with international developments in criminal justice. In 1988, for example, China ratified the United Nations Convention Against Torture and in 1991 China ratified the UN Convention on the Rights of Child[2].

All these factors led the Standing Committee of the Eighth NPC to begin to consider revising the CPC of 1979. To assist in this revision in 1993 a Legislative Affairs Working Committee in 1993 initiated a survey as to how the CPC of 1979 was being implemented. The Working Committee solicited the opinion of law enforcement, judicial, and administrative agencies, as well as legal scholars, as to whether there was a need to revise the 1979 Code. Soon thereafter the Standing Committee's Legislative Affairs Office asked the China University of Political Science and Law to draft a revision of the 1979 CPC[3]. By the fall of 1995, the Legislative Affairs Working Committee had prepared a "draft for comment" for an

[1] China introduced a bar examination in 1986 and used this system until 2000. In 2002, the bar examination was replaced by State Law Examination.

[2] United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment . The Convention was adopted 10 December, 1984. It came into force on 26 June, 1987. The Convention on the Rights of the Child (UNCRC) was adopted on 20 November, 1989. It came into force on 2 September, 1990.

[3] The author participated in the research and drafting. The Ford Foundation assisted in financing the comparative research necessary for drafting the new law.

amended CPC[1]. On December 20, 1995, the Committee presented its draft to the Standing Committee for preliminary review. Following its preliminary review, the Standing Committee invited all the relevant governmental departments to a special meeting for the purpose of discussing the revision and addressing an important set of controversial issues that had been raised. After a thorough discussion the Standing Committee presented its revision to the Fourth Session of the Eighth NPC[2]. Many delegates made suggestions and proposed new provisions. On 17 March, 1996, the Congress adopted a collection of amendments entitled "Decision on Amending the Criminal Procedure Law of the People's Republic China". President Jiang Zemin signed the revised Code into law later that same day. The amended law became effective on 1 January, 1997.

The 1996 amendments significantly altered the CPC of 1979, increasing the previous 164 articles to 225 and making 110 changes in the law. Some of the more important changes were:

1. Establishing a principle similar to the presumption of innocence in western criminal procedure laws [3, Art.12];

2. Increasing the role of criminal defense lawyers;

3. Establishing a system of legal aid for criminal defendants who were indigent. This is perhaps the most important of the 1996 criminal procedure reforms;

4. Partially shifting the trial procedure for criminal cases from a pure inquisitorial model to a model that includes both inquisitorial and adversarial elements;

5. Eliminating the practice of "custody for investigation"[3];

6. Providing more protection for victims' rights.

1997-2011—Implementation of the 1996 Code and Other Developments. An even more important development occurred in 2007 when the NPC amended the Lawyers Law. Because the amended version of the Lawyers Law conflicted with the CPC of 1996, the NPC suggested that the CPC be revised so as to resolve the conflict[4].

In the period since 1996 China has continued to change rapidly. Recognizing that China has an important role to play in international society, China has signaled its willingness to accept international criminal justice standards and to abide by the rule of law. In 1997 China signed the United Nations International Covenant on Economic, Social and Cultural Rights (ICESCR)[5] and in 1998 it signed the International Covenant on Civil and Political Rights (ICCPR)[6]. Although China has not yet ratified the ICCPR, the Government has recognized the importance of ratification. The National Human Rights Action Plan (2012-15), for example, calls for actions to reform the laws, improve practice, and prepare for ratification of the ICCPR[7].

China is a large country with an immense population. The Chinese legislature must balance the protection of human rights with the need to

[1] In pinyin, this is called "zheng qiu yi jian gao".

[2] The Standing Committee is an important committee of the NPC. It is generally responsible for the handling of necessary business when the NPC is not in session.

[3] In pinyin, this is called "shou ong shen cha".

[4] See, e.g., NPC, Draft Amendments to CPC, Explanatory Notes , indicating that "there are several improper problems in criminal procedure".

[5] The Convention was adopted on 16 December 1966. It came into force 3 January 1976.

[6] The Covenant was adopted on 16 December, 1966. It came into force on March 23, 1976.

[7] It was published on 11 June 11 2012.

conserve the limited resources available for criminal justice. This task has often brought heated debate in the years since the 1996 Code was adopted. Among the important steps taken during this time was the creation by the law and practice of Chinese Supreme Court of a simplified procedure for handling minor offenses and prosecutions filed by private parties instead of the procurator[1]. Many legal scholars and practitioners have also called for a much greater use of mediation. This has led to significant debate and quite a few pilot projects in local courts.

Recognizing that the CPC of 1996 would eventually need to be revised, the Tenth NPC in 2003 scheduled a revision for 2008. Although much preliminary work had been done by 2008, the issues under consideration proved to be controversial. This led to several postponements. In August 2011, the Legislative Affairs Committee of the NPC published draft amendments and invited public comments[4]. This was the first time in its history that the Legislative Affairs Committee had invited the public to comment on proposed legislation. The public responded massively; 7,489 persons submitted more than 80,000 suggestions[2]. The Legislative Affairs Committee also held several important internal discussions of the proposed code. Ultimately, the Standing Committee[3] submitted a revised draft to the Eleventh NPC. The Congress approved the new code on 14 March 2012. The new code took effect on 1 January 2013.

