

Introduction to the Main Amendments made to the *Criminal Procedure Law* of the PRC 1996

Professor Fan Chongyi

China University of Politics and Law

The *Criminal Procedure Law* of the PRC was passed at the second session of the Fifth National People's Congress (NPC) on July 1979. It was the first Criminal Procedure Code for China and contained a total of 164 articles. It came into effect on 1 January 1980. In 1990, discussions began about revising the Criminal Procedure Law (CPL) in order to adapt it to the circumstances of reform and opening up, to the construction of a socialist market economy system, and gradually to perfect the criminal laws. The discussions for revision of the CPL have been carried out over six years.

On 17 March 1996 the 8th NPC deliberated upon and passed the "Decision on Amendment of the CPL of the PRC", (the "Amendment Decision") in all 110 articles. The Amendment Decision supplemented and made a series of major revisions to the criminal procedure system and to conduct of criminal procedure. The number of articles in the CPL increased from 164 to 225 and the law was changed in 143 places. 63 new articles were added which is 26% of the total. 70 articles were revised which is 32% of the total and 92 articles were retained which is 41.33% of the total. This is a big event in the construction our country's legal system. It is a major reform to the system of criminal procedure and to the system of administration of justice. It represents development, progress and the perfecting of our system of criminal procedure. The amended CPL will come into effect on 1 January 1997.

This article gives an introduction to several issues in the revision of the CPL to provide some understanding of the reforms to the criminal procedure law.

1. Revisions to the guiding thought and tasks of the Criminal Procedure law

1.1 Guiding Thought

The guiding thought originally stated in the CPL was Marxism, Leninism and Mao Zedong Thought. This has been omitted from the amended law. The reasons are:

- a). The Constitution already provides that Marxism, Leninism and Mao Zedong Thought is the guiding principle. It is the basic guiding ideology of our country. As the CPL is based upon the Constitution, it is not necessary to repeat this provision.
- b). To ensure that the CPL will be consistent with the Administrative Litigation Law and the Civil Procedure Law. The latter two procedural laws do not contain any provision about guiding ideology.

c). From the point of view of a system of legislation, it is not appropriate to include a broad guiding ideology by way of a single provision in a legal code in one particular area.

1.2 Tasks of the law

At art 2, the CPL makes provisions about the tasks of the law. One task which has been added is to “protect property rights”.

The old CPL only provides protection for personal rights of citizens, democratic rights and other rights, but doesn't contain any clear regulation protecting citizen's property rights. In order to meet the requirements of the market economy and conform with the increasing legal protection of property rights in a range of areas, we have added the legislative protection of citizens' property rights to the basic tasks of the amended CPL.

This article in the old CPL provided that a purpose of the law was to “safeguard the socialist revolution”. The law now guarantees the smooth progress of socialist construction. It is no longer considered appropriate under the current socialist economic system to retain safeguarding the socialist revolution as a central task .

2. Adding a provision that judicial organs carry out their tasks and function independently

CPL art. 5 provides

The People's Courts exercise their adjudication powers independently according to the law, and the people's procuratorates carry out their procuratorial functions independently according to the law. They shall not be subject to interference by any administrative organ, social organisation or individual.

This provision was not included in the previous CPL. However, the 1982 Constitution provides at art 126 that:

“the People's Court exercises its adjudication powers independently according to the law and shall not be subject to interference by any administrative organ, social organisation or individual.”

The Constitution art. 131 provides:

“the People's Procuratorate exercises its procuratorial powers independently according to the law and shall not be subject to interference by any administrative organ, social organisation or individual.”

According to the principles of our country's legislative system, where the principles of criminal procedure are contained in the Constitution, the CPL should contain a corresponding regulation. Moreover, in practice where administrative agencies, organisations and individuals “use words as a substitute for law” and use “power to suppress law”, it was necessary to include art. 5 in the new CPL to guarantee the independence of the courts and procuratorate in criminal proceedings.

3. Affirmation that the people's court is the only agency permitted to make a determination of criminal guilt.

Related to this proposition, the system of conviction without punishment has been abolished. Art 12 of the amended CPL provides:

No-one may be convicted of a crime unless by a judgment of a people's court according to the law.

