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**China Analysis**  
Les Nouvelles de Chine

# Reforming China's Criminal Procedure Law

**Analysis by Hugo Winckler based on:**

- Wang Jianxun, "The provisions of the reform of criminal procedural law legalising secret investigations are a step backwards," *Caijing wang*, 5 September 2011. <sup>(1)</sup>
- Chen Youxi, "The legalisation of secret investigations is an important violation of political integrity," *Zhongguo wangluo dianshitai – CNTV web site*, Opinion section, 27 November 2011. <sup>(2)</sup>
- Wu Zhehua, "Chen Weidong discusses reform of the criminal procedure law: Behind each article there is a story," *Zhongguo guangbo wang*, 8 March 2012. <sup>(3)</sup>
- Chen Guangzhong, "The provisions of the great reform of [China's] criminal procedure law represent progress," *Jinghua Shibao – Beijing Times*, 9 March 2012. <sup>(4)</sup>
- Xie Doudou, Wang Heyan, "The vicissitudes of the clause on secret detention," *Caixin wang*, 12 March 2012. <sup>(5)</sup>
- "A focus on the great reform of criminal procedure law: Important perspectives on the 'little constitution'," *Banyuetan wang*, 13 March 2012. <sup>(6)</sup>
- Li Xiangning and Xu Kai, "Criminal procedure law amendment passes amid controversy," *Caijing*, 25 March 2012. <sup>(7)</sup>
- Yao Dongxing, "Behind the scenes of the 'great reform': Four protagonists' narratives about ten years of power games," *Zhongguo jingji zhoukan – China Economic Weekly*, 27 March 2012. <sup>(8)</sup>

On 14 March 2012, the PRC adopted a draft amendment to its criminal procedure law (CPL), bringing an end to a process of reform begun in 2009. In that year, the National People's Congress created a task force to conduct a national survey on the proposed amendment. This committee interviewed legal professionals from all levels of the judicial system, and in doing so began a wide-ranging debate on legal reform. The revised law will enter into force on 1 January 2013, and the consultative process involved in its preparation shows that China's political leadership wants to be seen as listening to the people.

Over the last few years, the Chinese media have carried news of a series of highly publicised criminal cases. Yao Dongxing says that the public was allowed to express opinions on each of these cases and that people took an active interest in the legal proceedings. Wang Jianxun says the use of illegal methods to collect evidence led to several unfair convictions (*yuancuo anjian* 冤错案件). These miscarriages of justice caused a public outcry and a dramatic drop in confidence in the authorities. The crisis of confidence in the judicial system is frequently discussed in the Chinese media. The way the amendment to the CPL was presented to the public was therefore as important as its substance: reform was seen as a step towards regaining public confidence. This meant the Chinese press had an important role to play in explaining and justifying the new law. The framers of the law hoped to find a balance between giving concessions to the public and maintaining the judicial system as a tool of control over Chinese society.

## A new discourse on criminal procedure law

The media coverage of the new law shows a shift in perspective on the role of criminal procedure law in China. The CPL is no longer presented as a tool of the authorities for bringing criminals to justice. Instead, the law is described as guaranteeing individuals' fundamental freedoms, but with a necessary trade-off between respect for those freedoms and the requirements of justice. This conception of the spirit of the CPL is very different from the Maoist interpretation. The transition took place in stages. The CPL was enacted in 1976 and amended for the first time in 1996. The 2012 reform will be its second revision. Yao Dongxing says the evolution of the CPL reflects increasing public awareness of fundamental individual freedoms. Including individual rights in the text made the CPL a "mini-constitution" (*xiaoxianfa* 小宪法). This is a real breakthrough, since judicial application of

1. Wang Jianxun is associate professor of law at China University of Political Science and Law (CUPL) in Beijing.
2. Chen Youxi is a well-known lawyer famous for his defence of Li Zhuang, a lawyer from the city of Chongqing who faced criminal charges while defending a local mafia boss. For more details about this affair, see Jean-Pierre Cabestan, "The implication of the Chongqing Model for the reform of China's legal system," *China Analysis*, November 2011.
3. Chen Weidong is professor of law at Renmin University of China (RUC).
4. Chen Guangzhong is a law professor who is considered to be one of the founding fathers of modern criminal procedure law in China.
5. Xie Doudou and Wang Heyan are both journalists for *Caixin*.
6. This article contains a series of opinions from people who participated in the reform.
7. Li Xiangning and Xu Kai are both journalists for *Caijing*.
8. Yao Dongxing is a journalist at *Zhongguo jingji zhoukan*.

constitutional provisions remains limited and uncertain, and unlike a constitution, the CPL is fixed and is applied every day in all criminal cases at every level of the judicial system.