The CPC of 2012. The CPC of 2012 contains 290 sections as compared with the 1996 Code's 225 sections. One hundred forty of the 290 sections are either new or amended. An official explanation published by the NPC [5] indicates that the new code addresses eight major issues: 1. rules relating to criminal defense attorneys; 2. the evidence rules that apply to criminal cases; 3. the coercive measures (sometimes called "compulsory measures") that may be used in criminal investigations[4]; 4–5. rules relating to investigative measures[5]; 6. trial procedures; 7. enforcement procedures, and 8. special criminal proceedings.

Criminal Defense: The Most Challenging Part of the 2012 Reform. Criminal defense is one of the most controversial and most important parts of the 2012 criminal procedure reform. When the CPC of 1979 was adopted, the legal profession was still in the process of being re-established. This made it difficult at that time to balance the prosecution, defense, and adjudication roles. By necessity, criminal defense lawyers played a very limited role in criminal proceedings. In addition, the Lawyers Law, as it existed at that time [7], classified defense lawyers

[1] 1996 CPC Art 174. This Article defines the scope of minor offences as cases for which the punishment is less than three years.

[2] This total includes comments from important groups such as the faculty at China University of Political Science and Law.

[3] For a description of the role of the Standing Committee, see n 11 above.

[4] European law scholars use the term "coercive measures" or "compulsory measures" to describe criminal justice investigative procedures that can potentially infringe on the basic rights of the accused or others. In the Chinese CPC, the term "coercive measures" is limited to measures that deprive suspects or the accused of their right of liberty. In the 2012 CPC, ch. 6 contains five procedures that can be used to deprive suspects or the accused of liberty during investigations or trials. These measures are (1) summons for questioning (sometimes called "compelled appearance") (ju chuan); (2) obtaining a guarantor pending trial, (sometimes called "bail") (qu bao hou shen); residential surveillance (jian shi ju zhu); arrest (ju liu); and pre-trial detention (dai bu). The Chinese law may be derived from the former Soviet Union CPC.

[5] This includes technical measures such as wiretapping and other secret procedures [6, Art. 148-152].

as state employees[1]. As state employees the defense role was very limited. In some cities in the early 1980s, defense lawyers who wanted to use a not guilty defense for their clients had to secure approval from the head of law firms.

The 1996 criminal procedure reforms made major changes in this system, authorizing criminal defense lawyers to become involved in criminal cases at the investigative stage[2]. The 1996 Code also allowed criminal defense attorneys to collect their own evidence. Vagueness in the wording of the 1996 Code, however, created problems in day-to-day practice. Although the 1996 Code allowed defense lawyers to become involved in criminal cases at an earlier stage than the 1979 Code, it failed to define the defense lawyers' role clearly. Instead of authorizing criminal defense attorneys to begin whatever work they needed to perform at the formal start of the prosecution, the 1996 Code authorized only a few specific functions during the investigation(such as offering legal advice [3, Art. 96] or representing the suspect in filing a complaint or reporting a crime) [3, Art. 96]. One very important restriction was that the 1996 Code allowed lawyers to become involved in investigations only after the police had completed their first interrogation of the suspect or completed certain other investigative procedures such as arrest. (Under Chinese law, these procedures are called "compulsory measures.") This meant that under the 1996 Code a defense lawyer was not allowed to represent a suspect during the first interrogation. The 1996 Code also did not require the police or any other official agency to inform a suspect of his or her right to retain a lawyer. An interpretation of the 1996 Code made jointly by the Legislature and other legal authorities indicated that if a suspect expressed a desire to hire a lawyer but failed to name a specific attorney, the investigator should ask the local bar association to recommend an attorney for the suspect [9, Art. 10]. This interpretation also failed to provide the obligation for informing suspect's right.

The 1996 Code also provided defense lawyers with other limited rights for assisting their clients. The 1996 Code allowed defense attorneys to meet with clients and detained suspects in order to gain an understanding of the facts related to the case. Defense lawyers frequently referred to these rights as the "Three Difficulties" [10, p. 35]. There are conflicting interpretations between the law and regulations. The 1996 Code appears to obligate the police to arrange meetings between defense attorneys and suspects. Only in cases involving state secrets does the meeting between the lawyer and the lawyer's clients need to be approved by investigating organ [3, Art. 96]. A 1998 joint regulation confirms a rule that in ordinary cases approval is not needed for lawyers' visits with their clients. The key issues in cases that involve state secrets are the scope of the "state secret" involved and who has the authority to decide other issues related to the "state secret." In practice, the

[1] Interim Regulations of People's Republic of China on Lawyers Art 1. These regulations were adopted on 26 August 1980, and took effect as of 1 January 1982. In Art 1 of this law said that "Lawyers are state legal workers whose task is to give legal assistance ....."This regulations became invalid when the first Lawyers Law was adopted in 1996, where the nature of lawyer has been changed into a "profession". The Lawyer's Law was revised again on 27 October 2007, in the Art 2, it says that:" For the purpose of this law, a lawyer means a professional who has acquired a lawyer's practice certificate pursuant to law....".

