REFORMING CHINA'S CRIMINAL PROCEDURE: AN INTRODUCTION TO THIS SYMPOSIUM

Jerome A. Cohen

Author
Professor of Law, New York University School of Law; Of Counsel, Paul, Weiss, Rifkind, Wharton & Garrison LLP; Co-Director, U.S.-Asia Law Institute; Adjunct Senior Fellow, Council for Foreign Relations. J.D., Yale Law School.

PREFATORY NOTE

On August 30, 2011, the Standing Committee of China's National People's Congress published comprehensive and significant draft amendments to the nation's Criminal Procedure Law and sought public comments on the proposed revisions. According to China's legislative process, it is likely that the National People's Congress will vote on some version of these proposed amendments during its annual meeting in March 2012.

The articles in this volume reflect, analyze, and discuss the state of Chinese criminal procedure law before the publication of the proposed amendments. Accordingly, they set the stage for the current round of legislative reform, which has aroused great interest both within China and abroad.

Once the amendments become law, this will no doubt create an opportunity and perhaps an imperative to revisit the issues examined in this volume and to evaluate what has and has not been amended and the effect of those changes. We are happy to play a role in this important process.

I. THE CONTEXT FOR CRIMINAL PROCEDURE REFORM

The dramatic "peaceful rise" of the People's Republic of China (China or PRC) has made the world more attentive than ever to its achievements in political, economic, military, and diplomatic affairs. Yet China's leaders want more—they want their country also to be recognized for its contemporary quality of life, for being a humane and cultured society that is the deserving heir to a great civilization. Thus, the PRC's "soft" power has become a matter of concern to its leadership. That is why it has established over three hundred "Confucius Institutes" on foreign campuses. That is also why China has committed itself to the United Nations Convention Against Torture;[1] the International Covenant on Economic, Social and Cultural Rights;[2] the International Covenant on Civil and Political Rights (signed but not yet

[1] United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987). China signed the Convention on December 12, 1986 and ratified it on October 4, 1988. United Nations Treaty Collection, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en#5 (last updated Aug. 26, 2011).

[2] International Covenant on Economic, Social and Cultural Rights, *adopted* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976). China signed the Convention on October 27, 1997 and ratified it on March 27, 2001. United Nations Treaty Collection, International Covenant on Economic, Social and Cultural Rights, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en#6 (last updated Aug. 26, 2011).

ratified);[3] and many other international "human rights" agreements. In recent decades the Chinese Government has increasingly come to realize that its stature and influence in the world community depend in important part on foreign perceptions of China's human rights record, including its treatment of alleged anti-social offenders.

A similar situation prevails at home. With the passing of the revolutionary era and the declining attraction of Communist ideology and government, the Communist Party has had to seek continuing legitimacy not only in China's growing international prowess but also in the results of its domestic administration, especially the significant economic and social benefits that it has brought to most of the Chinese people. Yet its accomplishments have come at great economic and social cost. The gap between rich and poor is now generally thought to be greater than at any other time in PRC history, and it is reportedly expanding. Similarly, official and business corruption and collusion seem to be greater than ever and are on public display in both countryside and city as the demands of economic development inexorably, and often unfairly, deprive ordinary people of their farming and housing rights. The consequences of massive environmental neglect are also daily more apparent, adding to growing social unrest. The failure to meet the needs of some two hundred million rural people who have migrated to the cities is another source of resentment among long-term urban residents as well as newcomers. So too are inadequate protections against unsafe food and medicines and faulty products and construction. In many places, forced abortions and sterilizations add fuel to the fire. And arrogant behavior by police and other officials is ubiquitous.

Without democratic freedoms of expression, representative political institutions, uncensored media, an effective system for persuading officials to alleviate individual and collective grievances, and consistently available, trusted courts, large numbers of ordinary Chinese have been voicing their dissatisfaction through alternative channels. Mass public protests, often violent, appear to be increasing. Attempts to ventilate grievances by using the Internet, activist non-governmental organizations, the system for petitioning officials, and even the courts to ventilate grievances have often offended the authorities. Efforts to establish political associations or mere discussion groups continue to be prohibited, and seeking solace in unapproved religious institutions is frequently deemed to be anti-social.

Although the government seeks to remedy the causes of dissatisfaction and social conflict, its measures are insufficient and slow to take effect. In these circumstances, the temptation for it to meet manifestations of social unrest with enhanced police surveillance and criminal punishment has proved irresistible. The PRC's national budget for internal security now exceeds that for national defense, despite the defense budget having more than doubled in

[3] International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976). China signed the Convention on October 5, 1998 but has not yet ratified it. United Nations Treaty Collection, International Covenant on Civil and Political Rights, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (last updated Aug. 26, 2011).

the past decade.[4] Yet this repression aggravates the situation by fostering the sense of injustice that appears to be growing among the populace. To be sure, this is hardly the first time since the PRC's founding in 1949 that repression has been a dominant instrument of social control, but now it is being imposed on a more open, educated and complex society, and through a legal system that is more sophisticated in terms of norms, institutions, personnel and experience, than earlier in PRC history.

