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## Addressing the Emergence of Advocacy in the Chinese Criminal Justice System: A Collaboration Between a U.S. and a Chinese Law School

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# Addressing the Emergence of Advocacy in the Chinese Criminal Justice System: A Collaboration Between a U.S. and a Chinese Law School

Robert Lancaster and Ding Xiangshun

## **Abstract**

This Article addresses how the procedural, educational, and professional changes in China's legal system have affected criminal trial procedure and criminal trial practice in the country. It discusses how these changes have created a need for Chinese criminal judges, prosecutors, and defense attorneys to be well versed in the adversarial process. It describes how the China Trial Advocacy Institute, a collaborative project between Renmin University of China School of Law and Indiana University School of Law-Indianapolis, has developed to help address this emerging need.

## ARTICLES

# ADDRESSING THE EMERGENCE OF ADVOCACY IN THE CHINESE CRIMINAL JUSTICE SYSTEM: A COLLABORATION BETWEEN A U.S. AND A CHINESE LAW SCHOOL

*Robert Lancaster* &  
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### INTRODUCTION

Criminal procedure law in China has been in a state of transition since the latter part of the twentieth century. The transition has been a slow move from an historically inquisitorial system codified in the Criminal Procedure Code of 1979 (“1979 Code”) to a more adversarial system framed by the Criminal Procedure Code of 1996 (“1996 Code”).<sup>1</sup> A new criminal procedure code is expected in 2007 that is predicted to shift Chinese criminal procedure into an even more adversarial trial system.<sup>2</sup> Despite the adversarial trial elements introduced in the 1996 Code and those expected in 2007, the Chinese criminal trial will

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1. See Xiao Yang, *Xiao Yang Emphasizes the Special-Invited Consultaion and Conversation of the Supreme Court: The Judicial Reform in People’s Court must meet the Situation of the Nation and Goes Forward Step by Step*, PEOPLES COURT DAILY, Feb. 23, 2006 (emphasizing that the judicial reform in people’s court must meet the situation of the nation and progresses step by step. Xiao Yang, President of the Supreme Court of China, stated that revisions in the criminal procedure law and promulgation of the civil procedure law are leading the changes in China from an inquisitorial justice system to an adversarial system. Although the current criminal procedure code does contain more adversarial elements, it remains largely an inquisitorial system.).

2. See Du Wenjuan, *Three Experts Talk About the Amendment of the Criminal Procedural Law*, PEOPLE’S DAILY, Nov. 9, 2005. Fan Chongyi, Professor and Director of the Procedural Law Research Center of China University of Political Science and Law, points out that the scholars have reached agreement on the amendments of the criminal procedural law.

still be far less adversarial than its Anglo-American counterpart.<sup>3</sup> The Chinese system clearly remains an inquisitorial one, with some limited adversarial elements in its trial process. Furthermore, the changes in the 1996 Code notwithstanding, Chinese judges, prosecutors, and defense attorneys have done little to implement the few adversarial elements allowed into the Chinese criminal trial. Even though the adversarial developments in Chinese criminal procedure are limited, they have the potential to substantially change the Chinese criminal trial system to one that has greater respect for the rights of the accused and fairness of process. Therefore, there is a need for the legal professionals involved in the Chinese criminal justice system to better understand the adversarial system of justice and the corresponding roles of the judge, the prosecutor, and the defense within such a system.

There have also been a number of other legal reforms in China during this same period as China began an evolution towards a nation ruled by law. In addition to economic law reform, two notable legal reforms came in the areas of legal education and the professionalization of judges and prosecutors.<sup>4</sup>

This Article addresses how the procedural, educational, and professional changes have affected criminal trial procedure and criminal trial practice in China. It discusses how these changes have created a need for Chinese criminal judges, prosecutors, and defense attorneys to be well versed in the adversarial process. It describes how the China Trial Advocacy Institute, a collaborative project between Renmin University of China School of Law and Indiana University School of Law—Indianapolis, has developed to help address this emerging need.

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3. Chen Weidong, Professor and Director of the Research Center of Procedural System and Judicial Reform at Renmin University of China Law School, also emphasized that it is important to establish the fundamental environment of enforcement of the adversarial system in the amendment of 1996 Code. See CHEN WEIDONG, ADVERSARIAL SYSTEM AND RE-AMENDMENT OF CRIMINAL PROCEDURE LAW, <http://www.civil.law.com.cn/weizhang/default.asp?id=24836> (last visited Nov. 30, 2006).

4. There have been some significant changes in the legal profession and in legal education in recent years, including the passage of the Judges Law, the Public Prosecutors Law, and the Lawyers Law. There has also been a big increase in the number of law schools during the period from 1995 to 2005. See *infra* Part II.

