Due Process of Law in China

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1. Evolution of Due Process of Law

Due process of law is a significant concept in Anglo-American Law. It is rooted in the theory of "natural justice" dating from Roman times (*nemo iudex in parte sua; audi alteram partem*).[2] Developed and improved by English law and inherited by American law, it is mainly aimed at protecting the right to a fair trial for individuals, especially for criminal suspects and defendants.[3]

In the 20th century, the doctrine of due process of law gradually developed into a fundamental human right, accepted by a number of countries and stipulated in legal documents of the United Nations. In 1945, the United Nations Charter reaffirmed "faith in fundamental human rights, in the dignity and worth of the human person,"[4] which in essence conformed to the doctrine of due process of law. In 1948, the Universal Declaration of Human Rights stipulated the right to life and the freedom of the person, the prohibition of cruel penalties and arbitrary arrest, as well as impartial justice and the presumption of innocence.[5] The International Covenant on Civil and Political Rights, promulgated in 1966, constitutes the international norm for fair trials. Art. 14 of the Covenant includes the following: The right to a fair hearing, the presumption of innocence, such minimum guarantees as prompt information of the nature and cause of the charge, adequate time and facilities for defence preparation, being tried without undue delay, obtaining the attendance and examination of witnesses on one's behalf, the free assistance of an interpreter and not being compelled to testify against oneself or to confess guilt, consideration of the age of juvenile persons and of the desirability of promoting their rehabilitation, review of convictions by a higher tribunal, compensation according to the law for the punishment suffered in the event of miscarriage of justice, and not being tried or punished again after the final conviction.[6]

Due process of law expands, as an evolving system, from mere procedural connotation to both procedural and substantive quality, penetrating the entire process of legislation, justice and law enforcement.

As mentioned above, due process of law has been viewed as a fundamental standard of human rights protection by the majority of countries and the United Nations. Following the tendency, the Chinese administrative, legislative and judicial organs are also focusing their attention on due process of law while raising human rights standards in the PR China. For instance, the Chinese government advocates civilized and fair implementation of laws and respect for personal rights, whereas the recently-revised Constitution of the PR China mentions the respect for and the protection of human rights. All these are contributory to the establishment of due process of law in Chinese laws. Following are the expositions of the current condition and deficiencies of due process of law in China, and the approaches to its establishment in China.

2. The Doctrine of Due Process of Law

The doctrine of due process of law was first laid down in China in 1996 in the course of the revision of the Criminal Procedure Law. The former concept, which regarded the punishment of crimes as the sole aim of criminal procedure, shifted to an equal emphasis of the protection of human rights and the punishment of crime. The Chinese criminal procedure system gradually approached the international minimum standards of due process of law: absorbing the rational essence of the presumption of innocence by stipulating the principle that exclusively a court may render criminal judgments,[7]

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[2] *FAN Chongyi* (樊崇义), A Research into the Re-amendment to the Criminal Procedure Law of the PR China (刑事诉讼法修改专题研究报告), Beijing 2004, p. 16.

[3] *WANG Yizhen* (王以真), Foreign Legal Studies on Criminal Procedure (外国刑事诉讼法学), Beijing 2004, p. 14.

[4] Preamble, Charter of the United Nations of June 26, 1945, United Nations Conference on International Organization Documents, Vol. XV (1945), p. 335.

[5] Universal Declaration of Human Rights of December 10, 1948, Resolution 217 (III), United Nations, General Assembly, Official Records third Session (part I) Resolutions (Doc. A/810), p. 71.

[6] International Covenant on Civil and Political Rights of December 19, 1966, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966).

incorporating aspects of the adversarial court system and broadening the scope of activities of both the accusing party and the defendant,[8] and making efforts to increase the rights of the criminal suspect and his or her defence lawyer during the pre-trial period.[9]

Nevertheless, the legal practice of due process of law in the PR China still has the following deficiencies:

A legal culture which attaches pervasive importance to the criminal procedure has not been completely established in China. In the absence of recognition of due process of law, the public is barely concerned about the substantive results of criminal cases. Moreover, the legislature excessively stresses the instrumental value of procedural law, whereas the independent value is ignored. One example is Art. 1 of the Criminal Procedure Law: "This Law is enacted in accordance with the Constitution and for the purpose of ensuring correct enforcement of the Criminal Law, punishing crimes, protecting the people, safeguarding state and public security and maintaining socialist public order."[10] Additionally, judicial practice at times witnesses such violations of due process of law as the affirmation of a criminal judgement prior to the actual adjudication, coerced mediations or the failure to inform the defendant of his or her procedural rights and duties.

