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THE PEOPLE'S REPUBLIC OF CHINA AND THE PRESUMPTION OF INNOCENCE*

TIMOTHY A. GELATT**

I. INTRODUCTION

The widely-publicized trial of China's legendary "Gang of Four" and six other fallen political and military leaders in November and December of 1980 gave the foreign press wide opportunity to comment on the operation of China's new codes of criminal law and procedure. Although the politically charged nature of the case probably made it an unsuitable one for use as an example by which to appraise the new system, the Chinese themselves seemed anxious for the trial to be seen by both domestic and foreign observers as a strictly legal proceeding. With increasing frequency as the case progressed, China's top legal scholars provided explanations of various aspects of China's criminal justice system as they were used in the Gang's trial.¹ Many of these commentaries seemed to be directed squarely at foreign criticisms of the handling of the Gang of Four case.

* The romanization system for Chinese names and words used throughout the text and notes is the *pinyin* system of the People's Republic of China. Where sources cited use other systems, the *pinyin* is given in parentheses. Quotations from and titles of Chinese materials are, except where otherwise noted, in the author's translation, which is not necessarily the same as translations of such titles and materials cited in the notes.

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¹ See *Famous Legal Scholar Zhang Youyu Answers Reporter's Questions*, Renmin Ribao (People's Daily), Nov. 22, 1980, at 1; *Interview with (Jurist) Qiu Shaohong*, Foreign Broadcast Information Service, Daily Report: People's Republic of China [hereinafter cited as FBIS-CHI], Jan. 29, 1981, at L2; (*Vice-Director and Secretary of the Legal Committee of the National People's Congress Standing Committee*) Wang Hanwu *Answers the Questions of Xinhua Reporter*, Renmin Ribao, Dec. 12, 1980, at 4; Zhang Zipei & Tao Mao, *Several Procedural Questions Concerning the Trial of the Lin Biao and Jiang Qing Counterrevolutionary Cliques*, Renmin Ribao, Feb. 2, 1981, at 5, trans. in FBIS-CHI, Feb. 10, 1981, at L10; Chen Guangzhong & He Bingsong, *The Question of Evidence in the Trial of the Lin Biao and Jiang Qing Counterrevolutionary Cliques*, Renmin Ribao, Feb. 3, 1981, at 5, trans. in FBIS-CHI, Feb. 11, 1981, at L23; Ma Rongjie, *An Example of Trying Cases in Accordance with the Law*, Renmin Ribao, Jan. 27, 1981, at 5, trans. in FBIS-CHI, Jan. 28, 1981, at L1; Huang Lin & Hu Heng, *Take Facts as the Basis and Law as the Criterion—Interviewing Woman Jurist Han Youtong*, Guangming Ribao (Enlightenment Daily), Dec. 21, 1980, at 3; trans. in FBIS-CHI, Jan. 8, 1981, at L16.

A common criticism was that the trial of the radical leaders demonstrated how, in China, criminal defendants are "presumed guilty until found guilty."² For a start, over a year before the Gang went on trial, then Party Chairman Hua Guofeng had assured a foreign correspondent that, despite their "very grave crimes," Jiang Qing and the others would not be sentenced to death³—a predetermination of guilt lurking behind what Hua obviously thought was a humanitarian remark.⁴ In the weeks preceding and during the trial China's official press regularly referred to Jiang Qing and her colleagues as "counterrevolutionaries," a term which by the Chinese own standards in their new emphasis on legal precision and the removal of arbitrary political labels, should only be used to describe those guilty of the specific conduct encompassed by the crime of counterrevolution in the Criminal Law ("Chinese CL").⁵ The front pages of the newspapers, furthermore, featured cartoons of the defendants in a coffin about to be nailed shut,⁶ and in "the garbage heap of history."⁷ Clearly, there was no "presumption of innocence" at work here.

The Chinese could, of course, have answered foreign critics by noting that the Gang of Four case was an exceptional one. Instead, the legal experts commenting on the case took it upon themselves to explain that the Chinese approach to criminal procedure is not to engage either in the "presumption of guilt"—the "feudal" method they accused the Gang of Four of employing during its lawless reign⁸—or in the "presumption of innocence." Instead, the concept of "taking facts as the basis and the law as the yardstick," enunciated in the new Criminal Procedure Law ("Chinese CP")⁹ the stress on thorough investigation and reliable evidence, the strict prohibition on extracting confessions by

² Butterfield, *In China, They're Presumed Guilty Until Found Guilty*, N.Y. Times, Nov. 23, 1980, at D4, col. 3.

³ FBIS-CHI, Oct. 9, 1979, at L4.

⁴ The comments of Party Chairman Hua also raised interesting questions about judicial independence from the Communist Party.

⁵ THE CRIMINAL LAW OF THE PEOPLE'S REPUBLIC OF CHINA, art. 90 [hereinafter cited as CHINESE CL] (passed at the Second Meeting of the Fifth Session of the National People's Congress, July 1, 1979), COMPENDIUM OF PUBLIC SECURITY LAWS AND REGULATIONS 1950-1979 4 (1980) [hereinafter cited as COMPENDIUM]. The English translation of the CHINESE CL is printed at pp. 138-70 *supra*. See CRIMINAL RESEARCH GROUP, THE LAW INSTITUTE, THE CHINESE ACADEMY OF SOCIAL SCIENCES LECTURES ON THE CRIMINAL LAW, *trans. in* 13 CHINA L. & GOV'T 1, 42-44 (1980).

⁶ Renmin Ribao, Nov. 22, 1980, at 1.

⁷ *Id.*, Nov. 24, 1980, at 1.

⁸ See, e.g., Chen Guangzhong & He Bingsong, note 1 *supra*.

⁹ THE CRIMINAL PROCEDURE LAW OF THE PEOPLE'S REPUBLIC OF CHINA, art. 4 [hereinafter cited as CHINESE CP] (passed at the Second Meeting of the Fifth Session of the National People's Congress, July 1, 1979), COMPENDIUM, *supra* note 5, at 35. The English translation of the CHINESE CP is printed at pp. 171-203 *supra*.

force,¹⁰ and related principles of China's new legal order, are employed to achieve the accurate and fair administration of justice. The Chinese legal system, we were told, does not "presume" anything—it "seeks truth from facts."¹¹

Those statements about the presumption of innocence, of course, raise many questions in the minds of Westerners accustomed to thinking of the presumption as an undeniable principle of criminal procedure. In appearing to reject categorically the concept for China's criminal procedure, and to replace it with an appealing but by itself unrevealing slogan, the Chinese may have done more to heighten the suspicion of foreign observers than satisfactorily to respond to their criticisms.

In fact, though the view expressed by the jurists quoted at the time of the Gang of Four case is reflected to a significant extent in China's contemporary legal literature, it is by no means universally shared. The revival of the legal profession and legal education beginning in the late 1970s¹² has been accompanied by the publication of a number of law journals, legal books and commentaries. In light of the promulgation in July 1979 of the codes of criminal law and procedure, such questions have been among the most discussed topics in this new literature. The presumption of innocence has been receiving particularly close attention, with China's major law review featuring at least one article on the subject in almost every issue of 1980. As will be seen, the views expressed in these recent discussions range from the outright rejection of the presumption in favor of the "truth from facts" rubric, describing the presumption as contradictory to that approach, to its wholehearted endorsement as a useful principle for China's criminal procedure, consistent with and supplementing other basic principles.¹³

Discussions of the presumption of innocence had been carried out in the mid-1950s at a time when a criminal procedure code was in the drafting stage. The "anti-rightist" movement that began in 1957 rendered difficult the serious legal analysis of this and other criminal law issues, forcing the discussions to serve the political dictates of the day. The draft procedure code that had been prepared by 1957 was shelved.¹⁴ Although there was some revival of legal discussion and

¹⁰ CHINESE CP, art. 32.

¹¹ See, e.g., Famous Legal Scholar Zhang Youyu, note 1 *supra*; Zhang Zipei & Tao Mao, note 1 *supra*.

¹² See Gelatt & Snyder, *Legal Education in China: Training for a New Era*, 1 CHINESE L. REP. 41 (1980).

¹³ See detailed discussion in sections V & VII *infra*. For summaries of the various viewpoints, see *Several Questions Being Debated in Fora of Legal Studies*, 1 MINZHU YU FAZHI (DEMOCRACY AND THE LEGAL SYSTEM) 60, 61-62 (1979); *Some Trends in Current Domestic Legal Studies*, Renmin Ribao, Jan. 27, 1981, at 5, *trans. in* BEIJING REV., Apr. 6, 1981, at 16.

¹⁴ See S. LENG, JUSTICE IN COMMUNIST CHINA 54, 147 (1967).

drafting work in the early 1960s,¹⁵ the political movements preceding the Cultural Revolution, and then the Cultural Revolution itself, soon preempted these efforts. The published discussions on the presumption of innocence resumed, naturally enough, in the late 1970s as the old draft code was being reconsidered and put into final form.

The fact that the Chinese CP passed in 1979 did not mention the presumption of innocence among its opening general principles is not of key significance to the question of whether the concept is accepted—or might be accepted—in China's criminal procedure. Codes of criminal procedure in the civilian countries whose basic scheme the Chinese CP adopts do not generally spell out the principle, leaving it to be mentioned in the constitution or other general legislation,¹⁶ or not at all. The relevant legislation of the Soviet Union makes no explicit reference to the presumption.¹⁷ The presumption of innocence, nonetheless, may generally be said to be accepted as a principle of criminal procedure in the aforementioned systems.¹⁸

This article will trace the themes in the recent debates and the discussions of the 1950s with a view to indicating how different Chinese jurists have understood the concept of the presumption of innocence and how their understanding of the term has affected their perception of its position in the Chinese system. A comparative analysis of relevant provisions of the Chinese Criminal Procedure Law will be undertaken to point out the ways in which that code might be viewed as consistent or inconsistent with a presumption of innocence. Various aspects of the criminal process in the People's Republic that bear upon the application of the presumption of innocence, such as the questions of the right to defense and the right to remain silent will be examined. Since the trial stage with which Anglo-American jurisprudence generally associates the

¹⁵ *Id.* at 72-74; Legal Research Institute, Chinese Academy of Social Sciences, *Pay Close Attention to Formulating a Criminal Law and A Criminal Procedure Law*, Guangming Ribao, Nov. 2, 1978, at 2.

¹⁶ The preamble to the French Constitution of 1958 incorporates by reference the 1789 Declaration of the Rights of Man and the Citizen, article 9 of which reads: "Everyone being presumed innocent until he has been declared guilty, if it is judged absolutely necessary to arrest a person, any severity that was not absolutely necessary to secure his person must be severely suppressed by the law." A. VON MEHREN & J. GORDLEY, *THE CIVIL LAW SYSTEM* 229 (1977). The German Ratifying Law of Aug. 7, 1952, gives domestic law status to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), art. 6(2) of which reads: "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law." Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 6(2), 213 U.N.T.S. 228; Ratifying Law of Aug. 7, 1952, (1952) *Bundesgesetzblatt* II 685, 953.

¹⁷ The criminal procedure codes of some of the East European satellite states do make such explicit references. Berman & Quigley, *Comment on the Presumption of Innocence Under Soviet Law*, 15 U.C.L.A. L. REV. 1230, 1232 (1968).

¹⁸ See discussion in section VI *infra*.

presumption of innocence may not be the most relevant one in the continental-Soviet-Chinese pattern, it will be important throughout to consider at what stage or stages of the Chinese criminal process the presumption should be applied.

The purpose of the author is not to reach a simple conclusion as to whether or not the People's Republic of China "has" the presumption of innocence. Any such conclusion would, as will become evident, be premature and unhelpful. The author's interest lies in going beyond the quick assertions of casual observers of China's legal development to see, through an examination of one particularly difficult and important issue, some of the difficulties and tensions the Chinese have been facing in developing a theory and system of criminal procedure that meets their practical, sociological, and ideological needs.

II. HISTORICAL BACKGROUND

As a preliminary matter, some brief background will be sketched of imperial China's criminal procedure and of criminal procedure developments in the first half of this century as these bear upon our focus of concern.

A. IMPERIAL CHINA

Contemporary Chinese jurists commonly refer to the judicial system of the "feudal" period of China's history¹⁹ as being characterized by the "presumption of guilt."²⁰ They note the all-importance in that system of the accused's confession, which torture could be employed to obtain.²¹ Also emphasized is the fact that the Code of the Tang Dynasty²² allowed a person whose guilt could not be confirmed by the evidence to be sentenced nonetheless, though allowed to "redeem" his sentence in money or property if he could afford to do so.²³

Interestingly, an early statement on criminal procedure, in the Lüxing chapter of the ancient Book of Historical Documents,²⁴ describes the proper conduct of cases in a way that might, if followed, have led to the installing of a presumption of innocence or *in dubio pro reo* concept into the Chinese legal tradition. "In doubtful cases," the passage explains,

¹⁹ In Chinese Communist periodization, this period is from 475 B.C. to A.D. 1840.

²⁰ See, e.g., Zhang Zipei, *Analysis of the Principle of the "Presumption of Innocence,"* 3 FAXUE YANJIU (LEGAL RESEARCH) 30, 30 (1980).

²¹ See text accompanying note 34 *infra*.

²² A.D. 619-906.

²³ Tanglu Shuyi (Tang Code), ch. 30, para. 17, quoted in Zhang Zipei, *supra* note 20, at 30.

²⁴ The date of this compilation has never been firmly established, though it is believed by some scholars to have been compiled by Confucius, who died in 478 B.C. See J. LEGGE, *THE CHINESE CLASSICS: VOLUME III, THE SHOO KING* 1-15 (1970 ed.).

the court must "investigate. . .ascertain and verify. . .minutely." If guilt is not "ascertained" the court "should not. . .deal with" the case.²⁵ Little information is available to determine the extent to which this comment was reflected in practice between the time it was written and the twelfth or thirteenth century A.D. The Tang provision of the seventh century noted earlier would in any event appear inconsistent with the spirit of the Lüxing passage.

Our knowledge of first instance judicial procedure in the Song, Ming, and Qing dynasties²⁶ indicates that in those periods there was little if any adherence to a notion of giving the accused the benefit of the doubt, and tends to bear out the Chinese Communist analysis of the system. Cases in the first instance were both investigated, prosecuted, and tried by a county magistrate who in addition to his law-keeping and judicial functions was the local administrative chief.²⁷ His manner of handling cases was inquisitorial, in the most common—and negative—sense of that term.²⁸ The underlying premise seemed to be that anyone who became involved with the law by being accused of a crime was guilty—if not necessarily of the crime he was accused of, in any case of being a "party to a disturbance of the peace in the district,"²⁹ which it was the overriding purpose of the magistrate to maintain.

The magistrates, not having the time or resources for a thorough evidentiary inquiry, and believing in any event in the supreme value of the accused's confession, relied heavily if not exclusively³⁰ on the questioning of the accused. The form of the interrogations, both before and during the formal trial, made it appear that the defendant was assumed guilty as long as he could not prove his innocence.³¹ At trial the accused—referred to as a "prisoner" even before the case had been heard³²—knelt before the bench, and constables were on hand with bamboo poles and whips that could be and were used to urge on the

²⁵ Translation of B. Karlgren, in R. VAN GULIK, T'ANG-YIN-PI-SHIH: PARALLEL CASES FROM UNDER THE PEAR TREE 49 (1956).

²⁶ A.D. 960-1279, A.D. 1368-1644, A.D. 1644-1911, respectively.

²⁷ See T. CH'U, LOCAL GOVERNMENT IN CHINA UNDER THE CH'ING 116-29 (1962); Miyazaki, *The Administration of Justice During the Sung (Song) Dynasty*, in ESSAYS ON CHINA'S LEGAL TRADITION 56, 59-62 (J. Cohen, R. Edwards & F. Chen eds. 1980); see generally J. WATT, THE DISTRICT MAGISTRATE IN LATE IMPERIAL CHINA (1972).

²⁸ The term "inquisitorial" is also used as a term of art to describe continental criminal procedure systems.

²⁹ R. VAN GULIK, *supra* note 25, at 56.

³⁰ See S. VAN DER SPENKEL, LEGAL INSTITUTIONS IN MANCHU CHINA 74 (1966); Miyazaki, *supra* note 27, at 61.

³¹ See S. VAN DER SPENKEL, *supra* note 30, at 68; R. VAN GULIK, *supra* note 25, at 56.

³² R. VAN GULIK, *supra* note 25, at 56. The Chinese term was *giu*.

defendant reluctant to confess.³³ Though magistrates differed in their views on the use of torture, many saw it as a useful way to secure the confession that was the *sine qua non* of conviction in the traditional Chinese legal system.³⁴ Defense counsel did not figure in the criminal process.

Concurrent with this approach to the basic level trial was the notion running through the legal codes and commentaries of the imperial era that the natural order would be disturbed by the punishment of an innocent person.³⁵ This idea may to some degree have tempered the presumption of guilt in the tribunals of the imperial magistrates. In the main, however, the magistrate's approach seemed to have been to presume guilt from the mere fact that the accused was before him. If the defendant managed to prove to the magistrate's satisfaction during the course of the interrogations that he was innocent and had been falsely accused, one way to maintain the proper order of society was to punish the accuser for the crime of false accusation.³⁶ In addition, an elaborate review procedure existed for all but the most minor cases³⁷ and no doubt rectified to some extent errors made as a result of the lower level presumption of guilt, though it could obviously not make whole the accused who had suffered the effects of that presumption. A complex scheme of punishments for magistrates who in light of review were found to have rendered wrong judgments may have tempered the guilt-presuming attitude of these officials in handling cases, though in this regard it should be noted that penalties were prescribed for mistaken acquittals or overly light sentences as well as for wrong convictions or excessive sentences.³⁸

B. LATE IMPERIAL AND REPUBLICAN PERIODS

The first decade of this century, which was also the final decade of the Qing or Manchu dynasty, saw the emergence of a group of law reformers, many of whom had become steeped, through study in Japan, in the contemporary Western doctrines of criminal law and procedure that stemmed from Enlightenment philosophers such as Voltaire, Rousseau,

³³ See S. VAN DER SPENKEL, *supra* note 30, at 74; R. VAN GULIK, *supra* note 25, at 56; Miyazaki, *supra* note 27, at 61.

³⁴ See T. CH'U, *supra* note 27, at 125; R. VAN GULIK, *supra* note 25, at 56; Miyazaki, *supra* note 27, at 61.

³⁵ See I.W. JOHNSON, *THE TANG CODE* 15 (1979).

³⁶ In some cases the punishment for this crime was determined by reference to the crime the defendant had falsely accused someone of. See D. BODDE & C. MORRIS, *LAW IN IMPERIAL CHINA* 402-08 (1967). This principle is still reflected in Chinese criminal law today. See CHINESE CL, art. 138.

³⁷ See D. BODDE & C. MORRIS, *supra* note 36, at 113-43.

³⁸ T. CH'U, *supra* note 27, at 128-29. Penalties for magistrates were generally lighter for overly light than for overly heavy sentences. *Id.*

and Beccaria. Among those doctrines, which emerged out of a felt need to reform an inquisitorial system on the continent that in many respects rivaled the Chinese system for cruelty,³⁹ was the presumption of innocence, which saw its first formal enunciation in the French Declaration of the Rights of Man and the Citizen of 1789.⁴⁰ The draft criminal procedure law that the late Qing law reformers presented to the imperial throne in 1906 was informed by the basic proposition that a suspect was to be presumed innocent unless proven otherwise, and included the abolition of ill-treatment of defendants and the imposition of fixed limits on pretrial detention.⁴¹ Though that draft law aroused tremendous conservative opposition and was never approved,⁴² the later drafts prepared during the first twenty years of the Republic founded in 1911 and the Criminal Procedure Code ultimately adopted in 1935⁴³ were based on the same continental principles as the late Qing efforts, absorbed through Japan,⁴⁴ and reflect the notion of the presumption of innocence.⁴⁵

C. THE EARLY CHINESE COMMUNIST EXPERIENCE: 1927-49⁴⁶

At the same time as the Republican legal structure was taking shape in those parts of China controlled by the Nationalists, the Chinese Communists were beginning to develop a legal system of their own. The early years of the Chinese "soviets" in the South China countryside, beginning in 1927, resembled the era of "war communism" after the 1917 Russian Revolution. Peasant tribunals engaged in rapid "trials" of gentry and landlords followed by immediate execution. In the course of their investigatory and judicial activities, these tribunals commonly engaged in the torture-induced confessions that had characterized the old imperial order. Even after the establishment of a system of "people's courts" in 1931, with some division of police, prosecutorial and judicial

³⁹ See generally A. ESMEIN, A HISTORY OF CONTINENTAL CRIMINAL PROCEDURE 55-390 (1913); Stepan, *Possible Lessons From Continental Criminal Procedure*, in THE ECONOMICS OF CRIME AND PUNISHMENT 181, 182-86 (S. Rottenberg ed. 1973).

⁴⁰ See note 16 *supra*.

⁴¹ J. Cheng, Chinese Law in Transition: The Late Ch'ing Law Reform, 1901-1911 157-59 (1976) (unpublished Ph.D. thesis, Brown University).

⁴² *Id.* at 154-55.

⁴³ See L. Fuller & H. Fisher, THE CODE OF CRIMINAL PROCEDURE OF THE REPUBLIC OF CHINA iv-xxii (1960). The 1935 code, as amended in 1967, remains in effect on Taiwan. See note 167 *infra*.