All of the authors say that by reaffirming the basic rights of the individual, the CPL sets a limit on the powers of government and a limit to the use of public power. The CPL is less concerned with investigating, pursuing, and judging criminals than with avoiding abuses of power. Its objective is to balance the administration's right to use legitimate force with the right of individuals to have their fundamental liberties respected. Since this idealised balance between protection and repression is in practice impossible, the debate has centred on the best type of reform. Commentators talking about the CPL are increasingly speaking up for telling the truth about the protection of liberties in the constitution, whether they genuinely support this sort of openness or not. Most of the articles written in support of the reform are intended to inform people about the amendment rather than to analyse it. The writers explain the role of the CPL in protecting the individual and try to inspire renewed confidence in the judicial system. The amended law is described as "a great reform," and its results are presented in such a way as to gain public support.

Under the CPL, however, the legal system is split in two. In some (mostly) serious criminal offences, such as organised crime and terrorism, civil liberty protections do not apply. Commentators disagree about the rationale for this dual-speed regime and are concerned about the scope of the cases in which civil liberties can be ignored.

## The initial stages of debate

The first stage of the reform process began in 2009 and resulted in two draft proposals. From the very beginning, intellectuals – mainly lawyers from the universities and the courts – expressed their opinions and their fears about the draft proposals on the Internet and in the press. These commentators provide a legal perspective on the law's deficiencies and its risks of infringing on basic freedoms. They could have been even harsher in their criticism; they could have spoken out against the government or denounced the cases of abuse that were reported in the media. But the legal commentators stuck to discussing the proposals in terms of their legal merits and highlighting the risk of abuse of constitutional guarantees. Chen Youxi's article is a good example of this kind of criticism. He is disappointed that the law has retained provisions giving extraordinary powers of investigation to the administration. He says that this in effect legalises covert investigations and secret detention.

## Covert investigation and secret detention

Some of the most controversial provisions in the law concern covert investigations (*mimi zhencha* 秘密侦察) and secret detention (*mimi jiliu* 秘密拘留). These methods were both in place before the law was written, so they had precedent in practice and basis in law. The reform legislated for both covert investigation and secret detention, and so ensured their continued existence – but at the same time, it exposed these practices to public scrutiny.

Covert investigation involves using technology to gather evidence (*jishu zhencha* 技术侦察). This includes bugging for sound, phone tapping, and intercepting private mail and email. The first draft of the amendment gave a very broad definition of the conditions under which this kind of surveillance would be allowed. The law states that covert investigation can be used "in

any other serious offence affecting society" (*qita yanzhong weihai shehui de fazui* 其他严重危害社会的犯罪). Chen Youxi points out that this provision means covert surveillance could potentially be used under any circumstances. Criticism made no difference, however: the final draft included the provision as it appeared in the first draft. The police can use technological surveillance at their discretion, which seriously compromises the individual's right to privacy.

The provisions on detention were equally contentious. Article 73 of the revised law, also known as the "extra-legal detention clause," says a suspect can be placed in a location other than his home without that location having to be officially designated as a detention centre. Article 83, also called the "secret arrest clause," says the detainee's relatives must be informed within 24 hours of the suspect's detention, unless informing them would impede the investigation or they cannot be located. The first draft of the revised law said Article 83 could be applied in cases of "criminal acts that threaten national security (*weihai guojia anquan fazui* 危害国家安全犯罪), terrorist activities (*kongbu huodong fazui* 恐怖活动犯罪), risk of impeding the investigation (*keneng you'ai zhencha* 可能有碍侦查)." In this version, there were three cases in which secret arrests could be made. But in the final draft, a comma was deleted between "terrorist activities" and "risk of impeding the investigation."

Thus the three exceptions in which relatives did not have to be informed were reduced to two. The third exception, "risk of impeding the investigation," was neutralised and became just a complement to the other two, as Xie Doudou and Wang Heyan say. Chen Guangzhong says that this revision meant the removal of the exception to informing a suspects' relatives within 24 hours where a risk of impeding an investigation was deemed to exist. Secret detention is therefore still allowed, but only within limits – it is only acceptable in cases that represent a threat to national security or in investigating acts of terrorism, and only when dictated by the requirements of the investigation. This example shows that the debate did lead to substantive modifications to the final draft, even if it did not get rid of all the controversial provisions.

## The death penalty

The law's critics did not argue for removal of the death sentence, but there was considerable debate over the procedural safeguards needed in capital trials. The main issue was an amendment to the law that says that if an appeal to a death sentence is registered, the Supreme Court "may" hear the accused. The debate led to a change in the draft legislation that replaced "may" (*keyi* 可以) with "should" (*yingdang* 应当). This gives people who have been sentenced to death one last chance to explain the circumstances of their case or to plead their innocence. The change illustrates the negotiation process that went on during the drafting of the amendment. Wu Zhehua says the Supreme People's Court was not initially in favour of the provision, but the length of the debate and the number of people arguing for the change made them reconsider, and the amendment was adopted.

