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Political Pluralism and Its Institutional Impact on Criminal Procedure Protections in China: A Philosophical Evolution from “*Li*” to “*Fa*” and from “Collectivism” to “Individualism”

ROBERT BEJESKY*

I. INTRODUCTION

With a history dating back nearly five thousand years, China is one of the most ancient civilizations.¹ The West often misunderstands the rich social and cultural norms emerging from this long-lived history.² Regardless of the misunderstanding, traditional cultural influences remain strong in China today.³ These traditions currently provide a framework for societal conduct that survived turbulent, revolutionary, and chaotic moments during the latter half of the twentieth century.⁴

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1. See ALBERT HUNG-YEE CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 1 (1992).

2. See William P. Alford, “*Seek Truth From Facts*”—Especially When They Are Unpleasant: America's Understanding of China's Efforts at Law Reform, 8 UCLA PAC. BASIN L. J. 177, 195 (1990).

3. CHEN, *supra* note 1, at 1. Many “methods were used to promote socially desirable behavior in traditional China, beginning with moral instruction in the home, which was the responsibility of the family.” Wallace Johnson, *Status and Liability for Punishment in the T'ang Code*, 71 CHI.-KENT. L. REV. 217, 217 (1995). Treatment of the individual under the law varied according to social status. See *id.* at 218. “The T'ang Code of A.D. 653 . . . is the most important legal work in East Asian History” for criminal law and is the foundation for all subsequent Chinese criminal law. *Id.* at 217.

4. When Mao rose to power, it appeared that stable societal institutions would emerge. Instead, the Anti-Rightist Campaign of 1957–58 cast the country into turmoil. See JEROME ALAN COHEN, THE CRIMINAL PROCESS IN THE PEOPLE'S REPUBLIC OF

Over the past two decades, Chinese reforms have caused potent social and legal change⁵ in nearly every aspect of Chinese life. These reforms, described as Western modernization with Chinese characteristics, challenged traditional social mores about the appropriate relationship between the populace and the government.⁶ In addition, the reforms fomented dynamic relationships among institutions and society. Reform also modified the balance of rights between the collective and the individual⁷ in objective legal codifications and traditional nonlegal forms of control.

A. Political Pluralism: The Impetus of Reform

Due to the pervasive societal role of the Chinese Communist Party (CCP) some believe that real change will not occur until diverging opinions are officially recognized without fear of reprisal.⁸ The accuracy of this argument, however, is questionable because conspicuous change has occurred in China over the last two decades.⁹ Substantive economic and societal progress will continue in China despite an existing political monopoly,¹⁰ because self-interested institutions within this power structure advocate positive change.

Significant progress originated with Deng Xiaoping's emphasis on economic modernization,¹¹ which created many

CHINA, 1949–1963: AN INTRODUCTION 5–25 (1968). The cultural revolution devastated China. Chairman Mao urged that legal institutions be paralyzed and dismantled and that chaos persist for the betterment of society. See CHEN, *supra* note 1, at 32. Radical Communist party actions sought to implement a new social order by force and intimidation. John T. Boxer, *China's Death Penalty: Undermining Legal Reform and Threatening National Economic Interest*, 22 SUFFOLK TRANSNAT'L L. REV. 593, 601 (1999).

5. See Timothy A. Gelatt & Frederick E. Snyder, *Legal Education in China: Training for a New Era*, 1 CHINA L. REP. 41, 41–43 (1980).

6. Other scholars describe this reform as “building socialism with Chinese characteristics.” CARLOS WING-HUNG LO, CHINA'S LEGAL AWAKENING: LEGAL THEORY AND CRIMINAL JUSTICE IN DENG'S ERA 29–31, 258 (Derek Roebuck et al. eds., 1995) [hereinafter LO, CHINA'S LEGAL AWAKENING].

7. See Pamela A. Seay, *Law, Crime, and Punishment in the People's Republic of China: A Comparative Introduction to the Criminal Justice and Legal System of the People's Republic of China*, 9 IND. INT'L & COMP. L. REV. 143, 146 (1998).

8. See Alford, *supra* note 2, at 183.

9. See RONALD C. KEITH, CHINA'S STRUGGLE FOR THE RULE OF LAW 143–80 (1994).

10. See *id.* at 3–5.

11. See JOHN KING FAIRBANK & MERLE GOLDMAN, CHINA: A NEW HISTORY 406 (1998).

positive and palpable societal reforms. Economic modernization, however, posed a challenge for government authority and has been accompanied by significant legislative changes outside of the realm of economics. In the area of protecting the rights of the accused, in 1979, Deng authorized the writing of a criminal code,¹² and the 1979 Law of Criminal Procedure (1979 CPL), which was amended in 1996.¹³ Additionally, the People's Congress adopted its Constitution in 1982,¹⁴ which has since been amended. The government has supported this process of legal transition, which includes other codified sources.¹⁵

B. Tradition v. Modernization

This Article illustrates the balance of competing party and institutional positions in criminal protection procedures, a matter of great interest to Western scholars.¹⁶ It also describes how China's criminal protection procedures evolved into a struggle between forces of tradition and modernity. This evolution created individual rights in the criminal justice system and confronted traditional forces that previously undermined legal functions.¹⁷

12. See Shao-chuan Leng, *Criminal Justice in Post-Mao China: Some Preliminary Observations*, 73 J. CRIM. L. & CRIMINOLOGY 204, 205 (1982).

13. THE CRIMINAL LAW AND THE CRIMINAL PROCEDURE LAW OF THE PEOPLE'S REPUBLIC OF CHINA (Jerome A. Cohen et. al. trans., 1984) [hereinafter 1979 CPL]. The 1979 CPL was adopted at the Second Session of the Fifth National People's Congress on July 1, 1979, and was revised in accordance with the Decision on Revising the Criminal Procedure Law of the People's Republic of China at the Fourth Session of the Eighth National People's Congress on March 17, 1996. It came into force on January 1, 1997. The Criminal Law was also updated and came into effect on October 1, 1997. See Lang Sheng, *On the Conception and Birth of the New Criminal Code of the People's Republic of China*, 2 CHINA LAW 54-57 (1997). Interestingly, a draft of the criminal procedure code was prepared in 1957, but it was largely ignored because social changes after the Cultural Revolution were so extreme that an entirely new code was needed. See SHAO-CHUAN LENG, *JUSTICE IN COMMUNIST CHINA: A SURVEY OF THE JUDICIAL SYSTEM OF THE CHINESE PEOPLE'S REPUBLIC* 54 (1967).

14. XIANFA [Constitution] (1982). The Constitution was adopted at the Fifth Session of the Fifth National People's Congress on December 4, 1982. It was promulgated for implementation by the Proclamation of the National People's Congress on December 4, 1982.

15. See Leng, *supra* note 12, at 207. The other sources include the Organic Law of Local People's Congresses and Local People's Governments, the Electoral Law for the NPC and Local People's Congresses, the Organic Law of People's Courts, and the Organic Law of People's Procuratorates. *Id.*

16. William P. Alford, *Of Arsenic and Old Laws, Looking Anew at Criminal Justice in Late Imperial China*, 72 CAL L. REV. 1180, 1191-96 (1984).

17. See Seay, *supra* note 7, at 143-45.

Part II of this article considers the philosophical underpinnings of China's criminal justice system and its influence on long-lived, philosophical norms. Part III analyzes Part II's framework of informal and formal criminal justice systems. Part IV concludes with an assessment of societal pressures on China's criminal justice system.

II. CHINA'S SYSTEM IDEOLOGY

A. Philosophy: Individualism and "Rights" vs. Collectivism and "Interests"

The balance between collectivist and individualist thought forms the essence of the direction and speed of Chinese legal reform.¹⁸ Historical influences on current ideology trace back to the teachings of Confucius, stressing the rights of society over the rights of the individual.¹⁹ Confucian thought designated the importance of particular actors in society by placing the state first, the collective second, and the rights of the individual last.²⁰ More individualistic societies elevate the concept of legal rights by institutionally articulating such rights as privileges of the individual that the collective society, government, and majoritarian voices cannot eliminate.²¹ Due to China's historically entrenched collectivist societal norms, however, what the Western world perceives as individual rights are considered "interests" in China.²²

The modern day balance between individual rights and collective interests began in 1919, when Chen Duxiu, an editor for Youth magazine who later became the CCP's first General Secretary, advocated collective rights.²³ Duxiu asserted that China's future philosophical direction should not seek to hearten individual human rights, but rather to accentuate democracy and

18. See JOHN RAWLS, A THEORY OF JUSTICE 4-5 (rev. ed. 1999).

19. See generally THE ANALECTS OF CONFUCIUS (Chichung Huang trans., 1997); see also Ronald J. Troyer, *Chinese Thinking about Crime and Social Control*, in SOCIAL CONTROL IN THE PEOPLE'S REPUBLIC OF CHINA 45, 46 (Ronald J. Troyer et. al. eds., 1989).

20. CHEN, *supra* note 1, at 10.

21. See Randall P. Peerenboom, *Rights, Interests, and the Interest in Rights in China*, 31 STAN. J. INT'L L. 359, 367 (1995).

22. See *id.*

23. See Guo Luoji, *A Human Rights Critique of the Chinese Legal System*, 9 HARV. HUM. RTS. J. 1, 2 (1996).

the larger community and nation.²⁴ Duxiu reasoned that individual rights can confine cooperative societal interests and sabotage government action,²⁵ particularly in circumstances where the government would otherwise emphasize that a higher utility exists when favoring majoritarian interests.²⁶ The Chinese government believes that society's collective rights outweigh the interests of any one individual or group of individuals.²⁷ The CCP's traditional posture is illustrated by Article 51 of the People's Republic of China (PRC) Constitution, which states, "[t]he exercise by citizens of the People's Republic of China of their freedoms and rights may not infringe upon interests of the state of society and of the collective, or upon the lawful freedoms and rights of other citizens."²⁸

Western individual human rights and laws do not have the same connotation in China because Chinese law is structured to take away individual rights²⁹ in favor of collective concerns. For instance, Chinese leaders may naturally favor harsh crackdowns on crime to maintain societal stability.³⁰ Thus, public safety is achieved by taking risks with the potentially innocent³¹ during the criminal justice process. These safety devices may include granting the police more leniencies when searching for evidence, holding an

24. *See id.*

25. The traditional Chinese legal system has been concerned with upholding state control. *See* Alford, *supra* note 16, at 1192.

26. *See* RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 269 (1977).

27. *See* Peerenboom, *supra* note 21, at 368–69. For example, when the state weighs interests of the collective and the individual, there is no conflict because individual interests unify into collective interests. In turn, those interests coalesce into derivative "rights" of constituent individuals. *Id.* There is a harmonious connection between government and citizens. *See* HUMAN RIGHTS IN CONTEMPORARY CHINA 86 (R. Randle Edwards et al. eds., 1986).