⁴⁴ See Fa, *A Comparative Study of Judicial Review Under Nationalist Chinese and American Constitutional Law*, Occasional Papers/Reprint Series in Contemporary Asian Studies 31-39 (No. 4, 1980); Takayanagi, *A Century of Innovation: The Development of Japanese Law, 1868-1961*, in LAW IN JAPAN 5, 18-23 (A. Von Mehren ed. 1963).

⁴⁵ See section VI *infra* for some discussion of relevant aspects of the Republic of China Code.

⁴⁶ The discussion in section II(c) relies heavily on S. LENG, *supra* note 14, at 1-26.

functions, legal procedures introduced to curb the earlier excesses were not always observed, often falling victim to the political exigencies of suppressing "counterrevolution" from within the Party and external resistance. The right to defense provided in judicial regulations, for instance, apparently existed primarily on paper.⁴⁷

In the Yanan period, 1935-45, when the Communists concentrated their power in northwestern base areas, a wartime "united front" with the Nationalists relieved some of the political tensions and allowed more attention to be paid to police and judicial restraint, emphasis on evidence more than confessions, the prohibition of torture, and related issues. The concern with the punishment of war criminals and class enemies in the post-1945 period of civil war, in turn, led to a reversion to more of a "presumption of guilt" model. "Struggle sessions" were followed in some cases by on-the-spot executions.⁴⁸

D. THE EARLY PEOPLE'S REPUBLIC: 1949-53

Although steps were taken in the early years of the People's Republic to formulate rules and regulations for the administration of justice, the war communism aura was predominant in the work of the special people's tribunals set up as part of campaigns to wage attacks on corruption and counterrevolution and to enforce the land reform movement.⁴⁹ The massive number of cases handled made procedural cautions impractical.⁵⁰ Although the regulations for the people's tribunals stipulated a right of defense, the political atmosphere of the day militated against any attempt to use that right.⁵¹ The guilt of the accused in these proceedings "was for all practical purposes a foregone conclusion."⁵²

During the period of "judicial reform" beginning in 1952,⁵³ the people's courts, purged of most Nationalist personnel, began to supplant the informal tribunals in the administration of justice. For the first year of this reform movement, the emphasis was on rejecting "old," "bourgeois" law concepts and "legal technicalities,"⁵⁴ a category in which the presumption of innocence may be assumed to have been included.⁵⁵ A

⁴⁷ *Id.* at 128.

⁴⁸ *Id.* at 21.

⁴⁹ See J. COHEN, *THE CRIMINAL PROCESS IN THE PEOPLE'S REPUBLIC OF CHINA, 1949-1963* 9-10 (1968); H. WEI, *COURTS AND POLICE IN COMMUNIST CHINA TO 1952* 17-40 (1955).

⁵⁰ H. WEI, *supra* note 49, at 12.

⁵¹ See S. LENG, *supra* note 14, at 38; H. WEI, *supra* note 49, at 6-7.

⁵² S. LENG, *supra* note 14, at 38.

⁵³ See J. COHEN, *supra* note 49, at 9-10; S. LENG, *supra* note 14, at 39-44.

⁵⁴ S. LENG, *supra* note 14, at 42; see Tao Xijin, *On the Judicial Reform*, 5 ZHENGFA YANJIU (POLITICAL-LEGAL RESEARCH) 12 (1957).

⁵⁵ See section IV *infra*.

European missionary described his interrogation before a tribunal in the prison where he was being held in 1953: "The judge said to me: 'If you have been arrested, it is not without reason. . . . It is. . . certain that you are guilty.'" To protest one's innocence was to "defy the government."⁵⁶

The "constitutional" era that began in 1954 with the promulgation of a constitution,⁵⁷ as well as organic laws for courts and procuracies,⁵⁸ was a period in which initial efforts were made to establish a criminal process characterized by separated police, procuratorial, and judicial functions, the right to defense,⁵⁹ appeal,⁶⁰ and other guarantees. It is no doubt accurate to conclude that in most cases innocence "was not seriously at issue" at the public trials that were beginning to take place in the mid-1950s.⁶¹ Nonetheless, the attempts to provide an investigatory process that showed concern for evidence and not just the extraction of confessions, mechanisms to control arbitrary arrest and detention,⁶² and a system of defense counsel who could and did argue for mitigation of responsibility and punishment, were significant. It was during this period, lasting through the early part of 1957, that the atmosphere had cleared sufficiently from the days of "judicial reform" to allow for serious intellectual discussions in China's legal literature of "old" legal theories—among them, the presumption of innocence and related issues.

⁵⁶ J. COHEN, *supra* note 49, at 368, 371.

⁵⁷ CONST. OF THE PEOPLE'S REPUBLIC OF CHINA (passed at the First Meeting of the First Session of the National People's Congress Sept. 20, 1954, promulgated by the Presidium, Sept. 20, 1954), 1 FAGUI HUIBIAN (COMPENDIUM OF LAWS AND REGULATIONS) 4 (Sept. 1954-June 1955) [hereinafter cited as FGHB], *trans.* in FUNDAMENTAL LEGAL DOCUMENTS OF COMMUNIST CHINA 1 (A. Blaustein ed. 1962). Page references to the 1954 Constitution in notes *infra* are to the translation cited.

⁵⁸ LAW OF THE PEOPLE'S REPUBLIC OF CHINA FOR THE ORGANIZATION OF PEOPLE'S CTS. [hereinafter "COURT LAW" in text and notes] (passed at the First Meeting of the First Session of the National People's Congress, Sept. 21, 1954, promulgated by the Chairman of the People's Republic of China, Sept. 28, 1954), 1 FGHB 123 (Sept. 1954-June 1955) *trans.* in FUNDAMENTAL LEGAL DOCUMENTS, *supra* note 57, at 131 (page references to the COURT LAW in notes *infra* are to the translation cited); LAW OF THE PEOPLE'S REPUBLIC OF CHINA FOR THE ORGANIZATION OF PEOPLE'S PROCURACIES (passed at the First Meeting of the First Session of the National People's Congress, Sept. 21, 1954, promulgated by the Chairman of the People's Republic of China, Sept. 28, 1954), 1 FGHB 133 (Sept. 1954-June 1955), *trans.* in FUNDAMENTAL LEGAL DOCUMENTS, *supra* note 57, at 144.

⁵⁹ CONST. OF THE PEOPLE'S REPUBLIC OF CHINA (1954), *supra* note 57, art. 76, at 27; COURT LAW, *supra* note 58, art. 7, at 132.

⁶⁰ COURT LAW, *supra* note 58, art. 11, at 134.

⁶¹ J. COHEN, *supra* note 49, at 13.

⁶² Under the 1954 Arrest and Detention Act, a maximum of three days' detention was allowed before the procuracy had to approve formal arrest or release the detainee. ARREST AND DETENTION ACT OF THE PEOPLE'S REPUBLIC OF CHINA (passed at the Third Meeting of the Standing Committee of the (First Session of the) National People's Congress, Dec. 20, 1954, promulgated by the Chairman of the People's Republic of China, Dec. 20, 1954), art. 7, 1 FGHB 240-41 (Sept. 1954-June 1955), *trans.* in J. COHEN, *supra* note 49, at 361.

III. DISCUSSIONS BY CHINESE JURISTS OF THE PRESUMPTION OF
INNOCENCE AND RELATED CRIMINAL PROCEDURE ISSUES:
1956-57⁶³

The early commentaries on questions of criminal procedure relating to the position of the defendant were all basically consistent with a presumption of innocence analysis, though not all of them used the term itself. Recurring themes of these initial discussions were that those "accused" or "suspect" must be distinguished from "criminals," and that a strict delineation should be drawn among the functions of police, procuracy, and courts.⁶⁴ The end of the movements against landlords and other resisters of the new order and the dawning of the socialist era were seen as necessitating a change in the orientation of the legal system from one in which the various legal organs cooperated against a common class enemy to a system in which divisions of function and procedural guarantees were to be promoted. These guarantees were not seen so much as ends in themselves but as means of rendering the criminal process more accurate and, as a result, more effective in the fight against crime.

The defendant, one analyst stressed, must be considered a "subject," not an "object," of criminal procedure.⁶⁵ At the moment the investigatory authorities had gathered sufficient evidence to accuse him, he became an "accused," or "defendant."⁶⁶ From that point on, he was entitled to enjoy the presumption of innocence. This meant that the investigators were to adopt an objective attitude, looking both at evidence tending to incriminate the accused and at points in his defense. The idea of many judicial workers that the concept of the presumption of innocence was in contradiction to the arrest of suspects and their prosecution for crimes was erroneous according to this commentator. The presumption was simply a principle created to dispel the preconception that all accused persons were inevitably criminals and to assure just and accurate investigations, based on full evidence, from which the guilty

⁶³ The articles cited in the discussion in section III are primarily from the journal *Zhengfa Yanjiu*, *Political-Legal Research*. This journal began publishing in 1954 under the sponsorship of the Chinese Political Science and Law Association. Writers included both legal scholars from the Nationalist era who had been integrated into the new establishments of legal education and research, and newly trained "political-legal workers." In the 1950s *Zhengfa Yanjiu* was one of only two major law journals in China; from 1959-66, when it ceased publication, it was the only one. Generally, as will be brought out in the text *infra*, its contents reflected current political thinking and trends. See J. COHEN, *supra* note 49, at 59.

⁶⁴ Liu Qinglin, *How to Treat the Defendant in Criminal Cases*, 3 ZHENGFA YANJIU 47, 48 (1956); Qu Fu, *Brief Discussion of the Procedural Position of the Defendant in Criminal Litigation*, 3 ZHENGFA YANJIU 22, 22 (1957); Zhuang Huichen, *The Problem in Criminal Procedure of the Relation Between Adjudication and Investigation and Prosecution*, 3 ZHENGFA YANJIU 28 (1957).

⁶⁵ Qu Fu, *supra* note 64, at 22.

⁶⁶ See text accompanying notes 154-56, 161-63 *infra*.

would not escape and in which the innocent would not be wronged.⁶⁷

Another commentator did not endorse the "presumption of innocence" in so many words, but agreed that whether or not a defendant was really a criminal "generally" could not be confirmed until the final decision at trial based on the evidence there considered.⁶⁸ This withholding of judgment, however, would not be necessary in the writer's view if an accused were caught "in the act" of crime⁶⁹—in such cases, by implication, he could be presumed a criminal from the start. With those qualifications, the author suggested that the attitude to be adopted toward a defendant until the final court decision was analogous to that of the skipper of a ship at sea sighting another boat but not yet being able to tell whether it was an enemy ship or a fishing vessel. A premature decision either way was to be avoided.⁷⁰

Consistent with this approach was the specification by the commentaries of various rights the defendant should enjoy at the investigatory stage. Most important was the right to defense, though so as not unduly to hinder the basic objective of criminal procedure, to expose criminals, only the right to defend oneself existed at this pretrial investigatory stage.⁷¹ In addition, the right to call witnesses, to confront a private accuser, to know the charges and evidence against oneself, and to seek redress for illegal conduct of investigatory officials during the pretrial activities were cited as appropriate rights at this stage.⁷²

The analysts at this time stressed that the trial itself must be allowed to play a significant independent role and must not be considered simply a continuation or cursory review of the preliminary investigation. Law review articles on criminal procedure contemplated a scheme in which a thorough investigation would be carried out prior to prosecution, and a preliminary review of the case by a judge would be undertaken prior to the actual trial before a collegial bench.⁷³ Although, as one of the commentators pointed out, the prosecutor, in order to prosecute the defendant, and the judge, in order to send the case for full trial, must be "positive and unwavering," without any doubt, of the defend-

⁶⁷ Qu Fu, *supra* note 64, at 23, 26. A similar analysis is found in Huang Dao, *Brief Discussion of the Principle in Criminal Procedure of the Presumption of Innocence*, 2 FAXUE (LEGAL SCIENCE) 49 (1957).

⁶⁸ Liu Qinglin, *supra* note 64, at 51.

⁶⁹ *Id.* at 49.

⁷⁰ *Id.* at 51.

⁷¹ Qu Fu, *supra* note 64, at 24. See also Zhou Hengyuan, *On the Defendant's Right of Defense in Our Country's Criminal Procedure*, 3 ZHENGFA YANJIU 51, 53 (1956).

⁷² Zhou Hengyuan, *supra* note 71, at 53.

⁷³ This was presumably the structure set out in the draft criminal procedure codes being prepared at that time and implemented on a trial basis. Ultimately, the Chinese Criminal Procedure law did take this form. See section VI *infra*.

ant's guilt, the conclusions at these two stages were not to be the final ones.⁷⁴ The ultimate determination could only be made after the collegial bench had considered the evidence and heard the arguments itself. The lack of a formal procedural system in the early years after the revolution led, the articles observed, to a widespread view among judicial personnel that the public security, procuracy, and courts were "three workshops in one factory," that there was no need, once the procuracy had conducted a thorough investigation, for the court to engage in anything more than a "formality," affixing its rubber stamp to the procuracy's findings. One consequence of this approach was that errors in the investigatory stage could easily be confirmed at the trial stage.⁷⁵

A related deleterious effect the analysts saw of the failure to distinguish the court trial from the preliminary investigation was that it led the court to take a one-sided view of the defendant, regarding him, as the prosecution did, as being on the "opposite" side.⁷⁶ This view in turn caused the court to diminish or altogether ignore the defendant's right to defense. Whereas during the pretrial phase the defendant was not an equal "party" with the prosecutor,⁷⁷ at the trial stage, he acquired "party" status equal to that of the prosecutor and, in that capacity, had the right not only to defend himself but also to employ a defender.⁷⁸ The court should not view the exercise of that right as an obstructionist tactic of the defendant's impeding its work, but rather should regard the defense arguments as an aid in its search for the truth. While the "adversary" or "accusatorial" model's view of the court as a passive umpire deciding between the two sides was not adopted,⁷⁹ the position was that the court could not thoroughly fulfill its task of actively eliciting and considering the evidence unless in the course of this process it was fully exposed and open to both parties' presentations of the case.⁸⁰

The analysis of the role of the defender served further to confirm the general orientation of these early legal commentators toward a crim-

⁷⁴ Liu Qinglin, *supra* note 64, at 48; *see also* Zhuang Huichen, *supra* note 64, at 28.

⁷⁵ Zhuang Huichen, *supra* note 64, at 28-29.

⁷⁶ *Id.* at 29.

⁷⁷ Qu Fu, *supra* note 64, at 24; Zhou Hengyuan, *supra* note 71, at 53. Both authors agree that while during the investigatory stage the defendant is not an equal "party," he is still a subject, and not an object, of criminal procedure. *See* citations *supra* this note; *see* note 65 & accompanying text *supra*.

⁷⁸ Qu Fu, *supra* note 64, at 24; Zhou Hengyuan, *supra* note 71, at 53; *see also* Ma Xiwu, *Regarding Several Problems in Present Adjudication Work*, 1 ZHENGFA YANJIU 3, 3 (1956).

⁷⁹ The "rightist" jurists were later accused, without specific substantiation, of supporting the adversary system with a passive judge. Shen Qisi, *Criticize the "Debate (Adversary) Principle" of Bourgeois Criminal Procedure*, 1 ZHENGFA YANJIU 30 (1960). *See* note 96 *infra*.

⁸⁰ *See* Liu Qinglin, *supra* note 64, at 48-49; Ma Xiwu, *supra* note 78, at 3, 5-6; Zhuang Huichen, *supra* note 64, at 29.

inal process based on the presumption of innocence. The basic duty of the defender at trial, according to a handbook on the new "people's lawyers system" instituted in the mid-1950s was,

from the facts and the law to raise before the court materials and reasons advantageous to the defendant, proving his innocence or the lightness of his crime. That is to say, the lawyer can present evidence and reasons proving that the criminal conduct of which the defendant is accused is completely or partially lacking in factual basis, or [he can show that] according to the law. . .the defendant's conduct cannot constitute a crime. . . .⁸¹

The defender was not to be castigated as someone who was seeking to shield guilty defendants from criminal responsibility. In fact, the defender's role, while highly "complex," was completely consistent with the court's search for objective truth. On the one hand, the defender was the most trusted person of the defendant. As such, it was not his role to expose to the court evidence of the defendant's crimes that had not otherwise been revealed. That was the duty of the prosecutor. On the other hand, the defender in criminal procedure did not act as the "agent" of the defendant, doing the latter's every bidding. Indeed, while he was to point out factual and legal arguments tending to prove the defendant's innocence or mitigate his responsibility, the defender also bore a duty to the overall accurate administration of justice not to make false defenses for the defendant or to be prejudiced in the defendant's favor in the face of the clear correctness of the prosecution's case. In the latter situation, however, he could still argue various mitigating circumstances. When he became aware of criminal evidence the court did not have before it, his duty was to persuade the defendant to reveal it, though, as noted, he could not reveal it himself.⁸²

One further way in which some of the legal theorists of the 1956-57 period demonstrated their subscription to the presumption of innocence was in their promotion of the defendant's right to remain silent at any phase of the criminal process and their contention that the defendant's failure to speak in his defense was not to be regarded as grounds for finding him guilty. The defendant, the analysis went, had no duty either to provide the court with evidence by confessing or to defend himself, though the court could attempt to elicit a defendant's statement by confronting him with evidence against him and with his accusers.⁸³ Confessions, furthermore, were to be viewed with caution and were not to be used as the sole evidence in trial judgments.⁸⁴ Not only did the

⁸¹ HUANG YUAN, OUR COUNTRY'S PEOPLE'S LAWYERS SYSTEM 13 (1956).

⁸² See *id.* at 14; Wu Lei, *Study Regarding the Procedural Position of the Defender in our Country's Criminal Litigation*, 4 ZHENGFA YANJIU 45, 45-46 (1957); Zhou Hengyuan, *supra* note 71, at 54.

⁸³ Liu Qinglin, *supra* note 64, at 49; Qu Fu, *supra* note 64, at 24.

⁸⁴ Liu Qinglin, *supra* note 64, at 49-50; Ma Xiwu, *supra* note 78, at 6; see also a later

defendant have no duty to make a statement, but neither was he to be held legally responsible for his false statements or false accusations of others.⁸⁵ Once guilt had been determined, presumably on separate grounds, a defendant's failure to speak or his false statements could be considered in sentencing, in line with the importance in the sentencing process of the defendant's "attitude" and the policy of "leniency to those who confess, severity to those who resist."⁸⁶

As has already been suggested,⁸⁷ the extent to which the vision of criminal procedure of the commentators in the period from 1956 to mid-1957 was reflected in actual practice at that time is open to question, but is not likely to have been very great. It would not be accurate to paint a picture of China's criminal process in the mid-1950s based on the sketches of the authors in the legal journals of the day. The evidence available does suggest that one of the principles championed in the law journals, the right to defense at trial, was being applied, at least in certain "routine, non-political" trials that the Chinese press chose to report at the time⁸⁸ and that foreigners were permitted to attend.⁸⁹ The role of defense counsel seemed significant in these cases, though evidently restricted to the argument of mitigating circumstances.⁹⁰ More funda-

analysis, Zhang Zipei, *Several Problems Relating to the Use of Evidence to Determine the Facts of a Case in Criminal Litigation*, 4 ZHENGFA YANJIU 11, 13-15 (1962), trans. in J. COHEN, *supra* note 49, at 392-94.

⁸⁵ Liu Qinglin, *supra* note 64, at 49; Qu Fu, *supra* note 64, at 24-25. This view of the defendant's nonresponsibility for perjury is a characteristic of continental criminal procedure and is considered an aspect of the right to silence in those systems. See Pieck, *The Accused's Privilege Against Self-Incrimination In the Civil Law*, 11 AM. J. COMP. L. 585, 586 (1962).

⁸⁶ Qu Fu, *supra* note 64, at 25. The issue of the extent to which a defendant's "attitude," reflected in his confession or failure to confess, degree of repentance, and related factors, is to be taken into account in the trial process has been and remains an important issue in Chinese law. The basic view of legal commentaries in the People's Republic has always been that attitude is a factor to be considered in sentencing but cannot be a basis for the determination of guilt itself. For discussions of this point, see INSTITUTE OF CRIMINAL LAW RESEARCH, CENTRAL POLITICAL-JUDICIAL CADRES' SCHOOL, *LECTURES ON THE GENERAL PRINCIPLES OF CRIMINAL LAW IN THE PEOPLE'S REPUBLIC OF CHINA* (1957), trans. in JOINT PUBLICATIONS RESEARCH SERVICE (JPRS 13331) 188, 191-92 (1962); Cong Wenhui, *The Relationship Between Attitude Toward Admission of Guilt and the Measurement of Penalties*, Guangming Ribao, Apr. 28, 1980, at 3; Feng Shiming, *Regarding the Question of the Measurement of Penalties*, 4 ZHENGFA YANJIU 19, 21 (1957); Ning Hanlin, *Voluntary Surrender in the Criminal Law of the People's Republic of China*, 4 ZHENGFA YANJIU 10, 16-17 (1957); Shen Guansheng, *Is a Good or Bad "Attitude" Relevant To the Determination of Crimes and the Measurement of Penalties?*, Renmin Ribao, Apr. 21, 1980, at 5. On the traditional treatment of this issue, see D. BODDE & C. MORRIS, *supra* note 36, at 231-35; Rickett, *Voluntary Surrender and Confession in Chinese Law: The Problem of Continuity*, 30 J. ASIAN STUDIES 797 (1971).