[2] The 1979 CPC Art 96 stipulates that criminal defense attorneys were not allowed to begin their representation until the case reached the trial court [8, Art. 96].

police decide which cases involve state secrets and which do not. Although the police decision in such cases is often not transparent, lawyers are rarely in a position to question or challenge the police decision. In practice, the police decide the time and place for meetings between suspects who are detained and their lawyers. The police often justify this kind of control by pointing to the limited number of interrogation rooms and the limited time available for visits. The 2007 amendments to the Lawyer's Law sought to deal with this problem. One amendment indicates that a defense lawyer who is hired by a suspect or a suspect's relatives has a right to meet his or her client when the lawyer shows his or her lawyer's certificate, an authorization letter from the client, or a legal aid office letter. [11, Art.33] The wording suggests that police approval is not required for a lawyer to meet with a client. When the new Lawyers Law came into force in 2008, however, the police began to require lawyers to register when they wanted to meet with their clients. The police said that such registration was necessary because of the limited meeting room space available. This procedure made it possible for the police to continue to regulate attorney visits. Another problem in the 1996 Code is that article 96 allows the police to be present at meetings between attorneys and suspects in "necessary" circumstances. This provision arguably violates international human rights treaties and standards [12, Principle 8, 22] that protect the confidentiality of communications between suspects and defense counsel. International human rights treaties provide that communications between a detained suspect and his or her counsel may be within sight but not within the hearing of law enforcement officials [12, Principle 8]. The 2007 revision to the Lawyer's Law provided that when a suspect is consulting with counsel, the conversation should not be monitored[1]. When this revision was first adopted, legal scholars and some lawyers viewed the new law as a great advance. Interpreting the new law as applying only to electronic monitoring of conversations between lawyers and suspects, however, the police soon began to require that a police officer be present at any "necessary" actual meeting between a lawyer and a suspect.

The 1996 Code allows defense lawyers to see and copy the procedural documents in their clients' case files as well as materials verified by technical experts [3, Art. 36]. Defense lawyers are also allowed to interview and communicate with suspects who are detained. Non-lawyer defenders, however, are allowed such rights only after receiving the permission from the procurator[2]. When the 1996 Code first came into force, lawyers, prosecutors, and judges quickly recognized the law's technical vagueness. They recognized, for example, that both the law and the interpretation failed to provide a clear interpretation as to what "materials" were accessible. Some procurators refused to provide suspects' confessions and witness testimony given during the investigation, materials that are very important for the defense. They provided only evaluations that were made by experts. The 2007 Lawyer's Law enlarges the scope of materials that the police must provide from "technical materials" to "materials in the case file" [11, Art. 36]. In practice, however, the 2007 Lawyer's Law was only partially

[1] In pinyin, this is called "jian ting".

[2] CPC Art 36 allows non-lawyer citizens who are recommended by an NGO or a quasi-governmental organization (the Code uses the term "people's organization"), or relatives, friends, guardians of the suspects or defendants.

successful. In the early years after adoption of the Lawyer's Law some prosecutors rejected defense requests for disclosure on the ground that the 1996 Criminal Procedure Law had not been revised.

In order to emphasize the court hearing the 1996 Code shifted the trial phase of the new system from the relatively pure inquisitorial model of the 1979 Code to an adversarial model. Under the 1979 Code prosecutors had been obligated to furnish the entire case file to the defense attorney as well as the presiding judge prior to the court hearing[1]. The adversarial model, however, has historically required less disclosure than the inquisitorial model. One important (but unintended consequence) of the 1996 criminal procedure reforms was that prosecutors were no long required to give the entire prosecutorial file to defense lawyers. Instead of the entire file the 1996 Code required prosecutors to provide only a list of the witnesses and a photocopy of the "major evidence" given to the trial court [3, Art. 150]. This greatly reduced defense access to the case file and to evidence that had not yet been transferred to the trial court. This reduced access to the evidence against the defendant quickly became a major problem for defense attorneys in the preparation of a defense.

Following traditional inquisitorial principles, the 1996 Codes restricted a defense attorney's ability to investigate and collect evidence. In fact, in the 1979 Code the lawyer's right of investigation and collection of evidence was absent [3, Art. 37]. If a defense lawyer wanted to get information from witnesses, work units, or other individuals, the defense lawyer needed to have consent from whoever was providing the evidence. If the defense lawyer wanted to visit the victim, the defense lawyer needed approval from the procurator or the court. In practice, however, defense requests were often refused-often because prosecutors and courts wanted to protect victims. Under the 1979 and 1996 Codes defense lawyers had a right to apply to the procurator and the court to collect additional evidence. In practice, however, applications were rarely approved. These various difficulties greatly weakened the defense. Although the Lawyers Law of 2007 provided some help to defense attorneys, it did not empower them to get information from witnesses, other individuals, and work units without the permission of these groups.