28. XIANFA art. 51 (1982). A more relaxed balance between individual rights and collective interests appears in a 1999 amendment to the Xianfa: "The People's Republic of China shall be governed according to law and shall be built into a socialist country based on the rule of law." Stanley Lubman, *Bird in a Cage: Chinese Law Reform After Twenty Years*, 20 NW. J. INT'L L. & BUS. 383, 399 (2000).

29. *See* Luoji, *supra* note 23, at 5.

30. *See* ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 30 (1974). Punishing the potentially innocent allegedly saves more lives by deterring potentially harmful conduct and by deterring a higher percentage of potential miscreants out of society. Detaining an individual pending a long investigation may be justified beyond the statutory period based on the same line of analysis. *Id.* at 32.

31. *See* H.J. McCloskey, *A Note on Utilitarian Punishment*, 72 MIND 599 (1963).

individual with minimal evidence despite a low probability of guilt, and convicting on a reduced or subjective guilt threshold.³²

The Chinese criminal justice system does not intentionally victimize the accused. In fact, China's criminal justice system is not founded upon punishing the individual but rather, rehabilitating him into the collective society as a productive member.³³ Thus, perhaps, the underlying philosophy of China's approach is quite humanitarian. Those in power in China espouse a conception of social order and human rights that balances in favor of the rights of the majority over the minority.³⁴ Chinese disposition and disagreement with the West is not only existent in legislative agendas and the face of the law, but also in the role of the judiciary.³⁵ For example, the court has wide discretion to assess criminal punishments. Penalties include restitution, probation, incarceration, and death. The court considers "relevant provisions of the law and in light of the facts and nature of the crime, the circumstance under which the crime is committed and the degree of harm done to the society."³⁶

Given the emphasis on collective interests over individual rights, Chinese government institutions and social forces define the legislative agenda for society.³⁷ Institutions and political influences affect criminal law. To understand Chinese criminal law reform, one must first determine what institutions have primary lawmaking authority. If a particular institution comparatively has more power, one must then determine whether that institution is completely infiltrated by CCP Central Committee ideology, and then analyze the institutional and the informal forces driving reform.

32. See Carlos Wing-Hung Lo, *Criminal Justice Reform in Post-Crisis China: A Human Rights Perspective*, 27 HONG KONG L.J. 90, 100-01 (1997) [hereinafter Lo, *Criminal Justice Reform*].

33. See Seay, *supra* note 7, at 152.

34. See Luoji, *supra* note 23, at 3. These distinctions are apparent in the criminal procedure system. "The 'crime control' model of trial procedure, which typically employs an inquisitorial process, takes maintaining public order as the primary concern The 'due process model,' on the other hand, grounded on the idea of irreconcilability between the interests of the individual and the state, accords priority to protecting the rights of citizens." Lo, *Criminal Justice Reform*, *supra* note 32, at 101.

35. Seay, *supra* note 7, at 145.

36. *Id.* at 151 (quoting FOREIGN AFF. BUREAU OF THE SUPREME PEOPLE'S COURT OF THE PEOPLE'S REPUBLIC OF CHINA, THE PEOPLE'S COURTS OF THE PEOPLE'S REPUBLIC OF CHINA 17-18 (1995)).

37. See *id.* at 143, 145-46.

B. Formal Institutional Law-Making Power

Rule of law and legislative power appear to be the dominant sources of legal authority in China.³⁸ The PRC Constitution proclaims that all power belongs to the people and that power is exercised through the National People's Congress (NPC).³⁹ Ultimate lawmaking power, however, resides with the NPC and it is the preeminent organ of state authority.⁴⁰ While it appears that both the NPC and the NPC Standing Committee⁴¹ are distinct entities constitutionally, separation of powers between the two is diminished because the Standing Committee is responsible to the NPC.⁴² In other words, those who direct the work of the Standing Committee are elected and/or are appointed by the NPC as a body,⁴³ and the NPC can "alter or annul inappropriate decisions of the Standing Committee."⁴⁴ "[T]he NPC has the ultimate authority over all legal and government decision-making"⁴⁵ and the NPC Standing Committee's law-making responsibilities, including enacting and amending laws and interpreting the Constitution and the laws,⁴⁶ derive from NPC authority.

The NPC delegates rule-making authority to the Chinese bureaucracy.⁴⁷ This allocation of authority, however, is particularly complex and has led to "legal fragmentation" and

38. *See id.* at 44.

39. *See* XIANFA art. 2 (1982).

40. *Id.* Technically, what comprises "law" in China might be interpreted in a number of ways. All statutory sources enacted by the state, including the Constitution, statutes, administrative regulations, and other rules enacted by government at any level, could be considered law. The Constitution, however, states that "no law" may conflict with it, which assumes a superior status for the Constitution above the category of "law." *Id.* art. 5. Statutes by the NPC or NPC Standing Committee may be considered law since they "exercise the legislative power of the state." *Id.* art. 58.

41. *See id.* art. 58. The NPC and NPC Standing Committee, either jointly or singly, have critical powers, including amending and supervising the Constitution, appointing and removing key individuals, approving budgets, interpreting laws and requiring compliance of all organs of the state. *Id.* art. 62. The NPC Standing Committee has legislative functions and the ability to interpret the Constitution and laws. When the NPC is not in session, the NPC Standing Committee may enact and amend statutes, so long as they do not compromise the basic statutory principles. *Id.* art. 67.

42. *See id.* art. 69.

43. *See* XIANFA art. 65 (1982).

44. *See id.* art. 62.

45. Seay, *supra* note 7, at 146.

46. *See* XIANFA art. 67 (1982).

47. *See* Donald C. Clarke, *What's Law Got to Do With It? Legal Institutions and Economic Reform in China*, 10 UCLA PAC. BASIN L.J. 1, 18-19 (1991).

jurisdictional overlaps.⁴⁸ Since the 1980's, the State Council, the executive of the government, posed real challenges to NPC authority because its many ministries, commissions, and agencies, drafted, enacted, and interpreted administrative regulations,⁴⁹ and proposed prospective laws for NPC adoption.⁵⁰ Key positions, however, within the State Council consisting of the "Premier, Vice-Premiers, and the heads of central ministries, bureaus, and commissions" are elected by the NPC upon recommendation of the CCP.⁵¹ Administrative regulations are subordinate to NPC and Standing Committee legislation.⁵² The NPC has the constitutional authority to reject or authorize laws presented for adoption.⁵³ For this reason, China is often described as having a unified legislature and administrative bureaucracy.⁵⁴ Recently, the NPC prevailed over the State Council and assured that ultimate authority for lawmaking resides with it. In other areas, however, where the NPC has not divulged a position, the State Council will continue to impact Chinese society.⁵⁵

Even though all government institutions are subordinate to the NPC, most new legal initiatives are compromises among various interested institutions and government organs.⁵⁶ The Supreme People's Court and the Supreme People's Procuratorate also affect the criminal justice system even though neither are lawmaking bodies.⁵⁷ The Supreme People's Court and the Supreme People's Procuratorate are constitutionally independent from each other and other government organs.⁵⁸ Though

48. Lubman, *supra* note 28, at 390.

49. See XIANFA art. 89 (1982).

50. See *id.*

51. See Clarke, *supra* note 47, at 17.

52. See XIANFA art. 57, 58 (1982).

53. See *id.*

54. See KEITH, *supra* note 9, at 83.

55. See Clarke, *supra* note 47, at 18.

56. See *id.* at 26.

57. *Translated in* Supreme People's Court, Certain Provisions on the Work of Judicial Interpretation (June 23, 1997) (unpublished translation by Professor Bing Ling). The Supreme People's Court publicly issues judicial interpretations with legal force in the form of: "Explanations" (how to implement a law or apply it in particular types of cases); "Provisions" ("norms and opinions given on the adjudication work according to the needs of adjudication"); and "Replies" ("responses to request for instructions on questions concerning concrete application of laws arising from adjudication work by the high people's courts and the military courts of the People's Liberation Army"). *Id.*

58. See XIANFA art. 126, 131 (1982).

independent, both are ultimately responsible to the NPC.⁵⁹ The NPC Standing Committee has the power to appoint or remove Supreme People's Court judges and procurators.⁶⁰ Thus, the Supreme People's Court and the Supreme People's Procuratorate are, to some degree, responsible to the NPC, as well as informally beholden to the CCP.⁶¹ However, the voices and interests of these two institutions differ. New criminal law and criminal procedure legislation often incorporate both positions into a final statutory product that strikes a compromise between historical collectivist CCP positions and individual legal rights.⁶²

C. Informal vs. Formal Societal Control: *Li vs. Fa*

Understanding tradition and culture is essential to appreciating legal processes and societal control in China.⁶³ Since Chinese society has rich informal norms of behavior, contradictions with codified law sometimes "disturb" society and devitalize natural norms of harmonious relations.⁶⁴ Thus, while the NPC is the primary lawmaking body that balances rights and interests in society, it is not the only source circumscribing proper societal behavior. "Legal culture" may be more consistent with informal societal relations than with new codifications.⁶⁵ Historically, informal relationships dominated Chinese society. In the twentieth century, however, China shifted from reliance on informal norms to reliance on legal codifications.⁶⁶

The first modern day movement to rely on law commenced with the Chinese Revolution in 1911. This was fleeting, and ended when Mao Zedong, as head of the CCP, abolished all laws in 1957.⁶⁷ For the next two decades, the CCP dominated Chinese society by employing informal power sources of ethical persuasion so deeply that formal legal institutions could not order societal

59. *Id.* art. 128, 133.

60. *Id.* art. 67, §§ 11–12.

61. See Jeremy J. Monthly, *Internal Perspectives on Chinese Human Rights Reform: The Death Penalty in the PRC*, 32 TEX. INT'L L.J. 189, 205 (1998).

62. See Lubman, *supra* note 28, at 405.

63. See CHEN, *supra* note 1, at 8.

64. See Timothy A. Gelatt, *The People's Republic of China and the Presumption of Innocence*, 73 J. CRIM. L. & CRIMINOLOGY 259, 307 (1982).

65. See Lubman, *supra* note 28, at 405.

66. See CHEN, *supra* note 1, at 9, 20–39.

67. See LO, CHINA'S LEGAL AWAKENING, *supra* note 6, at 10.

behavior.⁶⁸ Leaders ruled by ethical example and did not give credence to written sources of law.⁶⁹ They sought to educate and persuade through moral examples that emphasized social harmony.⁷⁰ This system influenced dispute resolution norms, the integrity of courts, and the criminal justice system in China.⁷¹ While Western judiciaries of the world are normally characterized as defenders of individual rights,⁷² courts in China are not always seen as independent and impartial tribunals that dispense justice equitably.⁷³

The CCP traditionally employed informal norms as a means of implementing its policies and achieving its goals, but also recognized that there was an imperative need to fortify the rule of law with "checks and balances to prevent arbitrary government based upon extremist class politics."⁷⁴ Refocusing on formal legal controls to fortify state power⁷⁵ diminished the CCP's informal hold on society, improved individual rights and liberties,⁷⁶ and bestowed heightened legitimacy to government.⁷⁷

The counterpoise between law and informal norms is often depicted as a struggle between *li* and *fa*.⁷⁸ *Li* refers primarily to "moral and social rules of conduct."⁷⁹ *Li* is meant to educate and persuade society about proper mannerisms of action and to espouse that excessive legal coercion is not necessary or desirable.⁸⁰ *Fa*, on the other hand, refers to rules imposed by the state, ostensibly in a codified form that can be backed up by state-

68. *Concepts of Law in the Chinese Anti-Crime Campaign*, 98 HARV. L. REV. 1890, 1890-91 (1985) [hereinafter *Concepts of Law*].