Moreover, popular demands to effectively protect society against common crimes, coupled with public outrage at highly-publicized wrongful convictions, have increasingly focused domestic attention on the criminal process. The death penalty remains an ideological hornets' nest in the country that every year executes far more offenders than all the other countries in the world combined. That fact is so internationally embarrassing to China's leadership that it treats the actual statistics as a state secret, despite capital punishment's evident domestic popularity. Nevertheless, the Chinese public is also concerned about the accuracy and fairness of the nation's criminal procedure as well as the equal treatment of like offenders in sentencing. China, like other countries, is striving for the right balance between the crime control and due process models made famous in the West by the late Herbert L. Packer.[5] It needs to develop its version of "due process" consistent with the country's—and the world's—evolving basic values, including those that call for protection of individual accused against arbitrary official action.

As a result, there is a continuing struggle in China between those who preside over the Party/police state that governs the country and those law reformers and legal experts who strive to subject government and Party officials to some meaningful degree of legal control and accountability and to provide the targets of official punishment with a fair opportunity to defend themselves. This struggle is waged at many levels—in political-legal theory, appointments to public office, legislation, and practice.

Political-legal theory sets the Party line and the tone for appointments to the many key jobs in the various police organizations, the procuratorate, the courts, the Ministry of Justice, and the Party institutions that control them in

[4] This fact was reported by Radio France Internationale (RFI) on March 5, 2011, and by Reuters on March 7, 2011. 中国今年维稳预算首超军费 [*This Year, China's Stability Maintenance Budget Exceeds Military Spending for First Time*], RADIO FRANCE INTERNATIONALE (Mar. 5, 2011), http://www.chinese.rfi.fr/node/60956; 中国今年维稳预算6;244亿, 首超军费 [*This Year, China's Stability Maintenance Budget 624.4 Billion Yuan, Exceeds Military Spending for First Time*], REUTERS (Mar. 7, 2011), http://cn.reuters.com/article/chinaNews/idCNnCN16508332011030 7. In response, Xinhua News released a report on April 6, 2011, specifying among other things that in 2011 the budget for "public security" (*gonggong anquan*) (公共安全) is about 624.4 billion RMB. 捏造"中国维稳预算"缺乏基本常识 [*To Fabricate "China's Stability Maintenance Budget" Lacks Basic Common Sense*], 新华网 [XINHUA NET] (Apr. 6, 2011), http://news.xinhuanet.com/politics/2011-04/06/c_121272130.htm. The 2011 budget for national defense is 601.1 billion RMB, as reported by RFI above.

[5] Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964).

administering the criminal justice system. It also establishes the parameters of possible legislation and provides the guiding light for implementation of promulgated norms. Party General Secretary Hu Jintao's introduction of the doctrine of the "Three Supremes" in December 2007,[6] not long after the 17th Communist Party National Congress awarded him a second term, signaled an end to the optimism about law reform that had peaked in 2002–2003, at the start of Hu's first term, and had gradually declined. In the spring of 2008, the new President of the Supreme People's Court, Wang Shengjun, a career police official who never studied law but spent fifteen years administering the Party's Central Political-Legal Commission, began to spell out the implications of the new line. He made clear that the efforts of his predecessor to introduce more autonomy and professionalism into the judicial system by reducing the role of the Party in decision-making were coming to an end.[7] I was at a conference of judges and legal scholars in Beijing the morning after Wang delivered one of his important early speeches and saw the chill that overcame many of the participants around the table as they circulated relevant excerpts reported on the Internet.

The new Party line and the appointments that accompanied it inevitably affected the criminal justice work of the National People's Congress as well. For example, efforts to enact a law abolishing "re-education through labor,"

---

[6] At the December 25, 2007 meeting attended by senior judges and prosecutors serving as delegates to the National Political-Legal Work Conference (全国政法工作会议) (*quanguo zhengfa gongzuo huiyi*), Party General Secretary Hu Jintao said the people's courts must "always insist upon the supremacy of the Party's tasks, the supremacy of the people's interests, and the supremacy of the Constitution and the laws" ("始终坚持党的事业至上、人民利益至上、宪法法律至上"). 人民法院要坚持 "三个至上" 指导思想 [*The People's Courts Must Persist in the Guiding Thought of the "Three Supremes"*], 青海平安网 [XINHUA NET, QINGHAI BRANCH] (Aug. 4, 2008), http://www.qh.xinhuanet.com/qhpeace/2008-08/04/content_14020362.htm (Chinese); Media Dictionary, *Three Supremes* 三个至上, CHINA MEDIA PROJECT, http://cmp.hku.hk/2010/11/12/6603/ (last visited Aug. 26, 2011).