The 2012 Code greatly improves the ability of defense lawyers to assist their clients. The major changes in the 2012 Code are as follows:

1. Giving defense lawyers much broader access to the case file prior to the trial. The 2012 Code broadens the defense attorney's right to access the prosecution's case file. It says, "A defense lawyer may, starting from the date of the procurator's review of the case, access, excerpt, and copy the materials in the case file" [6, Art. 38]. The wording of this provision is similar to that in the 2007 Lawyers Law. The language in the new 2012 Code seems to be clear enough to give defense lawyers a right to access all the facts and materials relevant to the defense.

2. Changing the role of the defense lawyer at the investigation stage from that of "providing legal advice" [3, Art. 96] **to that of "being a defense lawyer"** [6, Art. 33]. This authorizes defense lawyers to become involved at the investigative phase of a case. The NPC explained this change as follows: "in

[1] Although the 1979 Code contained no clear requirement that prosecutors forward the entire case file to the court which has jurisdiction, in practice prosecutors must do that.

consideration of the fact that a suspect or defendant has the right to a defender throughout the whole procedure, it is advised to insert and set forth that a suspect of a crime may also entrust a lawyer to provide him or her with legal assistance as a defender during an investigation." The 2012 Code also requires investigators to inform suspects of their right to legal assistance [6, Art. 33].

3. Changing the rules concerning how lawyers meet with their clients. The 2012 Code confirms the provisions in the 2007 Lawyers Law saying that "no monitoring shall be permitted during the meeting between the defense lawyer and the suspect or the defendant" [6, Art. 37]. Although this confirmation represents great progress, concerns remain about how the term "monitoring"[1] will be interpreted. Some academic experts argue that the new law would be better if it followed the text of the United Nations document that says, "all arrested, detained, or imprisoned persons shall be provided with adequate opportunities, time, and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception, or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials" [12, Art. 8].

The 2012 Code makes it clear that in ordinary cases suspects do not need permission from the police to meet with their defense lawyer (assuming that the defense lawyer has the documents necessary to establish that he or she represents the suspect) [6, Art. 37]. This article gives the police 48 hours to arrange meetings of this kind. Academics suggest that the law here should follow the "Provisions Concerning Several Issues in the Implementation of the Criminal Procedure Law" jointly promulgated in 1998 [9, Art.15]. The 2012 Code appears to have expanded the kinds of cases that require advance approval. The 1996 Code limited the cases requiring advance approval to those involving "state secrets." The 2012 Code appears to require advance approval for all cases "involving crimes threatening national security, the conducting of terrorism, and major bribery crimes." The author has concerns that, if in those above mentioned cases the application would not be approved, that will mean that the suspects would not receive the legal assistance during the investigation. We are also not sure if the defense lawyer could apply for the meeting again after the rejection during the investigation.

4. Greatly expanding the availability of a free criminal defense attorney. The 1996 Code provided free legal defense services to only three groups of defendants: those who might be sentenced to death, minors, and those who are blind, deaf, or mute. The 1996 Code also gave judges discretionary authority to provide free legal services to defendants who were too poor to hire their own defense attorney. In addition to the categories mentioned in the 1996 Code the 2012 CPC extends the right to a free criminal defense attorney to persons facing life imprisonment and persons with certain lesser mental illnesses. Free legal aid is also now provided at the investigation stage as well as the trial stage of the proceeding. The 2012 Code also allows poor suspects, defendants, and their close relatives to request free legal assistance. If they are eligible, the legal aid organization shall assign the lawyer for them.

In recent years China has done much to develop a system of free legal assistance for vulnerable persons

[1] In pinyin, this is called "jianting".

charged with crimes. Although China has developed this system very rapidly, the system is still not as extensive as that in some other countries. In 2009 free defense lawyers were provided in 121,870 of the 749,838 criminal cases prosecuted in Chinese courts [13, p. 924, 937]. Two factors that have limited an even more rapid development of legal aid are a shortage of legal aid lawyers and the financial problems of local government. Overall the trend has been positive. The next goal ahead is that of providing a free criminal defense lawyer for every criminal defendant subject to a sentence of five years imprisonment or more[1].

5. Criminal Evidence Rules-Positive Progress. Chinese evidence rules are scattered in three separate procedural codes. There is no unified law of evidence. Because they concern human rights and the conduct of criminal proceedings, the criminal procedure evidence rules are in many ways the most important. The CPC of 1996 contains a chapter on the rules of evidence in criminal cases. This chapter, however, contains only eight articles and has been criticized as being "too general." It has also been criticized for its lack of an implementation mechanism. It is not surprising therefore that the last 15 years has brought heated debates on such theoretical issues as the standard of proof and such practical matters as implementation and whether a rule excluding illegally obtained evidence should be adopted.