### I. *THE EMERGENCE OF THE ADVERSARIAL CRIMINAL TRIAL IN CHINA*

The 1979 Code codified an inquisitorial criminal justice procedure. The general framework of the Chinese inquisitorial system was that the judge<sup>5</sup> played an active role as the collector and arbiter of evidence. Because the judge was responsible for deciding whether the evidence was sufficient to support the charges, thus meriting a trial, the judge worked closely with the procuratorate<sup>6</sup> before trial to review the evidence. During trial, the judge also was responsible for the presentation of evidence and determined its veracity and weight.<sup>7</sup> Chinese legal scholars have argued that this rigid, judge-centered trial system was necessary to bring quick order to the chaos existing at the time of the 1979 Code.<sup>8</sup> However, with China's rapid economic development and increasing participation in the world market, Chinese political, social, economic, and cultural norms also found themselves changing rapidly.<sup>9</sup> As a result, the problems inherent in the inquisitorial criminal trial system became more apparent.<sup>10</sup> China's economic legal reforms helped pave the way for the re-

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5. The term "judge" in this Article refers to a "collegiate" bench which consists of several persons equally presiding over the case. Those persons may be a mixture of professional judges and lay persons appointed by the local people's congress.

6. The official prosecuting arm of the State in China is the Procuratorate. The terms "procuratorate," "procurator," and "prosecutor" are used interchangeably in this Article.

7. Under the 1979 Code, the judge held the leading and controlling position regarding both the pretrial investigation and the conduct of the trial. Article 108 of the 1979 Code provided that the presiding judge decided which evidence needed to be collected during the pretrial investigation of the case. The presiding judge also may decide the order of the witnesses and evidence to be presented at trial as well as taking the leading role at trial. *See* Criminal Procedure Law of the People's Republic of China, art. 108 (P.R.C.) (1979) (The criminal procedure code was promulgated by The National People's Congress on July 1, 1979 and became effective Jan. 1, 1980); *see also* Chen Weidong, *Chinese Criminal Procedure and Practice: Fairness, Efficiency and the Introduction of the Adversarial Element*, in *CHINA TRIAL ADVOCACY HANDBOOK* 157 (Herbert D. Bowman ed., 2005).

8. *See* Huang Taiyun, *The Significant Reforms of the Criminal Procedural System*, 2 *CHINA LEGAL SCI.*, Apr., 1996.

9. *See* Gu Angran, *The Explanations on Amending of the Criminal Procedural Law of PRC*, 3 *GAZETTE STANDING COMMITTEE NAT'L PEOPLE'S CONGRESS P.R.C.*, Mar. 12, 1996. Gu Angran is the Director of the Commission of Legislative Affairs for the National Peoples Congress.

10. Although historically China has never effectively subscribed to the notion of equality before the law, the concept was included in the 1982 Constitution. *See* P.R.C. CONST. art. 33(2) (1982).

forms of its criminal justice system.<sup>11</sup> Those problems are discussed below.

### A. Problems With the 1979 Code

First, the criminal trial was a mere administrative formality because the emphasis was on the judge's pre-trial investigation and examination of the evidence. Under the 1979 Code, the judge was charged with collecting and examining evidence before the court was ever called into session. Most of the evidence was verified through this pre-trial process. Since the judge took this active pre-trial role, the actual court trial was often an administrative event conducted in accordance with a pre-prepared questionnaire.<sup>12</sup>

Second, the criminal trial is also judge-centered under the 1979 Code because emphasis was placed on the judge's interrogation and production of evidence. The judge's function was therefore combined with the prosecutor's function, creating great disparity between the prosecutor and the defense counsel.<sup>13</sup>

Third, witnesses rarely appeared at trial:<sup>14</sup> In fact, the vast majority of criminal trials took place with no live witnesses.<sup>15</sup> Because the 1979 Code allowed written statements and reports to be introduced as evidence in lieu of live testimony, live witnesses

11. See Gu, *supra* note 9.

12. *Id.* at 157.

13. Criminal Procedure Law of the P.R.C., arts. 108-109 (1979). Article 108 provides that, after reviewing the case posed by people's procuratorate, the people's court shall open a session to hear the case if there are clear facts and enough evidence. In a case where the main facts are unclear and the evidence inadequate, the case shall be sent back to the people's procuratorate for supplementary investigation. In cases where the defendant will not be sentenced, the people's court may request the people's procuratorate to withdraw the prosecution. Article 109 provides that the people's court may conduct an inquest, examination, search, seizure, and expert evaluation when necessary.