Moreover, the comprehension of the concept of due process of law by both the legislature and the law enforcement agencies is still insufficient. Criminal procedure legislation merely lays emphasis on the reform of relevant proceedings, but ignores the substantial implications of due process of law. For instance, the reform of the criminal procedure law drawing on due process of law is limited to the innovation of specific legal systems and measures, such as the revision of the interrogation procedure and of coercive measures, thereby clearly demonstrating the reform's fragmentariness and incompleteness. In addition, due process of law is merely viewed by the law enforcement agencies as a principle for the implementation of laws, and is not yet considered as a fundamental concept of the rule of law.

3. Cultivating the Concept of Due Process of Law

First and foremost, the Chinese government is supposed to play an exemplary role in raising public awareness of due process. For example, the government has to continue the reform of the political structure and to promote the exercise of public powers by means of due process. A specific example is the government holding public hearings in the course of major decisions to tutor the public's notion of due process. Furthermore, considering that due process of law attaches importance to personal rights, the outlook on human rights and the respect for the individual as a subject are to be fostered. This would be conducive to the correction of the monistic legal outlook of the supremacy of the national interest, and to the promotion of a pluralistic legal outlook of equal attention to national, social and individual interests. Being beneficial to the entire process of legislation, the administration of justice and the enforcement and abidance of law in the PR China, this will accelerate the modernization of the Chinese legal system. No doubt, the Chinese government nowadays pays equal attention to national security (stability) and personal rights and endeavours to converge these aspects, with its guideline converted from "stability being the overwhelming consideration" to the "establishment of a harmonious community." This will certainly exert a positive influence on the establishment of a pluralistic legal outlook and thereby on the implementation of the concept of due process of law.

4. Incorporating Due Process of Law into the Chinese Constitution

As the most appropriate way to protect human rights, due process of law should be embodied in the Constitution of the PR China for the very purpose of emphasizing the justiciability and authori-

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[7] Art. 12: "No person shall be found guilty without being judged as such by a People's Court according to law." Criminal Procedure Law of the PR China (中华人民共和国刑事诉讼法) of March 17, 1996, China Legal System Publishing House (中国法制出版社), Nov. 1999, p. 10; English translation in: http://en.chinacourt.org/public/detail.php?id=2693 (visited April 24, 2007).

[8] Art. 155-160 Criminal Procedure Law of the PR China (supra note 7).

[9] Art. 33: "A criminal suspect in a case of public prosecution shall have the right to entrust persons as his defenders from the date on which the case is transferred for examination before prosecution. A defendant in a case of private prosecution shall have the right to entrust persons as his defenders at any time.
A People's Procuratorate shall, within three days from the date of receiving the file record of a case transferred for examination before prosecution, inform the criminal suspect that he has the right to entrust persons as his defenders. A People's Court shall, within three days from the date of accepting a case of private prosecution, inform the defendant that he has the right to entrust persons as his defenders."
Art. 96: "After the criminal suspect is interrogated by an investigation organ for the first time or from the day on which compulsory measures are adopted against him, he may appoint a lawyer to provide him with legal advice and to file petitions and complaints on his behalf for obtaining a guarantor pending trial. If a case involves state secrets, the criminal suspect shall have to obtain the approval of the investigation organ for appointing a lawyer.
The appointed lawyer shall have the right to find out from the investigation organ about the crime suspected of, and may meet with the criminal suspect in custody to enquire about the case. When the lawyer meets with the criminal suspect in custody, the investigation organ may, in light of the seriousness of the crime and where it deems it necessary, send its people to be present at the meeting. If a case involves state secrets, before the lawyer meets with the criminal suspect, he shall have to obtain the approval of the investigation organ." Criminal Procedure Law of the PR China (supra note 7).