a) Positive progress: preventing the use of illegally obtained evidence. The 2012 Code establishes a rule excluding the use of illegally obtained evidence. China differs from most other countries that use the continental law tradition. Statements from suspects and accused persons are considered important evidence in China. In practice such statements play a critically important role for practitioners such as police and prosecutors. If a suspect fails to confess, police and prosecutors hesitate to take cases forward to the next phase of proceedings. This kind of hesitation makes obtaining a confession the most important investigative procedure. Although the 1996 Code prohibits the obtaining of statements by means of torture, threats, or other illegal methods [3, Art. 43], it has no rules punishing violations of the law. Even if statements are obtained by torture or other illegal methods, judges tend to use the statements as evidence of the guilt of the accused if the judge thinks that the statements tell the true story. This situation occasionally leads some investigators to use torture to obtain information and has resulted in several miscarriage cases in recent years. Because such practices have been heavily criticized the Supreme People's Court, as long ago as 1998, adopted a rule stating that if it is proved that a confession was obtained by the use of torture, threats, or other illegal means, the confession could not be used to determine the outcome of a case. Since this rule was adopted, however, few cases have reported the exclusion of illegally obtained confessions. To deal further with issues of this kind in July 2010 the Supreme People's Court promulgated a Regulation on the Exclusion of Illegally Obtained Evidence. In August 2010 the Supreme People's Procuratorate and the Ministry of Public Safety jointly published a set of Rules on the Interrogation of Suspects designed in

[1] In China there are no published statistics concerning either the death penalty or life imprisonment. Statistics concerning the number of offenders who receive more than five years imprisonment include the death penalty cases. In 2012, 158296 offenders received sentences imposing more than five 5 years imprisonment. See Law Yearbook of China (Law Yearbook of China Press 2013). P. 1228.

part to deal with this kind of problem [14, Art. 2, Sect. 4]. This indicates that all the major legal institutions are attempting to make sure that the reforms begun by the Supreme People's Court succeed.

The 2012 Code reconfirms the 1996 Code's rules prohibiting the obtaining of evidence by illegal means [6, Art. 50]. The new Code also adds important new language, saying that "no person may be forced to prove his or her own guilt" [6, Art. 50]. This new language goes a long way toward establishing a privilege against self-incrimination, the international norm, as a matter of Chinese law. The 2012 Code, however, did not delete the 1996 Code's language stating that "the criminal suspect shall answer the investigator's question truthfully" [6, Art. 93] Academics and some legal practitioners are concerned about the possibility that this language conflicts with the privilege against self-incrimination. The 2012 Code also includes a paragraph allowing "leniency to suspects who confess their crime" [6, Art. 118]. This raises concerns about the consequences for suspects who do not confess. What happens if a suspect is then convicted? Is this an indication that the suspect did not tell "the truth" and that his or her punishment should therefore be harsher? Issues of this kind have existed in practice for a long time and could subvert the establishment of the privilege against self-incrimination. Another significant advance contained in the 2012 Code is that the exclusionary rule has been broadened to include physical and documentary evidence that has been illegally obtained as well oral evidence that has been illegally obtained. However, the law has provided two steps to exclude these kinds of evidences, the language it has been used is vague, it says that: "physical and documentary evidence collected in violation of the legally provided proceedings and severely affecting judicial justice shall be corrected or a proper explanation has to be made, for those evidences which could not be corrected or for which a proper explanation cannot be made, then the evidence should be excluded" [6, Art. 54]. The academics and practitioners challenge the absence of definition of such "correction", and the absence of an established procedure to make the correction. Moreover, "correction" of the illegally obtained physical and documentary evidences may lead to forging of evidence, which is illegal itself. We are expecting the interpretation of this article.

Recognizing that torture and other illegal behavior toward suspects often occurs in the time before the suspect is turned over to a custodial facility, the 2012 Code provides that arrested persons shall be delivered promptly to the custodial facility, maximum to hold the suspect for 24 hours [6, Art. 83].

b) Improved standard of proof in criminal cases. The 1979 and 1996 Codes had no clear standard of proof. To find a defendant guilty the 1996 Code required only that that "a guilty verdict, where the facts of case are clear and the evidence has been verified and sufficient" [3, Art. 162]. During the past two decades, there has been significant debate as to the meaning of "case are clear" and "the evidence has been verified and sufficient." The debaters have not reached a common conclusion. The 2012 Code goes an important step further. It adopts the "beyond a reasonable doubt" standard used in many countries around world [6, Art. 53].

The new Code developed detailed standards both for determining guilt and for sentencing. It establishes three requirements: 1) both conviction and sentencing require proof of the appropriate facts; 2) all the evidence required to decide a case must be verified through

procedures established in the Code; and 3) based on the overall evaluation of the evidence all facts must be proved beyond a reasonable doubt. In the debates leading up to adoption of the 2012 Code the proper standard of proof was one of the most hotly debated issues, particularly among Chinese academics. One group supported the "beyond a reasonable doubt"[1] standard that was eventually adopted. The group opposing the "beyond a reasonable doubt" standard [15, p. 494-496] argued that the purpose of criminal proceedings is to find the "objective truth" as to the events in question.

c) Improved handling of witnesses. The 2012 Code greatly improves the law related to witnesses. The 1996 Code recognized the importance of witness testimony in finding the truth. It also guaranteed the accused a right to confront the witnesses against him or her. Article 47 of the 1996 Code provided that witnesses must present their evidence at the trial and that prosecutors, victims, the accused, and defense attorneys have a right to cross-examine. Only after the testimony of all sides has been heard and undergone verification[2] could the testimony be used as a basis for deciding the case. The basic idea of the 1996 Code was excellent. After the 1996 Code came into force, however, several defects became clear. The first problem concerned when it was permissible to use written testimony that had never been presented orally in court. At first blush, the 1996 Code appeared to prohibit the trial court from accepting written testimony as evidence from witnesses who did not testify in person at the trial. A different Code section, however, appeared to allow the use of written testimony from persons who had not testified in person at the trial. To make matters more difficult the 1996 Code failed to specify which witnesses were required personally to testify and which were allowed to give written statements without personally appearing [3, Art. 157].