14. This is a continuing problem under the 1996 Code, which provides that all parties can question witnesses, but does not provide any mechanism to compel the witnesses' attendance. There are no official statistics on the rate of cases where witnesses appeared in China. According to Professor He Jiahong, Professor at Renmin University Law School, witnesses appeared at trial in less than eight percent of the cases. See also, CONG.-EXEC. COMM'M ON CHINA, 109 CONG., ANNUAL REP., at 31 (2005) [hereinafter ANNUAL REPORT, available at <http://www.cecc.gov>. Criminal Procedure Law of the P.R.C., art. 36 (1979)

15. See ANNUAL REPORT, *supra* note 14, at 31.

simply did not appear in court.<sup>16</sup> In most cases, the court clerk simply read the available reports and statements in open court. As a result, the defendant could not challenge witnesses' pre-trial statements through cross-examination.

A fourth serious problem with the 1979 Code was that trial judges had no independence to make decisions on the cases they heard. China's trial court system provided for a "collegial" bench or "trial committee." The upper court levels had authority over the lower courts to mandate lower court decisions.<sup>17</sup> Therefore, there were situations where the trial judge didn't make the decision in the case he was presiding over because the outcome was dictated by a higher judge who was not sitting on trial.<sup>18</sup> Also, decisions were sometimes made in the upper court levels prior to the trial being conducted in the lower court.<sup>19</sup> Further, this imbalance was exacerbated by the trial courts' fear of making a mistake, which caused them to seek instructions from the "trial committee" or the higher-level court. These factors severely weakened the trial judge as an independent arbiter.

Finally, the 1979 Code mandated that all criminal cases, either simple or complex, were to be conducted in the same manner.<sup>20</sup> Treating all cases uniformly was a gross waste of judicial resources and compromised judicial economy.

#### B. *Reform of the 1979 Code: The 1996 Code*

Because of these problems, the Legal Work Committee of the National People's Congress listed a revision of the criminal procedure code on its agenda in 1993.<sup>21</sup> On March 17, 1996, the Fourth Session of the Eighth National People's Congress passed the revised Criminal Procedure Code, effective January 1, 1997. The 1996 Code changed criminal trial procedure, estab-

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16. Criminal Procedure Law of the P.R.C., art. 116 (1979). Article 116 provides that the judges shall show the material evidence to the defendant to identify, including the records of testimony of witnesses who are not present in court and the conclusions of expert witnesses who are not present in court. The records of inquests and other documents serving as evidence shall be read aloud in court, and the judges shall heed the opinions of the parties and the defenders.

17. See Wang Liming & Yao Hui, *Studies on Establishment of People's Courts and the Reforms of Trial Mode*, CHINA LEGAL SCI., Apr., 1998.

18. See *id.*

19. See *id.*

20. See Criminal Procedure Law of the P.R.C., art. 13-22 (1979)

21. See Gu, *supra* note 9.

lished a rudimentary framework for an adversarial trial, and specified some particular adversarial procedures that would be either mandated or allowed in Chinese criminal trial procedure.<sup>22</sup> The 1996 Code also reformed the judge's role in pre-trial collection and examination of evidence and strengthened the independence of the trial court bench.<sup>23</sup>

The major changes in the 1996 Code that indicate a shift to an adversarial system are described below.

### 1. Pre-Trial Examination of Evidence

The 1996 Code limited the judge's pre-trial role as a collector and examiner of evidence. The 1979 Code had specified that all case files, bills of prosecution, and evidence collected in investigation be forwarded to the court. The judge then had to examine the evidence and make a substantive determination of whether it was sufficient for prosecution. Having satisfied that threshold, the judge then opened the court for trial.<sup>24</sup> The problem with this procedure was that the judge was likely to pre-judge guilt: First impressions are the strongest.

In order to avoid this problem, there was significant discussion while drafting the 1996 Code. Some scholars suggested that China adopt the practice of sending only the bill of prosecution to the judge without any evidence.<sup>25</sup> However, a counter view argued that judges would not be given enough to determine whether a trial should go forward. They argued that this would be counter to judicial economy because judges would call for

22. See generally Criminal Procedure Law of the P.R.C. (the Chinese criminal procedure code was promulgated by the National People's Congress on March 17, 1996, effective January 1, 1997).

23. See *id.* Article 5 states, "the People's Courts shall exercise judicial power independently in accordance with law, and the People's Procuratorates shall exercise procuratorial power independently in accordance with law, and they shall be free from interference by any administrative organ, public organization or individual." *Id.* art. 5. Article 150 states, "after a People's Court has examined a case in which public prosecution was initiated, it shall decide to open the court session and try the case, if the bill of prosecution contains clear facts of the crime accused and, in addition, there are a list of evidence and a list of witnesses as well as duplicates or photos of major evidence attached to it." *Id.* art. 150.