[7] The Supreme People's Court's Party study group for communist theory held an important meeting on May 8, 2008, at which the new SPC President, Wang Shengjun (王胜俊), delivered a speech specifying five aspects in which courts should advance with the times. When talking about the first aspect, "holding high the great banner of socialism with Chinese characteristics," Wang said the "Three Supremes" is the "important guiding theory that must always be followed in the work of the People's Courts in the new era." 陈永辉 [Chen Yonghui], 高举中国特色社会主义伟大旗帜努力实现人民法院工作与时俱进 [*Lift High the Great Flag of Socialism with Chinese Characteristics; Diligently Realize the Advancement of the Work of the People's Courts*], 中国法院网 [CHINA COURTS], (May 8, 2008), http://www.chinacourt.org/html/article/200805/08/300410.shtml. Wang later reiterated the "Three Supremes" as the guiding theory for courts at a meeting attended by presidents of high courts on June 22, 2008. 王胜俊：法院要更注重保障民生畅通民意表达机制 [*Wang Shengjun: The Courts Should Pay More Attention to Protecting the People's Livelihood and Unblocking the Mechanism for Public Opinion Expression*], 新华网 [XINHUA NET] (June 23, 2008), http://news.xinhuanet.com/legal/2008-06/23/content_8420389.htm.

which undermines the protections of the Criminal Procedure Law by authorizing the police to incarcerate people for up to several years without having to seek the approval of either prosecutors or judges, were reportedly on the brink of success at the start of Hu's first term.[8] The Ministry of Public Security (MPS), however, is always a formidable legislative foe. When, at the 17th Party Congress, the MPS Minister, Zhou Yongkang, was promoted to become a member of the Standing Committee of the Politburo and placed in charge of the Party's Central Political-Legal Commission, any remaining excitement about the impending end of the much-feared *laojiao* (劳教) dissipated.

The most shocking example of the implications of the new Party line for criminal justice has been the increasingly severe attack on defense lawyers, on not only the small but courageous group of civil liberties lawyers known as "rights protection lawyers," but also a larger number of "non-political" lawyers whose work on behalf of a range of clients has sometimes made them persona non grata with the government and the Party. Many members of these two groups have been subjected to both illegal and legal intimidation designed to silence them and stop their vigorous use of existing laws to protect their clients. Moreover, some lawyers who have never taken part in criminal defense but who have assisted clients in civil and administrative actions challenging a broad range of government actions have also been persecuted through a range of informal and formal sanctions, including criminal prosecution, that have neutralized many but radicalized others. The Ministry of Justice, which should be attempting to protect lawyers against this disgraceful attack, is instead one of the major attackers. Now led by another Party-police official, Ms. Wu Aiying, it presides over the local judicial bureaus that refuse to renew the licenses of many "rights lawyers" on spurious grounds, that threaten and

[8] There were heated debates about the possible abolition of reeducation through labor (劳教) (*laojiao*) in 2003. In that year, 127 people's representatives to the National People's Congress proposed motions to reform *laojiao*, and the NPC Legislative Affairs Commission began to produce a draft law titled "Law for the Education and Correction of Illegal Conduct" (*weifa xingwei jiaozhi fa*) (违法行为矫治法) that would have eliminated *laojiao* as an administrative punishment. 我国劳教制度面临变革将制定违法行为矫治法 [*China's "Reeducation Through Labor" System Faces Reform; Law for the Education and Correction of Illegal Conduct will be Drafted*], 人民网 [PEOPLE'S WEB], http://legal.people.com.cn/GB/42735/3212393.html (last visited Aug. 26, 2011); 废除劳动教养制度建设法治国家——15339 名中国公民提出违法行为矫治法 (公民建议稿) [*Repeal the Reeducation Through Labor System, Build a Rule-of-Law Nation; 15,339 Chinese Citizens Propose a Law for the Education and Correction of Illegal Conduct (Citizens' Proposed Draft)*], 中国维权律师关注组 [CHINA HUMAN RIGHTS LAWYERS CONCERN GROUP] (July 7, 2008), http://www.chrlcg-hk.org/?p=306. It was said that many legal experts regarded *laojiao* as one of the areas in which China's judicial reform was likely to achieve a breakthrough. However, the momentum for judicial reform slowed down in the second half of 2003. 新一轮司法改革全面启动 [*A New Round of Judicial Reform Begins*], 财经网 [CAIJING] (Jan. 5, 2004), http://magazine.caijing.com.cn/2004-01-05/110058971.html.

occasionally close down their law firms, and that usually restrict the local bar associations under their control from aiding lawyers who are being abused.[9]

II. THE SYMPOSIUM ESSAYS

Each of the five splendid essays in this symposium demonstrates that, despite the current depressing climate for improvements in the conduct of China's criminal justice system, law reform is far from dead. Year after year, an admirable group of not only legal scholars and lawyers but also judges, prosecutors, legislative staff, and government officials quietly continue their research, publication, and drafting of proposed laws, amendments, interpretations, and regulations as well as consultations, conferences, and other cooperation promoting improvements in criminal justice. Moreover, they gradually get rule-making results, as these essays confirm. The studies by Professor Chen Ruihua of Peking University Law School and Mr. Ira Belkin of the Ford Foundation's Beijing office help us understand the meaning and significance of the two landmark regulations relating to evidence jointly promulgated in June 2010 by the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security, the Ministry of State Security, and the Ministry of Justice (the Evidence Rules). Those measures, if implemented in good faith by the law enforcement departments, promise to put real flesh on the bare bones of the principle of excluding illegally obtained evidence from criminal cases, a formidable and controversial goal for any legal system.

