

Transparency and Legitimacy in Chinese Criminal Procedure

In memory of my honourable grandfather, Judge Zhang Xianmo

谨以本书告飨先祖父，共和国高级法官，张公讳咸谟

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Transparency and Legitimacy in Chinese Criminal Procedure

Beyond Adversarial Dogmas

Transparantie en legitimiteit in de Chinese strafprocedure;
Adversaire dogma's voorbij
(met een samenvatting in het Nederlands)

中国刑事诉讼的透明度和正当性：跳出对抗制的窠臼
(中文摘要附后)

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Preface – How a ‘non-conformity’ PhD was tempered

When I tried to profile this dissertation and its author with just one single word, ‘non-conformity’ hit me at once. In China today, ‘non-conformity’ or ‘FZL’ is a series of highly controversial, and usually with pejorative overtones, sub-cultural phenomena and groups, and often connected with rebellious teenagers who refuse to conform to the conventional standards of thoughts and behaviours expected by the senior. Moreover, this term is frequently visualized as odd-looking appearance or hairstyle.



Indeed, the main points of this dissertation and the personality of its author, I’m afraid, would not be considered as any less appalling and odd-looking in the eyes of the mainstream academia in China. Therefore, I dare immodestly refer to myself as a ‘non-conformity’ PhD, who was tempered by his unique background.

I was born in early 1980s, when China was just beginning its One-Child Policy. Given that China just abandoned this policy due to the aging population, I am almost destined to represent the most ‘non-conformity’ or odd-looking generation in my family tree, as both my ancestors and offspring have siblings while I do not.

Moreover, my paradoxical family background has added more weight to such ‘non-conformity’. My father is from a typically revolutionary family, while my mother is from a family that may have held a rather mixed, and

probably negative, feeling about the revolution. Specifically, my grandfather was born a proletarian peasant, who had to struggle for his living. He joined the Communist Party and People's Liberation Army of China in 1940s, with his revolutionary ideals to overthrow the corrupted ruling of the bureaucratic bourgeoisie and reestablish a new China. Grandfather was shot in his upper arm in a battle during the Chinese Civil War, and then sent to an Honoured Soldier School, where he recovered and learnt how to read and write. He worked so hard and performed so outstandingly during his stay in the school that he was appointed as the dean after graduation. After the founding of the People's Republic, as one of the small proportion of educated young cadres in the Party and the Liberation Army, he began to work in the High Court of Shandong Province, and had long been presiding over the criminal trial division of the provincial court. Indeed, most of the story is quoted from my father, as grandfather was not a talkative old man who always boast about his past. In my memory, he was a large fleshy man as benevolent as the Maitreya. There was only one time he mentioned to me how came his wound as I asked, and I still remember his exact words: 'I was bitten by Chiang Kai-shek.' In brief, Grandfather was a loyal CPC member who sincerely trusted in Mao and devoted himself to the cause of the Party, a pious communist that can be seen in China today almost only in the News Simulcast/Xinwen Lianbo, an official daily news programme produced by China Central Television (CCTV), shown simultaneously by all local TV stations in mainland China.

Influenced by grandfather, my father is also very orthodox in his views, but he shows more respect for Deng Xiaoping, thanks to who, he was able to participate in 1977 in the College Entrance Examination of China that had been suspended for 10 years during the Cultural Revolution, and later enrolled as one of the very first batch of college students after the Examination was restored. Without Deng's Reform and Opening Policy, he might have still been working in a remote village, 'being re-educated by the peasants'. After graduation from the university, father was assigned to his employer in Qingdao, where he met my mother.

In contrast to my father, mother has a rather heterodox mind due to her family background. Maternal grandfather was the best dentist in Qingdao. He learnt the skills from a Japanese dentist when my home city Qingdao was colonized by Japan. I have no memory of my maternal grandfather, as he passed away when I was only one year old. According to mother's memories, he probably found the Japanese ruler better than KMT, and KMT better than CPC, and kept a rather critical attitude to CPC and the authorities; he said from time to time that should KMT remain to rule in mainland China, he might have operated a highly profitable dental clinic, and mother would be a Miss rich. I could see a slight regret in her eyes when mother mentioned this to me. Unsurprisingly, mother is also quite critical of CPC and the Chinese authorities.

Consequently, my childhood and teenage years existed alternately in Xinwen Lianbo and Southern Weekly (China's most influential and most

outspoken liberal newspaper), which tempered my cynicism about any political propaganda. When most Chinese pupils of my age were proud to wear their red scarves all the time, I often felt uncomfortable to have what my mother called a hangman's noose around my neck; when many of them truly believed the political metaphor that our red scarves were coloured by the blood of the revolutionary martyrs, such rhetoric only made me sicker of this piece of red cloth since to my knowledge then, only sanitary napkins were coloured by human blood. I found knowledge a good thing, maybe the best of things that can prevent people from being fooled, and I hated the feeling of being fooled. So I had much more interest in reading extracurricular books on popular science than in obtaining a title of 'three-good student' (who is good morally, academically and physically). My favourite was a pack of black-covered paperback 'I Wonder Why', from which I acquired many of my common sense, including the fact that a piece of absorbent fabric supposed to be coloured by human blood is mostly defined as sanitary napkin rather than red scarf. I bought this pack of books in 1991 when I was first grade in primary school. I still remember exactly that the books cost RMB ¥ 40 of my pocket money, which at that time was undoubtedly a big sum of money for me. Yet this must be the most cost-effective investment during my life, since it helped me identify my real interest and unusual talent in natural science.

Father was not quite satisfied with my lack of sense of honour, but reassured by my enthusiasm and genius in natural science. At that time, China was still vigorously promoting the so-called 'four modernizations', i.e. the modernizations of industry, agriculture, national defence, and science & technology, and thus badly in need of scientists and engineers. Therefore, father did not terribly mind my ideological heterodoxy, and was happy to see his only son's prospects of becoming a scientist. I did not fail him very much during school time, although never obtained a 'three-good student' title, instead I won Second Prize of Hua Luogeng Gold Cup Mathematical Tournament for Juveniles, Second Prize of Chinese Chemistry Olympiad, First prize of Chinese Physics Olympiad, First prize of National Juvenile Games of Scientific Invention and Innovation, and etc. as a compensation. Moreover, I also finished learning part of university mathematics and physics courses by self-study during high school, so that I could be able to expedite my bachelor programme in science once I went to college.

However, the gods send nuts to those who have no teeth. On the one hand, I narrowly missed my opportunities to enter the best physics department that I had been dreaming of, since neither my SAT score nor my Olympiad achievements were competitive enough for enrolment; on the other hand, China's top law school was much interested in my academic performance and Olympiad achievements, and thus would like to enrol me through special procedure. I was quite frustrated with such an unexpected situation, but father was much reassured that I could stay within the legal community just as he and grandfather did, since after all, a son following his father's step very much

conforms to China's traditional culture. He tried to persuade me by asserting that a talented science student can easily learn jurisprudence well while an arts student can hardly learn maths and physics well, and to be enrolled in a top law school was even more promising than studying in the best physics department as China was beginning to promote rule of law and thus in need of jurists even more than scientists. I was rather indifferent with father's arguments, but still accepted his suggestion, as I felt sorry for being rarely obedient to his good wishes. I owed him a 'three-good student' title, and it might be time for me to do at least one 'conformity' thing. Moreover, I guessed that my talent in natural science was probably not enough to qualify me as a top scientist, and furthermore, it seemed much easier for a Chinese citizen to acquire the Nobel Peace Prize than the Physics Prize.

Thus did I go to China University of Political Science and Law (CUPL) in 2003. In gangster films, when a bad man eventually gets his conscience back and began to do good things, he will usually die soon. Similarly, a 'non-conformity' boy had to pay for the only 'conformity' thing he ever did during his life. Father might be right that jurisprudence does not demand much talent, but he failed to remind me that it does demand unusual patience that I lack the most for boring minutia of all kinds of legal instruments. In maths and physics exams, the key point for high score is 'less is more', which obviously does not apply to law exams. However, I still insisted my old habit of writing the answer to each question within several dozen words, only because I already became too lazy to write more words. Unsurprisingly, my college life was totally a disaster. My principle of 'less is more' worked only once. It was the final exam of the course 'An Introduction to Mao Zedong Thought'. The last question with 40 points required students to write down any poem of Mao without one single mistake. It was an 'all or nothing' question. While most students were thinking hard to recall Mao's best-known 'Spring in a Pleasure Garden. Snow', I finished my answer with one of his 'Poems of Sixteen Words',

Peak!
Whipping the steed without
dismounting, I
Look back surprised
To be three-foot-three off the sky.

This was the only time in college I felt like returning to the old time, when learning and passing exams was like playing games; but father should take all the credit since it was him who used to compel me to recite classical poems, including those of Mao's.

Apart from this, there were still two other things in college that reassured me. First, I made friends with other 'non-conformity' students from all over China, from whom I got to know that the rhetorical question 'which family cannot afford a meal of dumplings during spring festivals' which equals to 'every dog

has its day' does not speak to my friends from South China, since they never ate dumplings during spring festivals. I became increasingly tolerant and easy towards diversity of cultures and ideas. The other reassuring thing is that I met my future wife in college. She was recognized as the so-called Flower of my class, namely the most beautiful girl among all the classmates. However, we hardly knew each other during the four years in college as I seldom went to class while she, as a Beijing local, went home every weekend. The only thing I knew about her was her instant messenger nickname 'P-tulip' short for purple tulip. Our story would not begin until many years later when I physically went to a country of tulip.

In order to make me better understand the spirit of law, grandfather found me an internship in the criminal trial division of the Shandong People's High Court during the summer holiday of my junior year. I did not hesitate to accept this arrangement since the air conditioner in the court was good and the canteen was much better than my university's. Since grandfather worked there for many decades, the cadres of the court treated me as a family member. My supervisor, Judge Luo Ying, was several years older than me. She really took me as her little brother, and taught me much knowledge not only about criminal trial issues, but also about social and professional ethics. From then on, I had vivid feelings and awareness that (criminal) law really matters and means much broader and more profound than any textbook could ever tell. I began to explore interesting criminal law issues just like how I explored the law of the nature when I was a curious boy. At that time (2006), the Supreme Court of China just decided to soon retake the power of death penalty review that had been remitted to provincial courts for decades. Concomitantly, all death penalty cases of second instance were required to be subject to inter partes court sessions in high courts. I was assisting the trial judges for second-instance trial of death penalty cases, and thus began to focus on due process issues of criminal trial. We happened to come across a number of cases with which the judges had issues regarding the conflict between the right to public trial and privacy, most of which involved rape, prostitution, or juvenile delinquencies. I found it an interesting and relevant research question, so decided to explore it in my familiar scientific method. I collected 385 criminal cases whose file was in hand, and extracted relevant information from the trial reports, based on which I carried out a case-law study, culminating in my LL.B. thesis 'On the Non-Public Trials in Chinese Criminal Proceedings and its Regulations – From the Perspective of Privacy', which was later published on *Application of Law*.

After the internship, I had made up my mind to further my study in (criminal) law, and become a criminal lawyer in future. However, it was not an easy task for me to find what I lost in the past few years as I had wasted too much of my time. It took me almost two years to pay off my debts, during which grandfather passed away. It will forever be my deepest regret that I wasted a couple of years doing nonsense, and therefore grandfather narrowly failed to see his only grandson growing up and following his step to become a criminal lawyer. He

passed away in June 2008, while I passed the national bar examination with top-ranking score in November 2008, enrolled in my master programme in CUPL in September 2009, registered as a practicing lawyer in May 2010, and obtained the national fund for study abroad in March 2012.

During my master programme in CUPL, I majored in human rights law and criminal justice, and continued to focus on criminal trial. I took many courses on criminal procedure, and was taught that a fair criminal trial should only be a close contest between equal parties before a passive tribunal of fact, conducted in a highly oral and immediate way that requires all evidence be produced in an open court; and that Chinese criminal procedure was totally a disaster since it essentially contradicted the basic tenets of due criminal procedure. I was quite convinced by such mainstream opinions since it appeared quite coherent in logic, and thus had a feeling that those in authority must be either too stupid to understand such profound ideas, or too evil to carry out such desirable scheme.

At that time, one of the most criticized procedures in China's criminal process was the death penalty review procedure, which, being *ex partes* and *in camera*, was believed deviated from the basic tenets of due criminal procedure in every detail. I was quite curious about this mysterious procedure, especially given my previous internship experience of second-instance trial of death penalty cases. So I decided to conduct an empirical study on this procedure, and was lucky to get an internship in a criminal division of China's Supreme Court. During my internship in the Supreme Court, I was assisting the judges with their daily work regarding death penalty review, and witnessed how they did their work in every detail. Moreover, I was allowed to read the dossier, including the internal file such as trial reports and the concomitant feedback from superior judges. I was also permitted to be present at the deliberation of the collegial panel. Based on my internship experience and samples collected, I wrote my master thesis 'An empirical study on the right-to-life-guaranteeing function of China's death penalty review procedure'. Using SPSS to analyze the data collected, the thesis assessed, from each technical aspect, the functional contribution of the procedure to its fundamental goal of 'less numerous but more cautious executions'. Surprisingly, the conclusion of this empirical study contradicted almost every aspect of the mainstream opinions about the procedure. Data indicated that the most functional parts of the procedure were just what the mainstream opinions most strongly criticized while what they most advocated was proved barely functional. Moreover, through my empirical research, I also found that the legitimacy of China's death penalty review procedure, which was strongly challenged by some leading scholars as a so-called 'administrative procedure', was indeed well recognized by most Chinese populace; in turn, China's criminal trial of first and second instance, which had already been subject to considerable 'window dressing' according to their 'basic tenets', was actually confronted with declining legitimacy. I read in quite a number of trial reports that family members of deceased victims preemptorily required imposition of death penalty on the defendants, threatening to go 'Shangfang'

in Beijing if their request was not satisfied. When trial judges tried to convince them by explaining that the defendants did not deserve death penalty according to the law and criminal policy, and thus death penalty decision would eventually be overruled during the death penalty review procedure by the Supreme Court, they replied that they would have no issues should the Supreme Court say no to death penalty, but they simply did not trust the criminal trials of first and second instance.

The ironic reality made me reflect on what I learnt from curricula. Gradually, I found that the so-called 'basic tenets' of due criminal procedure that matter for its legitimacy, which had been enshrined in most syllabuses in China's law schools, were nothing but a set of coherent legal theorems with barely any solid ground in China's context. These tenets became popular in China mostly because it appeared much better-looking and more western-styled than our old-fashioned theories from Soviet Union, and perhaps moreover, they came from United States, the lighthouse of human civilization in many liberal minds in China. It seems that we are vigorously chanting that 'adversarial procedure is simply good, simply good', just like we were as vigorously chanting that 'the Great Proletarian Cultural Revolution is simply good, simply good' decades ago. Therefore, I made up my mind to study abroad to see whether adversarial procedure is really simply good or not. In order to have an impartial perspective to compare adversarial procedure and the Chinese system, I decided to go to a civil law country. Given the language problem, the Netherlands is an ideal choice, and I was so lucky that Prof. John Vervaele and Prof. Chrisje Brants accepted my application.

At the beginning of my four-year PhD study, I frequently felt awkward for being told by my supervisors that this is just what we do in the Netherlands when I invoked China's mainstream academia to criticize the 'weaknesses' of Chinese criminal procedure, such as dossier-based proceedings, powerful prosecutors, and activist judiciary. Later on, I found that adversarial dogmas are indeed the dumplings in Chinese legal community, and the curricula on criminal procedure just play a role as the CCTV Gala of the Spring Festival Eve that has misled people into believing that every family will eat dumplings during Spring Festival. Moreover, just like increasing northern Chinese families are beginning to spend Spring Festivals in Hainan, and might eat coconuts instead of dumplings, many exemplary common law countries have indeed deviated more or less from their adversarial traditions, and started to embrace an inquisitorial approach, especially in pre-trial procedure. Accordingly, I feel obliged to share with my colleagues that just like dumplings do not suit every stomach, adversarial dogmas do not speak to each country. This is just what this dissertation would like to tell in brief.

In a broader sense, I would like to caution Chinese liberal intellectuals, including myself, against our inherent, and perhaps unconscious, sense of superiority over both the officialdom and the populace, regarding political and legal issues. Such sense of superiority will blind us to what really contributes to

the well-being of the country and the people, and drive us fascinated in various ‘window dressing’ reforms rather than functional improvements. We must stop our vain attempts at the so-called ‘awkward integration’, which only leads us from our old-fashioned political correctness to a seemingly more western-styled one, and makes our law curricula sound like speeches of American village cadres.

‘Non-conformity’ as my opinions are, I am definitely not implying that China’s mainstream academia have contributed to nothing and are less insightful than me. On the contrary, I sincerely admire my Chinese predecessors, like my co-supervisor Prof. He Jiahong, who brought fresh air to Chinese legal community. Just as Master Lu Xun ever wrote in one of his works *Voicelless China*, ‘By temperament, Chinese people always prefer reconciliation and compromise. For instance, should you say that it is too dark in this room and thus propose opening a window here, no one would ever allow it. But if you advocate the demolition of the roof, they will come to reconcile, willing to open the window.’ The adversarialization reform scheme was just the proposal to demolish the roof of Chinese criminal procedure; and it transpires that this proposal works so successively that Chinese people are really thinking of demolishing the roof now. Evidently, my Chinese predecessors should take all the credit for such progress. If the (criminal) law reform in China could be compared to an advancing vehicle, the mainstream academia should be considered the engine, while I am no more than the brake. However, given that the vehicle is approaching a sharp turn, it is time for someone to put on the brakes for safety reasons, and I feel that it is my ‘curse’ to do such ‘non-conformity’ job.

The above is my story about how a ‘non-conformity’ PhD was tempered. Hereinafter, I would rather play a provisional ‘conformity’ PhD to thank those who help either in writing the book or in making me what I am. Above all, I must thank my country and my people for their generosity to fund my research via China Scholarship Council, especially given that many Chinese people are still living a difficult life who probably need this big sum of money more than I do. I shall also thank the cadres of the educational department of Chinese Embassy, especially Mr. Wang Yiwei, for their kind help during my four-year study in the Netherlands.

I miss grandfather and hope he can witness my achievements from above the heaven. I often feel guilty about leaving my aging parents thousands of miles away. Confucius taught that a son not ought to go to a distance where he will not be able to pay the due services to his parents, but I, as their only child, fail to fulfil this basic filial duty. I am also grateful for their indulgence and making me what I am. For the same reason, special thanks should be given to my parents-in-law and their only beloved daughter, Mrs. Zhang. They should not have suffered from this if I did not abduct Mrs. Zhang to the Netherlands with a bunch of tulips; and thanks to loving and caring Mrs. Zhang, this Chinese stomach could survive a Dutch kitchen.

In writing this book, I very much appreciate the kind help of my supervisors, Prof. John Vervaele and Prof. Chrisje Brants. It was such a pleasure to work with them that I often doubt whether I have abused their unusual kindness and indulgence in my indolence. I am also grateful to my co-supervisor, Prof. He Jiahong, especially for his tolerance of my impertinence. Prof. He is widely recognized as one of the few leading criminal law professors in China's mainstream academia; while this book is intended to target right at what he is representative of. Moreover, Prof. He also rendered many enlightening remarks on this book, based on which I could reflect on my views from a critical perspective. Apart from my current supervisors, I also would like to thank my previous supervisors, i.e. Judge Luo Ying from Shandong People's High Court, who launched not only my academic interest in criminal trial but also the research question about transparency and legitimacy in Chinese criminal procedure, Judge Gao Guijun from the Supreme Court of China, who also contributed a lot to my master thesis, and Prof. Ban Wenzhan from CUPL, who instructed my master thesis. Besides, the following people also offered their kind help in writing this book: Prof. Zhang Jianwei from Tsinghua University sponsored my field study in China; Dr. Cheng Lei from Renmin University of China introduced the Technical Investigation Measures in China; Dr. Jiang Su from Peking University discussed with me the concept of legitimacy and its best Chinese translation; my colleague in Willem Pompe, Dr. Allard Ringnalda, rendered informative materials and vivid explanation of Scottish criminal procedure; our secretary, Ms. Wieneke Matthijsse, worked diligently on the layout of this book; last but not least, Dr. Chen Weiluan from UIPS helped making the beautiful cover image of this book.

All the mistakes and nonsense in this book should be ascribed to my own impotence or negligence, and I look forward to further debates of this topic as well as the feedback from my readers.

Shuai Zhang
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自序 – “非主流” 博士是怎样炼成的？

当我试图用一个词来概括本文及笔者时，第一时间就想到了“非主流”这个词。在当下中国，“非主流”指一系列极富争议、且往往带有贬义的亚文化现象及群体，常令人联想到叛逆的少年。他们不愿按照长辈的期望顺从传统的思想和行为规范。在人们的印象中，“非主流”的代表就是荒诞怪异的外形和发式。



然而，在中国主流学界眼中，本文的主要观点及本人性格在荒诞不经方面恐怕是有过之而无不及。也因此，我敢于毫不谦虚地自诩为“非主流”博士，而这都是特有的成长背景炼成的。

我生于八十年代初，当时中国刚开始独生子女政策。由于这一政策已经随着人口老龄化而被放开，我几乎注定会成为族谱上最最“非主流”的一代，因为不管是我的祖先还是后代都会有兄弟姐妹，唯独我没有。

而我纠结的家庭背景也进一步加剧了这种“非主流”。家父出自典型的革命家庭，而母亲一家对革命的感受则要复杂许多，窃以为八成是抵触的。具体说来，我的祖父出身贫农，生计维艰。二十世纪四十年代，他抱着推翻官僚资产阶级反动统治建立新中国的革命理想加入了中国共产党和人民解放军。解放战争中，祖父上臂中弹负伤，被送到荣军学校进行康复和文化学习。因为在校期间学习努力，表现优异，毕业后被留任为教导主任。解放后，因党和军队亟需有文化的年轻干部，祖父脱颖而出，被选派至山东省高级法院，长期主持刑庭工作。以上经历多出自家父之口，因为祖父话不多，并不像《我爱我家》中的

傅明老人那般喜欢跟晚辈讲述自己的革命事迹。在我的印象中，祖父是个心宽体胖、慈祥如弥勒的老者。只有一次在我问起时，祖父谈及臂上伤疤的由来，我至今仍记得他的原话：“爷爷让蒋介石咬了一口。”简言之，祖父是一名忠诚的共产党员，他真诚地信仰毛泽东，并将毕生奉献于党的事业。如今，几乎只有在新闻联播中才能见到祖父这般虔诚的共产党员了。

受祖父影响，家父也是非常正统的人，但他更尊敬邓小平。多亏邓公，家父才有机会参加1977年的高考，并有幸成为恢复高考后的第一批大学生。假如没有邓公及其改革开放政策，家父很可能仍在偏远的农村劳作，“接受贫下中农的再教育”。大学毕业后，家父被分配到青岛的单位。正是在青岛，家父结识了家母。

与家父截然不同的，是由于家庭背景的缘故，家母的思想相当离经叛道，甚至多少有些“反动”。外祖父曾是岛城顶级的牙科医生。日占时期师从一名日本牙医，习得精湛技艺。外祖父在我周岁时就过世了，因此我对他没有印象。而据家母回忆，外祖父大概觉得日本人的治理要好过国民党，而共产党尤不及国民党，并对中共当局始终抱有批判态度；他时常讲，假如国民党仍在大陆，他可能早就开私人牙科诊所了，自己女儿也会从小就是富家小姐。每当言及此处，家母的眼神中总是流露出些许的遗憾。可以想见，母亲对当局的态度也多是批判性的。

我的童年和青少年时代就这样时而在新闻联播中，时而在南方周末中度过了。这造就了我对各种政治宣教玩世不恭的态度。当多数同龄人总是自豪地佩戴着红领巾时，我却时常觉得母亲口中这根“上吊绳子”缠在脖子上很难受；当许多小学生真的以为我们戴的红领巾是革命烈士的鲜血染红的时，我却更加厌恶这块红布，因为就我当时所知，只有卫生巾才是用鲜血染红的。我发现知识是个好东西，或许是防止被洗脑的最有力武器，而我特别讨厌被人当成傻子糊弄。于是我对课外科普读物的兴趣远大于获得三好学生称号。我最爱的是一套黑色封面平装本的《十万个为什么》。我从中获取了许多知识和常识，包括会被鲜血染红的多半是卫生巾而不是红领巾。这套书购买于1991年，那时我刚上小学一年级。我至今仍清楚地记得这套书花了我四十块零花钱，这在当时对我来说无疑是一笔巨款。然而这应该是我人生中最划算的一笔投资，因为它使我发掘出自己对自然科学的兴趣和天赋。

家父对我缺乏荣誉感这一点颇为不满，好在我对自然科学的热情和天分令他略感欣慰。那个时代，国家仍在大力推进“四化”建设，亟需大量科学家和工程师。因此，家父对我思想上的离经叛道并未太过介怀，且乐于看到他的独子有望成为一名科技工作者。所幸我的在校表现没有令父亲太过失望，尽管从未获得过“三好学生”称号，但我相继获得了华罗庚金杯少年数学邀请赛全国二等奖，全国化学竞赛二等奖，全国物理竞赛一等奖，全国少年儿童科技发明创新大赛一等奖等荣誉，可以聊作补偿。此外，我还在高中期间自修了部分大学数学和物理课程，以便在大学入学后可以加快本科学业进程。

可惜，造化弄人。由于高考和竞赛成绩不够理想，我与自己心仪的物理系失之交臂；而与此同时国内顶尖的法学院却对我的学业表现和竞赛成绩颇感兴趣，并愿意通过自主招生录取我。我为这不期而至的局面颇为沮丧，而家父却十分欣慰我可以接过他和祖父的衣钵，继续在法律界发展，毕竟子承父业非常符合中国的主流价值。父亲劝我说，理科尖子生可以轻易地学好法学而文科生基本

上很难学好数学和物理，而且能被顶尖的法学院录取甚至比在顶尖的物理系学习还有前途，因为国家正在推进依法治国，法学家甚至比科学家更稀罕。我对父亲的说辞有些漠然，但仍接受了他的建议，因为我自己多年来对他的阳奉阴违颇为内疚。我还欠他一个“三好学生”称号，是时候做哪怕一件“主流”一点的事情了。此外，我也觉得自己在自然科学方面的天赋大概不足以成为顶尖的科学家，更何况，对中国人来说，获得诺贝尔和平奖似乎比获物理学奖要容易得多。

就这样，我在2003年进入了中国政法大学。在警匪片里，每当坏人良心发现弃恶从善，基本就离死不远了。同理，“非主流”青年也要为其人生中唯一做过的“主流”的事付出代价。父亲没有说错，法学的确不需要太多天分，但他没有提醒我这门学科需要超常的耐心面对各种枯燥的法律条文，而这正是我最缺乏的品质。在数理世界中，根本奥义在于“天之道，损有余而补不足，是故虚胜实，不足胜有余”，所以答卷时越简练越好，而这显然不适用于文科考试。尽管如此，我仍然坚持过去的习惯，每道大题只答几十个字，只因为积习难改，实在懒得多写。可以想见，这在大学生活中完全是场灾难。我的“不足胜有余”原则只成功过一次。那是在“毛泽东思想概论”课的期末考试中，最后一道40分的大题要求默写任意一首毛泽东诗词，不得有任何错误，否则不得分。当许多同学搜肠刮肚拼命回忆《沁园春·雪》时，我早已交卷，留下一首毛的十六字令：

山
快马加鞭未下鞍
惊回首
离天三尺三

这是大学里唯一一次我感觉仿佛回到了从前，学习和考试轻松得就像游戏；但这也都要归功于父亲，是他逼我从小背诵经典诗词，包括毛泽东诗词。

除此之外，大学里还有两件事情聊以自慰。一是我结识了几个同样“非主流”的朋友，他们来自全国各地。从他们那里我知道了“谁家过年不吃顿饺子”这句俗语并不适用于我南方的同学，因为他们那儿过年真的从不吃饺子。我不再少见多怪，对异质的文化和观念也变得越来越包容和温和。另一件值得欣慰的事是在大学遇到了我未来的妻子——我们班公认的班花。然而，大学四年我们几乎不认识彼此，因为我很少去上课，而她是北京本地人，每周末都要回家。我对她唯一的了解就是她的网名是“P-tulip”，代表紫色郁金香。我们的故事直到多年以后我亲赴郁金香之国时才会开始。

为了使我更好地理解法律的精神，大三暑假时，祖父在山东省法院刑庭为我找了一份实习工作。我毫不犹豫地接受了这个安排，因为单位的空调很足而且法院食堂也比学校的好多了。由于祖父在这工作了几十年的缘故，省法院的同志们待我如同家人一般。我的实习导师罗莹法官年长我几岁，待我如同亲弟弟一般。她不光教我很多关于刑事审判的知识，也教会我许多为人处世的规矩。在实习工作中，我真切地体会到（刑事）法律的意义远比书中所载要深远得多，并开始探索感兴趣的刑法问题，就如小时候好奇地探索自然规律一样。那一年（2006），最高法院刚刚决定不久后收回下放给各省法院几十年的死刑复核权，同时，各省法院也被要求所有死刑二审案件一律开庭审理。我的任务正是协助法官进行死刑案件二审开庭工作。于是，我便开始关注刑事审判的正当程

序问题。院里当时刚好遇到一系列案件，触及公开审判权和隐私权的冲突，多数案件涉及强奸、卖淫，或未成年人犯罪，法官们对此莫衷一是。我认为这是一个既有趣又有意义的研究问题，于是决定用我熟悉的科学方法进行探索。我收集了当年的385个能查到案卷材料的刑事案件，从审理报告中提取相关信息，以此为基础，我做了一个案例研究，形成了我的本科毕业论文“论刑事诉讼中的不公开审判及其规制——以个人隐私为视角”，该文后来发表于《法律适用》。

实习结束后，我决定继续从事（刑事）法律研究，并立志成为一名刑事法律人。然而，想把过去几年浪费的时间补回来对我来说并非易事，毕竟逝者如斯。我用了近两年时间偿还欠债，在这期间，祖父过世了，这成为我永远遗憾，因为我的蹉跎，他终究没有看到自己唯一的孙儿出息的一天。祖父于2008年6月过世，而我于同年11月以名列前茅的成绩通过国家司法考试，2009年9月，我在法大开始了硕士项目，2010年5月，我获得执业律师资格，2012年3月，我拿到了国家留学基金，2017年9月，我将获得我的博士学位……

在法大读研期间，我的专业是刑事司法与人权，并继续关注刑事审判问题。我上了许多刑事诉讼法学课程，学到了公正的刑事审判只能是平等的控辩双方在消极中立的法官面前进行的势均力敌的对抗，诉讼应当以口头方式即时进行，所有证据只能产生于公开的法庭；而中国的刑事诉讼简直是个灾难，因为它从根本上违背了公证审判的基本原则。我对这种主流观点颇为信服，因为它看起来在逻辑上很自洽，于是不禁产生了一种肉食者鄙的感觉。

那时，中国刑事诉讼中最受学界诟病的程序之一就是死刑复核程序。这一不公开不开庭的程序被指责为完全背离正当程序的基本原则。我对这一神秘的程序非常好奇，毕竟有过死刑案件二审工作的实习经历，于是决定对这一程序进行实证研究。我很幸运获得了在最高法院某刑庭实习的工作机会。在实习期间，我负责协助复核法官进行日常工作，并亲眼目睹了他们具体如何从事这项工作。此外，我被允许阅读案卷，包括副卷中审理报告、阅卷意见和相应批示等，我也被允许旁观合议庭评议。基于该实习经历和收集到的样本，我撰写了自己的硕士毕业论文“我国死刑复核程序的生命权保障功能探析”。借助SPSS软件分析收集到的数据，该论文从每个具体细节评估了该程序对其“少杀慎杀”的根本目标的功能性作用。出人意料的是，该实证研究的结论几乎完全否定了关于该程序的主流观点。数据表明，该程序最具功能的部分正是主流观点最为诟病的方面，而主流观点大力宣扬的机制反被证明基本没有功能性价值。此外，通过该实证研究我还发现，我国死刑复核程序虽然被一些学术权威激烈地抨击为所谓的“行政程序”，然其正当性却被多数民众充分认可；相反，依主流观点的所谓“基本原则”做足了“门面”的一二审程序，其正当性在实践中反倒日益受到质疑。我曾在多份审理报告中读到，死者家属强硬地要求一二审法院判处被告人死刑，并威胁假如不判死刑就进京上访。尽管承办法官努力辨法析理，说被告人依法依政策都不应判处死刑，即便判了也会在死刑复核程序中被最高法院驳回，然而家属坚决表示假如最高法院驳回死刑他们没有任何意见，但他们就是不信任一二审程序。

讽刺的现实使我反思从书本上学到的知识。渐渐地我发现，法学院课程中宣扬的所谓正当程序的“基本原则”不过是一套自洽的法律命题，在中国缺乏坚实的实证基础。这些原则能够流行主要是因为看起来比来自苏联的老旧理论要好看和洋气得多，而且它们来自美国——自由派知识分子心目中人类文明

的灯塔。看起来我们正在高唱着“对抗制诉讼就是好，就是好”，一如数十年前我们同样高唱“无产阶级文化大革命就是好，就是好！”于是，我决定出国深造，看看对抗制诉讼是否真的就是好。为了从一个中立的角度比较对抗制诉讼和中国的制度，我决定到大陆法系国家。而考虑到语言的问题，荷兰成为了一个理想选择。很幸运，John Vervaele教授Chrisje Brants教授接受了我的申请。

在为期四年的博士研究之初，我时常感到尴尬不已，因为每当引用国内的主流观点批判中国刑事诉讼的“缺陷”，诸如基于案卷的诉讼程序，强势的检察官，以及能动的法官等，我的导师往往会告诉我，这就是我们荷兰的做法啊，无可厚非嘛。后来，我发现对抗制的教条也不过是中国法律界的“饺子”，而刑事诉讼法课程则扮演了春晚的角色，使人们误以为家家户户过年都要吃饺子。并且，正如越来越多的北方家庭开始在海南过年，因此很可能过年也不吃饺子而改吃椰子了，许多典型的普通法系国家实际上也或多或少背离了其对抗制传统，转而引入审问制方法，尤其是在审前程序。因此，我感到有必要转告同行，正如饺子不是人人都吃，对抗制的教条也并不适用于每个国家。这正是本书一言以蔽之想要表达的。

从更广泛的意义上，本书还想提醒中国的自由派知识分子，也包括我自己，在政治和法律问题上，不要对官方和民间抱持固有的，或许是下意识的优越感。这种优越感会蒙蔽我们，使我们看不到真正利国利民的方案，终日陶醉于各种“充门面”的改革而非有功能价值的进步。我们必须放弃徒劳的所谓“尬融”，因为这无非令我们从旧有的政治正确走向貌似更洋气的另一种政治正确，令我们的法学课程听起来像美国村干部的讲话而已。

尽管我的观点十分“非主流”，但我绝非在暗示中国的主流法学界尸位素餐，尚不及我高明。相反，我真挚地感佩我的前辈们，比如我的联合指导老师何家弘教授，是他们为中国法学界带来了新鲜空气。正如鲁迅先生在《无声的中国》中曾写道的，“中国人的性情总是喜欢调和、折中的。譬如你说这屋子太暗，须在这里开一个窗，大家一定不允许的。但如果你主张拆掉屋顶，他们就会来调和，愿意开窗了。”对抗制的改革方案正是那个要拆掉中国刑事诉讼的屋顶的主张；事实证明这个主张非常成功，国人真的在考虑“拆掉屋顶”了。显然，这一进步完全要归功于我的前辈们。假如将中国的（刑事）法律改革比作一辆前进的汽车，那么主流学界就是这辆车的引擎，而我不过是一个刹车片。只是，考虑到这辆车正在驶近一个急转弯，安全起见，需要有人点一脚刹车。我感觉自己注定要来做这种“非主流”的工作。

以上就是我，“非主流”博士是怎样炼成的故事。下面，我要临时扮演一次“主流”博士，感谢在我成长和写作本书的过程中惠赐帮助的人。首先，我要感谢我的祖国和人民，是他们通过国家留学基金委慷慨地资助我出国深造。我的祖国并不富裕，许多人民仍困于生计，他们很可能比我更需要这笔钱。因此，这种慷慨更加弥足珍贵。我也要感谢使馆教育处的同志，特别是王怡伟老师，他们在我四年的留荷生活中给予我许多帮助与支持。

我感念祖父的荫庇，希望他在天之灵能看到我的成长进步。我时常对双亲感到内疚。子曰，父母在，不远游。他们年事日高，我作为独子本应承欢膝下，却远跋尖山，未尽人子的本分和孝道。因此，我要感谢父母多年的宽容与悉心的栽培。更因此，我要特别感谢我的岳父母以及他们的独女，张太太。如果不是

我当初用一束郁金香将张太太骗来荷兰，他们本不该忍受分离之苦；而且多亏有贤惠的张太太，我的中国胃才能在荷兰生存下来。

对于本书的写作，我非常感激我的两位导师 John Vervaele 教授以及 Chrisje Brants 教授，与他们共事真是莫大的享受，以致我时常怀疑自己是否滥用了他们超越常人的好脾气和对我懒散性格的迁就。我也要感谢我的联合指导老师何家弘教授，尤其是他对于我无礼冒犯的雅量。何教授被公认为中国主流法学界最权威的刑法教授之一，而本书却意在挑战他代表的主流学界。我还要感谢何教授为本书惠赐许多发人深思的意见，基于这些意见，我从批判的角度重新审视了本书的观点。

除了现任的导师，我还要感谢各位前任导师：山东省法院罗莹法官，是她激发了我对刑事审判问题的学术兴趣，并促使我最早萌生了本书的研究问题；最高法院高贵君法官，他对于我的硕士论文和顺利毕业帮助极大；中国政法大学班文战教授，为了指导我的硕士毕业论文，并使其顺利通过，班老师付出了“艰苦卓绝”的努力。

此外，以下诸位对本书写作亦惠赐颇多：清华大学张建伟教授支持了本人在国内的调研考察；中国人民大学程雷副教授介绍了我国技侦措施的有关问题；北京大学江溯副教授与我讨论了legitimacy的概念以及最佳的中文译法；我的荷兰同事 Allard Ringnalda 博士针对苏格兰的刑事诉讼提供了详实的资料和生动的解释；我们的秘书 Wieneke Matthijsse 女士为本书的排版付出了辛勤的工作；乌特勒支药理学所陈伟杰博士帮助制作了本书漂亮的封面图片。在此一并表示感谢。

本书如有错讹与不经之处，须归咎于本人的疏忽和浅薄，期望能抛砖引玉，引发对本课题进一步的探讨，也欢迎读者诸君惠赐雅正。

张帅
2017年6月

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List of abbreviations

COPFS	The Crown Office and Procurator Fiscal Service
CPC	The Communist Party of China
CPPCC	Chinese People’s Political Consultative Conference
DIC	Discipline Inspection Commissions of CPC
ECHR	European Convention on Human Rights
KMT	Kuomintang of China, or Chinese Nationalist Party
NPC	National People’s Congress of China
PII	Public Interest Immunity
PRC	The People’s Republic of China
PSO	The so-called ‘public security organs’ in China, which actually function as the police
ROC	The Republic of China
SIC	The State Inspection Commission
SPC	The Supreme People’s Court of China
SPP	The Supreme People’s Procuratorate of China
TIM	Technical Investigation Measures

Introduction

1 Interaction between legitimacy and transparency

Legitimacy literally denotes the quality or state of being legitimate. According to Oxford Advanced Learner's Dictionary, legitimate means 'allowed and acceptable according to the law'. Accordingly, legitimacy can be understood simply in literal terms as the situation in which something or someone is lawfully recognized and accepted as right and proper. In political science, legitimacy is usually considered as the popular recognition and acceptance of the authority of a governing regime; or in a less typical case, the recognition and acceptance of the authority of an unpopular regime by at least a small but influential elite. Such popular or unpopular regimes, according to German sociologist Max Weber, can be categorized as three ideal types based on varying sources of authority: traditional, charismatic, and rational-legal.¹ As for the legitimacy of a modern criminal justice system, as far as it is relevant to this research, it correspondingly refers to the situation whereby the criminal justice system is generally recognized and accepted as fair and just, which in turn derives from a quality, capacity or high probability of that system that it can identify and convict the factually guilty while filtering or acquitting the factually innocent, or conversely, that it will not convict the factually innocent or acquit the factually guilty, and where inevitable, err on the side that is generally less valued; or at least a situation in which most people believe that such a quality, capacity or high probability of that system does exist. Briefly speaking, it consists in one hard core (recognition/acceptance) and two key points (substantive truth and formal fairness). Therefore, the normative concept of legitimacy of a modern criminal justice system lies in the answers to the following two questions: what is considered an acceptable degree of certainty and what methods are thought to be both reliable and acceptable to reach such certainty? Concomitantly, diverging directions of attempts to solve these questions will give rise to different theories and models of criminal procedure. Among others, there are

¹ For details, especially the Chinese pattern and tradition of political legitimacy in relation to juridical legitimacy, see Chapter 8.

two types of typical systems to underpin legitimacy of modern criminal justice, i.e. the inquisitorial system and the adversarial system.

The dichotomy between adversarial and inquisitorial systems is a theoretical framework conventionally employed by scholars of comparative (criminal) procedure. However, such conventional wisdom is not logically distributed and precise enough to give rigorous definitions of the two theoretical categories. That is to say, it is not always easy to determine whether a given (criminal) justice system can be recognized as adversarial or inquisitorial. ‘Given that almost all modern criminal justice systems combine procedural features of both traditions, it is better to consider them not as being totally adversarial or inquisitorial, but as positioned on a continuum. Indeed, rather than speak of inquisitorial or adversarial systems, it is more accurate to see modern jurisdictions as primarily ‘shaped by’ the inquisitorial or adversarial tradition.’² Nevertheless, a paradigmatic approach to categorization conceptualizes the adversarial and the inquisitorial as the so-called Weberian ideal-types.³ These models do not exactly exist in any historical legal system, but while the common law jurisdictions would be closer to the adversarial type, the civil law jurisdictions would be closer to the inquisitorial type.⁴ According to this theoretical framework, the ‘pure’ concepts of the two classical categories can be defined as follows.

An inquisitorial system is a legal system usually used in civil law jurisdictions where the court or a part of the court is actively involved in investigating the facts of the case. An ideal inquisitorial approach is centred on the official investigation of the neutral substantive truth, conducted by impartial state officials, such as police officers, public prosecutors, investigating judges, and trial courts, who

2 Brants 2012, p. 1073; for more details, see Brants & Ringnalda 2011, pp. 17-26.

3 In his classic description of Weber’s methodology, Max Rheinstein writes: Situations of such ‘pure’ type have never existed in history. They are artificial constructs similar to the pure constructs of geometry. No triangle, cube, or sphere has ever existed. But never could reality have been penetrated scientifically without the use of the artificial concepts of geometry. For the ‘pure’ concepts created by him, Weber used the term ‘ideal type’. ... The ‘ideal types’ ... are simply mental constructs meant to serve as categories of thought the use of which will help us to catch the infinite manifoldness of reality by comparing its phenomena with those ‘pure’ types which are used, so to speak, to serve as guide in a filing system. Rheinstein 1954, pp. 29-30, quoted from Langer 2004, p. 8.

4 Ibid, Langer. The dichotomy between common law and civil law is another fundamental categorization in comparative law research that is assumed to be common sense to the expected readers of this book. In brief, Common law is a system of law developed by judges and courts, stated in judicial decisions that not only decide individual cases but also have precedential effect on future cases (*stare decisis*); while Civil law is a legal system originating in Europe, intellectualized within the framework of late Roman law, and whose primary source of law is propositional statements (statutes) codified into a referable system. Generally speaking, common law jurisdictions include, inter alia, England, most states of the US, and other former British colonies, most of which are English-speaking countries; civil law jurisdictions encompass most continental European countries and their former colonies.

are supposed to have no private or partisan interests with regard to the facts or the defendant and therefore will make efforts to investigate and ascertain the objective facts of the case by collecting and verifying both incriminating and exculpatory evidence. All the evidence and other relevant material is to be compiled into a dossier, on the basis of which criminal process proceeds and the substantive truth is discovered. In sum, inquisitorial criminal procedure is essentially a process of official investigation, which, mostly adopting a written-dossier-centred approach, aims at the objective truth. In this process, the police serve as the only main investigative actor whose task is to collect all evidence favourable to the truth, whether incriminating or exculpating; prosecutors function as impartial judicial officers whose task is not only to present to the courts what they believe is true regarding the defendant's alleged crime based on the evidence collected by the police investigators, but also to guarantee that the police do what they ought to according to their structural function; judges work as the decider whose procedural responsibilities involve not only the application of the law, but also the active investigation of facts.

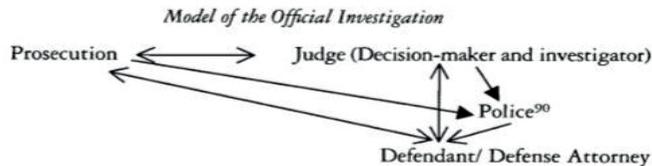
In contrast, *an adversarial system* refers to the legal procedure usually used in common law jurisdictions where the prosecution and the defence, as two adversarial parties, are expected to separately collect evidence favourable to their own side and therefore respectively present their own case before an impartial person or group of people, usually a judge or jury, who attempt to determine the truth of the case. A 'pure' adversarial system is characterized by an isosceles-triangle structure that requires a fair contest between equally-armed partisan prosecutors and defence before passive judges. In sum, adversarial criminal procedure is essentially a dispute *inter partes*, which, mostly taking an oral-debate-centred approach, emphasizes fair play between the two parties. In this process, each of the two parties has their own investigator – the police in the case of the prosecution, a private investigator in the case of the defence.⁵ That is to say, the police are not the only investigative actor, and work mostly in the interest of the prosecutorial party. Prosecutors function mainly as partisan advocates, whose primary task is to obtain a conviction of the defendant by proving his guilt beyond all reasonable doubt.

Essentially, the major difference between the 'pure' inquisitorial and adversarial approaches to legitimate truth-finding lies in the allocation of investigatory, evidentiary, and procedural responsibilities and powers, as well as in the concomitant functions of the actors involved in the criminal procedure. As is vividly shown in the pairs of flowcharts below,⁶ in inquisitorial procedure, truth is expected to be found through an official investigation into all potentially relevant incriminating and exculpating evidence. Thus, evidentiary and procedural responsibilities and powers are remitted mostly to impartial state officials, especially the prosecutors, whose task is to produce a full and

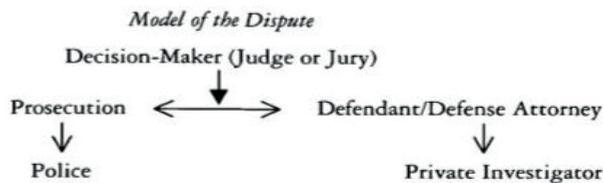
5 See Langer 2004, p. 24.

6 Quoted from Langer 2004, p. 23.

objective narrative about the accusation; while the defence often has little or no power to conduct its own investigations, but serves mostly as a source of information (see below).



On the contrary, adversarial truth-finding bases its legitimacy on dialectical method, on the competition between two conflicting cases prepared respectively by the two equal parties. Therefore, evidentiary and procedural responsibilities and powers in adversarial procedure are supposed to be allocated on an equal basis, with the prosecutors in charge of incriminating evidence and the defence in charge of exculpatory evidence. In this case, the defence must have full autonomy and sufficient powers to conduct their own investigation (see below).



The aforesaid ideal types are only theory and thus do not exactly exist in the pure form anywhere. However, the basic tenets of the ideal types are visible and structural, which could be used not only as a practical benchmark to identify a given system as basically inquisitorial, adversarial, or neither, but also as a touchstone for the legitimacy of a given system.

Transparency is a condition of informed and rational debate, ensuring that belief in, and criticism of those with power is possible, and therefore one of the basic conditions of democracy. As far as it is relevant to the topic of this research, i.e. fair and just administration of criminal justice, it is also considered as a fundamental tenet, which not only contributes to but also shows that criminal trials are conducted in a fair and just way. Among other things, transparency of criminal procedure could be considered as one of the most significant tenets that correlates to legitimate truth-finding, whether in inquisitorial or in adversarial systems. Specifically, transparency of criminal procedure can be categorized as internal and external, although the distinction between internal transparency

and external transparency is neither a native concept nor a particular rule of positive law in the English world. The terminology derives indeed from the European civil law system (or rather its legal theory), which has been translated into English in this research.

Internal transparency of criminal procedure is actually a rather young concept and practice whose relevance and significance was not substantially realized until 20th century. It refers to the transparency *inter partes* (in an inquisitorial system, also including the judiciary) in criminal cases, involving in large part information exchange between the defence and the prosecution. At stake is *the right to discovery/duty of disclosure* in adversarial procedure or the right of *access to the dossier/case file* in inquisitorial procedure. The right to discovery is a rather American concept, which generally refers to the legal rights of the defence and the prosecution to each obtain from the other information that relates to the evidence they might use at trial; the duty of disclosure is the typical term in other adversarial jurisdictions, such as England and Scotland, which in turn refers to the legal duties of the prosecution and the defence to each reveal to the other information that relates to the evidence they may use at trial (prosecution disclosure should also involve information about unused evidence that may materially strengthen the defence case or weaken the prosecution case). In an inquisitorial system, what is comparable to the abovementioned adversarial right to discovery/duty of disclosure is the right of access to the dossier, a right of the defendant, but controlled by the prosecution and courts, which allows the defence to obtain necessary materials from the dossier, or to give advice on or request amendments to the content of the dossier. In brief, internal transparency implies the expected cooperation between the prosecution and the defence for the purpose of better truth-finding; it generally involves mechanisms that facilitate information exchange among the actors involved in certain criminal justice system and ensure that no one participant (include the judge) knows more than another, and therefore contributes to the equality of arms and thus the fairness of trial. In this sense, internal transparency of criminal procedure could be considered as a procedural cornerstone of fair trial, and thus as a substantive prerequisite of judicial legitimacy.

External transparency of criminal procedure refers to the openness of criminal process towards the general public and mass media (i.e. the outsiders of criminal cases), involving in large part publicity of trial sessions and judgments. While internal transparency looks inward and serves as a guarantee of fairness itself, external transparency is directed towards the outside world, and serves as a guarantee that the public can see that the trial has been fair. In this sense, external transparency of criminal procedure could be considered as a democratic cornerstone of judicial legitimacy, and thus as an external indicator of the substantive quality of criminal trial.

As for the relationship between transparency and legitimacy of a criminal justice system, it has been generally considered as self-evident that guaranteeing of the former will facilitate fulfilment of the latter. However, it remains unclear

whether internal and external transparency are equally significant or which one is more crucial than the other in a given system. In fact, there seems to be no universally correct answer to this question since the situation in one system is very likely to differ greatly from that in another system. For instance, inquisitorial and adversarial systems build the legitimacy of their criminal justice on totally different foundations, and therefore focus on different aspects of transparency.

In the ‘pure’ adversarial system, where truth-finding and settlement of criminal cases have been considered a private matter of self-governing citizens represented by their own counsel, both the prosecution and the defence, and even the decider of fact, are supposed to be ordinary citizens vested with comparable rights; truth-finding in this system is therefore regarded as a process and outcome of open debates between equal and autonomous parties, which could be compared to a contest in which the two parties function as opponents while the judiciary do nothing but umpire the contest. In this case, (at least theoretically) both parties will be equally able to collect evidence and present their own cases before a passive judge or jury, and neither party will have much advantage over the other regarding the collection and control of evidence (equality of arms); accordingly, competition is supposed to benefit the interest of truth more than cooperation, which implies that confrontation in public (external transparency) will be more significant than internal exchange of information (internal transparency) for the purpose of truth-finding. Moreover, internal transparency is not only less necessary but also incompatible with the adversarial nature of the system, since the autonomy of the two parties would be compromised if they were required and expected to cooperate with each other in collecting evidence or presenting cases.⁷ More specifically, the defence will be more vulnerable and likely to depend on the prosecution in preparing their defence, in which case the very foundation of the adversarial framework of legitimate truth-finding, i.e. autonomous parties, is at stake. Therefore, transparency in ‘pure’ adversarial procedure should be primarily, if not solely, directed towards the outside world so as to facilitate full presentation of cases, adequate and fair contests, and thus truth-finding to an extent that not only the two parties but also the populace can see that fair trial according to the law has taken place and can understand why the outcome is as it is, and thus achieves justice that is ‘seen to be done’ and enhances legitimacy of the system; Briefly speaking, the ‘pure’ adversarial approach in establishing legitimacy of a criminal justice system is per definition centred on external rather than internal transparency of criminal procedure.

Conversely, in the ‘pure’ inquisitorial system where truth-finding and settlement of criminal cases have been considered a task of a traditionally

7 For detailed explanation, see the beginning of Part II.

'paternalistic' state,⁸ not only the judiciary but also the police and the prosecution are regarded as impartial state institutions whose common goal lies in finding the truth by neutral investigation. Unlike their counterparts in the 'pure' adversarial system, the prosecution and the defence in this system could better be compared to writers and proofreaders rather than opponents. In this case, the prosecution has overwhelming powers and legal rights in collecting evidence and presenting cases. Such a system relies largely on a dossier whose content is dominated by the prosecution; truth-finding in this system is regarded as a process and outcome of neutral investigation and verification of the evidence and facts through the police, the prosecution, and the judiciary's work in relays, based on the dossier. Therefore, internal transparency (especially that between the prosecution and the defence) may work to facilitate legitimacy of the system in that it can prevent debates as everything will have happened and been agreed beforehand if everyone does their job properly. External transparency alone cannot work to guarantee the quality of inquisitorial truth-finding, because without internal transparency, not only will the defence have little chance to obtain enough information to effectively challenge prosecutorial cases, but also the public will hardly be able to understand what is going on in the open courtroom. Briefly speaking, the 'pure' inquisitorial approach in establishing legitimacy of a criminal justice system is centred on internal rather than external transparency of criminal procedure.

To sum up, the variable significance of internal/external transparency for building legitimacy of a criminal justice system relies largely on two dimensions of factors, i.e. the conceptual dimension and the institutional dimension. The former involves the general idea of the people of a certain jurisdiction about what constitutes the primary merit of justice (e.g. truth or virtue) and concomitantly what can be considered a reliable approach to such a merit; the latter is how the actors involved in a certain criminal justice system function and interact with each other. Adversarial procedure that perceives and defines due process as a partisan dispute, in which the defence has the power and autonomy to conduct its own investigation while prosecutors only have partisan responsibility to actively collect incriminating evidence, primarily depends on external transparency to enhance its legitimacy; while inquisitorial procedure that perceives and defines due process as an official investigation, in which prosecutors play an impartial and 'paternalistic' role in collecting both incriminating and exculpating evidence while the defence has little power to conduct its own investigation, relies more on internal transparency to facilitate

8 A paternalistic state is defined and characterized by its government that acts as a father figure by taking care of the people as a parent would. It limits the people's liberty or autonomy for what is presumed to be their own good. In this style of authority, the government supplies complete concern for the people. In return, it receives the complete trust and loyalty of the latter. Albeit its probably pejorative connotation for many westerners, the author would rather perceive and use 'paternalistic' in a positive way, especially given the Chinese culture that profoundly values paternal love and filial piety.

its legitimacy. In theory, both ideal types may work well enough to maintain their legitimacy if the guarantees relevant to that type of system are in place and respected. That is to say, neither type is in itself inherently better than the other, and thus no criminal procedural dogmas can stand universally.⁹

2 Interaction between legitimacy and transparency in China

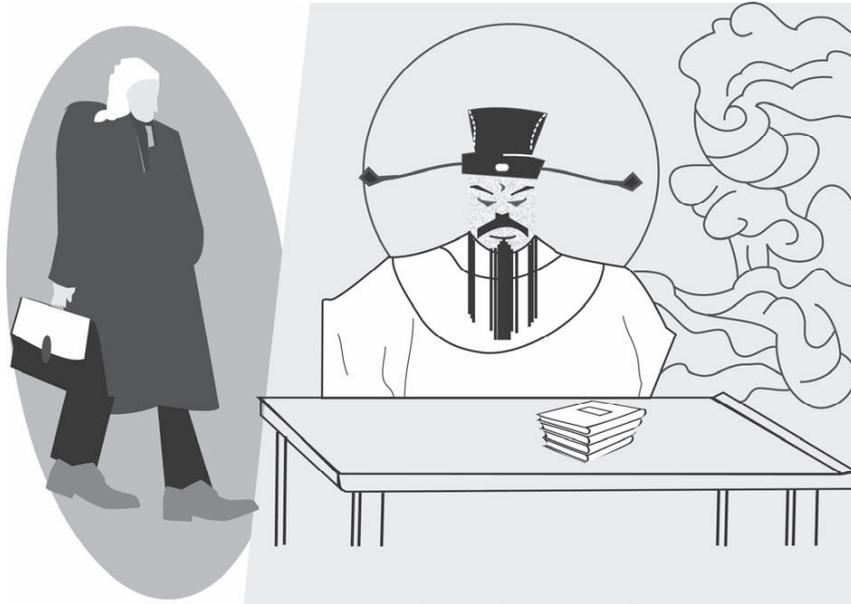
From the aforesaid presumption, it can be further inferred that adversarial procedure relies on debate at the trial phase for accurate truth-finding, and inquisitorial procedure on thorough and impartial investigation at the pre-trial stage. Therefore, a criminal justice system that inherently has considerable inquisitorial quality (especially in pre-trial stages), such as the Chinese system,¹⁰ needs internal rather than external transparency of criminal procedure as a critical condition for the achievement of legitimacy of the system.

In China, legal proceedings pertaining to internal transparency of criminal procedure, i.e. mechanisms that facilitate information exchange among the actors involved in its criminal justice system, may in large part be comparable to defence counsel's right to 'consult, excerpt and reproduce the case file materials' set forth in Art. 38 in the Chinese criminal procedure, which is in general referred to literally as 'right to see/view dossier (阅卷权)'; because trials in China consist largely in written documents collected in a dossier rather than in oral debates. Such perception and administration of (criminal) justice is deeply entrenched in China's legal culture, which could be well illustrated with China's peculiar terminology on (criminal) trial.

In Chinese, a law case is referred to literally as 'an (案)' or more specifically as 'an jian (案件)'. Etymologically, the former is a phono-semantic compound with the phonetic root 'an (安)' and the semantic root '木' which means (a piece of) wood. The original and basic meaning of the Chinese character 'an (案)' is a (usually wooden) desk (see the picture below) that was typically used by judicial official of ancient China, and the more specific term 'an jian (案件)' refers literally to 'items on the desk'. The cover image of this book vividly shows the greatly different perceptions and visualizations, between within Chinese and Anglo-American legal cultures, of what paradigmatically denotes a law 'case (or in Chinese, literally a 'desk' indeed)' and who typically embodies justice.

⁹ See Damaška 1986, pp. 3-6, 47-65.

¹⁰ For details of basic tenets of China's current criminal justice system and the nature of its criminal procedure, see Chapter 1.



Chinese use of a word that basically means ‘desk’ to metonymically represent law cases vividly reflects how (criminal) trial is perceived and conducted in China’s traditional legal culture. Unlike the situation in the English world, where (criminal) trials are supposed to consist in ‘cases’ of legal counsel of both parties (see the picture above), and therefore (criminal) trials are actually telling and hearing stories contained in the ‘cases’ of both sides; China’s (criminal) trials consist in the documents on the judges’ desks, and therefore are actually producing, displaying and examining written documents in a dossier. This might be the very reason why a trial can be literally referred to as a ‘hearing’ in English, while in Chinese the corresponding word (审) literally has nothing to do with ‘hear’, but an ancient connotation of ‘see’;¹¹ and similarly, the Chinese term regarding access to the dossier is defined literally as a right to see/view the dossier (yue juan 阅卷). In other words, China’s particular perception and administration of (criminal) justice based on its traditional legal culture is characterized by an entrenched judicial bureaucracy and technical legalism. Therefore, it is imaginable that should Lady Justice (Themis) be born in China, she would never be blindfolded, whereas her auditory sense would be less significant. In fact, the visual representation of Justice in Chinese traditional culture is a mythical unicorn named ‘獬豸 (xiè zhì)’ which will hit the guilty with its horn.¹²

11 See *infra* 2.1.4.2 Court session and 3.3 Institutional level.

12 For details about China’s traditional outlook on justice, see Chapter 8.

Given China's style of (criminal) trial and corresponding legal culture described above, it is reasonable to presume that in terms of the relationship between legitimacy and transparency of China's criminal justice, achievement of the former relies largely on the internal aspect of the latter, which consists mainly in relevant mechanisms regarding production and supervision of, and access to the dossier. However, such logical inference has not been recognized in China, whether by academia or by the authorities; rather, Chinese academics only emphasize the external aspect of procedural transparency, and Chinese authorities have, in turn, carried out a series of reforming campaigns to promote external transparency while diminishing internal transparency, although relevant academic ideas and corresponding reforming efforts have hardly alleviated the legitimacy decline of China's criminal justice.¹³

Evidently, the general consensus among the Chinese legal community about the relationship between legitimacy and transparency of China's criminal justice has conflicted not only with the inherent logic of its traditional legal culture, but also with the reality of its legal practice. Therefore, it would be noteworthy to see how such consensus has been entrenched in China, why relevant dogmas have long been worshiped, and whether such dogmas truly stand in China. It is consideration of these questions that has given rise to the research topic of this project.

3 Research topic

3.1 Historical background of the research topic

It is generally believed that transparency in criminal justice will to a great extent legitimate a criminal justice system, and accordingly help make criminal judgments well accepted by the populace. However, the opposite appears to be the case in China.

Once upon a time, at least before 1990s, legitimacy of the Chinese criminal justice system was not a big problem, as most Chinese people stood in awe and respect of the judicial authorities of the People's Republic of China, to which they (especially those who were implicated in criminal cases and their family) humbly referred as 'the Government'. Although this does not imply that the (criminal) justice system of China must have worked quite well at that time (rather, it transpires that it generated a tremendous number of miscarriages of justice, especially during the Cultural Revolution when, moreover, even the systems of the public security organs, the procuratorates,¹⁴ and the law courts

13 For details, see *infra* 3. Research topic.

14 Procuratorate refers to a Chinese institution that undertakes, among others, the task of prosecution. This word, used as the official English translation of its Chinese counterpart, is specially built up by the root word 'procurator' and the suffix '-ate'. The former means an administrative official with legal powers; the latter a group with the status or function of

were ‘smashed’), an undeniable basic fact is that the legitimacy and prestige of the (criminal) justice system of China then were indeed generally recognized and rarely challenged by the people (even many of those who were wrongfully convicted still believed that ‘the Government’ was just temporarily blinded by an extremely small bunch of bad guys, and therefore would eventually redress their grievances). In ancient China, the case seemed alike. Judicial authorities then which represented the so-called ‘Imperial Court’ were also generally respected by the populace and miscarriages of justice were attributed to immoral state officials.

However, it is not clear since when the ‘Old South’ of China’s judicial legitimacy seems to have become ‘no more than a dream remembered, a civilization gone with the wind.’ On the one hand, staff of judicial authorities have no longer been generally considered as avatars of justice from the decent (revolutionary) Government. People even salute and cheer on internet forums for those who dare kill police officers and judges, such¹⁵ typically as Yang Jia¹⁶ and Zhu Jun,¹⁷ comparing them to the heroes in Chinese martial arts fictions (or a Chinese version of Robin Hood and his Merry Men) who punish corrupted officials and the unscrupulous rich in their own way where justice cannot be done within the framework of judicial authorities of the state, regardless of the innocence of the deceased police officers and judges.¹⁸

On the other hand, in the history of the People’s Republic of China judicial decisions have never been disdained and challenged by ordinary people so comprehensively and radically as they are today, especially during the

something aforementioned. The language reflects the nature of the Chinese institution as a supervisor of law. For details, see *infra* 1.2.2 The people’s procuratorates.

- 15 The list of Chinese judges or police officers killed is even becoming increasingly longer these years. Each time such a tragedy occurred, a large proportion of the populace showed their indifferent or even gloating attitude.
- 16 See ‘Chinese cop-killer becomes internet hero’, <http://www.telegraph.co.uk/news/worldnews/asia/china/2627001/Chinese-cop-killer-becomes-internet-hero.html>, retrieved on Feb. 26, 2016.
- 17 See ‘Man kills three judges in Chinese court’, <http://www.telegraph.co.uk/news/worldnews/asia/china/7792896/Man-kills-three-judges-in-Chinese-court.html>, retrieved on Feb. 26, 2016.
- 18 What has even added weight to this unusual phenomenon is the very up-to-date distressing example that another judge, who serves in a suburban district court in Beijing, was shot dead at home at the very time while these words were writing down. One of the suspects, who was soon found dead (suicide), is believed to have been a party concerned in a divorce case decided by the victim. The bad news has been verified by many law school mates of the author who serve in the same court of the victim. In addition, Caixin.com released this news in real time but soon withdrew it for unknown reasons. The original link is <http://china.caixin.com/2016-02-27/100913494.html>, see the webpage snapshot by Google at 06:51:10 GMT on Feb. 27, 2016, <http://webcache.googleusercontent.com/search?q=cache:tVSXn7sHeRQJ:china.caixin.com/2016-02-27/100913494.html+&cd=1&hl=zh-CN&ct=clnk&gl=nl>, retrieved on Feb. 27, 2016. More details are pending further investigation. What disappoints all judges most is Chinese netizens’ nearly overwhelming cheering for the news and gloat over the deceased judge, which although, is supposed not to be unexpected any more for them.

new millennium. It seems that no matter which side the court is in favour of (especially in criminal cases), people simply do not buy it. Such unusual hostility of the populace towards judicial decisions can be well demonstrated by many widely reported (criminal) cases. E.g. in the ‘Wu Ying case’¹⁹ and the ‘Xia Junfeng case’,²⁰ the courts were widely criticized for imposing the death penalty while in the ‘Liu Yong case’²¹ and the ‘Li Changkui case’,²² the courts were, in turn, widely criticized for not imposing the death penalty; in ‘Xu Ting case’,²³ people found it too much to imprison an ATM thief while in ‘Li Qiming case’²⁴ and ‘Li Tianyi case’,²⁵ people thought the Guanerdai (Chinese: 官二代, literally the second generation of high officials) or Fuedai (Chinese: 富二代, literally the second generation of the rich) criminals deserved the death penalty instead of imprisonment. In many of the aforesaid cases (such as those of Wu Ying, Liu Yong, Li Changkui, and Xu Ting), relevant courts eventually surrendered to outraged public opinion and overruled the previous decisions, but people seemed not to appreciate this much; as for the other cases whose decisions have been sustained by relevant courts of appeal, the populace posed an even more radical challenge against the competence and impartiality of relevant tribunals. To sum up, leniency seems to be considered as exceptional indulgence towards criminals and associated with imaginary bribery of police officers and judges, while draconian punishments are criticized as oppression of poor people; adherence to law and resistance to public opinion is seen as arrogance of the power and disregard of the populace while submission to public opinion is deemed no more than a humiliating failure to cover the dirty

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- 19 Wu Ying is an entrepreneur from the city of Dongyang in Zhejiang Province, and formerly the sixth-richest woman in China. She was convicted of financial fraud and initially sentenced to death, but the sentence was overturned by the Supreme Court of China. On 21 May 2012 her sentence was reduced to death with a two-year reprieve, which is usually commuted to life sentence after two years. See ‘China Court Overturns Death Penalty for Tycoon in Fraud Case’. *New York Times*. 20 April 2012, http://www.nytimes.com/2012/04/21/world/asia/china-court-overturns-death-penalty-for-tycoon-in-fraud-case.html?_r=0, retrieved on Feb. 26, 2016.
- 20 See Andrew Jacobs, ‘Street Vendor’s Execution Stokes Anger in China’, *New York Times*, 25 September 2013, http://www.nytimes.com/2013/09/26/world/asia/street-vendors-execution-stirs-anger-in-china.html?_r=0, retrieved on Feb. 26, 2016.
- 21 Liu Yong, as an underworld lord, was sentenced to death in his first instance trial. The court of appeal subsequently decided to deny the death penalty decision because he was believed to be tortured by the police. However, the general public overwhelmingly posed a challenge over the second decision, which forced the Supreme Court to retry this case culminating in execution of Mr. Liu.
- 22 See ‘Killer’s case and death penalty dilemmas in China’, <http://deathpenaltynews.blogspot.nl/2011/08/killers-case-and-death-penalty-dilemmas.html>, retrieved on Feb. 26, 2016.
- 23 See ‘Courts withdraw verdict on ATM bandit’, <http://www.atimes.com/atimes/China/JD09Ad01.html>, retrieved on Feb. 26, 2016.
- 24 See ‘Trial of police official’s son turns cause célèbre’, <http://edition.cnn.com/2011/WORLD/asiapcf/01/27/china.trial/index.html>, retrieved on Feb. 26, 2016.
- 25 See ‘Li Tianyi: China court jails army singers’ son for rape’, <http://www.bbc.com/news/world-asia-china-24237463>, retrieved on Feb. 26, 2016.

secrets. Briefly speaking, legitimacy of the Chinese (especially criminal) justice system has been confronted with a so-called ‘Tacitus Trap’.²⁶

Furthermore, as Mr. Chen Youxi, one of the most famous and experienced lawyers in China argued, based on his practice of law, the Chinese ruling elite including those in judicial authorities, who should have believed in law with the most confidence and determination, even distrust and disdain the (criminal) justice system much more than the populace. They would prefer suicide rather than (criminal) trials if they were subject to investigation, as they are aware that the courtroom trials are just nominal while the results have already been determined in advance through internal discussion. They know this for sure, because it was just as they did when they were in charge: no one ever takes the law seriously. The populace may think they really regret their sins when they confess, failing to realize that they are indeed deeply desperate about fairness of the criminal procedure.²⁷

Flawed legitimacy of the Chinese (criminal) justice system can also be illustrated by the high proportion of vetoes on the working reports of the ‘Two Supreme’s’ (the Supreme People’s Court and the Supreme People’s Procuratorate) during recent years. For example, the passing rates of the 2009 working reports of the ‘Two Supreme’s’ was only 75.3% and 76.8% respectively, which means approximately 700 out of 3000 representatives of NPC decided to vote with their feet on the performance of Chinese judicial authorities. Given NPC representatives’ consistent tolerance and harmonious attitude towards Chinese authorities, such rates look very awful. Moreover, some local people’s congress even failed working reports of local courts. For example, the 2001 Working Report of Shen Yang Intermediate People’s Court, as well as the 2007 Working Report of Heng Yang Intermediate People’s Court, failed the vote of the corresponding local people’s congress, which is quite rare in the history of the People’s Republic of China.

The legitimacy decline of current Chinese criminal justice seems to strongly challenge the aforesaid theorem regarding the relationship between transparency and legitimacy of a criminal justice system, since transparency of (especially criminal) procedure has in fact not only been enshrined in China’s constitution and legislation, but has been emphasized by its supreme judicial authorities. China does not distinguish between internal and external transparency. Although it does have some specific mechanisms that indeed relate to internal transparency, e.g. the right of the defence counsel to see/view the dossier, those mechanisms or rights have never been connected with the

26 The term ‘Tacitus Trap’ comes from the Roman historian Publius Gornelius Tacitus (56-117 AD), who argued that neither good nor bad policies would please people if they resent their government. This was later called the ‘Tacitus Trap’ by some scholars. This is a quite high-profile and popular term among Chinese scholars when they try to describe and explain China’s current problems, which is believed to be invented by some Chinese scholar.

27 See Chen 2013, http://blog.caijing.com.cn/expert_article-151578-55519.shtml, retrieved on May 31, 2016.

issue of transparency. Rather, when coming to transparency in criminal justice, the term refers largely to the access to court sessions. In other words, there is no awareness of the concept of internal transparency in criminal procedure in China, whether in positive law or in legal theory, although there are indeed some mechanisms to facilitate internal transparency, such as access to the dossier; in short, procedural transparency of criminal justice in most cases refers indeed to external transparency. Prescribed by Art. 11 that ‘Cases in the People’s Courts shall be heard in public, unless otherwise provided by this Law...’ and further provided by Art. 183, Sec.1 that ‘All cases of first instance shall be subject to a public hearing except those involving state secrets or private affairs...’, the principle of public hearing is clearly recognized in China’s criminal procedure. In judicial practice, this principle has also been well met at various levels of the judiciary. According to a survey conducted by the author in 2006 in a middle province,²⁸ 339 out of 385 cases (more than 88%) were heard in public. So, it seems that the principle of public hearing has been well-established and faithfully-executed in China. Furthermore, China is currently carrying on a judicial reform campaign aiming at, inter alia, more judicial transparency, in order to restore judicial prestige and legitimacy. In so doing, since 2013 the Supreme People’s Court has been enthusiastically promoting the establishment of the so-called ‘three major platforms’, namely ‘the platform for transparent process of trials’, ‘the platform for transparent judgments’, and ‘the platform for transparent information on judgment enforcement’.²⁹ Accordingly, it seems not unfair to say that China has long been making efforts to facilitate more judicial transparency (although limited to its own conception of transparency, i.e. external transparency), especially in the field of criminal justice.

Notwithstanding the increasing stress on transparency in criminal justice by both the legislature and the judiciary, it is an undeniable fact that the Chinese judicial authorities have long been confronted with their decreasing prestige, which can be well demonstrated by a number of controversial judgments, especially in some widely reported cases.³⁰ Moreover, it seems that parties concerned in various cases show even less respect for legal decisions by the judicial authorities, which inevitably leads to one of the most disturbing

28 The survey was conducted in the summer of the year 2006 in a criminal chamber in the High People’s Court in that province. The chamber was selected at random, and the samples covered all the cases it heard during the first half of that year. The pitfall of this survey lies in that cases which go as far as a high court in China will usually involve the most serious crimes, such as state crimes or homicide that may culminate in life imprisonment or even death penalty, which indeed represent just a very small proportion of the overall caseload. However, it still demonstrates that external transparency in criminal justice is well preserved by China’s judicial authorities, even in the most sensitive criminal cases.

29 See 《最高人民法院关于推进司法公开三大平台建设的若干意见》法发〔2013〕13号, <http://www.chinacourt.org/article/detail/2013/11/id/1152225.shtml>. For details, see the beginning of Chapter 2, Transparency of Chinese criminal procedure.

30 For details, see e.g. *supra* footnote 16-25.

problems for the Chinese authorities, i.e. petitions and so-called ‘Shang Fang’.³¹ In Chinese ‘上访’, also known as Xin Fang, letters and calls, correspondence and reception, or petitioning, which is the administrative system for hearing complaints and grievances from individuals in the People’s Republic of China. This system derives from the ancient imperial times, where petitioners who needed justice would go to the authorities or high officials and beat a drum to voice their grievances. As such, every official court was supposed to be equipped with a drum for this sole purpose. Sometimes petitioners would throw their bodies in front of a sedan chair of a high official. When no one else at the local level was able to help, petitioners would then travel to the empire’s capital to seek help from a higher official. Similarly, petitioners in China today can also search for justice through such a system at local petitioning bureaus; or if unsatisfied, travel to Beijing as a last resort to appeal to the rulers in the age-old manner. Under this system, the State Bureau for Letters and Calls and local bureaus of letters and calls (‘petitioning institutions’) are commissioned to receive letters, calls, and visits from individuals or groups on suggestions, complaints, and grievances. The officers then channel the issues to respective departments and monitor the progress of settlement, which they feedback to the filing parties. In fact, almost every governmental organ in China, including law courts and procuratorates, has its special department for receiving ‘Shang Fang’. Petitioning institutions are ostensibly a communication channel between the government and the citizenry, and have been relied on since the establishment of the PRC in 1949. Petitioners may begin their attempts for redress at the local-level with letters and calls to offices located in courthouses or in township-level government offices. If unsatisfied, they can move up the hierarchy to provincial level offices and, at the highest level, the State Bureau for Letters and Visits in Beijing, or the Xin Fang department of certain governmental organs of the highest hierarchy. Sometimes, both parties file petitions against their decisions although the decisions per se actually have nothing improper.

This legitimacy decline has attracted the attention of not only the Chinese authorities but also Chinese academia. The academic mainstream in the domain of criminal procedure has attributed this situation primarily and directly to the lack of adversarial quality in the Chinese criminal justice system, arguing that

31 According to the Work Report 2010 of the Supreme People’s Court, the number of ‘Shang Fang’ pertaining to law cases in 2009 amounts to 1055 thousand, and that number of petitions is 125 thousand in 2009. Furthermore, this index is still booming. According to a survey in Shandong Province, the amount of petitions of criminal cases has doubled in 2010. Despite the efforts in strengthening mediation and retrial in terms of criminal policy, the judiciary has hardly restored its prestige. Rather, without the principle of double jeopardy, repetitive mediation and trials have, to some extent, further impaired the authority and justifiability of judgments, causing even more petitions, forming a vicious circle. No wonder many judges air their grievances that they represent the most misunderstood and embarrassed profession, because their hard work on persuasion, mediation and trials often gains suspicions and misunderstandings instead of respect and appreciation – for the statistics, see http://www.court.gov.cn/qwfb/gzbg/201007/t20100716_7756.htm.

‘There exists a trial mode centred on the case file in Chinese criminal procedure, in which public prosecutors dominate and control the whole process of trial sessions by reading the case file in their possession. Therefore, court sessions become merely a process of reviewing and affirming the case file, during which not only is the admissibility of the prosecution evidence not subject to any review, but the proving force of the evidence also prevails. As a result, the modern rules of criminal evidence lose their foundations, court sessions cannot play the role as they should, and the mechanism and culture that judgments be reached before the court cannot form. If the case-file-centred mode as such were not stopped, any judicial reform that expects the functioning of court trial will not stand.’³² Therefore, they suggest procedural reform with reference to the classical model and corresponding tenets of an adversarial system, focusing on restraints on prosecutorial power and concomitant strengthening of defence lawyers’ power. Unsurprisingly, this suggestion has been much welcomed by the bar as well as by liberal intellectuals in China, who further develop such ideas and thus imply or even advocate that many institutional settings and even political and legal traditions in China must be subject to radical reforms so as to meet the default settings of an adversarial system. E.g. a trial judge must be passive and thus ignorant of the cases so he should not see the case file before and even at trial; criminal proceedings should be operated directly and verbally so the function of the case file must be curtailed; adversarial contest or competition must be enhanced so the defence is expected not to cooperate with the prosecution; the power of the defence should be comparable with that of the prosecution so the former must be greatly enhanced while procuratorates should be abolished and replaced by individual prosecuting lawyers vested with powers equal to defence lawyers.

Such theory and concomitant methodology are very convenient as they generalize specific legal issues, which seem to have also convinced Chinese political and judicial authorities. Although they are usually quite reluctant to concede so, actions speak louder than words: enlightened by the aforesaid theory with strong Anglo-American influences, Chinese judicial authorities have carried out a series of procedural reforms during the past few decades, aiming at a fairer criminal justice system with more adversarial quality. The essential idea of those procedural reforms lies in adding weight to court sessions and concomitantly curtailing the weight of pre-trial proceedings. Specifically speaking, public trial *inter partes* was emphasized and the scope of the transferable case file before trial restricted. In other words, these procedural reforms sought to enhance external transparency while diminishing the internal transparency of Chinese criminal proceedings.³³ However, after thirty plus years, the reformers find themselves back at the very point at which they began

32 See Chen 2006, p. 79.

33 For details, see Chapter 2, Transparency of Chinese criminal procedure.

their reforms,³⁴ while the problems they tried to combat through the reforms remain unsolved. The academic mainstream has attributed this failure to the reforms not being profound and thorough enough; therefore, a new wave of wider-ranging and more radical and ambitious judicial reform campaigns are beginning all over China today. The two themes of these campaigns are 1) correction and prevention of miscarriages of justice and 2) promotion of judicial transparency,³⁵ especially in criminal justice. Both themes are particularly designed to serve the purposes of restoring the prestige of China's judicial authorities and repairing the flawed legitimacy of the Chinese (criminal) justice system.