⁸⁷ See text accompanying notes 57-62 *supra*.

⁸⁸ S. LENG, *supra* note 14, at 142.

⁸⁹ J. COHEN, *supra* note 49, at 449-53, 458-60.

⁹⁰ See notes 88-89 *supra*. A foreigner about to be tried for espionage in 1955 was, interestingly, told by his court-appointed counsel that he could plead guilty or not guilty. A. & A. RICKETT, *PRISONERS OF LIBERATION* 315 (1973).

mentally, however, it seems unlikely that the system of the "open trial" with defense counsel and other guarantees, following upon well-defined pretrial procedures, as conceived by the law journal discussions and presumably outlined in the draft procedure code being prepared at that time, was the norm of the day. Indeed, the legal commentaries were generally exhortatory in tone, criticizing what the writers saw as the failings in the then current practice and proposing their analysis as a conceptual framework for improvement.

In doing this, the law journals were in many respects reflecting a general political trend in the mid-1950s away from the war communism atmosphere of the first part of the decade with its resultant tendency toward summary justice and lack of procedural guidelines and restraints. At the Eighth Communist Party Congress in September 1956, Supreme Court President Dong Biwu noted the need to curb violations of rights such as the right of defense and generally to strengthen the procedural system.⁹¹ Other speeches by top leaders at the Congress reflected the atmosphere of relaxation of class struggle and the institution of a new order in which objectivity and legality were to replace political movements characterized by a disregard of form and regulation.⁹² Party Chairman Mao Zedong was calling for careful distinctions between revolution and counterrevolution,⁹³ between contradictions "among the people" and those "between the people and the enemy."⁹⁴ Even in counterrevolutionary cases, he was recommending that "no arrest [should be] made in those cases where it is marginal whether to make an arrest."⁹⁵ He was, furthermore, urging those who saw problems in the state of China's affairs to "bloom and contend," offering criticisms and suggestions. The political atmosphere, therefore, was conducive to and consistent with the analyses of criminal procedure that appeared during the period.

IV. CRITIQUES DURING THE ANTI-RIGHTIST AND GREAT LEAP FORWARD PERIODS: 1958-60

The open political atmosphere, however, did not last very long. By mid-1957, the Party had come to realize that the "blooming and con-

⁹¹ *Speech by Comrade Tung Pi-wu (Dong Biwu)*, in 2 EIGHTH NATIONAL CONGRESS OF THE COMMUNIST PARTY OF CHINA 79, 88-97 (English ed. 1956).

⁹² See, e.g., *Speech by Comrade Lo Jui-ching (Lo Ruiqing)* in *id.*, at 98; Liu Shao-chi (Liu Shaoqi), *The Political Report of the Central Committee of the Communist Party of China to the Eighth National Congress of the Party*, in 1 *id.*, at 13, especially 81-84.

⁹³ MAO TSETUNG (Mao Zedong), *On the Ten Major Relationships*, in V SELECTED WORKS OF MAO TSETUNG 284, 298-301 (English ed. 1977).

⁹⁴ See MAO TSETUNG (Mao Zedong), *On the Correct Handling of Contradictions Among the People*, in *id.*, at 384.

⁹⁵ MAO TSETUNG (Mao Zedong), *supra* note 93, at 298.

tending" was revealing much more fundamental dissatisfaction with the basic tenets of the regime than it had expected. As lawyers and other intellectuals began to make sharper and sharper criticisms, the leadership began to prepare for a renewed attack on "old," "bourgeois," "rightist" ideas that it saw as being propagated not just to rectify shortcomings in the socialist system but to threaten such basic premises as the leadership in all aspects of life, including law, of the Communist Party.

Public salvos against "bourgeois" legal theories began to be fired in late 1957. The presumption of innocence and its adherents were a prime target.⁹⁶ The *People's Daily* published harsh denunciations of "rightist" judicial officials who were accused of using the specious theories of "presumption of innocence" and "benefit to the defendant"⁹⁷ to help counterrevolutionaries and other criminals escape criminal responsibility.⁹⁸ For instance, these people were castigated for finding, regardless of reality, arguments such as the lack of criminal motive, intent, or harmful results, to treat criminals leniently,⁹⁹ for giving full credence to the defendant's "false" arguments and for not believing the results of investigation and prosecution.¹⁰⁰ These practices were said to have caused widespread harm to the "struggle against crime" that was the prime objective of the socialist legal system.¹⁰¹

⁹⁶ Another principle heavily criticized at this time was the continental concept of judicial decision-making that judges decide cases based on their "free evaluation of the evidence," or "inner conviction." See M. ESSAID, *LA PRESOMPTION D'INNOCENCE* §§ 472-90 (1971); J. LANGBEIN, *COMPARATIVE CRIMINAL PROCEDURE: GERMANY* 78-79 (1977). This principle was little discussed in the 1956-57 literature, though it was mentioned in passing in ways that indicated its acceptance by the commentators of that time. See, e.g., Wang Lisheng, *A Few Considerations on Criminal Confessions*, 3 *ZHENGFA YANJIU* 44, 47 (1956). The critiques during the anti-rightist period generally linked this concept with that of the presumption of innocence, the assumption apparently being that "rightist-minded" judges would use the excuse of inner conviction to find guilty people innocent. The theory was also linked to the concept of "judicial independence," also under attack as a refutation of Party leadership of judicial work. See Ro Quan & He Fang, *No Perversion of the Nature of the People's Courts is Allowed*, Renmin Ribao, Dec. 24, 1957, at 7; Tan Zhengwen, *Absorb the Lessons of Experience; Promote the Great Leap Forward In Procuratorial Work*, 3 *ZHENGFA YANJIU* 34, 39 (1958); Zhang Zipai, *Criticize the Bourgeois Principle of the Judge's Free Evaluation of Evidence*, 2 *ZHENGFA YANJIU* 42 (1958), partially trans. in J. COHEN, *supra* note 49, at 496. The role of the judge in the adversary model as passive weigher of evidence between the two sides was criticized as being equally as bourgeois and invalid as the inner conviction approach. Shen Qisi, *supra* note 79.

⁹⁷ *You li yu beigao lun*. This phrase was never actually used by the 1956-57 commentators, nor is it ever defined by their later critics. Often it seems to be used by the latter to encompass the presumption of innocence and other procedural rights, such as the right against self-incrimination, seen as being to the defendant's advantage. See Wu Lei, *Reject the "Doctrine of Benefit to the Defendant in Adjudication"*, 4 *ZHENGFA YANJIU* 59 (1958).

⁹⁸ *The Anti-Rightist Struggle In the High Court Achieves Great Victories*, Renmin Ribao, Dec. 12, 1957, at 4; Ro Quan & He Fang, *supra* note 96.

⁹⁹ *The Anti-Rightist Struggle*, *supra* note 98. See also Wu Lei, *supra* note 97, at 61-62.

¹⁰⁰ Ro Quan & He Fang, *supra* note 96.

¹⁰¹ See note 98 *supra*. Specific cases were cited of bourgeois doctrines of "benefit to the defendant" causing lenient treatment for real criminals. For example, a poor peasant who

The tone of these initial polemics set the stage for the rash of commentaries that appeared beginning in early 1958 in the law journals, many by the same authors whose earlier analyses favorable to the presumption of innocence have been discussed. The primary focus of the anti-rightist period literature on this topic was the question of delineation of the pretrial and trial functions in the criminal process. It was stated to be wrong to claim, as the earlier analyses had done, that the procuratorial investigatory function should be clearly separated from the function of the court. Of course, it was conceded, the prosecution and trial activities were carried out by different agencies. The court's role, however, was basically to "verify" or "confirm" the guilt of the defendant as established by the prosecutor.¹⁰² To illustrate that the court's role could not really be divorced from that of the prosecutor, it was pointed out that the court could substitute for the state prosecutor when he did not appear in court.¹⁰³ The series of pretrial procedures—arrest, investigation, prosecution, preliminary court hearing, and trial—were portrayed by one legal scholar as reflecting a series of progressively "deepening" determinations of the defendant's guilt.¹⁰⁴ Therefore, to "presume" or "consider"¹⁰⁵ the defendant innocent until final court

killed a woman with premeditation and sold the victim's property was sentenced to only five years because she was found to be poor and in need of money, because she confessed, and because the victim was a leper and so her death was not so harmful. Zhang Rudong, *Criticize the Old Law Viewpoints In Adjudication Practice and the Doctrine of Benefit to the Defendant: Discussion Based on Two Cases*, 4 ZHENGFA YANJIU 53, 54 (1958). As a demonstration of the ill effects of the presumption of innocence doctrine, which caused time to be wasted finding evidence favorable to the defendant and thus impeded the prompt struggle against crime, one report noted that in one province from May to August 1957, there were 261 cases of failure to arrest when there should have been arrest, of failure to sentence when there should have been sentencing, of grave crimes lightly punished, and of the long dragging out of cases without sentencing. Wu Lei & Wang Shunhua, *Refute the "Doctrine of the Presumption of Innocence,"* Guangming Ribao, Dec. 13, 1957, at 2.

¹⁰² Zhang Hui, Li Changchun & Zhang Zipei, *These Are Not the Basic Principles of Our Country's Criminal Procedure: Criticism of Qu Fu's "Brief Discussion of the Procedural Position of the Defendant in Criminal Litigation"* (see note 64 *supra*), 3 ZHENGFA YANJIU 76, 77-78 (1957); Zhang Zipei, *Reject the Bourgeoisie's Principle of the "Presumption of Innocence,"* 1 FAXUE 37, 39 (1958).

¹⁰³ Zhang Hui, Li Changchun & Zhang Zipei, *supra* note 102, at 78; see also Shen Qisi, *supra* note 79, at 32.

¹⁰⁴ Zhang Zipei, *supra* note 102, at 39.

¹⁰⁵ The apparent terminological confusion surrounding the term "presumption" of innocence that will be seen again in the context of the 1979-81 debates, section VII *infra*, and which has in the view of one analyst been present in the Soviet experience, see note 326 & accompanying text *infra*, seems primarily to have been fostered by the commentators of the anti-rightist period as a weapon in their attack. The writers of the 1956-57 period had always used the coined Chinese compound *tuiding* (to push the decision, presumption), or *jiading* (to suppose a decision, hypothesis) to express the "presumption." Zhang Zipei, *supra* note 102, and other writers, however, often used the word *renwei* (consider) to describe and ridicule the concept of the presumption of innocence, interchanging that word with *tuiding* and *jiading* in a way that seemed designed to make it appear that the proponents of the theory thought it was the same to "consider" someone innocent as to "presume" him innocent. See Zhang

judgment was to divorce oneself from reality. The only possible usefulness of such an approach could be to serve the interests of criminals, giving them a "legal weapon"¹⁰⁶ to impede the struggle of the dictatorship of the proletariat against its "enemies," who were at this time seen as making up the majority of criminal defendants.¹⁰⁷

In an Orwellian self-criticism of his previous article which adopted the presumption of innocence approach,¹⁰⁸ another commentator examined all the arguments that he had earlier made in favor of the principle—that it helped to ensure objectivity, safeguard against preconceptions, protect the defendant's rights, and related points. He had not realized at that time, he now explained, that China's criminal process was oriented toward what was of benefit to the dictatorship of the proletariat, not to criminals, and that the public security organs, procuracies, and courts were united in a struggle against the enemy under the close leadership of the Party.¹⁰⁹ He had not seen how "ridiculous" it was to argue that one could presume innocent a person who had been investigated, prosecuted, and sent for trial. Would it make sense, he asked rhetorically in illustration of his new-found understanding, to say that someone like Chiang Kaishek was innocent because he had not gone through the trial procedure? "Guilt is guilt," after all; "innocence is innocence."¹¹⁰

In support of their arguments against the presumption of innocence, the authors of this period cited statistics from earlier years showing the small percentage of arrests and prosecutions that were discovered to have been erroneous.¹¹¹ These figures were explained as a natural result of the careful determination of guilt at all stages of the process. If it became "obvious" at any point that there had been no

Zipei, *supra* note 102, at 39. One rightist legal scholar was directly accused of wanting to turn the "presumption" of innocence into a "consideration" of innocence. Huang Dao, *We Must Completely Criticize the Absurd Doctrine of the "Presumption of Innocence" (Preliminary Self-Criticism of "Brief Discussion of the Principle in Criminal Procedure of the Presumption of Innocence")* (see note 67 *supra*), 1 FAXUE 50, 51 (1958).

¹⁰⁶ Zhang Zipei, *supra* note 102, at 43.

¹⁰⁷ See Li Yuepo, *Isn't the "Doctrine of Benefit to the Defendant" an Old Law Point of View?*, 5 ZHENGFA YANJIU 80, 80 (1958).

¹⁰⁸ Huang Dao, *supra* note 67.

¹⁰⁹ Huang Dao, *supra* note 105, at 44 (*sic*). Another writer at this time described the three legal organs as forming "one fist" to fight the enemy. Zhang Wuyun, *Smash Permanent Rules, Go 1000 Li in One Day*, 5 ZHENGFA YANJIU 58, 60 (1958).

¹¹⁰ Huang Dao, *supra* note 105, at 51-52.

¹¹¹ In Beijing (Peking) for the year 1955 and the first half of 1956, 98.71% of counterrevolutionary criminals arrested were ultimately proved guilty, and 1.29% were found to have been innocent and wrongly arrested. Zhang Zipei, *supra* note 102, at 40. Another source quoting only 1955 figures said that only 0.72% of arrests were discovered to have been wrong in the end. Wu Yusu, *Criticize the Bourgeois Principle of the "Presumption of Innocence,"* 2 ZHENGFA YANJIU 37, 38 (1958). See note 319 *infra*.

crime or that the defendant was not the culprit, the case would be ended.¹¹² If the matter was not clear, further investigation would have to be carried out to dispel the doubt; it was no solution to decide on a "more or less" basis, in a manner advantageous to the defendant.¹¹³ The error of those who advocated the presumption of innocence was that they started out with a preoccupation with that small percentage of cases that might be wrongly handled, cases that the procuracy could always rectify later, and thereby "bound the hands and feet" of investigatory and adjudicatory personnel and gave criminals a way out.¹¹⁴

Despite the implications of this analysis, the "anti-rightist" commentators were careful to point out that they were not advocating a presumption of guilt.¹¹⁵ Indeed, what they claimed to be attacking was all "presumptions," since the very concept of a presumption was viewed as antithetical to the Party's "materialist" spirit of "seeking truth from facts," and "taking facts as the basis and the law as the yardstick." Not only did the presumption of innocence not add anything useful to these guidelines, it detracted from them by injecting "idealistic" notions into the criminal process.¹¹⁶

Consistent with the approach of these writers was their view of the right to defense and the role of the defender. The prosecutor and the defendant, first of all, were not seen as equal parties at trial. The prosecutor was the tool of the dictatorship of the proletariat; the defendant was the object of that dictatorship.¹¹⁷ The commentaries upheld the "right to defense" but they portrayed its key purpose as enabling the dictatorship to "attack the enemy even more forcefully," not to help "bad people" go free.¹¹⁸ The theory that defense lawyers had no duty to and indeed should not expose defendants' criminal conduct to the court was refuted on the ground that the lawyer, like the prosecution and the court, was to act in the interests of the people in the fight against crime.¹¹⁹ The earlier exponent of the view now under attack engaged in a self-criticism, recognizing the folly of depicting the defense counsel as the defendant's "most trusted" person, since a criminal could only trust

¹¹² Zhang Zipei, *supra* note 102, at 44.

¹¹³ Huang Dao, *supra* note 105, at 53; see also Zhang Zipei, *supra* note 102, at 42.

¹¹⁴ Zhang Zipei, *supra* note 102, at 40.

¹¹⁵ See, e.g., *id.* at 39.

¹¹⁶ "Idealism" is used in a Marxist sense as the opposite of "materialism." See, e.g., Li Baomin, *The "Presumption of Innocence" Should Not Be a Principle of Our Country's Criminal Procedure*, 1 FAXUE 45, 45-46 (1958); Zhang Hui, Li Changchun & Zhang Zipei, *supra* note 102, at 80; Zhang Zipei, *supra* note 102, at 42, 43.

¹¹⁷ Wu Lei, *supra* note 97, at 61.

¹¹⁸ Su Yi, *Should the Defender Attack Crime or Protect Crime: A Criticism of Comrade Wu Lei's Mistaken Viewpoint Regarding the Defender's Procedural Role*, 2 ZHENGFA YANJIU 76, 76 (1958), trans. in J. COHEN, *supra* note 49, at 468-69.

¹¹⁹ Su Yi, *supra* note 118, at 77, trans. in J. COHEN, *supra* note 49, at 470.

someone who helped him escape criminal responsibility. The defender, of course, should do no such thing and should reveal previously undiscovered criminal evidence if the defendant refused to confess it himself.¹²⁰

To complete the circle, the discussions of 1958-60 cast aspersions on the right of the defendant in criminal proceedings to remain silent. One analyst quarreled with the idea that this was a "right," though he seemed basically in accord with the earlier view that the failure to make a statement was only to be considered as a factor in sentencing and not relevant in the determination of guilt.¹²¹ Another author, however, made the self-contradictory argument that, while the defendant could not be made to shoulder the burden of raising evidence to prove his own innocence, he should have the duty to rebut the prosecution's evidence with counterevidence in defense. The defendant's silence in the face of "irrefutable" prosecution evidence would indicate that he could not refute it and could be taken as a "tacit admission" of guilt. The author added the refusal to speak should be taken into account in the determination of sentence.¹²²

The authors of these commentaries in 1958 and thereafter were the first to recognize what has become evident in the preceding discussion, that they were treating questions of criminal procedure not as legal, "academic" questions, but as issues of "political standpoint."¹²³ The dichotomy was made clear: those who supported the presumption of innocence took the standpoint of the counterrevolutionaries and other class enemies; those who opposed it stood on the side of the Party, the people, and the dictatorship of the proletariat. Much of the space in the law journal articles at this time was devoted to attempting to show why the presumption of innocence, while a "progressive" concept as developed by the bourgeoisie during the feudal era to combat the presumption of guilt that then prevailed, became an utterly specious phrase used to mask the real presumption of guilt employed against the working people when the bourgeoisie became the ruling class.¹²⁴ Once the proletariat took power, the analysis went, it had no need of that empty bour-

¹²⁰ Wu Lei, *Self-Criticism of the Article "Study Regarding the Procedural Position of the Defender in Our Country's Criminal Litigation"* (see note 82 *supra*), 2 ZHENGFA YANJIU 78, 79, 81 (1958).

¹²¹ Wu Yusu, *supra* note 111, at 40; see text accompanying note 86 *supra*.

¹²² Zhang Zipei, *supra* note 102, at 43.

¹²³ *Id.* at 38-39; *East China Political-Legal Institute Carries on Academic Discussion Meeting; Refute the Doctrine of the Presumption of Innocence*, 1 FAXUE 48, 49 (1958).

¹²⁴ See Li Baomin, *supra* note 116, at 45; Zhang Zipei, *supra* note 102, at 37. An example frequently cited of the bourgeoisie's presumption of guilt was a provision of the French Criminal Code providing that someone without a fixed residence who was found with goods worth 100 francs or more and who could not explain their provenance was criminally punishable. See, e.g., Zhang Zipei, *supra* note 102, at 37-38.

geois concept. Those who continued to support the presumption could only have politically suspect motives for doing so.

If the discussions of the presumption of innocence and related criminal procedure questions in the 1956-57 period were more a statement of aspirations than a description of reality, the general approach of the commentators of the anti-rightist era seemed to be reflected in large part in the actual criminal process at that time. The "great leap forward" of 1958-61, in which the policy was to implement industrialization and communization at breakneck speed, had its ramifications in the legal arena. While the formal courtroom trial with defense lawyer and collegial panel did apparently continue to occur at least in some cases,¹²⁵ an increasingly popular model in the late 1950s was apparently the "on-the-spot" method of handling cases, characterized by close cooperation and coordination among the officials of the public security organs, procuracies, and courts.¹²⁶ "Work groups" consisting of representatives of all three legal branches would go to the scene of crimes and arrest, investigate, and adjudicate, often in an educational "mass" setting, in extremely short periods of time.¹²⁷ This approach was seen as a much more efficient and effective way to fight counterrevolution and other crime than a criminal procedure system based on formal rules. Only by "smashing permanent rules" and by "having the courage to innovate" with the system of "cooperation" among all legal branches, it was said, could the work of handling cases "leap forward."¹²⁸

Procedural constructs such as the presumption of innocence would not seem to have had any place in the great leap forward scenario. Nevertheless, one local judge, in describing his approach to on-the-spot work, did stress the importance of avoiding both judgments that "unjustifiably acquit criminals" and those that "erroneously convict innocent persons." In order to ensure that such errors would not occur, he prescribed the following guidelines: "do not make a judgment if the facts are not clear; do not make a judgment if the evidence is not sufficient;

¹²⁵ See J. COHEN, *supra* note 49, at 453-58 for an account of a 1959 trial witnessed by a Japanese delegation.