24. See *id.* art. 108.

25. Professor Xu Jingcun, Deputy President of the Procedural Law Association of China Law Society, pointed out during an international symposium, that adopting the method of sending the bill of prosecution to the judge without any evidence may limit the courts and judges' pretrial responsibilities. See Zheng Yi Wang, <http://www.jcrb.com.cn/zyw/n5/ca11201.htm> (last visited Nov. 30, 2006).



trials in cases that should have been before trial due to insufficient evidence of guilt.<sup>26</sup> Consequently, in the 1996 Code, China adopted a compromise position whereby only the bill of prosecution and photocopies of the main evidence would be forwarded to the judge. Equipped with these documents, the judge would have enough information to determine whether the evidence was sufficient to open a court session but not so much information as to risk prejudging the case.<sup>27</sup> In practice, the result has been that, as long as the prosecution's submissions conform with this rule, a judge will call the case to a court session.<sup>28</sup>

## 2. Presentation of Evidence at Trial

The 1996 Code brings the judge's role into a more fair and neutral position as compared to the 1979 Code. Under the 1996 Code, the judge has less responsibility for collecting and presenting evidence, while the roles of the prosecutor and defense attorneys increase. At trial, the judge mainly listens and reviews evidence presented by the prosecution and defense. Only after hearing the evidence will the judge determine if the prosecutor has presented a sufficient case to support the accusation, and only then will he pronounce judgment.<sup>29</sup>

This reform has shifted the responsibilities of all parties within the criminal trial system. The prosecutor now has responsibility for producing evidence, while the defense now has the opportunity to present evidence of its own to rebut the prosecution or otherwise to support the defense's case. The judge's responsibilities have shifted from collecting and evaluating evidence before trial to hearing and evaluating evidence at trial. This requires judges to make substantive decisions during trial, manage the evidence as it is presented, and control the parties as they present their cases. This shift in responsibilities has created the need for prosecutors, defense attorneys, and judges to be well versed in the adversarial system and understand effective advocacy skills.

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26. *See supra* Part I.A.

27. *See id.*

28. According to Article 150 of the 1996 Code, the documents that are transferred to the court by the prosecutor's office are "a list of evidence and a list of witnesses as well as duplicates or photos of major evidence attached to it." *See* Criminal Procedure Law of the P.R.C., art. 150.

29. *See id.* art. 5.

### 3. Independence of the Lower Courts

The 1996 Code also strengthened the independence of the lower court bench, requiring that the court conduct an independent trial.<sup>30</sup> This provision mainly applies to the collegial bench. It allows the lower court to transfer a case to the court president only if the lower court bench itself decides that the case is so important or complicated that the lower court bench does not have the capacity to handle it.<sup>31</sup> The court president then transfers the case to the Court Trial Committee to discuss and make relevant decisions.<sup>32</sup> Only after the lower court bench makes this request does it abandon its independent trial rights. As long as the lower court bench believes it can handle the case itself, it will not refer the case to the court president and will thus retain its independence.<sup>33</sup> Under normal circumstances, the lower court bench can make decisions without direct interference from the higher court or the court president.

The 1996 Code accords the bench the independence necessary to avoid some of the criticisms of the 1979 Code. Decisions will be made by the court hearing the case, rather than their being dictated from above.<sup>34</sup> Therefore, the higher court or the Court Trial Committee will no longer usurp the authority of the trial judge.

## II. REFORM OF THE LEGAL PROFESSION AND THE PROFESSIONALIZATION OF JUDGES AND PROSECUTORS

Historically, there have been few professional requirements for Chinese judges, prosecutors, and lawyers. It was not until

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30. *See id.* art. 5 (providing "the People's Courts shall exercise judicial power independently in accordance with law and the People's Procuratorates shall exercise procuratorial power independently in accordance with law, and they shall be free from interference by any administrative organ, public organization or individual.")

31. *See id.* art. 149 (providing that "after the hearings and deliberations, the collegial panel shall render a judgment"). With respect to a difficult, complex, or major case, on which the collegial panel considers a decision difficult, the collegial panel shall refer the case to the president of the court for him to decide whether to submit the case to the judicial committee for discussion and decision. The collegial panel shall execute the decision of the judicial committee. *Id.*

32. *Id.*

33. *See* Fan Chongyi, *On the Fair Trial Standard of the United Nations and Reform of Criminal Trial in China*, 2 CHINA LEGAL SCI., Apr., 1998.

34. *See* Wang, *supra* note 17.

1986 that the National Lawyer's Professional Qualification Examination was implemented. Indeed, there were no qualifying examinations for judges and prosecutors until 1995, when the Judges Law and Procuratorates Law were changed to require that the internal staff of the judges' and prosecutors' offices take a national qualifying examination.<sup>35</sup> The examinations were administered three times prior to 2001—in 1995, 1997, and 1999.