This provision confirms that the people's court is the only organ with the power to convict a person of a crime. It accords with international practice and it is also the proper meaning of adjudication power. Criminal adjudication thus involves going through trial procedure to determine whether the person has committed a crime, and if so, then how that person should be punished.

First, this involves a question of determination of guilt. The people's procuratorate has the power to commence prosecution, not to determine guilt. The consequence of "conviction without punishment" is a determination of guilt. It carves up adjudication power [between the people's procuratorate and the people's court]. So, that power should be abolished. But the system of conviction without punishment has some positive uses, for example it complements the principle of leniency, assists in the rehabilitation of people who have committed minor offences and improves litigation efficiency. The amended CPL has subsumed the system of conviction without punishment within the scope of the decision of whether or not to prosecute.

Art 142 provides:

Where the criminal act is minor and where the CPL would not require a punishment to be given, or would permit exemption from criminal punishment, the people's procuratorate can decide not to prosecute."

The power of the procuratorate to determine not to prosecute is confined to minor crimes, where the legal consequence is that the accused person would not be considered to be guilty of a criminal offence. This avoids the abuse of the power of "conviction without punishment" and brings the discretion of the procuratorate in relation to minor criminal acts into conformity with world practice. It must also be pointed out that article 12 provides that before a person is convicted of a criminal offence by a people's court, she or he cannot be considered guilty of a criminal offence. This principle also applies to people who have been detained or arrested. Those people may be considered only to be to be criminal suspects or defendants. This clearly adopts the spirit of the western principle of presumption of innocence.

The amended CPL has implemented the presumption of innocence in three other respects:

1. Criminal procedure is process of development, from the time of accepting the case to enforcement. Before the procuratorate decides to commence proceedings, under the original criminal procedure the person was called a “defendant”. Now such a person is called a person “suspected of committing a crime”, and not a defendant.
2. The prosecutor has the onus of proof. The prosecutor must supply evidence in order to convict a person of a crime. The accused person does not have any obligation to produce evidence of her or his innocence. If a person cannot produce any evidence to show her or his innocence it is not permitted to presume that the person is guilty.
3. When the public security organs transfer a case to the procuratorate, if the evidence is unclear or insufficient, the matter may be returned to the police twice for reinvestigation. After that, if the necessary material has still not been produced, the procuratorate may make a decision not to prosecute on the basis of art. 140 (4)

When the case is transferred to the court for adjudication, during the first instance trial, if the court considers that the facts aren't clear, especially if the evidence is insufficient, the court may make a determination that the facts in support of the accusation are insufficient and make a judgment of not guilty on the basis of art. 162(3)

Where, in a second instance hearing, the court discovers that the evidence at first instance was insufficient and the facts do not support the accusation, the court can change the judgment or make a judgment of not guilty on the basis of art. 189(3).

These three provisions fully give expression to the principle of *yi zui cong wu* (until proven guilty, a person suspected of a crime must be treated as if not guilty).

A certain standard of proof must be met in order to determine that a any citizen is guilty of a crime, that is the evidence must be reliable and complete. If this standard cannot be met then the person will be a judged not guilty.

4. Strengthen the supervisory functions of the people's procuratorate

Art 129(1) of the Constitution and art. 1 of the Organisation Law of the People's Procuratorate provides that the People's Procuratorate is the legal supervisory organ of state. On the basis of these provisions, both the Civil Procedure Law and the Administrative Litigation Law provide that the people's procuratorate carries out legal supervision of civil adjudication activities and administrative litigation respectively. The old CPL did not contain this type of provision. The amended CPL added art. 8 which provides

“The people’s procuratorate carries out legal supervision of criminal litigation in accordance with the law”

There is a corresponding increase in the regulation of specific powers of supervision in areas such as filing a case (*li’an*) and enforcement.

For example art 87 provides:

“If the public security organ doesn’t file a case for investigation when the procuratorate considers it should have done, or a victim complains to the procuratorate that the public security organ has not filed a case for investigation which it should have, the procuratorate shall require the public security organ to give reasons why it did not file the case. If the procuratorate considers that the reasons given are insufficient, it shall notify the public security organ to file the case, after receipt of which the public security organ shall open a file.