¹²⁶ See Li Lin, *A Few Realizations In the Great Leap Forward In Judicial Work*, 5 ZHENGFA YANJIU 42 (1958); Liu Xiufeng & Huang Shishan, *Penetrate Deeply Into the Masses, Rely on the Masses, Take the Mass Line in Handling Cases*, 5 ZHENGFA YANJIU 47 (1958); Zhang Wuyun, *supra* note 109, partially *trans.* in J. COHEN, *supra* note 49, at 474-76.

¹²⁷ One on-the-spot work group investigated, prosecuted, and adjudicated 73 cases in twelve days. Zhang Wuyun, *supra* note 109, at 59, *trans.* in J. COHEN, *supra* note 49, at 476. In an experiment in Canton, coordination among the three legal organs and elimination of "unnecessary procedures and steps" reduced total work time from arrest to judgment to as little as just under thirty hours. *Canton's Political-Legal Departments Experiment With Cooperation in Case Handling*, Nanfang Ribao (Southern Daily), Mar. 30, 1958, at 3, *trans.* in J. COHEN, *supra* note 49, at 479-80.

¹²⁸ Zhang Wuyun, *supra* note 109, at 59, *trans.* in J. COHEN, *supra* note 49, at 476.

do not make a judgment if the nature of the case is still vague; and do not make a judgment if the policy is unclear.”¹²⁹ While this advice may not reflect a presumption of innocence at least it discouraged the opposite presumption. The extent to which this advice was followed in the heated political atmosphere of the anti-rightist period, when legal organs were under great pressure to uncover their share of class enemies or be considered ideologically lax,¹³⁰ and during the frenzied campaigns of the great leap forward, is of course hard to determine.

Indeed, after about 1960, the state, both practical and theoretical, of China's criminal procedure, becomes increasingly difficult to study. The sole remaining law journal had ceased by that time to publish material on criminal procedural issues, except for occasional critiques of bourgeois systems. The beginning of the Cultural Revolution in 1966 saw the one law journal cease publication altogether. Another thirteen years were to pass before legal journals resumed. Then, in the context of a revived legal order in which laws, including a criminal procedure code, were being prepared, discussion began of the presumption of innocence and other questions of criminal procedure that had for so long been “forbidden zones.”¹³¹

V. THE RESUMPTION OF DISCUSSIONS: 1979

A highly favorable analysis of the presumption of innocence appeared on February 17, 1979, in the official *People's Daily*,¹³² indicating that there were at least some in the leadership who believed it beneficial to consider “rehabilitating” this politically tainted doctrine. This short newspaper article contained a more concise and lucid analysis of the presumption of innocence than any of the law review commentaries of the 1956-57 period. The article reiterated the understanding of the authors of that earlier era that public security and procuratorial activities should not be taken as determinative of guilt and that only the trial judgment should resolve that question. The *People's Daily* analyst made explicit what the earlier writers had only implied in their general approach, that a major function of the presumption of innocence was to provide a solution for cases that, because of insufficient evidence, could not be resolved one way or the other. Refuting the anti-rightist period claim, still being made, that the notion of “seeking truth from facts” was a sounder theory than the presumption of innocence and indeed obvi-

¹²⁹ Li Zejun, *Realizations From My Adjudication Work*, 1 ZHENGFA YANJIU 48, 51 (1959), trans. in J. COHEN, *supra* note 49, at 463.

¹³⁰ Compare J. COHEN, *supra* note 49, at 261-64.

¹³¹ Tian Cai, *A Question Worth Investigating*, Renmin Ribao, Feb. 17, 1979, at 3, trans. in FBIS-CHI, Mar. 7, 1979, at E7.

¹³² *Id.*

ated the need for the presumption,¹³³ the writer observed that it was precisely in those unclear cases where there were insufficient facts from which to seek truth that an *in dubio pro reo*¹³⁴ function of the presumption of innocence must come into play. One could not, he noted, hold defendants indefinitely while prolonging the investigation, as Chinese legal sources now admit had been a common practice both before and during the Cultural Revolution.¹³⁵ One presumption or another was needed to resolve unclear cases after a certain, unspecified, amount of time had elapsed. Clearly, the article concluded, the presumption of innocence was preferable to the presumption of guilt in these circumstances and better embodied the spirit of seeking truth from facts.¹³⁶

The first law review article on the subject, appearing soon after the *People's Daily* discussion, was in utter contrast to the latter, indicating that a wide divergency of views existed on issues of criminal procedure as the draft procedure code underwent revision and discussion. Echoing the anti-rightist period approach to the presumption of innocence, two

¹³³ See text accompanying notes 9-11 *supra*; text following note 138 *infra*.

¹³⁴ In the continental systems of France and Germany this maxim is closely linked with the presumption of innocence. The two doctrines are described by one French jurist as corollaries of each other, together giving the court guidance in coming to its inner conviction. Patarin, *Le Particularisme de la théorie des preuves en Droit Pénal*, in *QUELQUES ASPECTS DE L'AUTONOMIE DE DROIT PENAL* 38-39 (G. Stefani ed. 1956); see also M. ESSAID, *supra* note 96, §§ 491-506; Fletcher, *Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases*, 77 *YALE L. J.* 880, 880 n.3 (1968).

The *People's Daily* article discussed in the text seemed to be stressing the use of the *in dubio pro reo* approach for pretrial proceedings. In other systems, the concept is usually discussed primarily in connection with the trial, but at least in principle appears to be accepted as relevant to earlier stages as well.

In the common law, the presumption of innocence has been identified not with *in dubio pro reo* so much as with the distinct, though related, concept of the prosecutor's burden of proof beyond a reasonable doubt that began to develop in the mid-nineteenth century. *Patterson v. State*, 21 Ala. 571 (1852); *State v. Tibbetts*, 35 Maine 81 (1852); 1 P. TAYLOR, *TREATISE ON THE LAW OF EVIDENCE* 133 (1887).

¹³⁵ Cases of accused being held for three, five, eight or ten years were not rare before and during the Gang of Four era, according to one account. In one case, still unresolved as of 1979, an accused had been held for eighteen years; there was insufficient evidence to hold a trial, but there remained suspicion. Lan Quanpu, *The Principle of the Presumption of Innocence is Beneficial to the Correct Implementation of the Criminal Procedure Law*, 4 *MINZHU YU FAZHI* 15, 16 (1979). See also Legal Research Institute, *supra* note 15.

¹³⁶ The author advocated in closing that the presumption of innocence—or “at least. . .its spirit”—be considered for inclusion in the Criminal Procedure Law then under preparation. In this and in his general *in dubio pro reo* approach, the *People's Daily* commentator was resoundingly seconded by one of the underground publications appearing in Peking at that time. Only by releasing people against whom sufficient evidence could not be obtained, an article in the *April Fifth Forum* proclaimed, was it “possible to insure that the broad masses of innocent people will not suffer injustice.” Hong An, *The Principle of the “Assumption (Presumption) of Innocence” Must Be Implemented*, 6 *SIWU LUNTAN* (APRIL FIFTH FORUM) 4 (1979), *trans. in THE FIFTH MODERNIZATION: CHINA'S HUMAN RIGHTS MOVEMENT 1978-1979* 105 (J. Seymour ed. 1980).

commentators in *Legal Research*¹³⁷ described the doctrine as having a "bourgeois class character," being "metaphysical," "idealistic," and "unscientific."¹³⁸ "Seeking truth from facts" was stated to be a sufficient basis for the accuracy of China's criminal procedure. Like the 1958 analysts, the authors maintained that there should not be a stultifying concern for erroneous decisions, since these would be rectified in line with the policy of "if there are errors, they must be corrected."¹³⁹

Responding to this position, the next commentary on the subject agreed that the presumption of innocence was a principle of bourgeois origin, of little value in contemporary bourgeois society, but contended that that was no reason for the developing socialist legal system to reject it without analysis.¹⁴⁰ The principle, properly understood as a suspension of judgment until guilt had been proved by evidence and a judgment rendered at trial, was a "scientific" one that could with great benefit inform the socialist legal system. Experience had shown, the authors contended, that failure to adopt the presumption of innocence as a "guiding thought" at all stages of criminal procedure had led to the opposite presumption and to the view that the trial was a formality. Under this view, anyone arrested was considered a criminal and could be treated like a criminal—made, for instance, to perform uncompensated forced labor while awaiting trial.¹⁴¹ The authors felt that the court, on the contrary, should not be "only a place for sentencing" but should be the place where the "judgment of right and wrong," *i.e.*, of guilt or innocence, was actually rendered.¹⁴²

A juxtaposition of diametrically opposite views on the presumption

¹³⁷ Wang Zhaosheng & Wei Ruoping, *View on the Principle of the "Presumption of Innocence"*, 2 FAXUE YANJIU 47 (1979). *Faxue Yanjiu*, published by the Legal Research Institute of the Chinese Academy of Social Sciences, began formal publication in 1979 and is the successor to *Zhengfa Yanjiu*, *Political-Legal Research*, see note 63 *supra*.

¹³⁸ Wang Zhaosheng & Wei Ruoping, *supra* note 137, at 47. The familiar points about the speciousness of the presumption in the bourgeois countries were reviewed, complete with the French vagrant provision. See note 124 & accompanying text *supra*.

¹³⁹ Wang Zhaosheng & Wei Ruoping, *supra* note 137, at 48. Recall text accompanying note 114 *supra*.

¹⁴⁰ Zhao Hong & Dou Jixiang, *Understanding of the Principle of the "Presumption of Innocence"*, 3 FAXUE YANJIU 47, 47 (1979).

¹⁴¹ Though information is scanty, it appears that at least in some cases in the past, prisoners in China in detention before formal sentencing have been made to perform labor. See BAO RUO-WANG (J. PASQUALINI) & R. CHELMINSKI, PRISONER OF MAO 83-101 (1973); A. & A. RICKETT, *supra* note 90, at 272-86. "Reform through labor" is, technically, a criminal punishment that should only apply after a judgment of guilt and sentencing. ACT OF THE PEOPLE'S REPUBLIC OF CHINA FOR REFORM THROUGH LABOR (passed at the 222d Meeting of the Government Administration Council, Aug. 26, 1954, promulgated by the Government Administration Council, Sept. 7, 1954), art. 17, 1954 FALING HUIBIAN (COMPENDIUM OF LAWS AND DECREES 350 [hereinafter cited as FLHB]), *trans.* in FUNDAMENTAL LEGAL DOCUMENTS, *supra* note 57, at 240.

¹⁴² Zhao Hong & Dou Jixiang, *supra* note 140, at 48.

of innocence was thus found in the months before the release of the Chinese CP. In the background of the debate was a juridico-political debate on the question of the "inheritability of law." The issue was whether all "old," "bourgeois" laws and legal concepts had necessarily to be rejected out of hand by a socialist legal system, or whether bourgeois law could be selectively adopted and adapted to meet the needs of the socialist system.¹⁴³ This question had been discussed in the open period of 1956 and early 1957,¹⁴⁴ before the anti-rightist movement at least temporarily decided the issue. In 1979, as in the 1950s, differing positions on the "inheritability" issue informed the debates on many specific legal questions such as the presumption of innocence.

VI. THE PLACE OF THE PRESUMPTION OF INNOCENCE IN THE
CRIMINAL PROCEDURE CODE OF 1979: ANALYSIS WITH
COMPARATIVE REFERENCES TO THE SOVIET,
WEST EUROPEAN, AND REPUBLIC OF
CHINA CODES OF CRIMINAL PROCEDURE

The debates on the presumption of innocence have continued in the past two years to occupy space in China's several new law journals. Before examining the arguments made in late 1979 and thereafter, an analysis should be undertaken of relevant aspects of the Chinese CP passed July 1, 1979, which forms the backdrop for those arguments. Some comparison of the Chinese CP with other continental-model legislation, especially that of the Soviet Union, will be useful in addressing the key issue regarding the Chinese CP that concerns us—what type of framework does it provide for the operation of a presumption of innocence?

The introductory section of the Chinese CP, setting forth basic principles, does not contain any provision that clearly reflects the presumption of innocence, though in no place can it be said to negate or deny the presumption. The Soviet Union's Basic Principles of Criminal Procedure¹⁴⁵ provide that "[n]o one may be held guilty of a crime and

¹⁴³ See Li Changdao, *Old Law Cannot Be Critically Inherited But May Only Be Used For Reference*, 3 FAXUE YANJIU 45 (1979); Lin Rongnian, *Brief Discussion on the Inheritability of Law*, 1 FAXUE YANJIU 13 (1979).

¹⁴⁴ For a discussion and sources, see F. Chiang, *Chinese Communist Attitude (sic) Toward the Inheritability of Old Law* (1978) (unpublished LL.M. Paper, Harvard Law School).

¹⁴⁵ BASIC PRINCIPLES OF THE CRIMINAL PROCEDURE OF THE USSR AND THE UNION REPUBLICS (1958), trans. in 3 LAW IN EASTERN EUROPE 113 (Z. Smirniak ed. 1959) [hereinafter "BASIC PRINCIPLES" in the text and notes; page citations are to the translation cited *supra*]. The Basic Principles are applicable throughout the USSR. The Criminal Procedure Code of 1960 of the Russian Soviet Federated Socialist Republic (RSFSR) (the largest of the union republics of the USSR), as amended [hereinafter "RUSSIAN CCP" in the text and notes], will be cited as well as the Basic Principles in discussing Soviet procedure. Page citations are to H. BERMAN & J. SPINDLER, *THE SOVIET CODES OF LAW* 158 (W. Simon ed.

undergo criminal punishment except by judgment of the court,"¹⁴⁶ a principle that has been described by some Soviet jurists as a basis for the presumption of innocence in Soviet law.¹⁴⁷ The Chinese CP makes a statement that appears to have little other than jurisdictional significance: "The people's courts are responsible for adjudication. No other organ, organization or individual has the right to exercise these powers."¹⁴⁸ The principle of taking "facts as their basis, and. . . law as their yardstick" is prescribed for the courts, procuracies and public security organs.¹⁴⁹ Absent are any provisions comparable to the Soviet statements that all criminal procedure organs shall ensure the exposition of the "circumstances implicating or exonerating the accused, as well as the circumstances aggravating or mitigating his guilt," and that at none of the stages of the criminal process may the burden of proof be shifted to the accused.¹⁵⁰

From the start, the Chinese CP contains language which appears to contradict a presumption of innocence. In the provisions on jurisdiction, for instance, the phrase place of "the crime," rather than "alleged" crime, is used.¹⁵¹ Probably no great significance should be attributed to these particular points of drafting, since other codes are characterized by similar language¹⁵² and, it might be recalled, the sixth amendment to the United States Constitution gives "the accused" the right to trial by a jury of "the State and district wherein the crime shall have been committed."¹⁵³

In another, more important context, however, the Chinese CP adopts terminology that could be seen to belie a presumption of innocence. In the provisions on arrest and detention, reference is made alternately to "defendants"¹⁵⁴ and "offenders,"¹⁵⁵ leaving the impression

1980). In cases where the Russian CCP contains an identical provision to the Basic Principles, the Russian CCP provision will be cited in the notes after the Basic Principles provision; the translation quoted will in such cases be that of the Basic Principles provision in the translation cited *supra*.

¹⁴⁶ BASIC PRINCIPLES, art. 7, at 117; RUSSIAN CCP, art. 13, at 166.

¹⁴⁷ See Petrukhin, *The Presumption of Innocence—A Constitutional Principle in Soviet Criminal Law*, trans. in Current Digest of the Soviet Press [hereinafter cited as CDSP], Mar. 28, 1979, at 14. See also Osakwe, *Due Process of Law Under Contemporary Soviet Criminal Procedure*, 50 TULANE L. REV. 266, 316 n.217 (1976).

¹⁴⁸ CHINESE CP, art. 3.

¹⁴⁹ *Id.*, art. 4.

¹⁵⁰ BASIC PRINCIPLES, art. 14, at 119; RUSSIAN CCP, art. 20, at 167-68. See note 257 & accompanying text *infra*.

¹⁵¹ CHINESE CP, arts. 19, 20.

¹⁵² See, e.g., RUSSIAN CCP, arts. 41, 42, at 174.

¹⁵³ U.S. CONST. amend. VI.

¹⁵⁴ *Beigao*. CHINESE CP, art. 38.

¹⁵⁵ *Renfan*. CHINESE CP, art. 39.

that the drafters considered these terms to be interchangeable.¹⁵⁶ Furthermore, the primary standard for arrest of an "offender" is that "the principal facts of [his] *crime* have already been clarified."¹⁵⁷ Commentaries on this provision¹⁵⁸ explain that it requires that sufficient investigation have been done of the "principal" criminal facts to uncover "complete, irrefutable" evidence of the crime.¹⁵⁹ In the absence of such evidence, the procuracy, before rendering a decision to approve arrest, must require supplementary police investigation.¹⁶⁰

By contrast, the Russian CCP¹⁶¹ establishes a clear demarcation, followed consistently in the Code, between the "person suspected of . . . a crime,"¹⁶² who remains in that posture until formally accused, and the "accused."¹⁶³ For the decision by the investigatory authority to "prosecute" a person as "the accused," the standard is that "there exists sufficient evidence to provide a basis for presenting an accusation of the commission of a crime."¹⁶⁴ Under the Russian CCP the decision to ap-

¹⁵⁶ One Chinese analysis appears to support the theory that in fact the Chinese legal system may consider "offender," *renfan*, as synonymous with "defendant," *beigao*, CHINESE CP, arts. 38, 39 despite the use of the character *fan*, meaning offense or crime, in the term. The analysis points out that it is necessary to distinguish between a *renfan*, who is undergoing the preliminary stages of the criminal process, and a *zuifan*, criminal, who has been tried and found guilty. Xie Lin, *Offenders and Criminals*, *Zhongguo Fazhi Bao* (China Legal System Weekly), Jan. 23, 1981, at 3. Another commentary seems consistent in saying that a *beigao* is not to be treated as a *zuifan*. Liu Wenhua, *'Defendants' Are Not the Same as 'Criminals'*, 8 MINZHU YU FAZHI 34 (1980).

¹⁵⁷ CHINESE CP, art. 40 (emphasis added).

¹⁵⁸ In what follows, reference will be made to three commentaries on the Criminal Procedure Law. CRIMINAL PROCEDURE TEACHING SECTION, BEIJING POLITICAL-LEGAL INSTITUTE, LECTURES ON THE CRIMINAL PROCEDURE LAW OF THE PEOPLE'S REPUBLIC OF CHINA (1979) [hereinafter cited as LECTURES]; CRIMINAL PROCEDURE TEACHING GROUP, LAW FACULTY OF CHINA PEOPLE'S UNIVERSITY, BASIC KNOWLEDGE ABOUT THE CRIMINAL PROCEDURE LAW OF THE PEOPLE'S REPUBLIC OF CHINA (1980) [hereinafter cited as BASIC KNOWLEDGE]; WANG SHUNHUA, XU YICHU, ZHANG ZHONGLIN, XIAO XIANFU & CHUAN KUANZHI, ANNOTATION OF THE CRIMINAL PROCEDURE LAW OF THE PEOPLE'S REPUBLIC OF CHINA (1980) [hereinafter cited as ANNOTATION]. These commentaries should not be taken as official; they are simply widely available books by leading legal scholars and educators intended to elucidate the law of criminal procedure for lay people and legal professionals alike. In general they are consistent with each other, though wording and emphasis may vary on certain points. There is no basis for assuming that, insofar as these commentaries expand upon the Chinese CP itself, they have the force of law.

¹⁵⁹ LECTURES, *supra* note 158, at 59; ANNOTATION, *supra* note 158, at 45.

¹⁶⁰ CHINESE CP, art. 47; *see* ANNOTATION, *supra* note 158, at 53.

¹⁶¹ *See* note 145 *supra*.

¹⁶² RUSSIAN CCP, art. 90, at 190.

¹⁶³ *Id.*, art. 46, at 175-76.

¹⁶⁴ *Id.*, art. 143, at 213. This accusation process, not present in the Chinese system, appears to take place at some point after the case is "initiated," before the initial interrogation of the defendant. For a case to be initiated, upon a report, voluntary surrender, direct discovery by the authorities, and so forth, there must exist "sufficient data indicating the indicia of a crime." *Id.*, art. 108, at 197. The CHINESE CP, art. 61, has a similar standard for "initiating" a case.

ply a measure of restraint, including arrest,¹⁶⁵ is based upon the danger of escape and other factors of this nature.¹⁶⁶ There is no reference to "evidence of the crime" at this stage. The Code of the Republic of China ("ROC Code")¹⁶⁷ provides for detention when an "accused" is "strongly suspected of having committed an offense."¹⁶⁸

An issue of major relevance to our concern is presented by the Chinese CP's provisions regarding the pretrial right to defense. The right to defense by outside counsel, as opposed to defense pro se, during the interrogations at the investigatory phase of the procedure, is never explicitly denied in the Chinese CP, but its denial may be gleaned from a series of provisions.¹⁶⁹ Defense counsel apparently may not become involved in a case until after the prosecution has decided to prosecute and the preliminary court hearing¹⁷⁰ has ended in a decision to hold a full trial of the case.¹⁷¹ After that point, the lawyer "may consult the materials of the case at bar and acquaint himself with the circumstances of the case [and] meet and correspond with the defendant in custody."¹⁷² The Soviet legislation gives the lawyer the right to become involved at a significantly earlier stage—in most cases, at the time the preliminary investigation is completed but before the decision to prosecute has been rendered.¹⁷³ It also seems to allow counsel a more significant role after

¹⁶⁵ Referred to in the Russian CCP as "confinement under guard." See RUSSIAN CCP, art. 96, at 191-92.