[10] Art. 1 Criminal Procedure Law of the PR China (supra note 7).

tativeness of human rights. In the present constitution, the chapter prescribing citizens' fundamental rights and duties is limited to certain procedural regulations on arrest and to the protection of privacy,[11] whereas the past amendments to the Constitution have failed to touch upon any "procedure", not to speak of due process of law. To a great extent, the absence of due process of law in the Constitution affects the pertinent stipulations of the basic laws and has detrimental effects on the completion of due process of law in the PR China.

5. Relevant Procedural Principles

In the present constitution, the chapter pertaining to citizens' fundamental rights and duties stipulates that "the state respects and protects human rights."[12] Therefore, the amendment of the current Criminal Procedure Law should take into consideration the protection of human rights both as the fundamental guiding ideology and as the superior principle of all criminal procedural principles.

Secondly, an accused is to be presumed innocent until finally proved guilty after judicial proceedings. From this principle, we can deduce such criminal procedural rules as the defendant's right to silence and that doubtful cases may not lead to conviction. The Criminal Procedure Law provides that "no person shall be found guilty without being judged as such by a People's Court according to law."[13] This demonstrates the general spirit of the presumption of innocence, but this provision does not entirely comply with the categorical idea of presumption of innocence. For instance, the Criminal Procedure Law stipulates that "the criminal suspect shall answer the investigators' questions truthfully, but he shall have the right to refuse to answer any questions irrelevant to the case."[14] Furthermore, the Criminal Procedure Law constitutes that, "with respect to a case for which supplementary investigation has been conducted, if the People's Procuratorate still believes that the evidence is insufficient and the case does not meet the conditions for the initiation of a prosecution, the People's Procuratorate may decide not to initiate a prosecution."[15] But according to relevant judicial interpretations, the People's Procuratorate retains the right to continue investigation in order to find new evidence for further prosecution.

Thirdly, the criminal suspect or the defendant should be entitled to exercise the right of defence, and the defence lawyer's relevant rights should also be fully guaranteed. It is obligatory upon the prosecutors and the judges not to obstruct the exercise of the right of defence. This is a significant right of the accused as well as one of the principles directly embodied in the concept of human rights protection in the course of criminal proceedings.

Fourthly, for the purpose of maintaining the stability and predictability of criminal procedure, all criminal procedures should be clearly prescribed by law, and the penal proceedings should be established in accordance with the codified criminal procedure.

Fifthly, criminal procedure should be open to the public, the proceedings should be accessible to the public, and the results of the procedure should be presented to the public. Procedural openness serves as the window through which the public can supervise judicial practice, as well as a significant link to make criminal procedure comprehensible and acceptable.

Sixthly, the determination of facts throughout the proceedings and the rendered judgment should be based on evidence, crimes should not be ascertained without evidence, and the evidence used for a judgment should meet the pertinent requirements.[16] The principle of judgment based on evidence helps to prevent judges from making arbitrary convictions and strengthens the authority of justice.

6. Procedural Systems

a) Coercive Measures

An embedded system of coercive measures includes coercive measures against the person, coercive measures *in rem*, and coercive measures infringing the right to privacy.[17] The Criminal Pro-

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[11] Art. 37: "The freedom of person of citizens of the People's Republic of China is inviolable. No citizen may be arrested except with the approval or by decision of a People's Procuratorate or by decision of a People's Court, and arrests must be made by a public security organ. Unlawful deprivation or restriction of citizens' freedom of person by detention or other means is prohibited, and unlawful search of the person of citizens is prohibited."
Art 38: "The personal dignity of citizens of the People's Republic of China is inviolable. Insult, libel, false charge or frame-up directed against citizens by any means is prohibited."
Art. 39: "The home of citizens of the People's Republic of China is inviolable. Unlawful search of or intrusion into a citizen's home is prohibited."
Art. 40: "The freedom and privacy of correspondence of citizens of the People's Republic of China are protected by law. No organization or individual may, on any ground, infringe upon the freedom and privacy of citizens' correspondence except in cases where, to meet the needs of state security or of investigation into criminal offences, public security or procuratorial organs are permitted to censor correspondence in accordance with procedures prescribed by law."
Constitution of the PR China (中华人民共和国宪法) of December 4, 1982, http://english.people.com.cn/constitution/constitution.html (visited April 19, 2007).