Art 215 provides:

Where an organ makes a decision that enforcement (of a criminal sentence) is to be “temporarily executed outside prison” it must send that decision to the people’s procuratorate. If the procuratorate considers that it is not appropriate for the enforcement to be “temporarily executed outside prison” it should notify the organ that made the original decision in writing within one month. After receiving the opinion of the procuratorate the organ must immediately carry out a reinvestigation of its decision.

Art 222 provides:

If the people’s procuratorate considers that the court has reduced a sentence or has given parole improperly it should, within 20 days of receiving the duplicate judgment, provide a written opinion on how to rectify the decision. The people’s court should, within one month of receiving the opinion, convene a new collegiate bench and re-try the matter and make a final judgment.

It must also be pointed out that there is a slight difference between the new and old provisions concerning procuratorial supervision of the conduct of the trial. The original provision found in art 112 (2) of the old CPL provides:

If the procuratorial officer who attends trial finds that there has been unlawful acts in conduct of the trial, the procuratorate has right to give an opinion on how to rectify them to the court.

The new provision is art. 169, provides:

If the people's procuratorate finds that the people's court has breached the law in carrying out trial procedure, the procuratorate has right to give an opinion on how to rectify them to the court

5. Adjusting investigation jurisdiction and the scope of cases which can be brought by an individual (private) litigant. Gradually straighten out the relationship between the police, procuratorate and court

There are two main areas in the amended CPL where the issue of jurisdiction has been amended.

The first is to reduce the scope of cases where the procuratorate has jurisdiction to investigate itself.

The second is to increase the scope of private litigation that can be commenced in the people's court.

In the chapter on jurisdiction, art. 18 provides that criminal investigation is to be carried out by the public security organs unless there is provision to the contrary. The jurisdiction of the procuratorate to investigate cases has been revised to include the following types of cases: crimes of corruption and bribery, crimes by personnel of state agencies using their position to carry out unlawful detention, extorting confessions by torture, retaliation and frame up, crimes of infringing on the rights of the person by carrying out unlawful searches and crimes of infringing on the democratic rights of citizens

In other cases where state officials have unlawfully use their position to carry out other major crimes, where there is a need for the procuratorate to handle the case directly, the provincial level people's procuratorate and above may make a decision to permit the people's procuratorate to file and directly investigate the case.

The main aspects of the jurisdiction of the procuratorate directly to investigate cases itself have been retained. But the direct investigation power of the procuratorate has been reduced in certain respects, such as for example: tax evasion or refusal to pay tax. At the same time, the provision under the old CPL giving jurisdiction to the people's procuratorate to investigate "other cases the people's procuratorate considers it should directly accept" has also been deleted. It is appropriate to reduce the scope of cases which the people's procuratorate can directly investigate because the procuratorate is the legal supervision organ of state. In relation to the prosecution functions of the people's procurateorate, as prosecution is the extension of investigation, it is inadvisable to make the scope of investigation too large. Moreover, it is very difficult to carry out supervision of those cases which the procuratorate is investigating itself. Apart from that, the reduction of the scope of cases the procuratorate can investigate itself is also related to the comparatively limited methods, power of the procuratorial personnel and equipment

to carry out investigation, in contrast with that of the public security organs. It is thus not beneficial for the procuratorate to undertake too much investigation itself.

The scope of private prosecutions that can be brought directly to the people's court are set out at art. 170 which provides:

“Private prosecutions includes the following types of cases:

1. cases which were only handled when a complaint has been made
2. where a victim has evidence to prove a minor criminal offence
3. a victim has evidence to show that the accused has infringed upon her personal, or property rights such that the matter should be investigated for criminal responsibility, but the public security organs or the procuratorate have not pursued criminal responsibility.

In the previous CPL, the scope of private prosecutions was confined to those handled only when a complaint was made, or to those involving other minor criminal offences which did not require investigation.

The revised CPL has expanded the scope of cases which can be privately initiated. The main reason is to resolve the problem of the common people having no channel for complaint and to improve the mechanisms for pursuing criminal responsibility.

6. Strengthen the protection for criminal suspects and defendants

Under the old CPL an accused person could only seek the advice of a lawyer after the case had been accepted by the court for trial. In principle, the amended CPL allows a person suspected of committing a criminal offence to retain a lawyer to provide legal advice during the investigation period.