## Power games between state organs

Throughout the discussion process and in the presentation of the final draft of the law, the authorities showed a clear desire to communicate and educate and a genuine will to advance human rights. Public opinion was taken into account through the interviews conducted by the working com-

mittee with members of the legal profession. Participation in the actual reform discussions was limited mainly to national and local experts, however, and the general public was not consulted. As Li Xiangning and Xu Kai wrote in *Caijing* and Yao Dongxing said in *Zhongguo jingji zhouban*, the bulk of the legislative process was focused on power games between different state organs: the Supreme Court, the legislature, the Ministry of Public Security, the public prosecutors, the Ministry of Justice, and other branches of government. The official narrative of reform emphasised public participation, but the real debate took place mostly at the state level. However, the reform committee did at least involve stakeholders in the judicial system in the formulation of reform.

The Ministry of Public Security was quick to get involved in the debate, issuing a series of proposals that were mainly aimed at strengthening the powers of the police. Not all of these proposals were adopted. Li Xiangning

and Xu Kai say that no state organ managed to take complete control of the process, and the final version was a compromise between the viewpoints of the legislature (*lifabu men* 立法部门), the judiciary, and the police (*sifa zhifa bu men* 司法执法部门). Their dialogue showed they recognised “the logic of negotiation” (*tanpan de luoji* 谈判的逻辑). Debate did take place among various public actors, but few of them were outside state organs; experts were really only consulted in an advisory capacity.

The conclusion of the reform process saw the end of the debate. Critical articles were published only while the law was still under discussion. Articles published after the adoption of the law ignored any remaining misgivings, and instead mostly highlighted the advances made in protecting fundamental freedoms.

■ Translated by Elizabeth Laederich.

# Local governments under pressure: The commodification of stability maintenance

Analysis by Jérôme Doyon based on:

- Xu Kai and Li Wei’ao, “The stability maintaining machine,” *Caijing*, 6 June 2011. <sup>(1)</sup>
- Zhong Weijun, “The ‘zero-incident’ logic of local governments in maintaining stability: An analytical framework,” *Zhejiang shehui kexue – Zhejiang social sciences*, no. 9, September 2011. <sup>(2)</sup>
- Gao Jun, “The trap of maintaining stability and how to avoid it,” *Lilun daokan*, no. 11, 2011. <sup>(3)</sup>
- Xia Nan, “The alienation of weiwén,” *Caijing*, 12 October 2011. <sup>(4)</sup>
- Zhang Qianfan, “The origin and disruption of the system for petitioning the higher authorities,” *Tansuo yu zhengming – Exploration and free views*, 10 May 2012. <sup>(5)</sup>

In 1994, the Chinese government carried out a tax reform that limited the revenues of local governments and made them dependent for funding on central authorities. Since then, local governments have been caught between the people, who want more social policies that local authorities cannot afford, and the central government, which is focused on maintaining social stability. Xu Kai, Li Wei’ao, and Xi Nan say that social stability has become the main priority of local governments. So, for example, in Yun’an district in the province of Guangdong, out of 6,700 people on the public authorities’ payroll, 1,800 have jobs related to maintaining stability.

The success of local administrations is evaluated largely on their ability to maintain social stability. In 2009, “The temporary provision on the enforcement of the responsibilities of Party leaders and the State” (*guanyu shixing dangzheng lingdao ganbu wenze de zanxing guiding* 关于实行党政领导干部问责的暂行规定) reaffirmed local government’s responsibility for incidents that threaten stability, with particular reference to riots and other mass demonstrations. These articles show that this method of evaluation puts pressure on local governments. The central authorities have said that they want to develop the system of “letters and visits” (*xinfang* 信访), as

reaffirmed in 2005’s “Regulations on letters and visits” (*xinfang tiaoli* 信访条例). This administrative practice, which exists parallel to the judiciary system, allows citizens to appeal local decisions by presenting a petition to central authorities. But evaluating local administrations on the basis of social stability maintenance undermines the system of letters and visits.

In order to appear to be making progress on social stability, local governments have adopted a logic of “zero incidents” (*buchushi luoji* 不出事逻辑).<sup>(6)</sup> Whatever the cost, they have to make sure they present an image of stability – even at the risk of not addressing the root causes of various prob-

1. Xu Kai and Li Wei’ao are journalists at *Caijing*.
2. Zhong Weijun is an associate professor at the School of Political Science and Public Management at the Zhejiang Institute of Technology.
3. Gao Jun is a professor at the School of Humanities and Social Sciences at Jiangsu Teachers University of Technology.
4. Xia Nan is a lawyer in the Beijing law firm, Hua Yi.
5. Zhang Qianfan is a professor at Peking University Law School.
6. Zhong Weijun attributes this concept to He Xuefeng and Liu Yue. See He Xuefeng and Liu Yue, “The ‘zero-incident’ logic in local management,” *Xueshu yanjiu – Academic research*, no. 6, June 2010.