[12] Art. 33 Constitution of the PR China (supra note 11).

[13] Art. 12 Criminal Procedure Law of the PR China (supra note 7).

[14] Art. 93 Criminal Procedure Law of the PR China (supra note 7).

[15] Art. 140 Criminal Procedure Law of the PR China (supra note 7).

[16] *WANG Yizhen* (supra note 3), p. 26.

cedure Law only prescribes for coercive measures against the person. The coercive measures *in rem*, such as inspection, search and seizure, are merely laid down in the chapter titled "Investigation"[18], and are stipulated as the exclusive power of the investigating organ. Coercive measures concerning the right to privacy, such as monitoring and compulsory sampling, are not enacted in the Criminal Procedure Law, but are nevertheless practiced by the investigating organs. Therefore, the system of coercive measures must be reviewed and coercive measures in rem and concerning the right to privacy should be incorporated into the law.

In addition, the currently enacted coercive measures against the person have certain shortcomings. There is, for example, no interval between the summons and the summons for detention; there is no independent mechanism of custody, so that detention and arrest automatically result in custody for trial; there is no specific time limit for obtaining a guarantor pending trial, and the maximum amount of the bail is not specified.[19] Additionally, a criminal suspect or defendant under residential surveillance is sometimes taken into disguised custody for trial by being placed in a hotel under strict surveillance. In view of this, an independent mechanism of custody for trial must be established, with custody for trial separated from detention and arrest. Meanwhile, judicial review should be enacted in order to examine coercive measures by a neutral third party; the interval between summons and summons for detention should not be less than 12 hours; residential surveillance should be eliminated and the obtaining of a guarantor pending trial should be reformed by enlarging its application and stipulating both the maximum amount of the bail and the means of collecting it.

b) Defence

At present, the Chinese criminal defence system is defective as far as the right to counsel is concerned. This right cannot be guaranteed during the pre-trial period (including the investigation and prosecution period). During the investigation period the lawyer is merely seen as a legal supporter rather than a defender.[20] In a state-secret related case, the criminal suspect even has to obtain the approval of the investigating organ if he or she intends to entrust his or her defence to a lawyer, and additionally the investigating organ may send investigators to be present at the lawyer's meeting with the criminal suspect in custody. By contrast, the Criminal Procedure Law does not stipulate that the lawyer be present at the investigating organ's interrogation of the criminal suspect.[21] The lawyer's rights to accumulate evidence and consult case-related documents are restricted: the lawyer's right to collect evidence during the investigation period is not legally prescribed, and during the prosecution period the defence lawyer may only collect case-related materials with the consent of the witnesses and the victim or his or her near relatives, as well as with the permission of the procuratorate and the court. During the investigation period, the lawyer has no right to consult current case-related documents, and during the prosecution period the case-related documents available to the defence lawyer are limited to the judicial documents and the technical verification materials.[22]

Moreover, a convict's right to seek a lawyer's aid after the judgment is not stipulated in the Criminal Procedure Law. This is evidently unfavourable to the accuracy of the convict's application for retrial and thereby to the protection of his or her rights. There are no stipulations on the lawyer's criminal immunity (the lawyer should under no circumstances be held liable for pleading in the course of performing his or her duties) or on the potential legal liability arising from an unsuccessful defence. Since the Criminal Law of the PR China particularly stipulates that it is a crime for a lawyer to destroy, falsify or hinder the collection of evidence, a lawyer's defence work does bear certain risks.[23]

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[17] *CHEN Guangzhong* (陈光中), Research on the Issues in Implementation of the Criminal Procedure Law (刑事诉讼法实施问题研究), Beijing 2000, p. 79.

[18] Art. 101-108 Criminal Procedure Law of the PR China (supra note 7).