Obviously, the first theme mentioned above is closely related to the bottom line of legitimacy of a criminal justice system; while the second theme regarding transparency, in the eyes of the reformers, will on the one hand objectively contribute to the fulfilment of the legitimacy of Chinese criminal justice through comprehensive supervision, and on the other hand make the populace believe so. However, it is debatable how much to the point the relevant measure is, since most efforts are still geared to improving the openness of court sessions while leaving Chinese criminal justice based on the dossier formed pre-trial.³⁶ In this case, the new wave of procedural reforms regarding transparency seems not very promising, because external transparency alone cannot function as is promised by the classical model of an adversarial system given the considerable inquisitorial nature³⁷ of the Chinese criminal justice system.

3.2 Problem setting

Such an unusual phenomenon may be attributed to many reasons, involving e.g. economic, political, ideological, cultural, and technical factors that will be further elaborated in Chapter 8. Briefly speaking, in a bigger picture, since the Chinese judicial authorities, as described above, have always been considered as part of 'the Government' as a whole, eroded legitimacy of the Chinese criminal justice system could be considered as part of that of the entire governing regime of China, perhaps resulting from the ever-growing gap between rich and poor, the slowing down of economic growth (performance

34 The latest version of Chinese criminal procedure code (V2012) has virtually restored the relevant rules regarding the transfer and use of case file to its initial pattern as was provided in its 1979 Version. In other words, the attempt to improve the Chinese criminal justice system by eliminating the so-called 'trial mode centralized on the files and notes' has failed.

35 See *supra* footnote 29.

36 For details, see Chapter 2.

37 The Chinese system is essentially inclined to an inquisitorial nature, since truth-finding in China is premised mostly on official pre-trial investigation rather than on in-court competition between prosecution and defence cases formed respectively by their autonomous partisan investigation. For details of basic tenets of China's current criminal justice system and the nature of its criminal procedure, see Chapter 1 and 2.

legitimacy), the insufficient participation of the people in politics, the formidable situation of corruption, the bankruptcy of orthodox ideology, etc. Profoundly and unprecedentedly influential among these underlying non-legal reasons is the recent technological innovation, especially in the Internet and social media, through which discourse powers have been decentralized and the spread of information has become atomized. In this situation, the moral/ideological Utopia that underpins China's traditionally-patterned legitimacy can hardly remain since withholding unfavourable information, forging convincing official discourse, and thus guiding public opinion as is needed by monopolizing the mainstream media has become decreasingly feasible.³⁸ In other words, legitimacy of the entire governing regime of China, significantly and profoundly underpinned in a traditional way, is confronted with unprecedented challenges due to recent technological innovation. The legitimacy decline of China's criminal justice is only part of the whole picture.

As far as it is directly related to this research topic, the aforesaid legitimacy crisis may be attributed, among other things, to two critical factors regarding the Chinese people's ever-increasing awareness of social reality: one is continual exposure of corrupted judicial staff either by media reports or through personal connection (especially by those who have been blackmailed by corrupted police officers or judges); the other, is the continual exposure of appalling miscarriages of justice³⁹ caused by the malfunctioning criminal justice system. The latter particularly demonstrates the pitfalls of the Chinese criminal justice system, and disappoints Chinese people most. Therefore, the research problem of this study may be well illustrated by some high-profile and typical miscarriages of justice in China, e.g. the Nian Bin Case.

Nian Bin, a former food stall owner, was accused of poisoning his neighbours with rat poison, leading to the death of two children and injuries to four others, in a small village in Fujian province in July 2006. In the following 8 years, he was accordingly sentenced to death four times, made three appeals, and underwent a supreme court review and three retrials before finally being acquitted in August 2014. It is appalling that Nian Bin and his family have had to suffer through 8 years with the threat of execution hanging over him despite the obvious lack of evidence in this case, as Amnesty International commented.⁴⁰

38 For details of how China historically underpinned legitimacy of its governance by establishing moral/ideological Utopia, see Chapter 8.

39 Some occurred during recent years when the legitimacy was comprehensively challenged, but many turn out to occur indeed at a time when legitimacy was firmly believed. Therefore, the problem seems not to lie in that the Chinese criminal justice system does not work as competently as before, but in that more problems, including those long existing, have been revealed on a more frequent basis. For details, see He 2016.

40 See Amnesty International, 'China: Death Row Inmate Freed After Six Years of Trials and Appeal', <https://www.amnesty.org/en/press-releases/2014/08/china-death-row-inmate-freed-after-six-years-trials-and-appeals/>, retrieved on Mar. 20, 2016.

According to the case file, the local police had managed to detect rat poison sodium fluoroacetate from the vomit, urine, and blood of the victims, and the same chemical had also been detected in their drinking water kept in a kettle in their kitchen, and on the knob of the door that connected that kitchen and the stall of Mr. Nian Bin, who was accordingly assumed to be the primary suspect, and summoned to the police for polygraph on Aug. 7, 2006. Due to the failure in the polygraph and anxious appearance, Mr. Nian was kept for further interrogation and confessed to the murder the next day. The local police then decided to arrest Mr. Nian for ‘placing dangerous materials’, announced the solving of the ‘7.27 Poisoning Case’, and publicized the outcome in the village where the incident occurred, i.e. the home village of Mr. Nian and the victims. (According to Mr. Nian’s sister, the family of the victims badly vandalized the house in which she, Mr. Nian, and their parents were living, shortly after the announcement by the local police. On Aug. 21, a local newspaper reported ‘Since late July police solved 9 murder cases, in August all murder cases solved’. Among the reported cases, Mr. Nian’s case was placed No.1. Later, the investigators were rewarded by Fujian province for solving the high-profile ‘7.27 Poisoning Case’).

In February 2007, Mr. Nian was prosecuted before the Fuzhou Intermediate People’s Court on the count of ‘placing dangerous materials’. He retracted his confession, which he alleged was given under torture by the police investigators. According to his later statement, he was hung in the air with only his toes slightly touching the ground; he was also tortured by putting books on his ribs and then pounding them with hammer and by inserting bamboo slivers between his ribs; he was in such agony that he even tried to commit suicide by biting into his tongue rather than confess to the murder. However, the police investigators threatened to arrest his wife too if he continued resistance, and promised that if he acknowledged it was him, he would be sentenced to only three years. Under such unbearable suffering, Nian Bin argued, he was forced to acknowledge that he put the poison into the water pot. The local police only offered the video of their interrogation against Mr. Nian to respond to his allegation of torture, indicating that the interrogation was conducted ‘in a relaxed situation with Mr. Nian’s natural demeanour’, as was quoted in the first judgment. In February 2008, Mr. Nian was sentenced to death by Fuzhou Intermediate People’s Court for ‘placing dangerous materials’, and he appealed to Fu Jian High People’ Court.

After hearing of Mr. Nian’s first death sentence, his sister had no choice but to hire a defence lawyer for her younger brother despite their financial difficulty. Reviewing the case file, the new defence lawyers found the prosecution case quite weak, based essentially on two categories of evidence, Mr. Nian’s confession and 7 forensic reports – the former was probably obtained under torture, and the latter consisted of only simple conclusions without any original grounds, such as the spectrum of toxicology tests. The lawyers therefore asked for access to the original spectrum. But the local police refused to disclose the

original spectrum for reasons of ‘internal confidentiality’. In December 2008, Fu Jian High People’ Court held that the facts were unclear and the evidence insufficient, and therefore overruled the decision of first instance, and returned the case to Fuzhou Intermediate People’s Court for retrial.

In April 2009, Fuzhou Intermediate People’s Court began to rehear Mr. Nian’s case. This time, the defence lawyers noticed the suspicious omission in the case file of testimony by a crucial witness of the case, namely Ms. Chen, the landlady of both Mr. Nian and the victims, deducing that the records of Chen’s testimony must have been withheld by the police; they applied to the court for disclosure of Chen’s testimony. As expected, 3 records of Chen’s testimony were found, which indicated that the cooking water was not from the kettle but from a plastic barrel and therefore contradicted the police’s narrative logic about how the leads of the case pointed to Mr. Nian and thus how the case was solved. Moreover, they challenged the coherence and completeness of the video that recorded the police interrogation against Mr. Nian, arguing that there was a reasonable suspicion that Mr. Nian confessed under torture, but to little avail. In June 2009, Mr. Nian was once again sentenced to death by Fuzhou Intermediate People’s Court on the count of ‘placing dangerous materials’, which was sustained by Fu Jian High People’ Court in April 2010. The case was then delivered to the Supreme Court for death penalty review.

In June 2010, the Supreme Court judge who took charge of Mr. Nian’s death penalty review travelled to Fu Jian Province to hear Mr. Nian in person. According to Mr. Nian’s later correspondence with his sister, this was the first judge who was willing to listen to his grievance, a judge from thousands of miles away. In July 2010, the Court even made a special appointment to meet the defence lawyers so as to listen to their opinions. In October 2010, the Supreme Court, holding that the facts were unclear and the evidence insufficient, disapproved the execution of Mr. Nian and returned the case to Fu Jian High People’ Court for retrial.

After withholding the decision by the Supreme Court for over half a year, Fu Jian High People’ Court finally decided to overrule the previous judgment and return the case to Fuzhou Intermediate People’s Court for retrial. However, the latter still insisted on the guilty verdict, and sentenced Mr. Nian to death for the third time in November 2011. And Mr. Nian, in turn, had to make an appeal for the third time, to Fu Jian High People’ Court. Subsequently, the third-time trial of second instance had been adjourned for several times before its first open session in July 2013. It was not until then that the police relinquished and disclosed the original spectrum of the toxicology tests, as well as other original materials as to the forensic evidence, which turned out to be the crucial factor to disprove the prosecution case. According to the inspection and analysis of relevant expert witnesses who voluntarily joined the defence, the spectrum of the urine sample of one deceased was exactly the same with the standard reference spectrum used in laboratory, which means that the deceased managed to urinate out a standard sample of sodium fluoroacetate. Moreover, what local

police referred to as the vomit sample of one deceased and what they referred to as the heart blood sample of the deceased were actually from the same sample. In addition, the extraction time of the sample on the doorknob was falsified, from August 8 into July 31 2006, while the former was exactly the date when Mr. Nian confessed to the murder. (One of the police investigators, who signed the relevant formal explanation, was finally summoned to the court, testifying that it was the chief director of the investigative department who instructed him to falsify that extraction time.) In brief, the basic narrative of the prosecution case that the victims died from sodium fluoroacetate does not stand, and the local police deliberately fabricated the forensic evidence and withheld the original materials only to incriminate Mr. Nian.

After several days of heated debate between the prosecution and the defence, the court was adjourned once again. In August 2014, Fu Jian High People' Court finally made up its mind to terminate the yoyo cycle of trials, appeals, and retrials and yet more appeals that consumed Mr. Nian and his defence lawyers, holding that Mr. Nian was not guilty.

Nian Bin's case shows that emphasis on the adversary will increase private and partisan interests of the prosecution to incriminate the accused, and therefore motivate them to make every effort to achieve a conviction. In this case, it is unsurprising that the police did not hesitate to withhold exculpatory evidence or impeachment evidence, or even to fabricate incriminating evidence, as long as they were powerful enough to do so and could circumvent effective supervision from outside. In the Chinese criminal justice system, where the police enjoy such a comprehensive and strong power that prevails greatly over not only the defence, but even the prosecution and the judiciary, this happens to be the case. Therefore, what happened to Nian Bin was by no means accidental, but systematically inevitable in a state that embraces an adversarial default of the roles of actors involved in criminal procedure, in which the police are meanwhile the dominant actor in criminal justice. In fact, Nian Bin is also not alone in the list of wrongful convictions in China, and the list may even get longer.⁴¹

Moreover, the promotion of external transparency may even worsen the aforesaid legitimacy crisis because on the one hand, as in Nian Bin's case, the mass media's enthusiastic exposure of the occurrence and solving of criminal cases may not only put more public pressure on the police, but also motivate them to play the hero to fight against crime. They are therefore more willing to solve the cases in hand as promptly as possible rather than to prevent potential injustice. On the other hand, exposure of the identity of the accused may incite hatred and even violence towards the accused, and therefore encourage the police to ignore his procedural rights, and even not to hesitate to practice torture for confession. Both will contribute to the possibility of miscarriages of

41 See He 2016.

justice. In addition, mass media tend to report, and where necessary even not hesitate to fabricate, shocking news such as appalling miscarriages of justice to attract more attention, and thus will exaggerate the darkness of the Chinese criminal justice system if possible miscarriages of justice were found, even though the media themselves may probably contribute to such injustice. This will further impair eroded prestige and legitimacy of the Chinese criminal justice system. Therefore, the prospects for this new wave of judicial reform campaigns in China regarding the transparency of criminal procedure appears somehow unpromising, especially given the failure of similar attempts in the past, although it might be premature to judge. Of course, this does not mean that judicial reforms should be discouraged in China. The problem lies in that China seems to have been led down a blind alley, on the one hand, the academic mainstream firmly believe in some (seemingly) self-evident doctrines about criminal procedure, requiring fair contests between equally-armed, partisan prosecutors and defence before passive judges (including further detailed requirements based on the aforesaid doctrine); on the other hand, a series of attempts at judicial reforms following the aforesaid doctrines turn out to have been barely effective in materially improving China's criminal procedure, culminating in a 'reform – deform – restore' cycle. A typical example of such pattern is the circulating development of the mechanism regarding the transfer and use of the case file,⁴² which is at the hard core of internal transparency.

Generally speaking, China's problem consists in two aspects. In practice, the so-called *trial mode centred on the case file* is indeed a rather closed process – the defence is not able to participate sufficiently in the whole process without sharing enough information, let alone the general public – due to the monopoly on the dossier by relevant institutions, especially the police.⁴³ Notwithstanding, it would be tantamount to putting the cart before the horse to attribute the aforesaid problem to the dossier-centred trial mode per se; rather, the crux of the problem lies indeed in the defence not having enough access to the dossier to prepare a real defence. In other words, criminal justice in China seems to lack sufficient internal transparency rather than external transparency, on which China's judicial authorities have long been working; moreover, the lack of sufficient internal transparency may even offset its efforts on external transparency, and thus undermine the legitimacy of the functioning of the Chinese criminal justice system.

In theory, the excessive adversarialization/Americanization thesis in criminal procedure has seriously distorted China's self-understanding of what due criminal process should be like. Specifically, the academic mainstream advocate that criminal procedure shall be considered in essence as a dispute between individuals and the state, which can be justified and legitimized

42 For details, see 2.2 Internal transparency in common criminal cases.

43 Ibid.

‘only by a fair contest between individuals and the state’;⁴⁴ moreover, they⁴⁵ continually and enthusiastically embrace and propagate most basic tenets of Anglo-American adversarial criminal procedure, e.g. judges shall be forbidden to collect evidence by themselves and criminal trials shall be centred on direct oral debates,⁴⁶ the defence shall be entitled to autonomous and independent right to investigation in pre-trial procedure,⁴⁷ the function of the dossier shall be displaced by court debates,⁴⁸ the prosecution and the defence shall be equal partisans;⁴⁹ and they have even explicitly proposed establishing an adversarial system in China,⁵⁰ and taken such judicial reforms as a sound starting point of deeper political reforms.⁵¹ Inspired by such ideas, many Chinese lawyers have, consciously or unconsciously, further distorted the adversarial dogmas and enthusiastically or even desperately embraced and propagated an absolute conception of formal justice, arguing that the objective truth shall not be pursued as the aim of criminal procedure while the so-called ‘legal facts’ alone based only on a (Anglo-American-styled) due process will suffice to give rise to justice.⁵² They even mistake the visual representation of Justice as ‘a goddess with her eyes closed’, and thus claim that a competent judge shall base his decisions only on what he hears about while turning his back on what obviously can be seen,⁵³ which implies that gaming the system within the existing framework of law is not only very cool but also righteous to a lawyer. Such distorted ideas about due criminal process can be defined as a Chinese fiction of Anglo-American adversarial criminal procedure. Furthermore, a growing number of the so-called ‘kick-ass faction’⁵⁴ of lawyers, as well as of their supporters, tend to demonize the state and the prosecution and exaggerate

44 In his most influential nutshell book on criminal procedure – ‘Justice seen to be done’, which has been recognized almost as Chinese criminal lawyers’ bible, Chen Ruihua, one of China’s leading criminal procedural law professors, has enshrined the Anglo-American self-understanding of the ideal of criminal procedure as the only and universally due form of criminal process. see Chen 2000, p. 68. This book also comprehensively propagates most adversarial dogmas, as universal principle. See other parts of the book.

45 The Institute of (Criminal) Procedural Law under China Law Society is undoubtedly representative of China’s academic mainstream on criminal procedure. Therefore, the following citations are all from summaries of their annual meetings.

46 See Hong 1995, p. 118.

47 See Ye 2004, p. 122; see also Tian 2013, p. 49.

48 See Yu 2014, p. 36.

49 See Chang 2015, p. 37.

50 See Wang et al. 2003, p. 188.

51 See Zhang 2009, pp. 101-109.

52 See Liu 2004, accessed on December 28, 2016, quoted from Zhang 2005, p. 11471.

53 See *ibid.*

54 In Chinese, ‘死磕派’ 律师。‘死磕’ (Chinese pinyin, Si Ke) is a slang term etymologically from North Chinese dialect, and means to fight against someone or something forcefully, vigorously, and aggressively, resembling the English slang ‘kick ass’. Accordingly, what the author has translated into ‘kick-ass faction’ of lawyers implies the fact that these criminal defence lawyers act in a rather aggressive and hostile way towards the police, the procuratorate, and the judiciary. For details, see Li 2014, p. 228.

the conflict between the prosecution and the defence, which has further intensified the hostility between them.

However, it transpires that such seemingly self-evident and universally-applicable doctrines of criminal procedure bought from the Anglo-American system, which have been comprehensively believed by China's academic mainstream and seem to have convinced the political and judicial authorities as well, albeit in an implicit way,⁵⁵ seem to have failed this foreign land. That is to say, the basic tenets of adversarial system should not be considered as universal principles, at least they can hardly stand in the current Chinese context. Given the fact that China's attempt to 'cut off her Chinese toes to fit the American shoes' has failed for quite some times, it might be the due time to consider throwing away her beloved Nike, trying Adidas, Kappa or Mizuno. However, China's biggest problem lies in that she does not even know her own size for sure. Accordingly, China's current problem is, to sum up, the conflict between the Chinese feet (i.e. the status quo of internal and external transparency of China's criminal procedure, especially that of internal transparency, and underlying factors relevant to its criminal justice system) and the Anglo-American shoes (i.e. the 'self-evident' doctrines of the adversarial system, and the concomitant emphasis on external transparency); and furthermore, whether (and if the answer is yes, then where and how) China could find a new pair of shoes that fits her well enough.

Specifically speaking, both academia and relevant authorities in China have ignored and even denied the relevance and significance of internal transparency (or rather they do not have such a concept of internal transparency), while relating transparency of criminal procedure simply and solely to access to court sessions, due to their preference or even worship of the fictional model of adversarial procedure (and perhaps misunderstanding and less knowledge about the inquisitorial approach as well). As a result, such a narrow perception of transparency of criminal procedure and the concomitant reforming efforts that focus on external transparency while ignoring and even curtailing internal transparency turn out to make little sense; because without sufficient internal transparency, the defence will have little chance of effectively challenging the prosecutorial cases and evidence, nor can the public really understand what is going on in the open courtroom, and therefore, neither of them can feel much justice.

Such problematic lack of harmonization between adversarial dogmas and China's experiences on the relationship between transparency and legitimacy of a criminal justice system indicates the inherent pitfalls of legal transplants: 'a crucial element of the ruleness of the rule – its meaning – does not survive the journey from one legal system to another... If you will, the relationship between the inscribed words that constitute the rule in its bare propositional

55 See *supra* footnote 47, 48 and 49, such adversarial dogmas are also enshrined in the official publications of China's SPP.

form and the idea to which they are connected is arbitrary in the sense that it is culturally determined,⁵⁶ which implies that a competent comparatist should therefore ‘think of law as a culturally-situated phenomenon and accept that the law lives in a profound way within a culture-specific – and therefore contingent – discourse’.⁵⁷ As far as it is related to the research questions of this book, this implication requires re-examining the legal-cultural postulates of adversarial dogmas and comparing them with Chinese reality. Accordingly, this research seeks to go beyond adversarial dogmas, and concentrate on internal transparency of criminal procedure, presupposing that in a criminal justice system that inherently has considerable inquisitorial quality (especially in the pre-trial stages), such as the Chinese system, internal transparency of criminal procedure is a critical condition for external transparency, and furthermore, crucial to the achievement of legitimacy; moreover, basic tenets of a criminal justice system, whether adversarial or inquisitorial, cannot stand without some underlying factors, such as, *inter alia*, political and legal tradition and ideological tendency, which should better be considered as a given prerequisite rather than variables that can be subject to discussion and optimization; however, the Chinese legal community has considered basic tenets of the adversarial system as self-evident and universally-applicable, ignoring the underlying factors peculiar to China, and therefore paying attention only to external transparency while disdaining and even diminishing internal transparency of China’s criminal procedure, which has aggravated the legitimacy decline of China’s criminal justice. This could be considered as the very basic hypothesis of this research.

In order to test the aforesaid hypothesis, this research will first try to employ the classification of internal and external transparency to evaluate Chinese criminal procedure, so as to examine whether internal transparency is not so well guaranteed as external transparency in China’s criminal justice; moreover, the underlying factors of the Chinese system, such as its legal culture and legal history, will be further examined so as to see whether they are compatible with the basic tenets of the adversarial system; in turn, the adversarial model of criminal procedure will also be subject to a thorough examination, especially in terms of the relationship between legitimacy and transparency of criminal justice, so as to see whether the Chinese fiction about adversarial dogmas really stands in its home countries.

As for the selection of the exemplary adversarial systems used for the comparative research, as England is the origin of adversarial criminal procedure and the USA represents the purest adversarial system on this planet, the English and US systems are undoubtedly sound choices; in addition, as Scotland has set an example of hybrid criminal procedure by mixing an inquisitorial pre-trial with an adversarial trial which could be considered as a good mirror for China’s reforming efforts in introducing adversarial mechanisms into its ‘paternalistic’

56 Legrand 1997, p. 117.

57 *Ibid*, p. 124.

system,⁵⁸ the Scottish system would also be a noteworthy jurisdiction for comparison.

Since the distinction between internal and external transparency is neither a native concept nor a particular rule of positive law in Anglo-American systems or the Chinese context, the researcher's primary task in this research is to identify the appropriate counterpart in positive laws of each selected jurisdiction should he intend to benchmark them respectively with the European continental tool. In this term, internal transparency in this research will in large part involve: 1. the right of the defence to see/view the dossier in Chinese criminal procedure;⁵⁹ 2. the pre-trial discovery in US criminal procedure;⁶⁰ and 3. the prosecution duty of disclosure in English and Scottish criminal procedure.⁶¹

3.3 Research questions

To solve the conflict between the Chinese feet and the unfit Anglo-American shoes, a series of questions must be dealt with in advance. First of all, the exact size of Chinese feet must be measured precisely; second, it is also important to know the size of NIKE, how it fits the Yankees' feet, what their feet look like, how different they are from the Chinese counterpart, and how many toes China has to cut off should she insist on wearing her beloved NIKE; likewise, it is equally important to know the size of, perhaps, CLARKS, how they fit Her Majesty's feet, what Her Majesty's feet look like, how different they are from the Chinese counterpart, and how many toes China has to cut off should she turn to embrace the English/Scottish fashion; last, it might be better to reach a conclusion about whether the Anglo-American shoes fit China well, and if not, what kind of shoes may fit China better, what the suitable shoes should look like, or at least, what they should not look like.

Specifically, the research questions of this PhD project should be listed as follows. All in all, the overarching research question is: what and how should China emphasize regarding transparency of criminal procedure so as to enhance or restore legitimacy of its criminal justice? In order to answer this question, the following sub-questions must be answered first.

a. Conceptual question: how does internal/external transparency facilitate legitimacy of criminal justice?

Before any further discussion of the research topic, it is necessary to first understand the rationale behind legitimacy building of criminal justice; specifically speaking, to understand how an ideal-typed adversarial/inquisi-

58 A paternalistic system refers to a political and legal system in which the state dominates everything on behalf of the people, acting like a parent of all the people.

59 For details, see chapter 1 and 2.

60 For details, see chapter 3.

61 For details, see chapter 4 and 5.

torial system functions to establish its legitimacy, so as to make clear the due relationship between internal/external transparency and legitimacy of a hypothetical criminal justice system.

b. Descriptive question: what is the status quo of internal/external transparency of criminal procedure in each selected jurisdiction?

Before any further comparison and analysis, it is necessary to describe the real situation of each selected jurisdiction, including the basic tenets of their systems and to what extent internal/external transparency has been guaranteed. Specifically speaking, the descriptive question involves two major aspects: 1) whether internal transparency is not so well guaranteed as external transparency in China's criminal justice; and 2) whether the Chinese fiction about adversarial dogmas really stands in their home countries.

c. Comparative and analytical question: why is internal transparency of criminal procedure so important to the achievement of legitimacy of criminal justice?

Based on the answers to the conceptual and descriptive questions, it is possible to further reveal, through comparison, why external transparency alone can no longer function well enough to guarantee the achievement of legitimacy of criminal justice, even in adversarial jurisdictions, let alone in a paternalistic system like China; and thus to show the significance of internal transparency of criminal procedure, especially in the Chinese system.

d. Normative question: what amendments could be suggested to China's criminal procedure based on the answers to the research questions described above?

At the end of this dissertation, based on the answers to the prior questions, it would be valuable to propose some normative solutions to China's legitimacy problem, e.g. to make the dossier more complete, accurate, and accessible so as to enhance internal transparency of Chinese criminal procedure.

4 Methodology

Generally speaking, this research seeks to avoid taking legal reforms as the so-called 'sound starting point of deeper political reforms',⁶² or as a means for other non-legal purposes, but solve relevant legal problems in a legal and technical manner based on China's existing political reality without any a priori political or ideological preference; since legal instrumentalism as such is tantamount to putting the cart before the horse. It can hardly change the mind of political decision-makers, but only cast doubt on the real motivation and intention of legal reformers, which may in turn hinder a sound legal reform.

62 See supra footnote 51.

Although it is true that many factors affect the legitimacy of a criminal justice system, whether political, economic, ideological, cultural, or legal factors, the selection and control of variables determines what subject a research belongs to. For legal research, in the author's opinion, only legal factors should be taken into account as variable, while other factors such as political, ideological, or cultural factors shall be assumed as given parameters or prerequisite. Therefore, this research will try to identify relevant non-legal factors that underlie each selected jurisdiction but take them just as a series of given conditions rather than variables that can be subject to discussion and optimization; relevant normative solutions to the research questions will thus be proposed in a legal and technical sense as well, based on varying hypothetical options of relevant non-legal factors that underlie each criminal justice system. In brief, the methods which will be used in this research are: literature review and normative analysis; theoretical review and check; common case study and illustration; comparative legal method; expert interviews; and analysis from a perspective of bureaucratic organization.

4.1 Literature review and normative analysis

The first step of this research is to collect and review relevant legal literature from China/US/England/Scotland. The relevant books or articles should cover not only the relevant issues regarding internal or external transparency of Chinese/US/English/Scottish criminal procedure, but also the more fundamental issues, such as the criminal process in a nutshell, the legal culture and tradition, and the constitutional and political arrangement of each selected jurisdiction. Moreover, the relevant rules will also be reviewed and analyzed in a normative approach so as to evaluate the degree of internal and external transparency of criminal procedure in each selected jurisdiction in terms of the law in books.

Given the hypothesis mentioned above, more attention will be paid to the issue of internal transparency in this project. Specifically speaking, this will involve the discovery/disclosure mechanisms in criminal procedure of US/England/Scotland. As for China, the normative analysis on the issues regarding internal transparency of Chinese criminal procedure will lie in the relevant mechanisms regarding the transfer and use of the case file, which, in an inquisitorial or semi-inquisitorial system, including in a Chinese context, should be considered as at least a very essential, if not the most significant, factor/variable to evaluate the degree of transparency, and furthermore, even the overall quality of the criminal procedure. In other words, such mechanisms are comparable with the discovery/disclosure mechanisms in adversarial systems of criminal procedure; because they are embedded in a system in which the formulation and verification of case theories and the discovery of truths are based mainly on a case file that is formed and compiled by various institutions pre-trial, such as the police and the prosecution, therefore relevant information can be exchanged only through the transfer and use of the case file.

4.2 *Theoretical review and check – scientific added value*

In fact, there were many former works by various Chinese scholars with respect to disclosure mechanisms or transparency of criminal procedure. However, most of them relate transparency only to open justice, i.e. the external transparency, while ignoring its significant connection with internal transparency, i.e. disclosure mechanisms; moreover, they carry many a priori arguments based on (seemingly) self-evident doctrines⁶³ which actually contain a number of unexamined and doubtful underlying assumptions. In order to clarify both the theoretical and practical dilemmas that China has long been confronted with, this project will first try to make these assumptions explicit, and reconsider and re-examine their validity in a Chinese context, so as to check whether these ‘self-evident’ doctrines bought from abroad really stand in China.

Moreover, the author assumes that in a criminal justice system that inherently has considerable inquisitorial quality (especially in criminal investigation), such as the Chinese system, internal transparency of criminal procedure is a critical condition for external transparency, and furthermore, is crucial to the achievement of legitimacy. However, internal transparency is not so well implemented as external transparency in China, therefore the overall transparency of criminal procedure has been undermined, with the legitimacy of the system compromised. In order to examine this assumption, this project will also try to find out whether internal transparency is indeed not so well implemented as external transparency, in terms of both legislation and adjudication of China.

4.3 *Common case study*

In order to get an insight into the real situation concerning internal and external transparency of criminal procedure in each selected jurisdiction, and also to give the reader a vivid impression of how relevant mechanisms function in practice, a number of typical cases in each selected jurisdiction will be cited and illustrated.

4.4 *Comparative legal study*

Since the major problem of this research topic lies in the conflict between the ‘Chinese feet’ and the ‘foreign shoes’, it is quite natural to compare them, to find out whether they match each other or not, and if not, where and why they do not match. In other words, comparative legal study will be a necessary method for this project. Given the fact that the ‘foreign shoes’ come mainly

63 In fact, these (seemingly) self-evident doctrines are not so ‘self’ in a purely Chinese context; most of which are indeed introduced from Anglo-American legal theory by China’s academic mainstream who usually have strong Anglo-American background.

from the Anglo-American adversarial system, it would be equally natural to select some exemplary countries out of this system, which, specifically speaking, as is explained beforehand, reasonably involve England, Scotland, and United States.

Comparison is not simply a puzzle game to mechanically identify the similarity and difference between China's relevant mechanisms and the counterpart in US/England/Scotland. Rather, it is meaningful only if the underlying logic of relevant mechanisms in each selected jurisdiction could be extracted from the formal rules, and compared with each other in a functional way. In doing so, it shall be necessary to learn not only how internal and external transparency is regulated and implemented in each selected jurisdiction and what relevant mechanisms look like, but also how such mechanisms function, on what kind of structural arrangements they are premised, and what defining elements constitute such arrangements (e.g. in what way powers and responsibilities are distributed between the main actors of the criminal process).

It is also noteworthy that a competent comparatist should 'think of law as a culturally-situated phenomenon and accept that the law lives in a profound way within a culture-specific – and therefore contingent – discourse'.⁶⁴ Before any meaningful comparison, relevant mechanisms and arrangements of each selected jurisdiction should also be related to its specific legal culture so as to show their contextual meanings. Accordingly, the author has employed a theoretical framework proposed by Langer, which perceives the dichotomy between adversarial and inquisitorial systems⁶⁵ 'not only as two different ways to distribute powers and responsibilities between the main actors of the criminal process, but also as two procedural cultures – two different conceptions of how criminal cases should be tried and prosecuted.'⁶⁶

Under this framework, the comparison must be done both in institutional terms and in cultural terms. Specifically, in institutional terms, each selected jurisdiction should be questioned about: 1) how big the disparity between prosecutorial and defensive powers is; 2) how much (internal) transparency it grants; and 3) how impartial the prosecution is. By the comparison in these terms, this research seeks to discover whether there is any correlation between (internal) transparency and other institutional factors. In addition, in order to make the comparison more vivid and explicit, the author would like to demonstrate how a criminal proceeding proceeds from the very beginning right to the end in a Chinese legal context, elaborating especially the issue of internal

64 Legrand 1997, p. 124.

65 It is undoubted that England, Scotland, and US can generally be categorized as adversarial system; while China could be considered as a semi- or quasi-inquisitorial system.

66 Langer 2004, p. 63. Specifically, the new theoretical framework involves three major dimensions, which are structures of interpretation and meaning, individual disposition, and procedural powers, as well as some additional implications, such as material and human resources, case-management techniques, professional ethics, etc. For details, see Langer 2004, pp. 7-17.

transparency at a number of crucial junctions, such as: a. pre-trial detention (coercive measures related to person); b. pre-trial coercive measure related to his goods (for instance seizure); c. the hearing at the end of the investigation/preparation of indictment; and d. the preparation of the defence of the court proceedings, including preliminary court proceedings. In cultural terms of the comparison, since ‘defining a legal culture or tradition for the comparatist means, therefore, “finding what is significant in [its] difference from others”’,⁶⁷ each jurisdiction shall be examined from the perspectives of structures of interpretation and meaning, of individual disposition, of material and human resources, of case-management techniques, and of professional ethics, etc. In the end, the comparison under such a new theoretical framework should reveal whether US / English / Scottish system would fit China well, and what kind of system would fit China better.

4.5 Analysis from a perspective of macro-history

In order to articulate the legal cultures and traditions of the two categories of (quasi-inquisitorial) Chinese and adversarial (England, Scotland, and US) systems for the purpose of a meaningful comparison, this book seeks to trace the origins of the Chinese and adversarial criminal procedures in respect of their legal histories respectively. Specifically, the elaboration of the origin of adversarial criminal procedure will be centred on how adversarial criminal trial came into being in English legal history; while the legal history of China that may probably be quite alien to western readers will be articulated in a more thorough way so that the procedural culture of China that originated from its sophisticated legal tradition can be made clear.

Although ‘tracing the genesis of the [European] Continental apparatus of justice does not require consideration of the judicial bureaucratization in Roman-Byzantine antiquity’,⁶⁸ it will not suffice to simply begin with the fresh outbreak of political and legal modernization in the 19th century when it comes to China’s case since the history of the Chinese Empire has in essence never completely been interrupted and terminated.⁶⁹ Therefore, the genesis of the Chinese apparatus of justice and its concomitant legal culture will in this book be traced up to the first dynasty in China. In analyzing the conventional organization of authority in China, this book will employ the theoretical dichotomy between the hierarchical and the coordinate ideals proposed by Damaška.⁷⁰

Moreover, given China’s special case-management technique and the concomitant technological legalism based on its perfect bureaucracy and

67 Legrand 1997, p. 123.

68 Damaška 1986, p. 29.

69 For details, see Chapter 8 China’s typical pattern of legitimate truth-finding and fair justice.

70 See Damaška 1986, pp. 16-46.

sophisticated dossier system which has profoundly influenced how Chinese minds perceive criminal procedure and legitimate truth-finding, special attention will be given to China's (juridical) bureaucracy and dossier system in relevant historical review, which closely relates to its conventional wisdom and logic of legitimacy building. Correspondingly, the normative solutions regarding transparency that this book finally proposes to alleviate the legitimacy decline of China's criminal justice will also take into account China's idiosyncratic (juridical) bureaucracy and dossier system.

Last but not least, this book will consider the recent technological innovation especially in the Internet and social media as a very up-to-date but most influential and unprecedented macro- historical factor that has profoundly and thoroughly impaired what underpinned China's traditionally – patterned legitimacy, and therefore take this very factor into account when trying to explain the underlying reasons of, and thus suggest normative solutions to the legitimacy decline of China's current criminal justice system.

PART I

CHINA'S STATUS QUO: LEGITIMACY IN DECLINE

China's current criminal justice system was formed after the ten-year Cultural Revolution, and has been embedded into a hybrid political and legal system, an order out of chaos. In fact, the beginning of China's hybrid system can be traced back to the middle of 19th Century, when the Anglo-Chinese War¹ that had shaken the very foundations of China's traditional order steered the country towards an entirely new era, launching the process, though in a less desirable way, of China's modernization. As China's long-enduring 'closed door' had been broken into by force, western sciences including western laws had been introduced into China as well. In terms of political and legal sciences, Chinese intellectuals, for the first time ever, had come into contact with masterpieces by Enlightenment figures such as Rousseau and Montesquieu, which facilitated the social awareness of civil rights. The introduction of western sciences resulted in a long-lasting 'legitimacy crisis' in China.² China was traditionally established on her great culture. The concept and awareness of the Chinese nation consisted precisely in such cultural terms. Chinese people had always been so proud and confident of this culture by then, that even though China was conquered by barbaric peoples many times, they still believed that her culture would always prevail eventually. In fact, there had never been any real challenge to China's traditional culture until the echo of gunfire from westerners' great warships awakened the Chinese people from their dream of 'the Celestial Empire' to realization of the existence of other civilizations, despite Chinese intellectuals' evident inexperience and unexpectedness of such situation. This culture clash brought forth anxieties and fears deeply inside Chinese people's hearts. From the awareness of the backwardness of their technology, to that of the (political and legal) system and the culture, Chinese people were deeply entrapped, step by step, in an inextricable 'legitimacy crisis', not only in technical terms, but

1 The *First Opium War* (1839-42), also known as the *Opium War* and as the *Anglo-Chinese War*, was fought between Great Britain and China over their conflicting viewpoints on diplomatic relations, trade, and the administration of justice for foreign nationals. China lost the war and then was forced to sign the Treaty of Nanking – the first of what the Chinese later called the unequal treaties – which granted an indemnity to Britain, the opening of five treaty ports, and the cession of Hong Kong Island. The war is now considered in China as the beginning of modern Chinese history.

2 Cao 2012, p. 34.

also in political terms, and ultimately in value terms.³ In order to combat this ‘legitimacy crisis’, Chinese intellectuals proposed a series of solutions, from ‘learning from the enemy’,⁴ ‘Chinese learning for fundamental principles and Western learning for practical application’,⁵ ‘wholesale westernization’, to ‘Mr. Democracy and Mr. Science’.⁶ However, this crisis has never been perfectly resolved since then. The Chinese history of modernization can be seen as a process of dealing with this ‘legitimacy crisis’.

The introduction of western laws was accompanied by the imposition upon China of extraterritoriality,⁷ which, although in an unpleasant and even painful way, to some extent contributed to the social awareness of the backwardness of the Chinese legal system and thus to the national consensus on the necessity of a legal reform and transplant. In an early stage, China’s acceptance of western legal theory and culture focused on the Anglo-American system, especially on international law.⁸ For example, during the Self-Strengthening Movement,⁹ the Qing government had financed and sent a great number of Chinese students to study in US or UK, and sponsored translation of a series of works concerning Anglo-American legal system and theory, such as H. Wheaton’s *Elements of International Law*. At the beginning of the 20th century, when the comprehensive amendments of law were launched however, the legal transplant followed the example of a civil law system, most notably that of Japan both as

3 Ibid, pp. 34, 35.

4 A slogan and guiding principle during the *Self-Strengthening Movement* (Chinese: 洋务运动 or 自强运动) from 1861-1895.

5 Proposed in 1898 by Zhang Zhidong (张之洞) in his work, *Exhortation to Study* (劝学篇, *Quàn Xué Piān*), for the English version, see Zhang Zhidong ‘*China’s Only Hope: An Appeal by Her Greatest Viceroy, Chang Chih-tung*’, translated by Woodbridge Samuel, New York: Revell, 1900. Zhang insisted on a method of relatively conservative reform, summarized in his phrase ‘Chinese learning for fundamental principles and Western learning for practical application’ (中学为体·西学为用, *Zhōngxué Wéi Tǐ, Xīxué Wéi Yòng*). His idea, which to some extent reconciled western learning with Chinese traditional culture and ideology, had been recognized by the authorities as the official conclusion on the controversy over westernization.

6 Advocated in the *May Fourth Movement*, an anti-imperialist, cultural, and political movement growing out of student demonstrations in Beijing on May 4, 1919, protesting the Chinese government’s weak response to the Treaty of Versailles, especially allowing Japan to receive territories in Shandong which had been surrendered by Germany after the Siege of Tsingtao. These demonstrations sparked national protests and marked the upsurge of Chinese nationalism, a shift towards political mobilization and away from cultural activities, and a move towards a populist base rather than intellectual elite. Many political and social leaders of the next decades emerged at this time.

7 Extraterritoriality was imposed upon China in the Treaty of Nanking, resulting from the First Opium War. In extraterritorial zones, Chinese and non-treaty state nationals were subject to Chinese law but were tried by the International Mixed Court which had a Chinese judge and foreign assessor sitting on it; while foreign nationals of treaty powers were tried by consular courts. For more details see Quigley 1926, pp. 46-68.

8 See Yang 2011, p. 161.

9 1861-1895 AD, a period of institutional reforms initiated in China during the late Qing dynasty following a series of military defeats and concessions to foreign powers.

to structure and content. This choice was based on two main considerations. First, the civil law system inherently has something in common with Chinese legal tradition, such as the emphasis on statutory codes, deductive logic and state-oriented justice. Second, Japan's success in self-strengthening through legal reform made it an ideal example for China to follow, and the geopolitical connection between China and Japan also facilitated this feasibility.¹⁰

Japan played such a significant role in China's legal modernization that all of the four foreign advisors invited by the Qing government for legal reform and legal transplant were Japanese legal experts, including Okada Asataro (岡田 朝太郎 おかだ あさたろう in charge of drafting the new penal code and organic law of the court, Matsuoka Yoshimasa (松岡 義正 まつおか よしまさ) in charge of drafting civil law and procedure law, Shida Kotaro (志田 鉦太郎 しだこうたろう) in charge of commercial law, and Ogawa Shigejiroan (小河 滋次郎 おがわ・しげじろう) in charge of drafting prison law;¹¹ even a great number of fundamental legal concepts in Chinese today were directly introduced from Japanese, such as '法学 (Fa Xue, science of law)' and '民法 (Min Fa, civil law)'.¹² Apart from assisting China in drafting new laws, Japanese scholars, notably Okada, also contributed to the propagation of western legal knowledge and ideas, as well as of 'the most advanced theory'.¹³

The new laws, notably the new penal code of the Qing Dynasty had declared the collapse of the traditional Chinese legal system, and launched the modernization of law in China. These new laws were based mainly on the legal transplant of the civil law system rather than the heritage of Chinese legal culture, thereby eliminating some cruel or inhumane traditions such as torture, corporal punishment, and analogy and introducing many modern principles of law, notably those of criminal law such as '*nullum crimen nulla poena sine lege*'. Although the Qing Dynasty fell before they could come into force, most of their rules and principles had been well preserved and implemented by the newly founded Republic of China.¹⁴ The legal reform in the last decade of the Qing Dynasty featured the following aspects: the formal separation of judicial and executive powers according to Montesquieu's theory of '*trias politica*'; the establishment of a four-level court system and three-instance trial system; the establishment of prosecuting offices; the formal abolition of torture and corporal punishment; the formal separation of criminal and civil procedure; an attempt

10 See Yang 2011, pp. 161-164.

11 Zhou 2012, pp. 104-105.

12 He 2010, p. 5; Jiang 1999, pp. 1-2.

13 See Yang 2011, pp. 100-108. The so-called most advanced theory referred mainly to the German new theory on criminal law. Okada used to study law in Germany, supervised by Franz von Liszt, so his theory was evidently colored by German, notably Liszt's theory, which had in turn influenced China's new penal code. See also Li 1995, pp. 16-38.

14 See Zhou 2012, pp. 1-9.

to establish a prosecutorial, lawyer and jury system;¹⁵ the rapid development of modern law schools and the pursuit of legal professionalization.¹⁶ Literally in a word, the most significant achievement and the most obvious feature of this legal reform consisted in ‘destruction’.¹⁷ Although this reform had not been thoroughly implemented and many new laws even had not formally come into effect before the Qing Dynasty fell, it enlightened the whole nation in such a profound way that it had greatly destroyed the traditional Chinese political and legal system, and triggered the hybrid pattern of China’s political and legal system that has lasted until today.

The *Xinhai Revolution*¹⁸ in 1911 overthrew the Qing Dynasty, formally ending the imperial system in China which had lasted for more than 2000 years. The newly founded Republic of China (ROC) preserved and furthered the achievements of legal reform in the Qing Dynasty. Except for those rules against a republican system, ROC continued the new laws from Qing Dynasty by and large, including the new criminal law and procedure. By 1949, a relatively perfected legal system had been formed in China.¹⁹

The legal system of ROC, though succeeding the system from the late Qing Dynasty, still made some progress in the following aspects: the formation a relatively self-consistent political and legal system since the establishment of the republican system, based on ‘*trias politica*’ theory; efforts to establish a lawyer system; the perfection of a law exam system and judge recruitment system, forming a professional group of legal practitioners.²⁰ Among other things, one of the most notable features of the political and legal system of ROC is the party-ruled state and party-oriented justice system. This, on the one hand, partly stemmed from the founding father *Sun Yat-sen*’s²¹ theory on the route map of China’s constitutionalization, as well as objective demands of

15 Due to the strong resistance by the conservative to liberal ideas and civil rights, only the prosecutorial system had been actually established in the end..

16 Fang 2006, pp. 68-88.

17 Ibid, p. 110. An interesting but also worrying phenomenon is that one century later in China, almost everything concerning legal reform seems to have returned to the origin. Except for separation of civil and criminal procedure and formal abolishment of torture and corporal punishments, many basic problems such as judicial independence and legal professionalization still remain unresolved.

18 The Xinhai Revolution was a revolution that overthrew China’s last imperial dynasty, the Qing dynasty, and established the Republic of China. The revolution was named Xinhai (Hsin-hai) because it occurred in 1911, the year of the Xinhai stem-branch in the sexagenary cycle of the Chinese calendar.

19 Xie 2012, pp. 1-6.

20 See Fang 2006, pp. 112-145.

21 Sun Yat-sen (12 November 1866-12 March 1925) was a Chinese revolutionary, first president and founding father of the Republic of China. As the foremost pioneer of Republic of China, Sun is referred to as the ‘Father of the Nation’ in the Republic of China (ROC), and the ‘forerunner of democratic revolution’ in the People’s Republic of China. Sun played an instrumental role in the overthrow of the Qing dynasty during the years leading up to the Double Ten Revolution. He was appointed to serve as Provisional President of the Republic

revolution and war; on the other hand, it was inspired largely by the October Revolution and Lenin's theory.²² Apparently, Soviet Union and Lenin's theory began to colour China's system earlier than is generally thought.

In 1949 when the People's Republic of China (PRC) was founded, all the laws enacted by ROC were officially abolished by the new government. The PRC began to establish its own political and legal system from the ashes of the old system. Indeed, this task had been launched much earlier. Since 1927, when the Communist Party of China (CPC) set up its first base area, up to the civil war period, the CPC had been trying to enact and enforce its own laws in its own areas. These laws were quite simple and fragmented, pertaining mainly to ownership of lands, marriage, anti-corruption, and other basic criminal rules. After taking control of the entire country, the CPC quickened the pace of the enactment of new laws. In 1954, the first constitution of the PRC had been passed, which established a basis for the political and legal system of China today.²³ The new laws of the PRC featured the following aspects: absolute opposition to and abandonment of the old system by KMT;²⁴ reflecting and maintaining the official ideology, i.e. the thoughts of Marx, Engels, Lenin, Stalin, and Mao Zedong,²⁵ and generally copying the Soviet Union's system; affiliation of judicial power to executive power; reliance on mediation to solve disputes.²⁶ The aforesaid aspects, in particular those regarding communist ideology, still make up the main pillar and mainstream discourse of China's current political and legal system. Since 1957, and up to the end of the Cultural Revolution in 1976, China experienced a series of political movements during which the vulnerable legal system of the newly founded republic was seriously undermined. Especially during the Cultural Revolution, hardly any law remained.

The aforesaid period (1949-1976) witnessed Mao Zedong, the last purely charismatic leader of China and his new empire, which could therefore be marked as Mao's Era, one of the most incredible epochs in Chinese history. The new emperor had managed to rebuild or rather restore China's authoritarian order by deifying himself and resorting to Machiavellianism. The legitimacy basis of Mao's system was essentially much the same as that of China's traditional system;²⁷ the only difference lay in that the new emperor had abandoned the seriously-flawed traditionally-ideological clothes of Confucianism, while putting on his beautiful new clothes of communist ideology. As Mao's new system was after all as self-sufficient and self-consistent as the old one that had

of China, when it was founded in 1912. He later co-founded the Kuomintang (KMT), serving as its first leader.

22 See Fang 2006, pp. 145-158.

23 Yang et al 2010, pp. 2-13.

24 Any legal principle with a 'bourgeois colour' shall be abandoned, including '*nullum crimen nulla poena sine lege*' and presumption of innocence.

25 董必武 《对参加全国司法会议的党员干部的讲话》 Quoted from Fang 2006, pp. 163, 164.

26 See Fang 2006, pp. 162-167.

27 For details, see *infra* 8.2 China's essential pattern of legitimacy building.

worked well in China for several millennia, it was well accepted by the Chinese populace, and one has to concede that his system was indeed a successful one in one way or another. However, Mao's system including his Ultra-Leftist line came to an inevitable end shortly after his death.

After that, notably the '*Third Plenary Session of the Eleventh Central Committee of CPC*' in 1978, the PRC began to restore the legal system from the ashes. In 1979, the first penal code and the first criminal procedural law of the PRC were passed, apparently strongly influenced by those of the Soviet Union.²⁸

Since the 1990s, the so-called 'Universal Values' have attracted more and more attention, and western legal theories have come to be considered and employed for amendments of law. 'Rule of law' and 'human rights' have become common ideas, being formally recognized by the constitution one after another. A new round of legal reform is ongoing, during which different legal theories and cultures are competing and converging, forming the new ROL system.²⁹

During this entire era of modernization (1840-present), China has always been in pursuit of a new systematic theory concerning the outlook on justice and law, such as the objectives and functions of law, the elements of judicial legitimacy, the due basis for judgments, the definition and relevance of truth, etc. She has also had many attempts at a sound legal system, which is well-accepted, self-consistent, and self-sufficient. However, this process was continually interrupted by unexpected events such as wars and civil unrest during the past century, from Xinhai Revolution (1911), the tangled warfare among warlords (1916-1930), the Second Sino-Japanese War (1937-1945), the full-scale civil war (1946-1950), and the Anti-Rightist Movement (1957-1959), to the Cultural Revolution (1966-1976). Literally in a word, China's legal system and theory during this era have featured tremendous 'chaos', being coloured by many ideologies, theories and systems, first the Anglo-American, then the Japanese and German, then the Soviet Russian, and recently the Anglo-American again. Similarly, China's current order out of chaos could be considered as a hybrid, which is still in a process of reforming and rebuilding during the past few decades (1978-present).

Consequently, China's current legal regime and theory, including its discourse system, has formed a very incoherent and even paradoxical structure, what the famous Chinese legal-cultural scholar Prof. Feng Xiang referred to as a 'parasitic discourse' embedded into its orthodox political and legal system, a sophisticated design with the special purpose of diluting ideological overtones, covering social contradictions, and introducing (western) 'civilization'. Feng argued that China's current order has regarded the Ultra-Leftist line as a 'rule of man' that must be eradicated, which has been substituted by a flexible 'rule

28 See Yang et al. 2010, pp. 16-20.

29 For details of China's new ROL system, see *infra* footnote 100.

of law', characterized by legal instrumentalism. This new pattern of 'rule of law', which has borrowed legislative techniques, superficial classification, and general legal terminology from foreign countries, still follows its Chinese-characteristic or rule-of-man tradition in terms of its political and legal framework and of its actual operation. Such an incompatibility between the actual framework, operation and jurisprudence has meant that China's new ROL can only focus on legislation, statutory interpretation, and propaganda, i.e. ideological construction, rather than solve specific problems; while those civil rights or legal proceedings enshrined by the law in books will usually be difficult to implement, and can hardly replace the legacy of the long-lasting rule-of-man practice. By transplanting from the 'civilized' world terminology and slogans, such as rule of law, human rights, or constitutional government, the socialist ideology of the host gradually absorbs the 'Universal Values', forming a hybrid discourse to cope with the new political, economic and social situation. Since the so-called 'parasitic discourse' may conflict with the discourse and values of the host at any time, effective functioning of its political and legal system relies upon the maintenance of a dynamic balance: the discourse of the host is responsible for maintaining the operation of the bureaucratic system, and handling disputes and other specific issues, functioning as the prevailing Mandarin of the whole society; the 'parasitic', new ROL discourse is preferred by textbooks and the mainstream media, functioning as the discourse specializing in the production of ideology.³⁰

Radical as Feng's remarks may sound, they have profoundly revealed the severe incoherence of China's current framework of legal theory and practice, what the author would rather refer to as a hybrid system. To a great extent, this hybrid system has resulted in the paradoxical situation of China today. First, since the introduction of China's new ROL relies upon the 'Universal Values' propaganda rather than on solving specific problems, it has to keep on translating specific issues into ideology, so as to cover up the aforesaid dilemma and to maintain or even expand the territory of such discourse. Therefore, China's mainstream jurisprudence, as a product of the new ROL discourse, focuses particularly on the speakers' ideological positions, rather than caring about the truth and details; its legalistic narrative will have an evident preference for dogmas, attributing everything to flawed legislation or underdeveloped institutions. Second, such divergence between legal dogmas and practice has inevitably undermined the attraction and instrumental function of the 'Universal Values'. And the new ROL can hardly continue to blame the 'host' for the ever-increasing corruption, without taking any credit. After all, most of the corrupted can enjoy more comprehensive legal protection, including gaming the system; a 'lame' ROL will only encourage more ordinary people to resort back to traditional rule-of-man solutions such as 'Shang Fang'.³¹

30 See Feng 2008.

31 See *ibid.*

It might not be unfair to argue that the establishment and practice of such a pluralistic discourse could be considered as a major achievement of China's three decades of (legal) reform.³² However, it could also be regarded as the root cause of China's current (legal) problems, and for the same reason, the decline of and paradox regarding the legitimacy of China's criminal justice system could be regarded as part of that of China's hybrid system, i.e. the new ROL discourse system introduced into China's traditional political and legal system. Specifically speaking, in terms of the legitimacy of China's criminal justice system, and its relationship with transparency of criminal procedure, the new ROL discourse system has insisted on the fiction that Anglo-American dogmas on criminal procedure are universally applicable and thus should be considered as the ultimate answer to all the relevant problems of China, while ignoring specific issues, such as the structural arrangements of China's Current criminal justice system, and the status quo of transparency of its criminal procedure. Therefore, Part I of this dissertation will try to get an insight into these issues before further challenging the aforesaid fiction.

32 Ibid.

Basic tenets of China's current criminal justice system

1.1 Introduction

China's criminal justice partly reflects the Chinese constitutional notion of the so-called 'people's democratic dictatorship',¹ which is formally deemed the nature of the state of China. In the Chinese context, 'dictatorship' here corresponds to a special Chinese term 'Zhuanzheng' (专政), which literally means dictatorship or oppressive governance. It is a rather communist concept enshrined in Art. 1 of the Chinese Constitution, invented by Mao and actually based on Lenin's revolutionary theory about 'Class Struggle'. In China, as well as in other (former) communist countries, this used to be a noble word that reflected the old generation's Marxist or Communist ideals. Even today, this idea still constitutes the formal foundation of China's constitution, although it receives less emphasis than before. Given the disapproving connotation of its official English translation in a western context, the author would rather refer to it as its original Chinese wording, 'Zhuanzheng'. In fact, this 'Zhuanzheng doctrine' permeates throughout the whole criminal process in China, so that Chinese criminal procedure can formally be defined as a 'Zhuanzheng system' when compared with an adversarial or inquisitorial system; and this 'Zhuanzheng system' is, in terms of the real functioning of China's current criminal justice system, indeed the host discourse system in which what Feng called the 'parasitic' (new ROL) system is embedded

The design of the 'Zhuanzheng system' actually stems from Lenin's ideas on state and law. He asserted that law, which reflects the will of the ruling class of a state, is a tool by which the ruling class practices dictatorship over the ruled class. In a socialist state specifically, the proletariat or the people must therefore practice dictatorship over the enemies so as to suppress and punish all kinds of 'anti-revolutionary' offenses.² Accordingly, Art. 1 of the Chinese

1 Art. 1 of the Chinese current constitution provides, '中华人民共和国是工人阶级领导的、以工农联盟为基础的人民民主专政的社会主义国家', which means the People's Republic of China is a socialist state under the people's democratic dictatorship led by the working class and based on the alliance of workers and peasants.

2 Although the current penal code of China has formally abolished the 'anti-revolution' crimes, this kind of political concepts can still be traced in the current legal system. For example,

Criminal Procedure Law provides that: ‘This Law is enacted in accordance with the Constitution and for the purposes of ensuring correct enforcement of the Criminal Law, punishing crimes, protecting the people, safeguarding State and public security, and maintaining socialist public order.’

Under this ‘Zhuanzheng doctrine’, the structural arrangements of China’s criminal justice feature the effective suppression of enemies³ and their rebellion so as to maintain stability of the state and the regime, which inevitably grants great powers to the police and public prosecutors.

The ‘Zhuanzheng doctrine’ is actually a political arrangement based on communist ideology and state theory, and its special meaning and connotation is believed to be connected with particular historical period. Specifically, the classical conception and apparatus of ‘Zhuanzheng’ should only exist in the period of the ‘Grand Revolution’, and expire since the establishment of the socialist system. The Third Plenary Session of the Eleventh Central Committee of the CPC in the year 1978 is recognized as the juncture at which the ‘Zhuanzheng’ regime was beginning to transform into modern ‘rule-of-law’ country. Now, China is believed to be in this transitional period, during which, though the enemy class as a whole is believed to have been eliminated by revolution and ‘Zhuanzheng’, atomized ‘enemies’ who may still harm the socialist country are then considered the object of ‘Zhuanzheng’.⁴ In this sense, criminal suspects or defendants might be somehow considered as potential or possible enemies, and thus the potential object of ‘Zhuanzheng’. Therefore, ‘Zhuanzheng’ actually has not died, and is still enshrined as the nature of the state of China in the very first article of the Chinese constitution, deeply embedded in the political and legal system of China, and thus can be perceived quite often; but it is an underlying concept rather than an applicable legal principle, so its effect is profound and latent.

Formally speaking, China follows a characteristically Chinese principle of ‘parliamentary sovereignty’⁵ in terms of constitutional arrangement.⁶ According to the constitution and relevant organic laws, other branches of

according to the official interpretation, the people’s democratic dictatorship prescribed by the constitution means ‘democracy within the ranks of the people and dictatorship over the enemy’. Generally speaking, China is still adhering to the ‘Zhuanzheng doctrine’.

3 This arrangement follows similar ideas as in so-called ‘feindstrafrecht’ by the German legal scholar Günther Jakobs, which excludes certain group of people from the civil society, depriving them of their civil rights, partly or entirely.

4 See Zhou 2016, pp. 107-121.

5 Astonishing as it may sound like, the undeniable truth is that China, according to its own constitution, is indeed a state that should follow the principle of parliamentary sovereignty. However, the Chinese authorities obviously define this principle in a quite different way from its original version in UK.

6 Art. 57 of the Chinese Constitution provides, ‘The National People’s Congress of the People’s Republic of China is the highest organ of state power. Its permanent body is the Standing Committee of the National People’s Congress.’ That means disregarding the ruling power of Communist Party of China (CPC), solely in terms of the legal system of the state,

powers are all accountable to the parliament, i.e. the people's congress, both the administrative branch and the judicial branch,⁷ and at either the central level or any local level. This people's-congress-centred system is formally considered as the fundamental system of China. Therefore, the characteristically Chinese principle of 'parliamentary sovereignty' can be seen in many concrete mechanisms.⁸ In brief, the NPC is formally entitled to decide on both the appointment and removal of high officials in any other branch of power, to enact any new law or to change or repeal any previous legislation, even the Constitution, and to decide on any significant issue of the state. Likewise, the people's congresses at local levels also enjoy similar sovereign powers over any other branch of power. However, unlike other typical states which adhere

the parliament of China, according to the constitution, has the highest authority over other institutions.

7 Generally speaking, the judicial branch in China includes both the court system and the procuratorate system.

8 E.g. Art. 62 of the Chinese Constitution provides, 'The National People's Congress exercises the following functions and powers:

- (1) to amend the Constitution;
- (2) to supervise the enforcement of the Constitution;
- (3) to enact and amend basic laws governing criminal offences, civil affairs, the State organs and other matters;
- (4) to elect the President and the Vice-President of the People's Republic of China;
- (5) to decide on the choice of the Premier of the State Council upon nomination by the President of the People's Republic of China, and on the choice of the Vice-Premiers, State Councillors, Ministers in charge of ministries or commissions, the Auditor-General and the Secretary-General of the State Council upon nomination by the Premier;
- (6) to elect the Chairman of the Central Military Commission and, upon nomination by the Chairman, to decide on the choice of all other members of the Central Military Commission;
- (7) to elect the President of the Supreme People's Court;
- (8) to elect the Procurator-General of the Supreme People's Procuratorate;
- (9) to examine and approve the plan for national economic and social development and the report on its implementation;
- (10) to examine and approve the State budget and the report on its implementation;
- (11) to alter or annul inappropriate decisions of the Standing Committee of the National People's Congress;
- (12) to approve the establishment of provinces, autonomous regions, and municipalities directly under the Central Government;
- (13) to decide on the establishment of special administrative regions and the systems to be instituted there;
- (14) to decide on questions of war and peace; and
- (15) to exercise such other functions and powers as the highest organ of state power should exercise.'

Art. 63 reads, 'The National People's Congress has the power to remove from office the following persons:

- (1) the President and the Vice-President of the People's Republic of China;
- (2) the Premier, Vice-Premiers, State Councillors, Ministers in charge of ministries or commissions, the Auditor-General and the Secretary-General of the State Council;
- (3) the Chairman of the Central Military Commission and other members of the Commission;
- (4) the President of the Supreme People's Court; and
- (5) the Procurator-General of the Supreme People's Procuratorate.'

to the principle of ‘parliamentary sovereignty’ such as the UK, China will always have only one party in power, without any opposition or a separate civil servant system, so the parliament will inevitably reflect the ruling party’s will. Therefore, parliamentary sovereignty hardly differs from Party sovereignty.⁹ This is the meaning and practice of the Chinese principle of parliamentary sovereignty.

During the past two decades, some legal theories from western countries have been recognized as well. In 1998, the Chinese government signed the ICCPR. Since then, the legislature and judiciary have become more and more aware of the protection of human rights.¹⁰ However, such a new discourse serves in large part still as a political propaganda that seeks to dilute the ‘Zhuanzheng’ colour of the Chinese system. In other words, what China advocates is a rather characteristically Chinese conception of human rights, prioritizing economic, social, and cultural rights over civil and political rights; and Chinese authorities are currently not ready to substantially and significantly promote civil rights that have the closest connection with criminal justice. To some extent, human rights protection in China remains a political declaration more than a normative scheme. First, the 2004 Amendment only indicates that the state respects and protects human rights rather than that the state shall respect and protect human rights, which literally implies that this clause put forwards only an attitude of rather than an obligation on the state. Second, after nearly one score years since the Chinese government signed the ICCPR, the State Council even has no schedule for delivering the Covenant to the NPC for rectification. Last, the Chinese institutions in charge of human rights affairs are the State Council Information Office and the Ministry of Foreign Affairs rather than any judicial or administrative authority.

Apart from Lenin, Marx and his epistemology also have an underlying effect on Chinese criminal procedure, especially on the part of fact-finding. In Chinese legal philosophy, criminal procedure is, essentially, also a process of discovering facts or acquiring knowledge, which can be compared to scientific discovery. Therefore, the mainstream epistemology will undoubtedly be employed to steer this process, forming the characteristically Chinese system of evidence and proof. The most paradigmatic reflection of this epistemology is that Chinese criminal procedure formally denies the idea of presumption, whether presumption of innocence or presumption of guilt.¹¹ Because, according to Marxist epistemology, the universe and its law can be known through the infinite process of learning and discovering activities by humans,

9 Of course, according to the theory of CPC, the Party will always represent all the people’s interests, therefore Party sovereignty resembles people sovereignty.

10 Most typically and generally, the 2004 Amendment to the Chinese constitution announced that the state respects and protects human rights. Specifically, a latest progress is that China has formally abolished the notorious system of the so-called ‘labour camp’.

11 See *infra*. ‘Presumption of innocence in China’.

truth should be based solely on sufficient evidence and full knowledge of all the relevant facts. The idea and method of presumption is therefore intolerable, considered as desecration of the truth and a symbol of a 'corrupted system of bourgeoisie'.¹²

Chinese legal tradition and culture also play a role in the design of the criminal procedure. In technical terms, it relies much on confessions; in conceptual terms, it emphasizes the distinction between ordinary people and the government officials.¹³

Generally speaking, current Chinese criminal procedure is a hybrid of Marxist-Leninist ideology, legal theories from western countries, international norms of human rights, and Chinese legal tradition and culture.

1.2 The principles of Chinese criminal procedure

The *Criminal Procedure Law of the People's Republic of China*¹⁴ provides its principles from Art. 5 to Art. 17,¹⁵ including the independence of adjudicative and procuratorial powers,¹⁶ equal justice under the law, a 'two-tier' system of hearing, check and balance, and public trial, etc. It is of great significance to clearly and precisely understand the subtle wording and exact meaning of some significant principles.

1.2.1 The independence of adjudicative and procuratorial powers

There is a subtle difference between this principle and so-called 'judicial independence' with which western scholars are familiar. In terms of wording, Art. 5¹⁷ of CPL2012 deliberately avoids the employment of 'judicial power (司法权)', and uses 'adjudicative power (审判权)' instead, which reflects Chinese

12 The official denial of plea bargaining in China follows the same logic.

13 See the supra sub-chapter concerning the ancient Chinese legal culture, notably the motto '刑不上大夫·礼不下庶人' and its meaning.

14 Adopted at the Second Session of the Fifth National People's Congress on July 1, 1979, and amended for the first time in according with the Decision on Amending the Criminal Procedure Law of the People's Republic of China adopted at the Fourth Session of the Eighth National People's Congress on March 17, 1996, and amended for the second time in according with the Decision on Amending the Criminal Procedure Law of the People's Republic of China adopted at the Fifth Session of the 11th National People's Congress of the People's Republic of China on March 14, 2012. The latest version came into force on Jan.1, 2013. This code will hereinafter be referred to as CPL2012.

15 See the Annex II Relevant legal provisions mentioned

16 Procuratorial branch/power refers to the Chinese institutional system as a whole that consists of all the procuratorates.

17 人民法院依照法律规定独立行使审判权·人民检察院依照法律规定独立行使检察权·不受行政机关、社会团体和个人的干涉·The People's Courts shall exercise adjudicative power independently in accordance with law and the People's Procuratorates shall exercise procuratorial power independently in accordance with law, and they shall be free from interference by any executive organ, public organization or individual.

authorities' inherent reluctance and caution to western ideology such as '*trias politica*'.

In terms of meaning, it demonstrates that Chinese criminal procedure actually follows a 'fusion of powers' principle rather than a 'separation of powers' principle. This article simply forbids interference from executive organs, public organizations or individuals, giving leeway to the people's congress and the communist party. According to the spirit of the Constitution,¹⁸ both the court system and the procuratorate system must be led by the communist party.¹⁹ In fact, an internal organ of the CPC,²⁰ the so-called 'political-legal work committee' is chosen, on behalf of the party, to lead and coordinate relevant state organs, such as the court system, the procuratorate system, the police, the state security organ, and other relevant systems in China, so as to guarantee the politically correct orientation of the administration of justice.

Moreover, the judicial branch of China, including the court system and the procuratorate system, are accountable to the people's congress; and adjudicative independence only speaks to the court system as a whole, not to judges in person. The latter must therefore obey their superiors and the adjudicative board.²¹

The 'fusion of powers' principle, which facilitates effective suppression of crimes, reflects the 'Zhuanzheng doctrine' ingrained in communist China's political arrangements. This principle also implies a different meaning of the check and balance principle in a Chinese context.

1.2.2 *The check and balance principle*

The check and balance principle is provided in Art. 7 of CPL2012, reading: 'In conducting criminal proceedings, the people's courts, the people's procuratorates and the public security organs shall divide responsibilities,

18 The leadership of CPC has not been provided in the main text of the Chinese Constitution; rather, it has been recognized as an existing fact and also a postulate by the Constitution in its preamble. Moreover, in political and legal practice, all state organs are indeed led by the CPC.

19 In fact, the Chinese constitution has not mentioned the leadership of CPC in its main text; rather, in retrospect of modern China's revolutionary history, it emphasizes the significant and indispensable role that CPC has played so as to justify the arguable legitimacy of its leadership, and further recognizes its comprehensive leadership. In other words, the Chinese constitution supports CPC's comprehensive leadership in a way that it acknowledges the established fact of CPC's leadership in narrative words, rather than provides the requirement of CPC's leadership in normative words. See the preamble of the Chinese constitution in the Appendix.

20 See the introduction.

21 In China, every law court has an internal organ called adjudicative board, which usually consists of a group of senior judges within this court, such as the president, vice presidents of the court, the head of each department, and other senior judges. According to law, this adjudicative board is in charge of discussion, decision and instruction concerning major cases or complex cases; judges must obey decisions of the adjudicative board.

coordinate their efforts and check each other to ensure the correct and effective enforcement of law’.

This principle is in general terms reflected in the following mechanisms: the procuratorial check on police investigation by approval of arrest and review of prosecution; the judicial check on public prosecution by judgments; the procuratorial check on judgments by protests,²² etc.

However, as we can see from the wording, this article features coordination prior to check. Moreover, legal practice in China also indicates the harmonious relationship between these three organs, so that popular among Chinese law-practitioners is the vivid metaphor that compares the procedural responsibilities of and the interrelationship between the three actors in Chinese criminal procedure to co-workers in an assembly line, with PSO cooking, the procuratorates vending, and the court eating. Since the Chinese criminal procedure is inclined to a ‘vendor’s market’, the investigation-centred model prevails.²³ Besides, the low rates of non-prosecution and acquittal respectively²⁴ also show that they tend to work together to maintain their authority. This tendency also affects the allocation of the burden of proof, and the standard of proof.²⁵

Furthermore, there are various levels of the so-called ‘political-legal work committees’ in China, as an internal department of either the central committee or each local committee of the CPC. They are generally in charge of the enactment or enforcement of policies concerning political and legal affairs. In order to maintain social order and stability, they have the power to coordinate and instruct²⁶ all the relevant organs, such as the public security organs,

22 According to CPL2012, the people’s procuratorates have the power to present two kinds of protests. Art. 217 reads ‘If a local People’s Procuratorate at any level considers that there is some definite error in a judgment or order of first instance made by a People’s Court at the same level, it shall present a protest to the People’s Court at the next higher level.’, providing the mechanism of the so-called ‘protests for second-instance trials’. Art. 243 Sec. 3 reads ‘If the Supreme People’s Procuratorate finds some definite error in a legally effective judgment or order of a people’s court at any level, or if a people’s procuratorate at a higher level finds some definite error in a legally effective judgment or order of a people’s court at a lower level, it shall have the power to present a protest to the People’s Court at the same level against the judgment or order in accordance with the procedure for trial supervision.’, providing the mechanism of the so-called ‘protests for retrials’.

23 See He 2016, pp. 110-112.

24 For instance, the procuratorates nationwide had reviewed 1281631 suspects in total in the year 2011, 1238861 out of which had been subject to public prosecution; the courts nationwide had judged 1096954 defendants for public prosecution in total in the same year, but only 146 of which had been acquitted in the end. That is to say, the rates of non-prosecution and acquittal were only 3.34% and 0.13% respectively. See the Law Yearbook of China 2012, pp. 208, 209.

25 See *infra*. ‘Presumption of innocence in China’.

26 The instruction is supposed to be given in a general way to simply guarantee the politically right orientation of the administration of justice. In practice however, tacit instructions in concrete cases could always be given in one way or another. Sometimes, local political-legal work committees even launch campaigns to ‘severely punish crimes’ of certain categories in a way that the police, the procuratorate and the court will be commanded to appoint staff

the state security organs, the people's procuratorates, the people's courts, and judicial administrative organs.²⁷ They can also combine these organs' resources to launch a crackdown. 'In practice, local political leaders place too much emphasis on the importance of 'coordinating efforts'. And if a case is noteworthy or difficult, the committee urges the three branches to 'handle the case cooperatively', which often means holding meetings attended by the heads of the three branches to discuss the case. The three branches are to manage cases with attention to the principles of 'coordination in battle' and 'unity of command', which more often than not means that when the public security bureau has finished its investigation, the procuratorate can do no more than issue the indictment, and the court can do no more than issue a guilty verdict. When the political and legal- work committee becomes involved, it often does no more than coordinate matters in such a way that the procuratorate and the court align with the findings and decision of the public security bureau.²⁸ This political arrangement evidently prioritizes cooperation of powers rather than check and balance of powers, reflecting the 'fusion of powers' and 'Zhuanzheng doctrine' described above.

1.2.3 The 'two-tier' system of hearing

As Art. 10 of CPL2012 reads, 'In trying cases, the People's Courts shall apply the system whereby the second instance is final', criminal trials in China only have two instances. Given the fact that most first-instance cases in China are tried in primary people's courts,²⁹ this principle means that most criminal cases in China will be dealt with within the scope of one city. Therefore, the local party committees and their corresponding 'political-legal work committees' will have a considerable say in the decision-making process.

Either the defendants or the procuratorates have an independent power to appeal (or protest) for a second-instance trial. The former are not even obliged to present any reason. As long as they are not satisfied with judgments of first instance and thus appeal for a second-instance trial, that trial is assumed,³⁰ unless the Supreme People's Court (hereinafter referred to as SPC) tries a case as the court of first instance. This right to appeal of defendants can be

to constitute an ad hoc joint case-dealing team which will solve cases more efficiently like a production line, just like what happened in Chongqing during Bo Xilai ruling there.

27 As for a brief introduction of these organs, see *infra* 'the major participants in the Chinese criminal procedure'.

28 He 2016, p. 112.

29 As for the structure of the Chinese court system and their division of labour in trying criminal cases, see *infra* 'The major participants in the Chinese criminal procedure – The people's court'.

30 As Chinese criminal procedure recognizes private prosecution, a private prosecutor, who is usually the victim of a criminal case in trial, also has the equivalent right to appeal as the defendant does. This right is provided in Art. 216 of CPL2012.

defined as 'peremptory appeal'. Moreover, the Chinese criminal procedure explicitly prohibits '*reformatio in peius*' so as to protect the right to appeal enjoyed by the defendants.³¹ In order to avoid circumvention of this principle against '*reformatio in peius*', the legislative and judicial authorities of China have continually perfected this principle through law amendments or judicial interpretations.³² However, this principle is still quite vulnerable in practice. First, it can be easily counteracted by a prosecutor, whether a public prosecutor or a private prosecutor,³³ according to the same article.³⁴ Second, both the procuratorial and judicial authorities have the power to initiate a special procedure called 'Procedure for Trial Supervision'³⁵ to challenge this principle. Unlike the defendants, the public prosecution has to present due reasons when protesting a court decision of first instance. In any event, appeals (or protests) by either the defendants or the procuratorates will undoubtedly lead to trials of second instance. Apart from the defendants and the procuratorates, the victims also have some say in the initiation of the trials of second instance. However, their claims are subject to reviews by the procuratorates, and do not necessarily lead to trials of second instance.³⁶

The principle of the 'two-tier' system is not absolute. In some exceptional circumstances, the number of instances will decrease or virtually increase. First, as described above, when the SPC tries a criminal case as the court of first instance, the judgment will be a final one and therefore can be neither appealed by any defendant nor protested by any procuratorate in pursuit of a

31 This principle was established as early as in the very first criminal procedure law of China, i.e. CPL1979, and was further recognized by CPL1996 and CPL2012. Art. 190 Section.1 of CPL1996 reads, 'When trying an appeal case filed by the defendant or his/her statutory representative, defender or close relative, a people's court of second instance shall not aggravate the punishments on the defendant.'

32 Art. 226 Sec. 1 of CPL2012 perfects this principle prescribed in Art. 190 Section.1 of CPL1996 by further providing that 'Where a case is remanded to the original people's court for new trial by the people's court of second instance, unless there are new facts of the crime and the people's procuratorate has initiated supplementary prosecution, the original people's court shall not aggravate the punishments on the defendant.' Moreover, in Art. 325 of its comprehensive interpretation of CPL2012, SPC further forbids another 7 potential ways of circumvention.

33 See *infra*, Private Prosecutorial System in 1.2.2.3.

34 Whether Art. 190 of CPL1996, or Art. 226 of CPL2012, they both have a Sec. 2 to limit the principle against '*reformatio in peius*' provided in Sec. 1, reading 'The restriction laid down in the preceding paragraph shall not apply to cases protested by a people's procuratorate or cases appealed by private prosecutors.'

35 See Part Three, Chapter V of CPL2012.

36 Art. 218 of CPL2012 reads, 'If the victim or his legal representative refuses to accept a judgment of first instance made by a local People's Court at any level, he shall, within five days from the date of receiving the written judgment, have the right to request the People's Procuratorate to present a protest. The People's Procuratorate shall, within five days from the date of receiving the request made by the victim or his legal representative, decide whether to present the protest or not and give him a reply.'

trial of second instance.³⁷ In this case, the judgment of first instance will be the final and effective judgment. However, so-called ‘final’ judgments in China are not so final. First, the ‘procedure for trial supervision’ allows retrials of those criminal cases whose judgments have legally come into force.³⁸ A definite error in a legally effective judgment is a prerequisite of such retrials, which, according to Art. 242 of CPL2012, specifically refers to:

- (1) Where there is new evidence to prove the errors in the facts ascertained in the original judgment or ruling, which may affect case conviction and sentencing;
- (2) Where the evidence that serves as the basis for conviction and sentencing is unreliable and insufficient, or shall be excluded in accordance with the law, or where the main evidence establishing the facts of the case contradict with each other;
- (3) Where the original judgment or ruling is erroneous in the application of law;
- (4) Where the case is tried in violation of statutory proceedings, which may affect the impartiality of the trial; or
- (5) Where the judge committed bribery and corruption, practiced favouritism for personal gains or bent the law in the trial of the case.

Theoretically, every single judgment in China is therefore indefinite, which may possibly cause infinite retrials of the same case. Although this seems to comply with the Marxist epistemology quite well – ceaseless re-examination and rethinking making the conclusion infinitely close to the truth – it is neither feasible nor necessary to do so in practice in a criminal process, and it also undermines the legitimacy of court decisions that can be accepted as the truth because they have been found through due process. Anyway, a judgment of second instance in China can still be formally challenged and officially

37 In practice, SPC has only tried one single criminal case as the court of first instance since the foundation of the People’s Republic of China, which was the trial of the ‘Gang of Four’.

