

## Short Communication

# Institutionalized Forensic Patients in China: A Perspective of Criminal Procedure

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The Criminal Law of China has long recognized insanity as an exempting or mitigating factor of criminal responsibility; however, procedural safeguards for forensic patients have not been granted until the amendment to the Criminal Procedure Law (CPL) in 2012.

First, forensic patients have acquired the right to free counsel. Second, while psychiatric testimony was almost always presented only by deposition in the past, the 2012 CPL requires that expert witnesses must take the stand where: 1) both parties have differing opinions regarding the expert testimony; 2) the court deems it necessary for the expert witness to appear before the court. More importantly, expert testimony will be inadmissible if the expert witness declines to take the stand after being subpoenaed by the court. This provision has established a hearsay rule for expert testimony in cases where the court finds it necessary to call the expert witness to testify, by which the defense acquires the opportunity to confront the other party's psychiatrist in the courtroom in criminal cases involving insanity. Third, because defense attorneys do not have psychiatric expertise, assistance from a psychiatrist is necessary to fulfill the task of cross-examining the prosecution's expert. The 2012 CPL permits the defense to have their own psychiatrists to assist counsel in confronting opposing experts. This provision makes it more meaningful to ask the expert witness to take the stand because both parties can conduct substantial cross-examination with such assistance.

Finally, the 2012 CPL brings compulsory treatment under the rule of law. Compulsory treatment involves not only the deprivation of liberty, but also involves compelled medical treatment in the psychiatric hospital, thus it should be regarded as a crucial measure involving citizens' fundamental rights. For the first time, the 2012 CPL sets out the scope, procedures, and supervision mechanisms for compulsory psychiatric treatment in criminal cases:

1. The 2012 CPL lays out three criteria for compulsory treatment—mentally ill persons who (a) committed a violent

crime, endangered public security or caused death or injury to others; (b) were determined to be not guilty by reason of insanity after a mental health assessment in accordance with law; (c) pose a continuing risk endangering public security may be compelled to receive medical treatment in a designated psychiatric hospital.

2. The 2012 CPL sets up judicial review mechanisms for determination of compulsory treatment, emphasizing the principle that this decision involving grave interests of the subject of application should be made by a panel of judges through a hearing.
3. The 2012 CPL adds a periodical evaluation and judicial review mechanism for the release of those with mental illness subject to compulsory treatment.
4. The 2012 CPL recognizes the importance of rights protection for forensic patients facing or under compulsory treatment. For example, when the accused, the victims of crime, their legal representatives or near relatives do not accept the decision of compulsory treatment, they are entitled to file a complaint for reconsideration with the next highest-level court. The institutionalized forensic patient and his family members can apply for removal of compulsory treatment.
5. The 2012 CPL also strengthens the prosecutor's supervision over both the imposition and implementation of compulsory treatment.

China has made significant progress in applying the international standards to the criminal mental health legislation. However, there are still gaps between domestic law and international standards. First, the defendants do not acquire the right to initiate mental examinations, only official agencies such as the police, prosecutors and judges can decide to conduct them. Second, once the right to free counsel is guaranteed for forensic patients, further effort must be made to ensure effective counsel to protect their rights not only because of their powerlessness and vulnerability, but also because of the existence of "sanism," a term describing

the irrational prejudice towards persons with mental disabilities. Third, based on rationales similar to those justifying the legal aid system, such as equal protection, due process, and meaningful access to justice, indigent forensic patients should be entitled to psychiatric assistance at state expense. Fourth, it is an international norm that forensic patients are entitled to the least restrictive alternative course of treatment even when institutionalized. This right should also be granted in China. A reflection of the right to the least restrictive alternative treatment is a community integration principle. The 2012 CPL does not create any alternative treatment model to institution-based treatment. Considering the shortage of beds in Ankang hospitals (where the forensic patients are committed) across the country, psychiatric probation can be a promising supplement to the institution-based treatment model. Psychiatric probation can either be used as a post-release treatment plan, or be offered to forensic patients as a less restrictive treatment option.

<sup>1</sup>Article 18 of the Criminal Law of the PRC states: “If a mental patient causes harmful consequences at a time when he is unable to recognize or control his own conduct, upon verification and confirmation through legal procedure, he shall not bear criminal responsibility. . . . If a mental patient who has not completely lost the ability of recognizing or controlling his own conduct commits a crime, he shall bear criminal responsibility; however, he may be given a lighter or mitigated punishment.” *Zhong huaren min gong he Guo Xing fa* [Criminal Law], available at <http://www.cecc.gov/pages/newLaws/criminalLawENG.php>.

<sup>2</sup>See Amendments to the Criminal Procedure Law (CPL), art. 187(3) (2012), available at <http://lawprofessors.typepad.com/files/130101-crim-pro-law-as-amended-en.pdf>

<sup>3</sup>The psychiatric service system of China is institutionally complex. It is uncertain how many administrative systems (Xi Tong) have their own psychiatric facilities, but the great mass of mental health services are provided by four departments. The largest mental health service system is governed by the Ministry of Health and its local bureaus (accessible to urban and rural citizens who have health insurance, which covers their medical costs). The second largest is managed by local departments of the Ministry of Civil Affairs (serving those who are jobless or homeless and those whose families are otherwise too poor to pay for their care). The third largest belongs to the military, operating primarily for military personnel and their families. In recent years a number of these hospitals have begun providing care on a fee-for-service basis to local citizens. Finally, there is a system managed by the provincial or municipal departments of public security, called “Ankang Hospitals” that provide care for mentally ill criminal offenders. See Yang Shao et al., *Current Legislation on Admission of Mentally Ill Patients in China*, 33 *INT'L J. L. & PSYCHIATRY*52 (2010).

<sup>4</sup>Article 286 of the CPL provides: “When the people’s court admits an application for compulsory medical treatment, it should form a judicial panel for the hearing.”

<sup>5</sup>CPL, *supra* note 2, art. 287.

<sup>6</sup>*Id.*, article. 289.

<sup>7</sup>See MICHAEL L. PERLIN, *INTERNATIONAL HUMAN RIGHTS AND MENTAL DISABILITY LAW: WHEN THE SILENCED ARE HEARD* 34 (2011)...

<sup>8</sup>The Convention on the Rights of Persons with Disabilities provides: “States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of this Convention, including by provision of reasonable accommodation” (emphasis added). “Reasonable accommodation” means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms. See Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, U.N. Doc. A/RES/61/106, arts. 2, 14 (Dec. 13, 2006)