Just three months later, the same five institutions that promulgated the Evidence Rules jointly put into effect another major document: the Opinion on Certain Issues of Standardized Sentencing. This was accompanied by a fourth document—the Directive on Sentencing in the People's Courts—issued by the Supreme People's Court (SPC) alone. Both of these latter documents (the Sentencing Opinions), although not legally binding like the Evidence Rules and merely tentative, represent the PRC's most serious nationwide attempt to articulate criteria for curbing the largely unlimited sentencing

---

[9] Jerome A. Cohen, *The Suppression of China's Human Rights Lawyers: Do Foreign Lawyers Care?*, U.S.-ASIA LAW INSTITUTE (June 6, 2011), http://www.usasialaw.org/?p=5543, *available in Chinese at* http://www.usasialaw.org/wp-content/uploads/2011/06/2011.06.09.pdf, http://www.usasialaw.org/?p=5551. Paul Mooney, *Silence of the Dissidents*, S. CHINA MORNING POST, July 4, 2011, at A4, *available at* http://www.pjmooney.com/en/Most_Recent_Articles/Entries/2011/7/4_Silence_of_The_Dissidents.html; Fu Hualing & Richard Cullen, *Climbing the Weiquan Ladder: A Radicalizing Process for Weiquan Lawyers*, SOCIAL SCIENCE RESEARCH NETWORK (Oct. 11, 2009), http://ssrn.com/abstract=1487367; Eva Pils, *The Practice of Law as Conscientious Resistance: Chinese Weiquan Lawyers' Experience*, *in* THE IMPACT OF CHINA'S 1989 TIANANMEN MASSACRE 109–24 (Jean-Philippe Béja ed., 2010), *available at* http://ssrn.com/abstract=1564447; Eva Pils, *The Dislocation of the Chinese Human Rights Movement*, *in* A SWORD AND A SHIELD: CHINA'S HUMAN RIGHTS LAWYERS 141–59 (Stacy Mosher & Patrick Poon eds., 2009), *available at* http://ssrn.com/abstract=1564171.

discretion allowed the courts by existing law. They are a response to the long-felt need for greater rationality, fairness and equality in the meting out of punishments. As Professor Ye Xiaoqin of Wuhan University Law School points out in her thoughtful and balanced analysis, these guidelines offer a general framework that requires detailed implementing rules at various court levels and that will be modified and refined in light of experience over the next few years. They can eventually be expected to evolve into binding norms through legislation or SPC interpretation. Sentencing, after so many years of avoiding the spotlight, has finally begun to receive the attention of law reformers that it deserves.

To be sure, China's most famous, indeed infamous, sentencing problems concern the death penalty, and Professor Margaret K. Lewis of Seton Hall University Law School gives us a stimulating and comprehensive examination of recent efforts to improve the criminal process in capital cases. This is not an easy task. It is not only the number of executions that is shrouded in secrecy. Although the government has focused its propaganda on the recent Eighth Amendment to the Criminal Law that reduced the number of offenses for which one can be sentenced to death from sixty-eight to what is still a mind-boggling fifty-five, it has revealed surprisingly little about the actual operation of the highly-touted 2007 return to the SPC of final review power in individual capital cases. We are occasionally treated to unverifiable claims that the new review procedure has reduced the number of executions by this percentage or that, but this is reminiscent of the ridiculed claims of the former Soviet Union that industrial production figures were fifty percent over last year, without ever revealing last year's production figures.

Perhaps most noticeable and frustrating to outside observers is the extent to which the policies that purport to guide capital sentencing are encapsulated, at least in public, by slogans and clichés that appear to have little concrete meaning. Yet Professor Lewis knows that judges in China, like the rest of us, live by symbols, and she admirably probes the implications of subtle linguistic shifts from "combine punishment with leniency" to "execute few and execute cautiously" to "appropriately combine leniency and severity." She also highlights the increasing importance of China's unique suspended death sentence, which is usually modified to a life sentence if the defendant does not commit another offense within two years after his conviction. It was recently reported that these "reprieved death sentences," as Professor Lewis calls them, have now come to outnumber sentences to immediate execution,[10] and this has caused alarm among some proponents of retaining the death penalty, as she notes.