According to art. 33 of the amended CPL, from the day on which the case is transferred to the procuratorate for investigation and prosecution, the person suspected of having committed a criminal offence may formally retain a lawyer to act as defence counsel. The lawyer can: consult, make extracts, make copies of the prosecutor's documents, technical expert evaluation material, visit and exchange letters with the criminal suspect who is in detention, and collect material beneficial to the suspect's case.

From the day on which the people's court accepts the case, the defence lawyer can consult, make extracts and copies of the material showing criminal facts of which the person is accused and can visit and exchange letters with the accused person in detention. Art. 34 of the amended CPL makes provision for three situations where the appointment of a defence lawyer will be directed:

1. cases where the prosecutor appears in court and the defendant has not appointed a person to defend her because of economic difficulties or other reasons;
2. the defendant is blind, dumb, deaf, or a minor and hasn't appointed a person to defend her or himself; and
3. the defendant may be sentenced to death and has not appointed a person to defend her or him.

In the first case the court may appoint a lawyer responsible for providing legal assistance to act as the defence lawyer. In the latter two types of case the court must appoint a lawyer responsible for providing legal assistance to act as the defence lawyer.

7. Strengthen the protection of victims' rights

Originally the rights of victims to participate in prosecuted proceedings was as an ordinary third person. The amended CPL, apart from expanding the scope of cases which can be initiated by individuals, gives victims a broad power to directly commence litigation and places victims in the position of litigant. The victim together with her or his representative, possesses independent power to request withdrawal [of members of the collegiate panel] and during the trial, possesses basically the same litigation rights as the defendant. During the first instance trial, after the prosecutor has read out the initiating proceedings, both the defendant and the victim may present their statement of the facts of the case. If the chief judge approves, the victim may interrogate the defendant, and ask questions of witnesses and experts. If the victim is dissatisfied with the decision at first instance he or she can request (*yaoqiu*) the procuratorate to protest the decision.

8. Perfect coercive measures and improve the protection of human rights

For many years the public security organs have used the power of detention for investigation. It has had some use in striking heavily against crime but there have also been many problems and abuse of of this power.

After amendment of the CPL, the system of detention for investigation was abolished. The amended CPL sets out the circumstances in which a person may be arrested or detained to take appropriate account of the requirements for pursuing crime.

For example, the circumstances under which a person could have been taken in for detention for investigation before the reforms, that is where a person does not tell their true name address or their status is not clear, and is strongly suspected of floating from place to place committing crime, committing many crimes or forming a group to commit crime, have now been included within the scope of criminal detention. The last mentioned category of person may be detained for up to one month. For the first category of person, who don't tell a true name or address and whose background is unclear, the time period will commence from the day on which the status of the person is determined.

Under the original CPL, the conditions for arrest were that “the main criminal facts are already clear” After revision the scope of arrest has been slightly broadened to be where there is “evidence to show that there are criminal facts” and it is appropriate to pursue criminal responsibility.

There has been progressively more detailed regulation of the power of guarded residence in order to prevent guarded residence being used as a form of detention. The amended CPL provides that a person under guarded residence may not, without permission of the agency carrying out the guarded residence, leave place of residence. For those people without a fixed residence, they may not without permission of the implementing agency, leave the place designated. This provision clarifies the method of implementing guarded residence. It avoids situations where in practice the judicial agencies were using this power infringes upon the personal rights of criminal suspects and defendants.

The amended CPL also provides that the time limit for guarded residence may not exceed 6 months and the time limits for obtaining a guarantor and awaiting trial out of custody may not exceed 12 months. The CPL originally provided that only a guarantor could provide the necessary guarantee, but in the amended CPL a new measure has been added to permit money to be given as surety. This procedure conforms to the new circumstances existing under the socialist market economy, as well as according with the western practice of granting bail.

9. Reform of trial procedure

There are three main ways in which trial procedure has been amended.