¹⁶⁶ See RUSSIAN CCP, arts. 89, at 190; 96, at 191-92.

¹⁶⁷ CODE OF CRIMINAL PROCEDURE OF THE REPUBLIC OF CHINA (promulgated by the National Government, Jan. 1, 1935), as amended, LATEST COMPLETE BOOK OF THE SIX LAWS 337 (Zhang Zhiben ed. 1975) [hereinafter in text and notes "ROC Code"]. Page citations are to translation in 2 A COMPILATION OF THE LAWS OF THE REPUBLIC OF CHINA 331 (1967).

¹⁶⁸ ROC CODE, art. 76, at 353.

¹⁶⁹ CHINESE CP, arts. 26-30; arts. 62-66; see also note 171 & accompanying text *infra*.

¹⁷⁰ See text accompanying notes 201-06 *infra*.

¹⁷¹ CHINESE CP, art. 110, para. 2.

¹⁷² *Id.* art. 29. A set of rules published in May 1981 by the Supreme People's Court, the Supreme People's Procurate, the Ministry of Public Security, and the Ministry of Justice spells out the rights of the lawyer under article 29 and provides rules for their implementation. For instance, it is stipulated that a lawyer may take notes on the case file. See report in FBIS-CHI, May 15, 1981, at K23.

¹⁷³ BASIC PRINCIPLES, art. 22, as revised in 1972, provides that defense counsel "shall be permitted to participate in a case from the moment the accused is informed of the completion of the preliminary investigation and is presented with all the proceedings of the case to become acquainted with them." By decree of the procurator, defense counsel may be permitted to participate in the case from the moment the accusation is presented, thus giving him a role during the preliminary investigation. In addition, participation of defense counsel during the preliminary investigation is obligatory in cases involving minors, deaf, dumb, or blind defendants or defendants whose handicaps otherwise prevent them from exercising their right to defense. H. BERMAN, SOVIET CRIMINAL LAW AND PROCEDURE 218 (1972). See also RUSSIAN CCP, arts. 47, at 176, 49 at 177; 211(2)(j), at 238. The provisions for permissive or obligatory participation of counsel during the preliminary investigation represent a compromise position on the issue of expanding the right to counsel at the pretrial stage, an issue that has been hotly

his entry than the Chinese CP affords him.¹⁷⁴ The ROC Code allows the accused to employ an advocate at any time after initiation of prosecution, and provides that the advocate may examine and copy the record and, generally, interview and correspond with the accused in detention.¹⁷⁵ The major Western European systems generally allow counsel to participate from at least as early a point as interrogation during the preliminary investigation.¹⁷⁶

The Chinese CP provides that the preliminary investigation phase commences with interrogation of the defendant and also includes questioning of witnesses, search, and other investigatory activities.¹⁷⁷ In in-

debated in Soviet legal circles. See H. BERMAN, *supra*, at 53, 54, 85; see also Alexeyev, *We Discuss Problems of Soviet Law: On the Participation of the Defense in the Preliminary Investigation*, trans. in CDSP, July 16, 1958, at 16; Shafir, *Right to Defense in Soviet Criminal Procedure and Possibilities of Its Enlargement*, trans. in THE SOVIET LEGAL SYSTEM 103 (J. Hazard, I. Shapiro & P. Maggs eds. 1969 ed.). The Yugoslav Criminal Procedure Code was amended to give counsel full rights to participate from the preliminary investigation stage. Damaska, *Comparative Reflections On Reading the Amended Yugoslav Code: Interrogation of Defendants in Yugoslav Criminal Procedure*, 61 J. CRIM. L. C. & P.S. 168, 175 (1970).

¹⁷⁴ In addition to consulting with the accused and examining the materials of the case, the defense counsel may submit evidence and petition for supplementary investigation. He may submit petitions to the procurator who decides on prosecution and to the preliminary court hearing that decides whether to bring the case for trial, and may also appeal from measures and decisions of the investigator and procurator. He may demand the recusal of investigators or procurators. BASIC PRINCIPLES, art. 23, at 125; RUSSIAN CCP, arts. 51, at 178; 63, 64 at 182; 202, 204, at 234-35; 223, at 243.

¹⁷⁵ ROC Code, arts. 27 para. 1, at 340-41; 33, 34, at 342. The issue of expanding the pretrial participation of counsel is currently being debated in Taiwan as part of discussions of revision of the Criminal Procedure Code. Author's conversation with member of Taiwan (Republic of China) Bar (March 1981).

¹⁷⁶ France, CODE DE PROCÉDURE PÉNALE, art. 114, at 119 [hereinafter cited as C. PR. PEN.] (page citations to Petits Codes Dalloz (21st ed. 1979-80)). The cited article permits counsel to participate beginning at the second interrogation session of the pretrial investigation conducted by the investigating judge, or *juge d'instruction*. At the first such session, the accused is informed of his right to choose counsel, and is informed of his right to silence. For a discussion of the development of the pretrial role of counsel in France, see M. ESSAID, *supra* note 96, §§ 384-411. The possibility exists in the French system that the *juge d'instruction* will elect to question the defendant as a witness, in which event the defendant has no right to counsel. The judge may not do this "with a view to causing the right of defense to fail" ("*dans le dessein de faire échec aux droits de la défense*") in the case of defendants against whom there exist grave and consistent indications of guilt ("*des indices graves et concordants de culpabilité*"). C. PR. PEN., art. 105, at 116.

In the West German system, counsel may be present from an earlier stage than in the French, namely from the time of initial police detention and investigation. See GERMAN CODE OF CRIMINAL PROCEDURE, arts. 93ff. at 216ff. [hereinafter cited as STPO] (page citations to T. Kleinknecht ed. 1977). On the development and expansion of counsel's pretrial role in West Germany, see Ackermann, *Garanties de la Défense Pendant la Procédure Préliminaire*, 24 REVUE INTERNATIONALE DE DROIT PENAL 71 (1953); Robinson & Eser, *Le Droit du Prévenu Au Silence et Son Droit A Être Assisté Par un Défenseur au Cours de la Phase Préjudiciaire en Allemagne et aux Etats-Unis d'Amérique*, 22 REVUE DE SCIENCE CRIMINELLE ET DE DROIT PENAL COMPARE 567, 578-85 (1967).

¹⁷⁷ CHINESE CP, arts. 62-90.

terrogating the defendant, the interrogator is to begin by asking him "whether or not he has engaged in criminal conduct" and then allow him to "make a statement of the circumstances of his guilt or a defense of his innocence."¹⁷⁸ A similar scenario seems contemplated by the Soviet procedure.¹⁷⁹ In addition, the Russian CCP requires that the accused be informed at the commencement of the preliminary investigation of his right to know what he is accused of, to "give explanations" concerning the accusation, to present evidence, to submit petitions, and to submit challenges and appeals from actions and decisions of pretrial agencies.¹⁸⁰ The accused, in addition to his counsel, has the right to become acquainted with the case files.¹⁸¹ None of these rights are afforded by the Chinese CP itself, though commentaries¹⁸² state the interrogator's duty to tell the defendant the reasons for his arrest and subpoena for interrogation¹⁸³ and also refer to the defendant's right to request the calling of witnesses and the obtaining of evidence, requests that should be granted as long as they are "significant to clarifying the case."¹⁸⁴ One Chinese commentary makes the additional point that the defendant's opportunity for defense during the preliminary interrogation must be regarded seriously and that the defendant's denial of guilt must not be used to shift the burden of proof onto him.¹⁸⁵

On the question of the right to silence, at the pretrial interrogation stage, the Chinese CP provides that the defendant "shall answer the questions put by the investigation personnel according to the facts," though it gives a limited right to refuse to answer questions that "have no relation to the case at bar."¹⁸⁶ The Chinese CP provides no comparable right at other stages of the process. By contrast, the Russian CCP is silent on the issue of refusal to answer as regards the pretrial phase, but provides an indirect right during trial by prescribing that the person presiding over the trial "shall eliminate questions having no relation to the case."¹⁸⁷ Neither the Chinese nor Soviet Code provides any more general "right to silence," in the sense of not making a statement or

¹⁷⁸ *Id.* art. 64.

¹⁷⁹ BASIC PRINCIPLES, art. 13, at 119; RUSSIAN CCP, art. 150, at 215.

¹⁸⁰ RUSSIAN CCP, art. 149, at 215; art. 46, at 175-76.

¹⁸¹ *Id.*, art. 201, at 233-34.

¹⁸² *But see* last sentence of note 158 *supra*.

¹⁸³ BASIC KNOWLEDGE, *supra* note 158, at 103. The passage cited seems to assume that this duty is "in accordance with the provision of the Criminal Procedure Law."

¹⁸⁴ *Id.* at 104; LECTURES, *supra* note 158, at 71-72.

¹⁸⁵ LECTURES, *supra* note 158, at 74. In this connection, it is interesting to note a provision of the ROC Code that if the accused at interrogation makes an explanation of the facts favorable to himself, he shall be ordered to "explain his method of proof." ROC Code, art. 96, at 358.

¹⁸⁶ CHINESE CP, art. 64.

¹⁸⁷ RUSSIAN CCP, art. 280, at 260.

testifying, though in both cases such a right at both pretrial and trial stages may logically be inferred from the general provision of a duty to testify on the part of witnesses coupled with the absence of such a duty for defendants.¹⁸⁸

The Chinese CP provides that in most cases the public security organs are charged with the preliminary investigation, though in certain specified types of cases the procuracy handles those activities.¹⁸⁹ In the Soviet Union, on the other hand, in most cases the pretrial investigator is an employee of the procuracy, the same agency that decides on prosecution. Though provision is made for the investigation to be undertaken by the investigator independently,¹⁹⁰ broad powers exist for the procurator to exercise control over the investigation.¹⁹¹

The issue of division of pretrial functions is related to the question of the standard employed to decide whether to recommend a criminal trial after investigation by the last authority involved before the case is given to the court. In the Chinese scheme, this decision is made by the procuracy, in the Soviet system, the procurator per se as opposed to his investigatory employees, and in France, by the examining judge. The Chinese CP requires the procuracy to "consider" cases sent up from the public security organs; such consideration may include supplementary investigation. The supplementary investigation, however, is not necessarily performed by the procuracy; it may be done by the public security

¹⁸⁸ CHINESE CP, art. 37, says: "Anyone with knowledge about the circumstances of the case has the duty to testify." This could be read to apply to defendants, but the surrounding context indicates that it is meant to apply to witnesses. *Cf. id.*, arts. 36, 37 para. 2. A commentary explicitly states: "This article [37] pertains to the duty of witnesses to testify." ANNOTATION, *supra* note 158, at 40. This provision applies to the trial stage, *cf. CHINESE CP*, arts. 36, 115, and may be juxtaposed with the provision of *id.*, art. 118, that the "defendant shall make his statement", which does not seem to imply a duty to do so. *Id.*, art. 68, expresses a duty for pretrial witnesses ("legal responsibility to be borne for . . . the concealment of criminal evidence"), which provision may in turn be coupled with the allowance of the defendant's statement at the pretrial stage in *id.*, art. 64 ("let him make a statement"). Comparable for the trial stage in the Soviet system are RUSSIAN CCP, art. 282, at 261, giving witnesses a duty to testify, and *id.*, art. 280, at 260-61, providing that the presiding judge shall propose that the person on trial testify; at the pretrial stage, see similarly *id.*, arts. 158, at 218; 150, at 215; see also *id.*, arts. 73, at 185; 77, at 186.

Western European codes are not always consistent or explicit in their provision of a right to remain silent at various stages of the process, but the right is generally recognized to exist at all stages in Western European systems. Pieck, *supra* note 85, at 585-86; Robinson & Eser, *supra* note 176, at 569-76.

¹⁸⁹ CHINESE CP, art. 13. Criminal cases to be handled only upon complaint (*see CHINESE CL*, art. 87) and other "minor criminal cases . . . that do not require the conducting of an investigation" are taken directly by the courts, which may carry on mediation. CHINESE CP, art. 13.

¹⁹⁰ BASIC PRINCIPLES, art. 30, at 131; RUSSIAN CCP, art. 127, at 205-6.

¹⁹¹ *Id.*; see also RUSSIAN CCP, arts. 211-12, at 237-38. For discussion of this point, see Fletcher, *The Presumption of Innocence in the Soviet Union*, 15 U.C.L.A. L. REV. 1203, 1215 (1968).

organs at the request of the procuracy.¹⁹² Upon completion of its consideration, the procuracy "shall make a decision to prosecute and. . . initiate a public prosecution" in cases where it considers "that the facts of the defendant's crime have already been clarified, that the evidence is reliable and complete and that according to law criminal responsibility should be investigated."¹⁹³ In the Soviet system, the procurator reviews the case after preliminary investigation.¹⁹⁴ His decision to prosecute is based, according to the accepted analysis of Soviet jurists and the implications of two legislative provisions, on his determination of the defendant's guilt.¹⁹⁵ At first glance this appears to be a higher standard than the Chinese CP provides, though the implication of the reference in the relevant Chinese provision to the "facts of the defendant's crime" might render the distinction less clear.¹⁹⁶

¹⁹² CHINESE CP, arts. 95, 96, 99. Interrogation of the defendant at this stage, however, must be performed by the procuracy. *Id.*, art. 98.

¹⁹³ *Id.*, art. 100.

¹⁹⁴ RUSSIAN CCP, arts. 213-14, at 239.

¹⁹⁵ See Fletcher, *supra* note 191, at 1215 n.40. The provision of BASIC PRINCIPLES, art. 17, at 121, 154 n.67a, and RUSSIAN CCP, art. 71, at 185, that procurators must evaluate evidence according to their "inner conviction" indicates that they are deciding on the guilt question, since that is the only question to which this continental concept is generally considered relevant. See Fletcher, *supra* note 191, at 1215 n.40; see note 96 *supra* and sources there cited. But see note 196 *infra* on the French situation.

Even more telling is BASIC PRINCIPLES, art. 15, at 121, providing: "During the preliminary investigation and at the hearing in court [it] must be proved . . . that the accused is guilty of the commission of the crime" (emphasis added). See also BASIC PRINCIPLES, art. 40, at 139; RUSSIAN CCP, art. 248, at 250.

¹⁹⁶ CHINESE CP, art. 100. Both the Chinese and Soviet standards appear at least on the surface to be higher than those of other systems considered. For example, the ROC Code standard requires evidence "sufficient to show that an accused is suspected of having committed an offense." ROC Code, art. 251, para. 1, at 396.

In France, the *juge d'instruction* decides if there are charges against the accused constituting a violation of penal law ("s'il exist contre l'inculpé des charges constitutives d'infraction à la loi pénale"), C. PR. PEN., art. 176, at 156. On review, the *chambre d'accusation* considers if there are "charges suffisantes." *Id.*, art. 211, at 175. It appears to be the view of some French jurists that the standard of "charges constitutives," while not requiring the conviction of the *juge d'instruction* that the defendant is guilty, does require his "conviction . . . that it is probable that" the defendant is guilty. M. ESSAID, *supra* note 96, § 483 (quoting Faustine Hélie). In this view, the doctrine of *intime conviction* does apply to the decision to send a case to court, though it does not require at this stage an absolute determination of guilt. *Id.* §§ 482-84. Another French scholar contends that the *juge d'instruction* does not send a case for trial unless "grave presumptions of guilt have first been established." Vouin, *The Protection of the Accused in French Criminal Procedure Part I*, 5 INT. AND COMP. L.Q. 1, 5 (1956). On the other hand, other jurists interpret the "charges constitutives" standard as being much lower, and as not addressing the issue of guilt at all, stressing the importance of separating the decision made by the *juge d'instruction* from that later to be made by the trial court. See, e.g., Nérac, *Les Garanties d'Impartialité du Juge Répressif*, 1 LA SEMAINE JURIDIQUE 2890, para. 5. (JURIS-CLASSEUR PERIODIQUE) (1978).

In the West German system, the investigating prosecutor prefers an official charge if he finds "sufficient cause." STPO, art. 170, at 497, *trans. in* J. LANGBEIN, *supra* note 96, at 160. The court tribunal then decides in a preliminary hearing whether to convene a full trial of the

The weight to be assigned to the procuratorial decision at trial is also related to the division of pretrial functions.¹⁹⁷ In the Chinese system the question is whether the procuracy makes its decision to prosecute based on the public security organs' recommendation to prosecute¹⁹⁸ followed by supplementary investigation by the same public security organs, or whether the procuracy carries out a thorough, separate inquiry of its own.¹⁹⁹ A similar question exists in the Soviet system, since as noted the separation of procurator and investigator is far from clear.²⁰⁰

The Chinese CP provides for a preliminary hearing of cases sent to court by the procuracy at which "the court"—by which apparently may be meant a single judge rather than the entire judicial panel²⁰¹—"considers" the case to determine whether to go forward with a full trial. An affirmative decision is rendered "where the facts of the crime are clear and the evidence is complete."²⁰² A remand to the procuracy for supplementary investigation may be prescribed if that standard is not met. If it determines—on unspecified grounds—that "there is no need for a criminal sentence" the court may demand that the procuracy withdraw its prosecution.²⁰³ Presumably a demand to withdraw the prosecution could also be prescribed if the standard described above was so far from being met in the court's mind that remand for further investigation did

case. STPO, arts. 199, 203, at 519-20, *trans. in* J. LANGBEIN, *supra* note 96, at 162-63. In making this decision, the tribunal considers whether there exists "hinreichend verdachtig," or "sufficient suspicion," against the accused.

¹⁹⁷ See text accompanying notes 249-56 *infra*.

¹⁹⁸ CHINESE CP, art. 93.

¹⁹⁹ A commentary urges the importance of a full and significant procuratorial consideration and criticizes the "misunderstanding" that the procuracy consideration is unnecessary after the public security organs have already performed a preliminary investigation. LECTURES, *supra* note 158, at 85-86.

²⁰⁰ See text accompanying notes 190-91 *supra*.

²⁰¹ CHINESE CP, art. 108, says "the court." However, one commentary indicates that a member of the court is "designated" to study the case, BASIC KNOWLEDGE, *supra* note 158, at 122, and it would appear that the collegial panel is not formed until after the decision to go to trial has been rendered by "the court." See CHINESE CP, art. 110, para. 1. On the other hand, an account of the 1950s criminal procedure system indicates that at that time a designated judge first studied the case and then was joined by two assessors to decide if trial would be held. V. CHUGUNOV, CRIMINAL COURT PROCEDURES IN THE CHINESE PEOPLE'S REPUBLIC, *trans. in* JOINT PUBLICATIONS RESEARCH SERVICE (JPRS 4595) 123-24 (1961). A 1955 article stated that the "judge and two people's assessors . . . together constitute a preparatory examination session." *Answering Questions From Readers: On Trial Procedure in Criminal Cases*, Guangming Ribao, Mar. 11, 1955, at 3, *trans. in* J. COHEN, *supra* note 49, at 429. Presumably the collegial panel conducting the preliminary examination also heard the case at the formal trial.

²⁰² CHINESE CP, art. 108.

²⁰³ *Id.* "When necessary [in the course of its consideration at the preliminary hearing] the people's court may carry on examination, inspection, search, distraint and expert appraisal." *Id.*, art. 109.

not seem useful. The procurator may, according to a commentary, be called in during the preliminary hearing to clarify points about the case.²⁰⁴ The defendant does not appear to be expected to appear at this proceeding.²⁰⁵ Apparently no defense counsel may be present.²⁰⁶

The Soviet system allows the decision on whether to go to trial to be made by a single judge or, if the judge disagrees with the prosecution on its conclusion to indict or the case involves crimes of minors or crimes punishable by death, by an "administrative session" of the collegial panel of judge and assessors.²⁰⁷ A key difference with the Chinese case lies in the standard to be employed in this decision. In the Chinese CP the standard is very similar to that employed by the procurator in deciding whether to prosecute and therefore appears close to a determination of guilt.²⁰⁸ In the Soviet case the decision, whether by the single judge or the administrative panel, is based on a finding that "sufficient grounds" exist for hearing the case in court and is made "without pre-determining the question of guilt."²⁰⁹

An issue of key relevance to the presumption of innocence is pre-trial detention. The Chinese CP allows a maximum of ten days of "detention."²¹⁰ After that, either formal "arrest"²¹¹ must be approved and the investigation set in motion, or the suspect must be released.²¹² However, an ambiguity is injected by the procuracy's right to require supplementary investigation should it be unable to render its decision, since no indication is given whether in such a circumstance the detainee must be released.²¹³ In any event, the Chinese CP attempts to restrict arrest to cases meeting four conditions: the principal facts of the crime have already been clarified;²¹⁴ on that basis the person could be sentenced to a term of imprisonment; allowing the person to remain out of custody with a guarantor or under surveillance would be insufficient to prevent

²⁰⁴ LECTURES, *supra* note 158, at 93.

²⁰⁵ Compare CHINESE CP, arts. 108-09.

²⁰⁶ Compare *id.*, art. 110, para. 2.

²⁰⁷ BASIC PRINCIPLES, art. 36, at 137; RUSSIAN CCP, art. 221, at 242. The prosecutor must be present at the administrative session. RUSSIAN CCP, art. 224, at 243. The accused appears not to be present, though he and/or his defense counsel would seem to have the right to petition the administrative session and thereby be invited to appear. See RUSSIAN CCP, arts. 46, at 175-76; 51, at 178; 223, 225, at 243-44.