69. See Troyer, *supra* note 19, at 50.

70. See *id.*

71. See *id.* at 46-53.

72. See generally THE GLOBAL EXPANSION OF JUDICIAL POWER (C. Neal Tate et al. eds., 1995).

73. See Daphne Huang, *The Right to a Fair Trial in China*, 7 PAC. RIM L. & POL'Y J. 171, 172 (1998).

74. Preston M. Torbert, *Book Review: China's Internal Debate*, 28 J. MARSHAL L. REV. 639, 640 (1995).

75. See James V. Feinerman, *The Rule of Law... with Chinese Socialist Characteristics*, 96 CURRENT HISTORY 278, 280 (1997).

76. Today, *fa* is simultaneously used to empower and repress individual rights. See Alford, *supra* note 2, at 183-85.

77. See *Concepts of Law*, *supra* note 68, at 1894.

78. See CHEN, *supra* note 1, at 9.

79. *Id.* at 8.

80. See *id.* at 9. *Li* is based on Confucianism. *Li* fosters societal resolution based on friendly negotiation, rather than government coercion. *Id.*

imposed sanctions.⁸¹ *Li*'s legal and political significance is integration between society, the family, and the paternalistic state.⁸² One commentator noted:

[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 the era in which there was no law to go by, and it was a historical progress.⁸³

Enacting new laws in China will infuse more objectivity and transparency into societal norms. Drafters, however, are often accused of intentionally employing ambiguous and general phrases to encourage arbitrary and discretionary law enforcement.⁸⁴ Thus, the interaction of *li* and *fa* lingers in the interpretation of codified sources. As culture eventually coalesces with legal reforms, fair enforcement of law should become more typical and informal political influences should decrease. This change would make reality more consistent with formal institutional structures. The government called this transition an evolution from "rule by man" to "rule of law"⁸⁵ because leader discretion should ultimately be restrained by law. Some believe that legal institutions in China today are more accepted and that governance by *fa*-like governments⁸⁶ is becoming more prototypical.

Even if informal norms diminish, collective interests and individual rights must still be balanced within the framework of the formal legal system.⁸⁷ China fluctuates between favoring informal norms and formal laws,⁸⁸ particularly where politics play an important role in interpreting foundational legal sources.⁸⁹ As

81. See *id.* at 8. This is advocated by legalists. *Id.*

82. See *id.* at 10.

83. Daniel C. Turack, *The New Chinese Criminal Justice System*, 7 CARDOZO J. INT'L & COMP. L. 49, 50 (1999).

84. See CHEN, *supra* note 1, at 94.

85. *NPC Approves Amended Criminal Law*, BBC Summary of World Broadcasts, Mar. 14, 1997, LEXIS, News Library, BBC File.

86. See Lubman, *supra* note 28, at 406-07. This philosophy began after particularly oppressive times when the Chinese government ruled entirely by *li*. See Boxer, *supra* note 4, at 600-03.

87. See RAWLS, *supra* note 18, at 4-5.

88. Michael Weisskopf, *China Ends a Fling at Free Thinking; China Reimposes Political and Cultural Curbs*, WASH. POST, Mar. 23, 1981, at A1.

89. See Huang, *supra* note 73, at 172.

late as 1980, China articulated that even the constitution must serve the political objectives of those in power.⁹⁰

Thus, even though one normally conceives of "law" in the Western world as an institutional structure that iterates individual rights against the government, in China, "law" can also increase state power vis-à-vis the individual.⁹¹ This became apparent during periods of particular social upheaval. Government authority safeguarded the larger collective interest at the expense of individual rights provided by the formal legal system.⁹² New legal codifications and later application of those codifications depend on nonpolitical and independent institutions and those in political power.⁹³ In China, the latter predominates both in enacting new laws and interpreting them.⁹⁴

D. Uniformity in Ideology Given NPC Monopoly on Legal Codification

A political party is any political group that sponsors candidates at elections, and is capable of placing them in public office.⁹⁵ In democracies, parties are key actors of societal and political representation because they provide an efficient and aggregated voice for society,⁹⁶ reduce information costs,⁹⁷ and bestow more predictability and compromise to the political process and government.⁹⁸ In consolidated democracies, there is a relatively clear nexus between constituent desires and the positions of respective politicians. Politicians compete in electoral markets as representatives⁹⁹ and would lose their elected positions

90. See Zhang Youyu, *Why "Sida" Has Been Abolished*, 42 BEIJING REV. 27 (1980).

91. See Feinerman, *supra* note 75, at 280.

92. See Colin Campbell, *China Suddenly Taking a Tougher Line on Crime*, N.Y. TIMES, Sept. 13, 1983, at A2 (citing China's anti-crime campaign as one example).

93. See Feinerman, *supra* note 75, at 280.

94. *Id.*

95. GIOVANNI SARTORI, *PARTIES AND PARTY SYSTEMS: A FRAMEWORK FOR ANALYSIS* 63 (1976).

96. See SIDNEY VERBA ET AL., *PARTICIPATION AND POLITICAL EQUALITY: A SEVEN-NATION COMPARISON* 142 (1978).

97. See WALTER LIPPMANN, *PUB. OPINION* 58-63 (1949).

98. See *BUILDING DEMOCRATIC INSTITUTIONS: PARTY SYSTEMS IN LATIN AMERICA* 4-5 (Scott Mainwaring et al. eds., 1995) [hereinafter *BUILDING DEMOCRATIC INSTITUTIONS*].

99. See J. Mark Ramseyer, *Public Choice, in CHICAGO LECTURES IN LAW AND ECONOMICS* 101, 101 (Eric A. Posner ed., 2000).

if they indulged their own whims at the constituents' expense.¹⁰⁰ In a democratic society, legitimate government authority depends on this process and on citizen consent.¹⁰¹ If there is only one political party in power, however, there is no electoral choice or debate among groups or positions.¹⁰² In terms of codifying rights, democratic participation, negotiation, and the democracy's evolving institutions determine how rights are defined in law at any given time.¹⁰³

In a democracy, enacting new criminal law and procedural protections would normally consist of the media informing the populace on proposed legislation, various groups advocating their causes, and political parties casting positions that are congruous with their ideologies.¹⁰⁴ The populace, media, and politicians would dynamically interact and there would be a balance between the interests of society and the rights of the accused.¹⁰⁵ Positions that weighed the interests of society more heavily would provide less protection for the accused.¹⁰⁶ Legislation would then interact with the prerogative and position of the judiciary.¹⁰⁷

During Mao's tenure, the CCP and Mao had an authoritarian grip on society that gave them all encompassing rule and policy-making authority.¹⁰⁸ This authoritarian grip has slowly

100. See Bruce Bender & John R. Lott, Jr., *Legislator Voting and Shirking: A Critical Review of the Literature*, 87 PUB. CHOICE 67, 89 (1996).

101. See BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 10-11 (1980).

102. See generally BUILDING DEMOCRATIC INSTITUTIONS, *supra* note 98, at 6-20.

103. See Kenneth G. Lieberthal, *Introduction: The "Fragmented Authoritarianism" Model and Its Limitations*, in BUREAUCRACY, POLITICS, AND DECISION MAKING IN POST-MAO CHINA 1, 9 (Kenneth G. Lieberthal et al. eds., 1992).

104. See generally Ramseyer, *supra* note 99, at 101.

105. See Peerenboom, *supra* note 21, at 383.

106. See *id.* at 362.

107. See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1302 (1976). In the United States, the judiciary acts as a "policy planner and manager" of individual rights and liberties. *Id.* It rendered a bulwark against government abuses even if majoritarian policy-making authorities of government are undermined by judicial decisions. See ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 25 (1962). Judicial independence operates along a spectrum. See Jerome Alan Cohen, *The Chinese Communist Party and "Judicial Independence": 1949-1959*, 82 HARV. L. REV. 967, 972 (1969). For example, civil law countries, such as France, intentionally sought to keep the judiciary weak and apart from policy-making. MIRJAN R. DAMASKA, THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS 37 (1986).

108. See Lubman, *supra* note 28, at 384.

declined,¹⁰⁹ and so has the centralized power structure of the CCP.¹¹⁰ Without a prestigious leader to aggregate power in the central government, lower levels of government, particularly the provincial level, retain decentralized decision-making authority.¹¹¹ Thus, more pluralistic voices can emerge from lower levels of government, even though these rules were enacted centrally and uniformly.¹¹²

General society can also apply political pressure since lower levels of government may adopt local regulations that do not contravene higher law.¹¹³ To effectively govern, lower levels of government require regional economic and policy-making power. General society can select lower level deputies for the NPC¹¹⁴ through a bottom-up hierarchical process,¹¹⁵ and low level deputies can have policy-making power at the grass roots level outside of the formal government apparatus.¹¹⁶ Likewise, inter-unit bargaining, successful modernization movements, and the erosion of communist economic ideology make centralized CCP control over society difficult. With power decentralized outside of Beijing, bureaucratic decision-making is "fragmented" because of inter-unit bargaining.¹¹⁷ Successful modernization movements and the lack of support for communist economic ideology at low levels of government have also challenged CCP control.¹¹⁸

Even with these impediments to a more centralized role, China still cannot be called a democracy. It does not have publicly open debates or competing political positions, and it has only one

109. See STANLEY B. LUBMAN, *BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO 2* (1999).

110. See Merle Goldman & Roderick MacFarquhar, *Dynamic Economy, Declining Party-State*, in *THE PARADOX OF CHINA'S POST-MAO REFORMS* 3, 25 (Merle Goldman et al. eds., 1999).

111. See James Hugo Friend, *The Rocky Road Toward the Rule of Law in China: 1979-2000*, 20 N.W. J. INT'L L. & BUS. 369, 374 (2000).

112. See Seay, *supra* note 7, at 147.

113. See XIANFA art. 100 (1982).

114. See *id.* art. 59.

115. See *THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA: 1983-1986*, 62, 68 (1995) [hereinafter *LAWS OF THE P.R.C.*].

116. See XIANFA art. 111 (1982).

117. See Lieberthal, *supra* note 103, at 9. Fragmentation emerges in the court system because of local protectionism, special relationships (*guanxi*), and corruption. See Lubman, *supra* note 28, at 395-96.