---

[10] 中国今年判死缓人数首次超过死刑立即执行人数 [*Number of Postponed Death Sentences Exceeds the Number of Immediate Executions in China this Year for the First Time*], 中国法院网 [CHINA COURTS] (Nov. 23, 2007), http://www.chinacourt.org/html/article/200711/23/275910.shtml. This observation was based on statements made by the Supreme People's Court at the National Conference for the Work of Judicial Reform in the Courts (全国法院司法改革工作会议) (*quanguo fayuan sifa gaige gongzuo huiyi*) held in Beijing on November 23, 2007.

In addition, Professor Lewis touches on one of the most sensitive issues confronting China's criminal justice, not only in capital cases but in all. That is the extent to which the sentence should be affected by the willingness and ability of the defendant to compensate, and thereby placate, the victim or the victim's family for the harm inflicted by his crime. Even many opponents of the death penalty become uncomfortable at the spectacle of the rich using their wealth to buy an exemption from a punishment they otherwise are thought to deserve, while those without sufficient resources are executed. By allowing this, China's widespread, practically-motivated "criminal reconciliation" policy conflicts with perhaps the most basic precept shared by Chinese and American societies—"equal justice under law"—which, as Professor Lewis recognizes, is frequently dishonored in both countries.

In the concluding section of her essay, Professor Lewis introduces another major issue that might eventually affect all criminal cases: whether China should expand direct public participation in judicial decision-making. Despite recurring efforts to bolster the role of "people's assessors," two of whom frequently sit together with a single judge to form the collegiate tribunal that deals with first-instance trials, there appears to be growing interest among some Party leaders and judges, as well as some segments of the public, in broadening direct popular participation in adjudication rather than continuing to rely only on the media, the Internet, and other channels of indirect influence to add popular input. The courts of Henan Province and a few other places have already experimented, in various kinds of criminal cases, with a so-called "people's jury" that does not formally make any decision but that is informally "consulted" by the trial court before the court makes its decision about both guilt and sentencing.[11] Professor Lewis urges that serious consideration now be given to instituting a formal jury role, not for the purpose of deciding guilt but "for the limited purpose of deciding whether to issue a death sentence." She acknowledges that this may require China to adopt a bifurcated, two-phase procedure, separating determination of guilt from sentencing. Although proposals for bifurcation have thus far been resisted, it seems to be desirable and may prove to be inevitable. Presumably, the sentencing jury, if it rejects both an immediate and reprieved death sentence, would be authorized to impose any lesser punishment that appeared warranted.

Would a sentencing jury, at least for capital cases, prove to be effective and feasible? What supporting measures might it require? What institutional, professional, and political problems might it confront? This proposal is a perfect illustration of the need for the type of demonstration project that Mr. Thomas Stutsman's essay advocates as a major complement to the traditional theoretical and comparative law research on which most Chinese criminal procedure reforms have been based. According to Stutsman, an outstanding young scholar of law and social science, a demonstration project is "an applied

[11] Jerome A. Cohen, *A "People's Jury" Trial for China's Criminal Defendants?*, U.S.-ASIA LAW INSTITUTE (Mar. 15, 2011), http://www.usasialaw.org/?p=5211, *available in Chinese at* http://www.usasialaw.org/wp-content/uploads/2011/03/2011.03.17.pdf, http://www.usasialaw.org/?p=5226.

form of empirical research characterized by the organized implementation and systematic evaluation of a new practice in the justice system to assess the merits of adopting the reform on a larger scale." He points out that empirical research itself is a relative newcomer to Chinese legal circles, and its application for the purpose of testing suggested criminal justice reforms by carrying out pilot projects in cooperation with government institutions is even a more recent arrival. Yet, by reviewing the impressive contributions to law reform that have already been made by demonstration projects during the past decade by a small group of China's leading criminal procedure scholars working with law enforcement officials, Stutsman makes a persuasive case that the added expense and time required by the complexity of such projects return very substantial dividends. He cites innovative experiments by Professors Fan Chongyi and Gu Yongzhong and their distinguished colleagues as examples of how these fact-focused projects, if properly designed, conducted and evaluated, can help to eliminate many objections to criminal procedure reform that are grounded in speculation, ideological preferences and concern for the loss of institutional and personal prerogatives.