A second problem in the 1996 Code related the rights of witnesses. The 1996 Code provided few rights to witnesses. One quite general provision obligated courts, prosecutors, and police to protect the safety of witnesses, their family members, and close relatives. The Code also punished several kinds of illegal acts against witnesses [8, Art. 49]. The law, however, failed to provide any detailed protective measures. The law also failed to provide witnesses with a right not to incriminate themselves.

A third problem related to witnesses. Although 1996 CPC (Art. 48) required witnesses to testify in court, it provided no sanctions for witnesses who failed to appear after being summoned.

All these problems come from vagueness and contradictions in the 1996 CPC. Judicial reports indicate that less that 10 percent of all witnesses appear at the trial and give testimony before the court. In some large cities only 1 percent appear [16]. The Supreme People's Court recognized this problem long ago. In 2010, the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Security, the Ministry of State Security and the Ministry of Justice published a joint policy statement entitled "The Regulation on Several Issues on Evaluation of Evidences in Handling Death Penalty Cases" In this policy statement the agencies established rules for witnesses. These rules provide that if

[1] The author of this Article belongs to this group.

[2] In Chinese "cha shi" means that the evidence has been confirmed and that there is no argument from any of the parties.

a witness fails to appear and testify before the court, the witness's testimony in written form cannot be used as evidence in deciding the case.

The 2012 Code strengthens the protection of witnesses in two important ways. First, it requires legal institutions to take special measures to protect witnesses, especially in cases involving crimes that threaten national security or involve terrorism, organized crime, or drug related crimes. The protective measures required include: (1) withholding the witness's real name, address, place of work, and other personal particulars; (2) disguising the witness's personal appearance and voice in any testimony given before a court; (3) prohibiting certain persons from contacting the witness, the victim, and relatives of the witness or victim; and (4) providing special protection to the witness or the witness's residence [6, Art. 62]. The second way that the 2012 Code improves the witness's situation is to reimburse the witness for expenses incurred while providing testimony at the trial. The expenses covered include transportation, accommodation, meals, and wages lost due to absence from work. The 2012 Code obligates all levels of government to appropriate monies to pay such expenses [6, Art. 63].

The 2012 Code also clarifies when witnesses must appear to testify. It provides that when a witness gives a statement that has material influence on the determination of either guilt or sentence and the public prosecutor, the parties (accused, the accused's attorney, victim or representative of victim) object to the use of the statement, or the court believes it necessary for the witness to appear before court to testify, the witness shall do so [6, Art. 187]. This article also provides that if a police officer is an eye-witness to a crime while on duty, the officer must appear before court to testify. These provisions also apply to expert witnesses. To ensure that witnesses actually appear the court may in serious circumstances detain the witness or expert for a period not exceeding ten days[1] [6, Art. 188].

While the new 2012 Code requires witnesses to appear when ordered to do so warning and detention are provided, the Code sets forth exceptions for the defendant's spouse, parents, and children. These relatives are not required to testify against the defendant. For the first time the modern Chinese law has tried to balance the crime control need for everyone's testimony against importance of maintaining and respecting trust within the family.

d) Electronic data can now be used as evidence. The 1996 Code recognized seven kinds of evidence. The seventh type was "audio and visual materials." Because technology has been developing rapidly this description failed to electronic data that might be used as evidence. In response to the challenge, the 2012 Code added "electronic data" however, academic experts noticed that, there are overlaps between two types of evidences, it needs to be clarified[2]. Anyway, the related issues are internationally challenged, in practice, there will be more new issues that come up, we assumed there would be further interpretation, or explanations.

6. Investigative Procedures: The Most Controversial Part of the 2012 Reform. The law governing police investigations is almost everywhere the most controversial part of criminal procedure. China is no exception. Like

[1] Many academic experts believe that this compulsory measure is too severe and should be replaced by a fine.

[2] Group of Experts (China University of Political Science and Law), Comments.

other countries China must find ways to light crime, especially serious crimes, and at the same time protect human rights. The 1996 Code was built on what theorists call a crime control model. It had few judicial controls over police investigative procedures or the work of prosecutors. Although the 2012 Code takes a somewhat different approach, its basic plan continues to be that of a crime control model. Some parts are quite controversial.

a) Technical investigative methods. The technical investigative measures have been surprisingly and eventually provided into 2012 Code [6, Art. 148-152]. Although long used by investigators in practice, technical and covert investigative techniques were not previously regulated by law. The Police Law (1995), for example, contained only a single, very general article concerning technical investigative measures. That article said that "the public security organs, based on the requirement of investigation, after passing strict approval can adopt technical investigative measures" [17, Art. 16]. Although the 2012 Code includes similar provisions, it specifies the kinds of cases for which these special investigative techniques may be used. For the police, the categories are: crimes concerning national security, crimes of terrorism, organized crimes, and major drug related crimes. For prosecutorial investigators the categories include crimes involving serious corruption and bribery as well as major crimes involving abuses of authority that violate the personal rights of citizens [6, Art. 148].