118. See Lubman, *supra* note 28, at 404.

legally recognized party.¹¹⁹ Debate does arise within the CCP, but the CCP, as a body, remains the driving force influencing legal reform due to its monopoly on power.¹²⁰ It need not appeal to any democratic voting majority¹²¹ to maintain power and it has historically defined policy by favoring collectivist interests over the rights of the individual.¹²²

The 1982 Constitution assumed a socialist unified state that directed policy-making for the betterment of Chinese society.¹²³ Today, legislative enactments are still influenced by the CCP, and Party members still hold a high percentage of top government, police, and military positions.¹²⁴ The CCP Central Committee, however, is not the constitutional organ that appoints senior state leaders. Since the regionally elected NPC is the primary organ,¹²⁵ there is no official direct nexus between the CCP Central Committee and NPC's legislative activities. Even though the NPC has elections, the CCP lacks direct influence over national decision-making because lower level officials elect representatives to higher levels of government.¹²⁶

Debate and compromise positions in policy and lawmaking indicate China's departure from a uniform ideology.¹²⁷ Over the past two decades there has been tension between the constitutional power of official government organs to define and implement policy and the mere implementation of CCP policy directives.¹²⁸ While "law in China today continues to have little independent reality outside of the political directives of the CCP,"¹²⁹ influential leaders have fortified NPC power and countered the CCP. Such trends allowed the legislative process to

119. XIANFA preamble (1982). "Both the victory of China's new-democratic revolution and the successes of its socialist cause have been achieved... under the leadership of the Communist Party of China." *Id.*

120. See Friend, *supra* note 111, at 374.

121. See *Intimations of Mortality*, *ECONOMIST*, June 30, 2001, at 21–23. If the CCP does not adapt to societal and economic needs, the CCP risks losing legitimacy. Thus, while the overthrow of the CCP would be an unlikely occurrence, unrest and dissent can still cause government officials to appease populace demands. *Id.*

122. See Peerenboom, *supra* note 21, at 377.

123. See XIANFA preamble (1982).

124. See Robert A. Dahl, *Pluralism Revisited*, 10 *COMP. POL.* 191, 201–03 (1978).

125. See XIANFA art. 57 (1982).

126. See *id.* art. 97.

127. See Lieberthal, *supra* note 103, at 239–54.

128. See Lubman, *supra* note 28, at 384–85.

129. See Friend, *supra* note 111, at 374.

become more consistent with China's constitutional separation of powers.¹³⁰ Increased pluralism within the NPC led to this shift in power.¹³¹

Several explanations are often given as the primary influences of reform. Certainly, the desire to restrict interference with political branch functions prodded China to reform its legal system.¹³² International pressures that advocate transparency in law have been noteworthy. Pressure from the international community, however, is only effective if accompanied by CCP efforts to achieve reform.¹³³ Outside pressure can only nudge China's leaders because the true impetus to reform the legal system must come from within.¹³⁴ The chief concern on the minds of China's leaders has been to implement programs and legislation that will best foster economic development. Thus, economic reforms to accommodate state development agendas are at the forefront of legislative change in many other arenas.¹³⁵

Whether economic reform is apt to beget more individual rights, political liberties, and pluralism is another question. No one should reasonably expect liberal democracy to magically materialize in China in the near future, but societal voices and interest groups do now influence the Chinese government.¹³⁶ It has been difficult for the CCP to accommodate these voices. Having various pluralist voices and failing to accommodate those voices has undermined the CCP's former uniform policy-making ideology.¹³⁷ Social forces have stimulated debate with the CCP, helped interest groups advocate at the regional level, and allowed NPC delegates to form constituent loyalties.¹³⁸ Likewise, ongoing privatization processes will continue to expand private sector power vis-à-vis the CCP. This trend continues to occur as the nexus between the state and private sector intersect and more market-based legal regulations are enacted.

130. See Seay, *supra* note 7, at 145.

131. See MURRAY SCOT TANNER, *THE POLITICS OF LAWMAKING IN POST-MAO CHINA: INSTITUTIONS, PROCESSES AND DEMOCRATIC PROSPECTS* 51-74 (1999).

132. See Turack, *supra* note 83, at 49.

133. See XIANFA preamble (1982).

134. See Torbert, *supra* note 74, at 640.

135. See Lubman, *supra* note 28, at 386-87.

136. See TANNER, *supra* note 131, at 51-74.

137. See *id.* at 56.

138. See *id.* at 72.

One must acknowledge this system of pluralistic voices and democratically asserted NPC power within the context of societal pressures.¹³⁹ Diminished faith in communist ideology and government corruption caused a loss of state control,¹⁴⁰ while profound political and economic changes have gradually shifted values and populace beliefs in many regions of the country toward individualism. This also led to other societal problems, such as rising crime rates and mass migration in search of employment.¹⁴¹ If anti-crime movements counter this heightened sense of individualism, it might undermine individual rights and uplift collective interests.¹⁴² This means that criminal justice reforms, specifically implemented to fortify personal rights,¹⁴³ are operating within a sphere of rising crime rates that risk societal harm. A new equilibrium, defining the interests of the state and the collective, will emerge as needed, to react to these societal forces.¹⁴⁴

III. CRIMINAL LAW AND PROCEDURAL PROTECTIONS

Human rights nongovernmental organizations and the U.S. State Department often complain about atrocious human rights violations in China's criminal justice system.¹⁴⁵ Certainly, the accused have less protection from unfair prosecution in China than in most Western countries. China's politicized criminal justice system is attributable to a struggle among institutional interests and competing populace demands.¹⁴⁶ The aggregation of these competing interests can beget legislative reforms, but legislative changes must operate flexibly within a structure that ensures effective prosecution to combat rising crime rates. In addition, these changes must favor either the rights of the accused or the rights of victims.

139. *See id.* at 251.

140. *See* Lubman, *supra* note 28, at 404.

141. *See id.*

142. *See* Huang, *supra* note 73, at 186.

143. *See* Turack, *supra* note 83, at 49.

144. *See* TANNER, *supra* note 131, at 231.

145. Paul Eckert, *China Human Rights Abuses 'Massive', says Amnesty*, WORLD TIBET NETWORK NEWS, Mar. 14, 1996, at http://www.tibet.ca/wtnarchive/1996/3/14_4.html.

146. *See* Friend, *supra* note 111, at 375.

A. History of the 1996 Criminal Procedure Law

China experienced periods of imbalance between the rights of individuals and the collective.¹⁴⁷ For instance, prior to 1979, China had no codified criminal law source, and it was unclear whether procedures existed to assess the suspect's guilt adequately.¹⁴⁸ Judges convicted the accused by their own standards and may have incorrectly assessed the guilt of individuals as a preventive measure to protect the collective. *Li* guided society, but implementing legal norms created inconsistency between new laws and cultural will.¹⁴⁹ This is what occurred with the adoption of the 1979 Criminal Procedure Law.

Subjected to the scourges of the Cultural Revolution, the drafters of the 1979 Criminal Procedure Law intentionally fortified the rights of the accused.¹⁵⁰ Upon application, however, the details of the law conflicted with its enforcement. This conflict led to further amendments that took away certain rights bestowed in the 1979 amendments so that written law and culture would become more consistent.¹⁵¹ Interested institutions and various pluralistic voices battled over criminal justice reform for the next decade and a half, but it was not until 1996 that these battles culminated into the NPC enactment of the 1996 CPL.¹⁵²

The first step in ruling by *fa* instead of *li* required the criminal justice system to consolidate and devise formal divisions of labor among investigative, prosecutorial, and adjudicative institutions.¹⁵³ Historically, the functions of these institutions ran together.¹⁵⁴ Since each institution has separate interests,¹⁵⁵ a lack of separation between the functions increases the potential for violations of international due process norms.¹⁵⁶

147. See Huang, *supra* note 73, at 172.

148. See LUBMAN, *supra* note 109, at 18.

149. See Huang, *supra* note 73, at 160.

150. See LENG, *supra* note 13, at 206-07.

151. See INTRODUCTION TO CHINESE LAW 164-65 (Wang Chenguang et al. eds., 1997).

152. See J. HECHT, OPENING TO REFORM? 19 (1996).

153. See Lo, *Criminal Justice Reform*, *supra* note 32, at 90.

154. See *id.* at 100-01.

155. See John Copeland Nagle, *The Rule of Law in Mainland China*, 2 AM. ASIAN REV. 147, 159 (1996).

156. See *The Administration of Justice and the Human Rights of Detainees*, U.N. Commission on Human Rights, 46th Sess., Prov. Agenda Item 10(d), at 67, U.N. Doc. E/CN.4/Sub.2/1994/24 (1994) [hereinafter *Rights of Detainees*].

The institutions voicing their concerns include: (1) the Supreme People's Court, which urges curbing the power of prosecutors and providing more rights to the accused;¹⁵⁷ (2) the Supreme People's Procuratorate, which represents prosecutors and is interested in bestowing greater authority and leniency in prosecutorial standards;¹⁵⁸ and (3) the Ministry of Public Security, which advocates greater flexibility for police enforcement of criminal laws.¹⁵⁹

While the Supreme People's Court might perceive the 1996 Criminal Law as a victory, the three institutions continue to debate over implementing and interpreting standards. Thus, both legal codifications and informal approaches to criminal justice remain important.¹⁶⁰ In practice, the dynamic tension between these two approaches highlights the unending struggle between *li* and *fa*, and collectivism and individualism.¹⁶¹

B. From "Li" to "Fa": Movement Towards International Standards

The Universal Declaration of Human Rights¹⁶² (UDHR) provides general international standards that states should adhere to during criminal investigations and prosecutions.¹⁶³ In China, an expeditious movement arose to provide a more objective structure to criminal justice where little existed.¹⁶⁴ This movement led to the adoption of new codified sources, but the balancing of informal norms and formal law, however, continues to this day.¹⁶⁵ This section will illustrate the transition in terms of: (1) formal criminal justice system procedures that restrain liberty, (2) formal criminal justice system provisions related to trial, and (3) informal detention methods that permit manipulation of protections provided in (1) and (2).

157. See HECHT, *supra* note 152, at 64–69.

158. FU HUALING, CRIMINAL PROCEDURE LAW, INTRODUCTION TO CHINESE LAW 138 (Wang Chenguang et. al. eds., 1997).

159. See *id.* at 137.

160. See Turack, *supra* note 83, at 52.

161. See Huang, *supra* note 73, at 186.

162. *United Nations Universal Declaration of Human Rights*, G.A. Res. 217A, U.N. GAOR, 3rd Sess., at 72, U.N. Doc A/810 (1948) [hereinafter *UDHR*].