²⁰⁸ See text accompanying notes 193, 196 *supra*.

²⁰⁹ BASIC PRINCIPLES, art. 36, at 137; RUSSIAN CCP, arts. 221, at 242; 227, at 244. See Gorgone, *Soviet Criminal Procedure Legislation: A Dissenting Perspective*, 28 AM. J. COMP. L. 577, 591-92 (1980), for a discussion of this point.

²¹⁰ *Juliu*. CHINESE CP, art. 48. Compare the prior provision of 1954 legislation, note 62 *supra*.

²¹¹ *Daibu*.

²¹² CHINESE CP, art. 48.

²¹³ See *id.*, arts. 47, 48.

²¹⁴ See note 157 & accompanying text *supra*.

danger to society; and there is the necessity of arrest.²¹⁵ A commentary stresses that all four of these conditions must be met for a decision to arrest to be made; it interprets the last one as meaning that even if all three other conditions are met but the decision could still go either way, arrest should not be used.²¹⁶

Generally, a maximum of five-and-one-half months, allowing for extensions provided, may elapse between the initiation of the investigation and the decision to prosecute.²¹⁷ However, an indefinite extension of the investigation may be granted by the National People's Congress Standing Committee on application by the Supreme People's Procuracy "in especially major or complex cases."²¹⁸

In the Russian CCP, confinement under guard, the equivalent of arrest, must be approved within forty-eight hours after detention or the detainee must be released.²¹⁹ Confinement under guard or other measures of restraint, such as surety, may only continue for ten days in the absence of a formal "accusation" that sets the investigatory process in motion.²²⁰ Arrest, as in the Chinese CP, is restricted to cases where the law provides deprivation of freedom for the crime at issue; other methods such as various types of sureties seem intended to be considered before arrest is employed.²²¹ A clear nine-month maximum is provided in the Soviet system for confinement during pretrial investigation, including an "exceptional" extension by the Procurator General that, unlike in the Chinese case, is limited to three months.²²²

²¹⁵ CHINESE CP, art. 40.

²¹⁶ LECTURES, *supra* note 158, at 59.

²¹⁷ CHINESE CP, arts. 92, 97, 99.

²¹⁸ *Id.*, art. 92. The relation of these periods to the period of the defendant's confinement is less than clear. *Id.*, providing a three-month maximum with the special indefinite extension mentioned in the text for complex cases, is the only article to mention the "period for holding a defendant in custody." The provisions for a maximum of two-and-one-half months for procuracy consideration and supplementary investigation, *id.*, arts. 97, 99, simply provide the time limits for these activities without mentioning the status of the defendant. It seems probable, however, that the intent is for the defendant who is in custody to remain there throughout the investigatory period. Also unclear are the ramifications for pretrial detention of the possibility of the remand of a case at the preliminary court hearing stage, after the five-and-one-half months have presumably elapsed, for further investigation. See text following note 202 *supra*. Even without such remand, the beginning of the trial is obviously delayed by the preliminary hearing, on which no time limit is imposed, and the period after presentation of the indictment. See CHINESE CP, arts. 108-10. The defendant who has been in custody is apparently expected to remain there during this period. See *id.* art. 110, para. 2 in conjunction with art. 29.

²¹⁹ RUSSIAN CCP, art. 122, at 202-03 (erroneously printed as "eight" hours; error confirmed by Prof. H. Berman to author).

²²⁰ *Id.*, art. 90, at 190.

²²¹ RUSSIAN CCP, arts. 96, at 191-92; 89-95, at 190-91.

²²² BASIC PRINCIPLES, art. 34, at 135; RUSSIAN CCP, art. 97, at 192-93. The Russian CCP does provide indefinite extensions of investigation, but unlike the Chinese CP, see note 218 *supra*, it clearly distinguishes these extensions of the investigation from the defendant's period

The ROC Code contains a four-month maximum on detention during investigation.²²³ In the French system, there is no limit to the "detention provisoire" that may be imposed in serious cases after an initial maximum of two days of "*garde à vue*" before the formal accusation and beginning of investigation.²²⁴ Such pretrial detention can and does last several years in some cases.²²⁵

At the trial stage, one of the key issues is the role and position of the defendant and defense counsel. The defense counsel at trial has under the Chinese CP the

responsibility. . . on the basis of the facts and the law, to present materials and opinions proving that the defendant is not guilty, that his crime is minor, or that he should receive a mitigated punishment or be exempted from criminal responsibility, safeguarding the lawful rights and interests of the defendant.²²⁶

After the questioning of the defendant by the court, both the prosecutor and the defender may, "with the permission of the presiding judge," question the defendant.²²⁷ The defender or the defendant himself may request the presiding judge to put questions to witnesses or may request permission from the presiding judge to put questions directly.²²⁸ Defendants and defenders also have the right "to apply to notify new witnesses to come to court, to obtain new material evidence, and to apply for new expert evaluation or inspection."²²⁹ The defendant makes his statement and defense, and the defender his defense, after the conclusion of the tribunal's inquiry and the statement of the prosecutor.²³⁰ After the close of debate among the participants in the trial the defendant has the right to make a final statement.²³¹

The role of defense counsel at trial and the position of the defend-

in custody. Compare RUSSIAN CCP, arts. 133, at 208 with art. 97, at 192-93. Compare CHINESE CP, art. 92. The judge or administrative session conducting the preliminary hearing, see note 207 & accompanying text *supra*, must either resolve the question of whether the case is to go to trial within fourteen days, RUSSIAN CCP, art. 221, at 242, or, if the administrative session decides to refer a case for supplementary investigation, it shall be "obliged to resolve the question of a measure of restraint with respect to the accused." RUSSIAN CCP, art. 232, at 246. Compare note 218 *supra*.

²²³ ROC Code, art. 108, paras. 1, 2, at 361.

²²⁴ C. PR. PEN., arts. 63, at 82; 77, at 91. A new law on *liberté et sécurité* of 1981, the implications of which have yet to be fully understood among French jurists, will apparently increase police power in the area of pretrial detention.

²²⁵ Vouin, *supra* note 196, at 20.

²²⁶ CHINESE CP, art. 28.

²²⁷ *Id.*, art. 114.

²²⁸ *Id.*, art. 115.

²²⁹ *Id.*, art. 117. No indication is given of the basis for the decision of the tribunal "on whether or not to approve the above applications." *Id.*

²³⁰ *Id.*, art. 118.

²³¹ *Id.*

ant are portrayed by the Soviet legislation in a manner basically comparable to that of the Chinese CP.²³² Two important provisions, however, are present in the Russian CCP that are absent from the Chinese CP and that strengthen the position of the defendant and the defender. One is the Soviet requirement of defense counsel participation in all cases involving a state accuser (prosecutor) or social accuser, which is presumably a large number of cases.²³³ Counsel's participation is also obligatory in cases of handicapped or minor defendants, and in other specified cases. If in these cases the defendant or others on his behalf have not chosen counsel, either the investigator or the court is obligated to secure counsel.²³⁴ In the Chinese system, only in the cases of deaf, mute, or minor defendants must the court designate a defender. In other cases in which the public prosecutor is participating,²³⁵ the court "may designate a defender for a defendant" who has not appointed a defender.²³⁶ Also absent from the Chinese CP, though in no way contradicted by it, is the provision in the Russian CCP that the "accuser, person brought to trial, and defense counsel. . . shall enjoy equal rights in presenting evidence, participating in the analysis of the evidence, and submitting petitions."²³⁷

The use of evidence at trial and the standards used in the rendering of judgment are also relevant to the presumption of innocence. The Chinese CP calls for the gathering of evidence "that can prove the defendant's guilt or innocence and the gravity of the circumstances of the crime."²³⁸ Following the general statement that "[a]ll facts that prove the true circumstances of a case are evidence,"²³⁹ the Chinese CP lists six categories of evidence. The Chinese CP, like continental systems generally, has no restrictive rules of evidence, though it does provide that the "use of torture to coerce statements and the gathering of evidence by threat, enticement, deceit or other unlawful means are strictly prohibited."²⁴⁰

²³² See BASIC PRINCIPLES, art. 23, at 125; RUSSIAN CCP, arts. 51, at 178; 249-50, at 250-51; 278-80, at 260-61; 283, at 261-62; 288-98, at 263-66.

²³³ The social accuser is a representative of a social organization of working people. RUSSIAN CCP, art. 250, at 250-51.

²³⁴ RUSSIAN CCP, art. 49, at 177.

²³⁵ See CHINESE CP, art. 112. In the first nine months of 1980, a public prosecutor appeared in 96.1% of criminal cases. *Zhongguo Fazhi Bao*, Jan. 16, 1981, at 1.

²³⁶ CHINESE CP, art. 27 (emphasis added).

²³⁷ RUSSIAN CCP, art. 245, at 249.

²³⁸ CHINESE CP, art. 32.

²³⁹ *Id.*, art. 31. The categories listed are: 1) Material evidence and documentary evidence; 2) Testimony of witnesses; 3) Statements of victims; 4) Statements and explanations of defendants; 5) Conclusions of expert evaluations; 6) Records of inspection and examination. *Id.*

²⁴⁰ *Id.*, art. 32. See CHINESE CP, art. 136.

The general statement that "evidence must undergo examination for truth before it can be used as the basis for determining cases"²⁴¹ is supported by two specific provisions. The first is the one providing that "[i]n cases where there is only the testimony of the defendant and there is no other evidence, the defendant cannot be determined guilty and sentenced to a criminal punishment."²⁴² A companion provision states that, where there is no confession but other evidence is "complete and reliable," guilt may be found.²⁴³ Together these provisions represent an important attempt to break away from what Chinese jurists now recognize as the prevalent practice in past years of insisting upon confessions and placing undue emphasis and reliance on them.²⁴⁴ This second provision tacitly supports the defendant's right to remain silent²⁴⁵ and indicates that only other reliable evidence, and not the defendant's silence, will be sufficient to convict him should he exercise the right.²⁴⁶

Another provision for verification of evidence requires that witnesses and their testimony be subjected to in-court questioning and verification by the prosecutor, and the defendant and defender before such testimony "may. . . be used as the basis for determining a case."²⁴⁷ However, another provision seems to undercut the defendant's right to confront witnesses by providing that records of testimony of witnesses not present in court are to be read out in court and the "opinions of parties and defenders. . . heard."²⁴⁸

Absent from the Chinese CP is any explicit statement of the principle, generally accepted in continental jurisdictions, that only evidence heard or considered at trial may be used as the basis for decision.²⁴⁹ The enunciation of such a principle, which is found in the Russian CCP,²⁵⁰ would serve at least as a theoretical guarantee that testimony, confessions and other evidence gathered at the pretrial stage would not be accepted by the tribunal without review. The absence of review by the

²⁴¹ CHINESE CP, art. 31.

²⁴² *Id.*, art. 35.

²⁴³ *Id.*

²⁴⁴ See LECTURES, *supra* note 158, at 47-48; BASIC KNOWLEDGE, *supra* note 158, at 75-79; Chen Yiyun, *Emphasize Evidence, Do Not Give Credence Readily to Oral Confessions*, Guangming Ribao, Aug. 17, 1979, at 3. The use of confessions as evidence was a major topic of discussion in the 1950s. See, e.g., Zhang Zipei, *supra* note 84. Recall the discussion of the imperial legal system in section II(A) *supra*. It is also an issue of concern in other systems. See, e.g., on the French system, M. ESSAID, *supra* note 96, § 428.

²⁴⁵ See text accompanying note 188 *supra*.

²⁴⁶ The ROC Code provides this explicitly in the context of a provision similar to the CHINESE CP, art. 35. ROC Code art. 156, at 373.

²⁴⁷ CHINESE CP, art. 36.

²⁴⁸ *Id.* art. 116.

²⁴⁹ See A. SHEEHAN, CRIMINAL PROCEDURE IN SCOTLAND AND FRANCE 28-29 (1975); Stepan, *supra* note 39, at 191.

²⁵⁰ RUSSIAN CCP, art. 301, at 267; see also *id.*, art. 295, at 265-66.

tribunal would cause particular concern if, as may at least sometimes be the case in the Chinese system, the evidence had not been carefully verified by at least one body other than the one that gathered it before forming the basis for the pretrial decision to prosecute the case.²⁵¹ The use to be made at trial of the written record of a defendant's statements or confessions at the pretrial stage is of particular relevance for the presumption of innocence. A commentary appears to contemplate use of such records as evidence at trial.²⁵² These records would presumably be counted among "other documents serving as evidence" that are to be read out in court "and the opinions of parties and defenders. . . heard."²⁵³ That the confession would presumably have to be verified by other evidence offers some protection to the defendant.²⁵⁴ Nonetheless, the lack of a general, all-encompassing statement of the direct evidence principle,²⁵⁵ and of a provision akin to the Russian CCP stipulation that "no evidence shall have a previously established force for the court,"²⁵⁶ leave the Chinese CP short of providing a solid framework for a fresh, unbiased consideration of a case at the trial level.

The Chinese CP contains neither a direct allocation of the burden of proof, nor even a "negative" allocation such as the provision in the Soviet legislation that the burden shall not be shifted onto the accused.²⁵⁷ In addition, the Chinese CP gives little indication of the standard by which the tribunal is to render its decision, providing only that the collegial panel shall. . . based on the facts and evidence that have been clarified and on the provisions of the relevant laws, render a judgment as to whether the defendant is guilty or innocent, what crime he committed, what criminal punishment is to be applied or whether he should be ex-

²⁵¹ See text accompanying notes 189-200 *supra*.

²⁵² LECTURES, *supra* note 158, at 47.

²⁵³ CHINESE CP, art. 116.

²⁵⁴ *Id.*, art. 35.

²⁵⁵ One recent article appears to interpret the Chinese CP as imparting a principle of direct examination of all evidence at trial. Zhuang Huichen, *Discussion of Open Adjudication*, 5 FAXUE YANJIU 35, 36 (1980).

²⁵⁶ RUSSIAN CCP, art. 71, at 185.

²⁵⁷ See Code articles cited in note 150 *supra*. For discussion of the burden of proof question in Soviet law, see H. BERMAN, *supra* note 173, at 60-61; Berman, *The Presumption of Innocence: Another Reply*, 28 AM. J. COMP. L. 615, 615-23 (1980); Gorgone, *supra* note 209, at 577-602.

The absence of any provision on the burden of proof in the Chinese CP should probably not be seen as conclusive of anything. One recent Chinese law review article states the view that, "in principle," the burden in Chinese criminal procedure is on the prosecution, citing his reading of the provision of CHINESE CP, art. 35, that confession cannot be the sole basis for conviction to mean that the prosecutor must gather other evidence. Liao Zhengyun, *A Few Views on the Principle of the Presumption of Innocence*, 5 FAXUE YANJIU 32, 33 (1980). European codes do not necessarily refer to the burden of proof, though the prosecutorial burden is accepted in those systems. See H. BERMAN, *supra* note 173, at 60; M. ESSAID, *supra* note 96, §§ 163-263. Interestingly, the ROC Code, as revised in 1967, added a provision explicitly placing the burden of proof on the prosecution. ROC Code, art. 161, at 374.

empted from criminal punishment.²⁵⁸

The Soviet legislation, on the other hand, states explicitly that a judgment of guilty may not be "founded on assumptions and may only be pronounced if at the hearing of the case the accused has been proved guilty of committing the crime."²⁵⁹ The Russian CCP's additional specification that an acquitting judgment is to be pronounced if that proof has not been met²⁶⁰ embodies the import of the *in dubio pro reo* principle. Complementing these provisions in the Soviet scheme is the requirement that the court's decision be based on its inner conviction,²⁶¹ a principle, absent from the Chinese CP, that one commentary on the Chinese CP explicitly rejects,²⁶² but that recent law review commentaries have supported.²⁶³

Since none of the codes of criminal procedure to which reference has been made in the foregoing makes specific mention of the presumption of innocence,²⁶⁴ in order to determine the "presence" of the presumption in these codes, it is necessary to examine the language of the codes from the point of view of the presumption and the treatment in the various codes of the issues raised in the foregoing. None of the continental-model codes used as bases for comparison with the Chinese CP emerges with a perfect score after undergoing scrutiny for compatibility with the presumption of innocence concept. As we have seen, for instance, the Soviet and Republican Chinese legislation limit the full-scale participation of counsel in the pretrial investigatory activities, taking a position that cannot be seen as fully consistent with a view that the person being investigated and interrogated is to be presumed innocent. The guilt standard for prosecution in the Soviet scheme is also a potential problem although it may be counteracted by the stipulation that the preliminary court consideration of the case not predetermine the question of guilt. Similarly, the failure of French legislation to place any

²⁵⁸ CHINESE CP, art. 120.

²⁵⁹ BASIC PRINCIPLES, art. 43, at 141; RUSSIAN CCP, art. 309, at 269.

²⁶⁰ *Id.* See similarly ROC Code, arts. 299, 301, at 406-07.

²⁶¹ BASIC PRINCIPLES, art. 17, at 121; RUSSIAN CCP, art. 71, at 185.

²⁶² LECTURES, *supra* note 158, at 55. The same passage rejects the presumption of innocence as being, like the inner conviction principle, "bourgeois," though it makes no attempt to analyze the Chinese CP from the point of view of the presumption. One of the authors of the chapter of the LECTURES in which this passage appears is jurist Zhang Zipei (see LECTURES, *supra* note 158, at Contents page before 1), whose views in opposition to the presumption of innocence have remained essentially unchanged since the 1950s. See notes 1, 20, 102, 103, 104, 105, 106, 112, 114, 122, 123, 124 & accompanying text *supra*; notes 286, 289, 292 & accompanying text *infra*.

²⁶³ See, e.g., Wang Jing, *On the Assessment of Evidence in Criminal Procedure*, 4 FAXUE YANJIU 27, 32-33 (1980). This author suggests that the principle, while bourgeois in origin, can be imbued with Marxist-Leninist content and used in a socialist legal system. Compare note 96 *supra*.

²⁶⁴ See text accompanying notes 16-17 *supra*.

time limit on pretrial detention seems to pose a major contradiction with the notion of the presumption of innocence.

Despite this and other less significant points of doubt, the theoretical presence of a presumption of innocence in the French and other Western European codes is rarely if ever disputed. Commentators have found the ROC Code to embody the presumption of innocence.²⁶⁵ Analysts, both Soviet and foreign, of the Soviet legislation come generally to a similar conclusion.²⁶⁶

It would appear significantly more difficult to find the new Chinese Criminal Procedure Law theoretically consistent with a presumption of innocence principle, since the Chinese CP seems to contain many more major discrepancies with the principle than the other codes considered. The relation of the arrest standard to clarification of the "facts of the crime," and the standard, apparently close to one of guilt, for prosecution, are both untempered by any provision comparable to the Soviet stipulation that the question of guilt must not be predetermined by the court. The reference to the accused person as the "offender" at the arrest stage also presents problems. Also, the absence of a right to counsel at pretrial interrogation, and the exclusion of counsel until virtually the eve of the trial, is a point of concern, as is the failure to afford many rights to counsel during his pretrial role. The possible indefinite extension of pretrial detention is relevant, though of relatively minor concern if limited and controlled as the provision for it indicates it should be. The failure to provide for the mandatory appointment of defense counsel when a public prosecutor is present at trial is problematic. Finally, the absence from the Chinese CP of a clear principle of fresh consideration of evidence at trial and of any indication of the burden of proof or the standard for decision at trial, while not in and of itself necessarily significant, in light of the other problems with the Chinese CP, serves to cast further doubt on the basis in the Chinese CP for a presumption of innocence.

These problems with the Chinese CP, however, by no means end

²⁶⁵ See L. FULLER & H. FISHER, *supra* note 43, at vii; JUDGE ADVOCATE GENERAL OF THE ARMY, COUNTRY LAW STUDY FOR THE REPUBLIC OF CHINA 80 (1959).

²⁶⁶ See H. BERMAN, *supra* note 173, at 59; Berman & Quigley, *supra* note 17, at 1230-31, 1230-31 nn.1-3; Fletcher, *supra* note 191, at 1221; Osakwe, *supra* note 147, at 281, 281-82 n.75; Strogovich, *Adversary Proceedings and Trial Functions in Soviet Criminal Procedure*, 1 SOVIET L. & GOV'T 11 (1962-63). See generally Gorgone, *supra* note 209. The chief draftsman of the 1958 Basic Principles has stated that the specific provisions of the Basic Principles, such as the prohibition on shifting the burden of proof to the defendant, the requirement that the defendant be acquitted if guilt had not been proved, and others discussed *supra*, have "immeasurably greater significance" toward providing a presumption of innocence than would a general declaration of the presumption. Berman & Quigley, *supra* note 17, at 1232-33 n.6. See also *id.* at 1235 n.15.

the discussion on the presumption of innocence in Chinese criminal procedure. The majority of the difficulties, it should be stressed, stem either from what could be regarded as imprecise drafting or from failure of the Chinese CP to include certain concepts or provisions associated with the presumption in other systems. At no point does the Chinese Criminal Procedure Law actually negate or preclude the presumption of innocence. For every point mentioned in the foregoing as undermining the presumption of innocence in the framework of the Chinese CP, counter arguments may be made that allow for the presumption to exist, albeit more uneasily and with weaker formal support than in other systems.²⁶⁷ Indeed, it was probably the intent of the drafters of the Chinese CP to produce a piece of legislation ambiguous enough to find support among both supporters and opponents of the presumption of innocence and related criminal procedure concepts.²⁶⁸ The continuing debate on the presumption being carried on in the light of the new Chinese CP demonstrates the drafters' success.