38 Art. 243 of CPL2012 reads, ‘If the president of a People’s Court at any level finds some definite error in a legally effective judgment or order of his court as to the determination of facts or application of law, he shall refer the matter to the adjudicative board. If the Supreme People’s Court finds some definite error in a legally effective judgment or order of a People’s Court at any lower level, or if a People’s Court at a higher level finds some definite error in a legally effective judgment or order of a People’s Court at a lower level, it shall have the power to bring the case up for trial itself or may direct a People’s Court at a lower level to conduct a retrial. If the Supreme People’s Procuratorate finds some definite error in a legally effective judgment or order of a People’s Court at any level, or if a People’s Procuratorate at a higher level finds some definite error in a legally effective judgment or order of a People’s Court at a lower level, it shall have the power to present a protest to the People’s Court at the same level against the judgment or order in accordance with the procedure for trial supervision. With respect to a case protested by a People’s Procuratorate, the People’s Court that has accepted the protest shall form a collegial panel for retrial; if the facts, on the basis of which the original judgment was made, are not clear or the evidence is not sufficient, it may direct the People’s Court at the lower level to try the case again.’

overruled in theory. In practice, this is indeed an unavoidable possibility resulting from the retrial system.³⁹

Second, in death penalty cases, a judgment of second instance does not come into effect before the so-called 'Procedure for Review of Death Sentences'.⁴⁰ In 2007, SPC withdrew the power to approve death sentences which had been granted to high courts for years. Since then, this procedure has been exclusively practiced by the SPC. In order to comply with the 'two-tier' system of hearing, this procedure has been designed as a 'review' process rather than a trial process, and is thus practiced in camera and ex parte, which results in much controversy and criticism.⁴¹ Although this procedure is formally not considered a trial of third instance, an undeniable fact is that the judgments of second instance in these cases cannot come into force, and this so-called death penalty review virtually plays a role of a trial of third instance. Therefore, death penalty cases are indeed an exception to the 'two-tier' system of hearing.

1.2.4 *The presumption of innocence*

Art. 12 of CPL2012 provides a principle, reading '*No person shall be found guilty without being judged as such by a People's Court according to law*', which was first set in CPL 1996, the latest former version of CPL2012. Accordingly, some optimists excitedly declared the establishment of an implicit or characteristically Chinese presumption of innocence in Chinese criminal procedure.⁴² However, what this principle emphasizes is simply the exclusive power of conviction enjoyed by the court system. As for the presumption of innocence, there are many provisions in CPL2012 which evidently oppose its basic criteria.

In general, the presumption of innocence means that one is considered innocent until proven guilty. Application of this principle is a legal right of the accused in a criminal trial, recognized in many nations. The burden of proof is thus on the prosecution, which has to collect and present enough compelling evidence to convince the decider of fact, who is restrained and ordered by law to consider only actual evidence and testimony that is legally admissible, and in most cases lawfully obtained, that the accused is guilty beyond a reasonable doubt. If any reasonable doubt remains, the accused is to be acquitted. The accused is therefore not obliged to offer any evidence. This fundamental principle in western systems is not only an abstract doctrine, but also underlies

39 This is closely related to another hot issue in China, the so-called '上访 (Shang Fang)', which means to appeal to higher authorities for remedies. According to the 2010 Work Report of SPC, the number of '上访 (Shang Fang)' pertaining to law suits in 2009 amounts to 1055 thousand, and that number of petitions was 125 thousand in 2009.

40 See Part Three, Chapter IV of CPL2012.

41 E.g. see Chen 2007, pp. 96-106.

42 E.g. see Yi 2012, p. 19.

a series of concrete mechanisms in criminal procedure, and is closely related to the right to silence. However, this is not the case in China.

First, CPL2012 still retains the provision which requires that ‘the criminal suspect shall answer the investigators’ questions truthfully’.⁴³ This rule virtually imposes the burden of proof partly on the accused, who is therefore obliged to offer evidence concerning either guilt or innocence. The accused then becomes an important source of evidence. In fact, many other kinds of evidence, such as documents or exhibits, are often found according to clues obtained during interrogation.

Second, the accused have no right to silence before the courts. According to law, not only the judges but also the public prosecutors are entitled to interrogate the accused in trials.⁴⁴ In fact, interrogating the accused is a routine feature of every single criminal trial in China. Every single defendant will be asked whether or not to confess to the charge, and what happened, etc. Those who refuse to cooperate would probably be regarded as showing no repentance and thus face more severe punishments. That is to say, the accused is obliged to testify before the law courts. Although it is true that Art. 50 of CPL2012 has, for the first time ever, added an explicit clause against compulsory self-incrimination, it is indeed targeted at torture rather than at right to silence, and has not negated Chinese criminal suspects’ obligation of ‘truthful answer’ provided in Art. 118. In fact, whether a right to silence is guaranteed by CPL2012 is still a slightly controversial issue in China today. Some legal scholars tend to optimistically interpret the paradox between Art. 50 and 118 in that ‘when facing an interrogator’s questions, a suspect may choose to answer, or he can remain silent. If he chooses to answer, he must answer truthfully. In other words, he has a right to remain silent, but he does not have a right to lie.’⁴⁵ However, this book would rather interpret the paradox in that when facing an interrogator’s question, a suspect is obliged to answer, and the answer must be truthful. If he refuses to answer, the interrogator may not coerce him into making a confession; rather, no answer or wrong answer

43 Art. 118 of CPL2012 reads, ‘When interrogating a criminal suspect, the investigators shall first ask the criminal suspect whether or not he has committed any criminal act, and let him state the circumstances of his guilt or explain his innocence; then they may ask him questions. The criminal suspect shall answer the investigators’ questions truthfully, but he shall have the right to refuse to answer any questions that are irrelevant to the case.

When interrogating criminal suspects, investigators shall inform the criminal suspect of the legal provisions allowing for leniency for those who truthfully confess their crimes.’ The first section is exactly the same with Art. 93 of CPL1996.

44 Art. 186 of CPL2012 reads, ‘After the public prosecutor has read out the bill of prosecution in court, the defendant and the victim may present statements regarding the crime accused in the bill of prosecution, and the public prosecutor may interrogate the defendant.

The victim, the plaintiff and defender in an incidental civil action and the agents ad litem may, with the permission of the presiding judge, put questions to the defendant.

The judges may interrogate the defendant.’

45 He 2016, p. 160.

may lead to a more severe sentence if he were proved guilty in the end. In other words, he has a right against compulsory self-incrimination, but he does not have a right to silence. Indeed, there is no substantive distinction between the two ways of interpretation, as they are just two forms of theorizing the same legal phenomenon. This book prefers to cut off a characteristically Chinese conception of right to silence by the 'Occam's Razor'.⁴⁶

Third, the standard of proof is mutual. In accordance with Marxist epistemology, the truth can be approached infinitely, so no case should be terminated until 'the facts are clear, the evidence is reliable and sufficient'.⁴⁷ Accordingly, this strict standard of proof must be a 'two way street' that speaks not only to convictions but also to acquittals. That is to say, there is no room for the notion of presumption in Chinese criminal procedure, whether the presumption of innocence or the presumption of guilt. In fact, a defendant will usually not be acquitted until he proves his innocence with 'clear facts and reliable and sufficient evidence'. The exceptional occasion arises mainly in the sentencing phase of death penalty cases.⁴⁸ A decision on the imposition of a death penalty is required to meet the most stringent standard of proof, while any reasonable doubt may overrule such a decision made by a local court.⁴⁹

Last, even the legislature in China has explicitly denied the presumption of innocence. In an explanatory statement of CPL 1996, which for the first time set the relevant provision concerning the presumption of innocence in the People's Republic of China, Mr. Gu Angran (顾昂然), then the head of the Legislative Affairs Work Committee of the Standing Committee of the National People's Congress, declared that 'Feudal societies employed the presumption of guilt, against which bourgeoisie formulated the presumption of innocence. We firmly oppose the presumption of guilt, but do not turn to support the presumption of innocence advocated by western countries. Rather, we rely on objective fact.'⁵⁰ This interpretation by such an authoritative spokesman, which not only

46 'Occam's razor', also 'law of parsimony', is a problem-solving principle attributed to William of Ockham (c. 1287-1347), who was an English Franciscan friar, scholastic philosopher and theologian. The principle can be interpreted as stating among competing hypotheses, the one with the fewest assumptions should be selected.

47 Art. 53, Sec. 2 of CPL2012 reads, 'Evidence shall be deemed to be reliable and sufficient if the following conditions are satisfied:

(1) There is evidence for each fact that serves as the basis for conviction and sentencing;
 (2) The authenticity of evidence used for deciding the case has all been confirmed in accordance with statutory procedures; and
 (3) Based on the comprehensive assessment of all evidence for the case, the ascertained facts have been proved beyond reasonable doubt.'

48 Usually in the so-called 'Procedure for Review of Death Sentences'.

49 In fact, many death penalty decisions by local courts have eventually been overruled by the SPC based on a reasonable doubt. The author will illustrate some of them in relevant chapters.

50 See 全国人大常委会法制工作委员会: '关于刑事诉讼法制定、修改情况和主要内容的说明材料'; see also 顾昂然: 《关于刑事诉讼法的修改原则》, 载《法制日报》1996年2月3日。原

complies with the mainstream epistemology, but also coordinates the relevant concrete mechanisms, may well stand as the correct reflection of the Chinese situation concerning the presumption of innocence or guilt.

1.3 The major actors involved in the Chinese criminal procedure

1.3.1 *The public security organs*⁵¹

The public security organs (PSO) in China are an organized group of police forces, which operate both hierarchically and locally. Vertically, the Ministry of Public Security directs every local bureau of public security.⁵² Horizontally, every public security organ is under supervision and leadership of the government at the same level. For instance, the Ministry of Public Security is led and supervised by the State Council and the Beijing Public Security Bureau is led and supervised by the Beijing Municipality.

In criminal process, PSO are in charge of investigation and execution of procedural compulsory measures and some criminal punishments. In principle, PSO will investigate all criminal cases unless otherwise provided by law. Apart from PSO, some other state organs are also granted investigative power in some particular cases. For instance, the state security organs investigate crimes against the state; the investigative departments in the people's procuratorates investigate crimes involving bribery, embezzlement, or other professional misconduct by state officials.⁵³ 'The security departments of the Army shall exercise the power of investigation with respect to criminal offences that

文附注：' 本文系顾昂然同志1月15日在刑诉法座谈会上的发言摘要'。More details about the presumption of innocence in China, please see Zhang 2011.

- 51 In a broad sense, the so-called 'public security organs' in the Chinese criminal procedure refer to all government branches that are in charge of investigating and fighting various kinds of crimes, including the 'public security organs' in a narrow sense (i.e. the police), the state security organs, the anti-corruption department in procuratorates, the security departments of the army, the investigative department of the prison, the anti-smuggling department of the customs, the frontier police force, etc.
- 52 The local bureaus of public security are established in three ranks, which is compatible with the structure of local governments. Every provincial government has its own public security organ, which directs all the lower bureaus at city level or at district level within its territory. Likewise, every city has its own public security bureau as well, which directs all the lower bureaus set in its various district. Last, every district or county has its own public security bureau, which is the lowest level within PSO. Additionally, every public security bureau at district or county level has a series of police stations within its jurisdiction so as to better serve the local community.
- 53 In Oct. 2016, the Central Committee of the CPC proposed establishing the State Inspection Commission (SIC). Subsequently, a pilot program was issued, and will be carried out soon in Beijing, Shanxi, and Zhejiang. Accordingly, all investigative departments within people's procuratorates in the three provincial regions will be merged into the SIC at various levels. For details of this reform, see *infra* 1.3.2.1 The development of the procuratorial system in China.

have occurred in the Army. Crimes committed by criminals in prison shall be investigated by the prison.⁵⁴

Specifically speaking, PSO are primarily entitled to the power to file most criminal cases according to Chinese criminal procedure,⁵⁵ and thus determine in most cases whether a formal criminal process will be launched for a certain offense.⁵⁶ This matters a lot, not only for the victims who want justice to be done, but also for the suspects whose right to a fair trial is at stake accordingly. Therefore, it is not unfair to argue that PSO have a considerable say in Chinese criminal procedure from the very beginning.

Moreover, PSO are granted even greater powers during the investigative stage. First, they have a preemptory power against the suspects to interrogate them, and as has already been mentioned, the latter are obliged to answer their questions truthfully according to Art. 118 of CPL2012. Although Art. 50 has, for the first time ever, added an explicit clause against compulsory self-incrimination, it does not explicitly forbid the police interrogator, should the suspect refuse to answer, from inducing the latter to confess in any way that the former thinks is not improper according to law, and the interrogation is indeed subject to little external check. Second, they can arrest the suspects and detain them for a maximal period of 37 days without any judicial permission⁵⁷ according to Art. 89 of CPL2012.⁵⁸ Third, they can detain the suspects even

54 See Art. 290 of CPL2012.

55 Art. 107 of CPL2012 reads, 'The public security organs or the People's Procuratorates shall, upon discovering facts of crimes or criminal suspects, file the cases for investigation within the scope of their jurisdiction.' According to Art. 18 of CPL2012, reading 'Investigation in criminal cases shall be conducted by the public security organs, except as otherwise provided by law. Crimes of embezzlement and bribery, crimes of dereliction of duty committed by State functionaries, and crimes involving violations of a citizen's personal rights such as illegal detention, extortion of confessions by torture, retaliation, frame-up and illegal search and crimes involving infringement of a citizen's democratic rights – committed by State functionaries by taking advantage of their functions and powers – shall be placed on file for investigation by the People's Procuratorates. If cases involving other grave crimes committed by State functionaries by taking advantage of their functions and powers need be handled directly by the People's Procuratorates, they may be placed on file for investigation by the People's Procuratorates upon decision by the People's Procuratorates at or above the provincial level. Cases of private prosecution shall be handled directly by the People's Courts', most criminal cases will be subject to the scope of PSO's jurisdiction.

56 See *infra* sub-chapter 'Filing a case'.

57 According to Art. 80 of CPL2012, PSO is entitled, in seven circumstances, to use its own discretion for the determination of an arrest. There is no habeas corpus or similar remedy to challenge this decision by PSO. A material check on PSO's power of arrest is the Procuratorates' power to approve further detention. Given the fact that the people's procuratorates in China are formally deemed part of the judicial branch, this mechanism may be considered as a quasi-judicial check and remedy.

58 Art. 89 of CPL2012 reads, 'If the public security organ deems it necessary to arrest a detainee, it shall, within three days after the detention, submit a request to the People's Procuratorate for examination and approval. Under special circumstances, the time limit for submitting a request for examination and approval may be extended by one to four days. As to the arrest of a major suspect involved in crimes committed from one place to another,

longer if approved by the people's procuratorates, and the latter seem to be very glad to cooperate given the fact that most suspects are in custody pending their prosecutions and trials.⁵⁹ Such strong powers give PSO a definite advantage over the suspects during the investigative stage.

Furthermore, this advantage continues even till the very end of the criminal process, because on the one hand, the evidence and other materials PSO have collected during the investigative stage, most of which are testimonies and confessions, will be compiled into a dossier whose admissibility is automatic and whose probative force prevails, based on the ubiquitous 'trial mode centred on the case file in Chinese criminal proceedings'.⁶⁰ On the other hand, PSO are usually not expected to be subject to examinations before a law court, neither according to Chinese criminal procedure, nor according to judicial practice in the past few decades. Therefore, it is logically inevitable that PSO's opinion on a certain case will significantly influence its final result in court; and it also transpires that from time to time, 'after the public security bureau completes its investigation and the procuratorate its prosecution, the court would have no choice but to convict the defendant at the trial. It is said that to minimize the amount of paperwork, some judges require prosecutors to submit the indictment electronically so that they can amend the document themselves as necessary, even if this means changing just a few words.'⁶¹ In short, PSO are vested with tremendous authority and great powers in the Chinese formal criminal procedure, which satisfies their due function and position under the 'Zhuanzheng Doctrine'.

Apart from the formal criminal procedure, PSO are also granted comprehensive powers when dealing with less severe offenses, i.e. in so-called 'public security cases',⁶² including acceptance, investigation, mediation,

repeatedly, or in a gang, the time limit for submitting a request for examination and approval may be extended to 30 days. The People's Procuratorate shall decide either to approve or disapprove the arrest within seven days from the date of receiving the written request for approval of arrest submitted by a public security organ. If the People's Procuratorate disapproves the arrest, the public security organ shall, upon receiving notification, immediately release the detainee and inform the People's Procuratorate of the result without delay. If further investigation is necessary, and if the released person meets the conditions for releasing on bail pending trial or for residential surveillance, he shall be allowed to be released on bail pending trial or subjected to residential surveillance according to law.'

- 59 From Chart IV in the Appendix, it is easy to calculate the ratio, 81.99% in 2009, 78.33% in 2010 and 74.55% in 2011. Given the lag between investigation and prosecution, the statistic scopes of the two ends in this calculation do not match perfectly, but from the results we can infer the actual ratio by and large.
- 60 In this trial mode, the public prosecutors dominate and control the whole hearing at trial by reading the files and notes, and the trial of court becomes into a procedure of reviewing and affirming the files and notes. See Chen 2006, p. 79.
- 61 He 2016, pp. 112-113.
- 62 According to LPAPS, 'public security cases' consist of those involving the following four categories of offenses: acts disturbing public order; acts impairing public security; acts infringing upon rights of the person and of property; and acts impeding social

charge, discontinuance, decision and execution of these cases, according to the 'The Law of the People's Republic of China on Penalties for Administration of Public Security' (hereinafter referred to as LPAPS).⁶³ Although these cases are formally not regarded as criminal cases, but as less severe offenses whose decisions, including imposition of punishments, are solely subject to the administrative authorities' own discretion, they probably satisfy the definition of 'criminal charges' according to the autonomous interpretation of Art. 14 of ICCPR, which recognizes one's right to 'a fair and public hearing by a competent, independent and impartial tribunal established by law' 'in the determination of any criminal charge against him'. In this context, the right to a fair trial is premised on qualified 'criminal charges', which, according to the UN Human Rights Committee, 'relate in principle to acts declared to be punishable under domestic criminal law', and 'may also extend to acts that are criminal in nature with sanctions that, regardless of their qualification in domestic law, must be regarded as penal because of their purpose, character or severity.'⁶⁴ According to LPAPS and Chart I and Chart II in the Appendix, it is evident that most 'public security cases' in no way differ in nature from criminal cases. The threshold to qualify an offense as a crime lies mainly in its severity. That is to say, a public security offense is usually just less severe in terms of its result under Chinese domestic laws; moreover, even the wording 'less severe' should be perceived in a Chinese context. Taking the two most frequent public security offenses, i.e. battery and theft, as an example, the threshold of criminal battery is that the severity of the victim's injury should amount to the so-called 'minor injury', which, according to the latest standard,⁶⁵ refers to e.g. a 4.5 cm or longer wound or scar on your face; a loss of two or more teeth; or a fracture of two or more ribs, etc. Generally speaking, if you were not beaten to a nearly disabled person in China, do not bother to think about criminal battery. As for the threshold of criminal theft in China, according to the relevant judicial interpretation issued by SPC and SPP,⁶⁶ the minimal loss should be more than

administration. For details, please see LPAPS Chapter III Acts Against the Administration of Public Security and Penalties.

63 Adopted at the 17th Meeting of the Standing Committee of the Tenth National People's Congress of the People's Republic of China on August 28, 2005, and effective from March 1, 2006, and replacing '*The Regulations of the People's Republic of China on Administrative Penalties for Public Security*' promulgated on September 5, 1986, and revised and promulgated on May 12, 1994, which, enacted by the State Council rather than the National People's Congress, was widely criticized as a violation of not only the principle of the 'rule of law' that citizens' liberty and property can be deprived of according only to law, but also the plain requirement provided in Item 5 Art. 8 of '*The Law of the People's Republic of China on Legislation*'.

64 CCPR/C/GC/32, para 15.

65 最高人民法院 最高人民检察院 公安部 国家安全部 司法部 《人体损伤程度鉴定标准》.

66 《最高人民法院、最高人民检察院关于办理盗窃刑事案件适用法律若干问题的解释》法释(2013)8号.

1000-3000 RMB.⁶⁷ That is to say, if you lost several hundred Euros in big cities such as Beijing or Shanghai, it may well be dealt with as a public security case. In a word, most public security cases in China can hardly be considered any different from criminal cases, according to relevant international norms.

Moreover, the sanctions imposed upon these ‘public security cases’ can hardly be regarded as non-penal either, because of their purpose, character or severity. ‘When a sanction is not only of a preventive character but also of a retributive and/or deterrent character, and when it is directed at the general public, then it is qualified by the European Court of Human Rights as punishment, regardless of its severity.’⁶⁸ Based on this interpretation, the sanctions imposed upon ‘public security cases’ are evidently penal in character. Furthermore, the severity of these sanctions may well satisfy the criterion of ‘punishments’ as well.⁶⁹

To sum up, most ‘public security cases’ in China should be deemed criminal in nature from the academic perspective, although relevant international norms are currently not binding for China since the ICCPR has not been formally ratified by the National People’s Congress of China.⁷⁰ Based on China’s ethical and political duty to faithfully promote the standards set by ICCPR, the tremendous number of ‘public security cases’⁷¹ should better be considered as penal in nature, and thus taken into account in this research.

Besides the violation of Art. 14 of ICCPR, the facts described above demonstrate the extensive powers granted to PSO in China’s criminal justice system, which is a vital clue to understanding the whole picture of the structural arrangements in Current Chinese criminal procedure.

1.3.2 *The people’s procuratorates*

It is notable that the counterpart terms and concepts of ‘prosecution’ and ‘prosecutor’ in Chinese, namely ‘*检察 (jian cha)*’ and ‘*检察官 (jian cha guan)*’, are quite different in nature. In Chinese, the root meaning ‘*检 (jian)*’ literally means to check, to examine, to inspect or to restrain oneself; ‘*察 (cha)*’ means to examine, to observe, to search, to investigate, to supervise or to scrutinize; ‘*检察 (jian cha)*’ together means to police and supervise society, to discover,

67 Each provincial jurisdiction is entitled to formulate its own standard within this range, based on its concrete situation concerning economic prosperity and criminal ratio.

68 Manfred Novak, *CCPR Commentary*, p. 318

69 Such sanctions can maximally be a detention of 20 days or a fine of 1000 RMB, see LPAPS Art. 16.

70 In fact, the State Council has not yet sent ICCPR to the NPC for ratification ever since the Chinese government signed it in 1998.

71 According to the statistics in Chart II and Chart III in the Appendix, it is easy to calculate a conservatively-estimated proportion of offenses in China resolved through informal criminal process, which is 93.85% in 2010 and 93.64% in 2011.

deter and suppress offenses, including their prosecution.⁷² ‘官 (guan)’ means a government official who is superior to ordinary people and must thus be obeyed. Therefore, the prosecutor in a Chinese context, namely ‘检察官 (jian cha guan)’ represents a government official vested with powers and authority to discover, deter and suppress offenses, who would better be referred to as ‘public procurator’.

The prosecuting offices in China are referred to as ‘检察院 (jian cha yuan)’, which, in literal terms, almost explicitly suggests their authoritarian position and supervising function.⁷³ Furthermore, the Chinese prosecuting offices, ‘检察院 (jian cha yuan)’, is officially translated as ‘procuratorate’, a compound word built up by the root ‘procurator’ and the suffix ‘-ate’. The former means an administrative official with legal powers, (especially in the former Soviet Union, the Roman Catholic Church, or the ancient Roman Empire); and the latter means ‘a group with the status or function of something aforementioned’. This term, to some extent, demonstrates the traces of the former USSR’s influences in China’s current legal system.⁷⁴

Nonetheless, there is indeed a Chinese term that corresponds precisely to ‘public prosecutor’, which is ‘公诉人 (gong su ren)’. This term perfectly corresponds to public prosecutor, as ‘公 (gong)’ means ‘public’, ‘诉 (su)’ means ‘to prosecute’, and ‘人 (ren)’ means ‘person’. However, this term refers only to an ad hoc status and job during the trial rather than to a career. That is to say, the so-called ‘公诉人 (gong su ren)’ in China, i.e. public prosecutor, refers only to one of the ‘hats’ worn by a Chinese procurator, who also has many other ‘hats’ so as to meet different ends. In brief, the functions of the ‘procuratorate’ system in China subsume, but go far beyond prosecutorial work.

The people’s procuratorates are mainly in charge of the review and initiation of public prosecution. They employ the same structure as the PSO.

72 It is also important to bear in mind that there is no part of speech but only substantive meanings in Chinese, so according to the context, the same word can be used as ‘prosecute’, ‘prosecuting’, ‘prosecution’ or ‘prosecutorial’.

73 In Chinese, the root meaning ‘院 (yuan)’ basically means a courtyard. In the past, Chinese students or scholars would usually assemble in courtyards for study and discussion, so these educational or academic institutes would be referred to as some ‘院 (yuan)’, such as ‘书院 (shu yuan)’, ‘贡院 (gong yuan)’, ‘翰林院 (han lin yuan)’. In Ming and Qing Dynasties, the last two dynasties in China, the Crowns invented and inherited a new system to supervise and impeach all government officials, i.e. ‘都察院 (du cha yuan)’. Almost all of its staff were Confucian scholars, whose duties were to examine all the government officials with Confucian norms and to impeach those who violated these norms. This state organ was called some ‘院 (yuan)’ as well, maybe because it was also full of scholars, or just because it was located in a courtyard. Anyway, this term had lasted for two dynasties, over 500 years, which made ‘院 (yuan)’ a rather solemn wording, connected with supervising function and authoritarian position. Nowadays, Chinese prosecuting offices are referred to as ‘检察院 (jian cha yuan)’, which is only one character different from ‘都察院 (du cha yuan)’, and their major functions still include supervising and impeaching all government officials. This partly reflects the Chinese legal tradition and culture ingrained in the current system.

74 The influence by the former USSR will be further explained in the following paragraphs.

Likewise, they are operated hierarchically, at four levels as well, the SPP (Supreme People's Procuratorate), the provincial level, the city level, and the primary level, so in general, every single public security organ has a unique corresponding procuratorate, with which it regularly co-operates, thereby suppressing crimes more efficiently. The people's procuratorate system, like the PSO, is designed in a bureaucratic way: the SPP leading all the local procuratorates; the higher ones leading subordinate ones; in a certain people's procuratorate, the chief procurator leading all the other public procurators, the head of an internal department leading all the other public procurators in this department. 'Leading', means the former are entitled to instruct the latter when dealing with concrete cases, and the latter must obey the former. Unlike PSO, the people's procuratorate system does not belong to the administrative branch, so horizontally it is not supposed to be subject to supervision or leadership by the government. However, according to the 'party controlling judiciary' doctrine, the people's procuratorates should be directed by the corresponding party committees and the corresponding political-legal work committees.

1.3.2.1 The development of the procuratorial system in China⁷⁵

The Chinese procuratorate system was almost ruined during the 'Cultural Revolution' from 1966 to 1976. From the ashes rose the virtually new born Chinese procuratorate system; and now, it is only 30 plus years old. During this short period, it has continually been attempting to find its due position. Accordingly, the development of the Chinese procuratorate system can be divided into 3 phases.⁷⁶

The first phase from the late 1970s to the late 1980s is the recovery and rebuilding phase of the Chinese procuratorate system. In March 1978, the First Session of the Fifth National People's Congress enacted the third version of the Chinese constitution, requiring the establishment of people's procuratorate system which was formally abolished by the last version of the constitution in 1975. After that, an organizing committee for the Supreme People's Procuratorate (hereinafter referred to as SPP) was founded so as to rebuild the SPP as well as the local levels of people's procuratorates. On June 1st 1978, the new SPP began to serve; and the local levels of procuratorates had also been established gradually by the end of 1979.

The Art. 43 of the *1978 Constitution* provided the supervising function of the procuratorate system in general terms, i.e. the SPP is entitled to supervise each branch of the State Council, each local organ of the state, state officials, and all

75 This section is based mainly on the review of prominent works on this issue: He & Zhang 2008, pp. 3-13; Zhang 2009/3, pp. 169-191.

76 The Third Plenary Session of the Eighteenth Central Committee of the Chinese Communist Party held in November, 2013 symbolizes the starting point of a new era, during which a series of critical legal reforms will be carried out steadily according to the statement of this session. Some of them have already been launched recently, but more details and further developments are still to be seen in the following years.

citizens as to whether they obey the Constitution and the law. It also provided that lower procuratorates should be supervised by higher procuratorates, and that each procuratorate must be supervised by its corresponding people's congress.

In 1979, the Second Session of the Fifth National People's Congress passed an amendment of the *1978 Constitution*, based on which it enacted the *Organic Law of the People's Procuratorates*. In fundamental terms, it changed the procuratorate system mainly in the following aspects: 1. explicitly providing that the people's procuratorate system is the law-supervising organ of the state, but eliminating its generally supervising function; 2. providing as a principle the independence of procuratorial power, i.e. the procuratorates independently exercise procuratorial powers without interference from any administrative organ, social community or individual; 3. changing the relationship between higher and lower procuratorate from supervision into leadership, thus establishing the dual leadership mechanism of the procuratorate system; 4. according to the principle of democratic centralism, providing that the chief procurators preside over the procuratorial committee.

Specifically in criminal proceedings, the *1979 Criminal Procedural Law*⁷⁷ prescribed that the procuratorates are in charge of the approval of arrest and pre-trial detention, procuratorial work (including investigation), and prosecution at trial. Furthermore, they are entitled to protest valid decisions and rulings, and to supervise the legitimacy of enforcement of court decisions and rulings. The abovementioned exploration and positioning of the Chinese procuratorate system provided in the constitutional and organic law has played a fundamental and structural role in its development; and many of these principles have lasted up till now.

The second phase from the late 1980s to the late 1990s witnessed the steady progress of the Chinese procuratorate system. After confirmation of the fundamental positioning, the development during this period focused on two themes: optimizing procuratorial functions and improving the quality of public procurators. The former was centred on the specialization of department settings, and the latter on the management of procuratorial staff.

First, as this boom decade for economic growth in China was also a boom decade for economic crimes, including embezzlement and bribery by state officials; it then became the key point of procuratorial work to suppress such crimes promptly and effectively. Due to the inability of the former department to investigate economic crimes, it appeared crucial to establish a special department to combat this new challenge. In July 1989, the special

77 On July 1 1979, the Second Session of the Fifth National People's Congress passed the Criminal Procedural Law. This is the very first piece of criminal procedural law in the history of the People's Republic of China. The Chinese Criminal Procedural Law was subsequently revised twice, in 1996 and 2012 respectively. The current version of Chinese Criminal Procedural Law, which came into force on January 1 2013, is the third version of it.

anti-corruption department was established in the SPP; and in the next month, the very first anti-corruption bureau in China was established in the People's Procuratorate of Guangdong Province. Subsequently, this kind of special institution has been gradually founded in all local procuratorates. Meanwhile, the procuratorates also established other internal departments that respectively took charge of different procuratorial tasks, such as investigation, arrest approval, and prosecution; and their work was subject to supervision from their superior procuratorates, so as to form internal checks.

Second, in order to improve the quality of public procurators and standardize the procuratorial exercise, the development of the Chinese procuratorate system during this decade also emphasized the management of procuratorial staff. A milestone of this progress is the enactment and enforcement of the *Public Procurators Law* in 1995. This is the very first piece of law in China which specializes in the procuratorial staff. It provided in detail the various aspects of public procurators, such as their responsibilities, rights, obligations, qualification, recruitment, dismissal, evaluation, training, rewards and penalties, etc, which has steered public procurators from ordinary state officials towards specialized judicial officers. According to this law, every procuratorate established a standing committee for evaluation of public procurators so as to restrict their professional conduct. Besides, the SPP created a nationwide uniform examination to qualify rookie procurators and assistant procurators in 1995. The examination was held annually, including a written test and interview, which contributed a lot to the improvement of the overall quality of public procurators. In 2001, this examination was incorporated into a unified national judicial exam for the acquisition of qualifications for legal occupations (including judges, public procurators and lawyers). The new exam further raised the threshold of attaining a procuratorial career.⁷⁸ Moreover, in order to enhance the professional competence of procuratorial staff, a series of training centres were gradually established. In 1989, the SPP created the China Training Centre for Senior Public Procurators, which in 1998 became the current National Procurators College. The college is in charge of various kinds of training which cover the leadership of the chief procurators, occupational skills of senior procurators, professional competence of rookie procurators, and so on. In addition, many local procuratorates also established their own training centres to secure the qualification of their procuratorial staff.⁷⁹ Last, the procuratorate system also developed a disciplinary department and a series of disciplinary regulations to restrict and punish misconduct by public procurators.

78 However, this qualification exam does not apply to chief procurators, deputy chief procurators or members of procuratorial committees, which is confronted with widespread challenges.

79 In practice, the National Procurators College has, to some extent, deviated from its original goals. Given the fact that many chief procurators of local procuratorates do not have any law-related knowledge or background, it is hardly feasible to give them specialized training as designed; on many occasions, they only got short-term lectures about the ABC of the law. See Sun et al. 2001, p. 34.

In the third phase since the late 1990s, the Chinese procuratorate system has been undergoing an in-depth reform. In the 1990s, both legal scholars and legal practitioners in China were increasingly aware of and interested in the legal theory, practice, culture and tradition of western countries. Some universal principles have been well accepted by many public procurators. Therefore, a bottom-up attempt at procuratorial reform was launched in many local procuratorates. In the following years, after reviewing the exploration of procuratorial reform by local procuratorates, the SPP recognized and promoted a series of successful models of procuratorial reforms, including those on such matters as accountability mechanisms of presiding procurators, safeguards of the suspect's rights, transparency of procuratorial service, sentencing proposal by public procurators, procuratorial instructions as to police investigations, etc. The accountability mechanism requires that the investigation or prosecution of a certain case should be allocated to a certain presiding procurator, who is primarily responsible for the case and accountable to his department and the chief procurator. The mechanism was initiated by some local procuratorates in the late 1990s. Among others the Haidian District Procuratorate in Beijing is a paradigm. They formally launched this mechanism in 1998, aiming at enhancing the independence and power of grass-roots procurators, resolving the long lasting problems of the former 'administrative-approval' model, and thus establishing a sound prosecutorial process that meets the norms of judicial activities. Subsequently, the SPP made the Haidian District Procuratorate the pilot unit of this mechanism, and called it the *Haidian Model*. In 2000, the SPP promoted the Haidian Model nationwide, and laid down uniform regulations on presiding procurators' qualification, recruitment, responsibilities, management, evaluation, rewards, penalties, supervision, working process and so on. This symbolized the widespread application of the accountability mechanism of presiding procurators throughout the major departments of the Chinese procuratorate system.

Since the Chinese government signed the ICCPR in 1998, human rights protection has attracted more and more attention in China. The procuratorial reform also followed this trend to some extent. The efforts made focused mainly on the resolution of the two major problems ingrained in the former procuratorial practice, i.e. torture and excessive pre-trial detention. In order to eliminate torture during the investigation, the SPP laid down a series of regulations, requiring continuous audio-visual recording when interrogating suspects, and released in detail corresponding technical instructions, so as to restrict coercion to confess.

In October 1998, the SPP decided to promote a transparent procuratorial service nationwide, and gradually released a series of guidelines concerning to the fundamental elements of a transparent procuratorial service. The scope of the transparency involved 12 aspects, such as the qualification of public procurators, the challenge application against public procurators, the reviewing process of 'non-prosecuted cases' (diversion), the reviewing process of criminal

appeals, etc. The SPP also created a series of mechanisms to guarantee both internal and external transparency of the procuratorial service, including the announcement of the rights and duties of relevant participants (the suspects, victims, witnesses, etc.), periodic announcement of important procuratorial information to the public, appointing spokesmen for procuratorates. Furthermore, the SPP required in principle public hearings of criminal appeal cases and ‘non-prosecuted cases’, involving public procurators, the parties concerned (petitioners, the investigators, the suspects or the victims etc.) and their legal representatives, jurors, audience and sometimes journalists.

Since the first attempt at a sentencing proposal by the Dongcheng District Procuratorate in Beijing in 2000,⁸⁰ ever more procuratorates have introduced this mechanism, requiring the public procurators to explicitly present a sentencing proposal concerning the sort of sentence, the duration of imprisonment, the size of fines, the manner of enforcement, the aggravation or mitigation. In 2005, the SPP recognized and promoted this mechanism nationwide.

In the new millennium, some local procuratorates and police stations began to explore the procuratorial guide as to police investigation. In these pilot areas, public procurators from investigation-supervising departments of procuratorates will instruct police detectives in concrete cases without participating in investigations in person.⁸¹ The procuratorial instructors focused on the legitimacy of the investigation, posing proposals on the collection, preservation and perfection of evidence on the basis of threshold of arrest or prosecution, giving instructions on the application of law, safeguarding against investigating misconduct such as torture and unlawful pre-trial detention. Later, this mechanism was also recognized by the SPP as an objective of the procuratorial reform.

Other than the nationwide accepted reforms described above, some small-scale attempts at procuratorial reforms are also of certain significance. These reforms concern initiating procuratorial civil proceedings representing the public interest, diversion from prosecution such as community-involved correction, recognition of right to silence during the inquisition and getting rid of the excessive dependence on confession, and plea bargaining, etc. Many of the procuratorial reforms and developments have been recognized and confirmed in the new version of *Criminal Procedural Law* (CPL2012).

As has been already mentioned, China is currently undergoing a new wave of radical legal reforms, which has also launched a fourth stage of the development of the Chinese procuratorate system. In this new stage, the most noteworthy change lies in that the anti-corruption function of the people’s

80 See 宋楠职务侵占、挪用资金、诈骗案, the first precedent of sentencing proposal.

81 According to the criminal procedure, public procurators have no power in the investigative stage to investigate criminal cases which, according to law, is beyond their jurisdiction. For their investigative jurisdiction in detail, please see *infra* 1.3.2.2 The current position of the public procurators in different stages.

procuratorates will be transferred to a newly founded 'State Inspection Commission', so that the former will lose all their investigative departments and thus become much weaker than before. The Sixth Plenary Session of the Eighteenth Central Committee of the Chinese Communist Party held in October 2016 proposed in its official report the establishment of the SIC. Subsequently, a detailed pilot program was issued, and will be carried out soon in Beijing, Shanxi, and Zhejiang. According to the pilot program, the existing investigative departments (including anti-corruption bureaus) within people's procuratorates in the three provincial regions will be merged into the SIC at various levels, so as to centralize and reinforce relevant powers to fight against corruption. Although some leading scholars in the domain of anti-corruption study in China have posed challenges against such radical change and proposed a steadier and more moderate scheme,⁸² it is predictable that such radical reform may be spread nationwide after the pilot program is finished. If so, the self-positioning of the procuratorate system will be confused once again. Moreover, some commentators even predict and expect the eventual disintegration of the procuratorate system, with its arrest-approval departments merged into the people's courts, and with its prosecuting offices merged into the Ministry of justice and its local bureaus.⁸³ To a great extent, such an adverse attitude towards the procuratorate system stems actually from the worship of adversarial dogmas that considers prosecutors merely as legal assistants of the accuser/government rather than as a necessary apparatus of justice to guarantee impartial truth-finding. In fact, many Chinese public procurators' self-understanding and self-positioning of their due role has also been significantly distorted by such adversarial dogmas, so that they frequently take the defence as their adversary and thus confidently act in a rather partisan and unfair manner towards the latter; in turn, this has increased the adverse attitude towards the procuratorate system, and ironically eroded the necessity and legitimacy of their existence.

1.3.2.2 The current position of the public procurators in different stages

Public procurators serve in the people's procuratorates, but not all those who serve in the procuratorates will prosecute. As is shown in Chart VI of the Appendix, the number of grass root public procurators amounts to nearly twelve thousand, representing half of all procuratorial staff. Given the fact that quite a proportion of these public procurators serve in non-criminal-case-dealing departments, such as civil and administrative objections departments, departments for the prevention of official misconduct, departments for research on law and policy, etc, the number of public procurators who deal with criminal cases should be smaller than this. Chart VII further demonstrates that nearly a half of the workload concerning criminal cases does not involve

82 E.g. see He 2016/11.

83 E.g. see Shi 2016.

public prosecution. Therefore, the number of public procurators who actually prosecute in criminal cases is even smaller in China.

The due position and core functions of the people's procuratorates and the public procurators have long been a controversial issue in China. The mainstream points of legal scholars differ strongly from those of the legal practitioners.⁸⁴ The former tend to regard public procurators primarily as public prosecutors, calling on the removal or reduction of other procuratorial functions; the latter, most of whom are senior procurators, insist on the law-supervising power as the core function and fundamental position of the Chinese procurators. Art. 5 of the *Organic Law of the People's Procuratorates of the People's Republic of China* reads,⁸⁵

People's procuratorates at all levels shall exercise the following functions and powers:

- (1) exercise procuratorial authority over cases of treason, cases involving acts to dismember the state and other major criminal cases severely impeding the unified enforcement of state policies, laws, decrees and administrative orders;
- (2) conduct investigations of criminal cases handled directly by themselves;
- (3) review cases investigated by public security organs and determine whether to approve arrest, to prosecute or to exempt from prosecution; exercise supervision over the investigatory activities of public security organs to determine whether they conform to the law;
- (4) initiate public prosecutions of criminal cases and support such prosecutions; exercise supervision over the judicial activities of people's courts to determine whether they conform to the law; and
- (5) exercise supervision over the execution of judgments and organs in criminal cases and over the activities of prisons, detention houses and organs in charge of reform through labour to determine whether such execution and activities conform to the law.

The provisions above suggest that the people's procuratorates in China feature two major functions: first, Clause 1 of this article reflects the 'Zhuanzheng' function, i.e. the suppression of crimes and criminals against the state; second, the other items reflect the law-supervising function, i.e. supervising state officials, especially those who play a role in criminal procedure, and inspecting and impeaching those who break the law. Accordingly, the functions of Chinese public procurators reach far beyond prosecution. They play an active role in every stage of the Chinese criminal procedure, and their role varies as the

84 About the controversy, see Zhu 2007; Cui 2007.

85 Adopted at the Second Session of the Fifth National people's Congress on July 1, 1979, and amended according to the Decision on the Revision of the Organic Law of the People's Procuratorates of the People's Republic of China adopted at the Second Meeting Committee of the Sixth National People's Congress on September 2, 1983.

procedure proceeds. However, this multifunctional position is in general terms. As for one certain public procurator, he or she usually plays a single role based on the specific internal department he or she serves. Generally speaking, the departments that deal with criminal cases in a people's procuratorate include: the investigative department which inspects bribery, embezzlement, or other misconduct by state officials; the department which supervises the legitimacy of investigations by police detectives or other investigators, and approves or decides arrests of suspects; a public prosecuting department which reviews and initiates public prosecutions, and protests⁸⁶ the judgments which are thought to have been wrong; a penitentiary-supervising department which supervises the legitimacy of enforcement of criminal judgments; a petition-dealing department which is in charge of criminal petitions, state compensation and aid to victims.⁸⁷ That is to say, the public procurators in China, who serve in various departments of the people's procuratorates, actually have the following roles or functions in practice, including quasi-judicial functions, investigator for professional crimes by state officials,⁸⁸ and the supervising power on adjudication.

First, public procurators in China have the exclusive power to decide or approve the arrest of suspects in pre-trial stages, although many legal scholars advocate that it should be in the hands of judges; besides, they can make decisions on diversion of prosecution in minor offences.

Second, the investigative department of procuratorates has been in charge of investigation of professional crimes committed by state officials, i.e. bribery, embezzlement, and other misconduct, including that by judges and police officers. This has also been criticized a lot, because on one hand, the prosecutorial checks on investigation become less meaningful when both investigative and prosecutorial powers have been granted to the same institution; on the other hand, the investigative power against judges tends to discourage the latter to make decisions which may dissatisfy the former. This may have detrimental effects on the impartiality of trial judges, and thus impair the fairness of the trial. However, the new *Criminal Procedural Law* has preserved this power of public procurators.

Last, their supervising power on adjudication means that the procuratorates are entitled to protest⁸⁹ valid judgments which they believe to be unfair. If they do so, the court must retry the case according to the law. Some legal scholars criticize this mechanism, comparing the dual roles of a procurator

86 The popular version of the English translation of the Chinese Criminal Procedure Law uses the word 'protest' to refer particularly to an appeal by the prosecution against a criminal decision that has already come into force; as compared with an appeal by either party before a criminal decision comes into force.

87 See the official website of the SPP: <http://www.spp.gov.cn/gjyjg/nsjg/>.

88 As has already been mentioned, this role as investigator is currently being incorporated into the newly founded SIC.

89 Rather than appeal against a criminal decision that has not come into force.

to a player in a football match who is also the referee.⁹⁰ Some scholars argue that this procuratorial function violates the '*Nemo iudex in causa sua*' principle of natural justice.⁹¹ However, the authorities still seem to insist on the law-supervising function and position of public procurators, and maintain their supervising power on adjudication in the new *Criminal Procedural Law*.

According to the *Legislation Blueprint of the Standing Committee of the 12th National People's Congress* issued in October 2013, the revision of the *Organic Law of the People's Procuratorates of the People's Republic of China* has been listed in the agenda, and is supposed to be passed during the tenure of this committee. Although there is no official information regarding the details of the revision, the relevant proposals by Members of NPC may still hold some clues to the orientation of the revision, which features the strengthening, safeguarding and perfection of the law-supervising function by the people's procuratorates.⁹² However, since the aforesaid pilot program which aims at a more centralized and efficient anti-corruption apparatus within the framework of the newly founded SIC is very likely to deprive the procuratorate system of its investigative powers, the functional significance of this system may be substantially curtailed as well. In these terms, the future of the procuratorate system is still uncertain, which demonstrates Chinese authorities' confusion about the due position of public procurators and people's procuratorates.

1.3.2.3 *The current prosecutorial system of China*

The public prosecutorial system constitutes the main pillar of China's prosecutorial system. In China today, all the public prosecutions in formal terms are in the hands of public procurators, specifically speaking, those who serve in the public prosecuting department of the people's procuratorates. They serve as public prosecutors in Chinese criminal procedure. As aforesaid, they have a title (公诉人 Gong Su Ren) which can be literally translated into public prosecutors when they present prosecutions before a law court.

When a criminal case is formally submitted by the investigator to the public prosecutor for review and initiation of prosecution, a new stage of the criminal process begins, and the public prosecutor will then take over the case. During this stage, he or she is obliged to comprehensively review whether the case satisfies the standard of public prosecution. From the procedural prospective, he or she has to check the legitimacy of the investigative process, i.e. whether there has been any torture, coercion of confession or testimony, or whether there has been unlawfully excessive pre-trial detention; from the substantive prospective, he or she has to verify all the evidence, both incriminating evidence and exculpatory evidence, through reviewing the written dossier made by the investigators, interrogating the suspect and examining the witnesses or the

90 See Cui 1999, p. 372.

91 See Hao 2006.

92 See the website of the National People's Congress of China, www.npc.gov.cn, 2013-11-06.

investigator. When believing that the evidence is insufficient, he or she can launch a further investigation, either in person or by the investigator.

After reviewing the case, the public prosecutor has three choices: to initiate a public prosecution if the case satisfies the standard of prosecution, i.e. the facts are clear, and the evidence is sufficient and concrete; to drop the case if the suspect is found not guilty or the evidence is insufficient; to divert the case if necessary.

Given the high ratio of public prosecution and conviction in the Chinese practice of criminal procedure, the Chinese public prosecutors have not played a filtering role in the criminal process as their western counterparts do. This fact also reflects the fusion of powers and the 'Zhuanzheng' doctrine in the Chinese criminal procedure.

The private prosecutorial system works just in a small proportion of cases, usually for petty crimes. According to Article 204 of CPL 2012, cases of private prosecution include the following:

- (1) Cases to be handled only upon complaint;
- (2) Cases for which the victims have evidence to prove that those are minor criminal cases; and
- (3) Cases for which the victims have evidence to prove that the defendants should be investigated for criminal responsibility according to law because their acts have infringed upon the victims' personal or property rights, while the public security organs or the people's procuratorates have not investigated the criminal responsibility of the accused.

In such situations, the victims or their relatives are entitled to present private prosecution directly to a law court.

Apart from the formal public or private prosecution system mentioned above, there are indeed other informal prosecutorial systems in China, including CPC's disciplinary prosecution, PSO's prosecution for administration of public security, and informal prosecution by other administrative authorities.

First, each committee of CPC has its own disciplinary committee which is entitled to investigate and punish party members who have allegedly violated the discipline of CPC or the law. Although the committees are not a formal state organ in the Chinese criminal procedure, they do have great authority and powers to deal with official misconduct, including interrogation and detention of such officials. This is quite a characteristically Chinese institution for anti-corruption and real prosecution of state officials.⁹³

Second, as was mentioned before, the PSO in China have a big say in deciding the so-called public security cases, which is virtually a power of informal prosecution according to relevant international norms.

93 As has already been mentioned, the anti-corruption law-enforcement in China is now being integrated within the framework of the newly founded SIC.

Last, apart from the institutions described above, many other administrative authorities also enjoy some power of informal prosecution, such as the customs, the tax authorities and the industry and commerce administrative organs, environment protection authorities, etc. They are entitled to investigate and punish the relevant offenses. Their position and function are similar to regulatory agencies in UK. Generally speaking, these cases only involve deprivation of properties instead of liberties of the accused.

1.3.2.4 *The checks subject to procuratorates*

The procuratorate in China is a very powerful system, but it is subject to relatively limited checks. According to the law and judicial practice, the checks on Chinese procurators come from the following institutions or individuals.

First, according to the Chinese principle that ‘the party must control its cadres’, there is a party leadership group in each procuratorate, and the appointment and dismissal of a chief procurator is also to large extent subject to the opinion of the corresponding local party committee. Meanwhile, there is a special *political-legal work committee* system at four levels (central, provincial, city and county). This system of party committee is in charge of law enforcement in general. The court, the procuratorate and the police are all under its leadership and supervision.

Second, according to the constitution, all the other state organs, including the procuratorate system, should be accountable to the people’s congress. They are obliged to report their work annually to their corresponding people’s congress. In practice, the people’s congress has some say in the procuratorates, especially around the period of ‘the two meetings’.⁹⁴

Third, as the lower procuratorates are under the leadership of their superior procuratorates, the internal checks are actually the primary and fundamental check on public procurators and procuratorates. There is a disciplinary committee in each procuratorate so as to supervise and punish procuratorial misconduct. The superior procuratorates and their disciplinary committees are also entitled to supervise and punish procuratorial misconduct by their subordinate procuratorates as well as the procurators there.

Last, according to the criminal procedural law, the suspects, the defendants, the victims and their legal representatives also have the right to supervision by complaining about procuratorial misconduct to the procuratorial disciplinary committees or the superior procuratorates. However, this check relies largely on the internal check mechanism of the procuratorate system. If the latter fails to work, this mechanism can hardly work. The victims can also initiate

94 Plenary sessions of the national or a local people’s congress and plenary sessions of the Chinese or a local people’s political consultative conference. The two series of meetings will be held annually one right after another on national and local basis, which are formally regarded as the most significant event for Chinese people to exercise their democratic rights. In China, they are referred to briefly as ‘the two meetings’.

private prosecutions if they do not accept the non-prosecution decisions by the procuratorates. This is also an external check upon procuratorial power; however, private prosecution is limited only to a small number of less serious crimes. Generally speaking, the checks from the defence or the victims on the procuratorate system are quite weak.

1.3.3 The people's court

The people's court is the adjudicative system in China. Its structure is also the same as the public security organ and the people's procuratorates. Likewise, they are operated vertically, at four levels as well, the SPC, the provincial level, the city level, and the primary level; so generally speaking, every single court has a unique corresponding procuratorate, with which it regularly co-operates so as to better the efficiency of case dealing. The people's court system, unlike the procuratorate system and the PSO, is designed as a relatively independent institution: the SPC supervising instead of leading all the local courts; the higher ones supervising instead of leading subordinate ones. 'Supervising', means the former are entitled to check the latter through further process such as a second instance trial or a retrial, but they have no authority to directly instruct the latter as to the result of a specific case in the latter's hand. However, the relatively independent position only speaks to the court as a whole, rather than to every judge as an individual, so in a certain people's court, trial judges still have to obey the instructions by the adjudicative board⁹⁵ regarding the decision in concrete cases. Resembling the procuratorate system, the court system does not belong to the administrative branch either, so horizontally it is not supposed to be subject to supervision or leadership by the government. However, according to the 'party controlling judiciary' doctrine, the people's courts should also be directed by the corresponding party committees and the corresponding political-legal work committees.

1.3.4 The prison

The prison system is in charge of long-term detention of convicted criminals who are sentenced to fixed-term imprisonment, life imprisonment or the death penalty with a two-year reprieve and forced labour. Moreover, the investigative department of a prison is entitled to inspect the crimes committed by criminals who are serving their imprisonment in the prison, or their undiscovered crimes

95 The adjudicative board is unique to the Chinese judicial system, and exists at each of the four levels of China's court system. The adjudicative board of a court meets regularly to discuss and decide important or difficult cases, sum up judicial experience, and review other important matters related to case adjudication. In general, the board consists of the president and vice-presidents of the court, as well as the heads of internal departments of the court, most of whom are virtually administrators more than working judges.

committed before serving the imprisonment. When investigating these crimes, their powers and functions resemble those of the PSO.

1.3.5 *The political-legal work committee*

‘The political-legal work committees at each party level are leaders of the three branches of criminal justice, with their main responsibilities being to support and supervise each branch in exercising its functions and powers; to coordinate relationships among the three; and to oversee cases that are controversial, important, or in doubt.’⁹⁶ Their structure is also the same as PSO, the people’s procuratorates and the people’s court, so every public security organ and its corresponding procuratorate and court will be under control of a corresponding political-legal work committee. These committees used to be very powerful, ‘if a case is noteworthy or difficult, the committee urges the three branches to ‘handle the case cooperatively’, which often means holding meetings attended by the heads of the three branches to discuss the case.’⁹⁷ However, the *Third Plenary Session of the Eighteenth Central Committee of the Chinese Communist Party* has decided to reduce their power in dealing with concrete cases. The outcome in practice is still to be seen.

1.3.6 *The defence*

The defence in China is in a weak position. The defendant is usually in custody during the whole criminal process, and under strict monitoring and control. Only a small proportion of suspects or defendants will be fortunate enough to have defence counsel during the process. According to Chart I, III, VIII, and IX, the annual number of criminal cases dealt with by either the procuratorates or the courts amounts to nearly one million, and that number by PSO even amounts to six million; therefore, the annual number of suspects or defendants implicated in criminal cases at various stages is expected to be over ten million, but the number of criminal defence lawyers is only about half million. That is to say, the ratio of criminal defence in China is only 5%. Moreover, the suspects or defendants are not allowed to attain much information about the details of the dossier. To some extent, they can do nothing material for their defence but to be tried in the Chinese criminal procedure.

The situation of their defence counsel is not much better. Defence counsel in China base their defence mostly on the dossier formulated by the prosecution. They are legally entitled to collect evidence themselves, but on one hand, they do not have enough powers and resources to do so; on the other hand, it is quite dangerous for them to do so. Art. 306 of the Chinese Criminal Code reads: ‘A defender or an agent ad litem who, in the course of criminal procedures,

96 He 2016, p. 112.

97 Ibid.

destroys or forges evidence, assists the party concerned in destroying or forging evidence, threatens or lures a witness to, contrary to the facts, change testimony or provide false evidence, shall be sentenced to fixed-term imprisonment of no more than three years or criminal detention; and if the circumstance is serious, to fixed-term imprisonment of no less than three years and no more than seven years.'

This article, which is widely called 'the 306 noose' by criminal lawyers, is undoubtedly the Sword of Damocles hanging over every single criminal lawyer's head. In some well-known cases in which defence lawyers were sent to prison, most of them went to collect evidence, especially testimonial evidence against the prosecution. The prosecution would then force the witness⁹⁸ to change their testimony and to accuse the defence lawyers of forging evidence.⁹⁹ Therefore, almost every rookie criminal lawyer would be well-advised by the experienced ones to be cautious about collecting evidence in person, especially testimonial evidence.¹⁰⁰

Generally speaking, the work of the defence in China is limited in many respects under the 'Zhuanzheng doctrine' pattern of criminal procedure. The CPL2012 has enlarged the power of defence lawyers in many aspects. The most critical progress is that criminal lawyers can participate in a criminal case as a defence counsel as early as in the investigative phase. According to former versions however, they could not do so until the next phase, i.e. the review and initiation of public prosecution by the people's procuratorates. Moreover, the information they can get from the prosecution during this phase is no longer limited to 'the judicial documents regarding the current case and the technical verification material' as provided in Art. 36 of CPL1996; rather, they can get 'the case file materials'. Furthermore, their right to meet their clients in custody is also much better guaranteed according to the CPL2012.¹⁰¹ Besides, the

98 Usually a so-called 'stained witness', who is usually a confederate of the alleged crime, e.g. a briber in a bribery case who is required to offer testimonial evidence against the bribee charged, in return for leniency or non-prosecution of his crime; sometimes, even the accused will be forced to do so.

99 For examples, in the 'Li Zhuang case'. For more details, please see Johnson & Loomis 2013, pp. 66-83.

100 As a licensed criminal lawyer in China, the author was so warned many times, either by senior partners in his law firm or by prominent criminal lawyers in training camps.

101 The *Decision of the National People's Congress on Amending the Criminal Procedure Law of the People's Republic of China (Order No. 55 of the President of the People's Republic of China)* has provided in its Art. 9 that

'Article 36 shall be changed into two separate articles as Article 37 and Article 38, which shall read as follows:

'Article 37 Defence lawyers may have meeting and correspondence with criminal suspects or defendants who are under detention. Other defenders, subject to the permission of people's courts and people's procuratorates, may also meet and correspond with criminal suspects or defendants who are under detention.

'Where a defence lawyer requests a meeting with a criminal suspect or defendant under detention on the strength of the lawyer's practicing certificate, and the certification

CPL2012 also adds new provisions concerning reciprocal duties of disclosure by prosecution and defence.¹⁰² The outcome in practice is still to be seen.

1.3.7 *The victims*

The victims play a rather limited role in cases of public prosecution. Their position in such cases is as a sort of witnesses rather than a party concerned. Even their right to appeal is subject to the review and decision of the people's procuratorates. In some minor cases, they are entitled to initiate private prosecution, but this right is limited only to a list of simple cases.

documents and letter of authorization issued by his/her law firm, or an official legal aid document, the detention house concerned shall arrange the meeting in a timely manner, no later than 48 hours after receiving the request.

'During the investigation period for crimes endangering State security, involving terrorist activities or involving significant amount of bribes, defence lawyers shall obtain the approval of investigating organs before they meet with the criminal suspects. The investigating organs shall inform the detention houses of information relating to the aforesaid cases in advance.

'A defence lawyer shall be entitled to inquire about the case and provide legal advice during the meeting with a criminal suspect or defendant under detention and may, from the date on which the case is transferred for examination before prosecution, verify relevant evidence with the criminal suspect or defendant. The meeting between the defence lawyer and the criminal suspect or defendant shall not be monitored.

'With respect to circumstances where defence lawyers meet and correspond with criminal suspects or defendants who are under residential surveillance, provisions of Paragraphs 1, 3 and 4 of this Article shall apply.

'Article 38 A defence lawyer may, from the date on which the relevant people's procuratorate begins to examine the case for prosecution, consult, excerpt and reproduce the case file materials. Other defenders, with permission of the people's procuratorate or people's court, may also consult, excerpt and reproduce the above-mentioned materials.'

102 The Decision of the National People's Congress on Amending the Criminal Procedure Law of the People's Republic of China (Order No. 55 of the President of the People's Republic of China) has provided in its Art. 10 that Two new articles shall be added as Article 39 and Article 40:

'Article 39 Where a defender is of the opinion that the relevant public security organ or people's procuratorate fails to submit certain evidence gathered during the investigation period or period for examination before prosecution while such evidence can prove that the criminal suspect or defendant is innocent or the crime involved is a petty offense, the defender shall be entitled to apply with the people's procuratorate or the people's court concerned to obtain such evidence.

'Article 40 Where a defender has gathered evidence showing that the criminal suspect concerned was not at the scene of the crime, has not reached the age for assuming the criminal liability, or is a mentally challenged person who is not required by law to assume the criminal liability, the defender shall inform the relevant public organ and people's procuratorate of such evidence in a timely manner.'

Transparency of Chinese criminal procedure

As explained in the introduction, transparency of criminal procedure can be categorized as internal and external. As for the status quo of external transparency of Chinese criminal procedure, i.e. the access to open court sessions by Chinese people or mass media, since there has been plenty of both theoretical and empirical research in China, we can limit ourselves to a summary of the relevant academic outcome at the beginning of this chapter.

In terms of legislation, both the Chinese constitution and criminal procedure have virtually espoused external transparency of criminal procedure as a fundamental principle, and the latter has also set specific standards for administration of the principle. However, due to the long-lasting tradition of judicial bureaucracy, external transparency of criminal procedure often used to be circumvented in China. First, before the year 2006, criminal cases of second instance were often reduced to mere *ex parte* proceedings based on the case file of the first instance only; second, some criminal judges in local courts were so reluctant to have open sessions that they often decided to hear even criminal cases of first instance in camera, invoking and expanding the exceptions of the transparency clause, such as state secrets or personal privacy;¹ third, some local courts used to set up various barriers to the access to open court sessions, such as limitations on the number or identity of attendees, a complex procedure for audience pass application, and failure to announce time and place of court sessions; fourth, perfunctory course of many court sessions virtually offsets the effect of external transparency; fifth, the identity of members of adjudicative boards was not made public;² sixth, reasons of judgments were not given.³

The aforesaid problems regarding the external transparency of criminal procedure attracted increasing attention of both academia and the judicial authorities in China, especially in the first decade of the new millennium, during which the former produced a large number of relevant academic

1 See Zhang 2010, p. 61.

2 See Ye et al. 2011, p. 153.

3 Ibid.

publications, concerning the overall narrative of,⁴ reason for,⁵ content of,⁶ way of,⁷ and implementation effect⁸ of external transparency. All of these works were actually using the new ROL discourse system to advocate adversarial dogmas, and therefore brought forward the basic tenets of the ‘pure’ adversarial system (including emphasis on external transparency of criminal procedure) as a sound solution to China’s relevant problems.

Convinced and inspired by such academic ideas and new ROL discourse, China’s judicial authorities took a series of steps to facilitate the external transparency of Chinese criminal procedure so as to enhance the criminal justice system. First, the SPC released many regulations or guidelines to standardize the administration of external transparency or emphasize the significance of external transparency. For instance, the SPC issued a notice in December 2005, requiring that all death penalty cases of second instance be subject to court sessions instead of ex parte review by the second half of the year 2006;⁹ it further issued in December 2009 the ‘Six Provisions on Judicial Openness’ and ‘Several Provisions on the People’s Courts’ Exposure to Public Supervision through Mass Media’,¹⁰ requiring comprehensive transparency regarding the administration of justice. As for the openness of court sessions, it provided that ‘The people’s courts shall establish and improve rules of orderly opening and effective management for observing and reporting court trials, and eliminate the obstacles to the access to information and supervision by the public and the media. For cases to be heard openly according to law, the observers shall be subject to security check before entering the courtrooms to observe the hearings. Due to the limitation of the trial sites and other objective factors, the people’s courts may, by issuing observer certificates, or by means of cam recording, live broadcasting, or rebroadcasting the trials or other ways, meet the needs of the public and the media to know the actualities of court trials. *All evidence should be disclosed in the court proceedings, and should be confirmed in court when possible.* The people’s courts shall notify the witnesses and experts to take the stand, unless it is otherwise provided by the laws or judicial interpretations. The basic information of the sole judges, members of a collegial panel, and members of a adjudicative board shall be disclosed, and the parties shall be entitled to apply for withdrawal. The extension of the time limit for the trial of cases shall be notified to the parties. For cases to be heard openly or not, the people’s courts shall openly announce the judgments in court or through other public ways.’ Moreover, the SPC even drew up a special incentive

4 See e.g. Xu & Liu 2002; Zhang 2008; Ye & Ruan 2011.

5 See e.g. Wang & Ren 2008; Zhou 2007.

6 See e.g. Zhang 2010; Hu & Wei 2006; Liang 2010; Liu 2007.

7 See e.g. Xue & Chen 2009; Guo & Liu 2008; Li 2010.

8 See e.g. Ye et al 2011; Zhao 2012.

9 See 《最高人民法院关于进一步做好死刑第二审案件开庭审理工作的通知》·法(2005)214号。

10 See 最高人民法院印发《关于司法公开的六项规定》和《关于人民法院接受新闻媒体舆论监督的若干规定》的通知·法(2009)58号。

mechanism and evaluation method to facilitate the implementation of the ‘Six Provisions on Judicial Openness’, by issuing the ‘Criteria on Model Courts for Judicial Openness’ in Oct. 2010. The SPC also issued ‘The Supreme People’s Court Provisions on People’s Courts Release of Judgments on the Internet’ in November 2013, requiring that all judgments in principle be released on the internet unless otherwise provided.¹¹

Second, some local courts also took a series of steps to promote the implementation of external transparency of (criminal) procedure. Specifically, local courts in some more developed areas began to explore ways of promoting external transparency at least from the year 1996, via e.g. live or taped TV broadcast, or radio broadcast;¹² recently, ever-more local courts began to use the Internet and social media, e.g. live text-graphic broadcast on ‘Weibo (or micro-blog, equivalent to twitter in China)’, or live audio-visual streaming of (criminal) trials on specialized official websites of the courts.¹³ Moreover, some local courts draw up special provisions or mechanisms to facilitate external transparency. For instance, Shanghai People’s High Court made detailed provisions to facilitate the implementation of open justice;¹⁴ Shanghai Second Intermediate People’s Court even produced a special mechanism to challenge members of its adjudicative board.¹⁵

Third, according to relevant empirical research,¹⁶ the implementation of external transparency of Chinese (criminal) procedure made great progress during the past decade, especially through the medium of the internet. ‘By the year 2009, there were totally over 50 intermediate courts, and over 160 grassroots courts that had established the online database of judgments, and a total of 59 744 pieces of valid judgments, over 160 million words had been published by various courts in China. Only two years later, the number of intermediate courts that had set up public websites for publishing judgments had amounted to 234, which was more than four times as that in 2009, and accounted for 61.3% of the total number of intermediate courts in China; in addition, 28 High courts in China had established online database of judgments, which represented 84.8% of the total number of higher courts in China. ... to broadcast live or taped public trials through the Internet or other media. Foshan, Henan, Shanghai, Chengdu, Shenzhen, Liaoyuan, Anshan and other regions were all beginning to explore such high-tech way to publicize their

11 See 最高人民法院关于人民法院在互联网公布裁判文书的规定·法释(2013)26号; see English translation of this instrument on <http://chinalawtranslate.com/spc-regulation-on-releasing-opinions-online/?lang=en>, retrieved on June 21, 2016.

12 See He & Wang 2015, pp. 54, 55.

13 See *ibid.*, p. 55.

14 See 《上海法院着力推进司法公开的实施意见》, <http://www.hshfy.sh.cn/css/webpub/upload/201101181051545170.doc>, accessed on Feb. 26, 2017.

15 See 《关于当事人对审判委员会委员讨论决定案件提出回避申请的办法(试行)》, <http://www.shefy.com/view.html?id=46649>, accessed on Feb. 26, 2017.

16 See He & Wang 2015; Zhao 2012.

court sessions. It is foreseeable that online publication of judgments will be normalized and institutionalized, and online publication of court sessions will also prevail.¹⁷ Briefly speaking, it transpires that China's judicial authorities have, through the use of new technology, made great success in promoting external transparency of criminal procedure.¹⁸

However, such reforming efforts and achievements seemingly failed to produce the intended consequence that adversarial legalism promises. First, according to relevant empirical research, very few people have paid or will pay any attention to public trials, and those who have or will were mostly either relatives of defendants or victims, or lawyers or journalists who had to do their jobs;¹⁹ to a great extent this is because criminal trials in China have long been conducted in a perfunctory and nominal way, with the audience hardly able to understand what is going on in the courtroom.²⁰ Second, the legitimacy of China's criminal justice system has been increasingly challenged by the populace and miscarriages of justice are continually revealed by mass media. On the one hand, promotion of external transparency failed to avoid the emergence of more miscarriages of justice; on the other hand, over-indulgence of the mass media and social media in premature or biased coverage regarding high-profile criminal cases has made things even worse. Specifically, mainstream media that monopolize the discourse power can easily influence public opinion about a certain case and thus intervene in the administration of justice, by labelling or caricaturing the actors and framing the story instead of impartially and completely presenting what truly happened. This can be best exemplified with the ironies of two high-profile deaths that both occurred coincidentally in Changping District of Beijing in 2016. The death of Mr. Lei Yang, a young official at a research institute under the State-owned Assets Supervision and Administration Commission of the State Council (SASAC) with a master degree from the prestigious Renmin University (RU) in Beijing, which occurred during a prostitution raid at a foot-massage parlour, blazed across the Internet in China, raising suspicions of police brutality and underscoring a widespread lack of faith in the country's law enforcement. Outraged at the breaking news titled 'Master [student] of RU died during police custody after prostitution raid', the populace overwhelmingly sympathized with Mr. Lei and called for severe punishment of the police officers implicated in this event.²¹ Although it later transpired that Mr. Lei actually choked to death

17 Zhao 2012, pp. 134, 135. The original text of the publication cited is in Chinese. This book has translated relevant paragraphs into intelligible English.

18 See He & Wang, 2015, p. 56.

19 See Zhao 2012, pp. 133, 134.

20 See He 2011, p. 125.

21 See 'A mysterious death in China raises suspicions of police brutality', Los Angeles Times, May 10, 2016. <http://www.latimes.com/world/asia/la-fg-china-police-brutality-20160510-snap-story.html>, retrieved on Dec. 29, 2016. See also 'China Middle-Class Anger Reignited by Death of Researcher in Custody', The Wall Street Journal, Dec. 27, 2016, <http://>

on his own vomit after fierce resistance against arrest and failed attempts to escape, many people simply have no interest in the truth, whether Mr. Lei had truly visited prostitutes and whether he truly resisted arrest and attempted to escape; rather, they judge only from what Mr. Lei is believed to be: a well-educated young man, a good husband who was celebrating his third wedding anniversary, and a new father who just had his baby girl two weeks prior to his death. They argued that such a good man would not visit prostitutes, so the local police must be framing him; and even if he did, it is nothing serious but an individual liberty that should have been allowed and has indeed been allowed by many countries such as the Netherlands, so why did the local police bother to conduct the stupid prostitution raid rather than chase terrorists or corrupt officials? Moreover, many consider Mr. Lei's resistance against the police as heroic behaviour, though tilting at windmills. After all, most people opt to stand on the side of what is believed to be the good, like the 'citizen' Lei Yang, rather than on the side of what is proved to be the true. Therefore, it is predictable that most people would gloat about Mr. Lei's death if the news was titled 'Official of SASAC resisted arrest during prostitution raid, choked to death on his vomit', which was just the case after the death of Ms. Ma Caiyun, a grassroots judge in the People's Court of Changping District, who was shot dead right in her apartment by a party to a divorce case she had tried. Evidently, such an outlook on justice that prioritizes the good over the true determines that how the story is told is much more significant than what the story is, and therefore the mainstream media that monopolize the discourse power will become the real judge and 'no one shall be determined innocent unless CCTV (China Central Television) so confirmed openly.'²² That is to say, confrontation will become nothing but a struggle between discourse powers while external transparency will facilitate anything but truth, especially given the fact that the media in China are not independent. To sum up, it seems that the presupposed positive correlation between the legitimacy of a criminal justice system and external transparency of its criminal procedure have not been demonstrated by China's status quo, or at least that what and how China has done with regard to the promotion of external transparency are not enough, or not much to the point, to give rise to such a positive correlation.

Moreover, China's death penalty review procedure can be considered as another counter example against the applicability of adversarial dogmas in China's criminal procedure. On the one hand, it has been radically criticized as in camera, ex parte, bureaucratic, and therefore incompatible with the 'general

www.wsj.com/articles/china-middle-class-anger-reignites-over-death-of-researcher-in-custody-1482837636, retrieved on Dec. 29, 2016.

22 In 2006, many suspects were indeed subject to open confession in CCTV during the pre-trial stage, which virtually determined and legitimized their convictions in advance. In these cases, CCTV reporters were so powerful that they were able to meet and interview the suspects in custody whom even their defence lawyers cannot meet. See Tan 2016.

principle' of criminal procedure; while on the other hand it has after all saved countless lives,²³ and accordingly achieved its initial goal of 'less numerous but more cautious execution'. Therefore, it may represent one of the most effective criminal proceedings in China, or at least be considered as less unsuccessful than any other criminal procedure reform in China during the past few decades. Given the aforesaid paradox and dilemma regarding China's reforming efforts on external transparency, and given that China has long ignored the existence and significance of the internal aspect of transparency of criminal procedure,²⁴ both in theory and in practice, this research will try to analyse the legitimacy decline of China's criminal justice system mainly from the perspective of internal transparency. Before the elaboration of the status quo of Chinese criminal procedure in terms of its internal transparency, it is necessary to demonstrate how common criminal cases in China are typically handled.

2.1 The process of common criminal cases in China

2.1.1 Filing a case

2.1.1.1 Reporting and accepting a case

Reporting and accepting a case is the very first step of the criminal process in China. When there is due evidence to show that a criminal act has occurred, the relevant organs should file a case according to law. This power of filing a case is mostly enjoyed by PSO.²⁵ However, cases concerning corrupted state officials

23 As is known to all, the statistics regarding execution in China is top secret, so we do not know exactly how many Chinese convicts in death row who might have been executed have survived because of the SPC's retake of the power of death penalty review 10 years ago. According to anonymous Chinese specialists in the death penalty, the annual number of execution was estimated to be more than 10 000 before the retake, but now it is believed to have fallen down to only several thousand, very few thousand indeed; in total, 60% of those in death row have been prevented from execution by the SPC's death penalty review during the one whole decade since the retake in 2006. Quoted from Li 2016, accessed on December 24, 2016. According to the above, it can be estimated that tens of or even hundreds of thousands of lives may have been saved by the SPC's death penalty review during the past decade, which should by all means be considered as a great success.

24 Although the underlined provision of the 'Several Provisions on the People's Courts' Exposure to Public Supervision through Mass Media' quoted above indicates that Chinese juridical authorities appear to have already had a primitive awareness of the significance of internal transparency by requiring disclosure of evidence in court sessions, it transpires that on the one hand the disclosure requirement is indeed perceived in connection with the idea of the right to confrontation which is one of the adversarial dogmas, rather than with the concern of internal transparency; on the other hand, the disclosure requirement does not involve the pre-trial procedure or the supervision over the compilation of the dossier, which are indeed more crucial to internal transparency of Chinese criminal procedure. Therefore, it is not unfair to argue that the existence and significance of the internal aspect of transparency of criminal procedure is still overlooked to a great extent in China.

25 The state security organs, the security departments of the Army, and the investigative departments of the prison, etc., also enjoy this power in their respective jurisdiction.

will be filed by the people's procuratorates; cases of private prosecution will be filed by the people's court.

Specifically speaking, filing of a criminal case is usually launched by it being reported, which can happen in three different ways: 1. case report, i.e. anyone, including victims, reporting to relevant authorities a crime without pointing out any suspect; 2. denunciation, i.e. anyone but victims reporting to relevant authorities a crime allegedly committed by someone; and 3. complaint, i.e. a victim reporting to relevant authorities a crime against himself allegedly committed by someone. In any case, the officers (in most cases police officers) have the lawful duty, upon warning the reporter against false accusation,²⁶ to accept such reports by filling in the *Registration Form for Accepting Criminal Cases*²⁷ and recording verbatim the reporter's description about the case,²⁸ even if the case is beyond their jurisdiction.²⁹ Usually, one officer will inquire in detail about the reporter's personal information and the whole story of the alleged crime; while another officer records his description verbatim in the *Record of Reported Case*.³⁰

Having recorded all the reporter says, the officers will ask him to check the record thoroughly. Upon confirming that there are no mistakes, he will be required to handwrite at the end of the record 'I have checked the record above, which is the same as I said.' and the date, and to leave his thumb print

26 Both Art. 109 Sec. 2 of CPL2012 and Article.169 of *Public Security Organ Procedures For Handling Criminal Cases* (hereinafter PSOP) provide, 'The officer receiving the complaint or information shall clearly explain to the complainant or the informant the legal responsibility that shall be incurred for making a false accusation. However, a complaint or information that does not accord with the facts, or even a mistaken complaint shall be strictly distinguished from a false accusation, as long as no fabrication of facts or falsification of evidence is involved.'

27 See the model in the Form 1, Annex I.

28 Art. 109 Sec. 1 of CPL2012 provides, 'Reports, complaints and information may be filed in writing or orally. The officer receiving an oral report, complaint or information shall make a written record of it, which, after being read to the reporter, complainant or informant and found free of error, shall be signed or sealed by him or her.'

29 Art. 108 of CPL2012 provides, 'Any unit or individual, upon discovering facts of a crime or a criminal suspect, shall have the right and duty to report the case or provide information to a public security organ, a People's Procuratorate or a People's Court. When his personal or property rights are infringed upon, the victim shall have the right to report to a public security organ, a People's Procuratorate or a People's Court about the facts of the crime or bring a complaint to it against the criminal suspect. The public security organ, the People's Procuratorate or the People's Court shall accept all reports, complaints and information. If a case does not fall under its jurisdiction, it shall refer the case to the competent organ and notify the person who made the report, lodged the complaint or provided the information. If the case does not fall under its jurisdiction but calls for emergency measures, it shall take emergency measures before referring the case to the competent organ. Where an offender delivers himself up to a public security organ, a People's Procuratorate or a People's Court, the provisions of the third paragraph shall apply.'

30 See the model in the Form 2, Annex I. For the sake of brevity, only the key information is extracted in the text.

and signature on each page of the record, which eventually qualifies the record as effective.

Based on this record, the officers then fill in the *Registration Form for Accepting Criminal Cases*, which outlines the reporter's personal information and his story about the alleged crime. The legal documents for filing a case have now been formally completed. In most cases, a report of criminal case in China will be delivered to a police station,³¹ which however has no formal jurisdiction over criminal cases. Therefore, the next step is to hand over the case to a public security bureau at county level to decide whether or not to file a case.³²

Of course, the mere report of criminal case is actually far from sufficient to file a case, as the consequences of initiating criminal proceedings against anyone are too great, especially in China where quite a proportion of filed cases will culminate in guilty verdicts.³³ It would thus be unfair to do so without probable cause. In a Chinese context, the probable cause for filing a case refers to 'it [a people's court, People's procuratorate or public security organ] believes that there are facts pointing to a crime and that criminal responsibility should be investigated'.³⁴

It is evident that a reporter's one-sided story is not sufficient. More convincing evidence, such as forensic evidence and witness testimony, is needed. In case a victim reports e.g. a bodily injury or rape, the reporter would

31 In China, grass-roots public security organs, i.e. public security bureaus at county level, will divide their jurisdiction into many precincts. A police station will be installed in each precinct to serve as an agency of the grass-roots public security organ.

32 Art. 175 Sec. 1 of PSOP provides, 'After the public security organ has received a case, and upon review finds that there are criminal facts, that require criminal liability to be pursued, and that the case falls within their jurisdiction; it shall file the case upon approval by the responsible person at a public security organ at the county level or higher. Where it is found that there are no facts of a crime or that the criminal facts are clearly minor and do not need to be pursued for criminal liability, or where there are other circumstances whereby there is no need to pursue for criminal liability in accordance with law, the case shall not be filed upon approval of the responsible person at a public security organ at the county level or above.'

33 For instance, the procuratorates nationwide had reviewed 1281631 suspects in total in the year 2011, 1238861 out of which had been subject to public prosecution; the courts nationwide had judged 1096954 defendants for public prosecution in total in the same year, but only 146 of which had been acquitted in the end. That is to say, the rates of non-prosecution and acquittal were only 3.34% and 0.13% respectively. See the Law Yearbook of China 2012, pp. 208, 209. According to relevant judicial statistics, it is not unfair to draw such a conclusion.

34 Art. 110 of CPL2012 provides, 'A People's Court, People's Procuratorate or public security organ shall, within the scope of its jurisdiction, promptly examine the materials provided by a reporter, complainant or informant and the confession of an offender who has voluntarily surrendered. If it believes that there are facts pointing to a crime and that criminal responsibility should be investigated, it shall file a case. If it believes that there are no facts pointing to a crime or that the facts are obviously incidental and do not require pursuing criminal responsibility, it shall not file a case and shall notify the complainant of the reason. If the complainant does not agree with the decision, he may ask for reconsideration.'

be well advised to have a forensic test, such as an injury assessment, physical examination or sampling,³⁵ as soon as possible, which usually takes place in a forensic laboratory of a public security bureau.