163. See *id.* at 72–73.

164. See Huang, *supra* note 73, at 187.

165. See *id.* at 186–89.

1. Criminal justice system procedures permitting legal detention of a suspect

The chaos of the Cultural Revolution led to a drastic shift to restrain police action that violated suspect rights.¹⁶⁶ In 1996, however, inconsistency between social demands and the 1979 legal standards led the PRC to adopt new standards.¹⁶⁷ The development of the current law, which is more consistent with international human rights standards, more fully adheres to formal restrictions on freedom of action, and moves away from informal restrictions on such freedoms.¹⁶⁸

The five compulsory measures in today's CPL that restrain a suspect's freedom of action are:¹⁶⁹ compulsory summons, pre-trial payment of bail, supervised residence, pre-arrest detention, and arrest.¹⁷⁰ The People's Courts or the People's Procuratorate create compulsory summons by issuing a warrant compelling a suspect to appear and provide evidence or to "obtain a guarantor pending trial or subject him to residential surveillance."¹⁷¹ A compulsory summons is a government action that seeks information and does not, by its terms, restrict freedom of action. Conversely, succeeding compulsory measures do restrict freedom of action.¹⁷²

To balance an accused's right to freedom against the people's right to prosecute effectively, the 1996 CPL permits the use of bail.¹⁷³ Although the People's Court or the People's Procuratorate can deny release with conditions,¹⁷⁴ a criminal suspect or his representative or relatives have a right¹⁷⁵ to request

166. See LUBMAN, *supra* note 109, at 165–66.

167. See Huang, *supra* note 73, at 191.

168. See Turack, *supra* note 83, at 66.

169. See HECHT, *supra* note 152, at 20.

170. See Criminal Procedure Law of the People's Republic of China, pt. 1. ch. VI (1996), available at <http://www.chinalaw114.com/englishlaw/shownews.asp?id=178> [hereinafter 1996 CPL].

171. See *id.* art. 50.

172. See HUALING, *supra* note 158, at 138.

173. *Id.* at 144.

174. See *id.*

175. See *id.* The ability to request bail will normally attach once the suspect has apprised relatives of the incarceration. The ability to communicate with an attorney once incarcerated, however, has been a problem in China. International law grants all detainees the right to counsel and the right to receive "prompt and full communication" regarding arrest. See 1988 U.N.Y.B. 511, U.N. Sales No. E.93.I.100 [hereinafter U.N. Sales No. E.93.I.100].

a “guarantor” or guarantee money releasing the defendant pending trial.¹⁷⁶ Upon release with such conditions, the suspect loses some freedom of action. For example, the suspect must remain within the locale, must not tarnish or destroy evidence, and must fulfill his obligations to the court.¹⁷⁷

International law states that “[e]xcept in special cases provided for by law, a person detained on a criminal charge shall be entitled . . . [t]o release pending trial subject to the conditions that may be imposed in accordance with the law.”¹⁷⁸ The police, however, are not required to approve the guarantee, and 1996 CPL provisions do not mandate guidance, transparency, or objectivity regarding this decision.¹⁷⁹

During supervised residence, a criminal suspect may not leave his abode without authorization.¹⁸⁰ This confinement can last up to six months,¹⁸¹ but if evidence is later discovered exculpating the accused, the supervised residence ends.¹⁸² On the other hand, “if there is evidence to support the facts of a crime,” then the Procuratorate or Court may approve the arrest of the accused.¹⁸³

The modification of the 1979 CPL arrest standard lowered the standard from its high level requiring that the “principal facts of the crime have already been clarified”¹⁸⁴ before an arrest could be made. This high threshold compelled police action outside of the criminal justice process to incarcerate individuals because the standard was too difficult to meet.¹⁸⁵ A high arrest standard mandating unofficial incarceration methods violates international human rights norms just as easily as a low arrest threshold permitting detention for what should be protected behavior.¹⁸⁶

176. See HUALING, *supra* note 158, at 138. *Guarantee money* is equivalent to bail in the West. A *guarantor*, however, is an individual who will vouch for the suspect and be responsible for his release and return. The guarantor can be fined and even be held criminally responsible if he does not fulfill his duties. See *id.* at 138–39.

177. 1996 CPL, *supra* note 170, art. 56.

178. See U.N. Sales No. E.93.I.100, *supra* note 175, at 514.

179. 1996 CPL, *supra* note 170, art. 52.

180. *Id.* art. 57.

181. *Id.* art. 58.

182. *Id.* art. 58.

183. *Id.* arts. 59, 60.

184. See HECHT, *supra* note 152, at 21.

185. See *id.* at 21.

186. U.N. CONGRESS ON THE PREVENTION OF CRIME AND THE TREATMENT OF OFFENDERS at 20–21, U.N. Doc. A/Conf.144/28/Rev.1, U.N. Sales No. E.91.1V.2 (1991) [hereinafter U.N. Sales No. E.91.1V.2].

International law requires that "no one shall be subject to arbitrary arrest [or] detention."¹⁸⁷

As for the permitted duration of police detention, pursuant to the 1979 CPL, police had up to two months to investigate and gather evidence of a crime, once a suspect was arrested. This period, however, could be extended an extra month for "complicated cases."¹⁸⁸ Some believed the limited duration was too restrictive and rarely adhered to it. This restriction is another rationale for reliance on nonofficial means of detention.¹⁸⁹

Today, under the 1996 CPL, the initial incarceration period is still two months. Yet, the People's Procuratorate can approve a one month extension for "complex" cases.¹⁹⁰ In addition, this period can be further extended another two months in "grave and complex cases," cases that involve criminal gangs and transient people, and cases in which evidence is difficult to obtain.¹⁹¹ For a crime that can lead to ten years imprisonment, the People's Procuratorate can approve yet another two-month extension.¹⁹²

Overall, the detention period can last for seven months, from the time of arrest to determination of guilt. In China, individuals have no right to bring a habeas corpus proceeding¹⁹³ although freedom from arbitrary detention is an internationally recognized right that mandates a remedy for violation.¹⁹⁴ This modification of the length of detention increased the police's official power¹⁹⁵ by shifting the holding period from the informal to the formal criminal justice system. This may mean that the terms and length of the holding period may not differ upon application. Similarly, more malleability is built into the 1996 CPL since the seven months is also open to official holding periods of an ambiguous length when the "suspect is found to have committed other crimes" or his identity is unknown.¹⁹⁶ Moreover, the NPC

187. See *UDHR*, *supra* note 162, art. 9. Probable cause must exist for an arrest. See *Rights of Detainees*, *supra* note 156, at 69.

188. See 1979 CPL, *supra* note 13, art. 92.

189. See *HUALING*, *supra* note 158, at 136.

190. 1996 CPL *supra* note 170, art. 124.

191. *Id.* art. 125.

192. *Id.* art. 127.

193. *HECHT*, *supra* note 152, at 33.

194. *UDHR*, *supra* note 162, at 73.

195. See *HUALING*, *supra* note 158, at 138.

196. 1996 CPL, *supra* note 170, art. 128.

Standing Committee can approve indefinite holding period extensions for “particularly grave and complex case[s].”¹⁹⁷

The rule changes regarding the time period in which a suspect can be arrested and held once the case is referred to the Procuratorate contains a similar parallel. In the 1979 CPL, the time period rule was broad. It permitted the Procuratorate to request any number of supplementary police investigations,¹⁹⁸ which meant there was no effective limit on this detention time period. On the other hand, the 1996 revisions maintain the same general rule of one month with a half month extension (for complex cases) before initiating public prosecutions.¹⁹⁹ Yet, the revisions limit supplementary investigations to two requests.²⁰⁰

2. Formal criminal justice system trial procedures

The quintessential protections for the accused are pretrial rights and rights to a fair hearing.²⁰¹ These broadly encompass many protections, such as the presumption of innocence, freedom from punishment for engagement in protected conduct, freedom from arbitrary arrest, trial by an impartial and independent tribunal, and the right to adequate representation.²⁰²

a. pretrial rights

Considerable hostility surfaced against the adoption of a presumption of innocence standard when the 1979 CPL was enacted.²⁰³ Those opposed to such a presumption articulated that to hold otherwise would protect guilty people from punishment, restrict law enforcement personnel, and undermine a confession’s merit.²⁰⁴ Additionally, those opposed to the presumption of innocence standard believed it would be “a true expression of materialism because it insists that a judgment can only be made by reliable, objective evidence rather than by subjective views inherent in the feudalistic tradition.”

197. *Id.* art. 125.

198. *See* 1979 CPL, *supra* note 13, art. 99.

199. *Id.* art. 138.

200. *Id.* art. 140.

201. *Rights of Detainees*, *supra* note 156, at 67.

202. *See id.* at 64–69.

203. *See* Gelatt, *supra* note 64, at 284.

204. Leng, *supra* note 12, at 222–23.

If "the defendant is 'innocent,' why has he been arrested and a public charge preferred against him?"²⁰⁵ This query is circular. An equitable court decision in a criminal case depends on independent, fair, and impartial investigative and prosecutorial actions, which may go awry in any judicial system. Thus, presumptions about the actions of an accused, prior to submission of a case to the court system, are important in protecting the rights of the accused. In the well publicized "Gang of Four" prosecution in 1980, it was stated, "[t]he Chinese approach to criminal procedure is not to engage either in the 'presumption of guilt' . . . or in the 'presumption of innocence'"²⁰⁶

At the international level, the UDHR requires that those charged with penal offenses be afforded a presumption of innocence.²⁰⁷ While the 1996 CPL provides that "no person shall be found guilty without being judged as such,"²⁰⁸ this provision ostensibly does not conclusively adopt a presumption either way.²⁰⁹ In light of policy battles from interested institutions and ideologies, several factors suggest the most plausible interpretation of this new provision is that a person cannot be deemed guilty before trial.²¹⁰ First, the term employed for the accused in the 1996 CPL is "the suspect." Second, the 1996 CPL strengthened procedural rights originally intended to objectively screen facts. Third, the amendments lowered the arrest standard to stymie the occurrence of nonlegal incarcerations.²¹¹ Lastly, a court can dispose of long time pending cases without prosecution using a "verdict of not guilty."²¹²

The Supreme People's Procuratorate also supported the rule of "exemption from prosecution," which permitted the People's Procuratorate to decide whether to prosecute, not prosecute, or exempt a defendant from prosecution.²¹³ The rule was attacked by all but the Procuratorate because it violated a suspect's presumption of innocence, which would also violate the UDHR presumption requirement. Essentially, the prosecutor made a guilt

205. Leng, *supra* note 12, at 223.

206. Gelatt, *supra* note 64, at 223.

207. UDHR, *supra* note 162, art. 11.

208. 1996 CPL, *supra* note 170, art. 12.

209. HECHT, *supra* note 152, at 61.

210. *But see* Luoji, *supra* note 23, at 12 (arguing that arrest is proof of guilt).

211. HECHT, *supra* note 152, at 62-63.

212. 1996 CPL, *supra* note 170, art. 162(3).

