

Transcript of September 6, 2012 Interview with Prof. Margaret K. Lewis

This is Elizabeth Lynch of *China Law & Policy* and welcome to our podcast. In March 2012, after almost a year of public debate, China's National People's Congress passed a revised Criminal Procedure Law. The revisions were the first in sixteen years and represented only the third time in the nation's history that the Criminal Procedure Law was revised. The revisions were designed to bring China more in line with the rest of the world, providing greater rights to criminal suspects and defendants.

[00:29] But while the law on paper provides some greater protections, the question remains - does it go far enough. Will it ever go far enough given the immense power of China's Public Security Bureau. While the law was being debated this past year, the Chinese government yet again increased funding to China's domestic security apparatus. Today, funding for domestic security outstrips funds to China's armed forces. With these two interests—the rights of defendants and the power of the police apparatus—who wins out in China's revised Criminal Procedure Law?

[01:00] With only four months left to the law's implementation in January 2013, *China Law & Policy* sat down with Seton Hall associate professor of law and noted Chinese criminal law expert, [Margaret K. Lewis](#), to answer these questions and discuss the future of the law.

[01:19] *EL: Thank you for joining us today Prof. Lewis.*

[01:22] *ML: My pleasure*

[01:23] *EL: Before we delve into the details of China's new Criminal Procedure Law or what is known as the CPL, can you give our listeners some background: what exactly is a criminal procedure law? Does the United States have anything like that?*

[01:37] *ML: China has both a Criminal Law and a Criminal Procedure Law or CPL that apply to the entire country. This legal system would be more familiar to students of Continental civil-law jurisdictions than to American lawyers. There is not one unified Criminal Law that applies across the U.S. because, in addition to federal criminal law, each state has its own laws.*

[02:00] Now, for criminal procedure, although there are laws, regulations, rules and other types of formal legal documents that shape the criminal process in the United States, we rely heavily on case law to determine what procedures are allowed. For example, what constitutes an unreasonable search?

[02:16] Importantly, in China, the Criminal Law and CPL are distinct, standalone laws with the former addressing substantive crimes and defenses—such as what constitutes theft, murder, and other crimes—and the latter addressing the process for investigating, prosecuting, and adjudicating alleged criminal activity. Yet these laws are closely intertwined.

[02:39] For example, use of the death penalty is first constrained by the substantive offenses for which it is a possible penalty; this now stands at fifty-five, down from sixty-eight in the pre-2011 version of the Criminal Law—not a small number. If a person is prosecuted for a death-eligible crime, the CPL lays out the procedures that must be followed, including a final review by the Supreme People’s Court (SPC) prior to execution. How China actually uses the death penalty is still largely opaque, with the number of annual death sentences and executions remaining a state secret and estimates really range widely though generally now in the several-thousand range. That said, the trend in recent years has been to constrain the scope through both through substantive and procedural reforms.

[03:28] Today in China, we have a revised CPL that will go into effect as you said in a few months. The law is written at quite a high degree of abstraction. Rumors have been swirling this summer about a forthcoming interpretation from the Supreme People’s Court that will flesh out the provisions in the law. This process happened in previous times when we had a new law and is par for the course. Most important, we need to wait to see how government authorities actually implement the law in practice.

[04:21] *EL: I feel like for at least the past six years, the Chinese government has been actively talking about revising and amending the Criminal Procedure Law, the CPL. Why did it do it now? Why 2011, 2012?*

[04:17] *ML:* I would emphasize *at least* the past six years. It's been a boy who's cried wolf or a Congress who's cried law for a long time. It's always difficult to read the tealeaves, but anecdotal reports indicate that there were deep-rooted differences of opinions among various stakeholders in the drafting process. Generally speaking, the 2013 CPL retains the same structure of the previous law but expands the number of articles from 225 to 290. The revisions themselves reflect tension and compromises between the public security forces and more reform-minded academics and other individuals involved in the drafting process.

[05:01] For instance, re-education through labor has long been a contentious issue. This is a police-controlled sanction which is considered administrative, not criminal, and thus does not go through the courts as would a criminal sentence. Yet the police can send someone away for three years with a possible one-year extension. Reports circulated for years that China would revise re-education through labor by including it within the CPL or creating some sort of separate court review to comply with provisions in international human rights documents or just abolish it entirely. To date, none of these proposed reforms have prevailed over resistance from the public security forces and they maintain control over the re-education through labor system.

