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NEW DEVELOPMENTS IN CHINESE CRIMINAL PROCEDURE LAW

XIA JINWEN

On March 17, 1996, the 8th National People’s Congress passed a new criminal procedure law during its 4th conference, based on an earlier code promulgated on January 1, 1980. In general, the new Criminal Procedure Code introduced significant developments in connection with the following aspects of the law.

I. A MILESTONE — BASIC ESTABLISHMENT OF THE RULE OF PRESUMPTION OF INNOCENCE

In China, the rule of presumption of innocence is contained in Article 12 of the Criminal Procedure Code: “No one shall be guilty of a crime unless proven guilty by a court of law.” This general principle has two aspects:

a) First, no one shall be guilty of a crime unless a final judgment against him is rendered by the People’s Court. This is based on the principle of presumption of innocence prevailing in western countries. Because of this general principle, some scholars erroneously believed that China had accepted in practice the presumption of innocence rule. Previously, the term “offender” was used to refer to both the suspect and the defendant, with the general inference being that the suspect was invariably guilty. The new rule distinguishes between “suspect” and “defendant.” Now, before the prosecutor brings charges against a defendant, the person

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under investigation is only a criminal suspect. Once charges are brought by the prosecutor, the suspect is called the defendant. Under the revised Criminal Procedure Code, the presumption of guilt as a principle is now replaced by presumption of innocence as a rule.

Second, the prosecutor must discharge the burden of proof. The defendant need not prove that he or she is innocent; instead, the prosecutor has the burden of proof. The defendant cannot be presumed guilty of a crime simply because he or she fails to prove his or her own innocence. The prosecutor must prove beyond a reasonable doubt that the defendant is guilty of a crime; otherwise, judgment must be entered in favor of the defendant. The defendant is not guilty unless guilt is proven beyond a reasonable doubt. The Criminal Procedure Code states that there must be clear and convincing evidence before the prosecutor can bring charges against a defendant and before the People’s Court can rule that the defendant is guilty of a crime. The evidence must be under strict scrutiny in order to be the basis of a determination of guilt. If there is no probable cause to prosecute, or insufficient evidence to convict after initial and additional discovery, the prosecutor must drop the charges. If during trial, the weight of the evidence does not show beyond a reasonable doubt that the defendant is guilty, the People’s Court must rule in favor of the defendant and set him free due to lack of evidence.¹

b) The judgment of guilt of a crime is delivered by the People’s Court. The People’s Court is the only judicial branch that exercises the power of criminal justice on behalf of the country. Even if the defendant is in fact guilty, he or she is not a criminal unless declared so by the People’s Court.

II. THE IMPROVEMENT OF PRELIMINARY COERCIVE MEASURES

The Chinese Criminal Procedure Law provides for five types of coercive measures. They are, from the lightest to heaviest, Summons for Detention, Bail, Residential Surveillance, Detention, and Arrest. The main problem with this system is that the conditions for detention and arrest, which are not scientifically prescribed, have rigid requirements. The original provisions stipulate that the principal facts of crimes must have already been clarified before an arrest is made. However, there is

¹. XIA JINWEN & CHENG DEWEN, COURSES FOR SCIENCE OF CHINESE CRIMINAL PROCEDURE LAW, Nanjing Normal University Press (1999).
only a short period of three days before an arrest is made. Although this period can be extended from one to four more days, it is difficult to ascertain the principal facts of a criminal case within three to seven days, particularly when the case is complicated.

With regard to criminal defendants, the law originally stated that advanced detention could be enforced under seven circumstances in which an active criminal or a serious suspect commits a crime that is supposed to result in arrest. However, it is more difficult to determine the crime that is supposed to sustain arrest in the case of an emergency. Hence, in judicial practice, the public security organ fails to allow for Due Process with regard to detention and arrest, but instead takes the measure of “confinement for examination,” which enables the public security organ to prolong the pretrial detention period. This has created an unhealthy social influence. The new Criminal Procedure Law clearly sets out that the condition for arrest is that “there is evidence to show the facts of the crime,” and has excluded the precondition that the crime is supposed to lead to arrest.  

Further, the new law has clarified and perfected conditions respectively applied to Summons for Detention, Bail, and Residential Surveillance, providing that the period for the consecutive summons for detention not exceed twelve hours, and that no consecutive calling or summons for detention be used for the arbitrary imprisonment of suspects. The new law also clarifies that the two means for bail are a release on obtaining a guarantor or on deposit. Only one means can be taken at one time. No concurrent application can be made. The new law also specifies that a person under residential surveillance is not allowed to leave his residence without permission. If the person does not have a fixed residence, he is not allowed to leave the designated residence.