213. HAULING, *supra* note 158, at 147.

determination without providing a hearing or legal counsel during this critical and determinative stage.²¹⁴ Assuredly, this granted a high level of discretion and permitted a prosecutor to treat suspects differently to enhance efficiency in the court system and relieve a suspect from prosecution at an early stage. After using this discretion, the prosecutor could exempt guilty people, without an appellate court procedure.²¹⁵ The dissent from all but the Procuratorate eliminated “exemption from prosecution.”²¹⁶

In China, the right to counsel was recognized in the 1954 Constitution but was later abolished, largely because the Cultural Revolution decimated the legal profession.²¹⁷ The right to counsel or to proceed pro se returned in the 1979 CPL.²¹⁸ While the right to counsel “is never explicitly denied in the [1979 CPL] . . . its denial [at earlier stages] may be gleaned from a series of provisions.”²¹⁹ For instance, counsel was denied during police interrogations.²²⁰ Counsel was appointed when the defendant was “deaf, mute or a minor.”²²¹ The right to counsel, however, only attached once the indictment was sent to the defendant, which was at least seven days prior to trial.²²²

The Ministry of Justice and many law professors pushed for reform over the years.²²³ The result was a compromise based on a variety of more polarized positions.²²⁴ Today, the 1996 CPL provides the accused a right to a lawyer within the three days after the police refer the case to the prosecution.²²⁵ Before this—at the first police interrogation or immediately after arrest—the accused

214. *See id.* at 147–48.

215. *See id.* at 148.

216. *Id.*

217. *See* COHEN, *supra* note 4, at 472–73.

218. 1979 CPL, *supra* note 13, art. 26.

219. Gelatt, *supra* note 64, at 287.

220. *See id.* at 288–89.

221. *Id.* art. 27.

222. *Id.* art. 110.

223. *See* HECHT, *supra* note 152, at 37–38.

224. *Id.* “One proposal was that the lawyer’s involvement should begin at the point when the police completed investigating the crime and forwarded the case materials to the procuratorate for a decision on whether to prosecute.” *Id.* This would give the defense and prosecution the same amount of time with the case. *Id.* at 38. Another, more extreme position was to give [a right to counsel] during the investigation phase since it could “help the police to determine which cases did not merit further investigation,” provide “greater oversight of investigation activities,” and uncover human rights abuses. *Id.*

225. 1996 CPL, *supra* note 170, art. 33.

has this right but need not be informed of a right to counsel. Within three days of prosecutor receipt of the case, however, the prosecution must inform the accused of his right to counsel.²²⁶ Defense counsel must also be able to comment on the case and the Procuratorate must listen to the defense counsel's position.²²⁷

International law states that some right to counsel must exist²²⁸ for the accused to the extent necessary to ensure a "fair" hearing that affords "all the guarantees necessary for [a] defence."²²⁹ Yet, due to the dissimilarities among criminal law systems, the timing and extent of this right are ambiguous issues. Also, international norms suggest a broad view of the right—the right to know counsel is available.²³⁰

Over time, the trend has been to provide counsel at an earlier stage in the criminal justice process. In the investigation phase, the accused has a limited right to counsel.²³¹ To aptly ensure a fair hearing, regardless of financial status, the 1996 CPL provides for legal aid under given circumstances.²³² The People's Court may designate a lawyer if the accused has not entrusted one for his defense, "due to financial difficulties or other reasons."²³³ This availability of counsel without regard to financial ability is ostensibly consistent with international standards requiring a fair hearing. Evidently, China is readily providing such counsel.

While these rules on their face seem consistent with international standards, exceptions to the right to counsel are problematic, especially regarding denials based on expansive definitions of "state secrets."²³⁴ If the underlying offense relates to state secrets or if advocacy of a suspect's individual rights might infringe on state interests or secrets, then in practice, the right to counsel is denied. The right to counsel can be marginalized in several other ways. First, lawyers in China have weak status.

226. See HECHT, *supra* note 152, at 39.

227. *Id.*

228. U.N. Sales No. E. 91.IV.2, *supra* note 186, at 120.

229. UDHR, *supra* note 162, arts. 10–11.

230. See 1988 U.N.Y.B. 510, U.N. Sales No. E.93.I.100, *supra* note 175, at 511–12; see also International Convention on Civil and Political Rights, Dec. 19, 1996, 999 U.N.T.S. 171, 176 (hereinafter ICCPR).

231. See *id.* at 38–39.

232. 1996 CPL, *supra* note 170, art. 34.

233. *Id.*

234. See generally Timothy A. Gelatt, *The New Chinese State Secrets Law*, 22 CORNELL INT'L L.J. 255 (1989).

Second, the law restricts advocating “too forcefully” on behalf of clients. Third, attorneys have difficulty determining which documents they need for particular cases and whether those documents contain state secrets. Finally, the state might employ intimidation techniques on defense lawyers.²³⁵

b. right to a fair hearing

Human rights activists have raised numerous attacks on the general characteristics of China’s court system. However, the general structure and jurisdiction of courts that handle criminal cases do not raise pervasive quandaries. The Primary People’s Court is the court of first instance handling ordinary criminal cases,²³⁶ while the Intermediate People’s Court has jurisdiction over criminal cases that involve life imprisonment or the death penalty.²³⁷ It is how cases are handled within these courts that has been said to raise complications.

Prior to the late 1980s, China’s inquisitorial trial process did not adequately protect the rights of the accused because the pretrial review made the trial a sham. For example, the judge acted like a prosecutor, and the adjudication committee could intervene in a nontransparent manner. China has since adopted more adversarial criminal justice system procedures.²³⁸ This should provide more transparency and international consistency to the judicial process²³⁹ and be a victory for the integrity of courts.²⁴⁰ Still, this was a long fought battle between interested institutions.²⁴¹

Individual judges’ actions are occasionally unfair in the criminal justice process.²⁴² For example, judges and prosecutors

235. Elisabeth Rosenthal, *In China’s Legal Evolution, the Lawyers are Handcuffed*, N.Y. TIMES, Jan. 6, 2000, at A1.

236. 1979 CPL, *supra* note 13, art. 14.

237. *See id.* art. 15.

238. *See* Lo, *Criminal Justice Reform*, *supra* note 32, at 310–11 (explaining that adversarial systems publicize proceedings).

239. *See UDHR*, *supra* note 162, at 71–72.

240. *See* HUALING, *supra* note 158, at 152–54. The amendment made important changes to the former criminal justice process. For example, judges no longer review documents before trial. Also, court adjudication committees only intervene if a panel decides or if a panel is unable to reach a decision. In addition, witnesses can be questioned and parties can present evidence. *Id.*

241. *See* HECHT, *supra* note 152, at 67–69.

242. The right to a public trial is provided for in the Xianfa. *See* XIANFA art. 125 (1982).

might employ coercive measures to obtain more evidence in order to support a guilty verdict.²⁴³ In addition, although judges and lawyers may be impartial, Party leadership can influence the justice system.²⁴⁴ Nevertheless, there is evidence that China has made vital improvements to its "accessibility and credibility" of courts.²⁴⁵

One improvement is China's diminished use of *li*, and increased use of *fa*, in the criminal justice process. This change decreases the potential for judicial partiality. In the past, judges had substantial leniency and flexibility in defining a crime.²⁴⁶ They were able to flexibly construct crimes premised on codified punishable behavior even though the action at hand did not meet the elements of a formal crime.²⁴⁷ To deal with this problem, the number of articles in the amended Criminal Law and Criminal Procedure Law was increased in order to more fully define crimes.²⁴⁸ The use of specific definitions ensured that conviction would only occur in accordance with exact and objective code provisions, thus eliminating judicial freedom to mischaracterize a defendant's conduct in order to make it fit a particular crime.²⁴⁹

A clear definition of crime is important to ensure fairness and due process, and apprise individuals of criminally punishable actions.²⁵⁰ While the 1996 CPL certainly improves the degree of precision by delineating what is criminally punishable behavior, one particularly problematic area remains. Crimes are also listed according to whether they endanger "state security,"²⁵¹ a categorization that is equivalent to the former counterrevolutionary line of crimes. Since political interests define when a particular set of facts undermine "state security," the state has a broad purview of discretion to charge individuals with

243. Ruth Youngblood, *Chinese Judge Admits Coercive Measures*, UPI, July 18, 1996, LEXIS, Nexis Library, UPI File.

244. See Leng, *supra* note 12, at 224. The CCP is the only permitted political party and it dominates the NPC, which has control over the judiciary. Judicial autonomy is then restrained by both the local and national CCP structure. See Lubman, *supra* note 28, at 394-96.

245. *Id.* at 388.

246. See Turack, *supra* note 83, at 53.

247. *Id.*

248. *Id.*

249. *Id.*

250. See *id.*

251. *China: Whose Security? "State Security" in China's New Criminal Code* 9 HUM. RTS. WATCH/ASIA, 50-52 (1997).

offenses. All four of China's constitutions have given citizens a freedom of speech,²⁵² which international law recognizes as a fundamental international right.²⁵³ However, since political dissent is perceived to endanger state security, the justification for punishing many individuals is not consistent with international norms and leads to arbitrary and unfair prosecutions.

The right to appeal criminal convictions has long existed, and today the individual convicted has the right to one appeal.²⁵⁴ The defendant must appeal within ten days.²⁵⁵ Then the appellate court has the option to affirm the judgment, revise the judgment, or remand the case for a new trial.²⁵⁶ The appellate court must make a "complete review of the facts . . . and the application of law in the judgment of first instance."²⁵⁷ The implementation of open-court appeals improved the transparency of the appeal process.²⁵⁸

Although the appeals process has improved, appeal rates have declined over time probably because of their lack of success, and the possibility that a new sentence could impose a stricter penalty.²⁵⁹ The 1996 CPL did not intend to decrease appeal rates.²⁶⁰ However, if cultural notions of accepting responsibility and punishment for one's actions are still intact in China, and criminal procedure law changes have resulted in more accurately assessing guilt, then it is unlikely that a higher percentage of inmates will complain about incorrect decisions.

China has a death penalty, but because approximately half of the countries of the world still have one,²⁶¹ this does not violate international law's right to life as long as the death penalty is imposed for a justified offense.²⁶² However, the Chinese

252. Luoji, *supra* note 23, at 8.

253. See UDHR, *supra* note 162, at 74-75.

254. See 1979 CPL, *supra* note 13, art. 129.

255. 1996 CPL, *supra* note 170, art. 183.

256. *Id.* art. 189.

257. *Id.* art. 186. One problem is that this system permits double jeopardy because both the local People's Procuratorates and the victim are able to protest and appeal a judgment. See *id.* art. 185; see also Huang, *supra* note 73, at 184.

258. See 1996 CPL, *supra* note 170, art. 187.

259. HECHT, *supra* note 152, at 70-71.

260. 1996 CPL, *supra* note 170, art. 190.