So far, a police station has almost fulfilled its duty in a criminal case.³⁶ Afterwards, the case, together with relevant records and forms, will be transferred to the Criminal Investigation Department (CID) of its corresponding public security bureau at county level for possible preliminary investigation and determination of filing a case.

2.1.1.2 Preliminary investigation and decision of filing a case

If necessary, the director of a CID will require a preliminary investigation of the case,³⁷ including the collection of evidential material³⁸ and the search for witnesses. On receiving tangible evidence from any provider, the investigators must register every single piece in a *List of Evidential Materials Received*,³⁹ and give the provider one copy of the list.⁴⁰ In case of having found a witness,

35 Art. 130 of CPL2012 provides, 'To ascertain certain features, conditions of injuries, or physical conditions of a victim or a criminal suspect, a physical examination may be conducted, and fingerprints, blood, urine and other biological samples may be collected. If a criminal suspect refuses to be examined, the investigators, when they deem it necessary, may conduct a compulsory examination. Examination of the persons of women shall be conducted by female officers or doctors.'

36 As the reception unit, it may, upon request, render further assistance in later stages of the criminal process, e.g. to help the CID of a grass-root public security bureau with the investigation, or to deliver a statement of the source of the case in a trial session. However, its lawful duty in this case has formally come to an end so far.

37 Art. 171 of PSOP provides, 'The public security organs shall quickly conduct a review of cases they accept or criminal leads they discover. If in the course of review it is discovered that case facts or leads are unclear, when necessary, upon the approval of the department's responsible persons, a preliminary investigation may be conducted. In the course of preliminary investigations, the public security organs may, in accordance with relevant laws and regulations, employ methods that do not limit the right to liberty or right to property of persons being investigated, such as questioning, making inquiries, inquests, evaluations, or gathering evidence.' A preliminary investigation of a case should therefore be regarded as an informal investigation before relevant criminal proceedings could formally be initiated through filing a case. Technically speaking, both preliminary and formal investigation should follow the same standard. The difference lies only in two aspects: 1. no compulsory measures shall be used in a preliminary investigation; and 2. the direct end of a preliminary investigation is just to convince the police that 'there are facts of a crime and criminal responsibility should be investigated' so as to decide filing a case, or the other way around.

38 Art. 48 of CPL2012 provides, 'All materials that prove the facts of a case shall be evidence. Evidence shall include: (1) Physical evidence; (2) Documentary evidence; (3) Testimony of witnesses; (4) Statements of victims; (5) Statements and exculpations of criminal suspects or defendants; (6) Expert opinions; (7) Records of crime scene investigation, examination, identification and investigative experiments; and (8) Audio-visual materials, and electronic data. The authenticity of evidence shall be confirmed before it can be admitted as the basis for making a decision on a verdict.'

39 See the model in the Form 3, Annex I.

40 Art. 167 of PSOP provides, 'Where a citizen turning someone in, making a report, accusation or whistle blower report, or turning themselves in, provides relevant evidentiary

the investigators shall, upon going through certain formalities⁴¹ and warning him against perjury,⁴² question him about the case; the answers will formally constitute a piece of *Record of Questioning*.⁴³ In fact, during the course of evidence collection and witness search, investigators usually have to look for many people who might know something or be able to provide some leads about the case. Such inquiries do not constitute a formal questioning of witnesses and therefore require no special formalities.⁴⁴ The answers to such inquiries would probably be recorded in working notes of the investigators instead of formal legal documents, which could be used as valuable or less valuable leads for solving the case, rather than as formal evidential materials which could be incorporated into the case file, and thus admitted as a basis of the future judgment. If such inquiries lead to an oral statement that is valuable enough to help prove or disprove the allegation, sooner or later and under certain formalities (usually a *Notice of Questioning*⁴⁵), the answerer will be formally questioned so as to form an effective legal document that is qualified as evidence. In fact, large-scale visiting, inquiring and searching have long been one of the most frequently used methods for solving cases in the Chinese pattern of policing, and represent the political tradition of ‘Mass Line’ in ‘socialist China’. The unused materials generated from such mass inquiries will be solely dominated by the police; while public prosecutors and judges, let alone the defence, will have little access to them.

If a crime scene has been found, the investigators will clear and block the relevant site,⁴⁶ and call for professional CID examiners to inspect the crime

materials to public security organs, the latter shall register them, make a list of evidentiary materials received, and have this signed by the person turning someone in, making a report, accusation or whistle-blower report, or turning themselves in. When necessary, pictures shall be taken or an audio or audio-visual recording made and properly preserved.’

- 41 Art. 122 of CPL2012 provides, ‘Investigators may question a witness at the scene, at his/her employer’s premises, at his/her domicile or at a location designated by the witness. Where necessary, the witness may be notified to provide testimony at a people’s procuratorate or a public security organ. Where the witness is questioned at the scene, the investigators shall present their work certificates; and where the witness is questioned at his/her employer’s premises, his/her domicile or a location designated by the witness, the investigators shall present the supporting documents issued by the people’s procuratorate or the public security organ. Witnesses shall be questioned individually.’
- 42 Art. 123 of CPL 2012 provides, ‘When a witness is questioned, he shall be instructed to provide evidence and give testimony truthfully and shall be informed of the legal responsibility that shall be incurred for intentionally giving false testimony or concealing criminal evidence.’
- 43 The format of *Records of Questioning* is similar to that of *Records of Reported Case*. See the model in the Form 4, Annex I.
- 44 See *infra*, *Notice of Questioning*
- 45 The notice is in triplicate, one for the witness, one for case file, and one for archive. The second duplicate is shown in the Form 5, Annex I.
- 46 Art. 209 Sec. 1 of PSOP provides, ‘The police sub-station, patrol police and other departments at the place where the crime occurred shall properly preserve the crime scene

scene. According to the relevant rules,⁴⁷ the latter shall, upon showing a *crime scene inspection document*,⁴⁸ examine the scene and make a record with photos and drawings of the site.⁴⁹

If the CID of a public security bureau at county level or higher levels finds, upon having obtained evidential material, that it is enough to conclude ‘there are facts pointing to a crime and criminal responsibility should be investigated’, they shall draft a *Report for the Permission of Filing a Case*, which briefly introduces the background to the case, what might happen, the legal basis for filing a case, and the plan for investigative work; and promptly submit it to the head of the public security bureau at county level or higher levels. Upon the latter’s approval, the decision to file a case will be made. At the same time, a formal certificate shall be made out.⁵⁰ At this point, the criminal proceedings must formally be initiated, and a formal investigation subsequently begun.

2.1.2 Investigation

After filing a case, the phase of investigation begins. As most cases are filed by public security organs, such cases will also be investigated by them. As for cases filed by procuratorates, the investigative departments of the procuratorates will investigate them. Cases of public prosecution comply with a principle called ‘Whoever files the case, investigates the case’. Investigation of cases concerning private prosecution is conducted by the private prosecutors who bring the cases to the people’s courts. These are usually the victims of the cases. Normally speaking, investigation of most criminal cases in China will undergo the following steps.

2.1.2.1 Summoning, custody and first interrogation

In China, the primary task of investigation is usually to identify and catch the suspects for interrogation, which frequently involves Technical Investigation

and evidence, control the suspects and immediately report to the public security organ department with primary responsibility.’

47 Art. 126 of CPL2012 provides, ‘Investigators shall conduct an inquest or examination of the sites, objects, people and corpses relevant to a crime. When necessary, experts may be assigned or invited to conduct an inquest or examination under the direction of the investigators.’ Art. 131, ‘A record shall be made of the circumstances of an inquest or examination, and it shall be signed or sealed by the participants in the inquest or examination and the eyewitnesses.’

48 Art. 209 Sec. 2 of PSOP provides, ‘After the investigators conducting the inquest receive notice, they shall immediately report to the scene; at the inquest scene, they should have a crime scene inspection document.’

49 Art. 211 of PSOP provides, ‘Examination of a crime scene requires taking photos, drawing maps of the site, and making records. The examiners and the witnesses shall sign on the records. Major crime scenes shall be video-taped.’

50 See a sample of the *Certificate of the Decision of Filing a Case* in the Form 6, Annex I.

Measures (TIM)⁵¹ to help locate suspects. If necessary, the suspects will, through certain formalities⁵² (typically the *Custody Warrant*⁵³ and the *Notice of Custody*⁵⁴), be subject to (police) custody,⁵⁵ which depends solely on the discretion of the investigative authorities (usually a PSO). ‘To take a suspect into custody, a report for permission of custody⁵⁶ shall be formulated and submitted to the head of a public security organ at county level or higher levels, upon whose approval a custody warrant shall be made. When enforcing custody, the custody warrant must be shown, on which the suspects shall sign their name and leave their thumb print; in case the suspects refuse to sign their name and leave their thumb print, the investigators shall make a note.’⁵⁷ In case of summoning a suspect, a *Notice of Summoning*⁵⁸ shall be used. According to Chinese criminal procedure, summoning is not a compulsory measure,⁵⁹ as it

51 Technical Investigation Measures, refers to certain technical means by which investigative authorities detect particular criminal acts, typically including wiretapping, electronic monitoring or surveillance, secret camera and video, mail checks and other secret technical means.

52 Art. 83 of CPL2012 provides, ‘When detaining a person, a public security organ must produce a custody warrant. After being taken into custody, a detainee shall be immediately transferred to a detention house for detention within 24 hours. The family of the detainee shall be notified of the detention within 24 hours after the detention, unless the notification cannot be processed or where the detainee is involved in crimes endangering State security or crimes of terrorist activities, and such notification may hinder the investigation. The family of the detainee shall be notified of relevant information immediately after the circumstances impeding investigation has been eliminated.’

53 See the model in the Form 7, Annex I.

54 See the model in the Form 8, Annex I.

55 Art. 80 of CPL2012 provides, ‘Public security organs may initially detain an active criminal or a major suspect under any of the following conditions:

- (1) if he is preparing to commit a crime, is in the process of committing a crime or is discovered immediately after committing a crime;
- (2) if he is identified as having committed a crime by a victim or an eyewitness;
- (3) if criminal evidence is found on his body or at his residence;
- (4) if he attempts to commit suicide or escape after committing a crime, or he is a fugitive;
- (5) if there is likelihood of his destroying or falsifying evidence or tallying confessions;
- (6) if he does not tell his true name and address and his identity is unknown; and
- (7) if he is strongly suspected of committing crimes from one place to another, repeatedly, or in a gang.’

56 This report should be kept in the internal file of police dossier. For details, see *infra* 2.2.1 Police disclosure.

57 Art. 121 Sec. 1 of PSOP.

58 See the model in the Form 9, Annex I.

59 Art. 117 of CPL2012 provides, ‘A criminal suspect who does not need to be arrested or held in custody may be summoned to a designated location of the city or county where he/she lives or to his/her domicile for interrogation, provided that the supporting documents issued by the relevant people’s procuratorate or public security organ are furnished. A criminal suspect found at the scene may be orally summoned by a law enforcement officer by presenting his/her work certificate, provided that the oral summon shall be noted in the written records of interrogation. Summons or compelled appearance in court shall not last longer than 12 hours. For complicated cases of grave circumstances where detention or

is designed for ‘a criminal suspect who does not need to be arrested or held in custody’. ‘When summoning the criminal suspect, the notice of summons and investigation personnel’s work-identification shall be presented, and the suspect shall sign and leave a thumb print on the summons. After the criminal suspect appears in the case, he shall fill in the time of the appearance on the summons. After the interrogation concludes, he shall fill in the concluding time on the summons. Where the suspect refuses to write this on the summons, investigative personnel shall make a notice of this on the summons.’⁶⁰

Upon appearing in the CID, a suspect shall promptly be subject to interrogation,⁶¹ and his answers kept in a *Record of Interrogation*,⁶² Interrogation might be the most significant and fundamental way of investigation in China, since it may generate not only confession and plea of defendants on which Chinese criminal justice relies heavily, but also possible leads for other crucial evidence. According to relevant rules, ‘When interrogating a suspect, investigators shall first ask whether the suspect has committed a crime and inform the suspect of legal provisions that truthfully recounting one’s criminal acts may result in lenient or commuted punishment, and let them describe the circumstances of their guilt or explain their innocence, then ask other questions. A criminal suspect shall truthfully answer questions raised by investigative officers. However, there is a right to refuse questions which are not relevant to the case. The first interrogation shall clarify relevant information such as the suspect’s full name, aliases, previously used names, date of birth, household registration location, current residence, place of origin, birthplace, ethnicity, profession, education level, family situation, work experience and background, whether they are a people’s representative or a member of a political consultative committee, and whether they have previously received a criminal penalty or an administrative disposition.’⁶³ ‘Investigators shall truthfully and clearly note down the questions and the suspects’ confessions or explanations in the record. The interrogation record should be made in a material that can sufficiently preserve text.’⁶⁴ ‘Interrogation records shall be shown to the suspect to verify or read aloud to them. If the record has errors or omissions, the suspect shall be allowed to supplement or make corrections. After the suspect has confirmed that there are no errors, he shall sign each page,

arrest is necessary, summons or compelled appearance in court shall not last longer than 24 hours. A criminal suspect shall not be detained under the disguise of successive summons or compelled appearance. A criminal suspect shall be guaranteed with necessary food and rest when he/she is summonsed or compelled to appear before investigators.’

60 Art. 194 Sec. 1, 2 of PSOP.

61 Art. 84 of CPL2012 provides, ‘A public security organ shall interrogate a person held in custody within 24 hours after being taken into custody. Once it is discovered that custody should not have been imposed, the public security organ shall immediately release the person, and issue a release certificate.’

62 See the model in the Form 10, Annex I.

63 Art. 198 of PSOP.

64 Art. 200 of PSOP.

leave a thumb print, and write on the last page ‘I have read the above record (or had it read to me), and it reflects what I have said.’ Where they refuse to sign or leave a thumb print, investigators shall note this in the record. All items listed in the interrogation record shall be filled in completely in accordance with relevant rules. Investigators and interpreters shall sign the interrogation record.’⁶⁵

2.1.2.2 Formal pre-trial detention and ongoing interrogation and questioning (Police) custody is only provisional pre-trial detention that can last for up to 37 days.⁶⁶ ‘If the public security organ deems it necessary to arrest⁶⁷ a detainee, it shall, within three days after the detention,⁶⁸ submit a request to the People’s Procuratorate for examination and approval. Under special circumstances, the time limit for submitting a request for examination and approval may be extended by one to four days. As to the arrest of a major suspect involved in crimes committed from one place to another, repeatedly, or in a gang, the time limit for submitting a request for examination and approval may be extended to 30 days. The People’s Procuratorate shall decide either to approve or disapprove the arrest within seven days from the date of receiving the written request for approval of arrest submitted by a public security organ. If the People’s Procuratorate disapproves the arrest, the public security organ shall, upon receiving notification, immediately release the detainee and inform the People’s Procuratorate of the result without delay. If further investigation is necessary, and if the released person meets the conditions for releasing on bail pending trial or for residential surveillance, he shall be allowed to be released on bail pending trial or subjected to residential surveillance according to law.’⁶⁹

‘Where it is necessary to request the arrest of a criminal suspect, upon approval by the responsible persons at a public security organ at the county level or higher, a written request for approval of arrest⁷⁰ shall be drafted and sent along with the case file materials and evidence to the people’s procuratorate at the same level to review for approval of arrest.’⁷¹ ‘After receiving the people’s procuratorates written approval of arrest,⁷² the responsible persons at a public security organ at county level or higher shall sign and issue an arrest warrant,⁷³ immediately have it enforced, and have an enforcement receipt sent to the

65 Art. 201 of PSOP.

66 See *infra* Art. 89 of CPL2012.

67 The term ‘arrest’ has long been incorrectly used in China to refer to the formal pre-trial detention of a suspect as compared with the provisional pre-trial detention, i.e. (police) custody set forth in Art. 80 of CPL2012. Therefore, it is notable that ‘arrest’ in a Chinese context differs from its original meaning in English.

68 Here the ‘detention’ refer to (police) custody set forth in Art. 80 of CPL2012.

69 Art. 89 of CPL2012.

70 See the model in the Form11, Annex I.

71 Art. 133 of PSOP.

72 See the model in the Form12, Annex I.

73 See the model in the Form13, Annex I.

people's procuratorate that made the decision to approve the arrest. If the arrest cannot be enforced, an enforcement receipt shall also be sent to the people's procuratorate, explaining the reasons for the failure of enforcement.⁷⁴ 'Where an arrest is enforced, the arrest warrant must be presented and the person being arrested instructed to sign it and leave a fingerprint. Where they refuse to sign or leave a fingerprint, the investigative staff shall make a note. After arrest, the arrested person shall be immediately delivered to the detention centre for detention.'⁷⁵ 'After an arrest of a suspect is enforced, unless there is no way to give notice, a written notification of the arrest⁷⁶ shall, within 24 hours of the arrest, be drafted and given to the family of the arrested person. The arrest notification shall clearly state the reasons for the arrest and the place of detention.'⁷⁷

After a suspect has been subject to formal pre-trial detention (i.e. the so-called 'arrest' according to Chinese criminal procedure), the investigators will have more leeway to deal with the case, typically involving ongoing interrogation of the suspect and questioning of witnesses and victim, generating more pieces of record of interrogation or record of questioning, which can be used for comparison and verification. Those pieces of record of interrogation and record of questioning will frequently amount to a major part of the evidential material compiled into the case file.⁷⁸

2.1.2.3 Conclusion of investigation and compilation of police dossier

An investigation can be concluded, where '1) the facts of the case are clear; 2) the evidence is credible and sufficient; 3) the nature of the crime and the charges are correctly recognized; 4) the legal formalities are completed; 5) The case should be prosecuted in accordance with law'⁷⁹ To conclude an investigation, investigators shall draft and submit a conclusion report of the case,⁸⁰ containing '1) the criminal suspects' basic situation; 2) whether or not compulsory measures were employed and the reason; 3) the facts of the case and evidence; 4) the legal basis and opinions on disposition.'⁸¹ This report shall eventually be subject to review by the responsible persons at a public security organ at county level or higher, according to whose decision the formal prosecution opinions⁸² shall be formulated and transferred, together with relevant case file and evidence, to the people's procuratorate at the same level for examination

74 Art. 138 of PSOP.

75 Art. 139 Sec. 1 of PSOP.

76 See the model in the Form 14, Annex I.

77 Art. 141 Sec. 1 of PSOP.

78 For details, see *infra* 2.2.1 Police disclosure.

79 See Art. 274 Sec. 1 of PSOP.

80 This report will be kept in the internal file of the police dossier.

81 See Art. 275 Sec. 1 of PSOP.

82 See the model in the Form 15, Annex I.

and decision. At the same time, the criminal suspect and his/her defence lawyer shall be informed of the transfer of the case.⁸³

After investigation is concluded, all the case file material must be bound and filed in accordance with relevant requirements. When transferring a case to the people's procuratorate, only the litigation file⁸⁴ is transferrable, the investigation file⁸⁵ is kept by the public security organs for review. Where a suspect's property and its proceeds, documents that have been sealed or seized, or assets that have been frozen, are used as evidence, they shall be transferred with the case; meanwhile, a list of items transferred with the case shall be made in duplicate, one duplicate to be kept by the PSO itself, one to be submitted to the people's procuratorate.⁸⁶

The police proceedings have now formally come to an end, and the criminal cases and suspects will enter a new phase of criminal process, under control of the procuratorates.

2.1.3 *The procuratorate proceedings*

During pre-trial proceedings, procuratorates undertake two major tasks that closely relate to a defendant's civil rights: one is to review and approve a PSO's request for arrest; the other is to review the PSO's prosecution opinions and accordingly to decide to initiate or drop the prosecution.

2.1.3.1 *Review and approval of request for arrest*

Upon receiving a PSO's *written request for approval of arrest*, corresponding procuratorates shall check whether the suspect deserves a formal pre-trial detention according to relevant provisions,⁸⁷ and accordingly make a decision

83 See Art. 276, 279 of PSOP.

84 See infra 2.1.1 Police disclosure.

85 Ditto.

86 See Art. 277, 278 of PSOP. For detail, see infra 2.2.1 Police disclosure.

87 Art. 79 of CPL2012 provides, 'Where there is evidence to support the facts of a crime and the criminal suspect or defendant has committed a crime punishable by fixed-term imprisonment or severer punishments, and where it will not effectively prevent the following dangers to the society caused by the concerned criminal suspect or defendant if he/she is released on bail pending trial, the criminal suspect or defendant shall be arrested in accordance with the law:

- (1) The criminal suspect or defendant may commit a new crime;
- (2) There is a real risk that the criminal suspect or defendant may endanger State security, public security or public order;
- (3) The criminal suspect or defendant may destroy or falsify evidence, interfere with the witnesses who give testimony or collude with others to make confessions tally;
- (4) The criminal suspect or defendant may retaliate against the victims, informants or accusers; or
- (5) The criminal suspect or defendant tries to commit suicide or escape.

Where there is evidence to support the facts of a crime and the criminal suspect or defendant has committed a crime that is punishable by a fixed-term imprisonment of ten years or

within seven days as to whether or not to approve the request. In brief, three types of results can be expected in response to a PSO's request for arrest. The procuratorate may approve the request and thus issue a *written approval of arrest*; additionally, should it find that any other suspect who also deserves to be arrested has not been listed in the PSO's *written request for approval of arrest*, it may issue a *written opinion to require the arrest of the criminal suspect*.⁸⁸ It may also disapprove the request and in turn issue a *written decision to disapprove arrest*;⁸⁹ in this case, 'Where [PSO] feel that the people's procuratorate's decision to disapprove arrest was in error and requires reconsideration, they shall draft a *written opinion requesting reconsideration* within five days after receiving the *written decision to disapprove arrest*, and upon receiving the permission of the responsible persons at a public security organ at the county level or higher, send it to the people's procuratorate at the same level for reconsideration. If the opinion is not accepted, and it is felt that a review is required, a *written opinion requesting review* shall be drafted within five days after receiving the people's procuratorate's *written reconsideration decision*, and upon receiving the permission of the responsible persons at a public security organ at the county level or higher, send it to the people's procuratorate at the next higher level, along with the reconsideration decision from procuratorate at the same level.'⁹⁰ The people's procuratorate at the next higher level shall accordingly issue a *written decision on review*. In a third case,⁹¹ procuratorates may ask PSO to supplement the investigation by issuing a *written decision on supplementary investigation*; the latter shall then supplement the investigation in accordance with the former's outline for supplementary investigation. When PSO complete supplementary investigation and feel that the requirements for arrest are met, they shall apply for approval of arrest de novo, and submit a *report on supplementary investigation*.

2.1.3.2 Review and initiation of public prosecution

After investigation, if investigative authorities think the suspect is guilty and deserves a criminal punishment, the case will be delivered to the corresponding people's procuratorate for review and initiation of public prosecution.⁹² Upon receiving PSO's *prosecution opinions*, corresponding procuratorates shall

severer punishments, or where there is evidence to support the facts of a crime, and the criminal suspect or defendant has committed a crime that is punishable by fixed-term imprisonment or severer punishments, but has intentionally committed a prior crime or has an unknown identity, the criminal suspect or defendant shall be arrested in accordance with the law. A criminal suspect or defendant who is released on bail pending trial or is placed under residential surveillance may be arrested if he/she commits grave violations of the provisions with respect to release on bail pending trial or residential surveillance.'

88 See the model in the Form 16, Annex I.

89 See the model in the Form 17, Annex I.

90 See Art. 137 of PSOP.

91 See Art. 134 of PSOP.

92 For more details, see 1.2.2.3 The Current Prosecutorial System of China.

ascertain whether the case should be brought to justice according to relevant provisions,⁹³ and accordingly make a decision within one month (under certain circumstances 1.5 months)⁹⁴ as to whether or not to initiate a public prosecution.

‘When examining a case, a people’s procuratorate shall interrogate the criminal suspect, consult the defender, the victim and his/her agent ad litem, and record their opinions in writing. Any written opinion of the defender, the victim and his/her agent ad litem shall be attached to the case files.’⁹⁵ Therefore, what procuratorates may add to the case file consists largely in several pieces of the *record of interrogation*, some procedural instruments, and possible written opinions of the defender or the victim and his/her agent *ad litem*. In other words, what the defence may discover against the prosecution consists largely in police dossier.

Similarly, three types of results can be expected after the review of the case with PSO’s *prosecution opinions*. The procuratorate may support public prosecution of the case⁹⁶ and thus formulate the indictment.⁹⁷ It may also drop the case⁹⁸ and in turn ‘deliver the decision in writing [i.e. the *written decision*

93 Art. 168 of CPL2012 provides, ‘In examining a case, a People’s Procuratorate shall ascertain:

(1) whether the facts and circumstances of the crime are clear, whether the evidence is reliable and sufficient and whether the charge and the nature of the crime has been correctly determined;

(2) whether there are any crimes that have been omitted or other persons whose criminal responsibility should be investigated;

(3) whether it is a case in which criminal responsibility should not be investigated;

(4) whether the case has an incidental civil action; and

(5) whether the investigation of the case is being lawfully conducted.’

94 Art. 169 of CPL2012 provides, ‘A People’s Procuratorate shall make a decision within one month on a case that a public security organ has transferred to it with a recommendation to initiate a prosecution; an extension of a half month may be allowed for major or complex cases. If jurisdiction over a case to be examined and prosecuted by a People’s Procuratorate is altered, the time limit for examination and prosecution shall be calculated from the date on which another People’s Procuratorate receives the case after the alteration.’

95 Art. 170 of CPL2012.

96 Art. 172 of CPL2012 provides, ‘When a people’s procuratorate is of the opinion that the facts of a crime committed by a criminal suspect have been ascertained, the evidence is concrete and sufficient, and the suspect shall be subject to the criminal liability in accordance with the law, it shall make a decision on prosecution, initiate a public prosecution in a people’s court in accordance with the provisions on trial jurisdiction, and transfer relevant case materials and evidence to the people’s court.’

97 The indictment is the most important instrument in procuratorate dossier.

98 Art. 173 of CPL2012 provides, ‘A people’s procuratorate shall make a decision on non-prosecution of a case if there is no fact pointing to the crime that has allegedly been committed by the criminal suspect or there is any of the circumstances set forth in Article 15 herein. With respect to a case that is minor and the offender need not be given criminal punishment or need be exempted from it according to the Criminal Law, the People’s Procuratorate may decide not to initiate a prosecution. Where a people’s procuratorate has decided not to prosecute a case, it shall take measures to release the property sealed up, seized or frozen during investigation. Where administrative punishments, administrative sanctions or confiscation of illegal gains shall be imposed on the person spared from

of non-prosecution] to the public security organ. If the public security organ considers that the decision not to initiate a prosecution is wrong, it may demand reconsideration, and if the demand is rejected, it may submit the matter to the People's Procuratorate at the next higher level for review.⁹⁹ Likewise, *written opinion requesting a reconsideration*, *written opinion requesting review*, *written reconsideration decision*, and *written decision on review* will also be involved and attached to the case file.

In a third case, the procuratorate may ask PSO to supplement the investigation or do so itself.¹⁰⁰ Similarly, *written decision on supplementary investigation and report on supplementary investigation* will also be involved and attached to the case file.

2.1.4 Court proceedings

Most criminal cases¹⁰¹ in China will be subject to a trial which is usually conducted by a collegial panel of professional judges.¹⁰² Generally speaking,

prosecution, the people's procuratorate shall issue procuratorial opinions and transfer the case to relevant authorities for handling. Such relevant authorities shall promptly notify the people's procuratorate of the handling results.'

99 See Art. 175 of CPL2012.

100 Art. 171 of CPL2012 provides, 'When examining a case, a people's procuratorate may request the relevant public security organ to provide the evidence materials needed for court trial proceedings, and may request the public security organ to explain the legality of evidence gathering if it is of the opinion that the evidence may have been gathered by unlawful means as stipulated in Article 54 herein. In examining a case that requires supplementary investigation, the People's Procuratorate may remand the case to a public security organ for supplementary investigation or conduct the investigation itself. In cases where supplementary investigation is to be conducted, it shall be completed within one month. Supplementary investigation may be conducted twice at most. When supplementary investigation is completed and the case is transferred to the People's Procuratorate, the time limit for examination and prosecution shall be recalculated by the People's Procuratorate. A people's procuratorate shall make a decision on non-prosecution of a case for which a second supplementary investigation has been conducted, if it is of the opinion that there is still not sufficient evidence and that the case fails to meet the requirements for prosecution.'

101 For instance, the procuratorates nationwide had reviewed 1281631 suspects in total in the year 2011, 1238861 out of which had been subject to public prosecution. That is to say, the rates of prosecution were up to 96.66%. See the Law Yearbook of China 2012, pp. 208, 209.

102 Art. 178 of CPL2012 provides, 'Trials of cases of first instance in the Primary and Intermediate People's Courts shall be conducted by a collegial panel composed of three judges or of judges and people's assessors totalling three. However, cases in which summary procedure is applied in the Primary People's Courts may be tried by a single judge alone. Trials of cases of first instance in the Higher People's Courts or the Supreme People's Court shall be conducted by a collegial panel composed of three to seven judges or of judges and people's assessors totalling three to seven. When performing their functions in the People's Courts, the people's assessors shall enjoy equal rights with the judges. Trials of appealed and protested cases in the People's Courts shall be conducted by a collegial panel composed of three to five judges. The members of a collegial panel shall be odd in number.'

court proceedings encompass ‘Procedure of First Instance’,¹⁰³ ‘Procedure of Second Instance’,¹⁰⁴ ‘Procedure for Review of Death Sentences’,¹⁰⁵ and ‘Procedure for Trial Supervision’.¹⁰⁶ Specifically speaking, ‘Procedure of First Instance’ has two forms: common procedure¹⁰⁷ and summary procedure,¹⁰⁸ dealing with two kinds of cases, i.e. ‘Cases of Public Prosecution’¹⁰⁹ and ‘Cases of Private Prosecution’.¹¹⁰ All in all, the common procedure of first instance for cases of public prosecution represents the most typical pattern of court proceedings in China, which can be divided into three major stages: pre-trial preparation, court session, and judicial deliberation and decision.

2.1.4.1 Pre-trial preparation

Upon receiving an indictment with the relevant case file from procuratorate, the court should first review in form whether the public prosecution is acceptable and thus shall be subject to a court session.¹¹¹ ‘After having decided to commence court sessions to try a case, a people’s court shall determine the

103 See Part Three Chapter II of CPL2012.

104 See Part Three Chapter III of CPL2012.

105 See Part Three Chapter IV of CPL2012.

106 See Part Three Chapter V of CPL2012.

107 See Part Three Chapter II Section 1,2 of CPL2012.

108 See Part Three Chapter II Section 3 of CPL2012.

109 See Part Three Chapter II Section 1 of CPL2012.

110 See Part Three Chapter II Section 2 of CPL2012.

111 Art. 180 of *The Supreme People’s Court’s Interpretation On The Application Of The PRC Criminal Procedure Law* (hereinafter SPC Interpretation): After people’s courts receive the indictments in a public prosecution (8 copies adding 5 additional copies for each additional defendant in the case), the case file, and the evidence, they shall designate adjudicatory personnel to review the following contents:

(1) whether it is within that court’s jurisdiction;

(2) Whether or not the indictment clearly states the defendant’s identity, whether or not he has been given a criminal penalty or is currently serving a criminal penalty or under compulsory measures, the type of compulsory measures or location of detention, and the time, place, method and consequences of the crime, as well as other circumstances that might influence the verdict or sentencing;

(3) Whether or not evidentiary materials that prove the facts of the alleged crime have been transferred, including any approvals of use of technical investigative measures and all evidentiary materials gathered;

(4) Whether or not the defendant’s unlawful gains or other property involved in the case have been sealed, seized or frozen, and attach evidentiary materials showing that the property should be recovered in accordance with law.

(5) Whether or not the victims’ names, addresses and contact methods are clearly listed; whether or not the list of witnesses and evaluators is attached; whether or not they have notified witnesses, evaluators and persons with expert knowledge to appear in court and have clearly listed their names, sex, ages, professions, addresses, and contact information; whether or not there a list of witnesses, evaluators and victims requiring protection is attached;

(6) Where the parties have already retained defenders or agents ad litem or have accepted legal aid, whether or not the names, addresses and contact information is listed for the defenders or agents ad litem;

members of the collegial panel, and serve on the defendant and his/her defender the duplicate of the indictment of the people's procuratorate no later than ten days before the commencement of a court session.

Before the commencement of a court session, judges may convene a meeting with the public prosecutor, the party concerned and his/her defender and agent ad litem to deliberate and consult their opinions on withdrawal, the list of witnesses, exclusion of illegal evidence and other trial-relevant issues.¹¹² Specifically speaking, a pre-trial meeting can be convened in any of the following circumstances: '(1) The parties and their defenders or agents ad litem request the exclusion of illegal evidence; (2) There is a relatively large amount of evidence and the case circumstances are major and complicated; (3) major social influence; (4) Other circumstances requiring that a pre-trial conference be convened.'¹¹³ 'If convening a pre-trial conference, the chief judge may learn of the following matters and request opinions from both sides: (1) Whether or not there is any objection to the case's jurisdiction; (2) Whether or not there is an application to recuse relevant personnel; (3) Whether or not there is an application to collect evidence gathered during the investigation or during the review for prosecution from public security organs or people's procuratorates that has not yet been transferred and which shows that the defendant is innocent or that the crime was minor; (4) Whether or not new evidence is submitted; (5) Whether or not there are any objections to the list of witnesses, evaluators or persons with expert knowledge appearing in court; (6) Whether or not there is an application to exclude illegal evidence; (7) Whether or not there is an application to not have an open trial; (8) Other questions relevant to the trial. Adjudicators may question both parties as to whether or not they have objections to the evidence, and shall make evidence that is objected to the focus of courtroom investigation; the raising and verification of evidence for which there are no objections may be simplified. Where the victim, his legal representative or close relatives have raised an attached civil lawsuit, it may be mediated. A record of the circumstances of the pre-trial conference shall be recorded.'¹¹⁴

'Once the date for a court session is determined, the people's court shall notify the people's procuratorate of the time and place of the court session, summon the party concerned, inform the defender, agent ad litem, witnesses,

(7) Whether or not an attached civil lawsuit has been raised; if an attached civil lawsuit has been raised, whether the names, addresses, and contact information for the parties to the attached civil litigation are listed, and whether or not relevant evidentiary materials are attached;

(8) Whether or not all litigation documents and formalities for investigation and review for prosecution are complete.

(9) Whether or not there are any of the circumstances in Article 15, paragraphs 2-6 of the Criminal Procedure Law providing that criminal responsibility should not be pursued.

112 Art. 182 Sec. 1, 2 of CPL2012.

113 See Art. 183 of SPC Interpretation.

114 Art. 184 of SPC Interpretation.

experts and court interpreters, and serve the summons and notices three days before the commencement of the court session. If a case is to be tried in an open court session, the name of the defendant, the causes of action and the time and location of the court session shall be announced publicly three days before the scheduled open court session. The circumstances of the above-mentioned proceedings shall be recorded in writing, and be signed by the judges and the court clerk.¹¹⁵

2.1.4.2 Court session

In brief, a court session in China has three major parts: courtroom investigation, courtroom debate, and final statement. Courtroom investigation consists largely of cross examination and presentation and rebuttal of evidence. Its purpose is to verify the prosecution case and thus ascertain the truth. In fact, the main activity of courtroom investigation is the public prosecutors reading aloud the relevant case file with the defence rebutting or conceding what the former has presented.¹¹⁶ Other judicial activities also consist largely in producing and reviewing written documents of the dossier. This might be the very reason why a trial is in Chinese referred to with the word shen ‘审’ that literally has nothing to do with ‘hear’, but an ancient connotation of ‘see’. Therefore, it appears not unfair to argue that court sessions in China are premised in large part on case file on paper. Based on the courtroom investigation, a courtroom debate will subsequently be developed, focusing on controversial issues regarding the facts or the law. By the end of a court session, the defendant is entitled to a final statement. The entire court session shall be recorded verbatim in writing by court clerks, forming the *record of court session*.

According to Art. 11 and Art. 183 of CPL2012, court sessions shall be conducted in public, unless otherwise provided by this Law. In fact, except for a small proportion of criminal cases, usually involving state secrets or private affairs, most criminal cases in China have indeed been subject to public court sessions. Specifically speaking, Chinese citizens of age can present their ID cards to acquire passes for audience of public court sessions; Chinese journalists can enter public court sessions by showing their credentials, and take photos or videos with permission of presiding judges; foreign citizens or journalists can also take part in public court sessions involving foreigners with permission of relevant authorities. During the recent judicial reforming campaign regarding transparency, online live or taped broadcasting of public court sessions of high-profile criminal cases have been tried by many local courts, which has been approved by SPC. And mass media are also becoming enthusiastic to report increasing criminal cases in an increasingly timely manner. It is therefore fair to argue that the court sessions should be considered as the most transparent stage of Chinese criminal process.

115 Art. 182 Sec. 3, 4 of CPL2012.

116 See Chen 2006, p. 79.

2.1.4.3 Judicial deliberation and decision

After the court session, the members of the collegial panel shall discuss and deliberate on the case. ‘If opinions differ when a collegial panel conducts its deliberations, a decision shall be made in accordance with the opinions of the majority, but the opinions of the minority shall be entered in the records. The records of the deliberations¹¹⁷ shall be signed by the members of the collegial panel.’¹¹⁸ ‘After the hearings and deliberations, the collegial panel shall render a judgment. With respect to a difficult, complex or major case, on which the collegial panel considers it difficult to make a decision, the collegial panel shall refer the case to the president of the court for him to decide whether to submit the case to the adjudicative board for discussion and decision. The collegial panel shall execute the decision of the adjudicative board.’¹¹⁹

In this case, deliberation of the adjudicative board shall also be recorded verbatim in writing, and kept in the internal (undiscoverable) file of the court dossier; while the external (discoverable) file of the court dossier consists largely in judgments and *records of court sessions*.

2.1.5 Execution

Execution begins after judgments enter into force. In brief, public surveillance, criminal detention, and deprivation of political rights shall be executed by PSO; fixed-term imprisonment, life imprisonment and the death penalty with a two-year reprieve shall be executed by the prison; and death penalty, financial penalties, and confiscation of property shall be executed by people’s courts.

At this stage, the issue of discovery arises mainly in two circumstances: 1) a criminal is qualified for commutation or parole; 2) it is discovered that a criminal committed another crime for which he had not been sentenced before the judgment was pronounced; or that he has committed a new crime after the judgment was pronounced but before the punishment had been completely executed. In the former case, a court proceeding will be launched, to which § 2.1.4 applies; while in the latter case, an investigation proceeding will begin, to which § 2.1.2 applies.

2.2 Internal transparency in common criminal cases

Before any in-depth elaboration on this topic, it is of great significance to make clear the concepts involved, since we are talking about quite a different legal system. In a Chinese context, evidence and other materials in criminal matters

117 Records of deliberation of collegial panels shall be kept in the internal (undiscoverable) file of court dossier.

118 Art. 179 of CPL2012.

119 Art. 180 of CPL2012.

are usually collected by public security organs¹²⁰ during the investigative stage, most of which are testimonies and confessions. These materials will be compiled into a dossier whose admissibility is automatic and whose reliability is recognized as superior due to the ubiquitous ‘trial mode centralized on the files and notes existing in Chinese criminal trial’.¹²¹ Therefore, internal transparency of criminal procedure in the Chinese context refers virtually to a series of rules which provide how to share the dossier, especially between relevant authorities. In other words, internal transparency in China, unlike its western counterparts, focuses on the disclosure of information between the competent authorities (i.e. the police, the prosecution, and the judiciary), rather than between the prosecution and the defence. As for the latter, the right of defence lawyers to access to the dossier (or a defence lawyer’s right to discover case file) is crucially important.

2.2.1 *Police disclosure*

In China, the so-called ‘filing a case’ has always been provided as an independent phase of criminal procedure.¹²² In this phase, the institution in charge shall, ‘within the scope of its jurisdiction, promptly examine the materials provided by a reporter, complainant or informant and the confession of an offender who has voluntarily surrendered. If it believes that there are facts of a crime and criminal responsibility should be investigated, it shall file a case. If it believes that there are no facts of a crime or that the facts are obviously incidental and do not require investigation of criminal responsibility, it shall not file a case and shall notify the complainant of the reason’,¹²³ in order to filter out cases that should or need not be resolved by criminal justice. As for the scope of jurisdiction, Art. 18 Sec. 1 of CPL2012 provides that ‘investigation in criminal cases shall be conducted by the public security organs, except as otherwise provided by law’. In other words, common criminal cases in China shall in principle be subject to PSO’s jurisdiction. Accordingly, most criminal processes in China are indeed launched by the police, who have great discretionary powers in deciding whether or not to treat someone as a criminal suspect. Moreover, the police have more than sufficient resources to prevail over the defence in the investigation of criminal cases and collection of relevant evidence. Not

120 The police department in the Chinese government, hereinafter referred to as PSO.

121 In this trial mode, the public prosecutors dominate and control the whole hearing in trial by reading the files and notes, and the trial of court becomes into a procedure of reviewing and affirming the files and notes. See Chen 2006, p. 79.

122 All the three versions (79/96/13) of China’s criminal procedure code (hereinafter CPL1979, CPL1996, and CPL2012) have provided ‘filing a case’ as an independent phase in Part Two Chapter I. This special setting, invented in the historical background that Chinese people just endured ten years’ nightmare of the Cultural Revolution, was to protect people from arbitrary criminal sanctions.

123 Art. 110 of 2013 Chinese Criminal Procedural Law (CPL2012).

only the defence, but also the prosecution and even the judiciary have to rely upon the police-made dossier to formulate their case, so it is not unfair to argue that Chinese police play a fundamental – if not the most significant – part in criminal procedure, and thus that police disclosure forms the corner stone of internal transparency of Chinese criminal procedure, especially given the fact that the formulation of the police dossier in China's criminal justice is a closed and exclusive process, during which only PSO have the say in the decision of how to formulate the police dossier.¹²⁴

According to the criminal procedure code and other relevant rules, Chinese police shall in principle collect evidence comprehensively, and submit the evidence to the prosecution. Specifically speaking, CPL2012 requires police disclosure to the prosecution as a principle. Art. 160 so reads, 'A case whose investigation is closed by a public security organ shall have clear facts of crimes and sufficient and concrete evidence. The public security organ shall prepare written prosecution opinions, and submit the same together with the case files and evidence to the people's procuratorate at the same level for examination and decision, and shall at the same time inform the criminal suspect and his/her defence lawyer of the transfer of the case.'¹²⁵ As for the scope of the evidence collected by the police, Art. 113 has provided a general rule that 'With respect to a criminal case which has been filed, the public security organ shall carry out investigation, collecting and obtaining evidence to prove the criminal suspect guilty or innocent or to prove the crime to be minor or grave. Active criminals or major suspects may be detained first according to law, and criminal suspects who meet the conditions for arrest shall be arrested according to law.'¹²⁶ Although neither CPL2012 nor CPL1996 explicitly and directly require that police disclose exculpatory evidence to the prosecution, it is still reasonable to deduce that they should do so according to the two clauses above.

Moreover, for the first time ever defence lawyers have been formally entitled to check on the police with respect to the latter's disclosure duty; CPL2012 has added in its Art. 39 that 'Where a defender is of the opinion that the relevant public security organ or people's procuratorate fails to submit certain evidence gathered during the investigation period or period for examination before prosecution while such evidence can prove that the criminal suspect or defendant is innocent or the crime involved is a petty offense, the defender shall be entitled to apply with the people's procuratorate or the people's court concerned to obtain such evidence.' Therefore, it is fair to say that some progress has been made by CPL2012 in internal transparency of criminal procedure.

However, Chinese police still have a definite advantage over the defence in terms of evidence control. On the one hand, their disclosure duty is not directly to the defence, but to the prosecution. According to Art. 36 of CPL2012, during

124 See *infra*.

125 Art. 129 of CPL1996 is almost identical to this clause, but without the last sentence.

126 CPL1996 provided exactly the same rule in its Art. 89.

the investigation stage, what a defence lawyer can do is limited to, among other things,¹²⁷ ‘inquire of the investigating organ the offense that the criminal suspect is suspected of and the information pertaining to the case, and offer his/her opinions.’ When finishing the investigation, the police still need not disclose any evidence or material to the defence; rather, they are obliged to do so to the prosecution.¹²⁸ Given the new clause that Art. 160 of CPL2012 adds to Art. 129 of CPL1996,¹²⁹ and together with the new clause in CPL2012 that entitles defence lawyers to comprehensive discovery of the case file after investigation,¹³⁰ the logic of CPL2012 is quite obvious here – the disclosure duty of Chinese police and defence lawyers’ right to discovery shall be met through the medium of the prosecution once the investigation is over.

On the other hand, the formulation of the dossier and the scope of disclosure are to a great extent up to the police’s discretion, since the process is almost a black box. In fact, China’s criminal procedure code has never clarified the concrete content or compilation process of the police dossier, but left them to the regulations of the Ministry of Public Security (MPS). Therefore, the classification, naming and compilation of police dossier in practice are quite confusing and inconsistent according to different instruments. In terms of the concrete content and transfer of police dossiers, MPS has set a general pattern mainly in two instruments – ‘*Regulations on the Procedures for the Handling of Criminal Cases by Public Security Organs*’¹³¹ and ‘*Provisions on the Management of Professional Archives of Public Security Organs*’.¹³² The Regulations provide that police dossier can be classified as the so-called ‘investigation file’ and ‘litigation file’ according to their respective content, characteristics and use; ‘When transferring a case to the people’s procuratorate, only the litigation file shall be sent, while the investigation file shall be kept by the public security organs for review.’¹³³ However, it says nothing about the concrete content, which has been listed in detail in the Provisions.

127 Art. 36 so reads, ‘During the investigation period, a defence lawyer may provide a criminal suspect with legal aid, file petitions and complaints on the suspect’s behalf, apply for alteration of the compulsory measures, find out from the investigating organ the offense of which the criminal suspect is convicted and the information pertaining to the case, and offer his/her opinions.’

128 See Art. 160 of CPL2012 and Art. 129 of CPL1996.

129 See note 5, Art. 160 further requires that the police inform the criminal suspect and his/her defence lawyer of the transfer of the case at the same time of its disclosure to the prosecution.

130 Art. 38 of CPL2012 so reads, ‘A defence lawyer may, from the date on which the relevant people’s procuratorate begins to examine the case for prosecution, consult, excerpt and reproduce the case file materials. Other defenders, with permission of the people’s procuratorate or people’s court, may also consult, excerpt and reproduce the above-mentioned materials.’

131 In Chinese, 《公安机关办理刑事案件程序规定》, hereinafter referred to as the Regulations.

132 In Chinese, 《公安业务档案管理办法》, hereinafter referred to as the Provisions.

133 Art. 277 Sec 2 of the Regulations. Although all the police enforcement, including relevant documents, should have been subject to the supervision by the people’s procuratorates

According to the Provisions, a police dossier related to the handling of criminal cases can be classified mainly as ‘investigation file’, ‘preliminary inquiry file’ and ‘TIM¹³⁴ file’. ‘Investigation file’ includes relevant documents and materials formed during investigation, which shall be further classified as ‘primary file’ and ‘supplementary file’. The ‘primary file’ mainly includes: 1. registration forms for accepting criminal cases and materials of case reports;¹³⁵ 2. written notices of summons (receipt); 3. application forms for arrest, arrest warrants, and written notices of arrest to the suspects’ families or workplaces (duplicates); 4. written decisions and written guarantee of release on bail, or decisions for revoking release on bail; 5. written decisions of residential surveillance, and written decisions of revoking residential surveillance; 6. application forms for pre-trial detention, written decisions of approving pre-trial detention, or written decisions of disapproving pre-trial detention; 7. written decisions of supplementary investigation; 8. pre-trial detention warrant, and written notices to the suspects’ families or workplaces (duplicates); 9. records of questioning the suspects, and their written confessions made by themselves; 10. records of questioning others, denunciation materials, and detection materials; 11. photos and pictures of crime scenes, records of crime scenes inquest and examination, evidence and appraisal materials; 12. statements, warrants, and records of search, and lists of articles seized, etc. The ‘supplementary file’ mainly includes: 1. reports submitted and instructions responded pertaining to acceptance of criminal cases; 2. investigative plans and measures, and internal statements and instructions; 3. reports about developments of cases; 4. wanted orders and emergency notices; 5. secret investigation materials (those used as evidence shall be kept in the primary file); 6. investigative experiments materials; 7. materials about solving of cases, and materials about miscarriage; 8. the texts of internal reports submitted for the application of pre-trial detention, search, residential surveillance, and release on bail, etc, and the instructions returned; 9. other materials that need to be kept. On the suspects’ being detained, the primary file or relevant evidence and legal documents shall be transferred into the preliminary inquiry file, while the supplementary file shall be transferred to the archive department of the same organ for filing.¹³⁶

A ‘preliminary inquiry file’ includes relevant documents and materials formed during the preliminary inquiry after the suspects’ being apprehended. Likewise, the ‘preliminary inquiry file’ shall also be further classified as a ‘primary file’ and a ‘supplementary file’. A ‘Primary file’ mainly includes: 1. the

according to the spirit of China’s constitution, PSO are indeed so powerful in China’s political arrangement and legal practice that they can easily circumvent such law in book simply by releasing their own regulations.

134 Technical Investigation Measures.

135 In Chinese criminal procedure, ‘to report a case’ is a legal term defined as the act that anyone informs the police (or other law enforcement) of an offense, which constitutes the main source of criminal cases accepted.

136 Art. 8 of the Provisions.

portraits of the suspects; 2. application forms for arrest, arrest warrants, and written notices of arrest to the suspects' families or workplaces (duplicates); 3. application forms for pre-trial detention, pre-trial detention warrant, and written notices to the suspects' families or workplaces (duplicates); 4. reports of supplementary investigation; 5. warrants and records of search, and lists of articles seized; 6. records of interrogation, and the suspects' written confessions made by themselves; 7. evidence materials such as exhibit photos, records of questioning, statements of victims, appraisal materials, records of crime scene inquest, examination, and etc; 8. written decisions of release on bail, written decisions for revoking release on bail, and written guarantee; 9. written decisions of residential surveillance, written decisions of revoking residential surveillance, and written guarantee; 10. written notices of the decisions to seize and/or to stop seizing mails and/or telegrams of the suspects (receipt); 11. proposal and approval of extension of detention; 12. written opinions of prosecution or non-prosecution, and indictment or written decisions of non-prosecution; 13. written decisions of case dismissal, or written opinions of the request for reconsideration and review; 14. judgments, and written notices of release; 15. statements of deaths, coroner certificates of inquest; 16. written receipt of suspects transferred; 17. lists of articles disposed, and etc.

The 'supplementary file' mainly include: 1. judgments; 2. integrated materials of cases; 3. PSO internal statements of reference, instruction, and conclusion; 4. work plans for preliminary inquiry and detection; 5. conclusion statements of preliminary inquiry; 6. materials about investigation by prisons; 7. final drafts or duplicates of legal documents pertaining to description of cases and conclusions, and other materials that need to be kept. Primary file out of preliminary inquiry file of police dossier for common criminal cases can be transferred together with the cases, while the supplementary file shall be transferred from professional (case dealing) departments to archive departments of the same organs for filing.¹³⁷

The 'TIM file' consists of valuable materials obtained by PSO TIM departments by means of TIM, if such materials point to a criminal case. After the case is concluded, relevant originals (such as original tapes or original documents) shall be classified according to specific means and thus compiled into a different file, attached with caption and transferred on a regular basis to the archive departments of the same organ for filing, kept as top secret file. The rest shall be kept by the professional (case dealing) departments.¹³⁸

To sum up, the police dossier related to formal criminal justice can be divided into three major parts according to content: evidence-related materials, legal documents, and internal statements; while according to the form, it can also be divided into three major parts: primary file, supplementary file, and TIM file or top-secret file. The primary file consists of evidence-related materials and

137 Art. 10 of the Provisions.

138 Art. 28 of the Provisions.

legal documents; the supplementary file consists of internal statements; and the TIM file consists of TIM related materials. In fact, the primary file resembles the so-called ‘litigation file’ defined by Art. 277 Sec. 2 of the Regulations; while the supplementary file resembles the so-called ‘investigation file’. But the two latter terms have never been widely accepted and used in practice.¹³⁹ Generally speaking, a primary file¹⁴⁰ (also litigation file,¹⁴¹ investigative file, or external file¹⁴²) constitutes the main body of the police dossier, which shall be transferred together with the cases to the relevant people’s procuratorates for review; a supplementary file¹⁴³ (also investigation file,¹⁴⁴ investigative work file, or internal file¹⁴⁵) can be considered as an administrative file of PSO for internal review and check on investigative work, which shall not be transferred to others, but kept by their own archive departments.¹⁴⁶

Furthermore, primary files are usually classified as an evidence volume and legal document volume in practice, and customarily bound and compiled separately.¹⁴⁷ This approach originated from the prosecution disclosure mechanisms in the past, when the CPL1996 provided that people’s procuratorates should only disclose ‘judicial documents pertaining to the current case and the technical verification materials’¹⁴⁸ to the defence. Therefore, the corresponding ‘*People’s Procuratorates’ Rules of Criminal Procedure*’ required in its Art. 245 that PSO should bind and compile the judicial documents and technical verification materials into a separate volume, which was accordingly called ‘(legal) document volume’; while the rest were correspondingly called ‘evidence volume’. These two terms were not precise definitions, but just names for short; since the technical verification materials per se are also one type of evidence according to the criminal procedure code,¹⁴⁹ and most materials in the so-called evidence volume are by themselves not evidence, but written forms of solidified evidence, such as photos of exhibits and records of questioning or interrogation.¹⁵⁰ Nevertheless, this classification and the two terms were so well-accepted in practice that they are still widely used at present.

In addition, the primary file of the police dossier can also be categorized as investigation file and preliminary inquiry file according to the Provisions

139 Lin 2009, p. 57.

140 The name according to the Provisions.

141 The name according to the Regulations.

142 Names in theory or practice.

143 The name according to the Provisions.

144 The name according to the Regulations.

145 Names in theory or practice.

146 Xie 2012/2, p. 581.

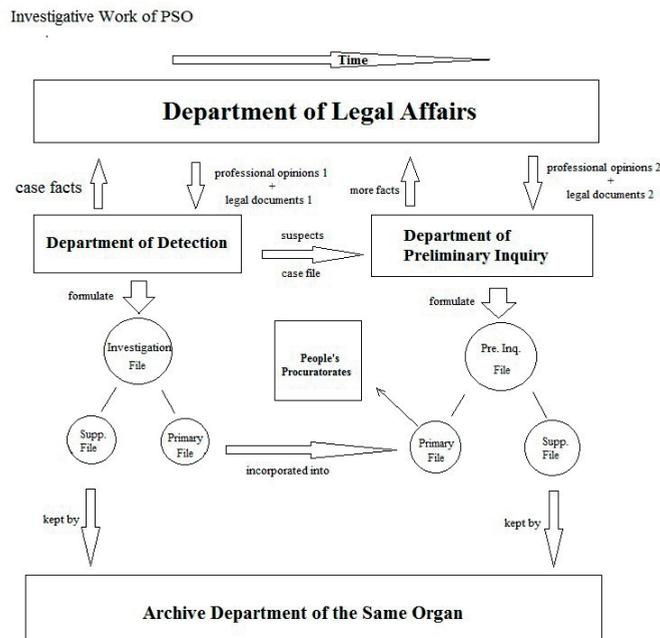
147 Tang & Kuang 2012, p. 99.

148 See Art. 36 Sec. 1 of CPL1996.

149 Zhang 2002, p. 47.

150 Chen 2002, p. 30.

as described above.¹⁵¹ This approach of classification actually originated from PSO's classical internal division of labour with respect to the investigation of criminal cases. Traditionally speaking, PSO's criminal-case-dealing sector is divided into three departments: department of detection, department of preliminary inquiry, and department of legal affairs. As their respective names suggest, the department of detection is responsible for finding out what happened and who did it, and for bringing the suspects to justice; the department of preliminary inquiry is responsible for interrogating the suspects, and further collecting, verifying, and solidifying the evidence; the department of legal affairs resembles a group of prosecuting solicitors, whose task is to offer the other two departments professional opinions concerning how to deal with the cases and the suspects based on the discovered facts and according to relevant laws, and to draft corresponding legal documents. Therefore, the whole process of the police investigation stage in China's criminal procedure can be further divided into two sub-stages: the sub-stage of detection and the sub-stage of preliminary inquiry, whose junction is the time when the suspects have been apprehended. Accordingly, the formulation and flow of relevant materials can be demonstrated in the following chart.



151 So far, most readers must be totally confused by the varying terms and chaotic classification. In fact, even the policemen in China could hardly make it any clearer, as the relevant regulations per se are indeed contradictory and chaotic like this, and practices may differ very much in different areas. However, it is still possible to draw an outline about relevant practices. See *infra*.

As is shown in the chart above, when a criminal case enters into the investigation stage, it will first go to the department of detection, for fact-finding and suspect-identification; during this sub-stage, the department of detection will inform the department of legal affairs about the developments of the case in time in order to consult the latter about such issues as filing the case and compulsory measures; while the department of legal affairs will reply on these issues and then draft corresponding legal documents (such as written notices of summons, application forms for arrest, arrest warrants, written decisions of release on bail or decisions for revoking release on bail, written decisions of residential surveillance or written decisions of revoking residential surveillance, and application forms for pre-trial detention); then the department of detection will bind and compile these legal documents together with the evidence-related materials they have collected and solidified into the primary investigation file, and send them together with the suspect to the department of preliminary inquiry. At that point, the case enters into the sub-stage of preliminary inquiry. The department of preliminary inquiry is responsible for the interrogation of the suspect, through which they must further collect and solidify evidence for prosecution. During this sub-stage, they will continue to cooperate with the department of legal affairs for the latter's professional opinions concerning compulsory measures or the conclusion of the case; while the latter will reply on these issues and then draft corresponding legal documents (such as written notices of the decisions to seize and/or to stop seizing mails and/or telegrams of the suspects, proposal of extension of detention, written opinions of prosecution or non-prosecution, and written decisions of case dismissal); finally, the department of preliminary inquiry will bind and compile these legal documents together with the evidence-related materials they have further collected and solidified into the primary preliminary inquiry file (the primary investigation file they receive from the department of detection will also be incorporated so as to form the integrated police dossier pertaining to their investigative work), and send them together with the suspect to the relevant people's procuratorate for prosecutorial review.

From the description above, we can deduce that the formulation of the police dossier in China's criminal justice should follow the principle of comprehensiveness, standardization, and exclusiveness according to relevant laws, technical regulations, and customary practice. First, the content shall be comprehensive, not only including almost all the evidence collected by investigative staff, whether incriminating evidence or exculpatory evidence, but also containing various legal documents and explanatory materials that reflect the process of investigative work. Both substantive issues and procedural issues shall be incorporated into it. Second, its form shall follow a unified and strict standard. Each kind of evidential materials shall be solidified in certain form, so as to precisely and exhaustively reflect when, where, how, and who made what, and whether due process has been observed; each kind of legal document shall be filled in or formulated in unified and strict form as well. Additionally,

the case file shall be bound, classified, and compiled according to technical regulations and customary practice so that all the file will be arranged in a unified, stratified, and logical way. Third, the formulation of the police dossier in China's criminal justice is a closed and exclusive process, during which only PSO have a say in the decision of how to formulate the police dossier, while other participants of the criminal procedure can hardly influence it – the judiciary has no say here, since pre-trial judicial review does not exist in China's criminal procedure; the suspects can do nothing but 'answer the investigators' questions truthfully',¹⁵² and their defence lawyers cannot help a lot either since they have no access to the police dossier and nor may they investigate the cases by themselves; notwithstanding the people's procuratorates are formally entitled to prosecutorial supervision on police investigation through examination and approval of pre-trial detention and prosecutorial review, and thus may to some extent influence the dossier by requiring supplementary police investigation or carrying out supplementary investigation by themselves, this seldom happens in practice, so generally speaking, the people's procuratorates also have little say in the decision of the formulation of the police dossier.¹⁵³

From the following paragraphs,¹⁵⁴ we will further learn that the police dossier will go through the entire criminal process, and play a decisive role in all the case file, based on which the indictments and judgments are formulated. Therefore, the so-called 'trial mode centralized on the files and notes existing in Chinese criminal trial'¹⁵⁵ is indeed an illustration of a criminal justice mode centralized on the police investigation. The subsequent prosecutorial review and adjudication of the cases should be considered as continual verification of the conclusions and corresponding evidential materials formed in the stage of police investigation. In this mode, the police, the prosecution, and the judiciary together constitute a production line of criminal decisions, and the police dossier should thus be considered as raw materials; it seems not unfair for the judiciary to expect its colleagues to be professional and responsible enough to render sufficient raw materials. Following this logic of judicial bureaucratism,¹⁵⁶ police disclosure mechanisms in China's criminal justice only require in principle that the police disclose all the necessary materials to relevant people's procuratorate, but set little external check on the same duty.

Nonetheless, it is also not unfair for the defence to worry about whether exculpatory evidence has been withheld by the police, since to a great extent the entire process of the formulation of the police dossier is a black box. In fact,

152 See Art. 118 of CPL2012 or Art. 93 of CPL1996.

153 Lin 2009, p. 58.

154 See the relevant chapters concerning disclosure mechanisms in the prosecution and trial stages.

155 See Chen 2006, p. 79.

156 Judicial bureaucratism refers to the tendency in China's criminal justice that criminal cases be handled through stratified review and approval by judicial bureaucrats from lower ranks to higher ranks, which can be originated from China's political and legal tradition.

the worry of the defence is not groundless. First, it is notable that most materials in the so-called evidence volume of the police dossier – as described above – are by themselves not evidence at all, but written forms of solidified evidence, such as photos of exhibits and records of questioning or interrogation. In other words, it is mainly at the discretion of the police whether or not to solidify certain original evidence into the various records. Therefore, the exculpatory evidence would be less likely to be solidified into the police dossier although the police have a legal duty to do so in principle, because on the one hand, the police would probably be quite reluctant to do so, and on the other hand, a police officer whose duty is to fight against crimes will naturally tend to focus more on incriminating clues while neglecting exculpatory clues. Moreover, the great discretionary power of the police in solidifying both incriminating and exculpatory evidence would give them much leeway in corruption. Second, the police have their own interests in the incrimination of the suspects. If a criminal suspect were eventually convicted, especially when a felony is involved, the investigative institution including the investigators may be honoured and rewarded; while if a criminal suspect were eventually acquitted, especially when he/she has been kept in custody, the investigative institution including the investigators will probably be punished for the miscarriage of justice. That is to say, the police can hardly be regarded as impartial in the handling of criminal cases; it is therefore less reasonable to expect them to be objective and detached enough to solidify and disclose as much exculpatory evidence as incriminating evidence. In fact, it is even not more reasonable to expect all of them to be professional and responsible enough to be able to solidify and disclose sufficient incriminating evidence, given the fact that many grass-roots police officers lack basic skills and awareness to solidify and preserve certain evidence.

Nevertheless, China's judicial authorities are still quite reluctant to resort to the defence; rather, a sophisticated system of judicial bureaucracy has been highly developed so as to combat the problems described above. This system is operated based on the exhaustive internal and external dossier formulated and conveyed throughout the entire criminal process. The internal dossier, including the supplementary file of the police dossier, is kept for internal supervision on a regular or irregular basis, and is in principle undiscoverable for any other institutions or persons. Especially when a solved case turns out to be a miscarriage of justice, it would be quite easy to find out those responsible by consulting the relevant internal dossier. Given the 'full trace' and 'eternal accountability' mechanisms¹⁵⁷ established recently, the internal supervision mechanisms resemble a Damocles Sword hanging over the head

157 In order to combat judicial corruption and unfairness, Chinese authorities have required that any piece of instruction or order with respect to any criminal case given by any leader must be fully recorded in written form in relevant dossier (usually internal dossier); and any judicial officer must be always accountable for the criminal cases handled by him/her.

of every judicial bureaucrat, so that they have to think twice before they intend to do anything unsuitable when handling criminal cases. Notwithstanding the formidable internal check based on the internal dossier, self-censorship cannot avoid negligent omission but only deliberate withholding; moreover, this kind of supervision is less likely to promptly expose wrongdoing during the process of handling criminal cases. In this situation, external supervision mechanisms have been developed to solve the abovementioned problems.

As described above, legal documents and evidential materials shall be bound and compiled respectively into a document volume and an evidence volume. Specifically speaking, the former mainly includes various documents or warrants pertaining to compulsory measures, investigative manners, or conclusions of cases, such as arrest warrants, application forms for pre-trial detention, written decisions of release on bail, written decisions of residential surveillance, written opinions of prosecution or non-prosecution; the latter mainly includes records of various verbal evidence, captions of investigative activities such as examination and seizure, and the photos taken during these activities, e.g. records of search, and lists of articles seized, records of interrogation, the suspects' written confessions made by themselves, exhibit photos, records of questioning, statements of victims, appraisal materials, and records of crime scene inquest and examination. All the above-mentioned materials shall be conveyed as a primary file of the police dossier to the relevant people's procuratorate for prosecutorial review, and ultimately to the relevant criminal court as the basic reference for the decisions.

According to relevant technical regulations and customary practice, the police dossier shall be formulated on such a comprehensive and exhaustive basis that an experienced judicial bureaucrat would probably be able to smell out something wrong if any exculpatory evidence or other materials favourable to the defence were withheld by the police. For instance, by comparing the starting and ending time on the records of summons in detention houses¹⁵⁸ and the length of the corresponding piece of record of interrogation, an experienced judicial bureaucrat will be able to notice the withholding of evidence if the length of the interrogation record appears unreasonably shorter than expected according to the duration of the summons, or there are even no records of interrogation for the summons. Meanwhile, a public prosecutor or trial judge may consult the audio or video cassettes of the interrogation¹⁵⁹ if he/she smelled

158 Most criminal suspects in China will be kept in custody pending their trials. If an investigator needs to interrogate a suspect, he/she may probably have to do that in a detention house. In this situation, the latter will mark in its records of summons the time when the suspect stepped out of and back into his/her cell.

159 Art. 121 of CPL2012 so requires, 'Investigators, when interrogating a criminal suspect, may record or videotape the interrogation process, and shall do so where the criminal suspect is involved in a crime punishable by life imprisonment or capital punishment or in a otherwise major criminal case. Recording or videotaping shall run throughout the interrogation process for the purpose of completeness.' In addition, Art. 197 of The People's Procuratorates'

something wrong. Besides, an experienced judicial official would probably be very cautious about whether the confession is prior to decisive exhibits¹⁶⁰ or the other way around, when referring to the police dossier. Moreover, as for testimonies, an experienced judicial bureaucrat will carefully read the records of questioning and compare several pieces of testimony given by different witnesses to see whether they contradict each other concerning the key fact; or rather, whether they are highly identical to each other as if they have been formulated by the same person. In addition, the explanatory statements about the emergence and solving of the cases would also expose suspicious points if exculpatory evidence were withheld by the police. In summary, a series of sophisticated skills and experience based on dossier and bureaucracy have been so well developed that an experienced judicial bureaucrat would always be able to detect something wrong from numerous files if a criminal suspect were actually innocent while the police withheld exculpatory evidence or other materials favourable to the defence. Therefore, it might be fair to say that the police disclosure mechanisms in China's criminal justice indeed consist in the sophisticated mechanisms of the formulation and transfer of the police dossier, which is operated in a context of judicial bureaucracy and technical legalism. In this context, non-bureaucrats like defence lawyers, let alone criminal suspects, would not be regarded as a sound choice with whom to cooperate for the pursuit of justice. In other words, the defence has indeed been excluded from the community that participates in criminal cases. Therefore, disclosure is none of their business, and internal transparency of criminal procedure only speaks to the police, the prosecution, and the judiciary. Under this standard, it might be fair to say that China's police, in their own way, appear to have done a good job with respect to their disclosure duty and thus the internal transparency of criminal investigation.

2.2.2 Prosecution disclosure

2.2.2.1 The development of prosecution disclosure in China

The Criminal Procedure Law 1979 (CPL1979) provided that public procurators should hand in the whole dossier¹⁶¹ together with the indictments to the court

Rules of Criminal Procedure (Provisional) requires that all the interrogation be entirely videotaped if the cases belong to the jurisdiction of people's procuratorates according to the criminal procedure.

160 The corresponding Chinese term (先供后证) refers to the situation that a criminal suspect had confessed before the police obtained further exhibits, and the police, according to the details of the confession, managed to discover the decisive exhibits like the body or weapon in a murder case. It is generally believed that a criminal suspect in this situation would be less likely to be innocent. While in the other way around, it is possible that the suspect has been coerced to confess to a crime committed by others. Therefore, this difference has become a crucial standard in practice to assess the reliability of a piece of confession.

161 Indeed, all the dossier they have in hand, namely the dossier they can get from the police; meanwhile, the people's procuratorates will also establish their own internal file of dossier,

when presenting the prosecutions; the trial judges, based on their reading of the dossier, will usually examine and verify the evidence (usually by interrogating the defendants and examining the witnesses) prior to the trials. After reading the dossier and verifying the evidence before trial, the court will decide whether or not to formally launch the trial sessions, based on the sufficiency or insufficiency of the evidence. This trial mode is called ‘substantive examination’, as the trial judges will be able to, and have to materially examine the prosecution cases prior to the trials so as to decide whether or not to go on with the process. In this mode, the defence plays a rather auxiliary and dependent role. The defendants are probably in custody and therefore can do nothing but wait. Even if they are ‘lucky’ enough to have defence counsel, their representatives usually have little chance and ability to investigate and collect evidence independently; rather, they have to rely on the prosecution to get evidence for their defence cases. During that stage, the defence lawyers could get only a little part of the dossier from the prosecution, so they had to wait until the prosecution had submitted all of the dossier to the court and the latter had decided to launch the trial sessions, then they would be told to consult, extract, or duplicate the dossier in the judges’ chambers. Since the trial judges play the main role in this mode, it is no wonder that the disclosure mechanism is designed to operate primarily between the prosecution and the court. Under such logic, the trial judges, vested with comprehensive powers for finding truth actively, in an impartial role that stands for justice, are supposed to fight for the neutral truth, and will never tend to ignore any exculpatory evidence. Therefore, there is no room for any lawyer-dominated mechanism of discovery/disclosure.

The disadvantages of this mode began to surface during the enforcement of the CPL1979. The most obvious one was that the trial judges tended to form a premature conviction of the guilt of the defendants before the trial. In other words, they virtually decided before they heard the cases, rendering the trial sessions therefore nothing but formalities. Given the defects described above, the legislature, to some extent, borrowed the US and Japanese mode to reform China’s disclosure mechanism with regard to the dossier, forming the so-called ‘formal examination’ mode of CPL1996. In this mode, the prosecution may hand in to the court before trial only the ‘name list of the witnesses’, ‘the evidence catalogue’ and ‘the copies or photos of the major evidence’ together with the indictment. The trial judges just have to make sure of the completeness of documents in formal terms¹⁶² before they decide to launch the trial sessions. Most evidence should be presented by the prosecution only during the trial

just like the police, and disclose only the rest to the trial court.

162 Art. 150 of CPL1996 reads, ‘After a People’s Court has examined a case in which public prosecution was initiated, it shall decide to open the court session and try the case, if the bill of prosecution contains clear facts of the crime accused and, in addition, there are a list of evidence and a list of witnesses as well as duplicates or photos of major evidence attached to it.’

sessions. The defence lawyers could get access only to ‘the judicial documents pertaining to the current case and the technical verification material’ from the prosecution according to Art. 36 of CPL1996.

This new design aimed at avoiding trial judges’ premature decisions before hearing the cases. However, it was born self-inconsistent. On the one hand, the judges were prevented from having access to most evidence of substantive relevance prior to the trial sessions; on the other, they were supposed to effectively organize and direct the trial sessions. It is evident that this is a mission impossible. In addition, the defence had little access to the dossiers either, nor could they get them from the court as before; the trial sessions therefore became a private stage of the prosecution, who were able to control the scope, order and the manner of the presentation and examination of the evidence.

In fact, this mode was barely implemented in practice due to the common objection by trial judges and criminal lawyers. In 1998, the Legal Affairs Committee of the Standing Committee of the National People’s Congress coordinated five other state organs¹⁶³ to jointly release a legislative interpretation of CPL1996 in the name of the six organs.¹⁶⁴ Art. 42 of the Interpretation 1998 partly recovered the full dossier submission mechanism so that the prosecution was required to submit, after the trial sessions, all the evidence it had used during the trial. As for the written testimonies obtained out of court, if there were other unused versions which differed from the version presented before the court, all the versions should be handed in to the court within 3 days after the hearing. This mechanism regarding disclosure of unused evidence had common concern with *Brady*,¹⁶⁵ but the Chinese mechanism then was evidently different in two aspects: when (before or after the trials) and to whom (the defence or the judges) the unused evidence should be disclosed.

Although the revised mode described above did, to a great extent, avoid the trial judges’ forming premature opinions about the defendants’ guilt or innocence, the objective of the trial mode reforms that judges should form their opinions and decisions during the trial sessions still failed. On the one hand, it was because most evidence was then withheld by the prosecution, and the trial sessions therefore became the prosecution’s talk show instead of the competition and confrontation between the prosecution and the defence as expected. A trial session then usually went like this: the public procurator deliberately selected favourable paragraphs from the dossiers, read them aloud, and asked the defendant yes or no questions. The trial judge could expect nothing from the

163 They were the Supreme People’s Court, the Supreme People’s Procuratorate, the Ministry of Public Security, the Ministry of State Security, and the Ministry of Justice.

164 《最高人民法院、最高人民检察院、公安部、国家安全部、司法部、全国人大常委会法制工作委员会关于刑事诉讼法实施中若干问题的规定》，issued in Jan. 19, 1998, hereinafter the Interpretation 1998.

165 For details of *Brady*, see *infra* 6.2.2 The defence’s constitutionally guaranteed access to evidence.

trial session. On the other hand, the desire to read all of the dossier after the trial sessions so as to completely learn the cases would inevitably make the trial judges ignore the trial sessions and find truth actually after the trial sessions through reading the dossier. The trial session is still nothing but a formality.

Furthermore, as the prosecution was not allowed to hand in the dossier to the court before the trial sessions under this trial mode, defence lawyers could hardly get access to most evidence before the trial sessions; this made their preparation of defence rather difficult. Therefore, criminal lawyers were quite reluctant to embrace these trial mode reforms, some of them even appealed for a return to the mode under CPL1979.¹⁶⁶

Under these circumstances, more and more trial courts had reached tacit agreement with their counterpart procuratorates to recover the pre-trial submission of the dossier.¹⁶⁷ This unlawful practice was widely accepted by the courts, the prosecutions and the criminal lawyers, because it was convenient not only for the courts to better prepare the trial sessions in advance, but also for the defence lawyers to get easier access to the evidence for their defence cases, and anyway it did no harm to the prosecution.¹⁶⁸ Accordingly, the trial mode reforms were virtually abandoned even long before CPL2012 came into force.

In 2012, the Chinese legislature thoroughly revised the criminal procedure law. One notable change is that CPL2012 has formally recovered the pre-trial submission of dossier invented in CPL1979. It appears that all the reforms concerning disclosure mechanisms have come back to the original point. However, some apparently forgettable changes in the new law may hold a subtle clue to a great progress in the internal transparency of the Chinese criminal procedure.

A noticeable example is the provision about the pre-trial meeting prescribed in the Art. 182 Sec. 2 of CPL2012.¹⁶⁹ The pre-trial meeting is an optional procedure designed for sophisticated cases. During the meeting, the prosecution and the defence can present their opinions about the admissibility and truthfulness of the evidence. This may become a special disclosure process in Chinese criminal procedure, but the consequence in practice has yet to be seen. According to the practice in the past year, there are two diverging tendencies in applying this clause. One is to use this clause to circumvent the principle

166 Chen 2012, p. 15.

167 According to the author's experience in practicing law in China in the past few years, this flexible practice was rather common.

168 Chen 2012, p. 15.

169 It reads, 'Before the commencement of a court session, judges may convene a meeting with the public prosecutor, the party concerned and his/her defender and agent ad litem to deliberate and consult their opinions on withdrawal, the list of witnesses, exclusion of illegal evidence and other trial-relevant issues.'

of public trial. A typical example is the Liu Zhijun case.¹⁷⁰ During the trial sessions, the cross examination of many pieces of critical evidence was simply omitted because it was alleged to have been done during the pre-trial meeting. The other tendency is to use the pre-trial meeting to resolve some procedural issues, such as choosing an appropriate procedure (ordinary or summary), posing challenges against some judge or public procurator, and excluding illegally obtained evidence, etc; or to exchange significant information of the evidence, such as the list of witnesses or the evidence catalogue. A typical example is the Bo Xilai case.¹⁷¹ The court made proper use of the pre-trial meeting to deal with procedural issues, but left the substantive issues to the formal session, allowing thorough cross examination of the evidence, direct confrontation with witnesses, and sufficient debate and defence. The court's official Weibo¹⁷² account even text-graphically broadcast the status of trial live. This is undoubtedly a milestone of the external transparency of the Chinese criminal procedure.

From the above one can see that the new clause regarding pre-trial meetings is so vague that the result of its implementation is still to be seen in the future. Notwithstanding, CPL2012 has still made great progress in the disclosure issue, especially regarding prosecution disclosure.

2.2.2.2 *The current mechanisms of prosecution disclosure*

First, the former versions of criminal procedure limited the scope of prosecution disclosure, especially during the pre-trial phase. For instance, according to Art. 36 of CPL1996, defence lawyers have access only to 'the judicial documents pertaining to the current case and the technical verification material'¹⁷³ during the prosecution phase. Hereby, the so-called 'judicial documents' refer to various procedural documents formulated for the enforcement of compulsory measures or other investigative activities, for filing cases, or for the request of prosecutorial review, such as written decisions of filing cases, arrest warrants, written decisions of approval for pre-trial detention, pre-trial detention warrants, written opinions of prosecution, and etc; the so-called 'technical verification material' mainly includes documents that record the processes and

170 Liu was the Minister of Railways of China. He was tried for alleged bribery in Beijing in June, 2013.

171 Bo was a member of the elite Politburo of CPC, one of the most powerful party men in China. He was tried for alleged bribery, embezzlement, and abuse of power in Jinan in August, 2013.

172 A Chinese online platform similar to Twitter.

173 Art. 36 Sec. 1 of CPL1996 reads, '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.'

conclusions of coroner examinations, psychiatric expert certification, forensic examinations, and etc.¹⁷⁴

Even as late as the trial phase, this scope just extends to ‘the material of the facts of the crime accused in the current case’.¹⁷⁵ That is to say, exculpatory evidence or unused evidence would be literally beyond this scope. In addition, prosecution disclosure is supposed to be done towards the defence counsels according to law. As to whether and to what extent the information can be revealed to the defendants, CPL1996 responded with a subtle silence. Given the risks of being arrested for alleged perjury,¹⁷⁶ Chinese lawyers had been reluctant to reveal or verify the evidence in front of the defendants they stood for.

Art. 38 of CPL 2012 has substantially expanded this scope to the entire prosecution dossier in principle;¹⁷⁷ defence lawyers will therefore enjoy much greater access to the prosecution evidence according to the new criminal procedure. This would greatly change the imbalanced relationship between the prosecution and the defence. However, whether and how much unused material would be compiled into case files in practice remains a doubtful question.

Moreover, for the first time ever Art. 37 Sec. 4 of CPL2012 has explicitly granted defence lawyers the right to ‘verify relevant evidence with the criminal suspect or defendant’,¹⁷⁸ which means that prosecution disclosure is beginning to formally reach the defendants who were almost the objects of the trials before. This would help the defendants better prepare their self-defence.

Apart from revising the existing clauses to broaden the scope of prosecution disclosure or hasten this process, CPL2012 also contains a new clause to perfect the disclosure system in Chinese criminal procedure. First, Art. 39 provides, ‘Where a defender is of the opinion that the relevant public security organ or people’s procuratorate fails to submit certain evidence gathered during

174 Hao & Shan 1998, p. 62.

175 Art. 36 Sec. 3 of CPL1996 reads, ‘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.’

176 A noticeable example is the well-known case of Li Zhuang, a defence counsel who was arrested and imprisoned for perjury in Chongqing when Bo Xilai was ruling there.