So I say full speed ahead for a pilot project on sentencing juries. The data derived will be of interest not only to the PRC but also to its neighbors, as South Korea soon concludes its own five-year experiment with consultative criminal juries, Taiwan begins to consider something similar, and Japan continues with its distinctive mixed decision-making tribunals of three professional judges and six lay assessors initiated in 2009.[12]

Fortunately, the authors of these fine, reformist essays are all constructive realists. Each of them recognizes the challenges to implementing criminal procedure reforms presented by long-established institutional arrangements and political pressures. After calling the 2010 Evidence Rules "a revolutionary development in the history of China's system of judicial review," one that gives "courts their first formal authority to review the legality of criminal investigations, and take procedural measures against unlawful investigations," Professor Chen Ruihua understandably doubts whether judges are adequately prepared for this "extreme test of their intelligence and will." He notes that, until now, the police and the procuratorates as well as other agencies have proved more powerful than the courts and that the additional pressures of public opinion, petitions by victims or their families against a "not guilty" verdict, the negative evaluations of judges' performance that such a verdict is likely to bring from court superiors, and the judges' own inculcated values and legal training make it unlikely that they can carry out their duties under the Evidence Rules in good faith. In light of the perceived failure of the courts adequately to implement the protections enshrined in the 1989 Administrative

[12] Jerome A. Cohen, *South Korea's Evolving Citizen's Jury: A Model for China and Taiwan?*, U.S.-ASIA LAW INSTITUTE (July 19, 2011), http://www.usasialaw.org/?p=5720, *available in Chinese at* http://www.usasialaw.org/wp-content/uploads/2011/07/孔傑榮專欄－南韓陪審團制-可行？｜言論新聞｜中時電子報.pdf, http://www.usasialaw.org/?p=5739; Makoto Ibusuki, *Quo Vadis? First Year Inspection to Japanese Mixed Jury Trial*, 12 ASIA-PAC. L. & POL'Y J. 24, 28 (2010).

Litigation Law and the 1996 Criminal Procedure Law, he asks, almost rhetorically: "Will judges really be able to . . . return a judgment of not guilty, decisively and without regard for the consequences, only because illegal means have been used to gather the evidence?" His somewhat inscrutable answer to this question is that, unless the courts can devise a policy that will result in "institutions that will allow beneficial cooperation" among investigators, prosecutors, defense lawyers, and judges, the new legal rules are likely to be ignored to the same extent as earlier legislation has been, leaving matters, once again, to the control of what he delicately terms "unspoken rules."

In his impressive review of China's attempts to end torture and coerced confessions, Ira Belkin comes to much the same conclusion as Professor Chen. A highly-experienced American federal prosecutor before he specialized in the study of China's criminal justice system, Belkin too sees the historic significance of the 2010 Evidence Rules; they for the first time establish a procedure for litigating the lawfulness of confessions, in certain circumstances placing the burden of persuasion on the prosecution and requiring the in-court testimony, subject to cross-examination, of those investigators who interrogated the accused. Yet, even more strongly than Chen, Belkin not only questions whether those rules are likely to be effectively implemented but also argues that, unless other protections urged by many Chinese experts are adopted, "there will be no significant progress made in addressing the fundamental problem of how to change police behavior and prevent coerced confessions." Those protections he specifically mentions include the adoption of legal principles, such as the presumption of innocence, the right to silence and the privilege against self-incrimination; the requirement of new procedures that permit lawyers to be present at all investigative interrogations and that audiotape and videotape all such interrogations; and the alteration of the ideology and values of law enforcement officials in order to give equal weight to fighting crime and human rights and to substantive and procedural justice.

Professor Ye Xiaoqin too is very realistic about the obstacles to implementing the national standardized sentencing reforms. She foresees especial difficulty in persuading prosecutors to take on the extra burdens involved in their recommending sentences for judicial consideration. Also, this new obligation cannot be successfully carried out, she maintains, without adding to the duties of the police, who handle most investigations and will have to do the extra work of gathering the evidence needed for meaningful sentencing recommendations.

Understandably, since she is dealing with China's death penalty debate, Professor Margaret K. Lewis shows great caution in predicting the future of reform in that area. Although the recent Eighth Amendment to the Criminal Law reverses the trend toward adding to the number of death-eligible offenses, one infers that Professor Lewis is not sanguine about prospects for eliminating the death penalty for other, more frequently-committed, non-violent crimes, particularly those involving corruption. Also, she notes that the recent progress toward sentencing reforms, discussed by Professor Ye, has not yet spelled out concrete sentencing guidelines for capital cases. Nor, she points out, can we even take for granted—despite the assurances of many Chinese

scholars—that the 2010 Evidence Rules, which have legal effect because they constitute judicial interpretations, will be integrated into the next revision of the Criminal Procedure Law. A rising tide of popular concern that too many capital prosecutions are resulting in reprieved death penalties may, at least for a time, inhibit further procedural reforms unless, like the sentencing jury she proposes, they are seen to offer a better outlet for public opinion than currently exists.

Thomas Stutsman also tempers his enthusiasm for criminal procedure demonstration projects with realism. He warns of the difficulties that academics have encountered in winning and keeping the effective cooperation of Chinese law enforcement officials, a warning confirmed by two of my own research experiences several years ago. In the present, less welcoming political climate, any participation of foreign specialists makes research cooperation especially sensitive. Stutsman also emphasizes that even the best-conducted demonstration projects cannot be expected to sell themselves to the political class that makes the final determination about legislating and implementing law reforms. He urges legal scholars and the officials who cooperate with them to act "as policy entrepreneurs to maximize the impact of their findings" on policymakers. Otherwise the best efforts can fall flat.