261. See Monthly, *supra* note 61, at 195. China sentenced more people to death in the 1990s than all other nations combined. China, however, holds nearly one-fourth of the world's population. Thus, this may not be an extraordinary statistic. *Id.*

262. Customary international law is formed "as evidence of a general practice accepted as law." U.N. CHARTER, art. 38(b); see generally: DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 14-24 (2001) (on establishing customary

procedures involved in employing the death penalty might violate human rights²⁶³ by being tantamount to torture or by violating due process protections.²⁶⁴

The summary execution process provides an example. In 1983, the NPC Standing Committee enacted a decision requiring an expeditious criminal justice process in death penalty cases.²⁶⁵ According to the Decision, courts could convict and execute individuals within days of their arrest.²⁶⁶ Now eliminated, this expedited process is illustrative of an official government policy that supported societal stability over individual rights either because the quick process provided an example that would deter criminal conduct or because rehabilitation of violators was not expected.²⁶⁷

3. Punishments outside the formal criminal justice system

Police action in China outside of the context of the formal criminal justice system lacks consistency. There are codified rules specifying how to treat suspects, but norms and systems extraneous to this formal criminal justice system, can undermine such rules. In other words, the criminal justice system employs long-lived cultural norms—*li*—to assist in structuring society and to lessen reliance on the formal criminal justice system—*fa*. The extent and degree to which administrative sanctions are employed has steadily decreased and the criminal justice process is now more consistent with what is on paper.²⁶⁸ There are two more fundamental procedures that are outside the formal criminal

international law). The United Nations has committed itself to abolishing the death penalty in all countries. G.A. Res. 2857, U.N. GAOR, 26th Sess., Supp. No. 29, at 94, U.N. Doc. A/8588 (1971) [hereinafter G.A. Res. 2857].

263. See Boxer, *supra* note 4, at 605–07.

264. BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, U.S. DEP'T OF STATE, 1999 COUNTRY REP. ON HUM. RTS. PRACTICES § 1(e), available at <http://www.state.gov/g/drl/rls/hrrpt/1999/284.htm>. (Feb. 3, 2000).

265. Decision of the Standing Committee of the National People's Congress Regarding the Severe Punishment of Criminals Who Seriously Endanger Public Security, adopted at the Second Meeting of the Standing Committee of the Sixth National People's Congress and promulgated for implementation by Order No. 3 of the President of the People's Republic of China on Sept. 2, 1983; reprinted in THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA: 1983–1986 32–33 (Legislative Affairs Comm'n of the Standing Comm. of the People's Republic of China Ed., Foreign Language Press 1987).

266. See Boxer, *supra* note 4, at 605–06.

267. See *id.* at 598.

268. *Id.*

justice process: “shelter and investigation” (SI) and “reeducation through labor.” The former was abolished, but the latter still exists.²⁶⁹

The CCP transition from relying on *li*, as its primary power source, to *fa* remains an irresolvable contradiction.²⁷⁰ Today, it is imperative to the CCP’s credibility and control to emphasize the rule of law. This emphasis, however, is apt to beget other pressures that will undermine that control. At the essence of this contradiction are dichotomies “between law and discipline or administration,” and between “formal and informal proceedings.”²⁷¹ Administrative and informal methods of punishment are more consistent with *li* and modifying behavioral norms. In contrast, legal and formal criminal justice procedures do not aspire to instill new behavioral norms, but rather, these procedures aspire to guarantee individual rights and restrict government action.

“[L]aw” is distinct from “discipline” or “administration.” To understand the scope of the concept of law, therefore, it is necessary to map out the realm of discipline and administration and to demarcate the border between these areas and law.

Disciplinary and administrative sanctions are, like legal sanctions, imposed for transgressions against rules of conduct. The two differ theoretically in that the term “administrative sanctions” usually means sanctions imposed by the state as state, whereas disciplinary sanctions are imposed by one’s work unit, such as a factory, or some other organization of which one is a member, such as the Party or a labor union. When, however, as is frequent in China, the employer is the state or the organization is the Party, there tends to be little practical distinction between the two. What is important about disciplinary and administrative sanctions are that although they are explicitly differentiated in theory and practice from “legal” sanctions, they can, like legal sanctions, be imposed with the authority of the state.²⁷²

In the early 1960s, the CCP legislatively authorized SI as an administrative procedure outside the formal criminal justice

269. *Punishment Without Crime: Administrative Detention*, AMNESTY INT’L, Sept. 1991, at 5–14 [hereinafter AMNESTY INT’L].

270. See Lubman, *supra* note 28, at 399.

271. *Concepts of Law*, *supra* note 68, at 1898–1901.

272. *Id.* at 1898.

system.²⁷³ The procedure was enacted because of the societal instability caused by the mass incursion of migrants searching for food during the Great Leap Forward—one of Mao's revolutions in which he strove to push China toward his ideal state of communism.²⁷⁴ SI was an efficient method for rounding up migrants, temporarily detaining them, and returning them to rural areas.²⁷⁵ This system lasted for nearly two decades and was presumably eliminated in 1980 only to rise again in 1983.²⁷⁶ While the government ostensibly emphasized *fa* by eliminating SI and enacting new criminal laws and procedures, the instability of social order and the lack of adequate resources to sustain new legal institutions led the government to re-institute SI and re-education through labor.²⁷⁷ Even though this system was effective in safeguarding the interests of the collective, the process was the gravest violation of international human rights in the Chinese criminal justice process. This is because international law requires that "[a]nyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power."²⁷⁸

SI would not have received such vehement criticism if it had operated according to some form of codified law that provided due process protections. The Ministry of Public Security subjected two types of people to SI: (1) those committing "itinerant crimes," and suspects that refuse to identify themselves by providing their correct name, address, and background;²⁷⁹ and (2) those suspected of committing "group crimes" or multiple crimes.²⁸⁰ SI was overused because police were hesitant to apply for formal arrests since arrest standards were too stringent.²⁸¹ The codified law required the establishment of the "principal facts" of the crime before an arrest was made.²⁸² Since SI provided an easier way for

273. See generally, *Notice of the Ministry of Public Security Concerning Strict Control of the Use of the Method of Shelter and Investigation* (1985), CHINESE LAW & GOVERNMENT, 38 (1994) [hereinafter *Notice of the Ministry of Public Security*].

274. See generally, AMNESTY INT'L, *supra* note 269, at 7.

275. HECHT, *supra* note 152, at 22.

276. *Id.* at 21–22.

277. See *Concepts of Law*, *supra* note 68, at 1895–96.

278. See ICCPR, *supra* note 230, art. 9(3), at 175.

279. See *Notice of the Ministry of Public Security*, *supra* note 273, at 38.

280. *Id.* at 39.

281. See HECHT, *supra* note 152, at 21–23.

282. *Id.* at 21.

the police to resolve the migration problem outside the formal criminal justice system, it was not subject to formal legal checks on actions of the authorities.²⁸³

These controversies gave way to ongoing battles among rival institutions within the Chinese government over the use of SI:

Concerned that indiscriminate application of “shelter and investigation” was damaging the public image of the police, the Ministry of Public Security sought on several occasions to impose tighter controls on its use, but apparently without success. It also tried to persuade the NPC to enact a law on “shelter and investigation” and thereby place it on a more secure legal footing. However, these efforts also failed, reportedly due to broad opposition by the courts, procuratorate and the NPC itself.²⁸⁴

SI undermined many procedural protections and violated international law norms since eighty to ninety percent of those incarcerated were first detained under SI²⁸⁵ and were imprisoned without a finding of guilt. Some detainees were held for up to ten years²⁸⁶ even though SI was supposed to only last for a maximum of three months.²⁸⁷ Of those incarcerated under SI, sixty to ninety percent were later determined innocent.²⁸⁸ Also, the same prison conditions existed for SI detainees as for those formally convicted.²⁸⁹ SI was abolished in 1996²⁹⁰ after scathing attacks²⁹¹ and when the arrest standard was lowered from “the principal facts” of the case to “evidence to prove that a suspect committed certain criminal acts.”²⁹² Despite the elimination of SI, other informal administrative actions, such as “reeducation through labor,”²⁹³ might still violate international prohibitions against

283. *Id.* at 23.

284. *Id.* at 23–24.

285. *Id.* at 22.

286. *Id.* at 23.

287. *Notice of the Ministry of Public Security, supra* note 273, at 39.

288. AMNESTY INT’L, *supra* note 269, at 14. This violates the UDHR equal protection provisions. *See UDHR, supra* note 162, arts. 72–73.

289. *See* Gelatt, *supra* note 64, at 314.

290. *New Laws to Protect the Innocent*, CHINA DAILY, March 23, 1996, at 4; HUALING, *supra* note 158, at 137–38. Some wonder whether it was really abolished. *See* Huang, *supra* note 73, at 179–80.

291. *See* AMNESTY INT’L, *supra* note 269, at 5–6.

292. HUALING, *supra* note 158, at 135–38.

293. *See* AMNESTY INT’L, *supra* note 269, at 4.

involuntary servitude²⁹⁴ and due process norms because suspects are treated like prisoners without a proper conviction.²⁹⁵

“Reeducation through labor” rehabilitates the individual so that he can become a productive member of society.²⁹⁶ Recently, the U.N. high commissioner for human rights vigorously attacked this activity because of thousands of cases that reported severe abuse in the system.²⁹⁷ Since it is an administrative form of punishment managed outside the formal criminal justice system,²⁹⁸ it is not subject to official protection of rights. In 1996, the PRC stated that over two hundred thousand citizens were being held in “reeducation through labor” camps.²⁹⁹

Given the formal legal system, the adoption of codified standards, and the recent elimination of half of the notorious pseudo-official administrative detention programs, a third category of criminal procedure violations has still been said to occur outside of the formal system. Stories about the use of tactics such as fraud, threats, and torture in China pervade the media despite China’s claims, internationally³⁰⁰ and domestically,³⁰¹ that these measures can be legitimate police techniques.³⁰² For example, the use of evidence gathered from overly aggressive police and prosecutorial techniques is a current issue. As with most matters involving the balance between prosecutorial and individual rights, the Supreme People’s Court is at the forefront in placing limits on the use of such evidence in criminal cases.³⁰³

Likewise, while China “does not permit . . . monitoring of its prisons or re-education through labor camps,” the conditions in these incarceration programs can violate human rights standards.³⁰⁴ Human rights protections are specified in the Prison Law and it is a crime for prison police to violate those rights.

294. *UDHR*, *supra* note 162, art. 4.

295. *See Gelatt*, *supra* note 64, at 313–14.

296. *See HAULING*, *supra* note 158, at 134.

297. *China: The Same to You, Too*, *ECONOMIST*, Mar. 3, 2001, at 38–39.

298. *See HAULING*, *supra* note 158, at 134.

299. Giles Hewitt, *Wang Dan Heads for the Chinese Gulag*, *AGENCE FRANCE PRESSE*, Oct. 30, 1996, available at LEXIS, News Library, Allasi File.

300. *See Rights of Detainees*, *supra* note 156, at 76.

301. *See* 1979 CPL, *supra* note 13, art. 32. It is the People’s Procuratorate’s job to investigate such abuses. *Id.* art. 52.

302. *See China: The Same to You, Too*, *supra* note 297, at 38–39.