177 Art. 38 of CPL2012 so reads, ‘A defence lawyer may, from the date on which the relevant people’s procuratorate begins to examine the case for prosecution, consult, excerpt and reproduce the case file materials. Other defenders, with permission of the people’s procuratorate or people’s court, may also consult, excerpt and reproduce the above-mentioned materials.’

178 Art. 37 Sec. 4 of CPL2012 reads, ‘A defence lawyer shall be entitled to inquire about the case and provide legal advice during the meeting with a criminal suspect or defendant under detention and may, from the date on which the case is transferred for examination before prosecution, verify relevant evidence with the criminal suspect or defendant. The meeting between the defence lawyer and the criminal suspect or defendant shall not be monitored.’

the investigation period or period for examination before prosecution, while such evidence can prove that the criminal suspect or defendant is innocent or the crime involved is a petty offense, the defender shall be entitled to apply with the people's procuratorate or the people's court concerned to obtain such evidence.' Despite the obvious pitfall of how does the defence know about the unused evidence without having seen the file, this clause has for the first time ever explicitly imposed upon the prosecution a lawful duty to disclose unused exculpatory evidence to the defence, which can be formally considered as China's first version of *Brady* rule.¹⁷⁹

Meanwhile, CPL2012 has also imposed upon PSO an auxiliary duty to support the prosecution disclosure.¹⁸⁰ Although the evidence will not be directly disclosed to the defence, since the PSO still has to disclose to the prosecution and inform the defence of this development, the latter will be able to check the PSO dossier in time from the procuratorate. Given the fact that the defence used to know nothing of the progress of cases, and even had no idea by whom the cases were being dealt with, this auxiliary clause is significant for the internal transparency of Chinese criminal procedure.

2.2.3 Defence disclosure

China's new criminal procedure code has imposed on the defence a disclosure duty involving two circumstances: alibi and criminal liability¹⁸¹. Exculpatory evidence regarding these two circumstances shall be disclosed by the defence to the prosecution. CPL2012 requires the defence disclosure on a reciprocal basis. Art. 40 provides that 'Where a defender has gathered evidence showing that the criminal suspect concerned was not at the scene of the crime, has not reached the age for assuming criminal liability, or is a mentally challenged person who is not required by law to assume criminal liability, the defender shall inform the relevant public organ and people's procuratorate of such evidence in a timely manner.' This clause, especially the requirement regarding alibi evidence, is also similar to the *Brady* rule.¹⁸² However, as it is not only difficult but also dangerous for Chinese lawyers to independently investigate cases, this clause may not be used as much as Art. 39. Additionally, given the

179 For details of *Brady* rule, see *infra* 6.2.2 The defence's constitutionally guaranteed access to evidence.

180 Art. 160 of CPL2012 so reads, 'A case whose investigation is closed by a public security organ shall have clear facts of crimes and sufficient and concrete evidence. The public security organ shall prepare written prosecution opinions, and submit the same together with the case files and evidence to the people's procuratorate at the same level for examination and decision, and shall at the same time inform the criminal suspect and his/her defence lawyer of the transfer of the case.'

181 Criminal liability in China involves the factors that determine whether a criminal suspect should be accountable for his offense, such as age, mental capacity.

182 For details of *Brady*, see *infra* 6.2.2 The defence's constitutionally guaranteed access to evidence.

fact that public procurators in China are very powerful and can ask the courts to adjourn the trial sessions by all means so as to avoid ambush trials, it would be unreasonable and unwise for the defence to withhold the exculpatory evidence. Therefore, the prosecution is less worried about withholding of evidence by the defence, even if Art. 40 has not provided any remedy for the failure of defence disclosure.

Actually, the defendants bear a much heavier burden of disclosure than this, because both the current version and the former versions of Chinese criminal procedural law have provided the defendant's duty to tell the truth.¹⁸³ Although the new version has provided in principle the privilege against self-incrimination, the duty to tell the truth is still there and seems to prevail, because the refusal to confess can be deemed an aggravating circumstance. It is still to be seen how defence disclosure will be enforced in China.

183 Art. 93 of CPL1996 provides, and Art. 118 Sec. 1 of CPL2012 reiterates that 'When interrogating a criminal suspect, the investigators shall first ask the criminal suspect whether or not he has committed any criminal act, and let him state the circumstances of his guilt or explain his innocence; then they may ask him questions. *The criminal suspect shall answer the investigators' questions truthfully*, but he shall have the right to refuse to answer any questions that are irrelevant to the case'.

Interim conclusions of Part I

1. Internal transparency of Chinese criminal procedure is not so well guaranteed as external transparency.

From Chapter 1 and 2 we can conclude that China's reforming efforts on the promotion of procedural transparency have been focused on the external aspect, while the existence and significance of the internal aspect has long been ignored, and even considered as an obstacle to the former and therefore curtailed by CPL1996. Specifically speaking, at a conceptual and theoretical level, internal transparency is less valued than external; at a legislative and regulatory level, internal transparency has seldom been mentioned; at an administrative level, internal transparency is at stake since the police have the exclusive say on the formulation of the dossier while the prosecutorial check on that discretion is insufficient.

2. China's lame reforms on procedural transparency have failed to alleviate its legitimacy decline.

Although the external transparency of Chinese criminal procedure has been greatly enhanced through relevant judicial reforms in the past few decades, at the conceptual and theoretical, legislative and regulatory, or administrative levels, the legitimacy decline of China's criminal justice system has not been stopped over the years; while over-indulgence of mass media in premature and biased coverage of high-profile criminal cases has made things even worse.

3. The aforesaid lessons from China show the significance of internal transparency.

External transparency based on a 'void' trial scheme that lacks internal transparency (like China's current system) will end up in void, ritual, formal legitimacy and thus not in substantial legitimacy, because on the one hand, today's prosecution's permanent advantage over the defence can hardly be systematically evened up without internal transparency of criminal procedure, especially in the Chinese context. This will impair equality of arms and thus undermine legitimate truth-finding. On the other hand, lack of internal

transparency may result in suppression of materially exculpating or impeaching evidence, just as transpired in Nian Bin's case, and thus in incomplete or even distorted facts based on which miscarriages of justice may arise. In that case, external transparency of such trials can hardly function to avoid, indeed may facilitate, potential miscarriages of justice, since it may strengthen people's confidence in the incomplete or distorted facts by biased propaganda. Accordingly, it is not unfair to argue that adversarial dogmas, including the one-sided emphasis on external transparency do not stand, at least not in the Chinese context.

4. China's academia and judicial authorities still insist on the fiction of adversarial system.

China's academic mainstream in the domain of criminal procedure believes in the adversarial dogmas, and therefore still insists on the universal applicability of the basic tenets of the 'pure' adversarial system, including the positive correlation between the legitimacy of a criminal justice system and the external transparency of its criminal procedure. Influenced by such academic ideas, China's judicial authorities are still focusing on the promotion of external transparency in the new round of reforms.

In summary, Part I shows that the applicability of adversarial dogmas concerning the transparency of criminal procedure and establishment of procedural legitimacy is highly challengeable, at least in the Chinese context. Moreover, even in the exemplary adversarial systems, such as United States, England, and Scotland, it remains a moot question whether such dogmas truly stand as the Chinese believe they do, and in what circumstances they stand? In order to further examine that question, Part 2 will try to provide an insight into three adversarial systems.

PART II

EXEMPLARY ADVERSARIAL SYSTEMS

As we have seen in Part I, China's new ROL discourse strongly advocates the fiction of the adversarial system in terms of criminal procedure, which insists on the universal applicability of adversarial dogmas, including *inter alia*. partisan prosecution and defence, passive judges, silent defendants, lawyer-dominated trials, oral debates, priority of procedural justice, and court-session centeredness. These adversarial dogmas regarding criminal procedure have long been enshrined in Chinese law-school textbooks, and therefore transmitted year after year as universal and self-evident law to most law students, many of whom are now serving as grassroots law practitioners, including lawyers, public prosecutors, and trial judges. And the controversial ideas about the basic tenets of the adversarial system (in the Chinese fiction, the basic tenets of any sound system) typically reflected in Professor Monroe Freedman's article 'Professional Responsibility of the Criminal Defence Lawyer: The Three Hardest Questions'¹ published 60 years ago in the United States have somehow been widely accepted as indisputable principle in China today, especially by Chinese lawyers. However, Part I has shown that whether such a principle is reliable and applicable in the Chinese context is highly questionable given the paradoxical outcome of China's relevant reforms, and Part II will further reveal that such dogmas should not be considered as unalterable even in their home countries.

First, the entire adversarial system of trial as the defining feature of the Anglo-American legal procedure is only a relatively late development in English legal history.² For centuries defendants were forbidden to have legal counsel, and seldom did the prosecution have either; and the transformation from lawyer-free to lawyer-dominated criminal trial happened in England, the cradle of adversarial system, just within a period of about one century, from the 1690s to the 1780s, for equitable reasons. At first, defence counsel was allowed just as an evening-up actor to respond to menacing prosecutorial initiatives, such as reward-seeking thief-takers and crown witnesses induced to testify in order to save their own necks.³

1 Freedman 1966, p. 1469.

2 For details, see 4.1.1 The historical development of the modern English system.

3 See Langbein 2003, pp. 2-7.

Second, the formation and entrenchment of the modern pattern of adversarial criminal procedure has always been a dynamic process, so no procedural dogmas or tenets should be considered as the inherent or indisputable nature of Anglo-American legal system, let alone as that of any legal system. In fact, defence counsel was first allowed only in treason cases in England, and later extended to common felony, but served just for examination and cross-examination without stating the defendant's case or interpreting the evidence to the jury. The 'accused speaks' pattern of criminal trial did not change in England until the prosecutorial responsibilities for producing evidence and proving cases had been articulated by defence counsel, and therefore required by judges, to an extent that rebutting the prosecution case became a much wiser strategy than building the defendant's own case; which largely silenced the accused and led to the privilege against self-incrimination and the beyond-reasonable-doubt standard of proof.⁴

Last, even today in their home countries, the basic tenets of adversarial criminal procedure are still subject to constant fine-tuning for equitable reasons, and new mechanisms or institutions have continued to be introduced to balance the scales; many of which, including those regarding internal transparency, to some extent have virtually steered these adversarial systems to a less adversarial track. For instance, United States, as the most enthusiastic supporter of the original adversarial system has still had to resort to internal transparency of criminal procedure by establishing pre-trial discovery mechanisms in order to prevent the powerful prosecution from withholding unused evidence that may prove the innocence of the accused, despite the cost that it might diminish the adversarial nature of its criminal procedure by requiring and expecting a partisan advocate to co-operate with the adversary during their contests;⁵ furthermore, many lawyers in the US system, of which as many, or even more, Chinese lawyers have long been dreaming, are posing strong challenge to their own criminal justice system, proposing as radical reforming schemes as their Chinese counterparts do towards the Chinese system, most of which are indeed inclined to a more state-oriented and accused-speak style of criminal procedure,⁶ England, as the cradle of modern adversarial procedure, which also resorts to internal transparency by setting up the prosecutorial duty of disclosure, has even abandoned its long-lasting criminal procedural tenet of private prosecution, and established its own public prosecution institution, i.e. the Crown Prosecution Service; Scotland, as a noteworthy hybrid system with an inquisitorial tradition in the pre-trial phase but embracing the English adversarial trial mode, has

4 Ibid.

5 Such requirement and expectation is tantamount to an evening-up rule for a football match between China and Brazil which requires the latter must pass the ball and assist the former in certain circumstances so that the former would be less likely to lose badly; such rule may probably ruin the match although it does balance the scales.

6 For instance, see Risinger & Risinger 2012, pp. 882, 883; Slobogin 2014, pp. 715, 716, 724, 728; Gross 2012, pp. 1023-1026. Quoted from Ferguson 2017.

also turned to value the weight of internal transparency of criminal procedure by introducing a prosecutorial duty of disclosure in the pre-trial phase; the country still adheres to a rather inquisitorial approach in terms of its pre-trial prosecutorial system by requiring its prosecutors to play a quite neutral role as to their presentation of evidence and instructions to police investigation.

Accordingly, Part II shall first clarify the basic tenets of modern adversarial criminal procedure in order to undermine Chinese trust in adversarial dogmas, and then examine the historical and societal conditions that underlie such tenets. Part III examines whether China also has such conditions to follow such tenets and how feasible it is for China's criminal justice to embrace the adversarial approach.

Chapter 3

Basic tenets of the ‘pure’ adversarial system

3.1 General: A common law tradition

The adversarial system as the defining feature of the Anglo-American legal procedure is closely related to the common law tradition of the latter.¹ At the heart of any common law system lies the doctrine of *stare decisis*, requiring that consistent principles applied to similar facts yield similar outcomes.² It presupposes the bounded rationality³ of human-kind, and thus allows judges to absorb wisdom from their predecessors, to guarantee the consistent application of law, and thus justice in form, to ensure legal certainty and reliability, and to make the law predictable. Therefore, it may restrict the discretion of the judiciary, and make the law appear more objective. Its application depends largely on the development and maturity of the law reporting mechanism, the hierarchy of the courts, and a complex set of legal techniques.⁴

Due to historical reasons, this tradition shows a deep mistrust of and an inherent caution against almighty professional judges and bureaucrats, and concomitantly a resort to ordinary citizens and lay judges as decider of facts,⁵ which has made a profound impact on adversarial criminal procedure at present, both at the institutional level and at the conceptual level. Specifically speaking, the latter involves the outlook on justice and the epistemology and methodology for finding truth of criminal cases; while the former is in large part related to the use of an adversarial approach coordinated with mass application of plea settlement. Nevertheless, the inquisitorial approach also plays something of a role in modern adversarial jurisdictions, especially in the pre-trial stage.

Moreover, some contextual elements of each system also play a significant role as parts of the underlying settings. For instance, the dualistic structure of the US legal system, together with the common law tradition, allows and also

1 See Brants 2012, p. 1074.

2 See Llewellyn 1960, pp. 77-87.

3 Bounded rationality is the idea that when individuals make decisions, their rationality is limited by the tractability of the decision problem, the cognitive limitations of their minds, and the time available to make the decision.

4 For details, see Llewellyn 1960, pp. 17-61.

5 For details, see 4.1.1 The development of the prosecution system in England.

demands a Supreme Court's case-law system based on judicial interpretation of the Constitution, which sets various bottom-line principles for state legislations, and represents one of the most significant sources of US positive law.

All these points may be demonstrated briefly by the functions (and the reasons for them) of the actors involved in each selected criminal justice system, especially that of the prosecutors.

3.2 Conceptual level

3.2.1 *Epistemology and methodology*

Due to the bounded rationality of human-kind, it is very difficult to confirm 100% that something exists or has occurred, since an omission of any insignificant detail may impair the perfection of the trueness, and thus undermine the reliability, of the judgment; moreover, it is almost impossible to confirm 100% that something does not exist or has not occurred. For instance, it is already very difficult to confirm the existence of Extra-Terrestrials, but it is even more difficult if not impossible to confirm 100% that they do not exist, since one must check every corner of the universe before so asserting. Given the constraints of time and effort in a criminal proceeding, it won't be any easier to confirm 100% guilt or innocence. In other words, it is simply not feasible to expect 100% real facts in a criminal proceeding.

In order to resolve this dilemma, a practical epistemology has been employed to transform a matter of fact into a matter of law, i.e. to formulate a legal truth, based on admissible evidence, that can be considered as acceptable and reliable enough to justify a certain legal decision. Two methods are used to formulate such legal truths. The first method is presumption, used in case of proving innocent, or rather of disproving guilty. As described above, 100% confirmation of innocence is nearly impossible in fact. Therefore, a value judgment is taken into account when the matter of fact has been transformed into the matter of law, according to which everyone shall be presumed innocent before being proved guilty. Consequently, innocence as a legal truth can be established based simply on the failure to establish guilty as a legal truth, according to the principle of the presumption of innocence.⁶

The second method is theorizing, used in case of proving guilty. In the 'pure' adversarial system, each party is presumed to conduct its own investigation and thus collect as much evidence as possible, based on which it may theorize about what might have happened in a way favourable to its own case.⁷ In an adversarial system with inquisitorial elements in the pre-trial stage (like US, England, and Scotland), where the defence are greatly dependent on pre-trial discovery of prosecution evidence instead of independent investigation to obtain

6 For details, see Dahlman & Feteris 2012, pp. 207-221.

7 See Findley 2012, p. 914.

their evidence, it is highly possible that the defence do not theorize about their own case but simply impeach the prosecution case given the presumption of innocence. Anyway, the prosecution must restore the truth by theorizing about what has happened based on admissible evidence, and use its own case theory to defeat the case theory or impeachment of the defence. Where a prosecution case (theory) can stand beyond any reasonable doubt, such a case (theory) will be considered as legally acceptable and reliable enough, and thus formally recognized by the tribunal of fact as the legal truth of the case based on which the judgment can be made.⁸

3.2.2 The outlook on justice

So, in the adversarial model of fact-finding, neither the prosecution case nor the defence case can be considered as real fact; rather, they are just different versions of case theories supported by admissible evidence. Therefore, the so-called 'fact' formally recognized by a legal decision is indeed still a version of case theory, which however, has been legitimized through a fair trial, and thus commonly accepted as truth unless proved otherwise.⁹ In this sense, 'facts' recognized in judgments are indeed a legal construct rather than the objective truth, and could either be true or be false in reality. Therefore, the reliability and authority of a legal 'fact' and the legal decision based on it will stem largely, if not solely, from the quality of the process, rather than the substantive matter. This rationale determines the Anglo-American outlook on justice. In brief, Anglo-Americans believe that justice is not simply guaranteed by, but also consists largely in, due process. This outlook is closely related to the adversarial nature of their criminal procedure and relevant epistemology and methodology for fact-finding.¹⁰

3.2.3 Community-based administration of justice

Due to historical and contextual reasons, the Anglo-American system relies on the belief that (criminal) justice should be administrated primarily on the basis of local community rather than of the state. Specifically speaking, criminal proceedings against an accused person have long been considered mostly as a private matter within a certain community, and therefore relevant procedural tasks, such as investigation, prosecution, and adjudication, based on such theory, have been remitted to representatives of the community. As Sir William Blackstone firmly believed of the jury, 'it is the most transcendent privilege which any subject can enjoy, or wish for, that he cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve

8 See Damaška 2003, pp. 117-130.

9 See Dahlman & Feteris 2012, pp. 207-221.

10 See Damaška 1986, pp. 101-103.

of his neighbours and equals.¹¹ In brief, this outlook on how (criminal) justice should be administrated has in large part determined the defining features of Anglo-American criminal procedure, such as lawyer-dominated proceedings, partisan prosecution, and jury trial.

3.3 Institutional level

The conceptual tenets of the ‘pure’ adversarial system, as described above, have functioned explicitly in the institutional settings of those countries with adversarial criminal procedure. Although no country on this planet actually uses a pure model of the adversarial system in the administration of criminal justice, while most (western) countries actually employ, more or less, both adversarial and inquisitorial approaches, the institutional settings of those countries that consider themselves adversarial, such as the United States, England, and Scotland, still reflect considerable adversarial tenets, which consist mainly in the functioning and interacting of the actors involved in their criminal procedure.

However, the cost for adherence to such tenets is so high that even the world’s most powerful countries are still unable to afford a comprehensive use of typical adversarial procedure, but must make efforts to curtail the investment of judicial resources by e.g. resorting to plea bargaining, guilty pleas, deferred or non-prosecution agreements, or non-jury trials to simplify the process of most criminal cases.

As far as is relevant to the topic of this research, the typical or less typical adversarial tenets of the institutional level commonly reflected in US, English, and Scottish criminal procedure can be outlined as follows:

Lay decider of fact

A criminal defendant in an adversarial system is in principle entitled to a jury trial. In other words, lay decider of fact is a default setting of an ideal adversarial system.¹² This setting reflects a deep mistrust of and inherent caution against the almighty professional judges and bureaucrats that characterize a state-orientation. However, jury trial requires a complex set of legal techniques and procedure, involving e.g. the selection and determination of jurors, the admission and evaluation of evidence, and the deliberation and decision of cases, to facilitate the fairness of the trial and the competency of the decider. Therefore, an effective and adequate defence will become a highly specialized and skill-demanding job, which in turn requires a huge group of lawyers nationwide.

In a typical Anglo-American style of adversarial criminal trial, the decider will in fact consist of two actors, i.e. the trial judge and the jury. The latter

11 Blackstone, p. 379.

12 See Bibas 2012, pp. 3-6.

serve as the decider for the factual decision, while the former serve as the decider for legal decisions. Specifically speaking, the jury are responsible for a unanimous verdict as to the guilt or innocence of the criminal defendants; the trial judges have to ensure that both parties follow court rules and trial sessions are conducted in a fair way, and they also have the duty to instruct the jury where necessary as to legal issues such as admissibility of evidence and rules about deliberation, and decide the sentence for convicted defendants. In brief, if a typical Anglo-American adversarial criminal trial could be compared to a sports contest, so the two parties compared to opposite players, the trial judges should then be considered as the referee who uphold the competition rules and warn or even punish the players for their fouls, while the jury as the audience who watch the entire contest and rate the players according to their performances. Therefore, it is not unfair to say that truth-finding in a typical Anglo-American adversarial criminal trial is a mission jointly undertaken by the two parties, i.e. the prosecution and the defence, rather than by the decider.¹³ The decider, in turn, will just evaluate their performances as an outsider, and determine who has won the contest; as an outsider of the trial, they can neither examine any witness nor ask any insider to clarify any doubt they have about either prosecution cases or defence cases. To sum up, the decider of a typical Anglo-American adversarial criminal trial shall play a passive and impartial role as an outsider, who has no interests in the outcome of the cases. Their passive and impartial role also reflects the basic idea of the Anglo-American adversarial criminal procedure.¹⁴

It is notable that the deliberation of the jury is usually conducted totally *in camera*, even without the presence of professional judges, and the factual decision given either by the jury in a typical adversarial criminal trial or by the trial judge in a less typical adversarial criminal trial, need not be explained with detailed reasons such as admission and evaluation of evidence. Moreover, factual decisions by the jury will usually not be subject to any challenge during appeal procedures in adversarial systems.

Rights to non-cooperation

An accused shall not be compelled to cooperate with the government in an adversarial criminal proceeding. This involves two closely-related rights of a citizen, a witness's privilege against self-incrimination and the right to silence enjoyed by an accused. The rights ensure: 1) that an accused may not be questioned by a prosecutor or judge at trial unless he chooses to be, and in principle, no adverse consequences (e.g. increased penalty) should follow his refusal to do so; and 2) that the police shall cease any and all interrogation once a person has refused to answer or invoked the right to an attorney, and any statements made afterwards are inadmissible in court. It is therefore fair

13 For details, see Damaška 1986, pp. 109-135.

14 For details, see *ibid.*, pp. 135-140.

to argue that non-cooperation of the accused is another default setting of the modern adversarial system. This setting reflects on the one hand the classical model of an adversarial system in which prosecutors and defendants as equally-armed partisan citizens are supposed to compete against, rather than cooperate with, each other so as to achieve the truth of the criminal cases; on the other hand a great caution against possible torture since the expectation for cooperation of the accused may drive a person in authority to coerce the former into it where the expected result does not occur. Accordingly, an accused in the 'pure' adversarial system does not have to present his defence in person at trial.

Right to counsel

According to the two aforesaid points, one may find that an accused in the 'pure' adversarial system is usually neither competent nor obliged to present his defence in person at trial; meanwhile, his right to silence during interrogation will be launched by a claim of his right to counsel, therefore a universal right to counsel is indispensable to the accused for having an effective and adequate defence and thus a fair trial. A universal right to counsel, in turn, is premised on at least two conditions: 1) a huge group of licensed lawyers who can serve as either prosecuting or defence counsel; (E.g. the number of licensed lawyers in US has amounted to over 1.3 million by the year of 2015,¹⁵ which is approximately one for every 247 people, or approximately 0.4% of the total population [320 million].) and 2) sufficient opportunities and thus a big budget for legal aid so that the poor will not be deprived of the right to counsel. Besides, the counsel, especially the defence counsel, must be vested with comprehensive rights for preparing their cases.

Rights of defence counsel

As is inferred from the previous paragraph, defence counsel need comprehensive rights, especially those regarding the investigation of cases, and immunity from possible jeopardy caused by relevant law-practice, to prepare their cases. In the 'pure' adversarial system, both the prosecution and the defence are citizens who are supposed to have comparable powers in investigation;¹⁶ however, criminal procedures of many countries recognized as adversarial, including US, England, and Scotland, have employed more or less the inquisitorial approach as well, especially in the pre-trial stage of criminal process, in which a powerful police force undertakes the investigation of criminal cases and therefore has a monopoly on most evidence. In this case, the right to discovery of the defence (in England and Scotland the disclosure duty of the prosecution and in inquisitorial jurisdictions as well as in China the access to the dossier

15 See 'Lawyer Demographics Year 2015' by the American Bar Association, http://www.americanbar.org/content/dam/aba/administrative/market_research/lawyer-demographics-tables-2015.authcheckdam.pdf, retrieved on Jan. 31, 2016.

16 See Damaška 1986, pp. 63-64.

for the defence) has become of equal, if not more, significance as their rights regarding independent investigation. Accordingly, it is not unfair to argue that pre-trial discovery/disclosure is a mechanism necessitated on the one hand by the use of non-pure adversarial procedure and on the other by the principle of parties with equal rights/opportunities to present their own case.¹⁷

Proceeding in words rather than by writing

Another fundamental setting of the 'pure' adversarial system lies in that its proceedings consist formally in words directly given to the judicial authorities rather than in a case file that records such words.¹⁸ For instance, a record of interrogation (of the accused) or record of questioning (of a witness) cannot in itself be recognized as confession or testimony given by the accused or the witness; rather, the accused or witnesses must confess or testify in person at trial so as to form admissible evidence. In other words, in principle, any piece of evidence may not stand as it is unless it has been presented in words directly by the provider before the bench. This might be the very reason why a trial is literally referred to as a 'hearing' in English. Accordingly, the entire course of fact-finding, including the formal production and submission of evidence, in the 'pure' adversarial system actually occurs at trial, and it is therefore fair to argue that the trial session represents the hard core of an adversarial system.¹⁹

Plea bargain and non-jury trial

It is evident that an ideal adversarial trial is costly in terms of judicial resources. Should every criminal case be subject to a complete adversarial proceeding, neither judicial authorities nor the national finance could afford the cost. Therefore, it is necessary to resort to an alternative (less typical) resolution that may fit (complement) the typical procedure very well. In US, this refers to plea bargaining through which the accused may plead guilty in exchange for a lesser charge, or vice versa, the prosecution may propose leniency in exchange for guilty plea. Such a compromise enables judicial authorities to concentrate resources on the most significant cases.²⁰ In fact, a vast majority of criminal cases in the US will be resolved through plea settlement. This also reflects another idea of the adversarial system that a criminal case is a matter of two (groups of) citizens that can be subject to bargain. If the truth is determined by oral contest (between two versions of events), then it can also be said to have been established if the contestants agree beforehand, always presuming that no coercion is involved (the essence of plea bargaining). Plea bargaining in England is a much more recent practice and slightly different (though the

17 See *ibid*, pp. 131-134.

18 See *ibid*, pp. 61-62.

19 See *ibid*, pp. 57-58.

20 See Bibas 2012, pp. 18-20.

principle is the same); the English actually save their judicial resources by massive use of non-jury trials.

The aforesaid tenets of the ‘pure’ adversarial system determine in theory that external transparency of criminal procedure shall be considered as the primary guarantee for a fair trial, and thus given the utmost priority, while internal transparency that is at odds with such tenets may cause structural paradoxes and tensions of the entire system. Notwithstanding such a structural risk, the United States, England, and Scotland have chosen to provide more or less internal transparency in their criminal procedure by introducing discovery/disclosure mechanisms. This means that internal transparency seems to have become not only a significant guarantee for legitimacy of non-adversarial systems, but also a principle with increasingly universal value, which has even been conceded by the most exemplary jurisdictions with adversarial traditions. In this sense, it appears that internal transparency of criminal procedure might facilitate a more significant and desirable value that these countries would rather pursue at the expense of less defence autonomy.

In the main texts of Chapter 3-5, the author will explore how and why the United States, England, and Scotland as exemplary systems with adversarial traditions have invoked internal transparency of criminal procedure that might counteract with their adversarial nature; in other words. the following chapters in this part will try to find out where the aforesaid more significant and desirable value lies. Moreover, he seeks to further discover how relevant mechanisms contribute to the legitimacy of their criminal justice systems; which can be further used in Part III as a mirror to inspire China with a sound solution to the legitimacy decline of its criminal justice.

Chapter 4

Basic tenets and internal transparency of the English criminal procedure

As the origin of adversarial criminal procedure, England had historically established a series of (criminal) procedural dogmas, most of which have been subject to certain changes on the one hand due to equitable reasons in their home country, but on the other hand transmitted to China and somehow enshrined as inherent, immutable, and irrefutable principles of any sound criminal procedure in China's new ROL discourse. In order to challenge the Chinese belief in distorted adversarial dogmas, this Chapter will first trace the historical development of the English criminal justice system (focusing on the prosecution system), identify its basic tenets, elaborate how such tenets formed and evolved, and try to discover what factors underlie the process of initiation, evolution, and entrenchment of such tenets; then it will further describe England's relevant mechanisms (focusing on the prosecutorial duty of disclosure) pertaining to internal transparency of criminal procedure, and explain why internal transparency has become increasingly indispensable for the fairness of a criminal trial and how relevant mechanisms function to enhance legitimacy of the system.

4.1 The basic tenets of the English criminal procedure

4.1.1 *The historical development of the modern English system*¹

The criminal justice system in England has been, and still is, a dynamic process, which makes it a bit difficult to describe. Therefore, a brief historical retrospect is necessary for a better understanding of the status quo of this changing system. Historically, modern England has witnessed three phases of prosecution system, during which the allocation of responsibilities to the actors involved in criminal proceedings and their concomitant functions varied a great deal; therefore, the basic tenets of the modern English system have also changed a lot along the history.

¹ This section is based mainly on the review of several relevant works: Ashworth & Redmayne 2005; Hay & Snyder 1989; Beken & Kilchling 1999; Brants & Ringnalda 2011; Langbein 2003.

The first phase of the modern English system (approximately the 15th, 16th and 17th centuries, i.e. the end of the medieval period and the early modern period) was characterized by private investigation and prosecution, and lawyer-free altercation at trial. In general, the prosecution in England during this phase was entirely on a private basis. No major difference can be identified between criminal and civil procedure. The autonomy of individuals prevailed over intervention by the state, whose duty in this context was regarded as no more than providing a communicative forum that accommodated a full altercation between the accuser and the accused. At that period of time, English criminal procedure operated not only without legal counsel, but also without public prosecutors or police. In fact, it is not until 1829 that organized police forces – let alone any other organized, professional body of investigators or prosecutors vested with necessary powers and responsible for enforcing criminal law – came into being in England. By then, not only the investigation and collection of relevant evidence but also the presentation of cases at trial had therefore been the task of ordinary citizens such as the accusers and defendants; it was generally believed that denying defence counsel benefited the accused since the latter, if falsely charged, would clear himself through ‘the Simplicity and Innocence’ of his response, while the responses of guilty defendants would ‘help to disclose the Truth, which probably would not so well be discovered from the artificial Defence of others speaking for them’,² and that the idea of organized police forces and public prosecutors would fall into a French Style that strongly contradicted the English tradition of self-government and freedom. To a great extent, this belief was rooted on two ingrained constitutional notions in English legal tradition – the decentralization of power and the notion of community-involved policing. In brief, England at this period denied the necessity of an organized, professional, and powerful public system competent to investigate and prosecute all the crimes.

During such a phase in which the centrepiece of a criminal trial was the confrontation between the accuser and their witnesses and the accused in the courtroom, the basic tenets of the English system turned out to be as un-English as it was possible to be from a modern observer’s eyes: the accused, with no entitlement of legal representation and little opportunity to prepare a defence since they were not informed of the charge against them before it was read to the court so as to prevent the fabrication of a defence, were expected and thus compelled to speak at trial; trials were brief and short and juries more likely to convict than acquit; defence counsel was formally forbidden while the court supposed to act as legal counsel for the accused; defence witnesses were restricted.³

The aforesaid tenets, including the underlying belief that the best way to discover the truth of any accusation was to confront the accused directly, to

2 See Hawkins 1721, p. 400.

3 See Langbein 2003, ch. 1, pp. 10-66.

hear their unprepared response, and to see their natural reaction so denying defence counsel promoted truthful outcomes, was shaken in the celebrated treason trials (e.g. the Popish Plot and the Rye House Plot) that occurred in the late 17th Century, in which perjured evidence, it later transpired, resulted in the conviction and execution of innocent persons, including political notables.⁴ Reflection on these failures of justice led to the Treason Trial Act 1696, which formally allowed treason defendants to have their own counsel. Although the right to counsel was then only limited to the rare treason trials rather than common felonies, and the function of defence counsel only to examination and cross-examination, such small step of concession represented the English reformer's awareness of the idea that a person on trial for their life, faced by the resources of the state, could not necessarily mount a defence without legal assistance. This was especially true in the case of e.g. treason trials where the crown itself had significant interest and thus conducted the prosecution with partisan vigour and always through prosecution counsel, and where the bench, which still served at the pleasure of the crown, did not behave impartially towards the defendants.

This transformation of the English criminal trial in both conceptual and institutional terms marked the starting point for the development of the modern adversarial trial. In the following one hundred plus years, due to the growth of the state and its attempts to deal with problems of crime and disorder, prosecution had become increasingly more organized and professional although it was still private in name: the state offered financial incentives to prosecute which had given rise to a number of reward-seeking thief-takers; prosecuting associations had been formed, serving as self-safeguarding organizations of particular industries or groups; crown witnesses had been introduced, who were induced to testify against the defendants in order to save their own necks; prosecuting solicitors had been used by the prosecution on a more regular basis.⁵

Responding to such menacing prosecutorial initiatives, the judges of 1730s extended the scope of the right to counsel to common felonies; in addition, they created the law of criminal evidence to further restrain the aforesaid prosecutorial practices so as to offset their systematic threat to the truth and procedural fairness. In order to preserve the 'accused speaks' trial which they considered as the centrepiece of sound criminal justice, English judges continued to forbid defence counsel to defend or speak to the merits of the defence case. However, by strategically invoking the criminal evidence rules and emphasizing the prosecutorial burdens of production and proof, English lawyers managed to gradually diminish the courtroom roles of both the accused and the trial judges, and take increasing command of the conduct of the trial. In this way, the English criminal trial had unexpectedly transformed from a lawyer-free proceeding to a lawyer-dominated proceeding just within a period

4 See *ibid*, p. 3.

5 For details of the transformation as such, see *ibid*, ch. 3, pp. 106-177.

of about one century. Accordingly, the normative structure of the English criminal trial was transformed from an opportunity for the accused to speak in person to the charges and the evidence against him to an opportunity for defence counsel to test the prosecution case. Eventually, as the right to a full legal defence in trials for felony was formally recognized by the Prisoners' Counsel Act 1836, an adversarial system dominated by lawyers was entrenched in England.

The basic tenets of the aforesaid lawyer-dominated adversarial system had then become much more English and familiar to modern observers: silent defendants, passive judges, full legal defence, preparedness of the defence, cumbersome lawyer-dominated and oral-debate-centered trial sessions. What may distinguish the early-19th-century English criminal procedure from its current pattern is how and by whom the investigation and prosecution should be conducted. At that time, although private constables and local Justice of the Peace played increasingly significant roles in prosecutorial practices, the conduct of investigation and prosecution was still private in form, and substantially less organized than it later became.

In the course of the 19th century, three major aspects undermined the justification of the private prosecution system. First, in practice, the prosecuting system malfunctioned on a regular basis on both sides: on the one hand, inadequate investigation and thus weak prosecution cases often failed to prevent the guilty from escaping punishment they deserved, aggravating the increase of crimes; on the other hand, malicious prosecutions occasionally caused unjust conviction of innocent poor people, forming an abuse of the right to private prosecution. Second, the ideas of the Enlightenment prompted the reflection on the notion of punishment, featuring effective and well-rounded law enforcement instead of relying on the exemplary and deterrent effect of public corporal punishment and the concomitant selective law enforcement. Last, the model of its Scottish counterpart also served as an example for the reform of the English prosecution system. Accordingly, the prosecution system in England gradually transformed to *the second phase: police-oriented prosecution* (approximately from the middle of the 19th century to the late 20th century).

From '1829 (when the Metropolitan Police were established) to 1856 (when country forces became compulsory)',⁶ as organized and professional regular police forces were gradually introduced throughout England on a local basis,⁷ it became natural to expect them not only to detect and arrest suspected offenders but also to initiate their prosecution. Due to the great fear of the local elites that their own powers and authority were likely to be usurped, however, the police forces in England were initially granted very few powers. In particular, they were vested with no specific prosecution powers other than prosecuting

6 Hay & Snyder 1989, p. 5.

7 See Emsley 2005, pp. 230-235.

on behalf of a victim, just as any citizen could take out a private prosecution against any suspect.⁸

Gradually, the police became more and more involved in prosecuting, and in various ways. They could induce victims to initiate prosecutions by bringing them before the magistrates and having them bound over to prosecute, with the police officer acting as the main prosecution witness.⁹ Constables could also bring a prosecution, either by instructing a solicitor, or by actually presenting the case in court.

Eventually, the police took over the victim's role as the main prosecutor, and this remained the case until as late as 1986. During this phase, the police were given not only the powers and responsibilities for investigation and collection of relevant evidence, but also the decision making powers as to whether or not and on what charge to initiate a prosecution. If deciding to prosecute, they would either present their case at trial in person, or instruct a barrister¹⁰ who was bound to obey their instructions to do so.¹¹ As we can see, the police forces wore two hats during that period, one as investigator and the other as prosecutor.

The acceptance in England of the police forces as a solution to the dilemma and conflict between the need for a more powerful and effective crime control institution and the reluctance and hostility to a 'French-style' idea of an executive force for prosecution, can, to a great extent, be attributed to the special role and position of the English police. Influenced by the concept of 'policing by consent', the English police were regarded as citizens in uniform and an extension of the people rather than an extension of government. They were not construed as a top-down force whose power derives legitimacy from the government, and were autonomous and independent from government, without central executive policy and control. Therefore, they could be accepted much more readily as *de facto* and semi-official public prosecutors, which theoretically did not affect the private basis of the English prosecution system.

Apart from the police who had brought most prosecutions, there were still another two principal prosecuting agencies during this phase. One was the office of the DPP (Director of Public Prosecution) established in 1879. It only

8 See Hay & Snyder 1989, pp. 36-47.

9 The victim of a property crime often needed the help of a magistrate and constables to locate and recover his property, and the magistrate would typically oblige such a person to prosecute as a condition of assisting him with search warrants and the like. See Langbein 1999, p. 324.

10 A legal practitioner admitted to plead at the Bar. The primary function of barristers is to act as advocates for parties in courts or tribunals, but they also undertake the writing of opinions and some of the work preparatory to a trial. With certain exceptions a barrister may only act upon the instructions of a solicitor, who is also responsible for the payment of the barrister's fee. Barristers have the right of audience in all courts: they are either Queen's Counsel (often referred to as leaders or leading counsel) or junior barristers – Oxford Dictionary of Law.

11 Hay & Snyder 1989, pp. 36-52.

had responsibility for a very small number of the most serious and sensitive offences, including all murder prosecutions, and a variety of other cases concerned with such matters as national security, public figures, and alleged offences by police officers. In such cases, the DPP would decide whether the prosecutions already initiated by the police or others should be continued; and if so, it would act as solicitors¹² by preparing the prosecution and instructing counsel. It also gave advice to police forces, but had no control over the police, nor any investigative role or independent investigative powers.

The DPP, appointed by the Home Secretary, was accountable only to the Attorney General, who in turn was independent from government. His office was to be a non-governmental, independent institution, not involved with or affected by the policies of central government. While this was a true public prosecutor's office, its role was largely limited to serving as a check on the prevailing system of police-oriented prosecution. This arrangement, therefore, also maintained the theoretically private basis of the English prosecution system.

The last of the principal prosecuting agencies during this phase were (and still are today) the so-called 'regulatory agencies', including various agencies such as the Inland Revenue, the Post Office, Her Majesty's Customs and Excise, and so forth. They were non-ministerial government departments with statutory duties of control over particular privatized industries, as well as enforcement of regulatory law, including the prosecution of crimes, mostly in the economic sphere. They mostly had their own prosecutors. Like the police, the regulatory agencies also served a dual role as investigators and prosecutors in criminal proceedings; but they had different policies and practices in prosecution. They were usually more likely to divert rather than prosecute a case. Therefore, their role as prosecutors was rather limited in quantity, and the police still played the leading role in prosecution.

According to the self-government concept in England, it was, of course, possible for victims or any other citizen to initiate a prosecution against any suspected offender; however, in general, prosecution had already been taken over by the police. Additionally, hired lawyers (barristers) in private practice instructed by the police also served as prosecutors in criminal trials on a regular basis, especially in prosecutions for indictable offences. However, not only were they bound to obey the police's instruction, the latter were also in full control of decision making in the whole prosecution process. Furthermore, with no independent investigative powers, they had to base their prosecution

12 A legal practitioner admitted to practice under the provisions of the Solicitors Act 1974. Solicitors form much the larger part of the English legal profession, undertaking the general aspects of giving legal advice and conducting legal proceedings. They have rights of audience in the lower courts but may not act as advocates in the Supreme Court (except in chambers) or the House of Lords unless they have acquired a relevant advocacy qualification under the terms of the Courts' and Legal Services Act 1990 – Oxford Dictionary of Law.

cases entirely on the evidence gathered by the police. All the facts described above suggest that the police played the dominant role in prosecution during this phase.

The inherent drawbacks of the police-oriented prosecution system in England gradually surfaced: too many weak cases were being prosecuted, largely because the police were reluctant to drop them, leading to numbers of avoidable acquittals; too many cases were being prosecuted which could or should have been diverted from prosecution on the grounds of triviality of the offence or the personal circumstances of the offender; policy on prosecuting weak or divertible cases varied greatly from police area to police area, and therefore inconsistency led to unfairness.¹³

The reflection on and challenge to the police-oriented prosecution system drew an increasing amount of attention, especially in the 1970s. One of the most influential and paradigmatic events was the publication in 1970 of a report by the British section of the International Commission of Jurists, JUSTICE,¹⁴ which opposed the existing system of police-oriented prosecution in England and Wales, arguing that on the one hand, it was wrong in principle for the police, who investigated crimes, to take decisions concerning prosecution, which require impartiality and independence; and on the other hand, from a more pragmatic perspective, it would be a better use of police time to focus on investigation rather than to undertake all these prosecutorial duties, as they were experts at the former rather than the latter. The immediate impetus for reform, however, came from a spectacular miscarriage of justice, the *Confait* case. The subsequent inquiry report¹⁵ published in 1977, made criticisms of several aspects of the criminal justice system, and proposed that changes in the prosecution system should be considered. Later on, the Royal Commission on Criminal Procedure considered this proposal, and reported in 1981 in favour of the establishment of an independent public prosecution system, presaging the end of the police-oriented prosecution system in England and Wales, as well as the beginning of the *third phase* of the English system of criminal procedure, involving the establishment and operation of the Crown Prosecution Service (CPS).

The Prosecution of Offences Act 1985 created, on a national basis, the CPS, with a central headquarters headed by the DPP in charge of all local Crown Prosecutors, and formally accountable to the Attorney General. The CPS began to work in 1986, with a duty to take over all prosecution initiated by the police (except for certain minor offences), and with the power to take over other prosecutions. Moreover, Section 10 of the Prosecution of Offences Act 1985 laid upon CPS the duty to publish a Code for Crown Prosecutors and to report annually to Parliament on its work and the use of its powers.

13 HMSO 1983.

14 JUSTICE 1970, p. 668.

15 HMSO 1977.

The Service was divided into areas largely coinciding with the police areas, thereby facilitating liaison between prosecutors and police. Each prosecution area was headed by a Chief Crown Prosecutor (CCP). Crown Prosecutors, assisted by legally unqualified staff, had to be qualified lawyers and were recruited from the ranks of solicitors and barristers.

The strict separation between investigation and prosecution and the concomitant independence and objectivity of the Crown prosecutors could ensure that all cases which should be diverted would be, and that weak cases would be identified earlier and then either not prosecuted or strengthened. The threshold for prosecuting would also be raised from a *prima facie* case to one where conviction was more likely than acquittal. The quality of prosecutions and thus the conviction rate, therefore, could be significantly increased, facilitating the efficient use of judicial resources.

The internal or external instructions or scrutiny described above had for the first time formed a unified, centralized, and hierarchical public prosecuting institution throughout England, allowing a unified career structure of public prosecutors, and thus more cost-efficient law enforcement and more consistent policy implementation. The centralized instruction to and control over the local prosecutors in various areas, would develop and operate national criteria, thus reducing inconsistency and unfairness.

However, the powers and role of the CPS were quite limited during this period. First, the initiation of prosecution and the choice of charge were still for the police to decide; and accordingly the role of a Crown Prosecutor was limited to deciding whether prosecutions initiated by the police should be continued, possibly on a different charge. A Crown Prosecutor, therefore, was a mere veto user instead of a real decision maker as to whether or not and on what charge to initiate a prosecution. Second, the decision concerning prosecution was entirely dependent on the evidence and information gathered and then supplied by the police. Prosecutors had no powers of investigation, nor were they able to control, direct, or even give formal advice to the police in relation to the investigation or the lines of inquiry. Therefore, the conceived independence of the CPS from the police was in practice undermined to an uncertain extent. Third, Crown Prosecutors had no rights of audience in the higher courts, and could only prosecute in person in the magistrates' courts. The CPS was therefore still dependent on hired private counsel in the Crown Court, which undermined Crown Prosecutors' role as public prosecutors, as well as the public prosecution system as a whole. Fourth, the existence of the so-called 'regulatory agencies', which still played a dual role as investigators and prosecutors, and followed various tests or practices concerning prosecution and diversion, would undoubtedly not facilitate either the expected separation between investigation and prosecution, or the consistent implementation of prosecuting policy. Last, the structurally weak position of the CPS made it difficult to recruit enough competent lawyers as career public prosecutors.

The recognition of and reflection on the drawbacks of the CPS have led to a series of subsequent reforms concerning the public prosecution system, and England is still undergoing a transitional phase in terms of its prosecuting system.

4.1.2 The current position of the public prosecutors in England

Crown prosecutors and those officials who prosecute on behalf of the police or the so-called ‘regulatory agencies’ share a common role as public prosecutors. At large, they should play a neutral role, sometimes referred to as a ‘minister of justice’,¹⁶ and look out also for the interests of defendants, despite the simultaneous expectation for them to pursue criminals vigorously.

Today, the CPS still retains its hierarchically organized structure with its headquarters headed by the DPP, as well as its fundamental role and major characteristics. The CPS still has the duty to take over all prosecutions from the police, as well as the right to take over any other prosecution. Furthermore, it has taken over from the police the decision making power as to whether or not and on what charge to initiate a prosecution (except for some minor offences), which has enhanced its independent prosecutorial position from the police. Moreover, Crown Prosecutors can eventually progress to the rank of Crown Advocates with right of audience in the higher courts, facilitating the full control of the public prosecutors over ever-more prosecutions throughout England and Wales.

In addition, the position of the CPS has been steadily strengthened, which has in turn substantially weakened the private and partisan nature of the prosecution system in England. On the one hand, with the increasing number of qualified Crown Prosecutors including Crown Advocates, and with the incorporation of ever more regulatory agencies into the CPS, it is becoming an increasingly broad-based and centralized prosecution service; on the other hand, since it is barely possible for any English citizen to initiate private prosecution in person (with certain exceptions), which, at least in form, symbolizes the traditionally English notion of self-government and community-based administration of (criminal) justice, English prosecutors are indeed beginning to have ever more public nature, especially in pre-trial procedure.

Besides, despite the lack of the powers for independent investigation or formal control over the police, the CPS today can be closely involved during investigations, particularly in more serious cases; and has some indirect or informal ways of directing the police, since it formulates the charge and leads the Criminal Justice Units in which police and the CPS co-operate. The strengthened position of the CPS in practice during investigations has facilitated its competence, impartiality and independence from the police as to making decisions concerning prosecutions.

16 General Council of the Bar, Code of Conduct, Annex H, para. 11.

At large, the CPS today has played a leading role in prosecution in England. Despite its traditionally adversarial essence, it has been situated in an impartial rather than partisan position (unlike its opponent, the defence lawyers), its prosecutors being regarded as ‘ministers of justice’. In principle, they ‘must always act in the interests of justice and not solely for the purpose of obtaining a conviction.’¹⁷ However, this does not mean that it represents both sides in a substantive manner; rather, its impartial position is in formal terms, referring to: ‘Prosecutors must be fair, independent and objective. They must not let any personal views about the ethnic or national origin, gender, disability, age, religion or belief, political views, sexual orientation, or gender identity of the suspect, victim or any witness influence their decisions. Neither must prosecutors be affected by improper or undue pressure from any source.’¹⁸

The description above has featured the fundamental position of the CPS. Moreover, the CPS also plays various specific roles in various specific procedures.

Firstly, despite the lack of investigative powers, the CPS is beginning to play an informal role in the investigation phase. As has been noted above, the CPS today can be closely involved during investigations, particularly in more serious cases; and has some informal ways of directing the police, since they lead the Criminal Justice Units in which police and CPS co-operate. This new development may have presaged a tendency towards the avenue of their Scottish counterpart.

Secondly, the CPS plays a role of filter in deciding whether or not and on what charge to initiate prosecutions. It filters weak cases either by diverting or even dropping them, or by strengthening them. During this phase, they enjoy some discretionary power concerning the conclusion of investigation.

Thirdly, the CPS has played a balanced role in the pre-trial disclosure in the sense that it does not prevail over and thus direct the police just like its Scottish counterpart, rather, it co-operates with the police in an informal manner, and only discloses the disclosable evidence or information in its possession; moreover, it discloses the disclosable evidence or information to the defence on a reciprocal basis; and that it should also seek to withhold the ‘disclosable’ but sensitive evidence or information where PII (Public Interest Immunity) involved.

Lastly, on the ground of the traditionally adversarial essence, the Crown Prosecutors at trial, deemed as prosecuting counsel, have been situated in an independent and partisan position in the trial phase of the criminal process, symmetric with that of the defence counsel. In this phase, they play an unadulterated role of accuser in the sense that they only present their own cases before the court on basis of their review and presentation of incriminating evidence, thereby facilitating its goal of conviction.

17 CPS, Code for Crown Prosecutors (2013), para. 2.4.

18 Ibid.

The police have, and still do play a leading role in the investigation of criminal offences. Apart from a small proportion of offences for which various regulatory agencies are responsible, the vast majority of criminal offences are supposed to be dealt with by the police.

For some minor offences, the police also play a role as public prosecutors in the sense that apart from the investigation, they have not only to prepare and initiate the prosecutions, but also to present the prosecution case before a magistrate's court, either in person or through solicitors instructed by them, just like the Crown Prosecutors do. And they also play a role of filter in the sense that they can divert trivial cases through police cautions.

In England, a certain proportion of all prosecutions are brought by fragmented agencies other than the CPS or the police. For instance, those for offences concerning safety at work are brought by the Health and Safety Executive; those for offences relating to the evasion or attempted evasion of customs duties and VAT, by Her Majesty's Revenue and Customs; those for offences of pollution, by the Environment Agency; and so on.

These so-called 'regulatory agencies' have long been in a dynamic process: absorption, merger, and transfer continually occurred, which is somewhat confusing and thus difficult for an outsider to draw an outline. However, a converging trend is still perceptible during the development of these agencies: a British version of the FBI is seemingly on its way. For example, the merger of the Inland Revenue and Her Majesty's Customs and Excise which took effect on 18 April 2005 formed Her Majesty's Revenue and Customs (HMRC), which has a strong cadre of criminal investigators responsible for investigating serious organized fiscal crime. They have aligned their previous Customs and Excise powers to tackle previous Inland Revenue criminal offences; their skills and resources include the full range of intrusive and covert surveillance. HMRC inland detection officers have wide-ranging powers of arrest, entry, search and detention. Their main power is to detain anyone who has committed, or who the officer has reasonable grounds to suspect has committed, any offence under the Customs and Excise Acts. Their prosecution cases may be coordinated with the Police, the Revenue and Customs Prosecutions Office or the Crown Prosecution Service. HMRC's annual report gives brief mention of the 'number of people sentenced', which suggests very few prosecutions, implying that their proportion of 'alternatives' is higher than 73%.¹⁹ It seems that, like many regulatory agencies, HMRC treats prosecution as a last resort.²⁰

Currently, the most powerful regulatory agency in the English system, which represents the latest achievement of the converging trend described above, is the Serious Organized Crime Agency (SOCA), which was established on 1 April 2006 following a merger of the National Crime Squad, the National Criminal Intelligence Service, the National Hi-Tech Crime Unit, the investigative and

19 White 2008, p. 485.

20 See Hawkins 2002.

intelligence sections of HM Revenue & Customs on serious drug trafficking, and the Immigration Service's responsibilities for organized immigration crime. The Assets Recovery Agency became part of SOCA in 2008, while the Serious Fraud Office remains a separate agency. Apart from SFO, some existing regulatory agencies such as the Post Office, the Health and Safety Commission (including the Factory Inspectorate), the Pollution Inspectorate, local authorities (including, for example, their environmental health officers), still retain their prosecutorial powers, as do some private organizations, such as the Royal Society for the Prevention of Cruelty to Animals (RSPCA). In this situation, they play a dual role as both investigators and prosecutors.

SOCA is a national law enforcement and intelligence agency, established as a body corporate under Section 1 of the Serious Organized Crime and Police Act 2005, whose officers can be designated the powers of a constable, customs officer or immigration officer and/or any combination of these three sets of powers.²¹ The agency has apparently limitless scope within the criminal sphere: no definition of what constitutes 'organized crime' is forthcoming, nor is the agency restricted to organized crime.²² In addition, the new SOCA agents have unprecedented law enforcement powers, combining the arrest powers²³ of a police constable with the compellability powers²⁴ of a customs official. Furthermore, SOCA is under direct control of the Home Secretary, without any democratic accountability to local communities. Never before has central government commanded such a high degree of control over police agents, who have traditionally been independent, swearing allegiance to the Crown.²⁵

The formation of SOCA, a hybrid policing and intelligence agency represents a transformative leap in British law enforcement, and the dawning of a new era in British policing.²⁶ During this period, the British seem to be experiencing a practical dilemma and ideological ambivalence in criminal process and law enforcement, trying to reconcile the practical needs of effective crime control and the ingrained notion of society as self-policing. This is key to understanding many paradoxical rules in English criminal procedure. To sum

21 Under the Serious Organized Crime and Police Act 2005, s. 43(1).

22 Bowling & Ross 2006, p. 1033.

23 The Serious Organized Crime and Police Act 2005, s. 110 has extended the powers of arrest without warrant to apply to all offences (The term arrestable offence under the Police and Criminal Evidence Act 1984 s. 24 ceased to have effect). SOCA agents designated the powers of a constable may therefore arrest without a warrant anyone who is about to or is in the act of committing an offence, or anyone they have reasonable grounds to suspect of committing or being about to commit an offence. They may also arrest anyone they have reasonable grounds to believe is guilty of an offence they suspect has been committed.

24 A suspect's traditional right to silence has been radically challenged by the Serious Organised Crime and Police Act 2005, ss. 62(3), 67, which provide that a suspect's failure in co-operation without reasonable excuse may constitute an offence. SOCA agents may therefore have coercive powers during investigations.

25 Bowling & Ross 2006, pp. 1032-1033.

26 *Ibid.*, pp. 1019, 1032.

up, prosecution in England is becoming ever-more organized and centralized, with the role that prosecutors play in criminal process, especially in the pre-trial phase, becoming ever-less partisan, which represents the inquisitorial tendency of this development.

4.1.3 Checks and balances with regard to the CPS

Because no specific prosecution powers have been provided by law, it follows that there is no law either requiring anyone to prosecute in a particular circumstance or preventing anyone from prosecuting in any particular circumstance; England is not a 'legality' system. It is an 'opportunity' system in which the maximum amount of discretion is allowed to all agencies.²⁷ The flexible way of governance, as well as the traditionally English constitutional notion of community-involved policing, has undermined the necessity of strict checks. However, some checks do exist at various levels.

Based on the long-lasting adversarial tradition in England, the defence is undoubtedly the primary check on the prosecution service, in both the pre-trial phase and trial phase. The English criminal justice system, with great changes in its prosecuting system, has also witnessed a concomitant development of the criminal defence profession which in many respects has been spectacular.

As mentioned before, the prosecution was at first on an entirely private basis, and for centuries English criminal procedure was organized on the principle that a person accused of a serious crime should not be represented by counsel at trial. This remained the case in principle until as late as in the eighteenth century,²⁸ since it was generally believed that any defendant of common understanding may as properly defend himself as if he were the best lawyer, and it requires no manner of skill to make a plain and honest defence.²⁹ The notion that criminal defence was a suitable do-it-yourself activity arose at a time when the whole of the criminal trial was expected to transpire as a lawyer-free contest of amateurs. The prosecution was also unrepresented. The victim of the crime usually served as the prosecutor, aided by other witnesses and sometimes by the lay constable. A lay magistrate, and the Justice of the Peace, organized the prosecution witnesses for trial at a pre-trial committal proceeding.³⁰ This also reflects one of the ingrained constitutional notions in English legal tradition – the notion of community-involved policing. During this phase, the perfect equality of arms (at least in general and theoretical terms) between the prosecution and the defence enabled a well-established adversarial (altercation) basis in criminal process, on which the defence amounted to a competent check on the prosecution.

27 Beken & Kilchling 1999, p. 59.

28 Langbein 1999, p. 314.

29 Hawkins 1721, p. 400

30 Langbein 1999, p. 314.

In the eighteenth century, prosecuting solicitors emerged in both private and institutional prosecutions, functioning in investigating or having investigated cases, and preparing witnesses, etc. During the decades when solicitors/barristers were assuming an increasingly important role in the prosecution of crime, the profession also developed a defensive role in criminal cases with like functions.³¹ During this phase, the introduction of lawyers on both sides could hardly break the balance of power between them. The equality of arms and adversarial basis remained, and therefore the defence still represented a sound check on the prosecution.

The legal aid mechanism originally established in the early part of the twentieth century³² facilitated a massive growth in the proportion and number of defendants who are legally represented, particularly in magistrates' courts where legal representation was relatively unusual in earlier decades.³³ The great reinforcement of legal representation in England could, to a great extent, be attributed to factors related to system efficiency. At a time of substantial growth in the work of the courts, having lawyers acting for defendants actually eases the work of the courts, and enables greater throughput of cases without a proportionate increase in court resources. Therefore, the courts, as the principal decision makers concerning grants of representation orders, would unsurprisingly prefer to do so.³⁴ The British government's booming investment in legal aid also contributed to the reinforcement of legal representation in England,³⁵ which, in turn, has reinforced the role of the defence in criminal proceedings in general terms. Furthermore, the complexity of many modern laws and procedures means that courts would be in some difficulty if they could

31 See *ibid.*, pp. 325-341.

32 The *Legal Aid Board* was founded on 30 June 1949 under the *Legal Aid and Advice Act 1949*, which was replaced by the *Legal Services Commission (LSC)* in 2000 under the *Access to Justice Act 1999*, and further replaced most recently on 1 April 2013 by the *Legal Aid Agency* under the *Legal Aid, Sentencing and Punishment of Offenders Act 2012*. The LSC was responsible for the operational administration of legal aid in England and Wales, including the *Criminal Defence Service (CDS)*, which provides free legal advice and representation for people facing criminal charges who are unable to pay for legal help. This is supplied through criminal solicitors' offices and the Public Defender Service, through either co-operation with criminal lawyers in private practice, or salaried public defenders. The newly founded Agency carries out a similar function to the LSC, although executive agency status differs from the LSC's non-departmental public body status. – For an overview of the development of the criminal legal aid in England and Wales, see Bridges 2002. Legal aid is now severely under threat.

33 Cape 2004, p. 75.

34 *Ibid.*, p. 76.

35 The annual number of grants and net costs respectively, of legal aid were 110,000 and £ 16.9m respectively in 1970, 330,000 and £ 71.6m respectively in 1980, and 503,000 and £ 169.1m respectively in 1990. See McConville 1994, pp. 299-300; By 2002/03 the former had risen to nearly 600,000. See Legal Services Commission Annual Report 2002/03 (TSO, 2003), p. 50. In 2009, legal aid in England and Wales cost the taxpayer £2bn a year – a higher per capita spend than anywhere else in the world – and was available to around 29% of adults. See *The Guardian*, 12 March 2009, Legal aid in 21st-century Britain.

not rely on defence lawyers to explain them satisfactorily to the accused. By the 1990s the criminal courts, if not the criminal justice system, had become dependent upon criminal defence lawyers.³⁶

However, the defence is still not as strong as the prosecution. 'For in criminal cases, the State has in the police, an agency for the discovery of evidence, superior to anything which even the wealthiest defendant could employ.'³⁷ This imbalance of resources, and the prosecution's consequent control over information would, to some extent, undermine the equality of arms and thus the basis of adversarial procedure. At large, the defence in England play a responsive role under the current system, which, among others, gives rise to and is counterbalanced by the disclosure mechanism.

Apart from the external check (the defence) on the CPS, some internal mechanisms also work to constrain the conduct of prosecutors. The CPS is a hierarchically organized institution with a headquarters headed by the DPP, who is in turn accountable to the Attorney General. Therefore, there is unsurprisingly an internal check system. Firstly, instructions and guidelines are regularly issued by the DPP to all Crown Prosecutors concerning policy matters, prosecuting standards, and professional ethics. For instance, under section 10 of the Prosecution of Offences Act 1985, the DPP first issued the Code for Crown Prosecutors in 1986, and has revised it six times since. The latest version of the Code was published in January, 2013. Secondly, the CPS was divided into areas largely coinciding with the police areas. Each prosecution area was headed by a Chief Crown Prosecutor (CCP). In each prosecuting area, the CCP has powers of check and scrutiny. Lastly, the DPP can take over all cases he thinks are sensitive, thereby ensuring in person the quality of the prosecution.

In addition to the above, there are still other checks on the CPS. Firstly, the judiciary, among others, plays a certain role in the check on the CPS. On one hand, the judiciary can, and used to drive the prosecutors to enhance the threshold and quality of prosecution through a large proportion of acquittals, or conduct judicial review, especially of non-prosecution decisions; on the other hand, during the PII hearings, it is the judiciary that will decide whether or not to withhold disclosable evidence or information, avoiding the possible abuse of the PII exception by the CPS. Secondly, section 10 of the Prosecution of Offences Act 1985 also lays upon the CPS the duty to report annually to Parliament on its work and the use of its powers.

In sum, the checks on the discretionary powers of the CPS are quite limited. The underlying adversarial tradition and the constitutional notion of autonomy prefer leaving citizens more leeway so as to facilitate their contest in a freer and more adequate manner.

36 Cape 2004, p. 77.

37 Devlin 1976, para. 1.17.

4.2 Internal transparency of the English criminal procedure

Internal transparency of the English criminal procedure is guaranteed and demonstrated mainly by its disclosure mechanism. The disclosure mechanism that reflects the information exchange in the English criminal justice system has undergone great changes, especially over the past few decades. The duties to exchange and share information of both sides are in a dynamic process.

4.2.1 Prosecution disclosure

The duty of disclosure is not ingrained in the English legal tradition. Until 1946, ‘no authority existed for the proposition that there was any duty at all’.³⁸ After then, the judicial practice developed an, albeit confusing, common law basis for the duty of prosecution disclosure, by a couple of so-called ‘leading cases’,³⁹ i.e. *R v. Bryant and Dickson*⁴⁰ and *Dallison v. Caffery*.⁴¹ As far as these common law arrangements were concerned, it was accepted that trials in the Crown Court could only proceed on the basis of *full disclosure by the prosecution of all the evidence in its possession that is relevant to the case*. In the following fifty years, the prosecution duty of disclosure was extended beyond the prosecution’s own evidence to material, known as ‘*unused material that the prosecution does not intend to use but which may be of assistance to the defence*’.⁴² In *R v Hennessey (Timothy)*,⁴³ Lord Justice Lawton said that the courts must ‘keep in mind that those who prepare and conduct prosecutions owe a duty to the courts to ensure that *all relevant evidence of help to an accused* is either led by them or made available to the defence’. The definition of ‘unused material’ was further widened by a ruling in 1990 by the judge in the ‘Guinness trial’, Mr. Justice Henry, who held that the defence was generally entitled to access to any material ‘that has, or might have, some bearing on the offences charged’.⁴⁴

A series of notorious miscarriage of justice⁴⁵ in the 1970s, all of which could partly be attributed to a failure by the prosecution to disclose unused (exculpatory) information, led to widespread reflection on the disclosure policies and practices of prosecuting authorities. Accordingly, in December 1981 the then Attorney General, Sir Michael Havers, issued *Guidelines for the*

38 Devlin 1976, para. 5.1.

39 O’Connor 1992, p. 465.

40 (1946) 31 Cr. App. R. 146.

41 [1965] 1 Q.B. 348.

42 See H.C.L.1996, p. 17.

43 [1978] 68 Cr App R 419, 426.

44 *R v Saunders et al*, unreported 29.9.1990 CCC (transcript no. T881630).

45 The ‘Birmingham Six’; the ‘Guildford Four’; the ‘Maguire Seven’; and Judith Ward, and a number of others.

disclosure of unused material to the defence in cases to be tried on indictment,⁴⁶ imposing a comprehensive disclosure duty on the prosecution. The duty refers to ‘providing the defence with copies of, or access to, any material which might reasonably be considered capable of undermining the case for the prosecution against the accused, or of assisting the case for the accused’.⁴⁷ So far, a consistent policy and practice of prosecution disclosure, albeit without force of law, had been established. However, these guidelines did not override the common law rules concerning disclosure and indeed could not do so. As a result of a number of subsequent court decisions, the Attorney General’s 1981 guidelines had largely been superseded and were then only to be regarded as a starting point. The common law rules concerning disclosure and their development by the courts can only be overridden altogether by legislation.⁴⁸

In 1996, the disclosure duty was put on a statutory footing. The Criminal Procedure and Investigations Act 1996, along with the Code of Practice issued under it, lay out in some detail how prosecution disclosure should be managed and what tests should be applied to determine whether material should be disclosed.⁴⁹ Under the CPIA 1996, prosecution disclosure is split into two stages. At the primary stage the prosecution has to disclose unused material ‘which in the prosecutor’s opinion might undermine the case for the prosecution against the accused.’⁵⁰ A second stage is then tied to defence disclosure. The prosecutor has to disclose material ‘which might be reasonably expected to assist the accused’s defence as disclosed by the defence statement.’⁵¹ The tests set down in the original CPIA 1996 had some obvious drawbacks: the primary test was quite subjective and vague, and thus could be interpreted narrowly or broadly (the former is undoubtedly more probable in practice); moreover, it ‘only included material assisting the defence case at the secondary stage, and then only in the terms set by the defence statement. Of course, material which assists the defence case will also undermine the prosecution case in one sense, but the original scheme was at least ambiguous as to its aims. It might be read as making the disclosure of material which, rather than undermining the prosecution’s *prima facie* case, assisted any positive defence put forward by the defence, conditional on the defence’s explicitly revealing that defence in its statement.’⁵²

46 [1982] 74 CR App R302.

47 The Attorney General’s Guidelines on Disclosure, para. 8.

48 See H.C.L.1996, p. 17.

49 Ashworth & Redmayne 2005, p. 239.

50 The CPIA 1996, s.3(1)(a), substituted by Criminal Justice Act 2003, s. 32.

51 A defence statement generally refers to a written statement given by the accused which indicates not only the nature of his defence but also relevant factual and legal points on which he takes issue with the prosecution. See the CPIA 1996, s.7(2)(a), repealed by Criminal Justice Act 2003, ss. 331, 332, 336. For more details, see 4.2.2 Defence disclosure.

52 Redmayne 2004, p. 444.

The relevant provisions have been developing since the issuance of the CPIA 1996. Currently, the disclosure mechanism in English criminal process has been detailed in various scattered sources. The current law is set down in:

- the Criminal Procedure and Investigations Act 1996 as amended (CPIA 1996);
- the Code of Practice, issued under section 23 of the CPIA 1996 (the Code of Practice);
- Parts 22 of the Criminal Procedure Rules 2011 (as from 3rd October 2011) (the Rules);
- the Criminal Procedure and Investigations Act 1996 (Defence Disclosure Time Limits) Regulations 1997 issued under section 12 of the CPIA 1996 (the Regulations);
- the Criminal Procedure and Investigations Act 1996 (Notification of Intention to Call Defence Witnesses) (Time Limits) Regulations 2010 [SI 2010/214];
- Magistrates’ Courts (Criminal Procedure and Investigations Act 1996) (Disclosure) Rules 1997/703;
- Crown Court (Criminal Procedure and Investigations Act 1996) (Disclosure) Rules 1997/698.

In addition, there is the Crown Court Disclosure Protocol on Unused Material, the Attorney General Guidelines on Disclosure, and the Supplementary Attorney General’s Guidelines on Disclosure: Digitally stored material, which build on the existing law.⁵³

Actually, the disclosure scheme introduced by the original CPIA 1996 has not been radically changed; rather, it has been improved slightly. First, the distinction between primary and secondary disclosure, with different tests applied at each stage, has been virtually abandoned; and the wording of the tests has been changed into a uniform one that the prosecution must disclose material which ‘might reasonably be considered capable of undermining the case for the prosecution or of assisting the case for the accused.’⁵⁴ Moreover, the Prosecution’s duty on disclosure is a continuing one – ‘The prosecutor must keep under review the question whether at any given time (and, in particular, following the giving of a defence statement) there is prosecution material’⁵⁵ which meets the test described above. ‘If at any time there is any such material as is mentioned in subsection (2) the prosecutor must disclose it to the accused as soon as is reasonably practicable’.⁵⁶

53 CPS Disclosure Manual, s. 1.3.

54 CJA, s. 32, amending CPIA, s. 3(1)(a).

55 CPIA 1996, s. 7A (2), inserted by Criminal Justice Act 2003, s. 37.

56 CPIA 1996, s. 7A (3), inserted by Criminal Justice Act 2003, s. 37.

Investigators and disclosure officers must be fair and objective and must work together with prosecutors to ensure that disclosure obligations are met. A failure by the prosecutor or the police to comply with their respective obligations under the CPIA 1996 or Code of Practice may have the following consequences:

- the accused may raise a successful abuse of process argument at the trial
- the prosecutor may be unable to argue for an extension of the custody time limits
- the accused may be released from the duty to make defence disclosure
- costs may be awarded against the prosecution for any time wasted if prosecution disclosure is delayed
- the court may decide to exclude evidence because of a breach of the CPIA 1996 or Code of Practice, and the accused may be acquitted as a result
- the appellate courts may find that a conviction is unsafe on account of a breach of the CPIA 1996 or Code of Practice
- disciplinary proceedings may be instituted against the prosecutor or a police officer.⁵⁷

4.2.2 Defence disclosure

Before 1996, there was no general obligation on the defence to disclose details of its case before trial. The minor exceptions were involved in disclosure of alibi defences and alibi witnesses in trials on indictment;⁵⁸ disclosure of expert evidence in trials on indictment;⁵⁹ and a more general requirement to disclose a defence in some serious or complex fraud cases.⁶⁰

The CPIA 1996 imposed on the defence, for the first time in the history of the English criminal procedure, a general disclosure requirement: compulsory in the Crown Court,⁶¹ and voluntary in the magistrates' court.⁶²

As the law now stands the defence should provide a defence statement to disclose the details of its case. As to the normal content of such defence statements, the current statutory regime so requires:⁶³

- (1) For the purposes of this Part a defence statement is a written statement –
 - (a) setting out the nature of the accused's defence, including any particular defences on which he intends to rely,
 - (b) indicating the matters of fact on which he takes issue with the prosecution,
 - (c) setting out, in the case of each such matter, why he takes issue with the prosecution, and

57 CPS Disclosure Manual, s. 1.10.

58 Criminal Justice Act 1967, s. 11.

59 Police and Criminal Evidence Act 1984, s. 81.

60 Criminal Justice Act 1987, s. 9(5).

61 CPIA 1996, s. 5.

62 CPIA 1996, s. 6.

63 CPIA 1996, s. 6A, inserted by Criminal Justice Act 2003 s. 33(2).

- (d) indicating any point of law (including any point as to the admissibility of evidence or an abuse of process) which he wishes to take, and any authority on which he intends to rely for that purpose.
- (2) A defence statement that discloses an alibi must give particulars of it, including –
 - (a) the name, address and date of birth of any witness the accused believes is able to give evidence in support of the alibi, or as many of those details as are known to the accused when the statement is given;
 - (b) any information in the accused's possession which might be of material assistance in identifying or finding any such witness in whose case any of the details mentioned in paragraph (a) are not known to the accused when the statement is given.

If a defendant fails to issue a defence statement, or if his defence at trial departs from what was disclosed, an adverse inference may be drawn against him according to the law.⁶⁴ However, the relevant provisions are not applied with vigour. Although many defence statements in practice lack the required degree of detail, judges are reluctant to sanction defendants with adverse inferences as the law provides.⁶⁵

4.3 Summary

4.3.1 *The reasons that underlie England's reform on disclosure*

The transformative leap in English law enforcement, which somewhat deviates from a typically adversarial tradition into more or less an inquisitorial track, may be ascribed to many underlying grounds, both internal and external.

First, like its counterpart in Scotland,⁶⁶ the transformation in England can also stem from the principal and ingrained pitfall in typically adversarial criminal justice systems, namely the partisanship of the procedural framework and the consequent unreliability of especially the pre-trial outcomes, involving so-called 'tunnel vision'⁶⁷ that tends to focus on an inevitably partisan, filtered, and even prejudiced collection of evidence based on which truth might be concealed and a miscarriage of justice occur. Moreover, due to the systematic partisanship in gathering and presenting the evidence, 'each side operates under an incentive to suppress and distort unfavourable evidence, however truthful it may be.'⁶⁸ Such a 'combat effect'⁶⁹ may further impair the truth-finding capacity of adversarial criminal procedure. Therefore, a less partisan but more

64 See CPIA 1996, s. 11, substituted by Criminal Justice Act 2003 s. 39.

65 Redmayne 2004, p. 445.

66 See *infra* 5.3.1 The reasons that underlie Scotland's recent reform on disclosure.

67 See Findley & Scott 2006, p. 291.

68 Langbein 2003, p. 103.

69 See *ibid.*

paternalistic prosecutorial service would be desirable, and correspondingly, a comprehensive, impartial and objective disclosure mechanism may help alleviate such pitfall.

Second, the utilitarianism ingrained in traditionally English ideology could also be seen as a factor of the transformation described above: the rises in reported crime and the inability of criminal courts to cope with the resulting workloads promptly led to a rise in managerial ideology in the English criminal justice system, which, in turn, may facilitate the co-operative relationship between the prosecution and the defence, including more comprehensive disclosure; at the same time, the formidable situation concerning serious organized crimes, especially those pertaining to terrorism, has given rise to increasingly powerful, well-rounded and centralized law enforcement and intelligence services, which deviates from the notion of self-policing and decentralization ingrained in the British constitutional tradition. As is mentioned above, the British seem to be experiencing a practical dilemma and ideological ambivalence in criminal process and law enforcement, trying to reconcile the practical needs of effective crime control and the ingrained notion of society as self-policing.

Thirdly, the incorporation of the European Convention on Human Rights (ECHR) into domestic law and a series of decisions by the European Court of Human Rights (ECtHR) also have effect on the transformation of legislation and practice in the English criminal procedure. For instance, *Jasper v. UK* and *Edwards and Lewis v. UK* have given rise to fine-tuning in PII mechanism. In addition, following the judgments of the ECtHR in *Chahal v. UK* and *Tinnelly & Sons Ltd and Others and McElduff and Others v. UK*, the UK introduced legislation providing for the appointment of a 'special counsel' in certain cases involving national security. The provisions are contained in the Special Immigration Appeals Commission Act 1997 and the Northern Ireland Act 1998. Under this legislation, where it is necessary on national security grounds for the relevant tribunal to sit in camera, in the absence of the affected individual and his or her legal representatives, the Attorney-General may appoint a special counsel to represent the interests of the individual in the proceedings. The legislation provides that the special counsel is not however 'responsible to the person whose interest he is appointed to represent', thus ensuring that the special counsel is both entitled and obliged to keep confidential any information which cannot be disclosed. The relevant rules giving effect to the 1997 and 1998 Acts are set out in the Court's judgment in *Jasper v. UK*.

4.3.2 Primary conclusions

Through the historical review of the modern development of the English criminal procedure, one can see that the basic tenets of the English system have been undergoing an ever-evolving dynamic process, with its macro trend towards a more organized and powerful prosecution. This trend is inevitable and universal, because on the one hand, with the society evolving, the forms

and threats of crimes also continue to upgrade, which will promote the state's need for and intention of crime control; on the other hand, the growth of the state will facilitate its ability to deal with problems of crime and disorder. As the state invests increasing resources in investigation and prosecution of crimes, forming ever-greater and -overwhelming prosecutorial power, the scale will continue to tilt to the side of the prosecution. In order to even up the scale so as to preserve the English-styled fair truth-finding, English judges had to gradually introduce a series of equitable mechanisms that contradicted what they believed represented the best way to discover the truth of any accusation. Given their ingrained hostility towards the French-styled idea of a paternalistic and neutral investigation and prosecution, it was unsurprising that they would have no choice but to allow lawyers to carry increasing weight in criminal process, culminating in a lawyer-dominated typically-adversarial mode of criminal procedure. Such a design of truth-finding that depends on the sufficient autonomy of and perfect competition between the two adversaries (prosecution and defence) cannot accommodate the idea of internal transparency that suggests their cooperation in truth-finding. With hindsight it is easy to find that the idea of an adversarial criminal procedure that originates from England bears no superiority in theory since its basic tenets are neither irrefutable or eternal in practice along the history, nor are they systematically designed by any great wisdom; rather, this system and its basic tenets have become what they are and perhaps what many believe they should be, only as a result of a natural accumulation of piecemeal repairs for evening-up, which, as transpires, has totally transcended the original design of the initiators of the system. As Langbein summarized, 'The saga of the emergence of the adversary criminal trial in England is a topic of legal history much more than of legal theory, because it is the story of how we came to live under a criminal procedure for which we have no adequate theory.'⁷⁰

Nevertheless, two kinds of implicit reasons can be identified throughout the English story. First, the modern development of the English criminal procedure has followed *historical rationality* in a way that continues to respond to the increasing need of crime control and thus makes the prosecution ever-more organized and less partisan. Second, the evolution of the English system has always followed what I would rather refer to as '*technical rationality*', whose hardcore is to keep the dynamic balance between the prosecution and the defence so that neither side could ever manage to develop a permanent advantage over the other. Due to its inherent notion of self-policing and the concomitant adherence to the partisanship of the prosecution, the successive attempts of England 'to restore a balance between prosecution and defence that is continually being put under pressure by the practices of lawyers and other courtroom actors',⁷¹ have only resulted in increasingly cumbersome

70 Ibid, p. 9.

71 Duff 2007, p. 20.

court sessions with a inherently less organized pre-trial process. This also demonstrates that the basic tenets of adversarial criminal procedure, especially the court-debate-centred approach and lawyer-dominated mode, should be considered as a last-and-only-resort remedy of a deficient pre-trial stage rather than as a desirable virtue of any fair criminal procedure.