In 2001, the Judges Law, Procurators Law, and Lawyers Law were amended to require that persons seeking those posts shall be selected through public examination and strict appraisal, from among the best qualified for those posts, and in accordance with the standards of having both ability and political integrity.<sup>36</sup>

All persons applying for a position as a judge or procurator must take the exam, which is administered by the Ministry of Justice. The first Unified National Judicial Examination was administered in 2002. That year, 360,571 people applied, approximately 310,000 sat for the examination, and only approximately 24,000 people passed (approximately seven percent).<sup>37</sup> Since implementation in 2002, there have been four sittings for the Unified National Judicial Examination. A total of approximately 980,000 people have applied, approximately 878,000 people actually sat for the examination, and a total of 93,000 people have passed (approximately nine percent).<sup>38</sup>

To sit for the Unified National Judicial Examination, a candidate need only hold an undergraduate degree. There are no legal educational requirements, and approximately half of those who have passed the examination do not have any formal legal education.<sup>39</sup> It is important to note that passing the Uniform National Judicial Examination is not sufficient to become a licensed attorney, authorized to practice law. Before being licensed as an attorney, they must also spend one year as an ap-

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35. See Public Procurators Law of the P.R.C., art. 13; Judge's Law of the P.R.C., art. 12.

36. See Public Procurators Law of the P.R.C., art. 13; Judge's Law of the P.R.C., art. 12; see also Law of the P.R.C. on Lawyers, art. 6.

37. Chinese Ministry of Justice, <http://www.legalinfo.gov.cn/english/JudicialExam/judicialexam.htm> (last visited Nov. 30, 2006).

38. *Id.*

39. Measures for the Implementation of National Judicial Examination (for Trial Implementation), art. 13 (2002), [http://www.legalinfo.gov.cn/english/JudicialExam/judicialexam2\\_1.htm](http://www.legalinfo.gov.cn/english/JudicialExam/judicialexam2_1.htm) (last visited Nov. 30, 2006).

prentice at a law firm.<sup>40</sup> Further, anyone passing the national lawyers examination, who wishes to be a judge or prosecutor, must also pass a special examination organized by the courts and national prosecutors office.<sup>41</sup>

Some have criticized the omission of a requirement that one have formal legal education.<sup>42</sup> Scholars note that this omission is particularly problematic during a period of rapid legal reform. Many scholars and critics argue that China should set up a judicial qualification model similar to that in Germany, France, and Japan.<sup>43</sup>

The training judges and prosecutors receive is continuing to improve. Currently, the National Judges' College and the National Prosecutors' College provide continuing legal education under the auspices of the Supreme Court and the Supreme Procuratorate. Neither of these institutions, however, provides training to applicants interested in the judicial or prosecutorial profession. Furthermore, there is no training institute available for lawyers.

### III. THE DEVELOPMENT AND REFORM OF LEGAL EDUCATION

As the rule of law develops in China, its legal education system will be an important part of the national educational system. The current legal education system is relatively new, however, having formed only at the end of the Cultural Revolution. The present emphasis on legal education is a response to domestic reform and China's opening up to world markets. Moreover, following the Cultural Revolution, the government also developed an interest in strengthening legal construction and the rule of law.<sup>44</sup>

Since the end of the Cultural Revolution, the expansion of

40. See Law of the P.R.C. on Lawyers, art. 8(2).

41. See Public Procurators Law of the P.R.C., art. 13; Judges Law of the P.R.C., art. 12.

42. Jiang Minan, *The National Uniform Judicial Examination Should Not Decide Everything*, BEIJING NEWS, Nov. 30, 2005 (criticizing the current Bar Examination for encouraging students to memorize legal knowledge rather than testing their ability), <http://comment.thebeijingnews.com/0730/2005/11-30/012@003100.htm> (last visited Nov. 30, 2006).

43. See ZENG XIANYI & ZHANG WENXIAN, RESEARCH ON CHINA'S LEGAL EDUCATION REFORM AND STRATEGIC DEVELOPMENT IN THE 21ST CENTURY 65 (2002).

44. *Id.*

legal education in China has been rapid and dramatic: While there were only two functioning law schools in 1979, there are currently over 500.<sup>45</sup> Much of this growth has occurred within the past few years. At the end of 1998, there were approximately 300 law schools, while today there are approximately 560 universities offering legal education to approximately 300,000 enrolled students: 200,000 undergraduate students, 20,000 J.M. students, 60,000 LL.M. students, and 6,000 doctoral students.<sup>46</sup>

The rapid expansion of legal education has created challenges associated with ensuring the quality of programs, teaching, and curricula. In particular, there are no standards in place that regulate the creation of new law schools.<sup>47</sup> Some of the new schools have actually been created without enough qualified faculty.<sup>48</sup> The Ministry of Education does have some very basic requirements that set minimums for "qualification" as a law school: A list of fourteen core courses comprising the mandatory curriculum.<sup>49</sup> The schools that cannot provide the fourteen core courses are deemed unqualified. This requirement is minimal, however, and there is no quality oversight.<sup>50</sup> Moreover, none of the fourteen courses contains a practical element or includes the teaching of lawyering practice or trial skills.