[05:48] *EL: Just to follow up on that...so basically the two main stakeholders you think are the public security interests and then the academic interests?*

[05:57] *ML:* Of course there are also prosecutors, there are courts. I think the extremes are represented by the most human rights-oriented scholars—of course not all scholars agree on that—and then the real

law-and-order police forces. I think it gets more complicated when you look at prosecutors and judges: their interests can cut both ways.

[06:26] *EL: Right, right. In talking about the generalities, you mentioned the changes or some of the lack of changes like re-education through labor. But I want to focus now on something you have actually written about recently in your article [Presuming Innocence, or Corruption, in China](#), [and] one of the big changes to the new CPL which is basically a right against self-incrimination which we find in Article 50. Did the previous Criminal Procedure Law not provide such a right to defendants? Is the right in the 2012 CPL similar to the right to silence that criminal suspects and defendants have in the U.S.?*

[07:07] *ML: The right against self-incrimination in the U.S. has a complex history and its contours are notably different than the new provisions we're seeing in China's CPL.*

[07:17] The revised CPL has neither a clear right against self-incrimination nor a clear presumption of innocence. It moves in that direction but stops short. A way we commonly think of the right against self-incrimination is, as you say, a right to silence, which is included as part of the famous Miranda Rights [in the U.S.]. Anyone who has ever watched any TV knows those by heart. In China, the 2012 revisions have been lauded for providing that interrogators not force people to incriminate themselves, but this welcome addition fails to provide a clear right to silence, especially when combined with the lingering requirement that suspects must answer questions truthfully. And there's still an overt emphasis on leniency for confessions, which puts greater pressure on suspects to be forthcoming with information.

[08:15] *EL: Right, and just to follow up on that. I noticed that too when I looked at the new CPL, that you have this sort-of right against self-incrimination in Article 50 and then you have what is still left in the new CPL from the old CPL, is this requirement in Article 93 that the suspect answers truthfully and that the interrogator asks questions and they have to talk about their guilt or innocence, and that they answer truthfully. How do you see those two provisions playing out, or at all?*

[08:46] *ML: It is difficult to square Article 50 with Article 93. The best I can tell is suspects must answer truthfully, but interrogators are limited in the measures they can take to force people to talk. At base, this tension reflects the horse-trading that went on in the drafting process. We had more reform-minded drafters who wanted a robust right against self-incrimination but there was no way that this was going to get past the public security forces and other more law-and-order factions.*

[09:17] *EL: That's really interesting because I think a lot of people think China is just this one-party state and there isn't these factions and there isn't horse trading. And it seems like in your response, you alluded to one of the bigger things that I think a lot of people are applauding which is the adoption of provisions excluding evidence obtained through torture, especially confessions. Confessions in China are usually the basis of most convictions I believe, but correct me if I am wrong, and there has been a lot of*

recent stories of murder victims who appear alive and then they have to set the person free. Can you talk more about these new provisions found primarily in Articles 54 to 58 of the new CPL?

[10:01] **ML:** Confessions still are king in China and certainly the easiest case for a wrongful conviction is when the alleged murder victim returns alive, as seen in the case of Zhao Zuohai. In that case, the murder “victim” returned to the village alive after his self-confessed “murderer” had spent a decade in prison. Obviously you don't need DNA evidence to prove someone's innocence when someone who is supposedly beheaded now returns to the village intact.

[10:32] That case brought unprecedented public scrutiny to methods used to extract confessions. It eventually came to light that police had beaten Zhao during the interrogation process. Zhao's case and other reports of coercion and outright physical torture prompted the release of new evidentiary rules in 2010. That included, among other provisions, a pre-trial mechanism to challenge the admissibility of illegally obtained confessions.

[11:00] These new rules have largely been incorporated into the [revised] Criminal Procedure Law and this has marked a step towards recognizing the extreme reliance on confessions and the concerns for abuse and mistakes that are inherent in such a one-dimensional method of evidence collection. Again, the new CPL is not yet in effect, but reports of defendants invoking the 2010 rules are few and news of successful challenges limited to at best a handful.

[11:30] **EL:** *Just in trying to understand how these new provisions will work, who can actually raise the issue of a confession obtained through torture and what happens once it's raised? I think you mentioned a pre-trial mechanism to analyze that.*

[11:46] **ML:** The law provides that prosecutors *should* conduct an investigation on their own volition if they are tipped off that investigators used unlawful methods of evidence collection [Article 55]. But *should* is different than *will*. How enthusiastic prosecutors will be using this power is subject to doubt.

[12:04] Similarly, judges should conduct an investigation if they suspect that investigators used unlawful methods of evidence collection [Article. 56].