Although this new specificity represents significant progress, the provisions are still quite general. The new 2012 Code, for example, authorizes the use of technical measures "after passing strict approval requirements." It should be noted, however, that the new 2012 Code contains no details as to how such approvals are to be given.

b) Changes concerning the use of custody: the most controversial part of the 2012 Code. China uses the term "coercive measures" to describe the various ways that a suspect's liberty can be limited or can be taken into custody for investigative purposes [6, Art. 64-98].

The 2012 Code's provisions concerning arres[1] present a problem. In ordinary cases the Code requires that a detainee's family be informed of the reasons for detention and the place of custody within 24 hours. When the detainee is suspected of serious crimes that threaten the national security (such as crimes involving terrorist activities), no notice is required [6, Art. 83]. Some top criminal procedure experts say that this is acceptable. This kind of arrest, however, would amount to a form of incommunicado detention, something that is absolutely prohibited by international norms[2].

7. Improvements in Specialized Criminal Procedures. During the last 16 years, there are several important special proceedings in criminal justice have been discussed, in practice, legal practitioners have made efforts in the pilot projects, for instance, the special criminal proceedings for juvenile delinquents. With this reform, some of vulnerable person's rights have been paid more attention. The 2012 Code reflects the needs for the development of the society, the new part has been inserted into

[1] In pinyin, this is called "juliu."

[2] As required by the International Covenant on Civil and Political Rights (ICCPR) Art. 9, detainees have right" to be brought promptly before a judge or other officer authorized by law to exercise judicial power",however,in China, detainees have no right to do that..

the law named as: "Special Procedures" [6, Art. 266-289].

a) Juvenile proceedings. The 1996 Code contained no separate provisions for the handling of juvenile cases. For many years, however, many prosecutors and courts have used special procedures. In many areas specially designated prosecutors and specially designated judges have been responsible for the handling of juvenile cases. Drawing on this experience the 2012 Code includes a chapter entitled "procedures for cases of juvenile crime" [6, Art. 266-276].

1) The new juvenile justice chapter begins with a statement of principles, saying that "for juvenile delinquents a policy of education, reform, and rehabilitation should be applied." It goes on to say that the goals of the juvenile justice law should "primarily" be accomplished by "applying ... educational measures and regarding punitive sanctions as ancillary means" [6, Art. 266].

2) The new chapter indicates that free legal assistance is available for juveniles charged with crimes.

3) The new chapter requires that pre-trial detention be utilized in a strict and restrictive manner. This means that pre-trial detention shall normally not be used for juvenile cases. When detention is necessary, juveniles charged with crimes shall be held separately from adults [6, Art. 269].

4) If a juvenile is to be interrogated or tried, the legal representative shall be given notice and has a right to be present. If the juvenile's legal representative is not available, a close adult relative, a school representative, or some other related person may be notified as well.

5) Juveniles charged with infringing citizens right of the person and democratic rights, crimes of property violation, or crimes of obstructing the administration of public order may be sentenced to less than one year's imprisonment, even if the case meets the requirements for prosecution. If the juvenile shows regret, the prosecutor may grant conditional non-prosecution.

6) The case file of juvenile delinquency shall be sealed under several conditions: If a juvenile under the age of 18 commits a crime and is sentenced to a term of less than five years, the case file shall be sealed automatically. When a case file has been sealed, agencies and persons generally are not allowed access to the file, the law provides only two exceptions. One allows prosecutors and judges who are handling another criminal case that is related to the earlier juvenile case to have access to the juvenile's criminal record. The other allows access to the juvenile record when some other criminal justice law or regulation makes this necessary [6, Art. 275].

b) Reconciliation procedures to be more widely available. The 1996 Code authorized the use of reconciliation only for cases brought by private prosecutors. In order to pursue the harmony principle in criminal justice and reconcile more societal disputes the 2012 Code greatly broadens the possibilities for using reconciliation as a remedy. To avoid any injustices that this expanded use or reconciliation might create the 2012 Code sets forth the following conditions:

1) The cases shall be considered to be civil disputes

2) The reconciliation may be used only for infringing upon right of person, democratic rights and property rights which provided in the Chapter 4 and 5 of Code of Criminal Law.

3) If the crime is intentional, the possible term of imprisonment must be less than three years. If the crime involves negligence, the possible term of imprisonment must be less than seven years. If the crime involves negligence

related to malpractice, however, reconciliation may not used.

c) Confiscation of property of accused persons who abscond or die. When a suspect absconds or dies, the 2012 Code allows the suspect's property to be confiscated in cases involving corruption, terrorism, or other serious crimes — even though the underlying charge has not yet been decided. Through this special procedure the CPC of 2012 seeks to fulfill the special obligations imposed by the UN Convention Against Corruption [18, Art. 275] and certain anti-terror resolutions. The 2012 Code's procedures seek to guarantee the fairness of the confiscations.