Even so, England has been trying to combat its ideological ambivalence, and to embrace a less partisan but more paternalistic and more centralized style of prosecution to satisfy the increasing need of effective crime control and thus to follow the historical reason, which culminates in the introduction of the CPS and the unification of the prosecutorial functions of the regulatory agencies. In this situation, the traditional adversarial wisdom that focused on the sufficient autonomy of and perfect competition between the two parties, will no longer suffice to constrain the prosecutorial power and prevent systematic unfairness. Accordingly, the prosecution is supposed to play fairer and thus offer their adversary sufficient information so that the latter would still be able to organize an effective defence; a comprehensive duty of disclosure that facilitates internal transparency of criminal procedure would then look less incompatible with the basic tenets of the system, but be indispensable for restoring again the balance between the defence and the prosecution that seems to have already won the permanent advantage over the former.

Chapter 5

Basic tenets and internal transparency of the Scottish criminal procedure

Historically, Scotland had long been an independent country with its own special political and legal tradition before it eventually became part of the United Kingdom. In terms of legal system, it still retains the legacy of its Roman Law tradition; unlike their English neighbours, the Scots barely hesitate to embrace the idea of a quite French-styled paternalistic prosecution system, especially given a long-lasting ‘Auld Alliance’ with France. However, as it gradually integrated into the Union of the Crowns, and later the United Kingdom of Great Britain with Scottish Stuarts becoming English Kings, during which adversarial criminal procedure happened to come into being in England, English common law tradition and its nascent trial mode had also been increasingly integrated with the Scottish criminal justice system, forming the latter’s tradition of an adversarial criminal trial. Therefore, for historical reasons Scottish criminal procedure is a typically hybrid system, with an English-styled adversarial criminal trial and a rather inquisitorial mode of pre-trial procedure.

5.1 Basic tenets of the Scottish criminal procedure

The fact that the defence in Scottish criminal procedure has the formal autonomy and legal right to conduct its own investigation and introduce the evidence collected at trial shows that the Scottish system is indeed generally based on an adversarial framework of legitimate truth-finding. It therefore has much in common with England in terms of basic tenets of criminal procedure; while the divergence lies mainly in the pre-trial procedure, especially the function of prosecution and the role of the public prosecutor in Scotland. In the past, Scottish prosecutors who had no duty of disclosure only functioned as the adversary of the defence while the latter had to independently and autonomously bear the burden to collect and present exculpatory evidence; however, a practice of disclosure gradually developed throughout the 20th century and was eventually recognized by the legislature as a legal duty of the prosecution, to compensate for the inequality between prosecution and defence;¹ and Scottish prosecutors

¹ For details of such development, see 5.2 Internal transparency of the Scottish criminal procedure.

then became ever more paternalistic and impartial. To sum up, it is mainly the function and position of prosecutors that changed substantially along the history of the Scottish system, and it is also mainly the function and position of prosecutors that distinguishes the Scottish system from its English counterpart in terms of the basic tenets, therefore, the description of the basic tenets of the Scottish criminal procedure in this subchapter will focus mainly on the current function and position of the prosecutors.

5.1.1 The current function and position of Scottish prosecutors

Contrary to their English counterpart, Scottish prosecutors are traditionally public in nature, and now play a quite paternalistic and impartial role in criminal justice, which, to a great extent, is an inquisitorial feature. The Scottish prosecution system has been organized in a typically hierarchical and centralized way: the Crown Office and Procurator Fiscal Service (COPFS) is the independent and uniform public prosecution service for Scotland, and is a Ministerial Department of the Scottish Government, headed by the Lord Advocate and his deputy, the Solicitor General, two government ministers. Virtually, all criminal prosecutions are conducted in the name of the Lord Advocate, by members of the public prosecution service. They are organised on several different levels:

1. Advocates depute, being known collectively as Crown Counsel, appointed by the Lord Advocate from the Scottish Bar, whose task is both to prosecute in the High Court of Justiciary (the Supreme Court of Scotland whose criminal department is in charge of the first instance trial of most serious crimes and all the appeal cases.) and to provide advice to local prosecutors about various other categories of cases;
2. Local prosecutors including Procurators Fiscal whose task is to prosecute in a sheriff's court or a district court, and their deutes (where necessary), known as assistant fiscals and depute fiscals, whose task is to help their chief to deal with the large number of cases.

As mentioned above, Scottish prosecutors play a different role from their English counterparts mainly in the pre-trial phase. Actually, there is no officially recognized concept of a so-called 'pre-trial' phase in the Scottish criminal justice system. Accordingly, this term should be used in a non-technical sense to cover all relevant activities which occur before trial, including various stages such as investigation, first 'diet' (the Scottish term for a court date or appearance), disclosure, and preliminary hearings.

Generally speaking, the Scottish prosecution service has always been in a pivotal, leading, and to some extent, an impartial and quasi-judicial position during the pre-trial phase of criminal process, in the sense that it enjoys comprehensive powers and discretion as well as corresponding responsibilities and duties as to the progress and outcome of a given case.

Firstly, the Scottish prosecution service has an investigative power although the concrete tasks have usually been devolved to the police. This investigative power is usually used indirectly through instruction to and supervision of the police, who remain responsible to, and must obey any instruction from, the prosecution service.² Moreover, the prosecution is also supposed to bear a responsibility of scrutiny over the police's conduct so as to 'ensure that all reasonable lines of enquiry are pursued and, accordingly, may instruct the police or other investigating agency to carry out particular lines of enquiry where this has not already been identified, e.g. where the accused puts forward a line of defence at judicial examination.'³ The power and obligation described above has, to a great extent, situated the Scottish prosecution service in an impartial and objective position which goes obviously away from a typically adversarial tradition, and into an inquisitorial track.

Secondly, the Scottish prosecution service has a great deal of discretion in deciding the conclusion of an investigation. This discretion lies not only in whether the result of investigation would justify a prosecution (i.e. an indictment in solemn proceedings or a complaint in summary proceedings) or otherwise (including no proceedings, warning, diversion, fixed penalty, and fiscal fine), but also in the charges and in which court the case is to be heard. (Except in cases of the most serious offences such as murder or rape which must be heard before the High Court, the prosecutors generally will have the leeway to select the venue thought appropriate in terms of the gravity of the offence, paying particular attention to the sentencing powers of the various courts.) Briefly speaking, this discretion facilitates the leading position of Scottish prosecutors in the pre-trial procedure, culminating in either a plea settlement or a decision to file a prosecution, or not.

Thirdly, the Scottish prosecution service plays a dominant role in the pre-trial disclosure. 'It is the Crown's duty to disclose information that is material to the defence. This duty does not depend on the defence making an application or request to the Crown for disclosure.'⁴ 'However this does *not* mean that the Crown should disclose *all* information in its possession. It means that the Crown requires considering all information for disclosure, and disclosing any information which meets the *materiality test*, i.e. all information obtained in the course of the investigation and any criminal proceedings, of which the Crown is aware, which is likely to:

- materially weaken or undermine the evidence that is likely to be led by the prosecutor;
- materially strengthen the defence case; or

2 S. 12 of the Criminal Procedure (Scotland) Act 1995; S. 17(3)(b) of the Police (Scotland) Act 1967.

3 Para. 3.3.3 COPFS Disclosure Manual 2011.

4 Para. 2.1.4 COPFS Disclosure Manual 2011.

- form part of the evidence to be led by the prosecutor in the proceedings against the accused.⁵

The criteria described above demonstrate that the Scottish prosecution service is supposed to go through all materials that have been gathered in the course of the investigation and determine which materials should be subject to disclosure, which calls for a rather impartial and objective mind when selecting materials for disclosure. This impartiality and objectiveness of the Scottish prosecution service in the pre-trial phase of the criminal process shows a substantial degree of paternalistic characteristic.

Finally, the defence tends to rely mainly on the evidence disclosed by the prosecution service to present its own case before the trial, which means that even the adversarial style of the forensic debate in Scotland has, to a great extent, been established on the basis of the prosecution's impartial, objective and all-around collection of both incriminating and exculpatory evidence. The contribution of the Scottish prosecution service described above implies its pivotal position in the pre-trial and trial phase of criminal process.

As for the trial phase of the Scottish criminal procedure, just like its English neighbour, it has a strictly adversarial character, so the Scottish prosecutors at trial, deemed as prosecuting counsel, have been situated in an autonomous and partisan position in the trial phase of the criminal process, symmetric with that of the defence counsel. In this phase, it plays an unadulterated role of accuser in the sense that it only presents its own case before the court on the basis of its collection and presentation of incriminating evidence, thereby facilitate its goal of conviction.

5.1.2 The check and balance subject to the Scottish prosecution service

Although the Scottish system of public prosecution enjoys substantial independence and discretion, there do exist certain checks on the Scottish prosecution service, both internally and externally.

In terms of internal checks, instructions and guidelines are frequently issued by the Crown Office to fiscals on policy matters and the handling of cases. Although in most cases, the local procurators fiscal will act alone, in the most serious cases, the advice of Crown Counsels will be sought. Moreover, there is a requirement that fiscals' offices submit detailed monthly statistics on the disposal of cases to the Crown Office.

As for external checks, firstly, based on the long-lasting adversarial tradition of the Scottish criminal trial, the defence is certainly the primary check on the prosecution service, in both the pre-trial phase and trial phase. In the former, the defence has been, and still is, entitled to carry out its own investigation (in

5 Para. 2.1.7 COPFS Disclosure Manual 2011.

decreasing occasion and scope as it may be), thereby facilitating the collection and thus presentation of its favourable evidence which may either strengthen its case or weaken the prosecution case. Moreover, it may submit a defence statement to ask the prosecution to disclose useful information. 'Following receipt of a defence statement the prosecutor must review all the information that may be relevant to the case for or against the accused of which the prosecutor is aware and disclose any information which meets the materiality test.'⁶ Through a disclosure mechanism as such, the defence may well urge and direct the prosecution to seek an ideal line of inquiry into evidence favourable to its case, thereby facilitating the defence check on the prosecution.

Secondly, the judiciary also play a certain role in the check on the prosecution service in Scotland. 'Where the defence considers that the prosecutor has failed, in their response to a defence statement, to disclose an item of information which is disclosable in terms of the materiality test they may apply to the Court for a ruling on whether the information is disclosable.'⁷ Even if in exceptional circumstances, where there may be good reasons for prosecution seeking to withhold information which is normally disclosable in terms of the materiality test, e.g. reasons based on public interest immunity, any decision as to whether or not the Crown may withhold information which would otherwise be disclosable must be taken by the Court.⁸

Thirdly, for a dissatisfied victim, it is theoretically possible to initiate private prosecution in solemn proceedings (i.e. serious cases), but this requires the permission of the Lord Advocate or High Court, and thus in practice, is very rare. There were only two private prosecutions in the twentieth century, the last being *H.M. Advocate v. Sweeney* 1983 SLT 48.

Finally, the Lord Advocate is, theoretically and formally, accountable to Parliament, but in practice, unless there has been some particularly startling or notorious abuse of power, such matters are less likely to be raised in Parliament. To sum up, the checks on the discretionary powers of the Scottish prosecution service are quite limited, and to a great extent, it relies upon its own integrity and diligence. However, thanks to the small population of Scotland, the legal community is within a rather small circle, in which all the usual participants of criminal proceedings, including the police officers, the prosecutors, the defence counsel, and the judges usually share a sound private connection, thereby facilitating mutual credibility and thus good cooperation. In this situation, their connection and interaction will be much more frequent and repeated than those in a bigger community, so anyone who plays dirty is much likely to be soon known to all and thus excluded by the whole circle. Given such costs of misconduct, the incentive for the actors involved in the Scottish criminal procedure, including the Scottish prosecutors, to abuse the justice would be

6 Para. 2.4.2, 2.4.3 COPFS Disclosure Manual 2011.

7 S. 128 of the Criminal Justice and Licensing (Scotland) Act 2010.

8 See para. 2.4.13 COPFS Disclosure Manual 2011.

much smaller than otherwise; and therefore, a relatively crude system of check and balance in Scotland would still suffice to prevent systematic unfairness of the criminal procedure.

5.2 Internal transparency of the Scottish criminal procedure

As mentioned before, internal transparency of the Scottish criminal procedure is guaranteed and demonstrated mainly by its disclosure mechanism, which gradually developed during the 20th century; and disclosure in Scotland was not formally recognized as a legal duty until quite recently. In other words, the disclosure mechanism has changed substantially along the history of the Scottish system.

5.2.1 Historical development of disclosure mechanism in Scotland

Disclosure did not come into practice in Scotland until as late as 20th century, because according to its adversarial concept of legitimate truth-finding, the defence were believed to be autonomous enough to be able to independently bear the burden of production of evidence while disclosure would undermine such autonomy and thus impair legitimate truth-finding of the entire system.

The earliest practice of disclosure was launched in Scottish criminal process by the 1928 case of *Slater*,⁹ which, although it required the prosecution to consider exculpatory evidence, limited the scope of disclosure to material that the prosecution may use at trial only. Since *Slater*, a practice had further developed for the prosecution to attach to the indictment a list of witnesses and evidence which were not essential to the prosecution case yet might have a bearing on the innocence of the accused. Such practice was recognized by the 1952 case of *Smith*,¹⁰ which suggests that disclosure is needed to compensate for the inequality between prosecution and defence. However, it is notable that, on the one hand, disclosure was then recognized by case law just as a common practice of the Scottish prosecution instructed by the internal guidelines of COPFS rather than an actual legal duty;¹¹ and, on the other hand, the prosecution was not supposed to take over the defence's role to actively discover exculpatory lines of inquiry for the sake of the defence, but only required to furnish the defence with such lines incidental to their knowledge.

Disclosure of (exculpatory) evidence was formally recognized as a legal duty of the Scottish prosecution in the 1998 case of *McLeod*.¹² However, the court did not support the idea of full disclosure, but recognized prosecutorial discretion as to which information is disclosable, although such a pattern

9 Slater v. HMA 1928 SLT 602.

10 Smith v. HMA 1952 SLT 286.

11 See Higgins v. HMA, 1990 SCCR 268.

12 McLeod v. HMA 1998 SLT 223.

appeared quite paternalistic. The reason why the court was satisfied with such an imperfect and paternalistic disclosure mechanism lies largely in its confidence in two things: 1. the right of the defence to precognosce (examine) witnesses and prepare its own case, and 2. the special role of Scottish prosecutors as ministers of justice rather than as mere partisan advocates.

The implementation of the ECHR in Scotland further enhanced guarantees of disclosure, and the Scottish judiciary was beginning to relate disclosure to the right to fair trial based on Art. 6 of the Convention. First, disclosure had therefore been recognized as part of the connotations of Art. 6. Second, prosecutorial discretion as to which information should be disclosed to the defence had been subject to certain constraints, which required that police statements given by witnesses in the prosecution list and by those who are to be called by the defence should be categorically disclosed based on Art. 6.¹³ Third, the materiality test as to what kinds of unused evidence should be considered as material enough to be disclosed had been articulated as ‘either materially weaken the Crown case or materially strengthen the defence case’.¹⁴

In the end, the aforesaid case-law outcomes regarding disclosure were incorporated into the *Criminal Justice and Licensing (Scotland) Act 2010*, which constitutes the main legal source of the state-of-the-art disclosure mechanism in Scotland. In addition to the existing case-law outcomes, the 2010 Act has also set out principles pertaining to PII and to the reciprocal duty of disclosure on the defence.¹⁵

5.2.2 *The state-of-the-art disclosure mechanism in Scotland*

The disclosure mechanism in the Scottish criminal justice system has been incorporated mainly in Part 6 of the *Criminal Justice and Licensing (Scotland) Act 2010*, and further summarized in the *COPFS Disclosure Manual 2011*, according to which the subject, scope, standard, and exception, etc. of disclosure have been confirmed and articulated.

First, as has been noted above, the disclosure task in Scottish criminal process is mainly remitted to the Scottish prosecution service. It has been well summarized in the *COPFS Disclosure Manual 2011* that,

1. The Crown is obliged to disclose *all material information for or against the accused* (subject to any public interest immunity considerations). This relates to statements, but it also relates to *all* information of which the Crown is aware. ‘Information’ is defined as material of any kind given to or obtained by the prosecutor in connection with the proceedings.

2. ‘Material’ means information which either materially weakens or undermines the evidence that is likely to be led by the prosecutor; materially

13 See *Sinclair v HMA*, 2005 SLT 553.

14 See *McDonald v HMA*, 2008 SLT 993.

15 For details, see 5.2.2 *The state-of-the-art disclosure mechanism in Scotland*.

strengthens the defence case; or is likely to form part of the evidence to be led by the prosecutor in the proceedings against the accused (disclosable information).¹⁶

Moreover, ‘*The Crown’s duty is a continuing one – it persists in perpetuity.* It continues throughout and to the conclusion of any trial, and any subsequent appeal proceedings, and even after the final disposal of a case. Statute places a continuing duty of review on the prosecutor. The prosecutor must, from time to time, review the information held and disclosed and make further disclosure where appropriate ... *Any new information received by the Crown at any stage in the preparation of a case, during trial or any subsequent appeal proceedings, or even after the final disposal of a case must be considered for disclosure and may require previous decisions in relation to disclosure to be reviewed to assess whether further information requires to be disclosed to the defence.*’¹⁷

However, ‘the Crown is not obliged to disclose all material information *against* the accused, only that information against the accused that forms part of the prosecution case.’¹⁸ The defence are not given access to all materials gathered, so it is largely subject to the prosecution’s assessment and judgment to decide what is relevant for the defence to receive. Additionally, the Scottish prosecution has to conduct the disclosure duty *sua sponte*, as ‘this duty does *not* depend on the defence making an application or request to the Crown for disclosure.’¹⁹ The criteria described above imply a relatively impartial position and paternalistic character of the Scottish prosecution service.

Second, the scope of disclosure is, of course, subject to some restrictions, which may usually be ascribed to concerns such as security of witnesses, sensitivity of information, or public interests. ‘In exceptional circumstances, there may be good reason for seeking to withhold information which is normally disclosable in terms of the *materiality* test ... In Solemn cases, the prosecutor should not disclose details of sensitive information. ‘Sensitive’ means that if the information were to be disclosed, there would be a risk of (a) causing serious injury or death to any person, (b) obstructing or preventing the prevention, detection, investigation or prosecution of crime or (c) cause serious prejudice to the public interest. Where there is information which in terms of the materiality test *is* disclosable, but which it is considered should not be disclosed in the public interest, the matter should be referred initially to the District or Area PF. Thereafter the matter should be reported by the District or Area PF to the Deputy Crown Agent for the attention of Crown Counsel, with an appropriate recommendation, for a decision as to how the issue should be addressed.’²⁰

16 Para. 2.1.2 COPFS Disclosure Manual 2011, with footnotes omitted.

17 Para. 2.1.5 COPFS Disclosure Manual 2011, with footnotes omitted.

18 Para. 2.1.3 COPFS Disclosure Manual 2011.

19 Para. 2.1.4 COPFS Disclosure Manual 2011, with footnotes omitted.

20 Para. 2.1.13, 2.1.14 COPFS Disclosure Manual 2011, with footnotes omitted.

Third, although the Scottish prosecution is supposed to play a dominant role in the disclosure, the defence and judiciary, as has been noted above, still have a supplementary effect and check function. ‘Any decision on whether or not the Crown may withhold information which would otherwise be disclosable must be taken by the Court.’²¹ Moreover, the defence may submit a statement to ask the prosecution to disclose useful information. ‘The lodging of a defence statement is mandatory in all solemn cases and conditional in summary cases ... Following receipt of a defence statement the prosecutor must review all the information that may be relevant to the case for or against the accused of which the prosecutor is aware and disclose any information which meets the materiality test.’²²

Finally, the prosecutor may disclose information ‘*by any means*’,²³ formally or informally. In practice, the disclosure is usually conducted in a quite informal way – e.g. during coffee time in a café – between a public prosecutor and a defence counsel who have known each other very well for years.²⁴

5.3 Summary

5.3.1 *The reasons that underlie Scotland’s recent reform on disclosure*

The recent reform on disclosure in the Scottish criminal procedure, which demonstrates a development and tendency away from a typically adversarial approach into an inquisitorial track, may be ascribed to many underlying grounds, both internally and externally. However, the root cause of the reform, in the author’s opinion, lies largely in the historical law.

First, an increasingly organized and powerful prosecution appears to be an inevitable and universal historical trend, because of the state’s ever-growing need and intention to control crime, as well as its concomitantly ever-growing ability to do so. As the state invests increasing resources in investigation and prosecution of crimes, forming ever-greater and -overwhelming prosecutorial power, the scale will continue to tilt to the side of the prosecution until it comes to a turning point of the legal history where systematic balance between prosecution and defence is broken to an extent that traditional mechanisms within the system no longer suffice to guarantee legitimate truth-finding and new mechanisms must be introduced to repair the system so that legitimacy can be restored.

In Scotland’s case, the 20th century could be considered as such a turning point of its legal history where the defence had become systematically inferior

21 Para. 2.1.13 COPFS Disclosure Manual 2011.

22 Para. 2.4.2, 2.4.3 COPFS Disclosure Manual 2011, with footnotes omitted.

23 S. 160(2) of the Criminal Justice and Licensing (Scotland) Act 2010.

24 According to the kind introduction of my colleague, Dr. Allard Ringnald, who conducted a field study in Scotland and interviewed some experienced lawyers there.

to and dependent on their adversary in terms of evidence collection and case preparation. Moreover, Scotland's traditional mechanisms based on its adversarial conception of legitimate truth-finding could no longer work to even up such systematic unbalance, in large part due to the ingrained pitfalls of its adversarial tradition, such as the so-called 'tunnel vision' and 'combat effect' that tends to suppress unfavourable evidence that should have been presented to contribute to the completeness of the truth. In this situation, a disclosure mechanism had gradually developed in Scotland so as to facilitate a more impartial and objective truth-finding; with the practice evolving and precedents accumulating, the disclosure mechanism has eventually become a statutory duty of the Scottish prosecution service.

Second, the special legal tradition of Scotland also facilitates such reform, especially in the early stage. Unlike its counterparts in other typically adversarial systems, the Scottish prosecution service has long been considered as public, and such non-adversarial features have traditionally been part of the Scottish procedural system, therefore, Scotland will hardly hesitate to embrace a disclosure mechanism based on a rather paternalistic prosecution system.

Apart from the abovementioned historical reasons, there are also external incentives for Scotland to promote the disclosure mechanism in its criminal procedure. Among others, a highly influential force is the increasing sensitivity to rights of the accused, especially after the very recent incorporation of the European Convention on Human Rights (ECHR) into British domestic law.²⁵ Relevant cases have related disclosure to the right to a fair trial based on Art. 6 of the Convention, which has further broadened its scope and deepened its meaning. In addition, the human rights progress has also determined the timing of the reform.

Finally, other reasons may also contribute to Scotland's reform on disclosure. For instance, the government's possible intention to curtail the budget for legal aid may well constitute the economic incentive for the reform; the rise of managerialist ideology in the criminal justice system might be considered as a conceptual cause of the reform.

5.3.2 *Primary conclusions*

According to the modern development of Scottish criminal procedure, especially of its disclosure mechanism after the 20th century, one can see that the basic tenets of the Scottish system have also changed substantially. Such changes lie mainly in the roles and functions of its prosecutors and defence, as well as in its updated conception and practice of legitimate truth-finding, which can be demonstrated largely by its disclosure mechanism.

25 Duff 2004.

The structural transformation of the Scottish criminal procedure should be attributed in large part to the historical law, while the special legal tradition of public prosecutors in Scotland has made it less reluctant to accept the idea of disclosure based on a rather paternalistic conception of prosecution; however, Scotland's inherent confidence in its public prosecutors' integrity and professionalism made it disregard the value of disclosure for quite a long time.

The aforesaid historical law is centred on a dynamic balance between prosecution and defence so that neither side could ever manage to develop a permanent advantage over the other. When it seems unavoidable to have the prosecution with such a permanent advantage over the defence, it would be pragmatic to resort to quite another approach to preserve a fair trial, that could also be used to offset such a permanent advantage and overwhelming power. One feasible way is to impose as heavy a burden upon the same side, so that the party with the permanent advantage is also constrained by the burden incidental to such advantage. In Scotland's case, the disclosure mechanism could be considered as such a burden.

Nevertheless, Scotland's new framework of legitimate truth-finding is still confronted with inherent flaws in terms of coherence, since a design of truth-finding that traditionally depends on the sufficient autonomy of and perfect competition between the two adversaries (prosecution and defence) can hardly accommodate the idea of disclosure/internal transparency that suggests their cooperation in truth-finding (or rather, the dependence of one upon the other). Even though such coherence problem is not yet out of control in Scotland thanks to its special conditions, e.g. the public prosecutors' traditional role as ministers of justice, and the relatively small circle of legal professionals that facilitates mutual cooperation and trust, such a hybrid approach of legitimate truth-finding is still questionable in theory, especially where used as a frame of reference.

Chapter 6

Basic tenets and internal transparency of the US criminal procedure

Before elaboration of the relevant issues in the US criminal procedure, it is necessary to clarify the contextual meanings or overtones of some key concepts concerned in this topic to avoid unnecessary confusions and misunderstandings. First, as is explained in the introduction, the researcher's primary task in this chapter is to identify the appropriate counterpart in US positive laws should he intend to benchmark the US adversarial system against the inquisitorial concept of internal transparency. In these terms, internal transparency of the US criminal procedure involves two subjects in its positive laws. One is pre-trial discovery, i.e. the legal rights of the defence and the prosecution to each obtain from the other information regarding the evidence they might use at trial; the other is a series of constitutional standards that 'might loosely be called the area of constitutionally guaranteed access to evidence' [*Arizona v. Youngblood*, 488 U.S 51 (1988)], which, in large part, consist in the prosecution's *Brady* obligation.¹

Second, the United States is a federation that has a dualistic legal system, including at least 51 jurisdictions with their own criminal procedures, i.e. the federal system and the 50 state systems.² Specifically speaking, in state justice pre-trial discovery law consists largely in court rules which vary from one jurisdiction to another, and it is evidently neither wise nor necessary to enumerate all the relevant rules in each jurisdiction. Therefore, another formidable challenge as to the comparative research on the so-called 'US criminal procedure' lies in the selection and determination of a proper sample that represents relevant rules and mechanisms. In this sense, the federal system would be a sound choice given the codified *Federal Rules of Criminal Procedure* (hereinafter the *Federal Rules*) not only covering the entire territory of the United States but also patterned by many states in terms of pre-trial discovery.³ As for the relevant constitutional standards, the problem of the

1 For details of *Brady*, see *infra* 6.2.2 The defence's constitutionally guaranteed access to evidence.

2 Besides these civil jurisdictions, there is also military jurisdiction.

3 Indeed, the federal system and the states using the Federal Rule 16 model grant the narrowest pre-trial discovery. Therefore, it would be fair to claim that this model best represent the

determination of a proper sample and its representativeness certainly does not exist since they will universally speak to each jurisdiction of the United States. Based on the two factors above, the description in this chapter of relevant rules and mechanisms in the US criminal procedure consists of two parts: 1. the pre-trial discovery mechanism involving a) the *Federal Rules* as a sample that provides the threshold of discovery mechanism, and thus could partly reflect the whole picture of the US according to the ‘Barrel Theory’,⁴ and b) relevant Supreme Court rulings that set bottom-line principles for relevant state regulations; 2. the defence’s constitutionally guaranteed access to evidence, which applies to each jurisdiction. This mechanism consists largely in the prosecution’s *Brady* obligation, involving a series of constitutional precedents launched by the milestone case *Brady v. Maryland*.⁵

Before description of the above, it is also necessary to elaborate the major actors involved in the US criminal procedure based on which the relevant rules and mechanisms function, so that the comparative research will not remain at the superficial level.

6.1 Basic tenets of the US criminal procedure

As a nation that originates from the 13 English/British Colonies, the United States actually inherited from England a considerable number of legal tenets, including those pertaining to criminal procedure. Therefore, like the English original, the US criminal procedural system is also generally premised on an adversarial framework of legitimate truth-finding, and shares much in common with the English tradition in terms of basic tenets of criminal procedure. Moreover, as a nation formed by the descendants of the Pilgrims who valued the spirit of self-governance enshrined in the Mayflower Compact much more than allegiance to the Crown, the United States is even more faithful to the common law tradition and the pure adversarial idea about legitimate truth-finding, while more reluctant to accommodate any paternalistic design of criminal justice. Consequently, the United States currently has a purer adversarial system than any other country of the world, including even England, the birthplace of adversarial criminal procedure, and the basic tenets of the US criminal procedure in large part resemble those of the ‘pure’ adversarial system,⁶ which can be demonstrated typically by the roles and functions of the major actors involved in the US criminal procedure. Accordingly, the description of the basic tenets of the US criminal procedure in this subchapter will focus mainly on the current functions and positions of these actors.

internal transparency in the US criminal procedure according to the ‘Barrel Theory’. (The capacity of a barrel with staves of unequal length is limited by the shortest stave.)

4 Ibid.

5 373 U.S. 83, 83 S.Ct. 1194 (1963).

6 For details, see Chapter 3.

6.1.1 Investigators

Although the criminal justice system of the United States most resembles the ideal adversarial system, and thus it is true that the defendants are still vested with the right to conduct independent investigation so as to formulate their own cases, the task of investigation in most criminal cases in the US still lies on organized professional police forces rather than on the parties involved in the criminal cases.

Based on the same Anglo-American idea of community-based administration of (criminal) justice, police forces in the US, closely resembling their English counterparts, have generally been established in a decentralized structure as well. Like their colleagues in many other countries, American police officers are responsible for identification and further inspection of criminal cases, vested with comprehensive powers to investigate crimes by e.g. crime scene investigation, evidence collection, interrogation of suspects, and questioning of witnesses. However, their investigative powers are subject to various legal or constitutional constraints, especially in case of coercive measures that may infringe civil rights of individuals, such as arrest and pre-trial detention, search and seizures, and interrogation of suspects.

First, American police officers may not arbitrarily arrest suspects unless they believe with probable cause⁷ that the latter have committed crimes; once a criminal suspect is under arrest, he or she shall be promptly brought to a judge, and has the right to be released on bail.

Second, American police may search suspects and their vehicles without any further cause or warrant while conducting an arrest, as the probable cause for arrest alone is considered sufficient for the search of suspects and their vehicles. Such indulgence that American law shows to the police regarding the search of bodies and vehicles of suspects under arrest might be largely attributed to the fact that many Americans carry deadly weapons according to the Second Amendment, and such a search on arrest may protect police officers from potential attacks.

Nevertheless, when it comes to searching domicile or residence, American law imposes strict restraints upon the conduct of police based on the Fourth Amendment protection on residential privacy. Except for extremely exceptional emergencies, American police may not search any domicile or residence without search warrants; otherwise, any evidence obtained by such an illegal non-warrant search shall be excluded.

7 In United States criminal law, probable cause is the standard by which police authorities have reason to obtain a warrant for the arrest of a suspected criminal. The standard also applies to personal or property searches. It is defined as a reasonable amount of suspicion, supported by circumstances sufficiently strong to justify a prudent and cautious person's belief that certain facts are probably true.

Third, as for the interrogation of suspects, the privilege against compelled self-incrimination enshrined in the Fifth Amendment has granted criminal suspects in police custody or custodial interrogation a right to silence. Since 1966, the US Supreme Court has, via *Miranda v. Arizona*, required the police to inform criminal suspects in custody of their right to silence and right to legal assistance, known as the *Miranda Rule*. According to which, custodial interrogation must stop once criminal suspects have expressed their wish to remain silent or to acquire legal assistance. Violation of the *Miranda Rule* might result in exclusion of evidence obtained by such unlawful interrogation. This exclusionary rule only applies in case of custodial interrogation and has been very much watered down during the past few decades, but it does not forbid a *Miranda Warning* in non-custodial situations.

It is notable that apart from notification of the right to silence, ‘*Miranda* requires the additional warning that “anything said can and will be used against you.” This may be considered a typical expression of the American adversarial system. It can be viewed as a declaration of war – warning the suspect that the police questioner is an adversary whose job is to get a confession, not a sympathetic person with the suspect’s interests at heart.’⁸

Generally speaking, the American police function in its criminal justice system as a number of independent and professional detective organizations, whose systematic task is to identify and further inspect criminal leads, and eventually to discover and ascertain what the truth is, i.e. whether there was a criminal act and who did it, based on convincing evidence they collect, without dealing with legal issues such as the determination of whether or not to file criminal charges and how many and what charges shall be filed (which belongs to prosecutors). In order to facilitate truth-finding in criminal justice, American police have been vested with comprehensive legal powers and technical measures. However, in order to prevent the police from violating the law and invading civil rights of individuals, American law also imposes various legal or constitutional restraints upon conduct of the police. In general, most mechanisms in the US criminal procedure, including pre-trial discovery and *Brady* rule, reflect their attempts to balance the two abovementioned values that conflict with each other.

6.1.2 Prosecutors

A public prosecutor should have long been an alien concept to the Anglo-American common law system, and it is indeed true that England did not fully embrace the idea of a public prosecutor until 1985 when the Crown Prosecution Service was established.⁹ However, there have been public prosecutors in the United States since early colonial days. While the evidence is far from

8 See Feeney & Herrmann 2005, p. 367.

9 See Chapter 4.

conclusive, the first American public prosecutor was probably Dutch. Having long had a public prosecutor in their home country, it was natural that the Dutch should bring this institution with them to the New World. When New Amsterdam became New York in 1664, the Dutch system of prosecution seems to have been continued.¹⁰

From a macro point of view, even today, the American prosecution system still follows a typical adversarial model: criminal proceedings should be in large part considered as private disputes between the two parties, i.e. the plaintiff/victim represented by their own advocate and the defendant represented by his own advocate. Nowadays, the plaintiff/victim of criminal acts could be considered equivalent to the local community whose safety and peace is at stake due to relevant criminal acts. Indeed, most chief prosecutors in US are elected by the local communities in which they serve, and therefore could be considered as representatives or advocates of these local communities, i.e. (vicariously) plaintiff/victim of relevant criminal acts. To serve as elected politicians/representatives, one of their political missions in general is determination of how to implement criminal law. Specifically speaking, they have comprehensive discretionary powers in forming tailor-made public prosecutorial policies in their local communities; in other words, they have much leeway in determining what kinds of acts shall be prosecuted in their jurisdictions.

In concrete cases, district attorneys, according to law and public prosecutorial policies of their own jurisdictions, determine whether or not to file criminal charges against certain criminal suspects, prepare charging instruments, negotiate with defence counsel, and represent the victim/community in trial sessions. Therefore, American prosecutors should be considered not only as governmental officials and representatives who prosecute criminal acts in the name of the government, but also as partisan advocates of the plaintiff/victim, i.e. the local communities. Their partisan interests lie not only in conviction of criminal suspects which may satisfy their client's specific demands in concrete cases, but also in fulfilment of relevant public prosecutorial policies which may reflect the general consensus of a certain local community.

Given the huge number of criminal cases in contrast to the limited number of district attorneys, many D.A. offices in US have employed a production-line style in dealing with public prosecution of criminal cases: every case will be dismantled into many smaller pieces, and each piece will be allocated to a specialist who takes in charge of certain step of the prosecutorial work. Such division of labour indeed allows D.A. offices to deal with more cases with less investment.

Since American prosecutors are responsible for presentation of prosecution cases and relevant evidence in trial sessions, it is naturally their duty to prove the guilt of the defendants beyond all reasonable doubt. In order to undertake

¹⁰ See Feeney 1998, pp. 1-2.

this formidable task, they must play a protagonist in the system, being able to orient criminal proceedings towards their partisan needs (specifically to convict the defendants and generally to serve the public prosecutorial policies of their own jurisdictions). Therefore, they have comprehensive discretionary powers not only in determining in trial sessions what prosecution evidence in what order shall be presented to support their cases, and examining or cross examining witnesses, but also in deciding in pre-trial proceedings whether or not to file criminal charges against certain suspects, and how many and what kinds of criminal charges shall be filed. The abovementioned partisan role that American prosecutors play in US criminal justice system also reflects the basic idea of adversarial criminal procedure.

6.1.3 *The defence*

The defence, as the adversary party against the prosecution, play the other protagonist in US criminal procedure. The defence party is indeed played by two actors, the criminal suspects/defendants and their defence counsel. In practice, notwithstanding having the formal right to defend themselves, the former will usually be discouraged from doing so, since they are believed to lack the necessary skills and experience to undertake such a formidable, tricky, and professionally demanding task. Therefore, criminal suspects/defendants in US criminal procedure will usually stay passive, with their rights at stake entrusted to their defence counsel, who are supposed to actively work in their clients' interest. The internal role (within the defence party) that criminal suspects/defendants play in US criminal procedure could be compared to a shareholder of a company who entrusts his/her own interests to a professional manager, although what they actually entrust to their advocates is not only their property, but also their liberty and even their life. Such a passive setting of the internal role of criminal suspects/defendants in US criminal procedure is in large part attributed to the fact that criminal defence in the US system is a highly sophisticated technique, and that neither prosecutors nor judges will actively work in the interest of the defendant.

The external role (related to the prosecution and the judiciary) that criminal suspects/defendants play in US criminal procedure is also quite passive; because on the one hand, the adversarial model of criminal procedure assumes that the defence, as the adversary against the prosecution, are not supposed to cooperate with the latter, and on the other hand, since the Fifth Amendment protection on the privilege against compelled self-incrimination has granted criminal suspects/defendants the right to silence not only in police interrogation but also in trial sessions, they may either refuse to answer the police interrogation, or decide on their free will whether or not to testify in trial sessions. In fact, they are usually discouraged from testifying by their counsel, especially if they have prior criminal records, since prosecutors will easily be able to reveal their records by cross examination, which would undermine the jury's impression of

them, and thus have a detrimental effect on the verdict. Moreover, if defendants decide to waive their right to silence and present themselves before courts, they are just testifying under oath like any other witness, and thus considered as ordinary witnesses instead of defendants, who can be subject to perjury charges if discovered lying to the courts.

Briefly speaking, criminal suspects/defendants usually play a quite passive role in US criminal procedure, not only in pre-trial proceedings, but also in trial sessions. Just as some comparatist¹¹ commented, a typical criminal trial in adversarial system will be a trial on the witnesses, rather than a trial on the defendant. The latter will usually sit at ease next to his/her own counsel during the entire trial session.

Since criminal suspects/defendants usually play a quite passive role in US criminal procedure, and neither the prosecution nor the judiciary will actively work in their interest, they will be highly dependent on their own defence counsel throughout the entire criminal process. Therefore, American law has granted them a comprehensive right to legal assistance, from the police interrogation to the trial sessions and appeal procedures. Moreover, if they cannot afford private defence counsel, one will be appointed for them in various stage of US criminal procedure. The fulfilment of the lawful right to legal assistance of criminal suspects/defendants in US criminal procedure is indeed in large part facilitated by relevant institutional settings: on the one hand, as is mentioned above, the United States has the largest lawyer population (also the largest lawyer proportion of total population, although not all of them are criminal lawyers) in the world; on the other hand, many American cities have established public defender offices, which serve as a systematic institution to provide free defence counsel to those criminal suspects/defendants who cannot afford to hire their own counsel. P.D. offices usually also work in a production-line style, just as their colleagues in D.A. offices do. The large population of competent licensed lawyers together with the high case-disposing speed of P.D. offices have jointly enabled criminal suspects/defendants in US criminal procedure to enjoy their, at least nominal, right to legal assistance provided by American law, and thus may possibly guarantee the latter effective defence and fair trials in theory, despite the systematic 'wealth effect'¹² in reality.

In order to facilitate fair trials for criminal suspects/defendants, American law has also granted defence counsel comprehensive adversary rights against the prosecution. Generally speaking, defence counsel in US criminal procedure enjoy reciprocal rights with the prosecution: they are entitled to be present at

11 Quoted from Liu Daqun, judge of the Appeals Chamber for both the ICTY and ICTR.

12 'Adversary criminal procedure privatizes the investigation and presentation of evidence. Such a procedure is intrinsically skewed to the advantage of wealthy defendants, who can afford to hire the most skilled counsel and pay for the gathering and production of defensive evidence.' This can be defined as the so-called wealth effect of adversarial system. See Langbein 2003, pp. 102-103.

police interrogation, negotiation with prosecutors, and presentation of defence cases along with relevant evidence they collect; during trial sessions, they may determine what defence evidence in what order shall be presented to support their cases, and examine or cross examine witnesses. Briefly speaking, American defence counsel's adversary rights against the prosecution consist largely in two aspects: first, they have the right to conduct an independent investigation so as to collect exculpatory or impeaching evidence to formulate their own defence cases or to rebut the prosecution cases; second, since the prosecution have an increasingly overwhelming advantage, not only in technical terms but also in financial terms, in collecting all kinds of evidence, whether incriminating or exculpatory, American defence counsel have been vested with an increasingly comprehensive right to discovery since 20th century.¹³

To sum up, as the other actor within the defence party, American defence counsel are supposed to actively work in their (supposedly) passive clients' interests; as the active and competent advocate of the defence party, they are expected to make every effort in fighting against their adversary, namely the prosecution, trying to exculpate their clients by impeaching the prosecution cases or by successfully establishing their own case. Their partisan role also reflects the basic idea of the American adversarial criminal procedure.

6.1.4 *The decider*

As in other typical adversarial systems, the decider in a typical American criminal trial will consist of two actors, i.e. the trial judge and the jury. The latter serve as the decider for the factual decision, while the former serve as the decider for legal decisions. In general, they should play a passive and impartial role as an outsider, who has no interests in the outcome of the cases. Their passive and impartial role also reflects the basic idea of the Anglo-American adversarial criminal procedure.

However, it is notable that for economical purposes, the vast majority of criminal cases in US will usually be subject to a less typical American style of criminal trial, most of which are remitted to plea bargain and the rest to non-jury trial, during which trial judges alone will decide on both factual and legal merits. In this case, the decider will play a less passive role in finding truth, but generally speaking, their role is still quite passive and impartial.

6.2 Internal transparency of the US criminal procedure

Internal transparency of criminal procedure is not a native concept within an adversarial system, but an alien term borrowed from inquisitorial systems, and internal transparency of the US criminal procedure involves two subjects in

13 See 6.2.1 Pre-trial discovery and 6.2.2 The defence's constitutionally guaranteed access to evidence.

its positive laws: a pre-trial discovery mechanism and relevant constitutional standards that guarantee access to evidence; therefore, the elaboration of internal transparency of the US criminal procedure in this subchapter will be based on these two aspects.

6.2.1 Pre-trial discovery

Pre-trial discovery in the United States is primarily in the light of the adversarial nature of the US criminal procedure, which, allowing either party to obtain from the other useful information regarding the evidence it might use at trial, can help them better prepare their own case and the impeachment against the other's, and avoid possible surprise and repeated continuances at trial that may otherwise arise from withholding information. Moreover, 'the continuing duty to disclose' set forth by the *Federal Rule* 16(c)¹⁴ also reflects the legislator's evident aim at an effective and efficient operation of the adversarial system.

As for the scope of pre-trial discovery, relevant rules have to answer two questions, i.e. where discovery is required and where exempted. The former has been highlighted repeatedly in the *Federal Rule* 16(a)(1), 16(b)(1); while the latter involves the so-called 'work product' exemption or rather 'internal documents' exemption, the '*Protective and Modifying Orders*' set forth by the *Federal Rule* 16(d)(1),¹⁵ and the 'Grand Jury Transcripts' set forth by the *Federal Rule* 16(a)(3).¹⁶

Specifically speaking, the *Federal Rule* 16(a)(1), 16(b)(1) has limited discovery to items within the 'possession, custody, or control' of either the prosecution or the defence. As for the prosecution disclosure that is usually of more concern, the scope may extend indeed to the files of those investigative agencies that have participated in the development of the particular prosecution. As for the exemption of discovery, the 'work product' exemption actually originates from discovery in civil procedure, while the *Federal Rule* 16(a)(2) has extended it to an 'internal documents' exemption that 'does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or other government

14 Fed.R.Crim.P 16(c): Continuing Duty to Disclose. A party who discovers additional evidence or material before or during trial must promptly disclose its existence to the other party or the court if:

- (1) the evidence or material is subject to discovery or inspection under this rule; and
- (2) the other party previously requested, or the court ordered, its production.

15 Fed.R.Crim.P 16 (d)(1): Protective and Modifying Orders. At any time the court may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief. The court may permit a party to show good cause by a written statement that the court will inspect ex parte. If relief is granted, the court must preserve the entire text of the party's statement under seal.

16 Fed.R.Crim.P 16(a)(3): Grand Jury Transcripts. This rule does not apply to the discovery or inspection of a grand jury's recorded proceedings, except as provided in Rules 6, 12(h), 16(a)(1), and 26.2.

agent in connection with investigating or prosecuting the case. Nor does this rule authorize the discovery or inspection of statements made by prospective government witnesses except as provided in 18 U.S.C. §3500.¹⁷

6.2.1.1 *Discovery by the defence*

Discovery by the defence/government's disclosure¹⁸ constitutes the main pillar of the US pre-trial discovery mechanism. The *Federal Rule* 16(a)(1) has enumerated the specific items that fall into the scope of defence discovery, including defendant's statements,¹⁹ criminal records,²⁰ documents and objects,²¹ and scientific reports and expert witnesses.²²

It is notable that according to these provisions, each item is discoverable 'upon a defendant's request' or 'at the defendant's request'. Moreover, the language of these provisions strongly suggests that a general request for all the discoverable items cannot be regarded as a request, while discovery of a certain item must be based on specific request.

In addition to the aforesaid discoverable items, the *Federal Rules* 12.1 and 12.2 have granted a reciprocal right to discovery to the defence, on condition that it has fulfilled its duty to notice its intended defences in response to relevant

17 The statutory reference is to the so-called 'Jencks Act' that was adopted largely in the light of the Supreme Court's decision in *Jencks v. United States*, 353 U.S.657 (1957), which required the government (prosecutor) to produce a verbatim statement or report made by a government witness or prospective government witness (other than the defendant) who testified at trial. Typically, Jencks material may consist of police notes, memoranda, reports, summaries, letters, related to an indictment or verbatim transcripts used by government agents or employees to testify at trial.

18 The special term used in the US Federal Rules to refer to prosecution disclosure.

19 According to the Federal Rule 16(a)(1)(A) and (B), discoverable defendant's statements refer mainly to 'any relevant written or recorded statement by the defendant' and 'the substance of any relevant oral statement made by the defendant'.

20 According to the Federal Rule 16(a)(1)(D), 'Upon a defendant's request, the government must furnish the defendant with a copy of the defendant's prior criminal record that is within the government's possession, custody, or control if the attorney for the government knows – or through due diligence could know – that the record exists.'

21 According to the Federal Rule 16(a)(1)(E), 'Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and:(i) the item is material to preparing the defence;(ii) the government intends to use the item in its case-in-chief at trial; or (iii) the item was obtained from or belongs to the defendant.'

22 According to the Federal Rule 16(a)(1)(F) and (G), 'the results or reports of any physical or mental examination and of any scientific test or experiment' will be discoverable on condition that 'the item is material to preparing the defence or the government intends to use the item in its case-in-chief at trial'; moreover, 'the bases and reasons for those opinions' will also be considered as crucial to the reliability of those reports or opinions.

prosecution discovery.²³ Specifically speaking, the discovery here will in large part involve the information of relevant government witnesses.²⁴

Moreover, ‘Jencks material’ may also constitute discoverable items for the defence. The reference in the Federal Rule 16(a)(2) to 18 U.S.C. §3500, i.e. the so-called ‘Jencks Act’ that was adopted largely in the light of the Supreme Court’s decision in *Jencks v. United States*, 353 U.S.657 (1957), which required the government (prosecutor) to produce a verbatim statement or report made by a government witness²⁵ or prospective government witness (other than the defendant) who testified at trial. Typically, Jencks material may consist of police notes, memoranda, reports, summaries, letters, related to an indictment or verbatim transcripts used by government agents or employees to testify at trial.

Last, in meeting the evidentiary standard for a bind-over,²⁶ the prosecutor will necessarily provide the defence with some discovery of the prosecution’s case in the stage of preliminary hearing, which may on one hand well supplement the relatively narrow pre-trial discovery provided by *the Federal*

23 See infra 6.2.1.2 Discovery by the prosecution.

24 Fed.R.Crim.P. 12.1(b)(1)(A) and (B): (A) In General. If the defendant serves a Rule 12.1(a)(2) notice, an attorney for the government must disclose in writing to the defendant or the defendant’s attorney:

(i) the name of each witness – and the address and telephone number of each witness other than a victim – that the government intends to rely on to establish that the defendant was present at the scene of the alleged offense; and

(ii) each government rebuttal witness to the defendant’s alibi defence.

(B) Victim’s Address and Telephone Number. If the government intends to rely on a victim’s testimony to establish that the defendant was present at the scene of the alleged offense and the defendant establishes a need for the victim’s address and telephone number, the court may:

(i) order the government to provide the information in writing to the defendant or the defendant’s attorney; or

(ii) fashion a reasonable procedure that allows preparation of the defence and also protects the victim’s interests.

Fed.R.Crim.P. 12.3(a)(4)(C) and (D): (C) Government’s Reply. Within 14 days after receiving the defendant’s statement, an attorney for the government must serve on the defendant or the defendant’s attorney a written statement of the name of each witness – and the address and telephone number of each witness other than a victim – that the government intends to rely on to oppose the defendant’s public-authority defence.

(D) Victim’s Address and Telephone Number. If the government intends to rely on a victim’s testimony to oppose the defendant’s public-authority defence and the defendant establishes a need for the victim’s address and telephone number, the court may:

(i) order the government to provide the information in writing to the defendant or the defendant’s attorney; or

(ii) fashion a reasonable procedure that allows for preparing the defence and also protects the victim’s interests.

25 The special term used in the US Federal Rules to refer to witness for the prosecution.

26 A precautionary measure to be adopted when there are reasonable grounds to anticipate some present or future danger, ordering a person to provide a bond or recognizance by means of which he guarantees to carry out some act (e.g. to appear in court at the proper time if he has been granted bail) or not to commit some offence (such as causing a breach of the peace).

Rules; and on the other hand, render prompt information for the preparation of plea negotiation.

6.2.1.2 *Discovery by the prosecution*

Discovery by the prosecution is constitutionally permitted but restricted according mainly to two Supreme Court rulings. In *Williams v. Florida*, 399 U.S. 78 (1970), the Court held that the Florida rule that required a defendant, on written demand of the prosecuting attorney, to give notice in advance of trial if the defendant intends to claim an alibi, and to furnish the prosecuting attorney with information as to the place he claims to have been and with the names and addresses of the alibi witnesses he intends to use, did not violate his Fifth and Fourteenth Amendment rights, and therefore shall be allowed by the Constitution. In the subsequent *Wardius v. Oregon*, 412 U.S. 470 (1973), the Court unanimously held an Oregon state alibi-notice provision which made no provision for reciprocal discovery, to be unconstitutional. To sum up, the Due Process Clause of the Fourteenth Amendment does not forbid pre-trial discovery by the prosecution on condition that reciprocal discovery has been granted to the defence.

Federal Rule 16(b)(1)(A)-(C) has enumerated the specific items that fall into the scope of prosecution discovery in the light of the defence party's specific request for reciprocal discovery provided by Federal Rule 16(a)(1). Specifically speaking, such discoverable items encompass documents and objects,²⁷ reports of examinations and tests,²⁸ expert witnesses.²⁹

27 Fed.R.Crim.P. 16(b)(1)(A) provides, 'If a defendant requests disclosure under Rule 16(a)(1)(E) and the government complies, then the defendant must permit the government, upon request, to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items if:

- (i) the item is within the defendant's possession, custody, or control; and
- (ii) the defendant intends to use the item in the defendant's case-in-chief at trial.'

28 Fed.R.Crim.P. 16(b)(1)(B) provides, 'If a defendant requests disclosure under Rule 16(a)(1)(F) and the government complies, the defendant must permit the government, upon request, to inspect and to copy or photograph the results or reports of any physical or mental examination and of any scientific test or experiment if:

- (i) the item is within the defendant's possession, custody, or control; and
- (ii) the defendant intends to use the item in the defendant's case-in-chief at trial, or intends to call the witness who prepared the report and the report relates to the witness's testimony.'

29 Fed.R.Crim.P. 16(b)(1)(C) provides, 'The defendant must, at the government's request, give to the government a written summary of any testimony that the defendant intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial, if –

- (i) the defendant requests disclosure under subdivision (a)(1)(G) and the government complies; or
- (ii) the defendant has given notice under Rule 12.2(b) of an intent to present expert testimony on the defendant's mental condition.

This summary must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications.'

Apart from and independent of the reciprocal prosecution discovery set forth by Rule 16, the *Federal Rules* also provide for a series of defence duties as to notice of defences in response to relevant discovery by the prosecution, such as the notice of an alibi defence,³⁰ the notice of an insanity defence with relevant expert evidence³¹ and the notice of a public-authority defences with relevant evidence.³²

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- 30 Fed.R.Crim.P. 12.1 (a) Government's Request for Notice and Defendant's Response.
- (1) Government's Request. An attorney for the government may request in writing that the defendant notify an attorney for the government of any intended alibi defence. The request must state the time, date, and place of the alleged offense.
- (2) Defendant's Response. Within 14 days after the request, or at some other time the court sets, the defendant must serve written notice on an attorney for the government of any intended alibi defence. The defendant's notice must state:
- (A) each specific place where the defendant claims to have been at the time of the alleged offense; and
- (B) the name, address, and telephone number of each alibi witness on whom the defendant intends to rely.
- 31 Fed.R.Crim.P 12.2(a) and (b): (a) Notice of an Insanity Defence. A defendant who intends to assert a defence of insanity at the time of the alleged offense must so notify an attorney for the government in writing within the time provided for filing a pre-trial motion, or at any later time the court sets, and file a copy of the notice with the clerk. A defendant who fails to do so cannot rely on an insanity defence. The court may, for good cause, allow the defendant to file the notice late, grant additional trial-preparation time, or make other appropriate orders.
- (b) Notice of Expert Evidence of a Mental Condition. If a defendant intends to introduce expert evidence relating to a mental disease or defect or any other mental condition of the defendant bearing on either (1) the issue of guilt or (2) the issue of punishment in a capital case, the defendant must – within the time provided for filing a pre-trial motion or at any later time the court sets – notify an attorney for the government in writing of this intention and file a copy of the notice with the clerk. The court may, for good cause, allow the defendant to file the notice late, grant the parties additional trial-preparation time, or make other appropriate orders.
- 32 Fed.R.Crim.P 12.3(a) Notice of the Defence and Disclosure of Witnesses.
- (1) Notice in General. If a defendant intends to assert a defence of actual or believed exercise of public authority on behalf of a law enforcement agency or federal intelligence agency at the time of the alleged offense, the defendant must so notify an attorney for the government in writing and must file a copy of the notice with the clerk within the time provided for filing a pre-trial motion, or at any later time the court sets. The notice filed with the clerk must be under seal if the notice identifies a federal intelligence agency as the source of public authority.
- ...
- (4) Disclosing Witnesses.
- (A) Government's Request. An attorney for the government may request in writing that the defendant disclose the name, address, and telephone number of each witness the defendant intends to rely on to establish a public-authority defence. An attorney for the government may serve the request when the government serves its response to the defendant's notice under Rule 12.3(a)(3), or later, but must serve the request no later than 21 days before trial.
- (B) Defendant's Response. Within 14 days after receiving the government's request, the defendant must serve on an attorney for the government a written statement of the name, address, and telephone number of each witness.
- ...

6.2.1.3 Remedies and sanctions

If either the prosecution or the defence fail to fulfil their lawful duty of disclosure, the *Federal Rule* 16(d)(2)³³ has authorized a wide range of remedies, including 1) ordering immediate disclosure, 2) granting a continuance, 3) excluding evidence, and 4) a catchall provision authorizing ‘any other order that is just under the circumstances’. Specifically speaking, the latter may involve the following remedies or sanctions: (i) a charge directing the jury to assume certain facts that might have been established through the non-disclosed material, (ii) granting a mistrial, (iii) holding in contempt the party responsible for the nondisclosure, and (iv) dismissal of the prosecution. In principle, the preferred remedy is to offer to the other party a continuance that will help them make use of the delayed discovery and thereby avoid any prejudice, at least where the party responsible for the nondisclosure acted in good faith; while exclusion of non-disclosed evidence is just a remedy of last resort.

As for the failure as to notice of defences and relevant discovery set forth by the *Federal Rule* 12.1, 12.2 or 12.3, relevant provisions³⁴ simply authorize an exclusion of the undisclosed evidence at the discretion of the trial court.

With regard to possible sanctions, pre-trial discovery may involve professional ethics and discipline. For instance, the ABA Model Rule of Professional Conduct 3.8 (d) provides that a prosecutor in a criminal case must disclose all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigate the offense. A breach of these ethical guidelines may lead to disciplinary sanctions, from reprimand up to disbarment.

33 Fed.R.Crim.P. 16(d)(2) Failure to Comply. If a party fails to comply with this rule, the court may:

- (A) order that party to permit the discovery or inspection; specify its time, place, and manner; and prescribe other just terms and conditions;
- (B) grant a continuance;
- (C) prohibit that party from introducing the undisclosed evidence; or
- (D) enter any other order that is just under the circumstances.

34 Fed.R.Crim.P.12.1(e) Failure to Comply. If a party fails to comply with this rule, the court may exclude the testimony of any undisclosed witness regarding the defendant’s alibi. This rule does not limit the defendant’s right to testify.

Ibid 12.2 (d) Failure to Comply.

(1) Failure to Give Notice or to Submit to Examination. The court may exclude any expert evidence from the defendant on the issue of the defendant’s mental disease, mental defect, or any other mental condition bearing on the defendant’s guilt or the issue of punishment in a capital case if the defendant fails to:

- (A) give notice under Rule 12.2(b); or
- (B) submit to an examination when ordered under Rule 12.2(c).

(2) Failure to Disclose. The court may exclude any expert evidence for which the defendant has failed to comply with the disclosure requirement of Rule 12.2(c)(3).

Ibid 12.3 (c) Failure to Comply. If a party fails to comply with this rule, the court may exclude the testimony of any undisclosed witness regarding the public-authority defence. This rule does not limit the defendant’s right to testify.

6.2.2 *The defence's constitutionally guaranteed access to evidence*

Pre-trial discovery contributes substantially to the defence party's preparation for adjudication in two respects. On the one hand, it provides the defence with the prosecution's case and relevant supporting evidence; on the other hand, it may in many cases provide the defence with items within the possession or control of the prosecution that may either hold potential clues to defence evidence or be used directly as defence evidence. Closely related to the latter aspect of defence discovery are a series of constitutional standards or obligations that 'might loosely be called the area of constitutionally guaranteed access to evidence' [*Arizona v. Youngblood*, 488 U.S. 51 (1988)], which, in large part, consist in the prosecution's *Brady* obligation.

The prosecution's broad duty to disclose exculpatory information has gradually accumulated through a series of decisions. In some earlier precedents, such as *Mooney v. Holohan*, 294 U.S. 103 (1935), *Alcorta v. Texas*, 355 U.S. 28 (1957), and *Napue v. Illinois*, 360 U.S. 264 (1959), this duty was limited to false testimony. In *Brady v. Maryland*, 373 U.S. 83 (1963), the Court announced a rule known as the *Brady* rule, that in effect subsumed the false testimony cases, by holding that 'the suppression by the prosecution of evidence favourable to an accused upon request violates due process where the evidence is *material* either to guilt or to punishment, irrespective of good faith or bad faith of the prosecution.' In other words, the *Brady* rule is based on the requirements of due process. Its purpose is not to displace the adversarial system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur. Therefore, in order to minimize its possible detrimental effect on the adversarial nature of the US criminal procedure, the Court has restricted its use in two ways: 1) *Brady* rule requires prosecutorial disclosure only of evidence that is favourable to the accused, including both impeachment evidence and exculpatory evidence; 2) the aforesaid evidence yet shall be subject to a materiality test³⁵ before disclosure.

Although a fair analysis of the holding in *Brady* indicates that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial, *Brady* in itself did not answer the touchstone question of how 'material' it must be where due process requires prosecutorial disclosure of relevant evidence that is favourable to the accused, and whether the defence has to make a request for *Brady* material in order to trigger the prosecution's duty to disclosure.

Some subsequent Supreme Court rulings sought to clarify this materiality question. In *United States v. Agurs*, 427 U.S. 97 (1976), the Court developed two testing standards for three types of cases: an 'any reasonable likelihood' or harmless error test for false testimony (represented by *Mooney* line of cases)

35 A normative standard employed to determine whether a piece of unused evidence is material enough to be subject to mandatory (prosecution) disclosure.

and specific requests (represented by Brady); a ‘reasonable doubt’ test for no request (as in *Agurs*) and general request situations.

In *United States v. Bagley*, 473 U.S. 667 (1985), the Court integrated the *Strickland* formulation³⁶ into the *Agurs* test for materiality, forming a simplified materiality test that is sufficiently flexible to cover all the three cases set forth in *Agurs*. According to the *Bagley* test, evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defence, the result of the proceeding would have been different. A ‘reasonable probability’ refers to a probability sufficient to undermine confidence in the outcome.

In *Kyles v. Whitley*, 514 U.S. 419 (1995), the Court subtly modified the relatively narrow construction of the materiality test in *Bagley*, by interpreting liberally the *Bagley* formulation of reasonable probability.

In addition, the Supreme Court also provides the defence with constitutionally guaranteed access to witness testimony, since the government may also deprive a defendant of the testimony of a subpoenaed witness by exerting improper pressure on that witness not to testify, and thus the defendant’s access to witness is at stake, especially if the witness is also implicated in trouble. In *Webb v. Texas*, 409 U.S. 95 (1972), the court held that the trial judge’s warning against perjury had been given in ‘unnecessarily strong terms’, and his partial remarks ‘effectively drove the witness off the stand’, which violated the defendant’s right to a fair trial. Although *Webb* involved judicial action, this guarantee is usually applied in case of prosecutorial efforts to discourage prospective defence witness from testifying. Since threats to prosecute defence witness would probably be held to be against due process, ‘the safest course for a prosecutor seeking to warn a defence witness about the risks of self-incrimination or perjury is to convey those warnings through the witness’s attorney’.³⁷

6.3 Summary

Internal transparency is quite an alien concept to the Anglo-American system that normally embraces adversarial criminal procedure, since it opposes the adversarial nature by expecting the two opponents, i.e. the prosecution and the defence, to cooperate with each other in a crucial task, i.e. the collection of evidence. The US criminal justice system as the most typical sample of adversarial system had also been quite reluctant to accept this concept in its criminal procedure by the early 20th century. However, given the increasingly

36 See *Strickland v. Washington*, 466 U.S. 668 (1984). This Supreme Court ruling established the standard for determining when a criminal defendant’s Sixth Amendment right to counsel is violated by that counsel’s inadequate performance, by employing a test that consists primarily in ‘a reasonable probability that, if counsel had performed adequately, the result would have been different’.

37 Green 1989, p. 139.

overwhelming advantage of the government in investigation and prosecution of crimes, external transparency alone has become no longer sufficient to guarantee a fair contest between the powerful government and the vulnerable defence; while internal transparency has become a mechanism of equity that enables the defence to discover more exculpatory or impeaching evidence they might have missed without the prosecution's cooperation. Figuratively speaking, internal transparency is a small patch on the ideal adversarial approach of US criminal procedure, which facilitates the rebalance of strengths of the prosecution and the defence, and thus legitimacy of the entire criminal justice system..

Nevertheless, US criminal procedure as the most typical sample of adversarial system is seemingly still trying to preserve as much as possible of the original basic tenets of its adversarial framework of legitimate truth-finding; concomitantly, internal transparency of US criminal procedure is indeed subordinate to and restrained by basic tenets of the 'pure' adversarial system in many cases. First, since the idea of the classical adversarial approach of legitimate truth-finding considers criminal proceedings as private disputes between the two parties, it is natural for US criminal procedure to relate the fulfilment of internal transparency to private interests of prosecution and defence as partisan advocates, and therefore to provide pre-trial discovery as a reciprocal right of the two parties that should be enabled upon request rather than a *sua sponte* duty of the state/prosecutors.

Second, the defence may be able to claim their right to discover (the word itself implies activity by defence counsel) exculpatory or impeaching evidence in the prosecution's possession or custody only if they managed to be aware of the existence of such evidence, usually through independent but costly investigation of their own; otherwise, they will never know what they don't know and their right to discovery will remain just on paper. In other words, impoverished defendants can hardly make as effective use of the right as wealthy defendants, which will worsen the inherent 'wealth effect' of the adversarial system.

Third, as a partisan advocate, a US prosecutor is probably willing and able to hinder access by the defence to exculpatory or impeaching evidence in its possession. On the one hand, there are plenty of clever ways to do so, e.g. as is mentioned beforehand, it is quite safe for a prosecutor seeking to warn a defence witness about the risks of self-incrimination or perjury to convey those warnings through the witness's attorney; on the other hand, even if a prosecutor did it in a less clever way, it is still not that dangerous for them, since the defence, especially of indigent clients which is usually the case in United States, can barely be aware that such evidence has been withheld by the prosecution. Furthermore, even if a prosecutor were so unlucky that he/she is found to withhold discoverable evidence, the consequences would usually not be so serious for him/her – a continuance will be the most likely remedy while disciplinary sanctions are rare. Briefly speaking, internal transparency of the

US criminal procedure is to a great extent offset by what Langbein defined as the ‘combat effect’ ingrained in adversarial system.

Last, the pre-trial discovery mechanism in US criminal procedure is designed largely in light of a managerialist ideology that pursues efficiency more than equality. In other words, the limited degree of internal transparency of the US system, including relevant mechanisms, is indeed based on a quite different rationale from that of its inquisitorial counterparts.

To sum up, United States still adheres to a quite pure adversarial framework of legitimate truth-finding as well as its original tenets, despite its inherent ‘wealth effect’ and ‘combat effect’; while internal transparency of the US criminal procedure is restrained by such tenets in many aspects.

Chapter 7

Comparison between the adversarial systems

After the elaboration of basic tenets and (mostly internal) transparency of the criminal justice systems of England, Scotland, and United States respectively, it transpires that the three types of procedural schemes share much in common, especially in terms of their basic tenets, as they all employ generally an adversarial framework of legitimate truth-finding, but they do have a number of significant differences, in both basic tenets and specific mechanisms regarding internal transparency. Moreover, basic tenets of each system are still evolving on a slow yet steady basis, as they respond to the ever-changing situation of crime control and administration of justice, which gives rise to the possibility and necessity of the emergence of relevant (discovery/disclosure) mechanisms that relate to internal transparency of criminal procedure. This chapter will seek to compare and analyse the aforesaid similarities and differences in terms of basic tenets and of internal transparency respectively.

7.1 Basic tenets

7.1.1 Similarities

As is mentioned above,¹ the three exemplary adversarial systems have some defining features in common due to historical reasons, both on the institutional level and on the conceptual level. Specifically speaking, the latter involves separation of powers, the outlook on justice and the epistemology and methodology for finding truth in criminal cases; while the former is in large part related to the use of an adversarial approach, involving *inter alia*, lay judges of facts, rights to non-cooperation, right to counsel, rights of defence counsel, proceeding in words rather than by writing, which is coordinated with mass application of plea bargaining and non-jury trials.

As far as is closely relevant to our topic, such similarities are centred on their common scheme for legitimate truth-finding, which consists largely in the allocation of procedural functions and responsibilities among the actors involved in criminal procedure. Specifically speaking, their scheme for

1 For details, see Chapter 3.

legitimate truth-finding is premised on autonomous collection and production of evidence, respective presentations of partisan cases, and fair contest between the two versions of cases; therefore, the role of both prosecution and defence is that of partisan advocate vested with equal and reciprocal rights to independent investigations and presentations and supposed to play the dominant roles in the criminal procedure, while the judiciary only umpire the contests between the two adversaries, with no power to investigate the case or interfere with its presentation.

Moreover, basic tenets of each of the three systems are evolving as a response to the broader social changes, gradually deviating from the typical track of the adversarial approach, especially in the pre-trial procedure; while the differences lie largely in how far away they respectively have deviated by now.

7.1.2 Differences

The differences in basic tenets of the three systems consist mainly in the pre-trial procedure. Generally speaking, in United States the collection and production of evidence still mostly proceeds on a private and partisan basis, according to the classical adversarial scheme of legitimate truth-finding; while the private nature and partisanship of its English and Scottish counterparts have both been undermined to some degree, since the autonomy of the defence in England and in Scotland have both been more or less encroached upon by their centralized public prosecution services.

Specifically speaking, the aforesaid differences can be demonstrated in large part by the varying roles and functions (and the reasons for them) of the actors involved in the three systems, especially by those of the prosecutors. In United States, prosecutors still serve as partisan advocates even in pre-trial procedure, whose first priority is the interests of the community that they represent rather than discovery of the objective truth; concomitantly, the defence enjoy adequate autonomy, at least in form or if they are wealthy enough to pay for skilled counsel and independent investigation, so as to be able to collect and produce sufficient exculpating or impeaching evidence, and thus to launch effective counterattack against their adversary.

In England, the autonomy of the defence has been undermined to a substantial extent since the task of collecting and producing evidence has indeed been mostly taken over by the police; moreover, Crown prosecutors in England no longer play a purely partisan role that only represents the Crown in its criminal procedure, but have developed a quite impartial function at least in pre-trial procedure, since they ‘must always act in the interests of justice and not solely for the purpose of obtaining a conviction.’² In this way, England has

2 CPS, Code for Crown Prosecutors (2013), para. 2.4.

substantially deviated from the adversarial track of legitimate truth-finding, especially in its pre-trial procedure.

In Scotland, the defence indeed must to a great extent rely upon the prosecution to gather evidence for the preparation of its own case, and therefore has virtually lost its autonomy against the prosecution, especially in the pre-trial procedure. Concomitantly, the Scottish prosecution, considered as ministers of justice rather than mere advocates of the Crown, have played a rather paternalistic and impartial role in pre-trial procedure, who shall not only note and disclose exculpatory evidence in their possession just like their English counterparts, but also actively pursue potentially exculpatory lines of inquiry for the sake of the defence just like inquisitorial prosecutions. In this way, it is not unfair to argue that Scotland has indeed employed a mostly inquisitorial approach of legitimate truth-finding in pre-trial procedure.

To sum up, it transpires that the defence in United States enjoy the most autonomy, at least in form or in ideal situations where the defendants can afford skilled counsel and independent investigation, and their disadvantage in comparison to the police is at a minimum level; that prosecutors in Scotland play the most impartial and paternalistic role; and that prosecutors in United States play the most partisan and private role.

7.2 Internal transparency

7.2.1 Similarities

First, none of the three systems has a native concept of internal transparency of criminal procedure, and relevant (discovery/disclosure) mechanisms that guarantee internal transparency did not exist before 20th century. Second, relevant mechanisms came into forming in the three systems almost at the same time, i.e. early 20th century. Third, relevant mechanisms share similar specific requirements, such as discoverable/disclosable items and materiality test. Last, the introduction of relevant (discovery/disclosure) mechanisms has caused a certain degree of systemic incoherence in all three systems.

7.2.2 Differences

First, although relevant (discovery/disclosure) mechanisms that guarantee internal transparency of criminal procedure have been introduced to the three systems for similar rationale, i.e. to grant the defence more rights and powers, so that the systematic inequality of arms could be alleviated to some extent, and that the very foundation of the adversarial framework of legitimate truth-finding may still remain, their specific ways of pursuing the intended consequence are different. In the United States, internal transparency is guaranteed primarily by the defence actively pursuing their right to discovery; in England and in Scotland, relevant mechanisms have been introduced rather to impose on the

prosecution more duties and burdens, so that the state is likely to take over and begin to play an increasingly dominant and paternalistic role, or what Damaška defined as an 'activist' role,³ in preserving legitimate truth-finding and fair justice even if equality of arms has been systematically impaired. That is also the reason why relevant legal term is referred to as right to discovery only in US, while in other countries usually as duty of disclosure.

Second, since relevant (discovery/disclosure) mechanisms have been oppositely oriented in the three systems, relevant tasks of discovery/disclosure have been generally remitted to different actors. In United States, discovery is considered mostly as a defence task, which can be launched only upon request; while in England and in Scotland, disclosure is recognized as a prosecutorial task that shall be fulfilled *sua sponte*.

Last, the three systems have allowed different degrees of internal transparency of criminal procedure. Internal transparency in the United States is at a minimum level since it has been subject to various restraints; while internal transparency in England and in Scotland is substantially more. In comparison, England has allowed the most internal transparency since it provides a full disclosure duty of the prosecution, while the scope of disclosure shall be subject to the review and discretion of the prosecution in Scotland.

7.3 Summary

It seems that the pitfall degree of external transparency correlates to the disparity width between prosecutorial/investigative and defensive powers, and therefore, the more advantages prosecution (police) has over the defence, the more non-adversarial guarantees are needed so as to even up the unbalanced situation. Since non-adversarial guarantees as such consist mainly in two forms, i.e. impartial and paternalistic prosecution and internal transparency of criminal procedure, the two forms of guarantees may constitute a complementary or alternative relationship, which may jointly offset the aforesaid inequality of arms and thus restore legitimacy of the system. Such law can be indicated by a brief formula:

$$D = I + T$$

In this formula, D represents the disparity width between prosecutorial/investigative and defensive powers, I the impartiality of prosecution, and T internal transparency of criminal procedure. A due framework of legitimate truth-finding shall satisfy this formula at large. This formula can be used to explain why England, Scotland, and United States diverge in terms of internal transparency.

3 See Damaška 1986, pp. 80-88.

First, since United States has the minimum value of D, both its I and T can remain at a relatively low level. In other words, it may retain the least impartial, or rather, the most partisan prosecution and the least internal transparency at the same time because it relatively better retains the balance between prosecution and defence.

Second, although England and Scotland have similar values of D, since Scotland has the biggest I among the three systems, it does not need as big a T as England does. In other word, England and Scotland have similar situations of inequality of arms, but they emphasize different schemes to solve the aforesaid problem: Scotland prefers to rely more on an impartial and paternalistic prosecution service due to its legal tradition, while England would rather resort to more internal transparency due to their inherent reluctance to the other scheme.

This formula may be considered as an inspiring outcome of the comparative research, which could be used as a guideline for the normative solutions to China's current problems.

Interim conclusions of Part II

1. The basic tenets of modern adversarial criminal procedure have always developed as response to changes in relevant historical or contextual factors, and the evolution of such tenets should usually be attributed to reasons of equality. Just as the emergence of a nascent adversarial criminal procedure in England was to even up the strengths of unrepresented defendants and of the prosecution with their confederates, the relatively recent introduction of discovery/disclosure mechanisms into exemplary adversarial systems, such as the US, England, and Scotland, is based on the same idea, i.e. equality of arms.

2. In many adversarial systems including the US, England, and Scotland, 'pure' adversarial criminal procedure with a jury trial has virtually become a mere exemplary practice of their adversarial traditions, used only on the odd occasion. Most criminal cases in these systems are more likely to be subject to a less adversarial procedure, especially during the pre-trial stages, where the defence have become increasingly dependent on the prosecution as to their collection and production of evidence, favourable and unfavourable. That is the very reason why the more inquisitorial notion of internal transparency of criminal procedure has played an increasingly significant role in these exemplary systems with adversarial traditions, despite the structural risk that it might diminish the adversarial nature of their criminal procedure by requiring and expecting a partisan advocate to co-operate with its adversary during their contests. In other words, the recent introductions of discovery/disclosure mechanisms in adversarial systems such as US, England, and Scotland, to a great extent could also be considered a result of other than a reason for a decline of defence autonomy; indeed, it has remedied or offset rather than caused or worsened the paradoxes and tensions between internal and external transparency, and therefore contributed to legitimacy of their criminal justice systems.

3. Given that even in the world's most exemplary adversarial systems, such as the US and England, inquisitorial-devised internal transparency of criminal procedure has still become an increasingly significant factor that facilitates fairness of criminal procedure and thus the legitimacy of criminal justice due to global increase of investigative power, criminal procedure in countries with

much more paternalistic traditions and much less personal autonomy, such as China, shall by no means give any less weight to internal transparency of criminal procedure.

4. The ideal-typical adversarial approach is in itself by no means an optimal choice for establishing legitimacy of criminal justice, neither in theory nor in practice, given its truth-impairing combat effect and fairness-damaging wealth effect if compared with its inquisitorial counterpart. The story of the formation, evolution, and entrenchment of modern adversarial criminal procedure is indeed a matter of legal history rather than of legal theory. Therefore, the applicability of adversarial dogmas lies in legal-historical elements more than in legal-theoretical elements of a given system, and the blind faith in adversarial fictions/dogmas should be stopped.

Specifically speaking, the answer to the ultimate research questions as to whether the introduction of the adversarial approach would alleviate the legitimacy decline of China's criminal justice and what should constitute the primary merits (internal or external transparency) of the most promising solution, should thus be explored from a legal-historical dimension; and it is then necessary to revisit China in Part III to compare and examine whether China also has the legal-historical elements for the introduction of an adversarial approach, and what such legal-historical elements suggest in terms of the due relationship between internal and external transparency and in terms of that between transparency and legitimacy.

PART III

CHINA REVISITED AND FINAL CONCLUSION

Part I has shown that China's new ROL (discourse) system has strongly advocated adversarial legalism and thus the universal and self-evident applicability of adversarial dogmas, which seems highly questionable in the Chinese context given the paradoxical outcome of China's relevant reforms; and Part II has further revealed that such dogmas should not be considered as unalterable even in their home countries, and that the story of the emergence and entrenchment of the adversarial criminal trial in its birthplace is a topic of legal history much more than of legal theory. Therefore, Part III will revisit China from a legal-historical dimension so as to discover its traditional pattern of legitimate truth-finding and fair justice, and thus to further pursue the most promising solutions to its current problems based on that legal tradition in combination with the outcome of the relevant comparative research.

Chapter 8

China's typical pattern of legitimate truth-finding and fair justice

8.1 The historical background of the Chinese legal system

It is notable that so-called Chinese tradition is a dynamic historical course rather than a final result, which has changed considerably along the thousands of years of history. Therefore, Chinese tradition can be precisely revealed only by a thorough elaboration of Chinese political and legal history, focusing not only on the situation during each period of time, but also on the overall trend.

It is widely recognized by Chinese historians that the very first state in the Chinese history, i.e. the Xia (夏) Dynasty, arose in the 21st century BC. Since then, the great land has witnessed dozens of dynasties one after another, Shang (商), Zhou (周), Qin (秦),¹ Han (汉),² Sui (隋), Tang (唐), Song (宋), Yuan (元), Ming (明), Qing (清),³ Republic (民国), and the People's Republic established by Mao, chronologically. The legal system in China also evolved slowly during this long period of time, which can be briefly divided into three phases, the feudal era (21st century BC-220 BC),⁴ the imperial era (221 BC-1911 AD), and the modernization era (1912 AD-present). The first phase witnessed the rise and evolution of positive law, as well as conflicts among different legal philosophies. During the second phase, Confucianism had been enshrined by

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- 1 Qin (秦) is the very first unified imperial regime in the Chinese history. According to some linguists, this might be the origin of how the westerners name 'China'. As the name of this great country was disseminated westward, the ancient Chinese pronunciation of this character was gradually translated into 'Cīna' in Sanskrit, and then 'Sinae' in Greek and Latin, and finally 'China' as it is today. The glory of this dynasty was owing mainly to its strict adherence to the proposition of 'rule by law', which was unique in the millennia's history of China.
 - 2 Han (汉) was such a glorious dynasty during which China had become more powerful than ever before both militarily and culturally that the biggest ethnic group in China today still call themselves Han People, named right after this dynasty. Since then, Confucianism had been officially recognized as the mainstream ideology of China. This had lasted for over 2000 years, and thus strongly influenced the legal systems in Chinese history. This influence still can be perceived even today.
 - 3 The Chinese Dynasties enumerated above are phonetically annotated according to the current standard of Chinese phonetic alphabet, although many westerner intellectuals may be more familiar with the version based on the Wade-Giles Romanization.
 - 4 Before that it was the long-enduring age of myth, which is irrelevant to this topic.

the authorities as the official ideology of the great empire, which terminated the aforesaid conflicts. As a result, the so-called ‘Chinese Legal System’ was formulated, and remained stable and mature for two millennia. The third phase saw the collapse of the ancient system, and subsequently the painful process of its transformation, confusion, integration, and modernization. Even today, this process is still not over.

