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Seeking shelter

Jerome A. Cohen and Yu Han say Chinese reformers have made solid progress in a draft law to strengthen legal protection for ordinary people against arbitrary state power. But there's still a long way to go

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Criminal justice has always been a preoccupation of the Chinese people and their governments. The August 30 publication by the National People's Congress Standing Committee of a draft revision of the Criminal Procedure Law has opened yet another chapter in the struggle to protect society against crime while protecting individuals against arbitrary state power.

The release of the draft for public comment was itself notable. Responding to increasing demand for transparency, the NPC has, in recent years, issued a number of draft laws for public comment, and this is the first time the public has had an opportunity to critique major criminal procedure legislation before promulgation. It has stimulated hundreds of thousands of responses. This law is surely important enough to justify public legislative hearings.

Until now, the drafting process has been anything but transparent. The Ministry of Public Security, the Supreme People's Procuratorate and the Supreme People's Court took the lead in co-operating with specialists on the Standing Committee's legal work committee to produce the draft. That was done under the guidance of the Communist Party Central Committee's political-legal committee. There was limited participation by a small group of academics and defence lawyers.

Of course, the draftsmen also had models crafted by academic experts and lawyers almost a decade before, when civil libertarians hoped to improve

the 1996 Criminal Procedure Law, whose glittery promises were often subverted in practice by police, prosecutors and judges under party control.

In 2003, when revisions were first listed on the legislative agenda, law reformers were optimistic. Experts in and out of government believed that criminal procedures could be amended to include basic principles of fairness: meaningful limits on pre-trial detention, effective assistance of counsel, exclusion of evidence obtained by torture or other illegal means, in-court witness testimony subject to cross-examination, a presumption of innocence, a privilege against self-incrimination and an accused's right to silence. Some observers even expected the NPC to abolish "re-education through labour", which permits police to bypass the criminal process entirely. Reform was definitely in the air and produced a revised Lawyers' Law that expanded protections of the accused.

After the 17th party congress in 2007, however, the political climate became increasingly repressive, dimming hopes that the criminal law might be amended to embody such protections. The then minister of public security, Zhou Yongkang, an effective advocate of police power, ascended to the party's all-powerful Politburo Standing Committee as head of its political-legal committee. But, the following year, revision was again on the legislative agenda.

The current draft reflects more of a victory for the police and their allies among prosecutors and judges than for law professors and defence lawyers. Yet, reformers made some solid progress. The draft authorises more benevolent procedures for alleged juvenile offenders. It increases the responsibility of the legal aid system in a country where 70 per cent of criminal defendants are unrepresented, and inserts protections regarding confinement of those relatively few adjudged to lack capacity for criminal responsibility.

The draft also empowers judges to punish witnesses refusing to appear in court, though it does not mention whether their pre-trial testimony should be excluded from evidence. Supporters of the groundbreaking 2010 judicial interpretation providing procedures on the exclusion of illegally obtained evidence will happily find it essentially incorporated in the draft. Also noteworthy is a rule against coercing anyone to incriminate himself,

although an absolute right to silence and a presumption of innocence are noticeably absent.

The draft's attempt to reconcile the Criminal Procedure Law with more substantial rights conferred on defence counsel and their clients by the revised Lawyers' Law demonstrates the limited success of the criminal bar's strenuous lobbying. The draft confirms lawyers' rights to discuss cases with detained clients before trial, free of jailers' monitoring, but it restricts their ability to "verify" evidence with clients until investigators recommend indictment. The draft does not authorise lawyers to attend pre-trial interrogations, although these must now be recorded to reduce the risks of torture.

When will counsel gain access to detained clients? If the suspect's family is not promptly notified of detention, it cannot decide whether to retain counsel. The draft narrows an exception to the existing notice requirement that permits investigators to circumvent notice if, in their judgment, doing so might hinder their investigation, but still authorises no notice in cases involving national security, terrorist activities or "other similarly serious crimes".

Even when hired, a lawyer cannot meet detained clients without the consent of investigators in cases allegedly involving national security, terrorist activities or joint major bribery offenders. These vague categories offer investigators vast openings, and no independent review of their decisions is provided. Most worrisome is the draft's authorisation of the previously illegal investigators' practice of evading ordinary criminal procedural restraints by confining suspects for up to six months under the guise of "residential surveillance", but not in the suspect's residence.

This is to be allowed if officials decide the case involves national security, terrorism or bribery, and no notice need be given to family in the former two cases.

Many other draft provisions deserve analysis. Yet, perhaps enough has been said to demonstrate the continuing see-saw battle over the law, which, because it restrains government power, has been called "China's practical constitution". We hope that the draft will be substantially improved before its

likely to be enactment in March. The Chinese people deserve more significant guarantees of personal freedom than the draft promises.

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