VII. THE CONTINUING DEBATES: 1979-81

The law review discussions of the presumption of innocence and related points in the period since the release of the Criminal Procedure Law may be divided into three categories. In the first group are those that demonstrate a clear understanding of the principle and fully endorse it. In another category are those writers who, partly as a result of an apparent misconception of the presumption of innocence concept, purport to reject it out of hand. The analyses of this group tend to feature a heavy overlay of the political-ideological position of the 1958-60 period²⁶⁹ which is difficult to separate from their legal arguments. Finally, an intermediate category of commentators attempts to distinguish among different interpretations of the presumption and, in the final analysis, basically accepts it with reservations that seem more formal than substantive.

The discussions that accept the presumption generally see its primary import as the concept of *in dubio pro reo* as applied at all stages of the criminal process. The principle of "seeking truth from facts," one

²⁶⁷ It may be said that the presumption of innocence exists somewhat uneasily in all systems. See section VIII(C) *infra*.

²⁶⁸ The presumption of innocence had its detractors in the Soviet Union at the time of the drafting of the 1958 Basic Principles. The failure of the Basic Principles to mention the presumption and their ambiguous statement of some of the principles that embody the presumption, such as the prosecutorial burden of proof, see note 257 & accompanying text *supra* and Berman & Quigley, *supra* note 17, at 1233-34 n.12, may probably be attributed to a desire to play to both audiences. See Fletcher, *supra* note 191, at 1221; Gorgone, *supra* note 209, at 588. See text accompanying notes 311-13 *infra*.

²⁶⁹ See section IV *supra*.

analyst points out, needs to be supplemented with another principle when in the absence of clear evidence after investigation a decision must be made whether an accused is to be released as innocent or held under suspicion indefinitely. The presumption of innocence, he concludes, is the proper principle to apply at that point.²⁷⁰ In the author's view the essence of the principle is that the "legal position" of the defendant should hypothetically be that of an innocent person during the entire period before the trial judgment.²⁷¹ Another commentator states that to fall back on the presumption of innocence principle after a fixed period of investigation has failed to lead to a conclusive result is to adopt a "materialist"²⁷² stance on criminal procedure and, thus, is an eminently suitable approach for a socialist legal system.²⁷³

Taking a somewhat different but consistent approach, another discussion portrays the open trial as the "central link" in the entire criminal process. Only after a defendant has been judged guilty at trial does he become a "criminal." The results of the prior links—investigation, procuracy consideration, preliminary court consideration—are all important, but only the direct examination of the facts and evidence by the court should form the basis for a final decision.²⁷⁴

This group of commentators finds various sources of support for the presumption in the Chinese CP.¹ One writer cites the requirement that evidence be emphasized and undue reliance not be placed on confessions²⁷⁵ and the fact that the term "defendant" is used at the pretrial stage.²⁷⁶ Another emphasizes what he sees as the defendant's right to silence²⁷⁷ under the Chinese CP, the defendant's lack of responsibility for false statements,²⁷⁸ and his interpretation that under the Chinese CP a defendant cannot be found guilty as a result of his silence or on the basis of a bad attitude.²⁷⁹

The commentators in the second group who reject the presumption

²⁷⁰ Lan Quanpu, *supra* note 135, at 16. See also Tian Cai, *supra* note 131.

²⁷¹ Lan Quanpu, *supra* note 135, at 17.

²⁷² See note 116 *supra*.

²⁷³ Wang Xiaohua & Ma Qingguo, *Argument on the "Presumption of Innocence,"* 1 FAXUE YANJIU 63, 64 (1980). This article forms part of a four-article feature, *Discussion On the Principle of the "Presumption of Innocence,"* 1 FAXUE YANJIU 62 (1980). A translation of the entire feature may be found in China Report: Political, Sociological and Military Affairs JOINT PUBLICATIONS RESEARCH SERVICE (JPRS 76072), July 18, 1980, at 28-34. The passage referred to here is *trans. in id.* at 32.

²⁷⁴ Zhuang Huichen, *supra* note 255, at 36.

²⁷⁵ Wang Xiaohua & Ma Qingguo, *supra* note 273, at 64, *trans. in* JPRS, *supra* note 273, at 32; CHINESE CP, art. 35.

²⁷⁶ Wang Xiaohua & Ma Qingguo, *supra* note 273, at 64, *trans. in* JPRS, *supra* note 273, at 32; but see text accompanying notes 154-56 *supra*.

²⁷⁷ Lan Quanpu, *supra* note 135, at 16 (citing CHINESE CP, arts. 64, 35).

²⁷⁸ Lan Quanpu, *supra* note 135, at 16 (citing CHINESE CP, arts. 36, 68, 115).

²⁷⁹ Lan Quanpu, *supra* note 135, at 17. See text accompanying notes 245-46 *supra*.

of innocence, seem not to grasp the abstract quality of the presumption, requiring a suspension of disbelief, that the commentators of the first group appear to accept. It lacks "logic," one writer argues, to hypothesize the innocence of a criminal defendant, since to do so is tantamount to saying that the public security organs, the procuracy, and the court are violating the law by arresting, prosecuting, and trying him.²⁸⁰ How, asks one critic, can the procuracy prosecute or the court try a person they *consider* innocent?²⁸¹ To adopt the principle would ensure that there could never be any guilty verdicts.²⁸²

Although they are somewhat less virulent in tone, the recent arguments against the presumption are similar to those of the 1958-60 period in that they contain both simplistic legal analysis and an overtone of political dogma that makes it difficult not to attribute their apparent faulty rendering of the principle to deliberate ideological purposes.²⁸³ The contemporary authors supporting the presumption concede it to be specious in contemporary bourgeois countries, but claim that it can be imbued with proletarian content and applied effectively in the socialist legal system.²⁸⁴ The current detractors of the principle, on the other hand, condemn it as inherently "reactionary," "idealistic," and "metaphysical,"²⁸⁵ and likely to lead the judicial organs to commit "rightist" mistakes, just as the presumption of guilt caused the Gang of Four to commit "leftist" mistakes.²⁸⁶ The requirement that an accused be presumed or considered²⁸⁷ innocent at all stages of the criminal process through final judgment, they contend, will have the result of weakening the power of the proletarian dictatorship in its struggle against crime.²⁸⁸

Some of these critics reveal the essentially politico-terminological nature of their attack by describing what is in essence the presumption of innocence under the rubric of "seeking truth from facts." Thus, one consistent critic of the presumption since the 1950s explains that the entire pretrial process is based on progressive "dialectical" determinations of guilt. If innocence were made clear at any point in the process,

²⁸⁰ Yu Zhi, *The Presumption of Innocence Cannot Be A Guiding Thought of Criminal Procedure: A Discussion With Comrade Lan Quanpu*, 3 MINZHU YU FAZHI 20, 20 (1980).

²⁸¹ Xiao Hua, *The Principle of the "Presumption of Innocence" Is Incompatible With Our Country's Practice of Criminal Procedure*, 1 FAXUE YANJIU 62, 62-63 (1980), trans. in JPRS, *supra* note 273, at 29 (emphasis added). See note 105 *supra*.

²⁸² Xiao Hua, *supra* note 281, at 63, trans. in JPRS, *supra* note 273, at 29-30.

²⁸³ See note 105; text accompanying note 280 *supra*.

²⁸⁴ See, e.g., Lan Quanpu, *supra* note 135, at 15.

²⁸⁵ Tang Guanda, *One Should Make a Concrete Analysis of the "Presumption of Innocence,"* 1 FAXUE YANJIU 64, 64 (1980), trans. in JPRS, *supra* note 273, at 33.

²⁸⁶ Zhang Zipei, *supra* note 20, at 31.

²⁸⁷ See note 281 & accompanying text *supra*.

²⁸⁸ Xiao Hua, *supra* note 281, at 62, trans. in JPRS, *supra* note 273, at 29; Zhang Zipei, *supra* note 20, at 33.

of course, the case would be discontinued. If, on the other hand, he continues, no confirmation (either way) could be reached by the end of the investigation period, the defendant must be released as innocent—but this has “nothing to do” with the presumption of innocence.²⁸⁹

As might be expected, the writers in this group have no more difficulty finding provisions of the Criminal Procedure Law to support their arguments against the presumption of innocence than members of the first group have finding provisions to bolster theirs. These commentators stress the use of the term “offender” at the arrest stage²⁹⁰ and the high standards for arrest and prosecution.²⁹¹ This group of commentators views as embodying the principles of seeking truth from facts and stress on “investigative research”²⁹² the provisions of the Chinese CP limiting detention, forbidding forced confessions, granting right to silence, and related features.

Two of the recent discussions of this question cannot be placed squarely in either of the two categories described in the foregoing. They contain elements of the approaches of both of the groups but appear, when their arguments are subjected to close scrutiny, to be closer to the first group and, in essence, to support the presumption of innocence. One author begins by formulating the presumption of innocence as he sees it expressed in some bourgeois legislation: that the defendant must be “presumed” or “seen” as²⁹³ innocent until the court finds him guilty. This formulation the writer finds “unscientific” and in contradiction with the structure of China’s criminal procedure.²⁹⁴ This conclusion, however, does not lead the writer to reject the presumption. Instead, he proceeds to enunciate what he describes as a “different” formulation of

²⁸⁹ Zhang Zipei, *supra* note 20, at 31, 32. Recall note 104 & accompanying text *supra*. See also Tang Guanda, *supra* note 285, at 28 [sic], *trans. in* JPRS, *supra* note 273, at 34.

²⁹⁰ Yi Xiaozhong, *The Principle of the “Presumption of Innocence” Is Widely Divergent from Our Country’s “Arrest and Detention Act,”* 1 FAXUE YANJIU 63, 63 (1980), *trans. in* JPRS, *supra* note 273, at 31. The author cites Art. 9 of THE ARREST AND DETENTION ACT OF THE PEOPLE’S REPUBLIC OF CHINA (passed at the Sixth Meeting of the Standing Committee of the Fifth Session of the National People’s Congress, Feb. 23, 1979), COMPENDIUM, *supra* note 5, at 89; *trans. in* FBIS-CHI, Feb. 26, 1979, at E4, which reads: “Personnel carrying out the task of arrest or detention may adopt appropriate means of restraint against offenders who resist arrest or detention and may use weapons when necessary.” Most of the Arrest and Detention Act was incorporated into the CHINESE CP. Article 9 is one provision not so incorporated. It is unclear whether the Arrest and Detention Act was intended to retain legal force after the entry into force Jan. 1, 1980, of the Chinese CP.

²⁹¹ Yi Xiaozhong, *supra* note 290, at 63, *trans. in* JPRS, *supra* note 273, at 30; Xiao Hua, *supra* note 281, at 62-63, *trans. in* JPRS, *supra* note 273, at 29; Zhang Zipei, *supra* note 20, at 31. See notes 157, 193 & accompanying text *supra*.

²⁹² Zhang Zipei, *supra* note 20, at 33; Zhang Zipei & Tao Mao, *supra* note 1.

²⁹³ Shiwei. Compare note 281 & accompanying text *supra*.

²⁹⁴ Chen Guangzhang, *We Should Critically Inherit the Principle of the Presumption of Innocence*, 4 FAXUE YANJIU 34, 34-35 (1980).

the principle, that "until the court judgment the defendant is not to be considered a criminal." This, he concludes, is logical because only the court has the power to render a judgment; thus, before the court judgment, no one can be considered a "criminal in law," though he may be and probably is a "criminal in fact."²⁹⁵

At first glance, the author appears to be making a plausible distinction between what might be termed a "substantive" view of the presumption of innocence, which he rejects, and a "procedural" view, which he supports.²⁹⁶ On closer consideration, however, the distinction collapses. The presumption of innocence, after all, really has no "substantive" aspect. No matter how one chooses to formulate it, the presumption is an abstract procedural construct that neither purports to nor generally does bear any relation to reality.²⁹⁷ The author, in any event, serves the crowning blow to his attempted distinction by championing the *in dubio pro reo* formulation of the presumption which he explains as requiring that until the defendant is proved guilty, he be presumed innocent—the exact concept that he claimed earlier in his article to reject as "unscientific."²⁹⁸

The other article in this never-never category begins by accepting the two general propositions that "defendants are not the same as criminals," and that doubts must be resolved in favor of the defendant.²⁹⁹ Then, in an apparent attempt to make the same distinction as the article just discussed, this author maintains that the nature and structure of China's criminal procedure do not allow for defendants to be "presumed" to be "pure, innocent persons." Application of this "extreme" view of the presumption of innocence would be dangerous to the

²⁹⁵ *Id.* at 35. Chen finds support for this formulation in the Soviet Union's Basic Principles, art. 7, *see* note 146 & accompanying text *supra*. *See also* CHINESE CP, art. 3; *see* note 148 & accompanying text *supra*.

²⁹⁶ A parallel to the different interpretations of judicial independence is brought to mind. There are two different possible interpretations of "judicial independence" in the Chinese context—one, that the judicial system should be substantively, *i.e.*, ideologically, independent of the Party and of all extralegal influences, the other, that the courts, like all institutions, are subject to the Party's ideological guidance but that, procedurally, they decide their own cases on a day-to-day basis without direct Party involvement.

It is of course the latter view that the Chinese leadership has always had in mind when speaking of judicial independence. For recent discussions, *see, e.g.*, Liu Guangming, *The People's Courts Adjudicate Independently and Obey Only the Law*, 3 FAXUE YANJIU 29 (1979); Peng Zhen, *A Few Questions Regarding the Socialist Legal System*, 11 HONGGI (RED FLAG) 3, 6-7 (1979); Qiao Wei, *Adjudicate Independently, Obey Only the Law*, Renmin Ribao, Jan. 5, 1979, at 3.

²⁹⁷ *See* section VIII(c) *infra*. The author of the article under discussion, indeed, indicates his awareness of this point. *See* Chen Guangzhang, *supra* note 294, at 36: "The legal presumption . . . does not necessarily comport with reality . . ."

²⁹⁸ To his credit, or discredit, Chen tries to save face by assuring us a few lines down that this view of the principle does not require that the defendant be *presumed* innocent, but just that he be found to be innocent if his guilt cannot be proved. *Id.* at 35; *see also id.* at 36.

²⁹⁹ Liao Zhengyun, *supra* note 257, at 32.

fight against crime, giving criminals an escape hatch.³⁰⁰ It is this "absolutist" formulation that leads to the position, which the author apparently finds both mistaken and not mandated by the Criminal Procedure Law, that the defendant has the right to refuse to speak and even the right to make false statements. To carry the presumption this far is to impede the criminal process and to be "one-sided" in favor of defendants.³⁰¹ The writer does not attempt to explain how one particular formulation of the presumption necessarily carries these undesirable implications while the others he advocates do not.

As a postscript to this review of the recent literature on the presumption of innocence, it should be noted that current discussions of the position of defendant and the role of criminal defense lawyers recall those of the 1956-57 period³⁰² and are basically consistent with a presumption of innocence approach. Since the actual "criminal" status of a defendant cannot be finally decided until the court judgment, the contemporary commentaries on this subject agree, the defendant's exercise of his right to defense and the defense lawyer's efforts on his behalf should not be regarded, as some judicial officials continue to regard them, as "crafty," "resisting" behavior designed to cover up criminal responsibility.³⁰³ The defendant is portrayed as a "party" in court, enjoying citizen's rights until such time as his guilt is proclaimed by the court judgment.³⁰⁴ The defense lawyer, while not the defendant's "agent" and having no right to make false arguments on the defendant's behalf, has the right and the duty to counter incorrect factual and legal arguments of the prosecution by making points tending to demonstrate the defendant's innocence or by arguing mitigating circumstances.³⁰⁵ As might be expected from their general approach, the current analysts take the position that a defense lawyer, who must have the defendant's trust, need not and should not reveal crimes of the defendant unknown to the court, though he should make every attempt to persuade the defendant to confess them.³⁰⁶

³⁰⁰ *Id.* at 33.

³⁰¹ *Id.* at 33-34.

³⁰² See text accompanying notes 81-82 *supra*.

³⁰³ Cheng Rongbin, *The Defendant In Criminal Procedure*, 2 MINZHU YU FAZHI 21, 22 (1980). See also SUN YINGJIE & FENG CAIJIN, BASIC KNOWLEDGE ABOUT LAWYERS 46-48 (1980); Liao Junchang, & Xu Jingcun, *Brief Discussion of Our Country's Defense System*, 1 XINAN ZHENGFA XUEYUAN XUEBAO (JOURNAL OF THE SOUTHWEST POLITICAL-LEGAL INSTITUTE) 16, 18-19 (1980).

³⁰⁴ Cheng Rongbin, *supra* note 303, at 22.

³⁰⁵ Liao Junchang & Xu Jingcun, *supra* note 303, at 18-19; see also BASIC KNOWLEDGE, *supra* note 158, at 58.

³⁰⁶ BASIC KNOWLEDGE, *supra* note 158, at 57-58; SUN YINGJIE & FENG CAIJIN, *supra* note 303, at 66.

VIII. THE PROBLEMS FOR THE PRESUMPTION OF INNOCENCE IN CHINA: COMPARATIVE OBSERVATIONS

The continuing discussions of the presumption of innocence in the Chinese legal literature and the interest the Chinese are showing in learning about foreign experience with the doctrine³⁰⁷ indicate that the issue is of more than passing concern as China molds its legal system. Both the divergence of views in the contemporary law reviews and the prior history of debates on the issue suggest that the presumption of innocence is an issue that causes many difficulties and tensions for the Chinese. These difficulties and tensions have historical, ideological, conceptual, and practical aspects. In some respects they reflect peculiarly Chinese circumstances, but to a great extent they are faced in one form or another by other legal systems.

A. HISTORICAL

The People's Republic is not unique in bearing the burden of a traditional legal system that was often cruelly inquisitorial and generally unconcerned with the procedural rights of the accused. In China, however, the nature of this system was in many respects the outcome of a deep-rooted and long-standing philosophy, revolving around the all-important concept of social harmony, a harmony that was felt to be disturbed by anyone who became involved in any way with the law.³⁰⁸ This philosophy, engrained in officialdom as in the people at large, was difficult to displace by the importation of Western European legal concepts that began to occur in the late nineteenth century. These concepts had a history of barely fifty years in China before the Communist Party took power. This period was not characterized by the political stability and unity that might have been conducive to the gradual absorption of new legal ideas through a combination of doctrinal development and practical experience. The Communists took control of a China that was in many ways sociologically and philosophically unchanged from the imperial era, despite the Western-influenced structures and concepts that had found their way into its political and legal orders.

B. IDEOLOGICAL

Furthermore, in addition to wanting to break with the imperial,

³⁰⁷ One of the Chinese journals featuring translations of foreign legal materials recently published the analysis of a Japanese scholar of the presumption of innocence in Soviet law. Ueno, *The Principle of the "Presumption of Innocence" in Soviet Law*, 1 GUOWAI FAXUE (FOREIGN LEGAL SCIENCE) 58 (1980). Foreign lawyers and law teachers in China are frequently asked about this subject.

³⁰⁸ See section II(A) *supra*; see D. BODDE & C. MORRIS, *supra* note 36, at 1-51.

"feudal" past, the Chinese Communists in 1949 were also intent on uprooting Western, "bourgeois" legal ideas to the extent they had begun to develop in China during the Nationalist Republic. Indeed, one of the first acts of the new people's government was to annul the entire set of Nationalist Chinese laws³⁰⁹ and proceed to undertake a sweeping "judicial reform."³¹⁰ Little attempt seems to have been made at this early stage to analyze principles such as the presumption of innocence or to evaluate their usefulness for China; the driving goal was simply to expunge all associations with the old Chinese order and the Western world and inaugurate a new socialist China with a clean slate. By the mid-1950s, the leadership had become willing to entertain the idea that legal concepts and methods that had their antecedents in a different political and class setting from new China's could be selectively inherited and made to serve the Chinese system. The foreign concepts, however, were easy and obvious targets when the regime saw its hold over the hearts and minds of certain sectors of the society becoming less firm than it required. Again in large part without substantive analysis of the ideas under attack, the Party line beginning in mid-1957 branded the presumption of innocence and related principles as incurably foreign and "bourgeois," and entirely unsuitable for socialist China.

The Soviet Union never attempted such a clean sweep of prior law and legal ideas after the Bolshevik Revolution as the Chinese Communists did in 1949 and thereafter. Nonetheless, ideological underpinnings have not been absent from the Soviet experience with the presumption of innocence. During the debates on the issue in the decade preceding the adoption of the 1958 Basic Principles of Criminal Procedure, although the literature was apparently largely supportive of the presumption,³¹¹ there were those jurists who "preached an end" to the doctrine, "declaring it a bourgeois survival."³¹² Opinion on the question was evidently divided at the session of the Supreme Soviet that passed the Basic Principles, and the failure explicitly to mention the presumption of innocence in that document may have been a concession to those with the view of one deputy that the presumption was "a worm-eaten dogma of bourgeois doctrine."³¹³ Even since the mid-1960s, when the presumption of innocence was included as "one of the important democratic

³⁰⁹ COMMON PROGRAM OF THE CHINESE PEOPLE'S POLITICAL CONSULTATIVE CONGRESS (passed at the First Plenary Session of the Chinese People's Political Consultative Congress, Sept. 29, 1949), art. 17, 1 FLHB (1949-1950) 19, *trans. in* FUNDAMENTAL LEGAL DOCUMENTS, *supra* note 57, at 41.