[12:12] Moreover, and most interestingly, the defense may request the court to exclude the evidence gathered by unlawful means. This is a marked change from the prior Criminal Procedure Law. However, as with the 2010 Evidence Rules, it is questionable how receptive courts will be to these applications. Defense counsel is also hampered in its ability to access evidence that would prove illegal means. And you need to have a defense lawyer who understands these rules to begin with.

[12:41] There are a number of practical hurdles that stand between what the law says and what we are actually going to see in practice.

[12:48] *EL: Another interesting thing, and I don't know how this works as much in a civil law country, the CPL does not define what is considered torture. Even in the U.S., there are tactics used in interrogation that while rough, are not legally torture. Are there any other regulations in China which define torture? How will the courts go about defining torture? I know it is a civil law system but will there be any, sort-of, common law definitions emerging for torture?*

[13:21] *ML: First there is an issue of translation. The phrase you often hear in Chinese—xingxun bigong [刑讯逼供]—is often translated as “extracting confessions through torture” but it uses a different word for torture than, for example, in United Nations Convention Against Torture, which is kuxing [酷刑]. Right there, sometimes there is a little bit of questioning what we are dealing with.*

[13:46] *To my knowledge, there is no clear definition of torture in Chinese law, but that is true in other jurisdictions as well. I think one concern is that, by giving a clear definition, it can be easier for people to inflict suffering on another person and say, “But, look, what I did is not in the definition of torture.” Sometimes there is a reason not to have the definition too clearly spelled out.*

[14:11] *And as you point out, a related issue is what practices short of physical torture are deemed illegal; for example, coercion, lying to suspects, playing psychological games. When do interrogators cross the line from using creative, acceptable tactics to measures that society really wants to condemn.*

[14:37] *EL: Going from confessions, which form the basis of most convictions in China, I want to switch to another aspect of the CPL that I just find really, really confusing which is witness testimony. Right now, under the current CPL, or just as a general practice, witnesses usually don't appear in court, is that right?*

[15:00] *ML: That is right. Although we don't have an official statistic, I regularly hear that witnesses appear in less than 10% of cases, and even that is likely being generous. The more common practice is to read written statements that witnesses gave to the police or prosecutors. Once when visiting a court in China, the group I was with toured an empty courtroom. It was beautiful: beautiful polished wood, it was gorgeous. The judge giving us the tour pointed out where the defendant would sit and where the lawyers would sit. We asked, “Where does the witness sit?” There was an awkward pause and then it was said, “Well, a chair would be brought up here for the witness.” But it was clear that this was not common practice. Again, hopefully that will change but, to date, witnesses have played a very limited role when it comes to the actual trial process.*

[16:00] *EL: So with the new CPL, in reviewing the added provisions, I have noticed that there are a lot of provisions that talk about witnesses: compensating them for attending a trial and forbidding employers from docking pay or injuring an employee who has to go to court. I think you find that in Article 63. But then later on when I was looking through the amended CPL, we see Article 181, which seems to imply that only in rare circumstances will a witness be required to appear and if the court thinks they have to*

appear. Do you think based on some of these additions, but yet the retention of Article 181, do you think we will start to see greater in-court witness testimony under the new CPL?

[16:49] **ML:** As you note, on paper, the revised CPL puts greater emphasis on witnesses appearing in court. But I share your skepticism that these provisions will lead to a marked increase in witness participation. We need buy-in from the prosecutors, from the judges in particular to welcome this change in the actual courtroom.

[17:07] Again, a related issue is that lawyers remain restricted both in law and practice. The scarcity of lawyers who handle criminal cases in China combined with the highly constrained scope of publicly funded representation means that the majority of criminal defendants proceed without any counsel whatsoever. Having witnesses appear is generally of little use to the defendant unless there is competent counsel to examine, or cross-examine, the witness depending on whose witness it is.

[17:38] **EL:** *This is all really interesting because I think it shows—the fact that there is a tremendous reliance on confessions and there aren't witnesses in court—it shows how different the Chinese criminal court system or how a trial is performed in China from the United States. If you don't have witnesses and you have confessions, what is really going on in a Chinese criminal trial? What else happens? Or is there anything else that happens?*

[18:08] **ML:** I have only seen parts of a few trials in China—my blonde hair and white face doesn't help—and I know those trials were selected as appropriate for foreign visitors. As a result, I cannot speak much from personal experience. Instead it is anecdotes and talking to people who have a much more intimate understanding.

[18:26] But what we do know is that, the further a case progresses, the more likely that a suspect will be found guilty. China's approximately 99% conviction rate emphasizes the need for early advocacy on behalf of suspects if there is any hope of avoiding criminal liability. The trial itself routinely focuses on whether the defendant merits lenient punishment instead of whether the evidence is sufficient to support a guilty verdict.