First the original form of substantive investigation of the evidence by judges before trial has been changed into a procedural examination, in order to avoid judges making up their mind before the trial and allowing first impressions being the strongest. Under the amended CPL, before the trial it is only necessary for the originating process to contain a clear statement of the criminal facts with an appended index of the evidence, names of witnesses and their main evidence and a copy or photo of the main evidentiary documents. When these conditions are satisfied, the people’s court should commence the trial: art. 150.

Secondly, during the trial procedure to reflect the have strengthened the role and importance of the parties to the proceedings, the prosecutor and the defendant, have been strengthened in order to reflect the of supremacy of the parties in the Anglo American adversarial system (in contrast with the inquisitorial system). This amendment has been made to ensure that adjudication is even more objective and proper.

Thirdly is the regulation that the collegiate bench in ordinary cases has independent adjudication power.

10. Establish a new simplified procedure

In order to improve litigation efficiency, the amended CPL provides that simplified procedure may be used in publicly prosecuted cases where a sentence of less than 3 years imprisonment, detention, control or criminal fine could be ordered, where the facts are clear and the evidence complete and where the procuratorate recommends or agrees to its use. Cases initiated after accusation or initiated by private individuals may also be conducted using the simplified procedure.

The simplified procedure has a single judge and the prosecutor is not required to attend or to summons witnesses. Where the simplified procedure is used, the people's court must make a final decision within 20 days of accepting the case. By adding a new simplified procedure, minor criminal cases can be dealt with conveniently and quickly, to reduce costs of justice, improve litigation efficiency and concentrate resources, time and personnel into handling comparatively large and important cases.

11. Perfect second instance procedure

In order to improve second instance procedure, it is to be conducted mainly by review of the documents and does not involve reopening the trial. After amendment, art. 187 now provides for second instance cases arising from an appeal, the people's court should form a collegiate panel and conduct trial of the case. The collegiate panel should go over the papers, interrogate the defendant, listen to the other parties, the defendant's representative and the views of the litigation representatives. Where the facts are clear, the court may decide not try the matter in (open) court. Where the second trial is as a result of a protest by the people's procuratorate, the court should try the matter in court.

In order to ensure that the procedure of criminal litigation is strictly observed, the revised CPL provides at art 191: Where at second instance the court discovers that at first instance the trial procedure offended against the of litigation procedure, including that of public trial, withdrawal system, depriving or limiting a party's legitimate litigation rights which may have influenced the correctness of the judgment, the composition of the judiciary was illegal or other litigation procedures were violated which may have influenced the correctness of he judgment, the court should extinguish the original decision and send the matter back to the original court for retrial.

12. Reform the system of implementing the death penalty

The amended CPL at art 216 revises the provision of art. 45 of the Criminal Law that the method for implementing the death penalty is to be by shooting. The new provision is

that the death penalty can be carried out by shooting or by lethal injection. It also provides that the execution may take place at the execution ground (*xing chang*) or inside a designated prison. This provision gradually embodies the spirit of humanitarian principles.

Conclusion

The revisions made to the CPL have made a significant reform to the criminal procedure system which has been established in China over the last several decades. It is an important reflection of socialist democracy and legal system construction. It is a new milestone in the development of our country's system of the administration of justice. It has been universally well received both inside and outside China as being of deep and great significance.

First it suits the changes in society and in the current crime situation. It step by step perfects the pursuit and punishment of crime, as well as effectively protecting state security, the collective social order and socialist public order

Next it suits the needs of reform and opening up and the socialist market economy. On the basis of the guiding program of "using law to rule the country" it reflects socialist democratic construction of the legal system. The new law strengthens the protection of the rights of the parties to litigation, especially those of victims, criminal suspects and defendants, it demonstrates progress in the democratisation of the system of criminal procedure, it opens a new chapter in the judicial protection of human rights and is beneficial in the international struggle surrounding China's human rights problems.

Further it gradually sorts out the relationship between the people's court, people's procuratorate and the public security organs, clarifies their separation of function, improves and makes more effective their co-operation and coordination as well as their mutual restriction and properly ensures completion of the common tasks of the criminal procedure system

Finally reform of the CPL is an attempt to eliminate shortcomings in the criminal procedure law and the abuses which exist in practice, to ensure protection of the quality of handling cases and ensuring fairness in practice. At the same time as protecting the quality of criminal procedure the amended law improves litigation efficiency.