[19] Art. 53: "If the People's Courts, the People's Procuratorates or the public security organs decide to allow a criminal suspect or defendant to obtain a guarantor pending trial, they shall order the criminal suspect or defendant to provide a guarantor or pay guaranty money." Criminal Procedure Law of the PR China (supra note 7).

[20] Art. 33 Criminal Procedure Law of the PR China (supra note 9).

[21] Art. 96 Criminal Procedure Law of the PR China (supra note 9).

[22] Art. 36: "Defence lawyers may, from the date on which the People's Procuratorate begins to examine a case for prosecution, consult, extract and duplicate the judicial documents pertaining to the current case and the technical verification material, and may meet and correspond with the criminal suspect in custody. Other defenders, with permission of the People's Procuratorate, may also consult, extract and duplicate the above-mentioned material, meet and correspond with the criminal suspect in custody.
Defence lawyers may, from the date on which the People's Court accepts a case, consult, extract and duplicate the material of the facts of the crime accused in the current case, and may meet and correspond with the defendant in custody. Other defenders, with permission of the People's Court, may also consult, extract and duplicate the above-mentioned material, and may meet and correspond with the defendant in custody."
Art. 37: "Defence lawyers may, with the consent of the witnesses or other units and individuals concerned, collect information pertaining to the current case from them and they may also apply to the People's Procuratorate or the People's Court for the collection and obtaining of evidence, or request the People's Court to inform the witnesses to appear in court and give testimony.
With permission of the People's Procuratorate or the People's Court and with the consent of the victim, his near relative or the witnesses provided by the victim, defence lawyers may collect information pertaining to the current case from them." Criminal Procedure Law of the PR China (supra note 7).

Consequently, the PR China has to affirm the lawyer's status as the defender during the investigation period. It also has to guarantee the lawyer's right to meet his or her client in private, although the investigators may monitor such a meeting as long as it is inaudible; it has to make the presence of a defence lawyer mandatory when investigators interrogate a criminal suspect, to cancel the aforesaid limitations on a defence lawyer's inquiry into evidence, to establish an evidence presentation system by enacting the time, place, scope and legal consequences of such presentation, to stipulate the legal consequences of a failed defence and the suspect's right to legal counsel when he or she petitions for retrial, to amend the criminal law by incorporating the special crime concerning a lawyer's falsification of evidence into the general crime of falsification of evidence in order to ensure the lawyer's full performance while pursuing his or her duty of defence, and to waive the criminal law's general suspicion of and discrimination against lawyers. Finally, financial support for legal aid should be increased.

c) Relationship between Courts, Procuratorates and Public Security Organs

One of the most important principles of the criminal procedure of the PR China is that the public security organ (the police), the procuratorate and the court are linked by a division-of-labour system with separate responsibilities, mutual coordination and restraint.[24] At the moment, the three organs tend to coordinate rather than restrain each other. Such coordination hinders judicial justice and the neutrality of the courts. It aggravates the imbalance of power between the prosecutor and the defendant and worsens the situation of the defendant during criminal proceedings. Moreover, the division of labour between the aforementioned organs is irrational because this system grants excessive powers to the public security agencies which serve as the investigation organs without any sufficient restraint. Furthermore, the whole procedural structure concerning the prosecutor, the defendant and the judge, especially the pre-trial procedural structure, is defective. For example, most coercive measures and mandatory investigations that might encroach upon the citizens' right of the person or the property are determined and implemented by the public security organs themselves without review or approval by a third party, without any hearing, pleading or the participation of lawyers at all. If the defendant's procedural rights are violated by the public security organs or the procuratorates, the legal remedy for this violation may be filed by the infringers on their own initiative and by the suspect, but both appeals just lead to administrative remedies in the form of "self-examination" and "self-adjudication" by the infringers.

Accordingly, the above-mentioned coordination must be expunged from the Criminal Procedure Law in order to safeguard the courts' power of independent adjudication. Meanwhile, systems of judicial review and judicial remedy should be established. In consideration of the current legal supervision over the public security organs by the procuratorates in the PR China, the public security organs may apply to the procuratorates for judicial review when the former need to take coercive measures, whereas the procuratorates file their applications for judicial review with the court.