(d) Compulsory treatment for mentally ill persons who commit violent acts. Persons who inflict violent crimes on others but who are found to be mentally ill are not considered to have committed a crime. Although such persons are not considered to be criminally liable, the state may nonetheless impose compulsory medical treatment. Such proceedings are considered to be administrative in nature and are imposed without a trial. In order to balance the rights of mentally ill persons with the need for public security, the legislature created a special procedure for considering the imposition of compulsory treatment when the procurator asks for such treatment. The court is required to hold a hearing on the matter. If treatment is authorized, the procurator supervises the enforcement.

Conclusion. The 2012 Code represents a very positive development. It increases the availability of defense counsel to indigent defendants and it improves the exclusionary rule, the privilege against self-incrimination, the rules requiring witnesses to appear at the trial, and the special proceedings established for such things as juvenile delinquency, reconciliation, compulsory treatment for persons with mental illness who commit violent acts, and for the confiscation of illegal property. Although by no means perfect, the 2012 Code taken as a whole represents an important step forward. Citizens should not worry too much about the fundamental issues that still remain in some parts of the criminal justice system. China is still in transition and it is not possible to do everything that is desirable in one big move. The discussion needs to continue.

LITERATURE

1. Harold M. Tanner. Crime and Punishment in China. Ph.D. dissertation, Columbia University, 1994. (Unpublished)

2. China Law Yearbook 1997. Beijing: China Law Yearbook Press, 1997.

3. 1996 Criminal Procedure Code of the People's Republic of China. Code of 1979, amended by Decision of the National People's Congress on Revising the Criminal Procedure Law of the PRC, March 17, 1996.

4. Proposed Amendment to the Criminal Procedure Code of the PRC. 30 August, 2011.

5. Criminal Law Department, Legal Committee of Standing Committee, NPC. Comparative Form of CPC. Beijing: People's Court Publisher, 2012.

6. 2012 Criminal Procedure Code of the People's Republic of China. Code of 1979 (with amendments of 1996) amended by Decision on Amending the Criminal Procedure Law of the PRC, March 14, 2012.

7. Interim Regulations of People's Republic of China on Lawyers. Adopted on August 26, 1980.

8. Criminal Procedure Code of the People's Republic of China. Order No.55 of the President of the People's Republic of China, July 01, 1979.

9. Provisions Concerning Several Issues in the Implementation of the Criminal Procedure Law of the PRC, January 19, 1998.
10. Rui hua Chen. Empirical Research on Criminal Defense. Beijing: Beijing University Press, 2005.
11. Law of the PRC on Lawyers. Revised and adopted by Standing Committee of the NPC, October 28, 2007.
12. Basic Principles on the Role of Lawyers. Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.
13. China Law Yearbook 2010. Beijing: China Law Yearbook Press, 2010.
14. The Regulation on Interrogation of Suspect during the Stage of Approval of Pre-trial Detention. Issued by the Supreme People's Procuratorate and the Ministry of Public Security. August 31, 2010.
15. Chen Guangzhong. Draft Proposal of Experts on Evidence Law of People's Republic of China. China Legal System Press, 2004.
16. Hu Yunteng. Common Efforts Needed to Solve the Problem of Witnesses Appearing at Trial. // Legal Daily, April 29, 2007.
17. People's Police Law [China]. Adopted at the 12th Meeting of the Standing Committee of the Eighth National People's Congress on February 28, 1995.
18. United Nations Convention Against Corruption. General Assembly resolution 58/4, October 31, 2003.

Ліінг Юе.

Розвиток китайського кримінально-процесуального права.

Анотація. Стаття присвячена питанням, пов'язаним з розвитком кримінально-процесуального законодавства Китаю у сучасній історії. Висвітлюються основні положення КПК КНР 1979р., 1996р., 2012р. Звертається увага на зміни в економічній та соціальній сферах Китаю, що призвели до змін у кримінальному процесі. Акцент робиться на одних з найбільш важливих та суперечливих частинах реформи 2012р. — проведенні слідчих дій та захисті у кримінальному процесі.

Ключові слова: кримінальний процес; кримінально-процесуальний кодекс; правова реформа; Китай; КНР.

Лилинг Юэ.

Развитие китайского уголовно-процессуального права.

Аннотация. Статья посвящена вопросам, связанным с развитием уголовно-процессуального законодательства Китая в современной истории. Освещаются основные положения УПК КНР 1979 г., 1996 г., 2012г. Обращается внимание на изменения в экономической и социальной сферах Китая, повлекшие за собой изменения в уголовном процессе. Акцент делается на одних из самых важных и противоречивых частях реформы 2012 года — проведении следственных действий и защите в уголовном процессе.

Ключевые слова: уголовный процесс; уголовно-процессуальный кодекс; правовая реформа; Китай; КНР.