The criminal procedure reforms espoused in these essays cannot possibly succeed without the active participation of skilled and independent lawyers. As the Evidence Rules and the Sentencing Opinions illustrate, China's criminal justice system has become increasingly complex and cannot properly function in the absence of lawyers. Yet lawyers generally appear in fewer than thirty percent of criminal trials and many fewer participate in the crucial pre-trial stages. Moreover, those lawyers who are retained at the outset of a case have no right to be present at pre-trial interrogations of their clients or even to meet their clients until after the first interrogation by investigators. To make matters worse, as Mr. Belkin reports, despite the provisions of the 2008 Law on Lawyers, "police have continued to resist allowing lawyers to visit their clients during the investigation stage of a case," and usually insist on monitoring and limiting all such conversations. The content of lawyers' conversations with suspects during the investigation stage is restricted by law, and in practice lawyers face difficulties in both conducting their own investigations and obtaining the evidence collected by official investigators. Most alarmingly, as indicated earlier in this Introduction, criminal defense lawyers have increasingly come under attack. As Professor Lewis puts it, they currently suffer "many constraints in their work" and "are heavily restricted in their ability to be zealous advocates for their clients." Criminal defense lawyers who show too much zeal are often prosecuted for fostering the falsification of evidence. They often say that they operate "under the sword of Damocles" and envy the situation of their counterparts in Taiwan, Hong Kong, South Korea, Japan, and other non-authoritarian jurisdictions.

III. INTERNATIONAL IMPLICATIONS OF CRIMINAL PROCEDURE REFORM

The beginning of this Introduction pointed out that the reputation of China's criminal justice system is an important factor affecting the country's stature and influence in a world that gives considerable weight to the protection of human rights. Before closing, I should emphasize that its criminal justice system also affects China's ability to achieve more concrete goals. The recently-concluded eleven-year struggle between Canada and the PRC over Beijing's insistence on the return to China of Mr. Lai Changxing, alleged by the Chinese Government to have been the greatest smuggler in PRC history and a massive briber of PRC officials, offers a vivid illustration of this proposition. Lai, it should be said, is only the best-known of many Chinese fugitives who their government claims have illegally fled the country with the equivalent of tens of billions of U.S. dollars. China wants them back in order to vindicate national honor and sovereignty and to demonstrate to a skeptical, and indeed cynical, public that no Chinese perpetrator of corruption can escape punishment by fleeing abroad. Yet its criminal justice system has proved to be a significant obstacle to achieving this goal. Awareness of its inadequacies has prevented many democratic countries, including Canada and the United States, from concluding extradition treaties with China, and even Hong Kong, although a special administrative region of China, has failed to reach an agreement for the "rendition" of criminal suspects to mainland China. In the absence of such agreements, China's ad hoc repatriation efforts have often been blocked, as they were in the Lai case for a long time.

Lai failed in his attempt to gain political asylum in Canada as a supposed refugee from political persecution in China. Yet, for a decade thereafter, with the help of able, dedicated counsel and Canadian courts concerned with the protection of human rights, he staved off removal back to China by immigration authorities who were trying to put an end to Canada's serving as a favored refuge for alleged economic criminals from China. Lai's principal defense against deportation was China's criminal justice system. In the many administrative and judicial hearings that considered his case, he managed to put that system on trial, and for a time it appeared that he might succeed. In the spring of 2011, however, the Conservative government of Prime Minister Stephen Harper decided that Canada's overall relations with China should no longer suffer because of this festering dispute, and in July 2011, largely on the basis of recent, detailed "assurances" from the Chinese Government, the relevant immigration hearing officer decided that the barriers to Lai's removal no longer existed. Surprisingly, the reviewing court found that the case no longer presented any serious legal issue and that the removal could take place. Since no appeal from that decision was possible, Lai was immediately sent back to China.[13]

---

[13] Jerome A. Cohen, *Canada Rids Itself of Lai Chang Xing*, U.S.-ASIA LAW INSTITUTE (Aug. 4, 2011), http://www.usasialaw.org/?p=5776; Jerome A. Cohen, *In Safe Hands?*, S. CHINA MORNING POST, Aug. 3, 2011, at A17, *available at* http://www.usasialaw.org/wp-content/uploads/2011/08/20110803-NEWS_INSIGHT.pdf.