III. ABOLITION OF “EXEMPTION FROM PROSECUTION”

“Exemption from prosecution” means that, at the stage of examination, the procuratorate may decide not to prosecute and may free the suspect whose conduct has formed a crime, and no penalty is required or the suspect is exempted from penalty in accordance with the criminal law. “Exemption from prosecution” is the decision made by the procuratorate

2. CHEN GUANGZHONG & JIANG WEI, THESIS OF PROCEDURE LAW (VOLUME I), LAW PRESS (1998).
finding the suspect guilty and concurrently absolving him from penalty. Its effectiveness equals that of a court judgment. The system of "exemption from prosecution" corresponds to our country's policy of "the combination of punishment and leniency." The system contributes to a reduction in courts' caseloads and to efficiency in litigation. Nevertheless, such an invasion of the court's power of trial enables the procuratorate to make the exemption decision without reasonable checks or supervision from other authorities.³

Therefore, under the new law, the exemption from prosecution was abolished and the scope of no prosecution was enlarged. Aside from six circumstances set out by criminal procedure law, the procuratorate may decide not to prosecute in two other categories of cases: (1) where the circumstances of the crime are slight and no penalty is required, and (2) where the evidence is not sufficient even after the preliminary investigation, thus not qualifying for prosecution.

IV. IMPROVEMENT OF THE SYSTEM OF CRIMINAL DEFENSE

In Chinese criminal procedure, the role of the defense attorney is relatively weak. According to the former criminal procedure, counsel could only be involved during the trial phase. Generally, a copy of the complaint filed by the prosecutor was not sent to the defendant until seven days before trial. The defendant did not have the right to counsel until then. This procedure adversely affected the assistance of counsel to the defendant as it gave counsel a very short time to prepare the case.

The revised criminal procedure code provides that after the first interrogation or detention, a suspect may retain counsel to provide a legal opinion, a defense to the criminal charges, and an application for bail. Defense counsel may also intervene when the prosecutor prepares the charges. As for private prosecutions brought by private parties, a defendant may retain counsel at any phase.

The revised criminal procedure code specifically provides for the right to counsel. According to article 34A, legal aid must be provided to indigents and those who cannot retain counsel for other reasons. Generally, the People's Court appoints attorneys to provide legal aid on a pro bono basis. Article 34B also provides that legal aid must be made available to those who are blind or deaf and to minors. Article C

provides that for those defendants who potentially face the death penalty but fail to retain counsel, legal aid must be made available by the People's Court.  

V. THE DRASTIC REFORMATION OF JUDICIAL PROCEEDINGS

Under the criminal procedure code of 1979, Chinese criminal judicial proceedings resembled an inquisitorial system. The judge conducted the judicial proceedings and was also the fact finder. Judges initiated interrogations of the defendant and witnesses, including cross-examination. The prosecutor and the defense attorney played secondary roles. This weakened the judicial function and was detrimental to fact finding. Therefore, the revised Criminal Procedure Code retains the benefits of the adversarial mechanism and makes a drastic reformation of trial proceedings.

First, the scope of pre-trial discovery is now different, as the judge cannot undertake substantive review of all the evidence. All that a judge can do is review the existence of probable cause to prosecute, the list of exhibits, the witness list, photocopies of the primary evidence and photographs. Second, the prosecutor bears the burden of proof. Both the prosecutor and the defendant may present evidence, declarations by witnesses, and expert witnesses. Third, cross-examination is now definitely used in trial. Both parties may interrogate their own witnesses and cross-examine hostile witnesses upon consent of the judge. Fourth, illegal evidence can no longer be used at trial. Article 43 provides that testimony of witnesses, statements of victim, and confessions by defendants achieved through torture, lure, or cheating are not regarded as probative evidence by the court.

Further, the jury system faces a reform. Often people on juries just attend court instead of deciding cases because of their poor knowledge of the law, so the certification of juries needs to be more stringent, and experts who are proficient in certain fields should be accepted on juries. Finally, a financial subsidy system should be established.  

5. CHEN RUIHUA, THEORY OF JUDICIAL PROCEEDINGS IN CRIMINAL CASES, Peking University Press (1996).
VI. THE CREATION OF SIMPLIFIED JUDICIAL PROCEEDINGS

According to the criminal procedure code of 1979, normal judicial proceedings were equally applicable to misdemeanor cases that had clear facts or ample evidence. This resulted in a waste of judicial resources. Thus, the newly revised Criminal Procedure Code provides a simplified judicial procedure. For private prosecutions brought by private parties, and for misdemeanors that have clear facts and undisputed evidence, the prosecutor may suggest or consent to a simplified judicial proceeding. When simplified proceedings are applicable, the prosecutor may not be present in trial and judgments need not be delivered by the collegiate bench. Usually only one judge presides in simplified judicial proceedings. Discovery and interrogation may be conducted whenever necessary and are not restricted by normal proceedings. In addition, the judgment must be delivered by the People’s Court within twenty days from the date of filing.6

In conclusion, Chinese criminal procedure law is now developing in more scientific and democratic ways. Since 1996, many positive changes in the pursuit of justice have resulted from use of the newly revised code. Although there may be some defects remaining in the new code, it will ultimately become sounder and more complete through the efforts of scholars and practitioners to overcome obstacles to the pursuit of justice.

6. CHEN ET AL., supra note 2.