7. Retrial of Criminal Cases

The retrial system in the PR China, also called the "procedure for adjudication supervision", indicates that legally effective judgments and orders containing actual errors in the determination of facts or in the application of law shall be reheard by the court. On the basis of the principle of seeking truth from facts and correcting mistakes, the court may seek to find "errors" on its own initiative and initiate a retrial, whereas the procuratorate has the right to appeal against wrong judgments or orders and demand a retrial. Neither the plaintiff nor the defendant, however, can file a petition directly leading to a retrial.[25] The current form of retrial mainly aims at correcting errors rather than offering a remedy to the defendant. The following are the major defects in the current retrial system of the PR China:

a) Petition

The Criminal Procedure Law does not specify the reasons for petition or stipulate time periods, and there are no restrictions on the levels of the courts or procuratorates handling a petition, so the parties can arbitrarily file petitions regarding legally effective judgments or orders with the courts or procuratorates. This easily results in repeated petitions, trans-level petitions and peti-

[23] "Whoever resorts to persecution and retaliation against a witness is to be sentenced to not more than three years of fixed-term imprisonment or criminal detention; when the circumstances are severe, to not less than three years and not more than seven years of fixed-term imprisonment." Art. 306 Criminal Law of the PR China (中华人民共和国刑法) of July 1, 1979, amended on March 14, 1997, http://www.colaw.cn/findlaw/crime/criminallaw3.html (visited April 19, 2007).

[24] Art. 7: "In conducting criminal proceedings, the People's Courts, the People's Procuratorates and the public security organs shall divide responsibilities, coordinate their efforts and check each other to ensure the correct and effective enforcement of law." Criminal Procedure Law of the PR China (supra note 7).

[25] *CHEN Ruihua* (陈瑞华), Frontier Problems Involving Criminal Procedure (刑事诉讼的前沿问题), Beijing 2000, pp. 486-488.

tions accepted by neither the courts nor the procuratorates because they are likely to shift the responsibility on to each other.[26] If the petitioned case is heard by the court which made the legally effective judgment, the judgment is unlikely to be rescinded (mainly because the respective court has scruples about taking the responsibility for misjudged cases). Besides, the petitioned case is usually retried in an administrative way different from the standard criminal procedure, and the lawyer handling the petitioned case has no definite legally prescribed litigant status.

b) Initiation of Retrial Proceedings by the Court

The initiation of retrial proceedings by the court requires a legally effective judgment or order based on actual errors in the determination of facts or in the application of the law, with the exception of legally effective judgments and orders violating criminal proceedings itself. Additionally, there is no legally prescribed distinction between a retrial in favour of the defendant and a retrial going against the defendant. A case of the latter initiated by the court itself would contravene the principle of separated accusation and adjudication. Furthermore, the non-limitation of periods for the filing of a retrial leads to repeated investigation and determination of criminal responsibility.

c) Application of the Retrial Procedure

The Criminal Procedure Law does not stipulate whether the principle of "no increase of a defendant's criminal punishment in a case appealed solely by the accused party" is applicable in retrial proceedings. In judicial practice the defendant's criminal punishment can be aggravated in a retrial on a judgment appealed against merely by the accused party.

d) Conflict between Legislation and Judicial Interpretation

According to the Criminal Procedure Law, legally effective judgments or orders containing "erroneously determined facts" can be corrected through retrial.[27] Whereas it is inevitable for the first instance court to render a judgment of acquittal in cases with insufficient evidence, in cases with "erroneously determined facts" the respective case should not be accepted for retrial. However, under the relevant judicial interpretation, the procuratorate may after a judgment of acquittal based on insufficient evidence "reinitiate a public prosecution" if it has found new facts or new evidence, hence the validity of the acquittal is negated at the expense of the stability of and in contradiction with the Criminal Procedure Law.[28]

Therefore, the PR China should establish the principle of double jeopardy (or nemo debet bis vexari pro una et eadem causa, no one should be harassed for the same cause twice). The retrial procedure may fall into the categories of retrial for correcting erroneously determined facts - including retrial both in favour of and against the defendant, with the latter being highly restricted - and retrial for reviewing the application of law. No restrictions may be imposed on retrials for reviewing the application of law. In addition, the procedure for petition, which should be incorporated in the retrial procedure, should be divided into the procedure for applying to the court for retrial and the procedure for applying to the procuratorate for protest.[29] Also, the petitioner as well as the form of petition, the cause for petition and the petition procedure should be specified.