8.1.1 The Feudal Era (21st century BC-221 BC)

As a state first arose, simple legal rules and principles conceived in ancient customs and religious protocol were correspondingly brought into being. During the millennium of Xia and Shang (21st century BC-11th century BC), the justice system was rather theocratic due to the unity of monarchic power and religious authority.⁵ Therefore, deities played a significant role in both legislation and judicature, as well as in the underlying philosophy of law. An evident clue is how the ancient Chinese people designed the Chinese character for the word ‘law (法)’. It was then written or rather drawn like ‘灋 (fa)’.⁶



As we can see, this character consists of three parts, ‘氵’, ‘廌’, and ‘去’. In Chinese, ‘氵’ is a root for character making, which means water;⁷ ‘廌 (zhi)’ is the name of a mythical unicorn which will hit the guilty with its horn;⁸ and ‘去 (qu)’ means ‘to eliminate’. A classic ancient Chinese dictionary ‘*Shuowen Jiezi*’⁹ so explained and analysed the Chinese character ‘灋 (fa, law)’: ‘灋’ means

5 See Zhang 2004, p. 1.

6 This font, called ‘楷 (kai)’, which is still the standard font of Chinese characters in China today, was indeed developed in Han Dynasty (2nd century BC-2nd century AD) through simplification and abstraction of the more ancient fonts. Therefore, the character ‘灋’ would look more like a piece of painting rather than a word when it was designed at first. See the affiliated picture below.

7 From the more ancient fonts demonstrated in the picture, it is clear that the pictographic root symbolizes flowing river, and is thus used to express objects or ideas related to water.

8 It is obvious that this character is a pictograph as well, since this unicorn was believed to look like that in the picture above. This mythical animal could be considered as a hybrid of Leviathan and Lady Justice, which served as the visual representation of JUSTICE in Chinese culture.

9 *Shuōwén Jiězì* (Chinese: 说文解字; Wade-Giles: Shuo-wen chieh-tzu; literally ‘Explaining and Analyzing Characters’), often shortened to *Shuowen*, was an early 2nd-century Chinese

punishment (刑); it should be even and fair like water, involving ‘water (氵)’. ‘鷹 (zhi)’, is something used to hit the unjust, and will eliminate the unjust, involving ‘to eliminate (去)’.¹⁰ This classic interpretation demonstrates the simple idea about what law is by ancient Chinese people originally – fairness, power, mystery, and punishment.

The following millennium witnessed the erection, disintegration, and collapse of a new dynasty, i.e. 周 (Zhou, 11th century BC-221 BC), as well as of an old regime, i.e. the feudal system. The creator of the new order¹¹ overthrew the last king¹² of the Shang Dynasty, whose authority however, had by that time been widely deemed divine and unique, according to the prevailing ideology of theocracy. In order to convince the people of the legitimacy of his ruling, the new king, with his followers, fine-tuned the old version of theocratic ideology, forming the so-called ‘以德配天 (Yi De Pei Tian)’ theory. ‘以 (Yi)’ literally means ‘with’; ‘德 (De)’ ‘virtue’; ‘配 (Pei)’ ‘to match’; ‘天 (Tian)’ ‘the sky or Heaven’.¹³ This slogan, comprising the four characters altogether, literally means ‘(a qualified sovereign should) match God (or the will of God) with (his¹⁴) virtue’. The new theory broke the monopoly of one particular person or his family on the divine rights of kings, seeding a new belief that God will only bless those sovereigns who have adequate virtue, and will abandon those who do not. Without explicitly denying the rule of God, the new dynasty virtually secularized the country step by step, establishing a new order with the notion of ‘rule of virtue’. In terms of political and legal practice therefore, deities had faded away, living only in their tastefully decorated temples which were far away from the secular society; while humans became the main characters on

dictionary from the Han Dynasty, which first analyzed the structure of the characters and gave the rationale behind them (sometimes also the etymology of the words represented by them), and first used the principle of organization by sections with shared components, called radicals (bùshǒu 部首, lit. ‘section headers’).

- 10 The original text is in ancient Chinese: ‘灋·刑也·平之如水·从水;鷹·所以触不直者去之·从去·’ This book has translated it into plain English.
- 11 King Wu (武王), named Ji Fa (姬发), the first king of Zhou Dynasty, is well recognized as one of the greatest sovereigns in Chinese history.
- 12 King Zhou (纣王), also called Emperor Xin (帝辛), the last king of the Shang Dynasty, is well recognized as one of the most notorious tyrants in Chinese history.
- 13 ‘天 (Tian)’ is a fundamental and core concept in traditional Chinese philosophical and religious theory. It literally refers to the sky, but the Ancient Chinese believed that it has spirit, representing the utmost will and ultimate law of the universe or nature. A sovereign used to be deemed and called ‘天子 (Tian Zi)’ in China, which means the son of ‘天 (Tian)’. Chinese people have been worshipping ‘天 (Tian)’, considering it the source where the legitimacy of one’s ruling comes from. Therefore, ‘天 (Tian)’ could reasonably be translated as ‘Heaven’, which is just in accordance with the official translation of ‘天坛 (Tian Tan)’, i.e. the Temple of Heaven which is still a tourist attraction in Beijing today, and had been used as a huge altar for Chinese emperors to worship Heaven, i.e. ‘天 (Tian)’. In brief, ‘天 (Tian)’ could be perceived as the Chinese version of God, so the author will simply use ‘God’ to translate it hereinafter.
- 14 Logically also including ‘her’, but actually people at that time referred only to ‘his’ in this context.

the stage. This political theory, arising in the 11th century BC, was inherited, developed and strengthened by the 2nd century BC ultimately formulating the Chinese traditional outlook on political legitimacy,¹⁵ which has endured ever since, at least until the 19th century, and still has a latent effect on the legal and political system in China today.

Based on the political outlook ‘以德配天 (Yi De Pei Tian)’, the new dynasty further developed its legal policy, ‘明德慎罰 (Ming De Shen Fa)’. ‘明 (Ming)’ literally means ‘to enlighten’; ‘德 (De)’ ‘virtue’; ‘慎 (Shen)’ ‘caution or cautious’; ‘罰 (Fa)’ ‘penalty’. This policy emphasized the state’s obligation towards and efforts in enlightenment, while requiring restraint on the use of penalties.¹⁶ In order to carry out this policy, the authorities formulated a series of norms concerning virtue, i.e. ‘礼 (Li, etiquette)’, comprising customs and moral norms, social and religious protocol, and hierarchical order in the community. In his masterpiece *Zizhi Tongjian*,¹⁷ the great historian 司马光 (Sima Guang, 1019-1086) explained and analysed ‘礼 (Li)’ as follows: ‘the duty of a sovereign consists in (the maintenance of) 礼 (Li)’; ‘礼 (Li)’ in ‘分 (Fen, part)’; ‘分 (Fen)’ in ‘名 (Ming, rank or status)’. ‘礼 (Li)’ is the principle; ‘分 (Fen)’ is (the due relationship between) sovereign and subject; ‘名 (Ming)’ is (lordships such as) duke, marquis, minister, sheriff.’¹⁸ This classical annotation may hold a clear clue to the traditional Chinese pattern of governance. From a modern perspective, the content of ‘礼 (Li)’ is actually more similar to the idea of law in essence. Unlike modern law however, the implementation of ‘礼 (Li)’ relied mainly on flexible measures, including propagation and education, setting moral examples,¹⁹ and internalization and willing compliance with these norms and values. In this quasi-legal system of ‘礼 (Li)’, ‘分 (Fen)’ is the core concept. It literally means ‘part’, referring in this context to a space of rights

15 For details, see the next episode, ‘the imperial era’.

16 As mentioned hereinbefore, the ancient Chinese believed that law consists in, or even equals to penalties, and often called ‘law (法)’ ‘penalty (刑)’, so the restraint on the use of penalties can be considered the restraint of the use of law as well.

17 The *Zizhi Tongjian* (*Tzu-chih Tung-chien*; simplified Chinese: 资治通鉴; traditional Chinese: 資治通鑑; pinyin: *Zīzhì Tōngjiàn*; Wade-Giles: Tzu¹-chih⁴ T¹ung¹-chien⁴; literally ‘Comprehensive Mirror to Aid in Government’) is a pioneering reference work in Chinese historiography, published in 1084, in the form of a chronicle.

18 Ibid. The original text is ‘臣光曰：臣闻天子之职莫大于礼，礼莫大于分，分莫大于名。何谓礼？纪纲是也；何谓分？君臣是也；何谓名？公、侯、卿、大夫是也。’ - 《资治通鉴·周纪一·威烈王》

19 Among others, the sovereign was supposed to be the primary and utmost example, just as 司马光 (Sima Guang) asserted, this was supposed to be a sovereign’s primary task. Through the solemn performance, a sovereign must demonstrate his utmost virtue which shall match the will of God, so as to justify and legitimize his ruling. Accordingly, the officials and the people will follow his step and thus play their due part respectively. This loose pattern of governance can be deemed the typical Chinese version of Plato’s republic. Indeed, this pattern had already worked well in China for thousands of years. Under this pattern, a sovereign is nothing but a ‘living ancestor’ according to 黄仁宇 (Ray Huang). See Huang 1982, Chapter 4 ‘The Living Ancestor’.

and duties, within whose boundaries one's act can be deemed due. This reflects a simple idea regarding justice and law, which is so original and premature that separated concepts of rights and duties had not yet been developed, but stayed unified in chaos. The concept '*jus*' in Roman law may help understand the traditional Chinese legal concept '分 (Fen)'.²⁰ 'In Roman legal thought, '*jus*' frequently signifies the assignment made as between parties of justice according to law; and one party's 'part' in such an assignment might be a burden, not a benefit – let alone a power or liberty of choice.'²¹ Therefore, '*jus*' should be perceived as a mixture of rights and duties, and is 'best translated as 'due'; for 'due' looks both ways along a juridical relationship, both to what one is due to do, and to what is due to one'.²² In a traditional Chinese context, this assignment, i.e. '分 (Fen)', focused on the due part of sovereign and subject respectively as well as the due relationship between them according to the principle of '礼 (Li)'. It required that a sovereign should worship God, respect the ancestors and preserve the people,²³ so as to keep the divine rights²⁴ of kings; and that the subject should in turn respect and obey the sovereign, and duly play their own part as it should be. What it should be, according to 司马光 (Sima Guang), lies in '名 (Ming)', namely one's rank or status. The higher the rank, the bigger the part.²⁵ And after all, one's rank depends on one's virtue. The better the virtue, the higher the rank. Now we can finally draw an outline of the traditional Chinese legal culture.

20 Xia 2001, p. 145.

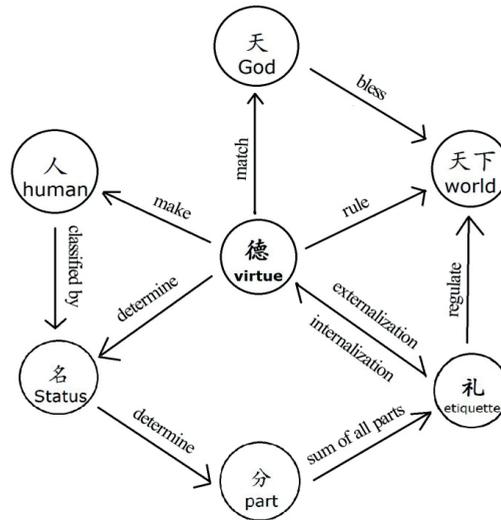
21 Finnis 1980, p. 209.

22 Ibid.

23 敬天, 敬宗, 保民.

24 In this context, divine 'parts' of kings should be more precise. As is explained hereinbefore, every single assignment was then deemed one's due, involving not only the quality of rights but also the quality of duties. Moreover, a sovereign's job was indeed not as cheerful as is usually imagined today, but rather boring and exhausting. For a sovereign's typical everyday life, see Huang 1982.

25 Evidently, this is a model of hierarchical society, but there is nothing inherently unjust in this model. Although people of higher rank can enjoy more rights, they are supposed to assume more responsibilities as well.



As is shown in the chart, the ideal blueprint of the ‘rule of virtue’ in ancient China focuses on virtue, which not only makes a human what he is, but also matches the will of God. In this system, people were classified by status, which was determined by one’s virtue which in turn determined how big one’s part was. Should every single member in the community play his or her due part as it should be, all the due parts together would amount to the ideal state of ‘礼 (Li)’, which could be deemed an externalization of virtue. The whole world²⁶ would therefore be well governed by virtue and ‘礼 (Li)’, essentially ruled by virtue and formally regulated by ‘礼 (Li)’. Finally, this wonderful world will be blessed by God.

We can also find that in this ideal blueprint, the direct bonding between humans and God was broken, which would largely free humanity from the repression of religious authority and virtually secularize the state. In terms of legal practice, this brought more and more attention to the justice of the legal process itself instead of the so-called divine revelations as it used to before.

In this system, only virtue can bridge the gap between humans and God, which will therefore hallow a sovereign and justify his ruling. In this sense, a rule of virtue rather than a rule of law would be the only choice of the authorities. Technically speaking on the other hand, since a government at that time did not have sufficient information to carry out a concrete, sophisticated or so-called

26 Ancient Chinese people used ‘天下 (Tian Xia)’ to express the idea of the world, which literally means ‘beneath the sky’. This expression not only vividly makes clear the idea of the world, but also implies its inherent connection with ‘天 (Tian)’ i.e. God. According to their geographical knowledge however, the extent of their world was just as big as, if not smaller than, the territory of China today.

digitalized²⁷ way of governance just like today, a simple and abstract way, i.e. rule of virtue would be well advised. No wonder the law²⁸ could hardly find its position in this picture, being deemed just a back-up of ‘礼 (Li)’ where it was necessary to impose exemplary punishments to maintain the order of ‘礼 (Li)’. In the second half of the Zhou Dynasty, the central government gradually lost control over the kingdom, leaving it a region of Chaos. The order of ‘礼 (Li)’ was then confronted with big challenges. These centuries are recalled as an era of disorder.²⁹ At that time, war frequently broke out between different marquis states, and so was it with different political and legal theories. Among others, the two competing theories of Confucianism and Legalism³⁰ were most typical. Confucianism is the school of thought developed from the teachings of Confucius (551-479 BC), which are principally recorded in the *Analects*. The principal theme of the teachings of Confucius is the central position of ethics in the maintenance of proper individual behaviour and proper relationships with others, including one’s parents, siblings, relatives, and superiors. This theme is epitomized in the emphasis placed by Confucius, his disciples and later interpreters on the concept of ‘renyi’ (compassion and propriety), and its manifestations in the concepts of ‘zhongshu’ (loyalty and forgiveness), and ‘zhongyong’ (appropriateness). According to Confucius, social order would be preserved through the maintenance of a moral order based upon proper personal behaviour and interpersonal relationships. On the other hand, the ruler should implement a ‘dezheng’ (virtuous rule) upon the ruled. The ‘virtuous rule’ should have two components: a policy benefiting the ruled in economic matters and a policy of lenient penalties upon the ruled while focusing on their education and rehabilitation in political matters. Briefly speaking, Confucianism had indeed inherited and developed the rule-of-virtue theory of Zhou Dynasty to a large degree.

Legalism was a philosophy emphasizing strict obedience to the legal system. It was one of the main philosophic currents during the Warring States period. It was a utilitarian political philosophy that did not address higher questions like the purpose and nature of life. The school’s most famous proponent and contributor Han Fei believed that a ruler should use the following three tools to govern his subjects: ‘Fa’ (Chinese: 法, p ‘fǎ’, lit. ‘law’): The law code must be clearly written and made public. All people under the ruler were equal before the law. Laws should reward those who obey them and punish accordingly those who dare to break them. Thus it is guaranteed that actions taken are systematically predictable. In addition, the system of law, not the ruler, ran

27 Refers to fine management based on big data.

28 In an ancient Chinese context, the law referred mainly to penalties, and was even called penalty (刑, xing) very often.

29 Chinese historians so describe the situation of the disorder, ‘礼崩乐坏 (Li Beng Yue Huai)’, which literally means ‘rites collapsed and (elegant) music disappeared’.

30 The schools of thought named after ‘law (法)’ in Chinese traditional political and legal theory.

the state, literally a rule of law. If the law is successfully enforced, even a weak ruler will be strong. ‘Shu’ (術, p ‘shù’, lit. ‘method’): special tactics and ‘secrets’ are to be employed by the ruler to make sure others don’t take over control of the state. Especially important is that no one can fathom the ruler’s motivations, and thus no one can know which behaviour might help them get ahead, other than following the laws. ‘Shi’ (勢, p ‘shì’, lit. ‘legitimacy’): it is the position of ruler, not the ruler himself or herself, that holds the power. Therefore, it would be a crucial skill for a competent ruler to be able to judge the situation and retain his favourable position.

To sum up, Confucianism inherited and maintained the theory of ‘rule of virtue’ invented at the beginning of the Zhou Dynasty, aiming at preservation of the old feudal order; while Legalism, a Chinese version of legal positivism, advocated the idea of ‘rule by means of law’.³¹ Different theories prevailed in different marquis states. The difference between Confucianism and Legalism stemmed from their contradictory hypotheses on human nature; the former believed in good human nature, the latter in bad human nature. Accordingly, the former emphasized the relevance of propaganda and education to good governance, deeming law nothing but an auxiliary tool for ethical norms; while the latter thought that Confucians were vainly attempting to resort to ethics and propriety for the purpose of good governance, that law is the best way of ruling, and that law itself inherently has its independent value thereby demanding no other value system to justify its existence. After all, the biggest difference between Confucianism and Legalism lies in their contradictory attitudes towards the principle of ‘equal justice before law’.³² Confucianism believed that all things are created different, and so are humans. This difference is the very foundation of the social order. The function of ‘礼 (Li)’ lies in the identification and classification of the right positions of different members in the community and then the determination of their respective dues, thereby forming a rigid hierarchy. Therefore, people in different positions should definitely be treated differently before law. Just as an ancient Confucian motto goes, ‘刑不上大夫 · 礼不下庶人’,³³ which literally means ‘penalties shall not be imposed on elite; etiquette shall not be applied to ordinary people’, Confucian political and legal theory, like Plato’s Republic, emphasized elitism and rule by virtue. Ordinary people only have to follow social norms at the minimum standard i.e. those put

31 The Legalist thought of the so-called ‘rule by means of law’ (in Chinese 法制) is much different from the well-known thought of ‘rule of law’ (in Chinese 法治). The former emphasizes the primary role of law instead of ethical norms in maintaining the authority of the ruling class. It was only an opposite ruling strategy against the ‘rule of virtue’ advocated by Confucianism, and also argued that the sovereign should be above the law.

32 Heuser 2010, pp. 49-54.

33 James Legge interpreted this motto as ‘The Rule of Ceremony do not go down to the common people; the penal statutes do not go up to great officers.’ This version is literally more similar to the expression of the original text, but not so much to the point in my opinion. See Legge 1872.

forward by ‘刑 (Xing, penalties)’, and they are not obliged to practice higher norms i.e. those provided by ‘礼 (Li)’. In contrast, a government official, as a member of the ruling elite, must obey all kinds of ethical and social norms at the maximum standard, and thus be strictly supervised. ‘刑 (Xing, penalties)’ is not designed for them, so they should not even bother to consider such lower norms put forward by ‘刑 (Xing, penalties)’. Should they really violate such norms at the minimum standard, they are supposed to feel too deeply ashamed to wait for the imposition of the penalties. Unlike Confucianism, Legalism would not count on virtue and self-discipline. They believed in driving people by force rather than convincing people by virtue. Stimulating people to do what the state needs them to and discouraging people from doing what the state does not expect them to through strict and fair rules on rewards and punishments, thereby steering people towards the goal of the state, is the key point of Legalism. Therefore, equal justice before the law is undoubtedly the vital principle of their utilitarian policy. Instead of the Confucian motto ‘刑不上大夫·礼不下庶人’, they advocated the doctrine ‘王子犯法与庶民同罪’ which literally means ‘even a prince who violates the law shall be punished as equal to ordinary people’.

Nonetheless, they both supported the paramount authority and thus the above-law position of the sovereign; the logic of Louis XIV, ‘*L’État, c’est moi*’, was also their common belief. Their disagreement lies only in the concrete strategy to serve this ultimate goal. Confucianism featured internally-oriented virtue and self-discipline, while Legalism emphasized externally-oriented law and stimulation. Their controversy came to a temporary end as the whole country was finally unified in 221 BC by Shih Huang-Ti,³⁴ the great king of Qin, whose official ideology and ruling strategy was from Legalism. In this period, Legalism had gained the upper hand, but the story was still not over yet.

8.1.2 The Imperial Era (221 BC-1911 AD)

The Imperial Era of China had witnessed the rise and fall of the Chinese Empire that derived from Qin Dynasty (221 BC-207 BC) and endured until Qing Dynasty (1644 AD-1911 AD). This era lasted for more than 2000 years and deeply influenced Chinese political and legal culture. In general, three Chinese Empires chronologically emerged during this era. The Chinese First Empire existed from 221 BC until 589 AD, including two major dynasties (Qin and Han) and many minor dynasties; the Chinese Second Empire existed from 386 AD until 1279 AD, including three major dynasties (Sui, Tang, and Song) and many minor dynasties; the Chinese Third Empire existed from 1271 AD

34 The King of the state of Qin (246-221 BC), who conquered all other Warring States and united China in 221 BC. Rather than maintain the title of king borne by the Shang and Zhou rulers, he ruled as the First Emperor of the Qin dynasty from 220 to 210 BC. The title emperor (huangdi) would continue to be borne by Chinese rulers for the next two millennia.

to 1911 AD, including three major dynasties (Yuan, Ming, and Qing).³⁵ The First Empire enshrined Confucianism in its official ideology and orthodox propaganda, creating the so-called ‘explicit Confucianism and implicit Legalism (外儒内法)’³⁶ ruling strategy that facilitated the Grand Unification³⁷ in cultural terms; the Second Empire saw the invention and entrenchment of the imperial examination system³⁸ for recruiting governmental officials, which formed the professional bureaucratic system in China; emperors of the Third Empire invented many ruling tactics, e.g. the ‘secret report’³⁹ mechanism so as to check and balance the power of the bureaucracy and thus to enhance the authority of the emperor.⁴⁰ Indeed, the so-called Chinese tradition just consists in the historical development, and therefore can be revealed only by a thorough elaboration and analyses.

8.1.2.1 *The First Empire*

Shih Huang-Ti unified China, terminated feudalism, no longer dividing the territory into scattered fiefdoms and granting them to his ministers as hereditary lordships. Instead, he set up a series of administrative areas at different levels, and appointed officers to govern these areas on his behalf. Therefore, the sovereign had become the one and only master of all the people. This centralized imperial and bureaucratic system is defined as a Grand Unification by Chinese theorists. However, Shih Huang-Ti’s Empire of Grand Unification collapsed soon after his demise, which was followed by the restoration of the kingdoms he conquered. The speedy breakdown of Empire Qin reflects the intense conflict during that period of time between the two opposite schools of political philosophy (Confucianism and Legalism) and that between the two concomitant historical routes (Feudalism and Grand Unification). Although Chinese people today generally take Grand Unification as a self-evident and basic tenet engrained in Chinese tradition, and thus as the historical necessity and inevitability of China, it transpired that in most Chinese minds around that time, the Grand Unification system that lasted for only 14 years was nothing but a crazy idea and impetuous attempt of Shih Huang-Ti that lacked historical and theoretical grounds, while the feudal system that Zhou Dynasty had implemented for 800 years was seen as the orthodox regime that satisfied the natural law. In other words, the Grand Unification of Empire Qin existed in a military and political sense only, not in cultural terms; in a cultural sense, China was indeed still a collection of warring states.⁴¹ Therefore, it is not unfair to argue that the Grand Unification is not a historical necessity and inevitability

35 See Huang 2007.

36 See *infra* 8.1.2.1 The First Empire.

37 See *infra* 8.1.2.1 The First Empire.

38 See *infra* 8.1.2.2 The Second Empire.

39 See *infra* 8.1.2.3 The Third Empire.

40 See Chen 2011; Huang 1997; Fu 2014; Lv 2009.

41 See Chen 2011, pp. 15-37.

of China, but indeed a legend created by the great emperors' efforts in relays during the late 3rd century BC and the 2nd century BC; the Chinese First Empire represented mainly by the Han Dynasty was essentially the 'un-dead' Empire Qin, since it had inherited the legacy of Qin Dynasty in all essential respects.⁴²

Moreover, the Han Dynasty managed to integrate Confucian ideology with Legalism-oriented ruling strategy in its political practice, forming the so-called 'explicit Confucianism and implicit Legalism (外儒内法)' system that finally achieved and underpinned the Grand Unification of China in all senses. 'Explicit Confucianism and implicit Legalism (外儒内法)' featured the following aspects: Confucian trend of law; Confucian trend of the standard of official recruitment; consecration of Confucianism.⁴³ This system explicitly advocated and even consecrated Confucian doctrines which emphasized one's ethical duty to be loyal to one's family and the ruler in order to tame the people; while it implicitly relied on Legalist theory of political gaming such as 'Fa' (Chinese: 法, p 'fǎ', lit. 'law'), 'Shu' (术, p 'shù', lit. 'method'), 'Shi' (势, p 'shì', lit. 'legitimacy') to maintain a sovereign's authority and his dictatorship. In this process of integration, the ruling class hardly invented new laws; rather, they simply re-interpreted and re-compiled, according to Confucian doctrines, the legal system created by Legalists which aimed at maintaining the utmost authority of the sovereign. In one way or another, this process can also be deemed a legalization of Confucian doctrines of family ethics, which allowed families to assume the responsibility of self-government. To a great extent, such self-government by families and self-discipline by individuals based on Confucian doctrines compensated for the technical insufficiency for the administration of positive law, and stabilized the imperial order.

In terms of the administration of (criminal) justice, unlike the legal system of Qin Dynasty, the new hybrid system no longer based judicial decisions on *actus reus* per se, but mainly, if not solely, on *mens rea* according to Confucian masterpieces. Such a legal theory and practice was called 'Criminal Decisions according to Chunqiu (春秋决狱)',⁴⁴ which only examined whether the intent of the accused satisfied Confucian doctrines rather than what he actually did. This theory defined *mens rea* as fact while *actus reus* was considered just as nominal and superficial. In other words, such a system understood the fact only in moral/ideological terms rather than in behavioural terms.⁴⁵ The 'explicit Confucianism and implicit Legalism (外儒内法)' political system and 'Criminal Decisions according to Chunqiu (春秋决狱)' (criminal) justice system greatly influenced Chinese people's outlook on justice.

42 See *ibid*, pp. 43-65.

43 Qu 2011, pp. 121-128.

44 Chunqiu (春秋) was a major masterpiece of the Confucian school at that time.

45 See Chen 2011, pp. 159-188, 250-264.

8.1.2.2 *The Second Empire*

The Chinese First Empire was from time to time weakened by the power struggles between the emperors and aristocratic high officials, and broken down during the 4th century AD due to invasion by barbarians from the north. The remainder escaped to South China, and continued the empire for another 2 centuries, which was finally conquered by the Second Empire that was established by sinicized barbarians. The most influential progress that the Second Empire made was the invention and entrenchment of the imperial examination system for recruiting governmental officials. As a result, the class of aristocratic officials, which used to greatly threaten the authority of the emperor, was systematically displaced by commoners who passed the imperial examination. The latter gradually evolved into a new class of professional bureaucrats who actually ran the empire on behalf of the emperor.⁴⁶

The great significance of these development in which the administrative power of the empire shifted from the aristocracy to the bureaucracy, lies mainly in three aspects. First, since the competitive class against the emperor, i.e. the aristocracy as a whole, had been systematically eliminated, the authority of the emperor was further strengthened, and thus the dictatorship of the empire was enhanced. Second, since Confucian doctrines were made the main content of the imperial examination, most Chinese minds were devoted to the study of Confucian masterpieces so as to pass the official recruitment examination and thus to enter the ruling class, and therefore the loyalty and obedience to the emperor that Confucianism advocated was further internalized and embedded deeply into Chinese minds. Moreover, the consecration of Confucianism would drive ordinary people to worship Confucius and his doctrines as well. This quasi-religious form had successfully made Confucian ethics deeply ingrained in the Chinese spirit. However, the sovereign himself still believed in and relied upon power and Legalist strategies of political administration to maintain his authoritarian ruling. In brief, the doctrines of Legalism still remained the hard core of the ruling strategy of the Chinese Empire, and its ‘explicit Confucianism and implicit Legalism (外儒内法)’ pattern of legitimacy building remained essentially unchanged, merely updated in technical terms. Last, a new class of skilled bureaucracy was gradually formed, and professionalism became the trend of the development of the administration of powers (including the administration of justice), which was premised mainly on the use of written files and dossiers.⁴⁷ This last effect determined that (criminal) trials in China were traditionally centred on written file rather than on oral debates.

8.1.2.3 *The Third Empire*

The Chinese Second Empire was conquered by the Mongolian Empire in the year of 1279 AD, since when China experienced an era of colonization and

46 For details, see Lv 2009, pp. 103-118.

47 See *ibid*; see also Huang 1997, pp. 93-103.

counter-colonization. This era witnessed the rise and fall of three dynasties, i.e. Yuan, Ming, and Qing, which constituted the Chinese Third Empire.

In this era, the bureaucracy recruited largely through the imperial examination had become a badly corrupted class of vested interests after the development of the recruitment system during the centuries' period of the Second Empire. In theory, the bureaucracy of the empire and the populace were all commoners, who shared equal citizenship and rights under the emperor; therefore, the bureaucracy of the empire should, without any privilege over the populace, have served the people on behalf of the emperor and devoted themselves to the welfare of the people. In reality however, the bureaucracy virtually kidnapped the imperial government due to their monopoly on administrative power, through which they exploited the people and embezzled public funds for their own interests; moreover, they formed a subtle and sophisticated solidarity of corruption, tacitly covering for each other by all means so as to conceal their corruption and circumvent the supervision of the emperor. Such unity of the bureaucracy was terribly harmful to the empire in at least two respects: on the one hand, it virtually displaced the emperor's governance of the empire, which badly impaired the authority of the latter and therefore shook the very foundation of the imperial regime; on the other hand, it severely harmed the interests of the people, which caused many riots and revolts that might have put an end to the empire.⁴⁸

In order to break the aforesaid unity of the bureaucracy and thus to check and balance their power, the emperors invented many formal or informal mechanisms for the purpose of effective supervision. In terms of formal mechanisms, Chinese imperial dynasties had historically established specialized supervising organs and mechanisms to restrict the officials, especially regarding their juridical activities. These supervising organs and mechanisms were constantly strengthened as time went on. During the Ming and Qing Dynasties, the last two imperial dynasties in China, the Crowns invented and inherited a new system to supervise and impeach all the government officials, i.e. '都察院 (du cha yuan)'. Their formal functions indeed consist in supervising and impeaching all the government officials.⁴⁹ These subtle connections, to some extent, reflect how this legal tradition and culture still influences the current system.

Of course, the operation and supervision of the bureaucratic system cannot be done without any medium; in fact, it has always relied on a sophisticated system of formal files and notes. This is also the case in China's criminal justice. In practice, justice must be done by the professional juridical bureaucrats, based on a well-formed case file. In other words, the juridical legitimacy in China indeed derives from a well-functioning juridical bureaucracy, which features:

48 See Miyazaki 2016, pp. 98-120.

49 See supra 1.3.2.2 The current position of the public procurators in different stages.

1. a sufficient number of competent professional judicial bureaucrats, and 2. a well-designed dossier system that guarantees the quality of case file.

In terms of informal means of checks and balances, one of the most significant mechanisms among other things was personal correspondence and secret reports between the emperor and his subjects and ministers. Under this reporting system, each high official was entitled and also obliged not only to submit in public formal documents dealing with matters of routine to the Cabinet, but also to send informal personal letters to the emperor to report all kinds of information with regard to public affairs, including those pertaining to official crimes, based on which impeaching or judicial proceedings could be initiated and decisions could be made. This reporting system actually formed a situation of information asymmetry between the emperor and his civil servants, under which a wise emperor may make all of the officials transparent before him so that no wrongdoings of his humble servants could ever avoid his 'sacred vision (圣明)'.⁵⁰

Moreover, the juxtaposition of the formal (public) and informal (secret) reporting systems led to the duality of formal and informal dossiers in China. At first, the informal dossier was subject to little limitation in terms of its format and content, and only available to the emperor; later, it was gradually standardized and semi-publicized, available not only to the emperor but also to a small number of high-ranking officials. Consequently, the official dossier system in China, including that with respect to criminal procedure, has been entrenched as a pattern of duality, with the formal (open) file dealing with matters of routine and formalities, and with the informal (secret) file dealing with the merits.⁵¹ It is evident that the functioning of such a reporting and file system should be based largely on the prerequisite that officials could not effectively and comprehensively communicate with each other so as to form conspiracies or formulate perjuries. In other words, internal transparency among officials, including potential criminal defendants, must be avoided. Accordingly, internal opaqueness of (criminal) procedure was eventually entrenched as one of the basic tenets of China's traditional pattern of (criminal) justice.

The Chinese Third Empire was terminated in the year of 1911 AD, when the monarchy formally came to an end in China and a republic was established. However, the political and legal tradition originating from the past is still deeply embedded in China's modern institutions, which colours its criminal justice system in a subtle but profound way.⁵²

50 See Miyazaki 2016, pp. 120-125.

51 See *ibid.*, pp. 176-209.

52 For details, see *infra* 8.2 China's essential pattern of legitimacy building.

8.2 China's essential pattern of legitimacy building

8.2.1 The traditional pattern

After this brief retrospect of Chinese 'macro-history', it transpires that two features are ingrained in China's traditional pattern of legitimacy building, which still have latent but considerable effects on the legal system and legal practice of China today. The two features are best demonstrated by the long-lasting ruling strategy of the Chinese Empire, i.e. the so-called 'explicit Confucianism and implicit Legalism (外儒内法)',⁵³ which can be generalized as a binary regime with: 1. an orthodox ideology, like Confucianism, as its outer face; 2. an autocracy, or rather a 'controlocracy',⁵⁴ as the hardcore. Although the traditional pattern of 'explicit Confucianism and implicit Legalism (外儒内法)' is the most classical and long-lasting model of this binary regime, it is indeed an evolving organic system that may fit any ideology or state form. It functions best under two conditions.

First, as the outer face of the binary regime, the orthodox ideology, whether Confucianism, Communism, or ROL, should be truly believed and respected by the majority of the people; the law has always been an auxiliary tool⁵⁵ for reflecting, propagating and maintaining the orthodox ideology. This long-enduring situation has deeply influenced the typical Chinese outlook on truth and justice. During most of the nearly 3 millennia from the very beginning of the Zhou Dynasty until the late Qing Dynasty, China was dominated by the thought of 'rule of virtue'; especially since the Han Dynasty, Confucian doctrines of ethics had even been formally made a vital source of law by the authorities, which could be used to systematically interpret the law.⁵⁶ In this sense, the 'truth' perceived by traditional Chinese minds should be deemed the 'ethical truth', i.e. whether the accused is a good person or not; whether his or her act complies with the ethical norms that were well accepted by the community. That is to say, China's traditional political and legal philosophy

53 See supra 8.1.2.1 The First Empire.

54 'Controlocracy' is the special name that Stein Ringen gives to China's regime, which refers to the sophisticated and effective system of the Chinese dictatorship which does not tell everyone everything they must do, but does control that they do not do what they must not, and which does so in great detail. see Ringen 2016. In fact, Chinese ancient intellectuals gave a more vivid name to the Chinese conventional regime of autocracy as such, namely the so-called 'Qin Pattern' named after the Qin Dynasty that invented and entrenched such a regime.

55 As a Chinese classical metaphor implies, the law is a 'public vessel (公器)' for the fruits of justice, public interests and social order, a tool for ruling. In the ancient Chinese political philosophy, vessel (器) is the opposite concept of Tao (道). The latter refers to the essence, the fundamental or the principle of the universe. Therefore, this metaphor had well demonstrated the utilitarian view on the law in the Chinese tradition.

56 The so-called 'Criminal Decisions according to Chunqiu (春秋决狱)', see supra 8.1.2.1 The First Empire.

built legitimacy on moral good rather than factual trueness. Therefore, justice is a state in which everyone has got what he or she deserves, the good being rewarded with good and the evil with evil, while factual truth only matters in terms of instrumentalism. For example, a guiding precedent published in ancient China went like this: a man found an abandoned baby and brought him up. When growing up, the latter committed a crime and went to the former. The former then decided to hide the latter but subsequently was caught by the local government. The judicial authorities held that the old one's raising and cherishing the young one had virtually satisfied their father-son bonding in ethical terms, although they did not have a formal adoptive relationship; the inter-relatives immunity should therefore apply to the old man, so he was found not guilty.⁵⁷ From this case, we can see that Chinese used to care little about what the factual fact is, but much about what the accused person is like; little about one's act, but much about one's thoughts. This abstract and ambiguous ethical standard of law application and enforcement formed a deeply-embedded tradition of analogy, which is strongly opposed by the principle '*nullum crimen nulla poena sine lege*'.⁵⁸ Nonetheless, this ethically-oriented outlook on truth, justice and juridical legitimacy served the official ideology and political arrangements based on the 'rule of virtue', forming a well-accepted, self-sufficient, and self-consistent logic of politics and law.

As we have seen, the binary system as such had been a long-enduring legal tradition of ancient China, from Han Dynasty (206 BC-220 AD) to late Qing Dynasty (1616 AD-1911 AD), during which Confucianism had become and remained the orthodox ideology of the Chinese nation that corresponded to the aforesaid tradition and dominated Chinese society for 2,000 years.⁵⁹ However, the Confucian tradition in Chinese culture had come under sustained attack since the later part of the Qing Dynasty, when the introduction and spread of western ideas, such as scientific methodology, evolution and democracy, posed a serious challenge to the viability and relevance of Confucianism to the needs of a society under the threat of colonialism by the west. The most radical criticism of conservative and reactionary qualities of Confucianism was launched by the proponents of the 'May Fourth Movement' of 1919. Thereafter, Confucianism ceased to play the dominant role in the functioning of the Chinese regime.⁶⁰

After the collapse of conventional ideology, Mao had once managed to rebuild the orthodox ideology nationwide based on the common belief in communism and notably on his absolute authority. During his reign over China, the acceptable truth and due basis for judgments did not rely on factual facts, but on 'ideological truth', i.e. whether the accused was revolutionary or

57 Quoted from Heuser 2010, pp. 49-54.

58 Yang 2011, p. 114-116.

59 See supra 8.1.2 The Imperial Era.

60 See Huang 1997, pp. 241-279.

anti-revolutionary,⁶¹ or specifically whether the accused was absolutely loyal to Mao's ideas and his ruling. This truth was usually based on one's status, proletariat or bourgeois. It appears that Mao's system was essentially much the same as the imperial one, which also focused on one's status, obedience to the official ideology and loyalty to the sovereign. The only difference lay in that the formally-utmost authority of the sovereign in ancient China had been replaced by Mao's actually-absolute authority in his era.

The second condition of the functioning of China's traditional binary pattern of legitimacy building is that, as the hardcore of the binary regime, an autocracy, or more vividly the 'Qin Pattern'⁶² must be sustained in order to guarantee the Grand Unification of the empire. It is notable that the term 'autocracy' here is used not in its negative sense, but as a neutral description to outline the ruling pattern of ancient China. It is also noteworthy that although the achievement of China's Grand Unification was to some extent a fortuitous outcome,⁶³ the story ever since was almost determined once the initial conditions were given; – just like an asteroid fortuitously captured by the gravity of the sun can hardly escape from its destined orbit any more, – the entrenchment and reinforcement of autocracy became the only reasonable choice for China.⁶⁴ In retrospect of China's history in the last subchapter, we can see that China's traditional 'rule of virtue' model continually mutated into new forms so as to reinforce the autocracy and thus to sustain the Grand Unification: the First Empire unified the thoughts with Confucian teaching, establishing the 'explicit Confucianism and implicit Legalism (外儒内法)' pattern, which virtually made the emperor also become the Pope of China; the Second Empire eliminated aristocracy by inventing and entrenching a new system of recruitment, which further enhanced the authority of the emperor; the Third Empire established more sophisticated mechanisms to check and balance the power of the bureaucracy, which required internal opaqueness of procedure as default setting.⁶⁵

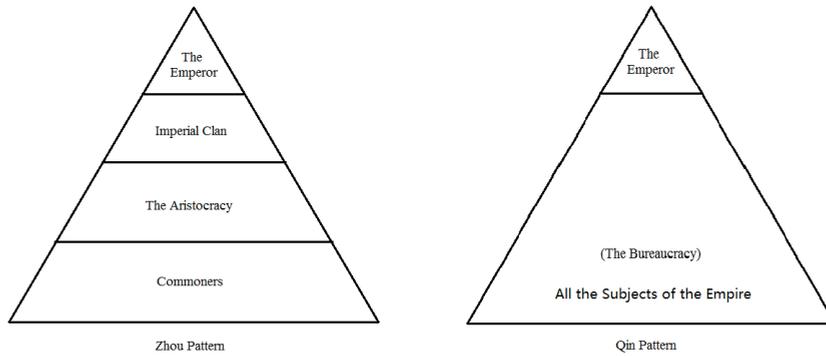
61 An evident clue to this ideology-oriented outlook on truth is that all the crimes then were formally connected with the term 'anti-revolution', such as anti-revolutionary homicide or anti-revolutionary rape, which explicitly demonstrated that the common nature and vital feature of crimes lie in their being anti-revolutionary. Therefore, the only issue concerned in a criminal trial would lie in the 'ideological truth' that whether the accused was held revolutionary or not, and the due basis for a conviction in one's being anti-revolutionary. It is not until the full-scale amendments of the Penal Code in 1997 that these so-called anti-revolutionary crimes have been formally abolished by the legislative authorities of China.

62 The so-called 'Qin Pattern' is a vivid term that Chinese ancient theorists used to refer to a 'rule of one man', i.e. an autocracy, of which the regime of the Qin Dynasty was representative. This term was used in contrast to the so-called 'Zhou Pattern', a more ancient form of aristocracy, of which the regime of the Zhou dynasty was representative. The major difference between the structures of the two patterns is shown in the following chart. For the origin of the chart, see Miyazaki 2016, pp. 172-173.

63 See supra 8.1.2.1 The First Empire.

64 See Miyazaki 2016, p. 145.

65 See supra 8.1.2 The Imperial Era.



However, since it was impossible for the emperor to rule the great empire all alone, he had to rely upon the bureaucracy who managed public affairs on his behalf; therefore, he had to not only beware of the bureaucracy, but also motivate, or rather bribe them so that they would do their jobs diligently enough to maintain the imperial order. In other word, both the emperor and the bureaucracy had to avoid a zero-sum game, and try to find a win-win solution. In order to maintain such a subtle balance within the small group of ruling elite, political gaming theory of the Legalism School was relied upon, and ‘hidden rules’⁶⁶ inevitably prevailed and actually dominated the operation of the real world.⁶⁷ In fact, ‘hidden rules’ is not a standard academic concept, like cruciferous plants, which can be given a logically distributed and semantically precise definition; rather, it is a popular expression, like vegetable or fruit. The users of this expression can only enumerate the ubiquitous examples⁶⁸ of it

66 Hidden rules refer to those implicit rules which have not been formally provided by the authorities while indeed well accepted and tacitly observed by many people. In Chinese history, it was usually the hidden rules rather than written laws that truly dominated the operation of the real world. The popular concept of ‘hidden rules’ is invented by Chinese scholar Wu Si (吴思), in his highly influential history books ‘*Hidden Rules: Real Games in Chinese History*’ (吴思 《潜规则：中国历史中的真实游戏》 复旦大学出版社·2009)’ and ‘*The Principle of Blood Payment: Survival Games in Chinese History*’ (吴思 《血酬定律：中国历史中的生存游戏》 语文出版社·2009)’, which is equivalent to the so-called ‘practical principles’ used by Heuser. It was just the hidden rules as such that enabled the functioning of what Stein Ringen defined as the ‘controlocracy’ of China.

67 Chinese scholar Wu Si (吴思) argued that this phenomenon had been noticed by Ray Huang and implicit in his masterpiece titled 1587, but Huang failed to point it out clearly, so Wu furthered Huang’s idea and systematically and comprehensively described, analyzed and explained this phenomenon. See *ibid*; see also Huang 1982.

68 When mentioning ‘hidden rules’ in China today, the first example most people may probably have in mind should be the tacit practice that a young actress who wants to play the heroine may probably have to sleep with the director of the movie. Consequently, ‘hidden rules’ has even been humorously used in Chinese as a verb in many occasions which means ‘to sleep with female inferiors’. Historically in Chinese officialdom, hidden rules as such were even more ubiquitous and exhaustive, which determined, e.g. how much money one official of certain rank in certain region should donate to his superior of certain rank on the latter’s

to point out what it can be like and how simple and common it is. In order to make this concept more theoretically relevant, it is usually connected with what according to conventional narratives could be simply called 'rule of men', in Chinese '人治 (ren zhi)', the opposite concept to 'rule of law', which is mostly used as a defining counter example to reflect what 'rule of law' is, or rather what it is not. Since there is a rather stunning lack of agreement on what the 'rule of law' is, there is an equally unsurprising lack of consensus on what the circularly-defined concept of 'rule of men' is. Historically, Chinese theorists and politicians believed in a rather flexible political philosophy that how men actually enforce the law matters more than what the law in itself is like, so they remitted good governance to an upright and wise ruling elite instead of well-formulated and faithfully-implemented laws, and trusted the 'rule of men' more than 'rule of law'; Chinese political self-understanding has been premised on the very ideal of the rule of men, a kind of moral utopia where those in power derive their authority to govern from their superior virtue – either Confucian virtue, in the case of traditional China, or Communist virtue, in the case of socialist China. This pattern used to be also appreciated by the Europeans as a sound example of 'sage politics'. However, as China was comprehensively defeated by the west in recent centuries, Chinese patterns, including the 'rule of men', were increasingly caricatured as less advanced, evil-minded, and worthless pure despotism, both in the west and in China. Indeed, China's self-understanding of the 'rule of men' is essentially not more mythical and self-congratulatory than the western one of 'rule of law', which could be regarded as the projection of minds in the real world. After all, it provides the traditional normative justification for the Chinese political order.⁶⁹

Nevertheless, as is shown in retrospect of China's macro-history, the political ideal and moral utopia based on the Chinese-patterned 'rule of virtue' or 'rule of men' inevitably mutated into a hypocritical despotism, under which abiding by the law in books that was premised on the aforesaid moral utopia became irrational or even impossible while widespread un-law⁷⁰ in the

parent's birthday, and in what other circumstances he should in what forms donate how much money to what other officials of what ranks. He must strictly obey such rules, – too much donation will be considered as unfair competition and betrayal to his peers, which was deemed equally despicable as no donation or less-than-standard donation, – otherwise, he will be despised by all the other officials and thus could not survive in the officialdom. Likewise, there was also a price list for the populace, which determined, e.g. how much money one criminal suspect of what crime or prisoner in what region had to donate to which officials so that he could avoid torture or be taken good care of in the cell. For more details and vivid examples of such hidden rules in Chinese traditional officialdom, see Zhang 2008 (a). To sum up, it was indeed such hidden rules that actually dominated China in every aspect, which could be considered as the invisible hands in the political domain of China.

69 See Miyazaki 2016, pp. 99, 124, 125; Ruskola 2013, p. 14.

70 Such a non-'rule-of-law' situation is usually defined as a Chinese lawlessness. see Ruskola 2013, pp. 6-8. However, in the author's opinion, China can hardly be called a lawless country, since law did exist during most time along its history, whether statutory law or

form of ubiquitous ‘hidden rules’ appeared irresistible and inevitable. Such a mutation of the ‘rule of virtue’/‘rule of men’ pattern of good governance was so formidable that even the most upright and idealistic politicians, be they emperors or ministers, had to substantially compromise their moral principles and indulge or even make use of such un-law⁷¹ to maintain the authoritarian order and thus the Grand Unification of the empire.

Briefly speaking, the main pillar of the binary structure of China’s traditionally-patterned political (including juridical) legitimacy building remained the so-called ‘Qin Pattern’ of autocracy, which essentially operated according to Legalism doctrines. As Legalism had such a cold, penetrating, and embarrassingly- plain insight into the darkness of humanity, it was absolutely not wise to make public its arguments, let alone the dirty secret of the ruling strategy based on it. Just like a magician will never let the audience know his tricks, otherwise the tricks will never work again;⁷² the real rules had to remain veiled and tacitly-implemented. The legal unpredictability and uncertainty caused by ‘hidden rules’ further increased the mysterious, intimidating, and awe-inspiring quality of the ruler’s power, which would arguably enhance its authority, notwithstanding it being totally opposite to the fundamentals of the rule of law.

In sum, the traditional pattern of China’s legitimacy building was in essence a political and ideological duality. Its main pillar always remained the ‘Qin Pattern’ of autocracy, which guaranteed the political unification of China. The other pillar of the duality was a unified and exclusive ideological discourse that was truly and faithfully believed and accepted by all the people, which allowed the cultural unification of China. Accordingly, the duality as such could be called a pattern of ‘Grand Unification’, the most typical example of which was the ‘explicit Confucianism and implicit Legalism (外儒内法)’ model. As is mentioned before, internal transparency was the primary taboo in such a political and legal culture. In technical terms, the functioning of such a binary system relied largely on a sophisticated dossier system, which distinguished between formal (open) and informal (secret) files. It transpired that such a dialectical unity of the dichotomy between the Confucianism-patterned ‘rule of

customary law. The real problem lies in that the law in China, especially those customary laws that actually dominated China in most occasions, i.e. the so-called ‘hidden rules’, was hardly qualified as real law since they were unjust in essence. Therefore, the author would rather call it un-law instead of lawlessness.

71 By selective administration of justice, dissidents can be easily eliminated for good reason; proponents will have to continually and ‘voluntarily’ satisfy the ruler’s will via cautious self-castration and self-censorship so as to prevent from predictable or unpredictable purges. Through the continual social heredity, the humbleness genes will be well preserved and gradually strengthened, which will eventually become ingrained into the tradition, forming a well-tamed species. This is indeed the hardcore of what Stein Ringen refers to as the Chinese ‘controlocracy’, the very rationale of the so-called ‘perfect dictatorship’, and what the author would rather called a ‘rule of un-law’.

72 See Qu 2011, p. 120.

virtue' and the Legalism-patterned autocracy tended to mutate into a corrupted form of moral utopia and political Leviathan, a hypocritical despotism indeed, which was eventually to be consumed by the flame of nationwide riots and revolts, and gave rise to a new dynasty that continued such a binary regime and repeated such a course of mutation and disintegration. In a romantic view of history, such a binary regime of China could be alleged to be immortal by means of repeated rebirths and nirvana in fire; however, it remains very questionable whether and to what extent such a binary regime is still working or can still work in China today.

8.2.2 *The state of the art*

As the monarchy formally came to an end in China in the year 1911 AD when Qing, the last imperial dynasty of China was terminated, and concomitantly the orthodox position of Confucian doctrines that supported the monarchy collapsed during the great revolution in the early 20th century, it seemed that both of the two pillars of China's binary system of 'explicit Confucianism and implicit Legalism (外儒内法)' had fallen down. However, it transpired that the revolutionary leaders who later ascended to power successively never abandoned the conventional wisdom of the binary system; rather, they just tried to change and update its specific form into a modern and more enchanting version. Chinese Nationalist Party (中国国民党 Chungkuo Kuomintang, KMT in short) did so through the propaganda of the so-called 'One Political Party, One Doctrine, One Leader',⁷³ but failed to achieve its ambition and therefore was displaced by CPC. The latter has apparently done a much better job in updating and restoring the conventional binary structure of legitimacy building: Mao successfully established not only his absolute authority above all his subjects which was formally referred to as 'Zhuanzheng', but also a national consensus on the orthodox position of the communist doctrine. From a value-free perspective, one could argue that Mao's achievement is comparable to that of Shih Huang-Ti or that of Han Wudi since Mao had restored the Grand Unification of China created by Shih Huang-Ti and reconstructed China's traditional binary system of legitimacy building entrenched by Han Wudi;⁷⁴ coincidentally, Mao's new system of what could be called 'explicit

73 See 《中国抗日战争大辞典》，北京燕山出版社，1997.

74 Mao himself was also confident that his achievement was comparable to or even greater than that of Shih Huang-Ti and that of Han Wudi, which can be demonstrated by his own poems. For instance, in the lyric poem named 'Snow' that Mao composed for the Chinese traditional tune 'Spring in a Pleasure Garden', he sighed with pride that
'Our motherland so rich in beauty
Has made countless heroes vie to pay her their duty.
But alas! Qin Huang and Han Wu
In culture not well bred,
And Tang Zong and Song Zu

Communism and implicit Legalism' also collapsed soon after his demise, just like Shih Huang-Ti's empire.

Subsequently, under the Deng Xiaoping's '*policies of reform and opening up*', western liberal thoughts were reintroduced into China, which aggravated the disintegration of the orthodox ideology established by Mao. The entire society has then diverged into several groups in terms of ideology: the leftists who still adhere to Mao's ideas, the rightists who advocate the so-called 'universal values', the neutralists who have a simple idea about good and evil, and the authorities who on one hand still stick to the 'Zhuanzheng doctrine' formally recognized by the constitution and on the other hand try to reconcile the diverging ideologies described above. Such divergence of ideology has shaken one of the two pillars of China's legitimacy duality, and thus undermined the political and juridical legitimacy in China; which can be vividly perceived in some typical cases, such as the 'Yao Jiaxin Case',⁷⁵ the 'Gu Kailai case',⁷⁶ the 'Cui Yingjie case' and the 'Xia Junfeng Case'.⁷⁷ These four homicide cases demonstrate the profound divergence in Chinese society and the uncertainty of both the ordinary people and the authorities towards these conflicts: the leftists supporting the idea of suppression of the bourgeois by the proletariat; the rightists advocating due process of law and other western core values about justice and law; the authorities making every effort to maintain social stability through 'Zhuanzheng doctrine', while being uncertain about

In letters not wide read.
 And Genghis Khan, proud son of Heaven for a day,
 Knew only shooting eagles by bending his bows.
 They have all passed away;
 Brilliant heroes are those
 Whom we will see today!
 translated by Xu Yuanchong. See Mao.

- 75 Yao Jiaxin murder case refers to an intentional homicide triggered by a traffic accident on October 20, 2010. Yao Jiaxin, a 21-year-old student from Xi'an, Shaanxi Province, hit a restaurant waitress, Zhang Miao, and stabbed her to death when he saw her memorizing his license plate number. Yao was put on trial on March 23, 2011 and was sentenced to death on June 7, 2011. This case brought much public attention because of Yao's family background and whether the death penalty should be abolished. See Wines Michael. 'Execution in a Killing That Fanned Class Rancor'. *New York Times*, 7 June 2011, <http://www.nytimes.com/2011/06/08/world/asia/08china.html>.
- 76 Gu Kailai (born 15 November 1958) is a Chinese former lawyer and businesswoman. She is the second wife of former Politburo member Bo Xilai, one of China's most influential politicians until he was stripped of his offices in 2012. In August 2012, Gu was convicted of murdering British businessman Neil Heywood and was given a suspended death sentence. See 'Bo Xilai scandal: Gu Kailai jailed over Heywood murder'. *BBC*, 19 August 2012, <http://www.bbc.com/news/world-asia-china-19312232>.
- 77 See Andrew Jacobs, 'Street Vendor's Execution Stokes Anger in China', *New York Times*, 25 September 2013, http://www.nytimes.com/2013/09/26/world/asia/street-vendors-execution-stirs-anger-in-china.html?_r=0.

the concrete standard,⁷⁸ and the neutralists who account for the majority of the total population showing compassion for the socially vulnerable group and hostility towards the privileged grandees, however being easily induced by social media. This swinging attitude is particularly obvious in ‘Yao Jiaxin Case’. At first, as the social media overwhelmingly emphasized the accused, Yao’s family background, implying that his father is a corrupted official, the general public were generally in favour of the spoiled boy’s death penalty; after Yao’s execution however, many social media began to reveal the shameless harassment and blackmail by the victim’s husband upon Yao’s poor father, a nearly retired ordinary officer who just lost his only son, so the public started to feel sorry about Yao’s execution and to condemn the victim’s husband for taking advantage of the compassion of the ignorant public.⁷⁹ In sum, the lack of national consensus about orthodox ideology has resulted not only in the decline of juridical legitimacy, but also in the disintegration of the traditional binary system of legitimacy building.

In order to alleviate such legitimacy decline, particularly that of criminal justice, China has carried out a series of legal reforms that nominally cater to ‘Universal Values’ and adversarial legalism.⁸⁰ Specifically speaking, as is quoted from Feng Xiang previously, China has borrowed terminology and slogans from the ‘civilized’ world, such as rule of law, human rights, and constitutional government, and transplanted legislative techniques, superficial classification, and legal doctrines, so as to integrate the communist-China’s ideology with the ‘Universal Values’, forming a hybrid discourse to deal with the new political, economic and social situation. Indeed, such a so-called ‘new ROL’ discourse system is still premised on a Chinese-characteristic or rule-of-man tradition in terms of its political and legal framework and of its actual operation.⁸¹ In other words, China has never managed to get rid of its traditional binary framework of legitimacy building, and things remain in essence much the same as in the past, whether in Mao’s era or in the imperial era: the universal respect for and obedience to the orthodox ideology (whether Confucianism or Communism) plus a virtually ‘Qin Pattern’ of ‘Controlocracy’ based on a well-functioning professional bureaucracy always constitute the two pillars of such a regime. Therefore, those who manage to monopolize the orthodox ideology and steer the mainstream discourse will undoubtedly represent the utmost justice, and thus be easily able to establish a priori political and juridical legitimacy. This is just the case in the imperial China or Mao’s China, and also what contemporary

78 This is well reflected by the reverse results of the ‘Cui Yingjie case’ and the ‘Xia Junfeng Case’, both of which involve street vendors killing urban enforcement officials on sudden impulse.

79 Indeed, there are plenty of, and ever-more, such ‘story reversal’ cases in China, which happen almost every day and can be seen ubiquitously online. The author can easily enumerate dozens of them to show how general the situation is., if the book is thick enough.

80 For details, see Part I China’s Status Quo: Legitimacy in Decline.

81 See Feng 2008.

China is actually pursuing or restoring; and this is precisely why China's new ROL can only focus on legislation, statutory interpretation, and propaganda, i.e. ideological construction, rather than solve specific problems.⁸²

It is quite amazing that China's contemporary political and legal system still follows its ancient pattern of binary-structured legitimacy building, which was thought to be seriously destroyed during the May Fourth Movement and the Cultural Revolution. The hard core of the classical duality lies indeed in its 'implicit Legalism', what Chinese ancient theorists referred to as the 'Qin Pattern'. It transpired that this pattern cannot live alone for too long, but it would become much more viable if embedded in an attracting theory other than itself; and it turns out to be adaptive enough to form a symbiotic relationship with various kinds of theory, whether Confucianism, Communism, or even ROL. Therefore, the 'Qin Pattern' could be compared to a super viable virus that may parasitize various kinds of hosts, and that has in fact managed to survive for over two thousand years in China by parasitizing the Confucian discourse system. Based on this logic, the author agrees with Feng Xiang that China's new ROL system could be considered a parasitic system; however, Feng was wrong about which is the host and which is the parasite: he argued that the ROL theory is the parasite and China's Zhuanzheng regime is the host; while in the author's opinion, both of them should be considered as the hosts, and the real parasite is indeed the 'Qin Pattern' entrenched in China's history. That is to say, China's traditional binary pattern of legitimacy building remains unchanged in essence, just varying in form along the history: during the Imperial era, it existed in the form of 'explicit Confucianism and implicit Legalism'; after the Confucianism orthodoxy collapsed in early 20th century, it managed to find a new host, i.e. the communist ideology, and continued to function in China during Mao's era; since the communist orthodoxy lost its attractiveness in China during the past few decades, the parasite of 'Qin Pattern' is once again beginning to pursue new hosts, and the ROL theory is just a sound choice.

If we turn to apply the theoretical model of the so-called 'Weberian ideal-types'⁸³ of legitimate authority, China historically should in large part be considered a typically traditional authority, mixed with a certain less typically charismatic authority plus an atypically legal-rational (or rather illegal-rational) authority. Specifically, the typically traditional authority was premised mainly on the political-legal tradition of the binary structure exemplified by the so-called 'explicit Confucianism and implicit Legalism (外儒内法)'; a small number of great emperors, usually the founding father of a certain dynasty, could add weight to the authority with their charisma, but such charismatic authority worked in a less typical way in that it tended to depersonalize the emperor as mostly an embodiment of the utmost virtue, a so-called 'living

82 See *ibid.*

83 See *supra* footnote 3 in the Introduction.

ancestor’;⁸⁴ China’s traditional authority also contained an atypical legal-rational elements, or what the author would rather refer to as an illegal-rational/unlawful-rational authority based on the so-called ‘hidden rules’ and ‘rule of un-law’. What has made China’s traditional authority a considerably sustainable and resilient system lies largely in that it successfully established and entrenched an effective, albeit atypical, Weberian ideal-typed bureaucracy that characterized informal,⁸⁵ moralized and personalized⁸⁶ governance. In brief, the rationality of China’s traditional bureaucracy greatly compensated the inherent lack of legitimacy in its traditional authority; while the moralized and personalized legitimacy, in turn, significantly offset the insufficient rationality in public administration, forming a self-reinforced equilibrium.

As far as is closely related to the research topic, China’s current (criminal) justice system is correspondingly and mainly legitimized by the conventional wisdom of the ideology-oriented duality; and most people still perceive justice and juridical legitimacy according to their simple ideas on good and evil that originate from traditional ethical norms. Alien ideologies, whether western liberal theories or communist thought, seem to have been overestimated in terms of their effects on China’s current legal system, although they have coloured it in one way or another. Actually, their effects lie mostly in technical or formal terms. Moreover, the traditional bureaucracy was also entrenched in the (criminal) justice system, and thus determined China’s dossier-centred trial mode, procedural culture, and case-management techniques.

8.3 The prospect of China’s essential pattern of legitimacy building

8.3.1 The impossibility to restore the traditional duality-patterned legitimacy

In retrospect, we can see that China’s attempts to restore its political (including juridical) legitimacy in large part involve the reconstruction of mainstream discourse and ideological orthodoxy. Currently, China is trying to formulate what Feng Xiang defined as a ‘new ROL’ discourse system that nominally embraces the ‘Universal Values’, which could serve as a fresh ‘host’ for the hard core of ‘Qin Pattern’ of ‘Controlocracy’, so as to reconstruct a new form of duality that could be called ‘explicit Legality and implicit Legalism’. Such a new form appears quite promising since it better harmonizes the ‘parasite’ with the ‘host’ by using the same root meaning ‘legal’. Specifically speaking,

84 See Huang 1982, Chapter 4 ‘The Living Ancestor’.

85 Connected with the so-called ‘hidden rules’.

86 In this governing regime, the state was considered as equivalent to a big family, with the emperor being the parent of all his subjects, the bureaucracy being the children, and the populace being the grandchildren. Therefore, the command-obey relationship in public administration was moralized and personalized as filial duty, and thus Confucian doctrines that emphasized filial piety were enshrined not only as fundamental moral norms, but also as essential political ethics.

the Chinese authorities can on the one hand announce their determination to practice ‘rule of law’ that satisfies the ‘Universal Values’, and on the other hand subtly substitute the sense and connotation of ‘rule of law’ with virtually the doctrines of traditional Legalism and thus steer the nominal ‘rule of law’ towards actually the track of ‘Qin Pattern’ of ‘Controlocracy’ when enforcing the law. In brief, the new form of duality would appear much more coherent and cohesive as long as the authorities skilfully switch between the two senses of ‘rule of law’.

Nevertheless, it transpires that the new form of duality does not function well as expected.⁸⁷ Moreover, in the author’s opinion, it is even impossible any more to restore and reconstruct such a new form of duality, because the decisive preconditions for both the two pillars of China’s traditional binary-structured legitimacy building no longer exist. First of all, as we have seen, internal opaqueness of procedure is the most significant prerequisite for the functioning of China’s traditional binary pattern of legitimacy building; while technological innovation, especially that in the internet media and social networking, has profoundly changed the structure of interpersonal networks, which makes withholding and filtering of information ever-more difficult. Therefore, it would be equally ever-less possible for the authorities to retain the traditional ‘Qin Pattern’ of ‘Controlocracy’ by putting everything under the table.

Furthermore, the inevitability of increasing transparency and symmetry of information makes it ever-less possible for the authorities to monopolize the entire discourse system and thus steer public opinion freely so as to maintain a unified and exclusive ideological orthodoxy. In other words, the unprecedented social changes brought by the aforesaid technological innovation have fundamentally destroyed the other pillar of China’s traditional duality of legitimacy building as well. In fact, this ideological pillar began to disintegrate in China even much earlier than the new technological revolution, since the vast majority of Chinese people in the post-Mao era had already taken an indifferent and distrustful attitude towards any beautiful words advocated in any written law or doctrine, just similar to the British people in the post-Cromwell era. After being fooled once, Chinese people tend to find it too naive to believe in any political advocacy and ideological orthodoxy. In their sophisticated and practical outlook, only powers and interests make sense, while others are nothing but another emperor’s new clothes. In this context, the ideologies which used to greatly colour the Chinese political and legal system, whether red or blue, leftist or rightist, have been fading away at an unprecedentedly fast speed. This getting-rid -of-ideology orientation is to a great extent launched by Deng Xiaoping and his ‘cat theory’.⁸⁸ Therefore, the ideological orientation

87 For details, see Part I China’s Status Quo: Legitimacy in Decline.

88 Deng’s maxim that ‘it doesn’t matter if a cat is black or white so long as it catches mice’ is well-known by almost every Chinese and has been taken as a practical principle for China’s

that still influences Chinese people's general outlook on juridical legitimacy today is mostly in simply ethical or emotional terms rather than in political terms. In other words, most Chinese people today consider the fundamentals of justice and juridical legitimacy simply in such a paradoxical way that on the one hand they cannot immediately abandon their habitual ideology-oriented way of perceiving justice; and on the other hand, they are challenging and thus getting rid of the existing ideologies they used to faithfully believe in. This might be one of the most significant structural reasons why China's judicial authorities can barely restore their prestige through the conventional wisdom. This time, the problem does not lie simply in that the government has lost its monopoly on orthodox ideology, or that the old version of orthodox ideology has been replaced by a new one; rather, it lies unprecedentedly in that Chinese people have seen through and had enough of the hypocrisy of the old-fashioned duality of legitimacy building which could be compared to 'the Emperor's New Clothes'.

As a result, the fashionable 'new ROL' and the less fashionable 'Zhuanzheng' advocated by Chinese authorities are considered by the grassroots class as nothing but self-deceiving tricks of the vested interests intended to fool the people as before; each time legal experts defend a criminal accused⁸⁹ and protect his civil rights or advocate property rights enjoyed mostly by the vested interests, the fascination and legitimacy of the new ROL and even that of the entire regime would be further impaired. Moreover, due to the inherent deficiencies of such foreign 'civilization' which even involves corruption, a diverse and multi-stakeholder-driven situation that involves constant negotiation by all classes has been formed in terms of the real functioning or rather discourse practice of China's political and legal system. It is particularly noteworthy that the negotiators (including the beneficiaries and practitioners of the new ROL) do not have to and indeed never follow the rules of the 'civilized' 'Universal Values'. In other words, that 'The Emperor's New Clothes' have still been worn and even praised every day, is only because they are in essence hardly anything harmful or useful but 'pretty', not because they can fool the adults.⁹⁰ In sum, China's conventional wisdom of basing political and juridical legitimacy upon a dialectical duality has eventually lost its foundation in every aspect; the root cause of which lies in the increasing transparency of information brought by technological innovation.

economic development.

89 It is notable that in China, he who can afford lawyers or even invite legal experts to defend himself is usually considered by the populace as, and often indeed used to be, one of the rich or those in power.

90 See Feng 2008.

8.3.2 *The possible way to reform the legitimacy building in China*

A binary framework of legitimacy building is currently not only unfeasible but also undesirable in China, and it could even be argued that to most Chinese, the inevitable hypocrisy of the duality appears more despicable than explicit autocracy. Therefore, China's new pattern of legitimacy must be based primarily on a unitary framework which allows the real fundamentals of the regime, either a liberal democratic 'Rechtsstaat' or a bureaucratic autocracy, to be explicit. That is to say, a rule of honesty is much more fundamental and desirable than either a rule of law or a rule of virtue/men, and explicitness should thus be made the foundation on which to reconstruct legitimacy, thereby ending the discourse game that has lasted for over two thousand years in China. It is evident that transparency is the most significant factor of such a rule of honesty, because in negative terms (especially internal) transparency is the primary taboo of the duality legitimacy and thus the most effective way to prevent it; in positive terms, transparency can work not only to facilitate honesty but also to show it. Accordingly, it is fair to conclude that transparency is the key to solving the legitimacy problem of China.

As far as is closely related to the ultimate (legitimacy) problem that this research project seeks to address, it also transpires, after all the historical analysis, that to form a new framework of legitimacy will be the most fundamental measure; and it is similarly fair to further deduce that in every sense, *transparency* of (criminal) legal procedure should be taken as the key to alleviate the *legitimacy* decline of China's (criminal) justice system. Moreover, given the traditional bureaucracy and the concomitant dossier centeredness entrenched in China's (criminal) justice system, it is also not unfair to state that the dossier-centred trial mode cannot be simply abandoned, and thus *internal transparency* of criminal procedure (access to the dossier) should by no means be neglected by criminal law reformers in tackling the legitimacy crisis.

However, it remains questionable which aspect of transparency, internal or external should be given the first priority in China, and more specifically, what normative measures should be taken in order to enhance the transparency of China's criminal procedure and thus to restore the legitimacy of its criminal justice. This question will be answered after an exhaustive comparison of the selected jurisdictions in next chapter, which can give rise to the final conclusion of this research.

Chapter 9

Final conclusion

Part I shows that the applicability of adversarial dogmas concerning the transparency of criminal procedure and establishment of procedural legitimacy is highly challengeable, at least in the Chinese context; Part II has further revealed that such dogmas should not be considered as unalterable even in their home countries, and that the story of the emergence and entrenchment of the adversarial criminal trial in its birthplace also lacks adequate theoretical ground; Chapter 8's revisit to China indicates that its traditional pattern of legitimacy building that prioritized moral good over factual trueness and featured a binary framework of moral/ideological Utopia and political Leviathan can no longer survive the unprecedented social changes brought about by recent technological innovation, since the increasing transparency and symmetry of information promoted by technological progress in internet media and social networks will explicitly expose the inevitable hypocrisy of the conventional duality. Therefore the new form of legitimacy building should be a unitary framework that features transparency and explicitness, which could be referred to as a rule of honesty. As far as is closely related to the research topic of this book, it transpires that transparency of criminal procedure should be taken as the most crucial mechanism needed to be enhanced to solve the legitimacy problem of China's criminal justice.

Now it is time to further examine whether the introduction of adversarial dogmas (especially those regarding procedural legitimacy and transparency) and China's concomitant reforming scheme based on such dogmas would alleviate the legitimacy decline of China's criminal justice, based on a comprehensive comparison between China and the adversarial systems; and thus to achieve the final conclusion as to what (and how) should China emphasize regarding transparency of criminal procedure to enhance or restore legitimacy of its criminal justice, culminating in the most promising normative solutions to China's current problems based on its legal tradition in combination with the outcome of the relevant comparative research.

9.1 Comparison between China and the adversarial systems

After elaboration of the legal traditions, basic tenets, and relevant mechanisms with regard to the (internal) transparency of criminal procedures in China,

England, Scotland, and United States respectively, it transpires that China greatly varies from these countries in almost every respect. All in all, China is radically different in its engrained outlook on philosophy. In pursuit of the common fundamental values of humankind, i.e. the true, the good, and the beautiful, China particularly prioritizes the good: Confucianism is a school of thought concerned with the good;¹ China's traditional political philosophy of the 'rule of virtue' was premised and centred on the moral good; the so-called 'Criminal Decisions according to Chunqiu (春秋决狱)', as the most fundamental principle of China's traditional (criminal) justice, also took the moral good as the crucial benchmark of factual decisions. Moreover, the pursuit of the true is even displaced by, or rather equivalent to, that of the good. In other words, what matters in China's traditional conception and administration of (criminal) justice is not what the suspect is proved to have done, but what he is believed to be – a good man or an evil man. On the contrary, the modern western scientific spirit awakened by the Enlightenment particularly emphasizes the true; concomitantly, westerners' outlook on justice is in essence centred on the pursuit of factual truth, on deeds and not on thoughts, since notions of individual freedom in the west inherently preclude state interference with what one is or thinks: only what one does is relevant because that can be construed in terms of harm.

In addition, as the only surviving ancient great empire with its long-lasting Grand Unification, China has retained its unique binary framework of legitimacy building, a moral/ideological Utopia as the shell plus a political Leviathan as the kernel. Such an imperial system is essentially different from the modern western model of liberal democratic 'Rechtsstaat'. To invoke Damaška's theoretical framework about the organization of authority, while Anglo-American systems, such as England and United States, tend to have a coordinate officialdom that features lay officials, horizontal distribution of authority, and substantive justice, continental European systems tend to embrace hierarchical officialdom, featuring professionalization of officials, strict hierarchical ordering, and technical standards for decision making;² moreover, 'in most communist countries judicial organizations have carried tendencies toward overall hierarchical leadership further than have traditional Continental systems, so that the ideal of a hierarchical apparatus may help in analysing some characteristics of the socialist legal process as well',³ including those of Chinese criminal procedure. Due to the aforesaid fundamental differences between China and the west with regard to philosophical outlook and political

1 'The Great Learning (大学)', as the introductory book of Confucian masterpieces, indicates in its very first sentence that 'What the Great Learning teaches is: to illustrate illustrious virtue; to renovate the people; and to rest in the highest good. (大学之道在明明德·在亲民·在止于至善·)'.
 2 See Damaška 1986, pp. 16-28.
 3 See *ibid.*, p. 17.

infrastructure, China is special in almost every respect regarding the legitimacy of its criminal justice, be it basic tenets or (internal) transparency of criminal procedure.

9.1.1 Basic tenets

Unlike its adversarial counterparts, China has a state-oriented framework of truth-finding with a ‘Zhuanzheng’ (suppressive) tendency of administration of justice. Therefore, Chinese authorities are inherently hostile to the idea of a lawyer-dominated criminal procedure, and truth-finding is designed mostly as a task of the state rather than of any individual. That is to say, the procedural culture of China is very similar to that of inquisitorial systems in civil law jurisdictions. Based on this overall logic, the functions and positions of actors involved in China’s criminal procedure, as well as their interaction and interrelationship, appear rather unique in contrast to the adversarial countries.

First, China has very powerful and centralized police forces vested with comprehensive and overwhelming powers of investigation, which have barely been subject to any effective external check; due to the ‘Zhuanzheng’ tradition, their investigative work is in large part oriented to crime control rather than to impartial truth-finding. On the contrary, the defence in China is indeed vested with very limited rights due to the same tradition. Briefly speaking, the disparity between China’s prosecutorial/investigative and defensive powers is much greater than its adversarial counterparts, and even many (mixed) inquisitorial systems.

Second, to a substantial extent Chinese prosecutors have functioned as legal assistants of the police due to the ‘Zhuanzheng’ tradition, and their supervisory function is mostly with regard to the judiciary rather than the police, usually if a decision of acquittal or lenience is given. In other words, the partisanship of Chinese prosecutors is even greater than that of their US counterparts.

Last, China’s judiciary is in a relatively weak position. It used to have some investigative function so as to guarantee a better-grounded truth-finding, but that function has been greatly curtailed by recent judicial reforms. Moreover, the judiciary in China is subject to procuratorial supervision, and thus has no last say in judicial decisions.

9.1.2 Internal transparency

Unlike its adversarial counterparts, China has a traditionally-established system of text-based proceedings with dossier-centred trials. Therefore, internal transparency of criminal procedure in China is indicated largely by its dossier system. However, to a great extent both the compilation and transfer of the dossier is at the discretion of the police, and has barely been subject to any effective external check; even the prosecution and the judiciary would have little way of knowing whether the police have withheld any evidence or not,

let alone the defence who have very limited rights to conduct independent investigations. Similarly, as we have seen in the exemplary miscarriages of justice in China (e.g. the Nian Bin's case), prosecutors also have permanent and overwhelming advantages over the defence with regard to the control of the evidence, so that the defence can hardly know whether the prosecution have withheld any evidence or not either. Briefly speaking, internal transparency of criminal procedure in China is even much smaller than in United States.

9.1.3 Summary

If we input the outcome of comparison into the formula derived in Chapter 7, it is evident that the D value in China is very big, even much bigger than that in England or in Scotland, while both the I value and T value in China are very small, even much smaller than those in United States. That is to say, China has fail with regard to the due framework of legitimate truth-finding, which can be considered the very legal-technical reason for the legitimacy decline of its criminal justice. Therefore, a promising solution based on the ROL theory should focus on rebalancing the formula. Specifically, it transpires after the analysis above that China should decrease the disparity between its prosecutorial/investigative and defensive powers, and enhance the impartiality of its prosecution and internal transparency of its criminal procedure. Accordingly, the research question: whether the introduction of adversarial dogmas (especially those regarding procedural legitimacy and transparency) and China's concomitant reforming scheme based on such dogmas would alleviate the legitimacy decline of China's criminal justice, may be translated as equivalent to whether such introduction and scheme would facilitate or hinder the balance of the aforesaid formula. To answer the latter question, we can invoke Langer's theoretical framework⁴ to assess the margins of the values of the relevant variables caused by such introduction and scheme.

First, from the dimension of procedural powers, it transpires that the introduction of the so-called 'new ROL' discourse, including adversarial dogmas and the concomitant reforming scheme, never touches on the very hard core of China's traditional duality, i.e. the 'Qin Pattern' of 'Controlocracy'; correspondingly, as the predominant policing power, the investigative/prosecutorial power in China is still overwhelmingly greater than the defensive power, and even much tougher than the juridical power. In other words, the distribution of procedural powers in Chinese criminal process remains much the same as before.

Second, from the dimension of procedural language, i.e. the structures of interpretation and meaning, as well as from the dimension of individual disposition, it transpires that, influenced by distorted adversarial dogmas,

4 See Langer 2004, pp. 7-17, 63.

increasingly both police investigators and public prosecutors and the authorities tend to perceive criminal trials as nothing but a contest between the so-called two ‘parties’, and thus take the defence as their adversary or even enemy. Some inherent pitfalls of adversarial system, such as the so-called ‘combat effect’, have even been seen by many as a symbol of universal civilization. In other words, it seems that, just as Legrand reminds us,⁵ the real meaning of adversarial dogmas does not survive the journey from their home countries to China. As a result, criminal lawyers in China would prefer to win the case rather than discover the truth. Moreover, such an adversarial procedural culture will have a subtle but profound implication on professional ethics, under which the prosecution tend to take it as just to use their overwhelming procedural powers to ‘bully’ the defence, e.g. to intentionally overlook or withhold exculpatory evidence, so as to win the case. Meanwhile, such distorted adversarial procedural culture and professional ethics will in turn change the distribution of procedural responsibilities. For instance, trial judges in China barely conduct active collection or verification of evidence as they used to, while on most occasions the prosecution prevail over the defence by withholding exculpatory evidence, since they (the judiciary) tend to perceive themselves as merely passive umpires of the game according to their self-understanding of the adversarial procedural culture and professional ethics. Generally speaking, both the judiciary and the prosecution have unintentionally shirked their procedural responsibilities to discover the truth that may have been favourable to the defence, and left them to the poor defence who lack the necessary procedural powers to assume such procedural responsibilities.