In response to quality issues, Chinese legal educators have been encouraging a new teaching method that combines theory and practice, but practical courses remain unavailable to most Chinese law students.<sup>51</sup> The two most common practical courses are internships and legal clinics. Undergraduate law students in

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45. See Zen Xian Yi, *The Rule of Law Need Sound Development of Legal Education*, *LEGAL DAILY*, Jan. 19, 2006.

46. See *id.* These statistics were reported by Professor Zeng Xianyi, Dean Emeritus of Renmin University of China School of Law and Chairman of the Legal Education Society of China.

47. See *id.*

48. See *id.*

49. The fourteen core courses are: Jurisprudence, Chinese Constitutional Law, Administrative Law and Procedure, Chinese Legal History, Civil Law, Civil Procedure Law, Criminal Law, Criminal Procedure Law, Commercial Law, Intellectual Property, Economic Law, Public International Law, Private International Law, and International Economic Law.

50. See Xianyi, *supra* note 43, at 161.

51. See Chen Hongwei, *The Legal Education Should Be Creative In All-Around Way*, *LEGAL DAILY*, Feb. 26, 2006. He Qinhua, president of East China University of Politics and Law, pointed out that the internship opportunities for Chinese law students are decreasing, especially since the number of law schools is increasing.

their final year of study are often encouraged to participate in internship courses that allow them to observe the practice of law in the courts, prosecutors' offices, law firms, and government. This is not a requirement of the basic curriculum, however, and the law schools cannot provide every student an internship opportunity.<sup>52</sup> A few clinical programs have been launched in China with the support of the Ford Foundation. As of June 2005, however, only thirty-five law schools had clinical programs.<sup>53</sup> Considering that 559 legal programs currently exist in China, clinical opportunities are almost non-existent. Also, there is criticism of some programs.<sup>54</sup>

Thus arose the idea for the China Trial Advocacy Institute. The more adversarial trial model introduced in the 1996 Code created the need for Chinese judges, prosecutors, and defense attorneys to be trained in advocacy skills. Professionalizing lawyers, judges, and prosecutors has created higher standards of practice. Some scholars have also recognized the need for skills-based programs within the law school curriculum.

#### IV. CHINA TRIAL ADVOCACY INSTITUTE

##### A. Introduction

The China Trial Advocacy Institute is a joint program of the Renmin University of China School of Law in Beijing and the Indiana University School of Law-Indianapolis that began in 2004.<sup>55</sup> Its primary goal is to educate Chinese judges, prosecutors, defense attorneys, and law students in international criminal trial norms and the adversarial system of justice. The Institute's educational focus is on adversarial trial skills in the context of Chinese criminal trial procedure. It is currently funded through Democracy, Human Rights, and Labor Grants administered through the U.S. State Department. The Institute and was

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52. *See id.*

53. *See generally* Zhen Zhen, *Present Situation and Prosperous Future of China Clinical Legal Education*, 59 CHINA LAW 104 (2006).

54. *See id.*

55. Indiana University School of Law-Indianapolis and Renmin University of China School of Law have a long history of cooperation, which has made the Institute's activities possible. Indiana University began its ventures in China in 1987 under the direction of Jeff Grove, Associate Dean for Graduate Studies and Professor of Law. Professor Grove initiated a Chinese Law Summer Program in Shanghai in 1987 and relocated that Program to Renmin University in 1997.

designed and implemented by Herb Bowman, a visiting professor and fellow in the Center for International and Comparative Law at the Indiana University School of Law–Indianapolis. Renmin University School of Law assigned Professor Ding Xi-angshun as Program Coordinator. The Institute has an office on the Renmin campus, and a Renmin graduate student serves as Program Administrator.

The principle training focuses on international fair trial norms and the particular articles within the 1996 Criminal Procedure Code that are aligned with those norms. Because China is a signatory to the Universal Declaration of Human Rights (“UDHR”) and the International Covenant on Civil and Political Rights (“ICCPR”),<sup>56</sup> the Institute uses these two documents as the basis of teaching international fair trial norms. Particularly, Article 10 of the UDHR provides that “[e]veryone is entitled in full equity to a fair and public hearing by an independent and impartial tribunal.”<sup>57</sup> Article 11 of the UDHR provides that “[e]veryone charged with a penal offense has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense.”<sup>58</sup> Article 14 of the ICCPR provides that “[i]n the determination of any criminal charges against him everyone shall be entitled to the following minimum guarantees . . . [t]o examine, or have examined, the witnesses against him—and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.”<sup>59</sup>

Some provisions of the 1996 Code are in line with the UDHR and the ICCPR. For example, Article 37 provides, “[d]efense lawyers may . . . collect information pertaining to the current case . . . and they may also apply to the People’s Procuratorate or the People’s Court for the collection and obtaining evidence, or request the People’s Court to inform the witnesses to appear in court and give testimony.”<sup>60</sup> Article 47 states, “[t]he

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56. China was a member of the Drafting Committee of the Universal Declaration of Human Rights (“UDHR”) and signed the International Covenant on Civil and Political Rights (“ICCPR”) in 1998, although it has not yet ratified the ICCPR.

57. Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen mtg., U.N. Doc A/810 (Dec. 12, 1948), art. 10.

58. *Id.* art. 11.

59. ICCPR, G.A. Res. 2200 (XXI), U.N. GAOR, 21st. Sess., U.N. Doc A/6316, art. 14 (Dec. 16, 1966).

60. *See* Criminal Procedure Law of the P.R.C., art. 37.

testimony of a witness may be used as a basis in deciding a case only after the witness has been questioned and cross-examined in the courtroom by both sides.”<sup>61</sup> Article 156 provides that “[t]he public prosecutor, the parties, the defenders—and the agents ad litem, with the permission of the presiding judge, may question the witnesses and expert witnesses.”<sup>62</sup> Article 159 further requires that “[d]uring a court hearing, the parties, the defenders and agents ad litem shall have the right to request new witnesses to be summoned, [and] new material evidence to be obtained . . . .”<sup>63</sup>

The Institute’s long-term goals are: (1) to expose Chinese judges and prosecutors to the benefits of encouraging active advocacy in criminal cases, (2) to stimulate meaningful discussion within the China’s legal community regarding the need for a more active defense, and (3) to encourage the inclusion of trial advocacy training as part of China’s law school curriculum. The ultimate goal is the increased recognition and protection of the human rights of the accused.

### *Institute Activities*

#### 1. China Trial Advocacy Handbook

The Institute has developed and published the *China Trial Advocacy Handbook* (“*Handbook*”), which can be purchased throughout China.<sup>64</sup> The *Handbook* is written in Mandarin and English and includes a DVD of lectures and examples of trial advocacy techniques. Utilizing the *Handbook*, the Institute organizes two-to-four day training modules for judges, prosecutors, lawyers, and law students throughout China. Two key venues for training activities have been the National Prosecutors College and the National Judges College—State institutions that provide training to prosecutors and judges throughout China. These two-to-four day training sessions are highly interactive with Western trial techniques, integrated into the regular curriculum.

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61. *See id.* art 47.

62. *Id.* art. 156.

63. *Id.* art. 159.

64. *See* Giacomo Bucci, *China: The Next Frontier for American Jurisprudence*, 34 LAW ENFORCEMENT QUARTERLY 5, 7 (2006).



## 2. Law School Training

The Institute delivered twelve training seminars in Chinese law schools between July 2004 and February 2006.<sup>65</sup> Many of the students who participated in these trainings were early to mid-level attorneys and judges who were seeking Master's degrees. An estimated 1,500 law students have attended these trainings.

The law school trainings are three-day modules that focus on international fair trial standards and the basic elements of the adversarial process. The discussions center around how implementation of the 1996 Criminal Procedure Code, within the context of international fair trial standards, affect the protection of the rights of the criminally accused and enhance the fair, fact-finding ability of the court. The trainers provide examples of advocacy techniques and require the students to practice those techniques in a mock case. Thus, the training is delivered through the use of three pedagogical methods: lecture, demonstration, and simulation—similar to most trial advocacy training programs in U.S. law schools.

## 3. China Mock Trial Advocacy Competition

The Institute sponsored the First China University Criminal Mock Trial Competition at Renmin University School of Law on December 3-4, 2005.<sup>66</sup> The main goals of the competition were: (1) to support and further the learning process started by universities who took part in the Institute's training programs; (2) to expand the impact and visibility of the Institute beyond the university training sessions; and (3) to provide a foundation for larger mock trial competitions to be held in future years, thus encouraging teaching of trial advocacy in Chinese universities.

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65. Those law schools include: Renmin University of China School of Law in Beijing; Jilin University in Changchun; Hainan University Law School in Hainan; Zhengzhou University Law School in Zhengzhou; Yantai University Law School in Yantai; Shanghai Jiaotong University Law School in Shanghai; Xinjiang University Law School in Xinjiang; Dalian Maritime University Law School in Dalian; Beijing University School of Law in Beijing; China Youth and Politic Law School in Beijing; Tianjin Normal University Law School and Nankai University Law School in Tianjin.