³¹⁰ See section II(D) *supra*.

³¹¹ See Fletcher, *supra* note 191, at 1205.

³¹² Rakhunov, *Soviet Justice and Its Role In Strengthening Legality*, *trans. in* CDSP, Nov. 14, 1956, at 6, 7.

³¹³ Fletcher, *supra* note 191, at 1205.

principles of Soviet criminal procedures" in a legal encyclopedia,³¹⁴ the doctrine apparently has continued to be subject to the criticism that it is "bourgeois" and unsuitable for the Soviet system.³¹⁵ It is thus not surprising that socialist China, whose political and ideological history has been much shorter and in many respects more tumultuous than that of the Soviet Union, should still be in the throes of debate on the "inheritability" of legal concepts³¹⁶ and that the view that new China should formulate its own legal doctrines, and dispense with all the trappings of the order it overthrew, should continue to enjoy support.

C. CONCEPTUAL

Above and beyond the unique historical and ideological difficulties China faces with the presumption of innocence is the problem, shared by all legal systems which employ the presumption, of coming to terms with what is in many ways a "conceptually anomalous"³¹⁷ doctrine, a concept that appears quite meaningless on all but a highly abstract level.³¹⁸ As Chinese jurists have shown themselves to understand, the proposition that the trial judge in a continental system of criminal procedure is to presume the defendant innocent is difficult to reconcile with the nature of the system. It seems obvious that a Chinese court receiving a case after a thorough, two-stage pretrial investigation followed by a procuratorial determination, for all intents and purposes of guilt, in turn followed by a preliminary court screening of the case, will be hard pressed to ignore all that has gone before and start from ground zero, presuming the defendant innocent. Though they may to some extent be the result of self-fulfilling prophecy, China's conviction statistics³¹⁹ contribute to demonstrating the air of unreality involved in saying that the

³¹⁴ Berman & Quigley, *supra* note 17, at 1230, 1230 n.1. See similarly Baliev & Savitskii, *Legality and Justice*, trans. in *THE SOVIET LEGAL SYSTEM* 119 (J. Hazard, W. Butler & P. Maggs eds. 1977 ed.). (The presumption of innocence is among "the most important democratic principles of Soviet criminal procedure.").

³¹⁵ Petrukhin, *supra* note 147, at 14.

³¹⁶ See notes 143-44 & accompanying text *supra*.

³¹⁷ Fletcher, *supra* note 191, at 1203.

³¹⁸ See generally J. SKOLNICK, *JUSTICE WITHOUT TRIAL* 197-98 (1975); Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 9-13 (1964).

³¹⁹ In 1979, 95.8% of cases tried in the courts ended in a guilty judgment; 3.6% ended in exemption from criminal punishment for various mitigating circumstances; 0.6% ended in judgments of innocence. *Work Report of Huang Huoqing, Chief Procurator of the Supreme People's Procuracy, to the 14th Meeting of the Standing Committee of the Fifth Session of the National People's Congress, April 11, 1980*, Renmin Ribao, Apr. 12, 1980, at 1, 4. In the first half of 1980, the cases ending in guilty judgments amounted to over 97% of cases heard. *Work Report of Huang Huoqing to the 15th Meeting of the Standing Committee of the Fifth Session of the National People's Congress, Sept. 2, 1980*, Renmin Ribao, Sept. 17, 1980, at 2. In Beijing, 0.15% of cases presented to the courts in the first nine months of 1980 ended in judgments of innocence. 3 FAXUE ZAZHI (JOURNAL OF LEGAL SCIENCE) 22 (1980).

defendant is to be presumed innocent by the time he has reached the trial stage.³²⁰

If it is at the pretrial stage that in most cases guilt is effectively determined in the Chinese system, then it would appear to be at that stage that the presumption should have its real operational significance. If the Chinese procurator and his counterparts in other systems are in essence acting as judges of first instance, with the function of the court tribunal being primarily to perform a review of their findings,³²¹ then, to ensure a fair process, these officials should adopt the presumption of innocence as they go about their task.³²² Yet, though they may be de facto judges, these pretrial officials are de jure prosecutors, and prosecutors tend to take a prosecutorial point of view. The argument of Chinese detractors of the presumption of innocence that it is unreasonable to expect procuratorial officials to "consider" defendants innocent in the course of their work may be a deliberate attempt at confusion for political ends,³²³ but it nonetheless contains the essence of a real contradiction that supporters of the presumption of innocence cannot fail to perceive as well. One might well ask why—if the presumption of innocence is to prevail at the pretrial stage—is the defendant in China deprived of the right to counsel at this stage? The answer, accepted by Chinese jurists who claim to support the presumption of innocence at all stages of the process, is that such a right would impede too much the principal goal of the pretrial activities, which is to ferret out crime.³²⁴

It is obviously true that if pretrial officials had to adopt procedural guarantees that are consistent with a presumption of innocence, including giving the defendant a full-scale right to defense, they would be unable to fulfill their investigatory role with maximum efficiency. Thus, they carry out that role in the absence of at least some of those guarantees. If pretrial officials arrive at a determination that the case should go to court, the presumption of innocence disappears forever for, as has

³²⁰ Also relevant in this regard is the role of the Chinese defense lawyer at trial. In few reported cases does counsel argue his client's innocence; indeed, in many cases he or she begins by acknowledging the defendant's guilt and proceeds to argue mitigating circumstances or, in some cases, disputes certain of the charges and argues for a different provision of the Criminal Code to be applied than the one the prosecutor has chosen. See Gelatt, *Resurrecting China's Legal Institutions*, Asian W. St. J., Mar. 29, 1980, at 4, col. 1. Again, there may be an element of the self-fulfilling prophecy operating in this connection. See text accompanying note 319 *supra*.

³²¹ Some Soviet jurists have portrayed the Soviet system in this manner. See Fletcher, *supra* note 191, at 1218-19. Recall text accompanying note 102 *supra*.

³²² Proponents of the presumption of innocence in the Soviet Union agree that the presumption should apply at the pretrial stage. Fletcher, *supra* note 191, at 1217.

³²³ See note 283 & accompanying text *supra*.

³²⁴ See section III *supra*, especially text accompanying notes 65-71 *supra*.

been pointed out, the court is unlikely to discount the conclusion resulting from exhaustive pretrial activity and presume innocence at trial.

The valiant attempts of Chinese jurists who support the concept of the presumption of innocence to deal with the difficulties it poses, by, for instance, distinguishing the presumption of innocence from the "non-consideration of guilt,"³²⁵ are not unique to China. Soviet jurists have confronted the problem, which may be compounded by a phenomenon of the Russian language that apparently causes "presume" to be translated "consider,"³²⁶ and have devised similar "solutions." One analyst explains that the accused at the preliminary stage is not "considered innocent," but only "not considered guilty;"³²⁷ another claims that while neither the prosecutor nor the court may be expected to presume the defendant innocent, "the law" presumes him innocent.³²⁸

These conceptual tensions and contradictions may come to the surface more in the socialist countries because the ideological ramifications of the presumption prompt its discussion and debate. In countries such as France, where in a sense the presumption was born,³²⁹ one sees little if any challenge to the proposition that the presumption can and does exist. Yet, essentially the same problems face the French system; in fact, that system is the model that creates many of the problems. While the French make some concession to the pretrial presumption of innocence by allowing a certain right to counsel at the *instruction* phase,³³⁰ that phase remains highly prosecutorial in nature and its outcome is likely to be given considerable weight without a full-fledged *de novo* consideration by the trial court.³³¹

Continental legal systems are not alone in facing conceptual difficulties with the presumption of innocence. In the Anglo-American legal system, the low probable cause standard for prosecution and the absence of the extensive pretrial procedure found in the continental pattern might make the presumption of innocence at trial seem at least theoretically easier to accept than in the continental model.³³² One would hardly expect, however, that, while being recognized and accepted for

³²⁵ See text accompanying notes 293-95 *supra*.

³²⁶ See H. BERMAN, *supra* note 173, at 62. See note 105 *supra*.

³²⁷ Polyansky, *The Question of the Presumption of Innocence in Soviet Law*, CDSP, Apr. 8, 1950, at 11, 12.

³²⁸ M. Strogovich, *quoted in* Fletcher, *supra* note 191, at 1220.

³²⁹ See text accompanying note 40 *supra*.

³³⁰ See note 176 *supra*.

³³¹ See generally Vouin, *supra* note 196; Vouin, *The Protection of the Accused in French Criminal Procedure Part II*, 5 INT. & COMP. LAW Q. 157, 158 (1956).

³³² In fact, the conceptual difficulties with the presumption of innocence at trial are probably not significantly less in the Anglo-American system than in the continental model. However, it may be that the Anglo-American "due process model" has a greater stake in denying the difficulties and upholding the "fiction" of the presumption than does the continental

the trial stage, the presumption of innocence could be declared to have "no application" at the pretrial stage. That, nonetheless, is what the United States Supreme Court recently stated,³³³ in rejecting the analysis of a line of circuit court cases whose holdings for pretrial detainees complaining of poor conditions and treatment had been based on a presumption of innocence analysis.³³⁴ Whereas the District of Columbia circuit had stated that the "liberty interest of the pretrial detainees is rooted in the presumption of innocence,"³³⁵ the Supreme Court maintained that the presumption was exclusively a rule for the allocation of the burden of proof at trial.³³⁶ This proposition seems to stem from an attempt to escape from conceptual confusion, an attempt not far in its metaphysical quality from the methods employed by Chinese and Soviet jurists. The "presumption of innocence" is seen to be somewhat in conflict with various pretrial activities such as detention.³³⁷ Thus, the presumption is said not to exist at the pretrial stage; rather, there is only a fourteenth amendment right not to be *punished* prior to the adjudication of guilt in accordance with due process of law.³³⁸

D. PRACTICAL

Finally, the various problems with the presumption of innocence in China discussed thus far are difficult to separate from various realities of the Chinese system that may pose serious contradictions with the presumption. Insofar as certain aspects of the Criminal Procedure Law appear to be conceptually compatible with the presumption of innocence, it must be asked whether they are being followed. Are, for instance, the time limits, which in most cases require the procuracy to end the investigation and release the detained defendant after a certain period if it cannot meet its standard for prosecution, being observed? This aspect of

"crime control" model. See Packer, *supra* note 318, at 12-13; see also J. SKOLNICK, *supra* note 318, at 182-83, 197-98.

³³³ Bell v. Wolfish, 441 U.S. 520, 533 (1979).

³³⁴ Wolfish v. Levi, 573 F.2d 118, 124 (2d Cir. 1978), *rev'd*, Bell v. Wolfish, 441 U.S. 520 (1979); Rhem v. Malcolm, 507 F.2d 333, 336 (2d Cir. 1974); Detainees of the Brooklyn House of Detention For Men v. Malcolm, 520 F.2d 392, 397 (2d Cir. 1975). These cases adopted the view that, since pretrial detainees enjoyed the presumption of innocence, restrictions on their rights must be justified by a "compelling necessity," a formulation similar to that in the French Declaration of the Rights of Man and the Citizen, see note 16 *supra*.

³³⁵ Campbell v. McGruder, 580 F.2d 521, 529 (D.C. Cir. 1978).

³³⁶ Bell v. Wolfish, 441 U.S. at 533.

³³⁷ See Hampton v. Holmesburg Prison Officials, 546 F.2d 1077, 1080 n.1 (3d Cir. 1975), cited in Bell v. Wolfish, 441 U.S. at 532.

³³⁸ 441 U.S. at 533. In 1951, the Supreme Court had specifically equated the "presumption of innocence" with the right not to be "punished" before trial and the right to be granted bail. Stack v. Boyle, 342 U.S. 1, 4 (1951). For a more recent example of Supreme Court dictum accepting the presumption of innocence at the pretrial stage, see McGinnis v. Royster, 410 U.S. 263, 273 (1973).

the Chinese CP has proved among the most difficult to implement; a shortage of investigatory officials was cited as necessitating legislation to extend those time limits during 1980 beyond those provided in the Chinese CP.³³⁹ It is impossible at this point to tell the extent to which the Chinese CP limits are now being applied, as they should be, but a high success rate would be surprising at this early stage. Also difficult to quantify is the extent to which pretrial detention is being employed as circumspectly as the law would seem to require³⁴⁰ and whether, once in detention, pretrial defendants are being subjected to poor conditions, ill-fed, forced to labor, and shaved bald, all of which have been known to occur in China in the past.³⁴¹

More fundamental is the extent to which the criminal process, with the protections it theoretically provides, is being bypassed for such "non-criminal," "administrative" methods as "rehabilitation through labor." The latter sanction, which involves a stay in a labor camp, is to be meted out *ex parte* by a committee of public security, civil affairs, and labor officials for, among others, "those who do not engage in proper employment, those who behave like hoodlums and those who engage in theft, swindling or other such conduct but whose criminal responsibility

³³⁹ See note 218 & accompanying text *supra*. A decision of the National People's Congress Standing Committee in February 1980, provided that: "If there are too many cases, and personnel handling cases is insufficient and [thus] unable to handle cases according to the time limits prescribed by the Criminal Procedure Law regarding the investigation [and] prosecution phases . . . within the year 1980, the standing committees of [provincial-level] people's congresses may approve extensions of the time limits for handling cases." Decision of the (13th Meeting of the) Standing Committee of the Fifth Session of the National People's Congress Regarding Questions of Implementation of the Criminal Procedure Law (Feb. 12, 1980), *Renmin Ribao*, Feb. 13, 1980, at 1, *trans. in* FBIS-CHI, Feb. 13, 1980, at L6. Such extensions were approved in various parts of China; in Peking, for instance, the maximum pretrial detention time seemed to have been extended to seven months. Decision of the 3d Meeting of the Standing Committee of the 7th Session of the (Peking) City People's Congress Regarding the Extension of Time Limits for Handling Criminal Cases (Apr. 1, 1980), *Beijing Ribao* (Peking Daily), Apr. 2, 1980, at 1.

A decision passed September 10, 1981, by the 20th Meeting of the Standing Committee of the 5th Session of the National People's Congress provides that "in general" cases received by the investigatory authorities on or after January 1, 1981, should be handled in accordance with the time limits in the Chinese CP. However, if in "a small number of criminal cases where the circumstances of the case are complex or which take place in outlying districts to which transportation is inconvenient," the time limits in Articles 92, 97, 125 and 142 of the Chinese CP cannot be observed, the Decision authorizes the standing committees of the provincial-level people's congresses, from 1981 to 1983, to "decide or approve appropriate extensions of the time periods for handling cases." Decision of the Standing Committee of the National People's Congress Regarding the Question of Time Limits for Handling Cases (Sept. 10, 1981), *Renmin Ribao*, Sept. 11, 1981, at 1; *trans. in* FBIS-CHI, Sept. 15, 1981, at K5.

³⁴⁰ See text accompanying notes 214-16 *supra*.

³⁴¹ See generally BAO RUO-WANG (J. PASQUALINI) & R. CHELMINSKI, *supra* note 141; A. & A. RICKETT, *supra* note 90.

is not pursued."³⁴² Although the Chinese have passed measures limiting the period of rehabilitation through labor to a maximum of four years³⁴³ and curbing the use of a variety of other administrative methods such as "forced labor" and "taking in for investigation,"³⁴⁴ the fact remains that up to four years of treatment that apparently is not appreciably different from that accorded real "criminals" may be prescribed without any clear standard for when this non-criminal method is to be employed instead of the criminal process. When it is employed, there is not even any pretense that the accused is to be treated as potentially innocent.

In addition, it is not possible to assess the practical prospects for the presumption of innocence in the Chinese system without considering the role of the Communist Party. By the admission of the Chinese themselves, the Party committees in judicial organs have in the past had their own sets of regulations, superseding other laws, allowing them, for instance, to extend detention periods indefinitely when they consider it necessary.³⁴⁵ It has been the network of Party committees, and not the judicial system, that has effectively been the principal force in handling and deciding cases. The Chinese are engaged in what is clearly a good faith effort to change those practices,³⁴⁶ but to the extent they remain,

³⁴² DECISION OF THE STATE COUNCIL OF THE PEOPLE'S REPUBLIC OF CHINA RELATING TO PROBLEMS OF REHABILITATION THROUGH LABOR, (approved at the 78th Meeting of the Standing Committee of the National People's Congress, Aug. 1, 1957, promulgated by the State Council, Aug. 3, 1957), art. 1 6 FGHB 243 (July-Dec. 1957)), *trans. in* J. COHEN, *supra* note 49, at 249.

³⁴³ SUPPLEMENTARY REGULATIONS OF THE STATE COUNCIL ON REHABILITATION THROUGH LABOR, art. 3 (approved at the 12th Meeting of the Standing Committee of the Fifth Session of the National People's Congress, Nov. 29, 1979, promulgated by the State Council, Nov. 29, 1979), art. 3; Renmin Ribao, Feb. 26, 1980, at 4; *trans. in* FBIS-CHI, Feb. 26, 1980, at L5.

³⁴⁴ Notice of the State Council on Consolidating the Measures of Forced Labor and Taking In For Investigation With Rehabilitation Through Labor, Feb. 29, 1980, Zhonghua Renmin Gongchegu Guowuyuan Gongbao (People's Republic of China State Council Gazette), Apr. 16, 1980, at 57. One of the dissident journals in China described the "reception centers" used for people not convicted of crimes but given various administrative sanctions.

People who are received [in these places] are nominally different from citizens who have been convicted of various crimes and detained. However, their treatment is worse than that of the convicts because they have 1) no definite discharge date, 2) no personal freedom and 3) no freedom to be visited by their dependents and no freedom of communication. They lead an inhuman life. [People have been detained in these places] for 10 years . . . 5 years and . . . 3, 2, or 1 years.

Liang Yao, *The "Deeds and Virtues" of Virtue Forest*, 3 TANSUO (EXPLORATION) 11 (1979), *trans. in* Translations on the People's Republic of China: JOINT PUBLICATIONS RESEARCH SERVICE (JPRS 73421), May 10, 1979, at 37.

³⁴⁵ Conversation of author with judge in China (May 1980).

³⁴⁶ See *Chief Justice of the Supreme People's Court Jiang Hua Calls For the Guarantee of Courts' Independent Adjudication and the Abolition of the Practice of Party Committees' Reviewing and Approving Cases*, Renmin Ribao, Aug. 25, 1980, at 1, *trans. in* FBIS-CHI, Aug. 27, 1980 at L7.

they may vitiate the protections that the legal system purports to provide.

In this practical realm, as in others, the Chinese are not alone in the problems they face. For instance, both Soviet and Nationalist Chinese jurists have recognized the contradictions posed by the existence in their systems of procedures outside the formal criminal process to punish people without the guarantees of that process.³⁴⁷ An American analyst has examined the circumstances in which police in our society treat minor offenses such as traffic violations in a way that creates a clear presumption of guilt for the defendant to rebut.³⁴⁸

The American system, in fact, has one of the poorest records on the actual practice of the presumption of innocence. Pretrial detention is often lengthy and conditions are so difficult that punishment for those convicted at trial may well be "less severe than the pretrial detention they suffered when they were theoretically 'presumed innocent.'" ³⁴⁹ In any event, most of those detainees will never go to the trial where their innocence is presumed, for in the United States, in the words of a renowned criminal defense lawyer, "[t]rials are obsolete [and] [t]he government no longer has the money to afford the luxury of presuming innocence."³⁵⁰ Instead, the vast majority of defendants plead guilty and plea bargain to obtain a lenient sentence, often pressured by the clear implication that if they choose to go to trial, and are found guilty by the jury, the sentence could be more severe. In such a system, it might be said, "[t]he guilty always win[;] [t]he innocent always lose."³⁵¹

IX. CONCLUSION

In light of the many different types of problems, historical, ideological, conceptual, and practical, posed for China by the presumption of innocence, the struggles with the subject in the 1950s and again before and after the release of the 1979 Criminal Procedure Law are hardly surprising. They seem even less surprising when one recalls the similar difficulties confronted by legal systems that have had much more time to grapple with these issues than the still fledgling system of new China. It would be unrealistic to expect the Chinese to have come to terms by this point with an issue as full of complex implications as the presumption of innocence. The various statements in support of and in opposi-

³⁴⁷ Petrukhin, *supra* note 147, at 15; Tao, *Reform of the Criminal Process In Nationalist China*, 19 AM. J. COMP. L. 747, 756 (1971).

³⁴⁸ J. SKOLNICK, *supra* note 318, at 75, 91.

³⁴⁹ Note, *Constitutional Limitations on the Conditions of Pretrial Detention*, 79 YALE L. J. 941, 947 (1970).

³⁵⁰ Erdmann, *I Have Nothing To Do With Justice*, LIFE, Mar. 12, 1971, at 56.

³⁵¹ See generally L. WEINREB, DENIAL OF JUSTICE 71-86 (1977).

tion to the presumption that will continue to emanate from China will have to be studied and evaluated in light of the previous discussions, the evolving legal framework and practice, and the political situation. Foreign observers would do well to be wary of forming early conclusions on the presumption of innocence in China, for the last word on the subject is far from being spoken.