Last, in terms of special case-management techniques, China has historically relied upon a sophisticated written dossier system to deal with various kinds of public affairs, including criminal trials. However, inspired by the adversarial procedural language which emphasizes oral debate in criminal proceedings, the use and transfer of the dossier have been subject to varying restrictions, which hinders internal transparency in Chinese criminal procedure, while the defence lack the autonomy to conduct their own investigation. Moreover, fascinated by the adversarial discourse of equal arms and fair contests that advocates a lawyer-dominated criminal procedure, many Chinese defence lawyers act in a quite hostile fashion towards the prosecution, and even towards the judiciary,⁶ while they actually lack necessary material and human resources to compete with them; this has only put them in a more unfavourable situation and eventually impaired the interests of their clients.

It therefore transpires that the introduction of (distorted) adversarial dogmas and the concomitant reforming scheme centred on external transparency may have made things even worse in China. The advocacy of (distorted) adversarial procedural culture and the concomitant professional ethics has resulted in an

5 See Legrand 1997, p. 117.

6 Known as the so-called ‘kick-ass faction’ of lawyers.

imbalance between procedural powers and responsibilities, which has further broadened the already-too-broad disparity between investigative/prosecutorial and defensive powers in Chinese criminal procedure. Moreover, blind faith in the adversarial language of contests *inter partes* and oral disputes, which, though did put the trial sessions to the forefront, has neglected, or rather failed to feature the adversarial character of the pre-trial setting, may have further worsened the existing lack of (internal) transparency and impartiality in Chinese criminal procedure. In brief, the imbalance of the aforesaid formula has been, and will be further increased. That is to say, the introduction of adversarial dogmas (especially regarding procedural legitimacy and transparency) and China's concomitant reforming scheme based on such dogmas will not alleviate, but even aggravate the legitimacy decline of China's criminal justice; and fresh ideas will be needed to solve the legitimacy problem.

9.2 Possible solutions in the future

Since the comparison and analysis above show that the adversarial dogmas can hardly work as expected in China, we now come to the main research question of this book: what (and how) should China emphasize regarding transparency of criminal procedure to enhance or restore the legitimacy of its criminal justice. Similarly, within the theoretical framework of this book, answering this question can be transformed into solving the aforesaid formula in the existing constraints of China. Therefore, before normative solutions to the main research question, it is necessary to outline the major pitfalls in China's current system so as to identify the existing constraints of China, and to further navigate the general direction of sensible solutions.

9.2.1 *The pitfalls in the current system and sensible orientation of the solution*

China's current system of criminal justice is indeed full of profound contradictions in its structural arrangement, in both conceptual and institutional terms. All in all, China's political tradition and legal culture cannot accommodate the fundamental theory and reforming scheme of criminal procedure advocated by its academic mainstream today, which, taking the Anglo-American system as the ideal in almost every respect, embraces the adversarial model of criminal process and thus emphasizes confrontation at the trial stage and external transparency of criminal procedure. In conceptual terms, China traditionally considered the aim and essence of justice as a pursuit of the (moral/ideological) good more than that of the truth. In other words, the legitimacy of China's (criminal) justice was traditionally predominately based on the construction of a moral/ideological Utopia rather than on the discovery of substantive truth. Therefore, a reforming scheme that seeks to patch up the orthodox ideology with the so-called new ROL discourse so as to reconstruct the moral/ideological Utopia and thus restore systematic legitimacy is in essence self-contradictory,

and will further impair rather than repair the lack of systematic legitimacy in either sense. On the one hand, the new ROL discourse is considered by ever-more people as full of self-contradiction, hypocrisy and impotence, which will puncture the moral/ideological Utopia more deeply and thus further impair traditionally-patterned legitimacy. On the other hand, the traditionally-patterned demonstration of legitimacy that focuses on the good (virtue) more than the true, will in turn hinder the discovery of the truth, since a demonstration of the good or evil is a matter of profiling and propaganda rather than a matter of fact. In that case, the moral judgment on an event will rely mostly on how mainstream media label or caricature the actors and frame the story rather than on what truly happened, which can be best exemplified with the ironies of the two high-profile deaths of Mr. Lei Yang and Ms. Ma Caiyun.⁷

In institutional terms, Chinese lawyers dream of fair contests between equally-armed prosecutors and defence before passive judges and call for elimination of the ‘trial mode centred on the case file’, the establishment of verbal trial, the increase of lawyers’ rights, the decrease of public prosecutor’s power, and almost all the rights enshrined in the 4th and 5th Amendments of US Constitution. However, these ideals are far away from China’s reality, because the ‘trial mode centred on the case file’, which reflects the juridical bureaucracy in China, is just a part of the whole picture of China’s hierarchical officialdom, which cannot be solely reformed without profound political reform. Specifically, such hierarchical authority implies a ‘methodical succession of stages’⁸ in criminal procedure, featuring a rather harmonious co-operative relationship between the actors involved and comparable or even more significance of the pre-trial stages than that of the trial stage. In this sense, the lack of internal transparency will, on the one hand, contradict such a co-operative relationship between the actors involved in Chinese criminal procedure, and on the other hand, undermine the function of external transparency. Moreover, Chinese lawyers, be they public prosecutors, judges, or defence counsel, have already adapted to, and even been part of the judicial bureaucracy, so their professional skills consist in reading and writing various files and notes, rather than hearing and arguing a case like their American counterparts. In other words, they are not ready for a real verbal trial. Additionally, the quality and quantity of Chinese defence lawyers cannot afford all the contests; and both the authorities and the ordinary people tend to distrust lawyers. These essential conflicts make the reforming scheme advocated by the academic mainstream unfeasible.

As we have seen, China’s criminal procedural reforms have long been following an adversarial track, and specifically seeking to strengthen defensive rights, increase external transparency by curtailing internal transparency, enhance the confrontation between prosecution and defence, and form passive judiciary by restricting trial judges’ investigative power. Based on the

7 For details, see the beginning of Chapter 2.

8 For details, see Damaška 1986, pp. 47-48.

experience of the past, such reforms may result, or even have resulted, in the following outcomes. First, adversarial propaganda will further enhance the partisanship of China's prosecution service, since they can reasonably regard themselves, and be regarded, as only an adversary against the defence, whose task is to obtain a conviction more than to discover the neutral truth. In other words, the impartiality of prosecution (I value) in China will further decrease. Second, although such reforms seek to strengthen defence rights, since Chinese authorities are inherently hostile to the idea of a lawyer-dominated criminal procedure, the increase of defence powers resulting from such reforms are indeed quite nominal; while the increase of the police's advantage over the defence is quite real since such reforms have curtailed prosecutorial and judicial checks on the police based on the adversarial dogmas. Briefly speaking, the disparity between prosecutorial/investigative and defensive powers (D value) in China is even broadened by such reforms. Last, such reforms also undermine internal transparency of China's criminal procedure (T value). In sum, it transpires that the imbalance of the formula derived in Chapter 7 will further increase in China due to its current reforming scheme; in other words, such a scheme will not alleviate, but even worsen the legitimacy decline of China's criminal justice system, based on the ROL pattern.

Moreover, such a scheme cannot restore China's traditionally-patterned legitimacy either, because, on the one hand, the unprecedented and increasing transparency and symmetry of information enabled by technological innovation will explicitly expose the inevitable hypocrisy of China's traditional binary framework of legitimacy building; and on the other hand, even if we disregard the aforesaid pitfall, China's current reforming scheme still contradicts its traditional pattern of legitimacy building, since the latter requires a national consensus on a unified orthodox ideology while the former seeks to balance the 'new ROL' discourse and the 'Zhuanzheng' regime, which has caused serious ideological clashes in China.

Since it transpires that China has already lost the crucial precondition of its traditionally-patterned legitimacy building, a modern-patterned scheme seems to be more desirable in China. According to the abovementioned formula, such a scheme should focus on three aspects: narrowing the disparity between prosecutorial/investigative and defensive powers (D value) in China, promoting the impartiality of China's prosecution service (I value), and enhancing the internal transparency of China's criminal procedure (T value). Meanwhile, the scheme must avoid the aforesaid self-contradictions, which could be taken as a series of constraints to solve the formula. Accordingly, the reforming scheme should satisfy the following factors.

All in all, since it has been postulated that authoritarianism in China cannot be changed within the existing legal framework, its systematic legitimacy should still be based on a political Leviathan that features a highly hierarchical officialdom including the juridical bureaucracy, which, in terms of the (criminal) justice system, implies *inter alia* professionalization of judicial

officers, case-file-centred proceedings, and exclusivity of the official process.⁹ Meanwhile, given the interim conclusion that the duality of legitimacy must be abandoned, justice shall no longer be premised on a moral/ideological Utopia; rather, it shall prioritize the substantive truth. To sum up, criminal procedure in China should in essence be considered as an exclusive official process to pursue the truth only, which features professionalization and case-file-centred proceedings. That is to say, China should define its criminal procedure as an official investigation of the truth, rather than as a private dispute between equal partisan advocates; and therefore emphasize the impartiality of public prosecutors and internal transparency of criminal procedure so as to enhance or restore the legitimacy of its criminal justice.

Specifically, given that Chinese authorities are inherently hostile to the idea of a lawyer-dominated criminal procedure, that China's lawyer class as a whole is not powerful enough to counteract the police, and that China's procuratorates have the constitutional power to supervise law enforcement, the reform will be faced with less resistance and more feasibility if the counteracting power against the police is remitted mostly to the public prosecution service so as to restrain the police's power and to narrow the disparity between prosecutorial/investigative and defensive powers. Furthermore, China's prosecutorial control over the police shall be made even bigger than that in Scotland; at least, it must reach the Scottish level: public prosecutors may and must actively take part in the police investigation, and instruct the police to pursue both incriminating and exculpating lines of inquiry, so that the investigative powers in China could be restrained to a due extent. Meanwhile, China's judicial checks on the procuratorates should also be enhanced, just as the current reforming scheme is pursuing, to avoid abuse of procuratorial supervision.

Second, Chinese public prosecutors must get rid of the adversarial dogma that prosecutors shall serve as partisan advocates against the defence, whose priority is to obtain convictions; rather, they must establish their faith that they are ministers of justice in the sense that their due function is to discover the neutral truth. More specifically, China's criminal procedural law should explicitly provide that public prosecutors shall, through police investigators or by themselves, actively pursue all valuable lines of inquiry, whether incriminating or exculpating. Given the estimation that four out of five criminal defendants of first-instance cases in China have no legal assistance at all,¹⁰ such reform will materially enhance the overall civil rights of Chinese accused and substantially facilitate the truth in most cases, improving the credibility of criminal justice before the public. Moreover, the SPP must release internal guidelines that articulate relevant specific operational details to emphasize the public prosecutor's impartial role; and the SPP should organize training programs

9 See Damaška 1986, pp. 18, 19, 50, 51, 53, 54.

10 Big data statistics in the year 2015 indicate that the rate of defence counsel in first-instance criminal cases in China is 19.9%. See 微信公众号《数说司法》第119期·2016-12-13.

on a regular basis to substantially improve the integrity and professionalism of local prosecutors; all levels of China's procuratorates should abandon existing internal assessment indicators that pursue high rates of conviction, and establish disciplinary regulations to punish partisan conduct of public prosecutors.

Third, internal transparency of criminal procedure must be greatly emphasized and enhanced. More specifically, China's degree of internal transparency shall be made even higher than that in England, or at least, it should reach the English level: a full disclosure duty of the prosecution service should be provided by law. Moreover, the compilation of the police dossier must be totally supervised by public prosecutors, and both internal and external files must be available for prosecutors, judges, and defence counsel unless such exposure may strongly threaten public interests, in which case such files shall at least be available for public prosecutors and judges.

Fourth, external transparency of criminal procedure shall be treated with great caution. On the one hand, it transpires that what and how China is doing with regard to external transparency, especially what and how the mass media and social media in China are allowed to do, are indeed not much to the point, or even going too far, so that it can hardly facilitate but may even hinder the discovery of the truth in a Chinese context. Therefore, how the mass media and social media cover criminal cases, especially those in pre-trial stages, should be subject to appropriate supervision by judicial authorities, to avoid abuse of media supervision and ensure that criminal cases be reported in a professional and neutral way that reflects complete and balanced facts. It is noteworthy that the general public do have the right to know about, and supervise, the administration of criminal justice, but not based on how the media label or caricature the actors and frame the story; rather, they should witness criminal cases in their original form. Specifically, courtrooms should in principle be open to any visitor who is willing to witness criminal trials in person; where possible, people's courts may also publicize court sessions via online live broadcasting or other convenient forms, just like what the SPC is promoting via the so-called 'three platforms'. On the other hand, since criminal proceedings in China consist mostly in the written file of the case which demands substantial professionalism to understand, external transparency directly towards the general public may hardly facilitate such understanding. In this sense, it makes little sense to require external transparency as such, while external transparency of criminal procedure in China should be made primarily towards the entire legal community, including lawyers, law professors, judges, public prosecutors, and police investigators, via e.g. professional databases. Specifically, the whole case file, both external and internal, should be accessible to the legal community in proper ways, so that the merits of criminal cases are visible and intelligible and thus external scrutiny of administration of criminal justice can really touch the point.

Apart from the transformation of the prosecutorial role and function, the judiciary and the defence also have to change their concepts of self-positioning.

As for the judiciary, given that China's judge class as a whole generally have the best legal-educational background among law-enforcement professionals, and that they inherently tend to have a more impartial perspective than either police investigators or public prosecutors, it would be an intolerable waste of judicial resources to require that they serve only as a group of indifferent observers and umpires based on adversarial dogmas; rather, they should play an active role in discovering the neutral truth since they have much more opportunity and authority than defence counsel to e.g., verify suspicious evidence and question prosecution witnesses. Moreover, they should also work to promote internal transparency of criminal procedure based on dossier-transfer mechanisms. In order to avoid possible preconceived opinions of trial judges based on their reading of the dossier, China's criminal procedure may be furnished with pre-trial judges/courts¹¹ that specialize in pre-trial tasks such as verification of evidence and pre-trial disclosure, rather than decreasing internal transparency of criminal procedure by restricting transfer of dossier.

As for defence counsel, the ubiquitous adversarial dogma in China that the defence is the adversary of the prosecution must be abandoned, since such hostility will only worsen the unfavourable situation of the defence and thus further undermine the equality of arms given the fact that China's prosecutorial/investigative powers are indeed overwhelmingly stronger than the defensive powers. Rather, China's defence counsel should turn to regard themselves, and be regarded, as proofreaders of prosecution cases, who are supposed to assist the prosecution to find the weakness of the cases from their special perspective, so as to facilitate a neutral truth-finding. Moreover, they should also be allowed to act as proofreaders of the police dossier, who can suggest supplementary lines of inquiry, so as to facilitate the completeness of the dossier and the internal transparency of criminal procedure.

To sum up, China should largely abandon the (distorted) adversarial approach to legitimate truth-finding in its criminal procedure, especially in the pre-trial procedure, since it transpires that the merits of adversarial dogmas can hardly survive the journey from Anglo-American systems to China, and may mutate into something else due to China's legal tradition and social reality, which will barely alleviate, but even worsen the legitimacy decline of its criminal justice system.

11 Indeed, China's recent reform on judicial staffing, aiming to streamline the judiciary, has generated a large number of so-called 'assistant judges', who are not qualified as formal judges, but do have enough judicial professionalism to serve as such pre-trial judges.

9.2.2 *A desirable normative solution*

9.2.2.1 *About the basic tenets*

Art. 2 of the CPL2012 should articulate the essence and the meaning of criminal procedure; therefore, a new paragraph can be added to Art. 2 as its Sec. 1, which reads:

Criminal procedure is the official investigation conducted by public security organs, people's procuratorates, and people's courts in relays, which shall aim at the objective truth as to whether a crime was committed and whether the criminal suspect or defendant committed it. Such official investigation shall be conducted in a neutral and balanced way that both incriminating and exculpating lines of inquiry be pursued with equivalent efforts.

Art. 5 of the CPL2012 should define both people's procuratorates and people's courts as judicial power, and emphasize both their independence and impartiality; therefore, Art. 5 can be revised as follows:

The People's Courts shall exercise adjudicative power independently and impartially in accordance with law and the People's Procuratorates shall exercise procuratorial power independently and impartially in accordance with law; and their judicial power shall be free from interference by any administrative organ, public organization or individual.

Art. 8 of CPL2012 should specify that the procuratorial supervision is particularly over the police investigation; therefore, Art. 8 can be revised as:

The People's Procuratorates shall, in accordance with law, exercise legal supervision over criminal investigations conducted by public security organs.

Art. 11 of CPL2012 should also involve internal transparency, which can be revised as:

Cases in the People's Courts shall be adjudicated in public, unless otherwise provided by this Law. All the materials based on which the adjudication is conducted shall be made available among defence lawyers, public security organs, people's procuratorates, and people's courts, unless otherwise provided by this Law. A defendant shall have the right to defence, and the People's Courts shall have the duty to guarantee his defence.

Art. 35 of CPL2012 should in principle set up defence counsel's auxiliary role in objective truth-finding; therefore, a new paragraph can be added to Art. 35 as its Sec. 2, which reads:

The defence counsel shall function to assist the prosecution in finding the objective truth that may have been favourable to the criminal suspect or defendant.

Art. 193 of CPL2012 should mention judges' right and responsibility to actively collect or verify evidence in case of need; therefore, a new paragraph can be added to Art. 193 as its Sec. 3, which reads:

The trial court may, in the interest of justice or on other occasions it finds necessary, actively conduct its own collection or verification of evidence by all proper means.

9.2.2.2 *About internal and external transparency*

Art. 11 of CPL2012 should make external transparency of criminal procedure mostly towards the legal community; therefore, a new paragraph can be added to Art. 11 as its Sec. 2, which reads:

All the materials involved in Sec. 1 of this article shall also be made accessible for all the lawyers, legal scholarship, public prosecutors, judges, and police investigators. Relevant organs shall establish professional databases to share such materials.

Art. 159 of CPL2012 should grant defence counsel not only full access to police dossier but also the right to reinforce the dossier; therefore, Art. 159 can be revised as:

All the materials relevant to one case in possession of relevant public security organ shall be included into one unified investigative dossier, which, unless otherwise provided in this Law, must be made all available to defence counsel. If the latter notified the former that certain exculpatory line of inquiry was overlooked and thus not covered by the dossier, the former must timely pursue such line of inquiry, and record relevant outcome in the dossier.

Art. 160 of CPL2012 should provide that the compilation of the police dossier must be under full supervision of relevant procuratorate; a new paragraph can be added to Art. 160 as its Sec. 1, which reads:

All the materials relevant to one case in possession of relevant public security organ shall be open to relevant people's procuratorate, which has the power to instruct the former about how to compile the dossier. If the relevant people's procuratorate thinks certain line of inquiry, whether incriminating or exculpatory, is omitted, it may have the relevant public security organ to pursue such line, or do it all by itself. Relevant outcomes shall be recorded in the dossier.

In addition to the amendments to the CPL, the SPC shall also release a disclosure manual which articulates the general principles, legal basis, and concrete contents and requirements of disclosure duties.

9.3 The feasibility and pitfalls of the proposed solutions

Admittedly, this book has proposed a series of solutions to China's legitimacy problems in a rather rebellious fashion, in that they have challenged not only adversarial dogmas, but also other basic tenets with regard to, e.g. China's political-legal tradition and modern democratic theory. Specifically, visible pitfalls or paradoxes are as follows: first, the proposals of this book are centred on the improvement of internal transparency in Chinese criminal procedure, but it is questionable whether it is possible to really change the degree of (internal) transparency, given the inherent secrecy of 'hidden rules'; second, this book has proposed establishing China's self-positioning and self-understanding of criminal procedure as an official investigation of the truth that focuses the deeds rather than the thoughts, which appears to contradict Chinese people's inherent tendency towards the moral good rather than the factually true; third, this book expects the counteracting power against the police be remitted mostly to people's procuratorates so as to restrain the police power and to narrow the disparity between prosecutorial/investigative and defensive powers, however, it is also debatable whether people's procuratorates are willing, and able, to do that, given China's tradition of 'fusion of powers'; last, this book suggests that external transparency of criminal procedure in China be made primarily towards the entire legal community and that mass media coverage of criminal cases, especially in the pre-trial stages, be constrained, in a word, an internalization of external transparency, however, this suggestion appears to impair the democratic doctrine of public scrutiny, and therefore seems to be less likely to satisfy the general public and enhance legitimacy.

Notwithstanding these visible pitfalls and paradoxes, this book still insists on its basic attitude, since it never promises too much about those solutions. Instead of dreaming about a perfect scheme with all desirable effects, this book only seeks something less undesirable or less unfavourable, within the existing framework of China's fundamental regime. In other words, this book is pursuing a sort of 'Pareto Improvement'¹² that, though making little progress, will barely make the situation any worse, rather than a well-rounded and ambitious scheme with many unpredictable potential risks that may probably

12 A Pareto Improvement is a neoclassical economics, an action done in an economy that harms no one and helps at least one person. The theory suggests that Pareto improvements will keep adding to the economy until it achieves a Pareto equilibrium, where no more Pareto improvements can be made. Similarly, a Pareto Improvement in legal reforms or legal transplants should at least guarantee that no negative effect will be further caused. This should be treated as the bottom line of a sound legal reform, especially given the Murphy's Law.

confirm the Murphy's Law¹³ only. In this sense, this book finds those proposals less unpromising than many others, since all the pitfalls and paradoxes are visible and thus predictable and controllable, and have long been undergone by China, so that will barely make the situation any worse.

As for the first question, two factors determine that the degree of (internal) transparency in Chinese criminal procedure can, and must, be increased, despite China's adverse tradition such as the inherent secrecy of 'hidden rules'. First, technological innovation as a macro-historical factor, which has facilitated information symmetry and social awareness, determines that the secrecy of China's traditional binary-structured legitimacy (including 'hidden rules') will necessarily be punctured, and thus that increasing (external) transparency, including that in criminal procedure, will become an inevitable trend based on the historical rationality, whether China is willing to accept it or not. In turn, this trend of increasing external transparency will call for ever-more internal transparency, since the lack of the latter will be ever-more possibly and frequently exposed by the increase of the former. Second, the inherent secrecy of China's conventional wisdom actually forbade two forms of transparency, to preserve the binary-structured legitimacy: ordinary people's awareness of official secrets and officials' awareness of the emperor's secrets. In this sense, China's political-legal tradition will not hinder the proposed improvement of internal transparency, because on the one hand, internal transparency does not involve the general public; and on the other hand, although China largely retains its traditional regime of authoritarianism, a great progress brought forth by the 'Xinhai Revolution' is having removed the emperor with the 'Occam's Razor', leaving only the professional bureaucratic class ruling the empire. Today, China is still governed by such a professional bureaucratic class, i.e. the CPC, without anyone equivalent to an emperor, therefore, there is no need to forbid internal transparency, especially in criminal procedure, even in the sense of traditional political-legal culture.

As for the second question, although it is true that Chinese people still tend to prioritize moral good rather than the factually true when judging the result of a criminal case, they do not really care about the course or result of criminal cases but to a great extent take them as another sort of entertainment. Rather, those who really care, such as the defendants, the victims, and their families, will definitely prioritize the truth. Therefore, an emphasis on the significance of the truth will enhance their confidence in the criminal justice system. Given that after all general public opinion on the overall quality of criminal justice, essentially speaking, originates directly or indirectly from remarks of parties concerned in criminal cases, such emphasis will eventually enhance public confidence in the criminal justice system as well. Moreover, the significance of the truth is also formally provided in Art. 2 of CPL2012.

13 A well-known adage or epigram based on social experience, which can be typically stated as: anything that can go wrong, will go wrong.

As for the third question, given the currently embarrassing situation of people's procuratorates, it seems that they have no better choice but cooperating with the defence, especially in the pre-trial stages, to restrain the police power, if they still want to play a meaningful role in criminal process and thus retain their position and avoid possible disintegration. As we have already seen, the procuratorate system has long been exploring its due position since its re-establishment, however, it always plays a rather auxiliary or marginal role in criminal process: in common cases, they act mostly as legal assistants of the police; in anti-corruption investigations, they usually do copy-paste paperwork only, to formalize what DIC (Discipline Inspection Commissions of CPC) obtained into court-admissible form of evidence in the prosecution dossier.¹⁴ Now, the establishment of SIC is tantamount to removing the procuratorate system's originally marginal and even nominal function in anti-corruption investigations. Likewise, it is predictable that PSO may also abandon the procuratorate system at any time since the former can easily find other legal assistants. Conversely, the defence who lack the necessary resources to prepare for effective defence are badly in need of a criminal procedural apparatus that can help them counteract the powerful police forces in China. It therefore transpires that only in this way can the procuratorate system find its due position, and legitimacy and *raison d'être*; moreover, it does have such functional power to restrain police conduct according to both the Chinese constitution and criminal procedure. Specifically, Art. 50 of CPL2012 has actually required impartiality of public procurators in evidence production, in a rather explicit way.

As for the last question, the proposal to constrain and internalize external transparency seems, admittedly, to contradict the democratic doctrine of public scrutiny and impair the public right to know about, and supervise, administration of criminal justice; however, it is tantamount to putting the cart before the horse to blame such a proposal for damaging the democracy. Indeed, what should underlie and underpin the dogma that the mass media reports on criminal cases promote external transparency, and thus democracy, is a liberal democratic 'Rechtsstaat' with independent mass media. However, this is not the case in China. Both Chinese authorities and mainstream scholarship have repeatedly reiterated that China is not, and will never be, a 'western-styled' democracy. E.g. in the year 2009, in the Second Plenary Session of the Second Round of the 11th National People's Congress, the president of the Standing Committee of the NPC openly reiterated in the Standing Committee's annual working report, that China will never follow the western-styled system such as 'Trias Politica' and 'Multi-party Democracy';¹⁵ the current president and chief justice of the

14 For details of the procuratorial function in relation to DIC in anti-corruption cases, see He 2016/11.

15 See 吴邦国：绝不能照搬西方搞多党轮流执政，<http://news.cctv.com/china/20090309/102808.shtml>, accessed on Feb. 26, 2017.

SPC just required that all judges ‘dare show their sword’ towards ‘wrongful western ideas’ such as ‘democratic Rechtsstaat’ and ‘judicial independence’;¹⁶ recently in its 2017 annual work plan, China Law Society announced that it will make effort to clearly and explicitly fight against ‘wrongful western ideas’ such as ‘democratic Rechtsstaat’ and ‘universal values’, which will be taken as the main points of this year’s work.¹⁷ Of course, Chinese authorities and mainstream scholarship argue that China is following its characteristically Chinese socialist democracy, and the western-styled democracy is hypocritical and fake. Let’s tentatively put aside such meaningless discourse struggle between China and the west, and try to invoke a value-free narrative. An obviously undeniable fact is that what underlies China’s criminal justice differs greatly from the defining features of the so-called liberal democratic ‘Rechtsstaat’ with which westerners are familiar, therefore the western dogma with regard to the presumed positive correlation between the function of the mass media and external transparency and democracy can barely stand in the Chinese context. Conversely, as we have already seen, excessive and biased mass media reports on high-profile criminal cases tend to undermine social awareness and concerns about the truth, aggravate meaningless struggle of ideologies and discourses, and worsen the legitimacy decline of China’s criminal justice. In this sense, since China has determined to abandon the advantages of western-styled democracy due to historical rationality or any other reason, why should it bother to take the disadvantages of such ‘democracy’ only to pretend to satisfy the democratic doctrine of public scrutiny?

Moreover, the proposal can be considered a ‘Pareto Improvement’, since constraint and internalization of external transparency can barely make the situation any worse, but enhance the quality of China’s criminal justice in a characteristically Chinese way. Specifically speaking, first, the mass media and social media are only interested in a very small proportion of high-profile cases, while most criminal cases have never attracted any public attention; therefore, constraint of the media will change nothing for most criminal cases. Second, even for the small proportion of high-profile cases in which the media are interested, it transpires that their reports tend to distort rather than clarify the truth; therefore, constraint of the media will barely decrease public awareness of the truth of criminal cases, and thus do virtually little harm to public right to know about criminal cases, nor will it significantly undermine press freedom since the media in China is originally not independent from the authorities. Third, given that the general public originally knew very little about criminal cases, while that, even so, criminal justice is still never among the least-known domains that they should have known about, less media reports on criminal cases

16 See 周强：要敢于向西方错误思潮亮剑，<http://www.chinanews.com/gn/2017/01-14/8124300.shtml>, accessed on Feb. 26, 2017.

17 See 中国法学会反对宣扬西方‘宪政民主’‘普世价值’和‘三权分立’，<http://www.cwzg.cn/politics/201702/34314.html>, accessed on Feb. 26, 2017.

can barely dissatisfy the general public any further, and they also have plenty of other things to complain about. Conversely, an internalization of external transparency fits the characteristically Chinese political-legal culture and case-management techniques very well, since China, as what this book would rather call a ‘technocracy’, tends to remit official matters, including criminal trials, to selected technologists and experts rather than to elected representatives of voters. Specifically in terms of criminal procedure, the whole process is centred on the written dossier and technological legalism; therefore, it seems much less unreliable to remit external scrutiny of criminal proceedings to the community of legal professionals rather than to the mass media.

Last but not least, it is notable that the main attitude of this book is *beyond*, not against adversarial dogmas. In fact, this book agrees that China’s adversarialization reforms on its criminal procedure have definitely contributed to a better quality and more fairness of the criminal process, especially the trial stage. Nevertheless, this book believes that such reforms are not totally, or even significantly, to the point, since what underlies and underpins China’s criminal justice so differs from what underlies and underpins adversarial systems, and thus adversarial dogmas are not necessarily applicable in the Chinese context; not to mention that, just as Legrand predicts,¹⁸ the real meaning of adversarial dogmas does not survive the journey from their home countries to China, while distorted self-understanding of adversarial dogmas, as transpires, has even worsened the legitimacy decline of China’s criminal justice. Most typically, China’s reforms emphasize the significance of the trial stage, trying to limit the functioning of the so-called pre-trial stage. In fact, the distinction between trial and pre-trial stages is a typical dichotomy based on the judicial practice in adversarial systems, whereby criminal procedure features a ‘concentration of proceedings’¹⁹ within the trial stage, while all the crude proceedings before the trial stage can only be simply defined as a general pre-trial stage. Conversely, Chinese criminal procedure features a ‘methodical succession of stages’,²⁰ and thus actually has at least three independent, special, and sophisticated pre-trial stages, i.e. filing a case, investigation, and prosecutorial review. Given China’s ingrained investigation-centred model of criminal procedure, a more reasonable and practical dichotomy should be the distinction between investigation and post-investigation stages. In this sense, in order to restrain the investigative power and facilitate a fairer criminal process, special attention should be given to the entire post-investigation stages, including, and especially relying on, the procuratorate proceedings. This is just the rationale behind the normative solutions proposed in this book.

18 See Legrand 1997, p. 117.

19 For details of such procedural implication, see Damaška 1986, p. 57.

20 For details, see *ibid.*, pp. 47-48.

Summary

Transparency and Legitimacy in Chinese Criminal Procedure; Beyond Adversarial Dogmas

Once upon a time, legitimacy of the Chinese criminal justice system was not a big problem, however, plenty of signs indicate that the legitimacy is currently confronted with a so-called ‘Tacitus Trap’, in which neither good nor bad judgments would please people as they resent the (judicial) authorities. This legitimacy decline has attracted the attention of not only the Chinese authorities but also Chinese academia. The academic mainstream in the domain of criminal procedure has attributed this situation essentially to the lack of adversarial quality in the Chinese criminal justice system, Therefore, they suggest procedural reform with reference to the classical model and corresponding tenets of an adversarial system, focusing on restraints on prosecutorial power and concomitant strengthening of defence lawyers’ power. Unsurprisingly, this suggestion has been much welcomed by the bar as well as by liberal intellectuals in China, who further develop such ideas and thus imply or even advocate that many institutional settings and even political and legal traditions in China must be subject to radical reforms so as to meet the default settings of an adversarial system.

Such theory seems to have also convinced Chinese political and judicial authorities, albeit in an implicit way. Enlightened by such theory with strong Anglo-American influences, Chinese judicial authorities have carried out a series of procedural reforms during the past few decades, aiming at a fairer criminal justice system with more adversarial quality. The essential idea of those procedural reforms lies in adding weight to court sessions and external transparency of criminal trials, while curtailing the weight of pre-trial proceedings and the case file.

However, it transpires that such seemingly self-evident and universally-applicable doctrines of criminal procedure bought from the Anglo-American system, which have been comprehensively believed by China’s academic mainstream and seem to have convinced the political and judicial authorities as well, seem to have failed this foreign land, since the legitimacy of its criminal justice system has been increasingly challenged by the populace and miscarriages of justice are continually revealed. Moreover, some essential

elements of Chinese criminal procedure, for instance the rules regarding the transfer and use of the dossier, have indeed been restored as it was before the relevant reforms, which means that even the Chinese authorities have partly negated such reforms on criminal procedure in the past few decades. That is to say, the basic tenets of adversarial system should not be considered as universal principles, at least they can hardly stand in the current Chinese context. Thus arises the overarching research question of this book: what and how should China emphasize regarding transparency of criminal procedure so as to enhance or restore legitimacy of its criminal justice?

Given the failure of the adversarialization reform in China, this research seeks to go beyond adversarial dogmas, and concentrate on internal transparency of criminal procedure, presupposing that in a criminal justice system that inherently has considerable inquisitorial quality (especially in the pre-trial stages), such as the Chinese system, internal transparency of criminal procedure is a critical condition for external transparency, and furthermore, crucial to the achievement of legitimacy; moreover, basic tenets of a criminal justice system, whether adversarial or inquisitorial, cannot stand without some underlying factors, such as, *inter alia*, political and legal tradition and ideological tendency, which should better be considered as a given prerequisite rather than variables that can be subject to discussion and optimization; however, the Chinese legal community has considered basic tenets of the adversarial system as self-evident and universally-applicable, and even distorted the real meaning of adversarial dogmas, ignoring the underlying factors peculiar to China, and therefore paying attention only to external transparency while disdaining and even diminishing internal transparency of China's criminal procedure, which has aggravated the legitimacy decline of China's criminal justice. This could be considered as the very basic hypothesis of this research.

The main body of this book has been divided into three parts, nine chapters. In order to test the aforesaid hypothesis and thus draw a conclusion on the main research question, Part I of this book has employed the classification of internal and external transparency to evaluate Chinese criminal procedure, indicating that internal transparency is not so well guaranteed as external transparency in China's criminal justice; and that the applicability of adversarial dogmas concerning the transparency of criminal procedure and establishment of procedural legitimacy is highly challengeable, at least in the Chinese context.

Part II has further revealed that, on the one hand, Chinese legal community has in large part misunderstood the real meaning of adversarial dogmas, and on the other, such dogmas should not be considered as unalterable even in their home countries; and that the story of the emergence and entrenchment of the adversarial criminal trial in its birthplace is a topic of legal history much more than of legal theory.

Part III has first revisited China from a legal-historical dimension, which indicates that its traditional pattern of legitimacy building that prioritized moral good over factual trueness and featured a binary framework of moral/

ideological Utopia and political Leviathan, such typically as a so-called 'explicit Confucianism and implicit Legalism', can no longer survive the unprecedented social changes brought about by recent technological innovation, since the increasing transparency and symmetry of information promoted by technological progress in internet media and social networks will explicitly expose the inevitable hypocrisy of the conventional duality. Therefore the new form of legitimacy building should be a unitary framework that features transparency and explicitness, which could be referred to as a 'rule of honesty', as compared with the dichotomy between the so-called 'rule of man' and 'rule of law'. As far as is closely related to the research topic of this book, it has shown that transparency of criminal procedure should be taken as the most crucial mechanism needed to be enhanced to address the legitimacy problem of China's criminal justice.

Given China's idiosyncratic political-legal tradition, the last chapter has further argued that the introduction of (distorted) adversarial dogmas and the concomitant reforming scheme centred on external transparency may have made things even worse in China. The advocacy of (distorted) adversarial procedural culture and the concomitant professional ethics has resulted in the imbalance between procedural powers and responsibilities, which has further broadened the already-too-broad disparity between investigative/prosecutorial and defensive powers in Chinese criminal procedure. Moreover, blind faith in the adversarial language of contests *inter partes* and oral disputes may have further worsened the existing lack of (internal) transparency and impartiality in Chinese criminal procedure. Consequently, China's adversarialization/Americanization not only fails to achieve the advantages of adversarial procedure since it can hardly establish what should underlie the system, but even causes more severe disadvantages of the system within China's cultural-specific discourse.

Accordingly, the concluding section of this book has proposed emphasizing the impartiality of public prosecutors and internal transparency of criminal procedure, enhancing prosecutorial control over the police and judicial checks on the procuratorates, restoring active judicial investigation where necessary, and promoting external transparency in a more cautious or internalized way.

In sum, China's lessons, specifically indicating the adverse effects of (distorted) adversarial dogmas in the Chinese context, have warned us against criminal procedure dogmatism and radicalism. However, if looking at the whole picture of comparative criminal procedure in the world, we will find that China is not alone. In this sense, the author has a feeling of watching a funny drama in which the male and female leads take the wrong scripts, reading each other's lines. He also recalls a popular Chinese adage: 'One is usually inclined to find one's spouse worse than others' while one's children better.' It seems that lawyers all over the world, such typically as Sir William Blackstone and most Chinese lawyers of my grandfather's generation, used to preferably see

their own procedural systems as their children, but now tend to view them as their spouses.

Unlike them, the author would rather compare a procedural system to a pair of shoes. Just as another Chinese ancient adage goes, 'Shoes need not be in the same size, but fit the feet; likewise, (political-legal) systems need not be in the same style, but benefit the people.' The author would extend this metaphor in a sense that shoes should at least not too small even if unfit; likewise, (political-legal) systems should at least not annoy the people even if unbeneficial.

In these terms, some general cautions must be mentioned with respect to legal transplants and criminal procedural reforms: first, dogmatism and radicalism should be avoided and what underlies criminal procedure must be taken into account; second, a sound legal reform had better be a 'Pareto Improvement', in other words, it should prioritize a less undesirable or less unfavourable scheme. Specifically in Chinese criminal procedure, these cautions imply a high priority of internal transparency.

Samenvatting

Transparantie en legitimiteit in de Chinese strafprocedure; Adversaire dogma's voorbij

Ooit was de legitimiteit van het Chinese strafrechtssysteem geen probleem, maar tegenwoordig zijn er veel aanwijzingen dat die legitimiteit zich in een zogenoemde 'Tacitusval' bevindt: mensen nemen genoeg met goede noch slechte uitspraken, omdat ze bezwaar hebben tegen de (strafrechts)autoriteiten. Dit verval in legitimiteit heeft de aandacht getrokken van niet alleen de Chinese autoriteiten, maar ook van Chinese academici, van wie de meesten de situatie in essentie eraan toeschrijven dat het Chinese strafrechtssysteem aan adversaire kwaliteit ontbreekt. Zij stellen daarom procedurele hervormingen voor gebaseerd op het klassieke model en de bijbehorende kenmerken van een adversair systeem, met de nadruk op beperkingen van de bevoegdheden en macht van de aanklager en versterking van de bevoegdheden en macht van de verdediging. Het zal niet verbazen dat dit voorstel met open armen is ontvangen door de Balie en ook door liberale intellectuelen in China; zij ontwikkelen zulke ideeën verder en impliceren daarmee, of bepleiten zelfs, dat vele institutionele arrangementen en zelfs politieke en juridische tradities in China radicaal moeten worden hervormd om aan de fundamentele eisen van een adversair systeem te voldoen.

Het lijkt, althans impliciet, alsof ook de politieke en judiciële autoriteiten door zulke theorieën overtuigd zijn. In het licht van dergelijke theorieën die een sterke Anglo-Amerikaanse invloed hebben, zijn de Chinese strafrechtsautoriteiten aan een serie procedurele hervormingen begonnen gedurende de afgelopen decennia, met als doel een eerlijker strafrechtssysteem met een hoger adversair gehalte. Kernidee van die procedurele hervormingen is meer gewicht toekennen aan de strafzaak ter zitting en aan externe openbaarheid; tegelijk wordt het belang van het vooronderzoek en het dossier beperkt.

Zulke kennelijk vanzelfsprekende en universeel-toepasselijke strafprocesuele doctrines, die van het Anglo-Amerikaanse systeem worden geleend en waarin zowel *mainstream* academici als politieke en judiciële autoriteiten geloven, blijken echter in dit vreemde land niet te werken, aangezien zijn bevolking de legitimiteit van het strafrechtssysteem in toenemende mate ter discussie stelt en rechtsdwalingen aan de orde van de dag lijken. Bovendien zijn inmiddels

sommige essentiële elementen van de Chinese strafprocedure, zoals de regels met betrekking tot overdracht en gebruik van het dossier, hersteld in de situatie die voor de relevante hervormingen bestond, zodat zelfs de Chinese autoriteiten deels zijn teruggekomen op hervormingen van de afgelopen decennia. Waaruit maar blijkt dat de basisprincipes van het adversaire systeem niet als universele principes kunnen worden beschouwd, althans, ze hebben in de huidige Chinese context niet standgehouden. En zo ontstaat de overkoepelende onderzoeksvraag van dit boek: waar, en hoe, moet de nadruk worden gelegd als het om transparantie van de strafprocedure gaat, teneinde de legitimiteit van de strafrechtspleging in China te verbeteren of herstellen?

Gegeven dat hervormingen in de richting van adversarialiteit in China hebben gefaald, wordt in dit onderzoek geprobeerd voorbij adversariële dogma's te gaan: de nadruk ligt hier op de interne openbaarheid van de strafprocedure, in de veronderstelling dat in een strafrechtssysteem van overwegende inquisitoire aard (vooral in het vooronderzoek) zoals dat van China, interne openbaarheid een kritieke voorwaarde is van externe openbaarheid en bovendien cruciaal is om legitimiteit te verzekeren. Daarenboven zijn de basisprincipes van een strafrechtssysteem – hetzij adversair, hetzij inquisitoir – afhankelijk van een aantal onderliggende factoren zoals onder andere de politieke en juridische traditie van een land en de ideologische onderbouwing ervan. Deze kunnen beter worden beschouwd als gegeven dan als variabelen die voor discussie en optimalisatie vatbaar zijn. Toch ziet de Chinese juridische gemeenschap de basisprincipes van het adversariële systeem als vanzelfsprekend en universeel-toepasselijk; het heeft de echte betekenis van adversariële dogma's verkeerd begrepen en alle aandacht gericht op externe openbaarheid, en de interne openbaarheid van de Chinese procedure steeds verder terzijde geschoven waarmee het legitimiteitsverval van de Chinese strafrechtspleging is verergerd. Dit zou men als de meest basale hypothese van dit onderzoek kunnen beschouwen.

De tekst bestaat uit drie delen en negen hoofdstukken. Om genoemde hypothese te toetsen en tot een conclusie te komen met betrekking tot de onderzoeksvraag, wordt in Deel I van het boek het onderscheid tussen externe en interne transparantie gehanteerd om de Chinese strafprocedure te beoordelen. Hieruit blijkt dat in China interne transparantie minder goed is gegarandeerd dan externe, maar ook dat de toepasselijkheid van adversariële dogma's met betrekking tot de transparantie van strafprocedures en de vestiging van procedurele legitimiteit te betwisten valt, althans in de Chinese context.

In Deel II blijkt dat enerzijds de Chinese juridische gemeenschap de echte betekenis van adversariële dogma's grotendeels verkeerd heeft begrepen, en, anderzijds dat zulke dogma's niet onveranderlijk zijn, zelfs niet in hun landen van oorsprong – het verhaal van het ontstaan en de vestiging van het adversaire proces in zijn geboorteland blijkt bovendien veel eerder een kwestie van rechtsgeschiedenis dan van rechtstheorie.

Deel III keert weer terug naar China, eerst vanuit een rechtshistorisch perspectief. Daaruit blijkt een traditioneel patroon van legitimiteit waarin het

moreel goede prevaleert boven feitelijke waarheid, dit alles binnen een tweepolig kader van een moreel/ideologische Utopia en een politieke Leviathan, zogenaamd ‘expliciet Confucianisme en impliciet Legalisme’. Een dergelijk patroon is niet langer levensvatbaar gegeven de ongehoorde sociale veranderingen als gevolg van recente technologische innovaties. Immers de toenemende transparantie en symmetrie van informatie die door technologische vooruitgang op het gebied van internet-media en social networks worden bevorderd, zullen de onvermijdelijke hypocrisie van de oude conventionele dualiteit aan het licht brengen.

Een nieuwe vorm van legitimiteit moet worden gebouwd op een kader van transparantie en expliciteit die we een ‘rule of honesty’ kunnen noemen, tegenover de dichotomie tussen ‘rule of man’ en ‘rule of law’. Uit dit boek blijkt dat transparantie van het strafproces het meest cruciale mechanisme is dat verbetering behoeft om het legitimiteitsprobleem in de Chinese strafrechtspleging het hoofd te bieden.

In het slothoofdstuk wordt betoogd dat, in het licht van de idiosyncratische politiek-juridische tradities van China, de introductie van (verkeerd begrepen) adversariële dogma’s en de bijbehorende hervormingen van het proces, met hun nadruk op externe openbaarheid, de legitimiteitscrisis in China wellicht hebben verergerd. Het bepleiten van een (slecht-begrepen) adversariële procescultuur en de bijbehorende professionele ethiek heeft tot gevolg gehad dat procedurele bevoegdheden en verantwoordelijkheden buiten evenwicht zijn geraakt, met het verdere gevolg dat de toch al te brede kloof tussen onderzoeks- en vervolgingsbevoegdheden, en de bevoegdheden van de verdediging nog breder is geworden. Bovendien heeft een blind vertrouwen in de adversariële taal van wedstrijd *inter partes* en mondeling debat het bestaande gebrek aan (interne) openbaarheid en onbevooroordeeldheid in de Chinese procedure mogelijk verergerd. Dientengevolge kan de adversarialisatie/Americanisatie in China niet alleen de voordelen van een adversair systeem niet verwezenlijken, omdat de noodzakelijke onderliggende factoren niet realiseerbaar zijn, ook wordt het strafrechtssysteem binnen het cultureel-specifieke discours van China ernstige schade toegebracht.

Het concluderend deel van dit boek bepleit dan ook dat de onbevooroordeeldheid van openbare aanklagers en interne transparantie worden benadrukt, dat de controle door de aanklager op de politie en door de rechter op de aanklagers worden verbeterd, dat actief rechterlijk onderzoek waar nodig opnieuw wordt ingevoerd; en dat externe transparantie wordt bevorderd, doch op een meer terughoudende en geïnternaliseerde manier.

Samenvattend kan worden gezegd dat de lessen uit China die wijzen op nadelige effecten van (slecht-begrepen) adversariële dogma’s in de Chinese context, ons waarschuwen voor procedureel dogmatisme en radicalisme in het strafproces. Maar, als we het hele beeld van strafprocesrechtsvergelijking overal ter wereld bezien, dan ontdekken we dat China niet alleen is. Wat dat betreft heeft de auteur het gevoel naar een raar toneelstuk te kijken waarin de

mannelijke en vrouwelijke hoofdrolspelers het verkeerde script hebben en elkaars tekst uitspreken. Hij moet ook denken aan een populaire Chinese gezegde: ‘Men vindt de eigen echtgenoot meestal slechter dan die van anderen, maar de eigen kinderen beter’. Het lijkt alsof juristen overal ter wereld, zoals Sir William Blackstone en de meeste Chinese juristen van mijn grootvaders generatie vroeger hun eigen processysteem als hun kind zagen, maar nu de neiging hebben het als hun echtgenoot te beschouwen. De auteur echter vergelijkt een processysteem liever met een paar schoenen. Volgens een andere oud Chinese gezegde hoeven ‘schoenen niet dezelfde maat te zijn, maar wel de voeten te passen’. Zo hoeven (politiek-juridische) systemen niet dezelfde stijl te hebben, maar wel goed te zijn voor de mensen. De auteur zou dit metafoor willen uitbreiden in de zin dat schoenen in ieder geval niet te klein moeten zijn, zelfs als ze niet passen; en dat (politiek-juridische) systemen, ook al zijn ze niet goed, de bevolking in ieder geval niet boos moeten maken.

In dit licht moet worden gewezen op enkele algemene waarschuwingen met betrekking tot juridische transplantaten in het kader van strafrechtshervorming. Ten eerste moeten dogmatisme en radicalisme worden vermeden en moet nota worden genomen van de onderliggende factoren van de strafprocedure. Ten tweede vereist behoorlijke juridische hervorming dat sprake moet zijn van ‘Pareto-verbeteringen’, met andere woorden, dat prioriteit wordt gegeven aan een minder onwenselijk of minder ongunstig plan. Specifiek in de Chinese context betekenen deze waarschuwingen dat interne openbaarheid hoge prioriteit verdient.

摘要

中国刑事诉讼的透明度和正当性：跳出对抗制的窠臼

曾几何时，刑事司法的正当性在中国并非大问题，然而种种迹象表明，这一正当性如今正面临所谓的“塔西佗陷阱”，判决不论良莠，百姓都不买账，司法权威受到诟病。中国当局和学界都关注到司法正当性的这种颓势。刑法主流将其根本上归咎于中国刑事司法制度缺乏对抗制的品质，因此建议参照对抗制的经典模式和相应原则改革程序，着力限制检控权并加强律师辩护权。这些倡议毫不意外的受到了中国律师和自由知识分子的欢迎，并被进一步引申，乃至宣扬对中国的诸多制度设置甚至政治法律传统都必须进行大刀阔斧的改革，以满足对抗制的默认设置。

这种理论似乎也说服了中国的政法部门，尽管是以一种默认的方式。在这种具有强烈英美色彩的理论引导下，中国司法机关在过去几十年推行了一系列诉讼改革，以期建立具有更多对抗制品质的更加公平的刑事司法制度。这些诉讼改革的基本思路在于加强庭审及其外部透明度，削弱审前程序及案卷的分量。

然而，尽管得到中国主流学界的广泛认可以及中国政法机关的默认，源于英美法系的这些看似不言自明的普世的刑事诉讼原则似乎在这片神州大地上有些失灵，因为其刑事司法制度的正当性日益受到民众质疑，冤案不断被曝光。此外，中国刑事诉讼法的一些基本要素，例如有关案卷移送和使用的规则，实际上也回到了相关改革前的状态，这意味着中国当局也部分否定了过去几十年的这些改革。也就是说，对抗制的基本原则不应被视为普世原则，起码在当前中国的背景下难以成立。这就产生了本书的总体研究问题：中国应如何加强刑事诉讼的透明度以增进或恢复其刑事司法的正当性？

考虑到对抗制改革在中国的失灵，本研究试图突破对抗制教义，并聚焦于刑事诉讼的内部透明度，假定在中国这样的具有相当的审问制的固有品质（尤其是在审前阶段）的刑事司法制度中，刑事诉讼的内部透明度是其外部透明度的一个决定条件，并且对达成司法正当性至关重要；此外，刑事司法制度的基本原则，不论是对抗制的还是审问制的，都无法脱离诸如政治法律传统和意识形态倾向等深层因素而单独成立。这些因素最好被视为给定的前提而非可以付诸讨论和优化的变量。然而，中国法律界却将对抗制的基本原则视为不言自明和普世的，甚至曲解了对抗制教义的真实内涵，忽略了中国特有的深层因素，从而只关注中国刑事诉讼的外部透明度而轻视乃至削弱了其内部透明度，这反而加剧了中国刑事司法正当性的颓势。以上或可视为本研究的基本假定

本书正文分为三篇，共九章。为了验证上述假定进而就主要研究问题得出结论，本书第一篇采用了内部和外部透明度的分类标准来评价中国刑事诉讼，并指出中国刑事司法对内部透明度的保障不如对外部透明度那么到位；并且，有关刑事诉讼透明度和建立程序正当性的对抗制教义的适用性，起码在中国的背景下，是高度可疑的。

第二篇进一步揭示了，一方面，中国法律界很大程度上误解了對抗制教义的真实内涵；另一方面，这些教义即便在其发祥地也并非一成不变；而且，對抗制刑事审判在其发源地出现并确立的经过更多地是一个法律史而非法学理论的话题。

第三篇首先从法律史角度重新审视中国，指出其构建正当性的传统模式强调“善”多过“真”，并呈现一种以所谓“外儒内法”为典型的二元框架的道德/意识形态乌托邦加政治利维坦，这一模式难以在相关科技革新所带来的史无前例的社会变革中继续维系，因为互联网媒体和社交网络方面的科技进步所促进的与日俱增的信息透明和对称会直白地暴露传统二元结构不可避免的伪善。因此，新的正当性构建应当是一种呈现透明度和直白性的一元框架。较之所谓“人治”与“法治”的对立话语，这一新框架或可称为“诚治”。在与本书研究主题紧密相关的范围内，这意味着刑事诉讼的透明度应当被视为应对中国刑事司法正当性问题所须加强的最关键的机制。

考虑到中国特有的政治法律传统，最后一章进一步认为，引入（被曲解的）對抗制教义以及相应的以外部透明度为中心的改革方案可能进一步恶化了中国的情况。宣扬（被曲解的）對抗制程序文化及相应的职业伦理导致了程序权力和责任的失衡，进一步扩大了中国刑事诉讼中侦查/检察权与辩护权之间本就过于悬殊的实力差距。此外，对诸如两造对抗和口头交锋等對抗制话语的迷信可能使中国刑事诉讼缺乏（内部）透明度和中立性的情况进一步恶化了。结果，中国的對抗制/英美化改革不但因其难以建立對抗制应有的底层架构而未能实现對抗制诉讼的优势，反而在中国特有的文化语境中加重了對抗制的固有缺陷。

综上，本书结论部分建议强调检察官的中立性和刑事诉讼的内部透明度，加强对警察权的检察制约以及对检察权的司法制衡，恢复法官在必要时候的积极调查权，并以更加谨慎或内部化的方式促进外部透明度。

总之，中国的经验教训说明了（被曲解的）對抗制教义在中国背景下的副作用，提醒我们反对刑事诉讼的教条主义和激进主义。当然，如果从整个世界的大背景审视比较刑事诉讼，我们会发现中国并非孤例。就此而言，笔者仿佛在观赏一出有趣的话剧，剧中男女主角拿错了剧本，各自念着对方的台词。笔者还想到一句中国的俗谚，“媳妇儿总是别人家的好，孩子总是自个家的强”。看起来全世界的法律人过去总喜欢将本国的诉讼制度看作自己的孩子，典型如威廉布莱克斯通爵士以及笔者祖父辈的多数中国法律人，而如今他们倾向于把本国的诉讼制度看成自家的媳妇儿。

与之不同，笔者更愿意将诉讼制度比作鞋子。正如另一句中国古谚所云，“履不必同，期于适足；治不必同，期于利民。”笔者欲将这一比喻引申为，“履不求适足，但勿削足适履；治不求利民，但求勿扰于民。”就此而言，法律移植和刑事诉讼改革一般须注意：首先，要防止教条主义和激进主义，考虑刑事诉讼的底层架构；其次，理想的法律改革最好是一种“帕累托优化”，换言之，改革方案须优先考虑不造成或减少不期或不利的影响和后果。具体到中国的刑事诉讼，这意味着应优先保障内部透明度。

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Annex I

Samples of relevant case file instruments in China

1. Registration Form for Accepting Criminal Cases¹

Registration Form for Accepting Criminal Cases

Reporting Unit:
(Seal)

Number:

reporter	Name		Sex		Age		Address	
	Company			TEL			Source of case	
Delivering Institution			Under-taker				Tel	
Case reported (time, place, brief story, basic information of suspects, damage, etc.)								
Instruction by superior:								
Decision:								
Reception Unit			Reception Place					
Reception Officer			Reception Time					

¹ This document is formed according to Art. 168 of PSOP, which provides, 'When public security organs receive a case, they shall make a registration form and issue confirmation receipts'.

2. Record of Reported Case²

<p>Record of Reported Case</p> <p>Time: ____year ____ month ____ date ____ hour ____ minute to ____year ____ month ____ date ____ hour ____ minute</p> <p>Place: _____</p> <p>The name and unit of the investigator _____</p> <p>Recorder: _____ Unit: _____</p> <p>The case reporter: _____ Gender: _____ Age: _____ Company _____</p> <p>Address: _____ Telephone number: _____</p> <p>Q: _____</p> <p>_____</p> <p>A: _____</p> <p>_____</p> <p>_____</p> <p>_____</p> <p>Q: _____</p> <p>_____</p> <p>A: _____</p> <p>_____</p> <p>_____</p> <p>_____</p> <p>I have checked the record above, which is the same as I said.(handwriting by the case reporter)</p> <p>Signature and thumbprint of the case reporter</p> <p>Date: _____</p>
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- 2 This document is formed according to Art. 166 of PSOP, which provides, ‘Where citizens turn someone in, make a report, accusation or whistle blower report, or where a criminal voluntarily gives themselves up, public security organs shall promptly accept it, inquire into the circumstances, and draft a record; upon confirming that there are no mistakes, the person turning someone in, making a report, accusations, whistleblower complaint or turning themselves in will sign their name and leave thumb print. When necessary, an audio or audio-visual recording shall be made.’

3. List of Evidential Materials Received

List of Evidential Materials Received

Number	Name	Quantity	Characteristics	Remarks
Presenter:		Keeper:	Undertaking Unit (Seal):	
Date:		Date:	Undertaker:	
Date:		Date:	Date:	

This list is in triplicate, one for case file, one for presenter, and for PSO keeper

4. Record of Questioning³

<p>Record of Questioning</p> <p>Time: ___ year ___ month ___ date ___ hour ___ minute to ___ year ___ month ___ date ___ hour ___ minute</p> <p>Place: _____</p> <p>The name and unit of the investigator _____</p> <p>Recorder: _____ Unit: _____</p> <p>Answerer: _____ Gender: _____ Age: _____ Company _____</p> <p>Address: _____ Telephone number: _____</p> <p>Q: _____</p> <p>_____</p> <p>A: _____</p> <p>_____</p> <p>_____</p> <p>_____</p> <p>Q: _____</p> <p>_____</p> <p>A: _____</p> <p>_____</p> <p>_____</p> <p>_____</p> <p style="text-align: center;">I have checked the record above, which is the same as I said.(handwriting by the answerer)</p> <p style="text-align: center;">Signature and thumb print of the answerer</p> <p style="text-align: center;">Date: _____</p>
--

3 This document is formed according to Art.120, 122, and 124 of CPL 2012.

Article 120 The record of an interrogation shall be shown to the criminal suspect for checking; if the criminal suspect cannot read, the record shall be read to him. If there are omissions or errors in the record, the criminal suspect may make additions or corrections. When the criminal suspect acknowledges that the record is free from error, he shall sign or affix his seal to it. The investigators shall also sign the record. If the criminal suspect requests to write a personal statement, he shall be permitted to do so. When necessary, the investigators may also ask the criminal suspect to write a personal statement.

Article 122 Investigators may question a witness at the scene, his/her employer’s premises, his/her domicile or a location designated by the witness. Where necessary, the witness may be notified to provide testimony at a people’s procuratorate or a public security organ. Where the witness is questioned at the scene, the investigators shall present their work certificates; and where the witness is questioned at his/her employer’s premises, his/her domicile or a location designated by the witness, the investigators shall present the supporting documents issued by the people’s procuratorate or the public security organ.

Witnesses shall be questioned individually.

Article 124 The provisions of Article 120 of this Law shall also apply to the questioning of witnesses.

5. Notice of Questioning

XXX Public Security Bureau

Notice of Questioning

(Duplicate)

_____ (20__) No. _____

_____:

Since you know relevant facts regarding the case _____ under our jurisdiction, according to Art.122 Sec.1 of the Criminal Procedural Law of the People’s Republic of China, we hereby notice you to get questioned at _____ (time) on _____ (date) at _____ company.

(Seal)

_____ (date)

The notice has been received.

Person being questioned: _____ (signature)

Date: _____,20____ (handwriting)

This duplicate for case file

6. Certificate of the Decision of Filing a Case

XXX Public Security Bureau

Certificate of the Decision of Filing a Case

_____ (20__) No. _____

In accordance with Art.110 of the Criminal Procedural Law of the People’s Republic of China, hereby decide to file and investigate a case involving XX (count) by XX (suspect).

(Seal)

_____,20__ (date)

This duplicate for case file

7. Custody warrant

<p>XX Public Security Bureau Custody Warrant</p> <p style="text-align: right;">____(20__) No. ____</p> <p><i>In accordance with Art.80 of the Criminal Procedural Law of the People's Republic of China, hereby decide to appoint our investigator _____ to take suspect _____ (gender ____, age ____, address ____) to ____ Jail for custody.</i></p> <p style="text-align: right;"><i>Head (Seal)</i> <i>(PSO Seal)</i> <i>(date) ____,20__</i></p> <p><i>This warrant has been announced to me on ____ (date)</i> <i>Detainee:</i> <i>The duplicate of the warrant has been received, the detainee ____ is in custody.</i> <i>Reception officer:</i> <i>(Seal of the jail)</i> <i>Date: _____</i></p>

This duplicate for case file

8. Notice of custody

<p>XX Public Security Bureau Notice of Custody (Duplicate)</p> <p style="text-align: right;">____(20__) No. ____</p> <p>_____:</p> <p><i>In accordance with Art.80 of the Criminal Procedural Law of the People's Republic of China, our bureau have already, at ____ (time) on ____ (date), taken the suspect _____ of the case _____ in custody, who is now kept in ____ Jail.</i></p> <p style="text-align: right;"><i>(PSO Seal)</i> <i>(date) ____,20__</i></p> <p><i>The Detainee's family _____ or employer _____</i> <i>Address _____</i> <i>The notice of the warrant has been received.</i> <i>The Detainee's family or employer</i> <i>(time) (date)</i> <i>If not notify the family or employer of the detainee within 24 hours after the custody, please indicate the reason:</i> <i>Undertaker _____</i> <i>Time: _____ Date: _____</i></p>

This duplicate for case file

9. Notice of Summoning

XX Public Security Bureau
 Notice of Summoning
 (Duplicate)

_____(20__) No. ____

_____:

In accordance with Art.117Sec.1 of the Criminal Procedural Law of the People's Republic of China, hereby summon you to the Criminal Investigation Department of XX Public Security Bureau for interrogation, by (time) ____, (date) ____,20__.

(Seal)

(date) ____,20__

The Notice of Summoning has been received on: date Signature:
 Arrival time of the person being summoned: Signature:
 Ending time of the summoning: Signature:

This duplicate for case file

10. Record of Interrogation

Record of Interrogation (First)

Time: ____ year ____ month ____ date ____ hour ____ minute to ____ year ____ month ____ date ____ hour ____ minute

Place: _____

The name and unit of the investigator _____

Recorder: _____ Unit: _____

Suspect: _____

Q: _____

A: _____

Q: _____

A: _____

I have checked the record above, which is the same as I said.(handwriting by the suspect)

Signature and thumb print of the suspect
 Date:

11. Request for approval of arrest

XXX Public Security Bureau
Request for approval of arrest

___(20___) No. ___

Criminal suspect XXX [name (alias, previous name, and nick name, etc.), gender, date of birth, place of birth, ID number, nation, education level, occupation, employer, post, address, political status (where NPC deputies or CPPCC members implicated, specify the precise level or session), criminal experience, and information regarding the compulsory measure involved in the present case. where more than one suspects involved, specify one by one.]

The criminal suspect is suspected of XXX (count), reported (complained, delivered) by XXX. [specify the cause and source of the case; specify the starting time of each proceeding during the investigative stage, such as the time of the acceptance and filing of the case; specify the information regarding the suspect's appearance in justice.]

By lawful investigation, it is ascertained: [outline the facts related to the arrest conditions provided by criminal procedure.]

[Where the accused is suspected of more than one crime, enumerate relevant facts one by one; in case of joint crimes, elaborate the fact of the joint crime and the role each suspect plays, and then according to the latter, describe the facts of separate crimes of each suspect respectively.]

The abovementioned facts are based on the following evidence:

..... [list the relevant evidence respectively]

According to the above, the criminal suspect XXX [outline the accusations according to the elements of the crimes], whose act has already violated Art. XX of the Criminal Law of the People's Republic of China, involving the XXX crime, therefore an arrest of the suspect is necessary. Hereby request for the approval of the arrest according to Art. 79 and 85 of the Criminal Procedural Law of the People's Republic of China.

Sincerely to

XXX People's Procuratorate

Head (Seal)

(PSO Seal)

(date) ___, 20__

Attachment: 1. the case file of the present case ___ volumes ___ pages.

2. the custody premises of the suspect.

12. Approval of arrest

People's Procuratorate
Approval of Arrest

Procuratorate ___ Arrest Approval (20__) No. ___

You _____, _____
You _____ applied for approving the arrest of the criminal suspect _____
on _____ year _____ month _____ date with the written *Request for approval of arrest*
No. _____. Upon the review by the procuratorate, the criminal suspect
involves _____ crime, which satisfies the conditions of arrest provided by Art.79 of
the Criminal Procedural Law of the People's Republic of China. Accordingly,
the arrest of the criminal suspect _____ is approved. Please immediately enforce it,
and inform the procuratorate of the information regarding the enforcement
within 3 days.

____,20__ (date)
(Procuratorate Seal)

The third duplicate transferred to the investigative organ

13. Arrest warrant

XX Public Security Bureau
Arrest Warrant

____ (20__) No. ___

*In accordance with Art.78 of the Criminal Procedural Law of the People's Republic
of China, upon the approval/ decision of _____, hereby appoint
investigator _____ of our bureau to enforce the arrest of _____ (gender _____,
age _____, address _____) who is suspected of _____ crime, and send him
to _____ jail for detention.*

Head (Seal)
(PSO Seal)
(date) __,20__

This arrest warrant has been announced to me on _____ (date)

Detainee:

*The duplicate of the warrant has been received, the detainee _____ has been kept in
custody by our jail since _____ (date).*

*(where the suspect has been subject to police custody in advance, fill in the date of
custody.)*

Reception officer:

(Seal of the jail)

Date: _____

This duplicate for case file

14. Notification of arrest

<p>XX Public Security Bureau Notice of Arrest (Duplicate)</p> <p style="text-align: right;">____(20__) No. ____</p> <p>____: _____, due to his suspect of _____ crime, upon the approval of _____, was arrested by our bureau at ____ (time) on _____ (date), and now being kept in custody by _____ Jail.</p> <p style="text-align: center;">(PSO Seal) (date) ____, 20__</p> <p>The Detainee's family ____ or employer _____ Address _____</p> <p>The notice of the warrant has been received. The Detainee's family or employer _____ (time) (date)</p> <p>If not notify the family or employer of the detainee within 24 hours after the arrest, please indicate the reason: Undertaker _____ Time: _____ Date: _____</p>
--

This duplicate for case file

15. Prosecution opinion

XXX Public Security Bureau
 Prosecution opinion

____(20__) No. ____

Criminal suspect XXX [name (alias, previous name, and nick name, etc.), gender, date of birth, place of birth, ID number, nation, education level, occupation, employer, post, address, political status (where NPC deputies or CPPCC members implicated, specify the precise level or session), criminal experience, and information regarding the compulsory measure involved in the present case. where more than one suspects involved, specify one by one. in case of crimes committed by a unit, specify the name and address of the unit.]

The criminal suspect is suspected of XXX (count), reported (complained, delivered) by XXX. [specify the cause and source of the case; specify the starting time of each proceeding during the investigative stage, such as the time of the acceptance and filing of the case; specify the information regarding the suspect's appearance in justice. At the end, indicate that the criminal suspect XXX is suspected of XXX crime, the investigation of which has already been concluded.]

By lawful investigation, it is ascertained:..... [outline the facts discovered through the investigation, including factual elements such as the time, place, course, means, purpose, motivation, results, etc, that relate to guilt. the description should, based on the specific situation of the case, briefly focus on the elements of the crime provided by the criminal law.]

[Where the accused is suspected of more than one crime, enumerate relevant facts one by one; in case of joint crimes, elaborate the fact of the joint crime and the role each suspect

plays, and then according to the latter, describe the facts of separate crimes of each suspect respectively.]

The abovementioned facts are based on the following evidence:

..... [list the relevant evidence respectively]

The abovementioned facts are clear, and the evidence is reliable and sufficient, which is enough to prove the guilt of the suspect.

The criminal suspect XXX [specify whether involving circumstances of crimes such as recidivist, voluntary surrender, or meritorious performances, etc. that may lead to heavier, lighter, or mitigated punishments.]

According to the above, the criminal suspect XXX [outline the accusations according to the elements of the crimes], whose act has already violated Art. XX of the Criminal Law of the People's Republic of China, involving the XXX crime. Hereby submit the case for prosecutorial review according to Art. XX of the Criminal Procedural Law of the People's Republic of China.

Sincerely to

XXX People's Procuratorate

Head (Seal)

(PSO Seal)

(date) ____, 20__

Attachment: 1. the case file of the present case ____ volumes ____ pages.

2. the place of the suspect.

3. ____ items transferred with the case.

4. the victim ____ has already filed the incidental civil action

(fill in the attached items according to the need)

16. Opinion to require the arrest of the criminal suspect

People's Procuratorate

Opinion to require the arrest of the criminal suspect

Procuratorate __ Arrest Opinion (20__) No. __

XXX (the name of the investigative organ),

As for the case in which XXX (name) is suspected of XXX (cause of accusation) who was transferred through your XXX (shorthand of the investigative organ and the file code) *Request for Approval of Arrest*, the procuratorate, upon review, find:

The criminal suspect XXX (specify the name, gender, date of birth, and age) that has not been listed in your *Request for Approval of Arrest* proves to have committed the following criminal acts: (focus on elements of crimes and relevant circumstances, and then present the major evidence). The act of the abovementioned criminal suspect XXX (name) has violated Art. XX of the Criminal Code, could be sentenced to a punishment of not less than imprisonment, and therefore is necessarily subject to an arrest. According to Art.79 Sec.1 of the Criminal Procedural Law of the People's Republic of China, [the suspect] shall immediately be arrested. Please make the written *Request for Approval of Arrest*, and submit it together with relevant case file and evidence to the procuratorate for the review and approval of the arrest.

(date) ____, 20__

(Procuratorate Seal)

17. Decision to disapprove arrest

People's Procuratorate

Decision to Disapprove Arrest

Procuratorate ___ Arrest Disapproval (20__) No. ___

_____,

You _____ applied for approving the arrest of the criminal suspect _____ on _____ year _____ month _____ date with the written *Request for approval of arrest* No. _____.

Upon the review by the procuratorate, _____.

According to Art.88 of the Criminal Procedural Law of the People's Republic of China, the arrest of the criminal suspect _____ is disapproved. Please immediately enforce it, and inform the procuratorate of the information regarding the enforcement within 3 days.

____,20__ (date)
(Procuratorate Seal)

The third duplicate transferred to the investigative organ

Annex II

Relevant legal provisions mentioned

Criminal Procedure Law of the People's Republic of China

Promulgating Institution:	National People's Congress
Document Number:	Order No. 55 of the President of the People's Republic of China
Promulgating Date:	03/14/2012
Effective Date:	01/01/2013
Validity Status:	Valid

Article 5 The People's Courts shall exercise judicial power independently in accordance with law and the People's Procuratorates shall exercise procuratorial power independently in accordance with law, and they shall be free from interference by any administrative organ, public organization or individual.

Article 6 In conducting criminal proceedings, the People's Courts, the People's Procuratorates and the public security organs must rely on the masses, base themselves on facts and take law as the criterion. The law applies equally to all citizens and no privilege whatsoever is permissible before law.

Article 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.

Article 8 The People's Procuratorates shall, in accordance with law, exercise legal supervision over criminal proceedings.

Article 9 Citizens of all nationalities shall have the right to use their native spoken and written languages in court proceedings. The People's Courts, the People's Procuratorates and the public security organs shall provide translations for any party to the court proceedings who is not familiar with the spoken or written language commonly used in the locality.

Where people of a minority nationality live in a concentrated community or where a number of nationalities live together in one area, court hearings shall be conducted in the spoken language commonly used in the locality, and judgments,

notices and other documents shall be issued in the written language commonly used in the locality.

Article 10 In trying cases, the People's Courts shall apply the system whereby the second instance is final.

Article 11 Cases in the People's Courts shall be heard in public, unless otherwise provided by this Law. A defendant shall have the right to defence, and the People's Courts shall have the duty to guarantee his defence.

Article 12 No person shall be found guilty without being judged as such by a People's Court according to law.

Article 13 In trying cases, the People's Courts shall apply the system of people's assessors taking part in trials in accordance with this Law.

Article 14 People's courts, people's procuratorates and public security organs shall safeguard the right of defence and other litigation rights to which criminal suspects, defendants and other participants in litigation proceedings are entitled.

Participants in proceedings shall have the right to file charges against judges, procurators and investigators whose acts infringe on their citizen's procedural rights or subject their persons to indignities.

Article 15 In any of the following circumstances, no criminal responsibility shall be investigated; if investigation has already been undertaken, the case shall be dismissed, or prosecution shall not be initiated, or the handling shall be terminated, or innocence shall be declared:

- (1) if an act is obviously minor, causing no serious harm, and is therefore not deemed a crime;
- (2) if the limitation period for criminal prosecution has expired;
- (3) if an exemption of criminal punishment has been granted in a special amnesty decree;
- (4) if the crime is to be handled only upon complaint according to the Criminal Law, but there has been no complaint or the complaint has been withdrawn;
- (5) if the criminal suspect or defendant is deceased; or
- (6) if other laws provide an exemption from investigation of criminal responsibility.

Article 16 Provisions of this Law shall apply to foreigners who commit crimes for which criminal responsibility should be investigated.

If foreigners with diplomatic privileges and immunities commit crimes for which criminal responsibility should be investigated, those cases shall be resolved through diplomatic channels.

Article 17 In accordance with the international treaties which the People's Republic of China has concluded or acceded to or on the principle of reciprocity, the judicial organs of China and that of other countries may request judicial assistance from each other in criminal affairs.

Annex III

Statistics¹

Chart I

Annual Statistics on Categorized Criminal Cases Filed by PSO

Categories of Cases	Number of Cases			Percentage %		
	2011	2010	2009	2011	2010	2009
Total	6005037	5969892	5579915			
Homicide	12013	13410	14667	0.20	0.23	0.26
Attack	165098	174990	172840	2.75	2.93	3.10
Robbery	202647	237258	283243	3.38	3.97	5.08
Rape	33336	33696	33286	0.56	0.56	0.60
Human Trafficking	13964	10082	6513	0.23	0.17	0.12
Theft	4259482	4228369	3888579	70.93	70.83	69.69
Fraud	484813	457350	381432	8.07	7.66	6.84
Smuggling	1350	1105	1200	0.02	0.02	0.02
counterfeit currency	688	1565	4766	0.01	0.03	0.09
others	831646	812067	793389	13.85	13.60	14.20

NB: The annual number of resolved cases out of those filed in the same year is 2312832 in 2011, 2329947 in 2010, and 2447515 in 2009 respectively, and the corresponding ratio is 38.51%, 39.03%, and 43.86% respectively.

¹ See The Chinese Law Yearbook 2012, pp. 1065-1083; The Chinese Law Yearbook 2011, pp. 1051-1069; The Chinese Law Yearbook 2010, pp. 919-937.

Chart II
Annual Statistics on Categorized Public Security Cases by PSO

Categories of Cases	Number of Cases Accepted			Number of Cases Resolved		
	2011	2010	2009	2011	2010	2009
Total	13165583	12757660	11752475	12563823	12122138	11053468
disturbing the order of workplaces	151437	145463	134120	149787	144340	133091
disturbing the order of public places	478102	391646	417580	477873	389983	415766
provocative acts	123708	142963	164377	117617	163670	157360
Obstructing official performances	31521	33171	36012	30785	32567	35535
illegally carrying firearms, etc.	73422	84148	66628	72657	83677	66280
hazardous-substance-related	24605	27845	18839	24200	27579	18520
battery	4416863	4258427	3791080	4264526	4125377	3640805
Attack	278482	237471	208051	261037	222715	193177
Theft	2081986	1994257	2030135	1814719	1678846	1683624
blackmail	22734	29905	38654	20231	26542	33007
Seizing	46685	48736	52876	38236	38086	41036
stealing or destroying public facilities	17828	19410	26008	15993	16745	23626
forging, altering, reselling negotiable bills or vouchers	18441	16057	20065	18411	16043	20008
Violating hotel industry regulations	151077	175252	144905	149933	174826	144698
House lessor misconduct	226765	182983	153017	225829	182431	152414
fraud	204572	170325	165975	171513	136500	128536
Prostitution or whoring	96162	103215	126140	95294	102407	125175
Gamble-related	367442	387217	641991	363999	383567	639314
Drug-related	365252	357195	346907	363522	355769	346000
others	3988499	3951974	3169115	3887661	3847468	3055496

Chart III

Annual Statistics on Criminal Cases Handled by the People's Procuratorates²

Number Year	Accepted		Resolved		Prosecuted	
	Cases	Suspects	Cases	Suspects	Cases	Suspects
2010	873864	1379969	794939	1230199	766394	1189198
2011	961363	1470589	853581	1281631	824052	1238861

Chart IV

Annual Statistics on Arrest³ and Prosecution by the People's Procuratorates

Number Year	Arrest		Prosecution	
	Cases	Suspects	Cases	Suspects
2009	633118	958364	749838	1168909
2010	627642	931494	766394	1189198
2011	640567	923510	824052	1238861

Chart V

Annual Statistics on the Number of the People's Procuratorates at All Levels

Level	Year	2009	2010	2011
Total		3658	3643	3640
SPP		1	1	1
Provincial		33	33	33
City		403	400	399
District		3005	2973	2970
Station		216	236	237

2 See The Chinese Law Yearbook 2012, p. 208; The Chinese Law Yearbook 2011, p. 202.

3 The wording 'arrest' used in Chinese criminal procedure actually refers to pre-trial detentions which may last for years.

*Chart VI**Annual Statistics on the Number of Staff Serving in the People's Procuratorates*

Post	Year	2009	2010	2011
Total		231705	236918	241232
Procuratorial Staff	Sum	218254	223334	227295
	Chief	3535	3538	3432
	Deputy Chief	11246	11380	11405
	MPC ⁴	16177	16966	17855
	Procurator	92053	91697	92256
	Associate	23528	25064	26454
	Secretary	25151	24410	24173
	Guard	15331	15848	16197
Other Officers	31233	34431	35833	
Auxiliary Staff		13451	13584	13627

*Chart VII**Annual Statistics on Categorized Workload of the People's Procuratorates*

Case	Year	2011	2010	2009
Investigation		32567	32909	32439
Arrest Approval		640567	627642	633118
Public Prosecution		824052	766394	749838
Protest		5346	5425	3963
Petition		8395	10701	3570

*Chart VIII**Annual Statistics on the Number Related to Criminal Defence*

Item	Year	2011	2010	2009
Law Firm		18235	17230	15888
Licensed Lawyer		214968	195170	173327
Criminal Defence		569330	530800	564204
Legal Aid		113717	112264	121870

4 Member of Procuratorial Committee.

*Chart IX**Annual Statistics on Categorized Criminal Cases Heard by All the People's Courts*

Case	Year	2011	2010	2009
First Instance		845714	779595	768507
Second Instance		98937	101786	100547
Retrial		3055	3356	2788

Curriculum Vitae

Shuai Zhang (1984) was born in Qingdao, China. He obtained his first law degree at China University of Political Science and Law in 2007. He acquired the Legal Professional Qualification Certificate of China in February 2009, and was registered as a barrister in Shandong Province in 2010. He obtained an LL.M in Human Rights Law at China University of Political Science and Law, where he specialized in Civil Rights and Criminal Justice. In 2012, he graduated on a master thesis focusing on China's death penalty review procedure and the right to life. From October 2012 onwards, Shuai worked as a PhD candidate at the Willem Pompe Institute for Criminal Law and Criminology at the Utrecht University, under the bursary of China Scholarship Council.

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