Reforming China’s Criminal Procedure Law

Analysis by Hugo Winckler based on:

– Chen Youxi, “The legalisation of secret investigations is an important violation of political integrity,” Zhongguo wangluo dianshitai – CNTV web site, Opinion section, 27 November 2011. (2)
– Wu Zhehua, “Chen Weidong discusses reform of the criminal procedure law: Behind each article there is a story,” Zhongguouganguangbo wang, 8 March 2012. (3)

A new discourse on criminal procedure law

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

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

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

The initial stages of debate

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

Covert investigation and secret detention

Some of the most controversial provisions in the law concern covert investigations (mimi zhengcha 靈魂偵查) and secret detention (mimi juliu 靈魂拘役). These methods were both in place before the law was written, so they had precedent in practice and basis in law. The reform legislated for both covert investigation and secret detention, and so ensured their continued existence – but at the same time, it exposed these practices to public scrutiny.

Covert investigation involves using technology to gather evidence (jishu zhengcha 技術偵查). This includes bugging for sound, phone tapping, and intercepting private mail and email. The first draft of the amendment gave a very broad definition of the conditions under which this kind of surveillance would be allowed. The law states that covert investigation can be used “in any other serious offence affecting society” (qita yanzhong weihai shehui de fanzu 其他嚴重危害社會的犯罪). Chen Youxi points out that this provision means covert surveillance could potentially be used under any circumstances. Criticism made no difference, however: the final draft included the provision as it appeared in the first draft. The police can use technological surveillance at their discretion, which seriously compromises the individual’s right to privacy.

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

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

The death penalty

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

Power games between state organs

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

Analysis by Jérôme Doyon based on:

– Zhang Qianfan, “The origin and disruption of the system for petitioning the higher authorities,” Tansuo yu zhengming – Exploration and free views, 10 May 2012.

In 1994, the Chinese government carried out a tax reform that limited the revenues of local governments and made them dependent on funding on central authorities. Since then, local governments have been caught between the people, who want more social policies that local authorities cannot afford, and the central government, which is focused on maintaining social stability. Xu Kai, Li Wei’ao, and Xi Nan say that social stability has become the main priority of local governments. So, for example, in Yun’an district in the province of Guangdong, out of 6,700 people on the public authorities’ payroll, 1,800 have jobs related to maintaining stability. The success of local administrations is evaluated largely on their ability to maintain social stability. In 2009, “The temporary provision on the enforcement of the responsibilities of Party leaders and the State” (guanyu shixing dangzheng lingdao wenze de zanxing guiding) reaffirmed local government’s responsibility for incidents that threaten stability, with particular reference to riots and other mass demonstrations. These articles show that this method of evaluation puts pressure on local governments. The central authorities have said that they want to develop the system of “letters and visits” (xinfang), as reaffirmed in 2005’s “Regulations on letters and visits” (xinfang tiaoli). This administrative practice, which exists parallel to the judiciary system, allows citizens to appeal local decisions by presenting a petition to central authorities. But evaluating local administrations on the basis of social stability maintenance undermines the system of letters and visits.

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

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4. Xia Nan is a lawyer in the Beijing law firm, Hua Yi.
5. Zhang Qianfan is a professor at Peking University Law School.