The "assurances" given by the Chinese government to Canada after protracted bilateral diplomatic negotiations should interest students of China's criminal justice not only because they may affect the fate of other suspected Chinese offenders who are resisting repatriation, but also because they may have more general implications for China's criminal procedure. Canadian courts and human rights advocates had one basic concern in the Lai case: whether the Chinese Government would honor its promises, first made in 2001 in a formal diplomatic statement to the Canadian Government, that, if returned to China, Lai would not receive the death penalty, nor would he be subjected to torture. Canadian law forbids the removal, extradition or deportation of anyone if that is likely to result in the person's execution or torture. More broadly, Lai's counsel argued, as part of his torture claim, that China is unlikely to accord Lai a fair trial. By 2007, it seemed clear that the Canadian courts were willing to accept the credibility of China's pledge not to execute Lai, but, without reliable arrangements for independently monitoring his continuing welfare if detained, the courts did not seem confident about the promise not to torture him. That and the related issue of the fairness of the trial he would receive then became the focus of diplomatic negotiations that quietly dragged on until China strengthened its assurances on March 10, 2010 and set the stage for resolving the dispute.

After repeating earlier promises not to impose the death penalty or inflict torture, the March 10 assurances made six specific new pledges. The first promised to inform the Canadian side about where Lai will be held and to arrange, upon Canada's request, for Canadian officials to visit him "as swiftly as possible" at his place of detention, including his living quarters. The second new assurance was related to the first but more distinctive. It provided that, at the request of Canada, China will, "if necessary," make available video conferencing facilities so that Lai can contact Canadian embassy or consular officials residing in China. The third assurance confirmed that Lai has the rights to retain a lawyer "to defend him" and to replace the original lawyer if he wishes. More significantly, it also stated that Lai would have the right to meet with his lawyer "without being monitored." The fourth assurance provided that, whenever a court holds an "open hearing" of the smuggling charges against Lai, resident Canadian officials may attend. The fifth assurance promised that the "judicial authorities" will make synchronized audio and video recordings of the court hearings and pre-trial interrogations and record the identities of all court officials present at Lai's trial and of all pre-trial interrogators. Upon request, the Canadian side will be able to "consult" these materials. The final assurance provided that, if Canada submits "a reasonable request," China will allow "an independent medical establishment legally qualified in China to examine Lai medically" and, with Lai's consent, allow the Canadian side to see the contents of the examination report.[14]

Any experienced observer can immediately see the many ambiguities and omissions in these assurances and the possibilities for disputes to arise in their interpretation. The assurances and the entire case deserve detailed analysis

[14] *Id.*

and a book-length study.[15] Here I simply want to note China's recognition of the relevance of its criminal procedure to an increasingly important aspect of its international relations and the impact that the needs of international relations are gradually making upon China's criminal procedure. The "assurances," although less than comprehensive and far short of what international standards require and what Lai's counsel requested, are nevertheless significant. For example, a detained suspect's use of video conferencing to facilitate contact with concerned persons outside the detention center is an idea that should be built upon, as should the guarantee that a detainee has the right to unmonitored meetings with his lawyer. Plainly relevant to the challenge of effectively enforcing the Evidence Rules discussed by Messrs. Chen and Belkin is the promise that all pre-trial interrogations will be recorded and, together with the names of all interrogators, made available for consultation. This should be done in all China's criminal prosecutions.

Indeed, one hopes that cases such as Lai's—and essays such as those in this Symposium—will stimulate the Chinese government to finally adopt more comprehensive measures of general applicability to bring the country's criminal justice system in line with international standards. Ratifying the International Covenant on Civil and Political Rights and revising the nation's Criminal Procedure Law in accordance with that treaty would be the best way to launch this effort. In the end, however, China must practice what it preaches. Unless its law enforcement personnel consistently implement the new norms, their adoption will only widen the gap between legislation and reality.

---

[15] Lai Changxing himself is already the subject of several books. *See, e.g.*, OLIVER AUGUST, INSIDE THE RED MANSION (2007). For the *New York Times* review, see Janet Maslin, *A Tycoon Who Ate the 'New China' for Breakfast*, N.Y. TIMES, July 30, 2007, at E6, *available at* http://www.nytimes.com/2007/07/31/arts/31iht-bookwed.1.6911890.html. Other reviews are excerpted at *Reviews: Inside the Red Mansion*, OLIVERAUGUST.COM, http://www.oliveraugust.com/mansion-reviews.htm (last visited Aug. 18, 2011). An excerpt of the book is available at Excerpt: Inside the Red Mansion, OLIVERAUGUST.COM, http://www.oliveraugust.com/mansion-excerpt.htm (last visited Aug. 18, 2011). A book on Lai in Chinese by Sheng Xue (盛雪) was published by Mirror Books (明镜出版社) (*Mingjing Chubanshe*) in July 2001 in Hong Kong. 盛雪 [Sheng Xue], 远华案黑幕 [DARK SECRETS OF THE YUANHUA CASE] (2001). Another book in Chinese about the Yuanhua smuggling operation, by Hai Yuan, was published in 2001 by the China Customs Press (中国海关出版社) (*Zhongguo Haiguan Chubanshe*) in mainland China. 海韵 [HAI YUAN], 远华大案纪实 [DOCUMENTARY OF THE GREAT YUANHUA CASE] (2001).