7. Exclusionary Rules of Illegally Obtained Evidence

The collection, examination and assessment of evidence should be defined by a complete set of laws, and the objectivity, relevancy and legality of evidence should be clearly prescribed in the rules of evidence. The Criminal Procedure Law devotes an entire chapter to the rules of evidence, and the Supreme Court of the PR China has specified these rules in some judicial interpretations, but all these stipulations do not yet constitute a complete system of criminal evidence.

The above-mentioned chapter in the Criminal Procedure Law, which includes eight ambiguous articles,[30] lacks operability. The criminal justice reform has achieved a certain success in promoting the equality of the plaintiff and the defendant as well as in improving the procedural rights of both parties. However, the necessary reforms of the criminal evidence system are apparently lagging behind. Hence, a complete system of criminal evidence rules should be established in the legal system of the PR China, based on the full respect for the inherent principles of the application of evi-

[26] *CHEN Guangzhong* (supra note 17), p. 277.

[27] Art. 189 No. 3: "After hearing a case of appeal or protest against a judgment of first instance, the People's Court of second instance shall handle it in one of the following manners in light of the different situations. … (3) If the facts in the original judgment were unclear or the evidence insufficient, the People's Court may revise the judgment after ascertaining the facts, or it may rescind the original judgment and remand the case to the People's Court which originally tried it for retrial." Criminal Procedure Law of the PR China (supra note 7).

[28] *SONG Yinghui/LI Zhongcheng* (宋英辉/李忠诚), Research on Functions of Criminal Procedure Law (刑事程序法功能研究), Beijing 2004, p. 485.

[29] *CHEN Guangzhong* (supra note 17), p. 287.

[30] Art. 42-49 Criminal Procedure Law of the PR China (supra note 7).

dence and of the domestic judicial practice. The major evidence rules should include:

(1) The rule of relevancy. The evidentiary materials presented during the criminal procedure should have a substantive connection with the case and be able to prove the facts of the case.

(2) Exclusionary rules of illegally obtained evidence. Testimonial evidence obtained by law enforcement organs in violation of the laws and the rights of the parties should be excluded, while the rejection of tangible evidence should be left to the discretion of the judges who should balance the specific conditions of the case and the importance of the right infringed upon by the act of illegally obtaining evidence.

(3) The rule of hearsay evidence. Unless the law provides otherwise, a statement by a witness out of court cannot be presented to the court and taken as the basis for determining the case. A witness may be excused from appearing in court if his or her presence is impossible or unnecessary.

(4) The rule of confession. This rule includes the principle of liberal confession (The plea of guilt should be made of the defendant's own free will, otherwise it cannot have any evidential effect.) and the rule of corroborative evidence (Confessions are very likely to be false, so they cannot be used to solely determine a case, but should be confirmed by other evidence via cross-identification in order to corroborate the facts of the case.).[31] In a case of joint crime, in default of other sufficient evidence the mere confession of one joint offender should not be used to render all joint offenders guilty.

8. Conclusion

The foregoing briefly reviews in retrospect the evolution of due process of law, and, in view of China's current practice of due process of law and relevant issues, mainly probes the establishment of due process of law in China in anticipation of the due position of due process of law in Chinese law. At present, China's legislature, which is devoted to the re-amendment to the Criminal Procedure Law of the PR China, tends to melt due process of law into the Criminal Procedure Law by accepting suggestions of Chinese legal experts.

We are confident of the incarnation of due process of law in Chinese law. However, it must be noted that unceasing efforts should be made to see due process of law completely and genuinely embodied in China's legislation and law enforcement.

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[31] *FAN Chongyi* (supra note 2), pp. 238-239.