66. Ten teams from universities around China competed. Each team consisted of four competitors and one coach. The participating universities were: Renmin University, Beijing University, China Youth University for Political Sciences, Hainan University School of Law, Dalian Maritime University School of Law, Xinjiang University School of Law, Zhengzhou University School of Law, Jilin University School of Law, Yantai University School of Law, and Shanghai Jiaotong University School of Law.

One of the aims of the competition was to gain more exposure and support for the program within both the Chinese and international legal development communities. To this end, both Chinese judges and lawyers and international lawyers were invited to judge the competition. All of the teams participated in at least two trial competitions. The two top teams had to compete in four separate trials. Most teams were required to compete as both prosecution and defense counsels in different trials. Most teams gave each team member an opportunity to play the lawyer role in at least one of the competition rounds. The competition was intense, and most of the teams were well matched. There was a wide range of skill shown by the teams, but overall performances were exceptional, given their limited exposure to the adversarial system.

One of the competition goals was to expose Chinese law professors and legal professionals to the advantages of more open trial advocacy. This was achieved as all ten teams were led by professor-coaches from competing universities. The professors were extremely engaged in their teams' preparation and were very concerned with their teams' performances and the ultimate results. In fact, the high level of competitiveness between the professor-coaches was one of the most surprising aspects of the competition. They took the competition and outcome very seriously. The Institute is following up the teams' experiences by encouraging the universities to use mock trial exercises to develop advocacy skills within their own curriculums.

As noted, the competition recruited practicing prosecutors, judges, and lawyers to act as judges in the competition. The primary reason for this was to give Chinese legal professionals exposure to the adversarial trial model. Therefore, the Institute chose judges from all facets of the legal profession. The Institute also made a conscious effort to choose some judges from the National Prosecutors College and the National Judges College in order to further establish its relationship with those institutions.

#### 4. National Prosecutors College and National Judges College

The National Judges College and National Prosecutors College are continuing legal education institutions under the supervision of the Supreme Court and the Supreme Procuratorate. As

professional training institutions, their main task is to train pre-judges, senior judges, pre-prosecutors, senior prosecutors, and presidents of the courts and procuratorates at different levels around the country. The training of judges and prosecutors, the two arms of the criminal justice system that can impact the most change, is an important Institute goal.

The Institute has held two training sessions in the National Judges College and two at the National Prosecutors College. Over 600 judges and prosecutors have participated in the trainings, including 100 deputy presidents of courts and procuratorates at different levels around China. As most of the participants at the National Judges College and the National Prosecutors College are experienced judges and prosecutors, they have expressed concerns about pursuing approaches that improve justice in practice through comparative judicial practices between China and the United States.

#### 5. Workshop on Legal Professions in Shanghai

In an effort to create a forum to communicate with legal professions in China, the Institute hosted a workshop in Shanghai with the cooperation of the Jiaotong University School of Law. The workshop brought together forty legal professionals including judges from the Shanghai High Court, prosecutors from the Shanghai People's Procuratorate, attorneys from local law firms, law professors from Jiaotong University School of Law and the Shanghai Social Academy. Presentations were made on international fair trial norms and the adversarial system. Chinese experts introduced the achievements and problems associated with China's criminal reform and pointed out the change from the inquisitorial system towards a more adversarial system in China's criminal procedure.<sup>67</sup>

### VI. CONCLUSION

As attention to the rule of law continues to grow in China and as the country continues to increase its participation in world legal affairs, Chinese criminal procedure will become more aligned with international fair trial norms. This will in-

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67. See Ling Zhongming, *More than 40 Experts from Domestic and Abroad had a Discussion Regarding the Adversarial Mode and the Reform of Chinese Trial Procedure*, *PROCURATORIAL DAILY*, June 16, 2005, at 3.

clude the implementation of a procedural code that recognizes the importance of the human rights of the accused and that promotes fairness and equality of the parties in the adjudication process, full disclosure of evidence and notice of charges for the accused, independence of the judiciary, and the importance of having live witnesses available for examination. These developments will increase the role of the prosecutors and defense attorneys in both the pre-trial and trial processes, will make the system more adversarial, and will require the prosecutor, judge, and defense to have knowledge of essential trial advocacy skills. Accordingly, legal education should rise to the challenge and add practical skills and advocacy training to its curriculum. Also, the professional institutions for judges and prosecutors as well as lawyer organizations should strive to train experienced legal professionals in advocacy skills. This education will result in further implementation of the changes to the 1996 Code and of the expected changes forthcoming in a new Criminal Procedure Code.

It is the hope of Renmin University of China School of Law and Indiana University School of Law-Indianapolis that their joint effort in sponsoring the China Trial Advocacy Institute will further this work in China and facilitate systemic change in the Chinese criminal justice system.