[18:53] I believe in giving criticism where criticism is due. People should realize that here in the U.S. cases seldom go to trial. Most cases are resolved by way of a guilty plea, not a dramatic *Law & Order* episode in the courtroom. That said, China is still even more dramatic in its conviction rate and how trials have always been of relatively little importance.

[19:20] **EL:** *Switching gears let's go back to what goes on before the trial during the investigation phase. I think this is perhaps one of the biggest changes to the CPL and most people think for the worse—is the codification of what's known as "residential surveillance." Can you first explain a little bit what is residential surveillance and how the new CPL addresses it?*

[19:45] **ML:** The government's ability to deprive people of liberty prior to conviction or even charging really was a focal point of the debates surrounding the revisions. This deprivation can occur, as you know, through [1]"residential surveillance" [*jianshi ju zhu* - 监视居住] though not necessarily at the suspect's own residence, or [2] through "detention" [*juliu* - 拘留] at what's known as a detention house or a *kanshousuo* [看守所].

[20:08] Following release of the draft revised CPL last summer, critics quickly pointed to the provision in the law that allowed police to hold suspects under residential surveillance in cases involving crimes of endangering state security, terrorist activity, or serious bribery. Nor would the police have to notify the suspect's family.

[20:27] But after [the draft's release], there was really potent criticism both from people inside China and outside China, the final law was revised and first to limit use to "especially" serious bribery and second to cabin the initially sweeping lack of notice provisions by changing it to "except where notification cannot be processed that there should be notification to the family." But critics continue to raise concerns that notice might not include the actual location of the suspect or other crucial information.

[21:20] With respect to detention, there is a provision that provides that a detainee's family needs to be notified within twenty-four hours unless again notification cannot be processed or where the detainee is involved in crimes endangering state security or crimes of terrorist activities, and notification may hinder the investigation. What these exceptions to the standard rule of family notification actually mean in practice, this will only be apparent over time.

[21:30] **EL:** *Just to follow up and to clarify a little bit, can anyone be placed under residential surveillance for any crime? How do they distinguish or is it just left totally in the prosecutor and public security bureau's hands?*

[21:44] **ML:** It is limited to certain crimes and types of suspects by law but I can't verify how it will be used in practice and some of those categories are quite broad. Other [provisions] are more direct saying that for certain categories of people for whom residential surveillance can be used when the conditions for arrest have been satisfied, such as people who are seriously ill or pregnant women...so I'd currently be eligible for residential surveillance. If you see residential surveillance as an alternative to locking someone up in what could be a very harsh jail-type setting, it comes across as a positive thing. If you're pregnant or breast feeding, to have you in a comfortable place, albeit secured and you're being watched. But if it becomes a sweeping way to have suspects being held for long extended periods of time, it starts to look a little less rosy.

[22:40] **EL:** *When exactly are the police or the prosecutor allowed to put someone under residential surveillance? Do they have to be arrested? Or can it be before that, during the interrogation stage?*

[22:52] **ML:** It can be used both for suspects during the investigation stage or for people who have been formally arrested. The term “arrest” [*daibu* - 逮捕] in China often occurs much later than how we colloquially think of arrests in the U.S. People in China can be in custody without being formally arrested. Bottom line is its scope is quiet broad as far as when it can be invoked in the criminal process.

[23:16] **EL:** *We do know there are time limits to detention but is there a time limit under which one can no longer be under residential surveillance or is it not clear at this stage?*

[23:29] **ML:** The law provides that the period for residential surveillance shall not exceed six months. Again, only time will tell whether this time limit is followed in practice. It's unclear at this point whether there might be some ways to reset the clock, some new charges, how this might be massaged, but the law does at least provide a clear time limit that might give lawyers and families something to work with.

[23:56] **EL:** *When the draft first came out back in 2011, I think the majority of China's legal academics were rather alarmed by the legalization of residential surveillance. But there were a few that did argue that in a way it was a positive development, that residential surveillance was happening anyway and now at least there are rules governing the process that must be followed. What do you think of that argument, do you think there is any validity to that?*

[24:25] **ML:** I agree that there is something to be said for honesty instead of simply codifying an ideal system that has no basis in reality. That said, I personally am worried that the procedural limits on residential surveillance and other liberty-depriving mechanisms will not be strictly enforced; they'll take the power that the law gives them without the restrictions. As implementation proceeds, a question to watch is whether these new provisions merely expand the tools available to police without providing any concrete safeguards against their unfettered use.