303. *See* HECHT, *supra* note 152, at 68–69.

304. *See* Turack, *supra* note 83, at 67–69.

Nonetheless, it is not what the law says, but instead what can be hidden and go undetected, that often supplants individual rights.³⁰⁵

IV. SOCIETAL PRESSURES

In China, as described up to this point, there is currently a movement that elevates individual rights relative to collective interests. The 1979 CPL established some fully protected individual rights.³⁰⁶ That protection, however, gave way to a *mélange* of noncodified exceptions to the criminal code and to an abysmal chasm between codified law and reality.³⁰⁷ For instance, while using *li* to control societal conduct is more consistent with administrative detentions, it seems that societal pressure has been pushing for more objectivity and transparency by eliminating nonofficial processes of detention.³⁰⁸ To respond to this problem, the CCP and various government organs have remedied individual rights abuses.³⁰⁹ By passing the 1996 amendments to the 1979 CPL, now, instead of having opaque exceptions that are outside of the code, exceptions and standards are apparent in the written law and provide more transparency. Even though human rights abuses and violations often still persist,³¹⁰ aggrieved individuals now have more tangible ground to stand on.³¹¹ Even so, others comment that legal reform in codified sources still has significant drawbacks in practice.³¹²

Consider the three important overarching policies in the new Criminal Law that on their face reduce the degree of power abuse in the criminal justice system: (1) penalties imposed must coincide with the criminal act, (2) equality for all before the law, and (3) only explicitly defined crimes are punished. In contrast, pursuant

305. *Id.* at 67–69.

306. *See generally*, 1979 CPL, *supra* note 13.

307. Turack, *supra* note 83, at 52–53.

308. *See* HECHT, *supra* note 152, at 19–32.

309. For instance, individuals can sue administrative agencies for arbitrary administrative actions under the Administrative Litigation Law of 1990. *See* ADMINISTRATIVE PROCEDURE LAW [APL] art. 11 (P.R.C.), <http://www.qis.net/chinalaw/lawtran1.htm>. In 1995, fifty thousand cases were brought under this Law. Plaintiffs, however, still lost the majority of cases. *See* Lubman, *supra* note 28, at 392–93.

310. *See* Elisabeth Rosenthal, *In China's Legal Evolution, the Lawyers are Handcuffed*. N.Y. TIMES, Jan. 6, 2000, at A1, A10.

311. *New Criminal Law Enshrines Rule of Law*, BBC SUMMARY OF WORLD BROADCASTS, Mar. 17, 1997, available at LEXIS, Asiapc Library, Allasi File [hereinafter BBC SUMMARY].

312. *See* Boxer, *supra* note 4, at 613–15.

to the 1979 CPL, crimes were "flexibly created" without a precise definition in the code.³¹³

China, historically, has not supported equality for all before the law.³¹⁴ In fact, at the essence of Confucian ideology is that individual differences are accommodated to stabilize societal relations.³¹⁵ This tradition continued in Mao's China until the Cultural Revolution, when the CCP finally announced that since capitalist notions of inequality and the "enemy" bourgeois class were finally beaten, "nationality, race, sex, occupation, social origin, religious belief, education, property status, or duration of residence"³¹⁶ or Party affiliation³¹⁷ were no longer factors in the judgment of guilt or penalties. Instead, those accused of crimes were judged on the degree of harm their actions caused to society.³¹⁸ This ideal that "harm to society" is the determining factor has since evolved to more fully protect the rights of individuals. Others have said that even with more predictable criminal justice processes, the CCP's control over Chinese society still makes the criminal justice process "an abiding stronghold of politicized administration of law."³¹⁹

Courts are still expected to follow policy as it is articulated by the CCP, most obviously in the campaigns against crime that have frequently been launched since the 1980s, but more subtly as well. Although the link between judicial decisions and general policies are much less explicit and less often emphasized than they were before the onset of reform, the courts are expected to apply the laws within whatever boundaries are set by such policies and must also respond to changing emphases.³²⁰

Thus, when a court applies the law, the impediments that have precluded a more fortified incorporation of individual rights are the remaining informal political holds on the criminal justice system. This politicization of the law is also more direct. One should not discount the fact that representative and populace-based pressures and policy agendas of the NPC manifest

313. See Huang, *supra* note 142, at 179-81.

314. See LUBMAN, *supra* note 109, at 15-16.

315. See FAIRBANK, *supra* note 11, at 52.

316. Leng, *supra* note 12, at 228-29.

317. See *id.* at 230-31.

318. See *id.* at 228-29.

319. Lubman, *supra* note 28, at 394.

320. *Id.* at 394-95.

themselves in an apparently consistent manner. Further, these forces support new and harsher interpretations of the criminal law before resettling back into positions that more fully sustain rights of the accused.³²¹

For example, consider the “strike hard” campaign implemented in April 1996. Government officials recognized escalating crime rates and believed harsher police practices were necessary to fortify national security.³²² The NPC granted more leniencies to police to fight crime and dispensed stricter penalties on those convicted of crimes.³²³ What is important about the campaign was that it was an official government policy established for a set period of time. The NPC implemented the campaign seemingly at the behest of societal and populace pressures. The actual adoption and administration of the harsher policies had overwhelming support from the populace.³²⁴

Societal pressure and the CCP’s desire to stay in power have inspired debates within government institutions and created plurality within the NPC. While the CCP remains the dominant political force in Chinese society, populace pressure begets pluralism within the Party. Even though the NPC is the primary lawmaking institution for criminal law and the CCP has great influence in the NPC, populace pressures do find their way into the legislative process. There is, however, still a struggle at hand that indicates populace pressure is relatively more puissant within the law making process and results in the acceptance of the application of the letter of the law within the criminal justice system.

The CCP is promoting gradual reform by granting more individual rights within codified norms, in other words, balancing more towards *fa* at the expense of *li*. This is what Chinese citizens favor most. Yet, it is a risky step for the CCP because it has traditionally relied on *li* as a power source.

New legal enactments make acceptable norms of behavior increasingly clear and fortified, but they remain hampered by informal social norms that control behavior. The formal legal change and the persona of the law are ahead of the actual functioning of the law. This is a generalization across provisions,

321. Boxer, *supra* note 4, at 604–12.

322. *See id.* at 604–05.

323. *Id.* at 606.

324. *See id.* at 604.

but it is by no means a permanent and irrefragable trend. Because informal and political flexibility in legal interpretation still exists, intentional and concerted efforts could spawn temporary movements back toward a deprivation of legal protections. This is the case with anti-crime movements and political crackdowns that reform or severely punish the behavior of those who undermine societal norms. Crackdowns also provide lessons to the rest of society that will thwart any movements challenging CCP rule or societal order. To illuminate this trajectory of change more fully, a recapitulation of the progress of reform with some detail from the actual provisions in a few major areas is provided in the Table following this Article.³²⁵

V. CONCLUSION

China's codified rules are fundamentally consistent with international criminal procedure standards. Upon application, however, the rules do not always conform to international law. This stems from the use of informal punishments and the sometimes unfair and unpredictable enforcement of substantive laws. Thus, individual rights violations arise from the void between the literal provisions and actual practice. Likewise, policy prerogatives of other organs of government or the CCP can interfere with the role of courts, such that independent and impartial tribunals are lacking. Judges make decisions that may not provide competent national tribunals. This is due to aspects such as lack of adequate education for judges,³²⁶ or the existence of weak appeals procedures.³²⁷

While most academic arguments attack the human rights record of China's criminal justice system, it is helpful to take a step back and consider the other side of the issue. Underlying the advocacy for more legal reform is the assumption that for such change to actually take root, the balance between emphasizing rights versus majoritarian interests must be modified. Despite current accusations of human rights abuses, China has made incredible advancements and will continue to improve its criminal justice system. From where China came, the chaos of the Cultural Revolution, those in power have, over the last two decades, taken

325. See *infra* Table p. 40.

326. See Clarke, *supra* note 47, at 21–22.

327. See *id.* at 20–21.

significant steps to right the wrongs that were done to society and the innocent.

While the CCP is still the dominant political force in China, pluralism does exist. New ideas do emerge. They challenge long-lived social mores and find their way into negotiated and compromised legislative positions. These differing ideals and competing pressures spearhead reform. They cause enforcement institutions and cultural norms to become more consistent with the written law. If reform is widespread in China, it would be incorrect to suggest that changes for the better are not occurring.

Positive change is palpable in the criminal justice system, but at a slower pace than in other areas of legal reform, since reform annexed to economic development is less subjoined to culture. In economics, institutional reform agendas can become consistent with tangible and practical dimensions of the law more rapidly. In contrast, the criminal justice system is not closely associated with economic modernization and is intricately tied to traditional mores. The West must understand that change is occurring. The change is positive, but demands patience.

TABLE: TRANSITION FROM *Li* TO *Fa*

Legal Issue	Practice of <i>Li</i> Prior to 1979	Practice of <i>Fa</i> Under the 1979 Criminal Code	Actual Practice: Use of Both <i>Li</i> and <i>Fa</i>	Practice of <i>Fa</i> Under the 1996 Criminal Code	Actual Practice: Use of Both <i>Li</i> and <i>Fa</i>
Length of Detention	No clear arrest standard. Length of detention guided by <i>li</i> .	High arrest standard: "Police must prove the principal facts of the crime." ³²⁸ Length of detention set at five and a half months but could be extended indefinitely.	Because of the high arrest standard, police resorted to informal detention methods (SI and Reeducation through Labor).	Arrest standard lowered to establishing "evidence to support the facts of the crime." ³²⁹ Length of detention limited to seven months maximum.	Decrease in the use of <i>li</i> as police followed formal detention measures.
Presumption of Innocence or Guilt	Presumption of guilt.	No presumption of guilt or innocence.	Considerable debate as to whether presumption of innocence existed.	Presumption of innocence: "No person shall be found guilty without being judged as such." ³³⁰	Judiciary appears to have adopted the presumption of innocence but it is uncertain whether it is universal.
Right to Counsel	No right to counsel.	Seven days prior to trial, suspects gained the right to counsel.	Often, right to counsel denied.	Right to counsel exists at first police investigation or immediately after arrest.	Right sometimes compromised because of weak status of lawyers against expansive CCP interests.
Transparency of the Legal System	Trial system opaque and run entirely by CCP.	Creation of the inquisitorial process spawned unfairness and a weak appellate process.	Debate as to whether this was true.	More adversarial procedures established clarifying appeal process.	Transparency has improved but politicization of trials and judges remains.
Definition of Crimes	Courts defined crimes in ad hoc fashion.	Crimes defined by analogy to counter-revolutionary crimes.	Defining crimes by analogy opened wide door for substantive and procedural abuses.	Crimes no longer defined by analogy.	Opportunity for substantive and procedural abuses has narrowed.

328. 1979 CPL, *supra* note 13, art. 40.329. 1996 CPL, *supra* note 170, art. 60.330. *Id.* at art. 12.