[24:59] **EL:** *I think that brings us to an issue that I think has been floating under the surface during this whole interview which is that at least on paper there seems to be better protect the rights of criminal suspects. But it seems like a lot of the initiative in protecting criminal suspects has to come from the police and the prosecutor's offices. Since the new law was passed in March 2012, do you know if there have been any training for the police and/or the prosecutors to prepare them for January 1, 2013, implementation, when it takes effect?*

[25:34] **ML:** As was done after release of the 2010 evidence rules and all sorts of prior declarations, there are reports of course that police, prosecutors, and judges are undergoing various trainings in preparation for the new law taking effect. Of course we are also waiting for this guidance that should come not only from the Supreme People's Court but similarly guidance from [1] the Supreme People's Procuratorate to the prosecutors, and [2] the Ministry of Public Security, to the police, some of which could be public some of which might not.

[26:04] Even with the new CPL, it is important to emphasize that it does not address the full criminal process. The law spans the life of the case from its initial filing through appeals and execution of punishments. The law does *not* comprehensively address procedures for the earliest handling of a case by the police prior to involvement by the procuratorate. This entirely police-dominated phase remains the least understood aspect of China's criminal justice system and, arguably, the most crucial. So there is still a lot we don't know and that is important to recognize.

[26:37] *EL: Right, right. That is very interesting that you bring that up, that there are no changes with what's going on with the police and we don't know. But in that regard, what about with the criminal defense bar. Has there been any efforts for the criminal defense bar to better learn the new law and to perhaps strategize how to use it to better protect their clients?*

ML: There are many dedicated, and even fearless, defense lawyers in China who are hard at work to figure out how best to use the new law. As is the case currently, a lawyer's good relations with the local authorities handling a case is what's truly critical when advocating for a client.

[24:13] I commend anyone who takes on the difficult task of being a defense lawyer in China. The long complaint of the defense bar is that they have the "Three Difficulties"—the difficulty in meeting with clients, the difficulty in getting access to the prosecution's case files, and the difficulty in carrying out investigation and collecting evidence. But lawyers have been recently expanding this critique to the "Ten Difficulties"—you take the original three and then we add on the difficulties of obtaining bail, getting witnesses to appear, obtaining a hearing for an appellate trial, pleading innocent, participating in the process of death penalty review, abolishing the criminal law that criminalizes when lawyers specifically encourages witnesses to change their testimony, and also the difficulties in proving that evidence was illegally obtained.

[28:03] There are so many barriers and perhaps this new law will diminish those barriers, but I think there is a sense of being beleaguered amongst the defense bar right now.

[28:15] *EL: What's interesting too is what you mentioned before, that most criminal defendants aren't actually represented in court or in any part of the proceedings. Has there been anything done to guarantee that those defendants without lawyers, which is probably the majority, know about their rights? Have there been any public education campaigns? At the very least, does China have any TV shows like Law & Order? I feel like everybody in the United States knows their rights through Law & Order.*

[28:45] *ML:* Even more interesting is that people in China watch our TV shows. When I was over there earlier this summer I got a number of questions about whether plotlines on *The Good Wife* were actually reflecting what happens in courtrooms, and I don't watch the show so I was at a bit of a loss. But obviously that's hit the DVD stands as well.

[29:05] The revised CPL mentions an increased role for legal aid and that raises hopes that the revisions could usher in some meaningful changes, though I am again withholding much in the way of praise until we see changes in practice.

[29:19] I think the bigger force for change will be weibo and other technologies that can quickly and broadly spread word of cases like Zhao Zuohai's where there has been a clear miscarriage of justice. That would have been swept under the rug a matter of years ago but, once that was out there in the public sphere and spread like wildfire, there was no way to put that toothpaste back in the tube. So really the most effective push for real change will likely come from large-scale public outcries based on real cases rather than government slogans.

[29:52] *EL: Right, and that Zuo....what's his name?*

[29:55] *ML: Zhao Zuohai.*

[29:56] *EL: Zhao Zuohai. A lot of people think that's what brought about the 2010 exclusionary rules.*

[30:02] *ML: And there are other cases that continue to come out, and I think that when you put a real face on the injustice it does a lot more than having slogans painted on a bulletin board.*

[30:17] *EL: Well, okay. There is still a lot to talk about with the new CPL and I think you're right, a lot of it we won't really know what happens until it is actually implemented and starts going into use, but I do want to thank you very much Prof. Lewis for sitting down with us today and explaining a lot of the new developments with China's new Criminal Procedure Law. Thank you.*