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Written Evidence and the Absence of Witnesses:

The Inevitability of Conviction in Chinese Criminal Justice

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A thesis submitted in fulfilment of the requirements for
the degree of Doctor of Philosophy

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This thesis is dedicated to

John

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Abstract

Through analysis based on an empirical study of the Chinese criminal process, this thesis examines the underlying reasons that lead to a striking feature of criminal trials in China---the absence of witnesses. The Chinese criminal justice system routinely relies on official written dossiers to determine the guilt or innocence of the accused. To investigate whether the constructed written evidence is truly reliable, participant observation and semi-structured interviews have been conducted to explore how these investigative dossiers are created, scrutinised and utilised at different stages of the criminal process. Themes that emerge in this study include the police's manipulation and fabrication of written statements, prosecutors' acceptance of, and even encouragement of, police malpractice in falsifying evidence, coerced prosecutorial interrogation in pursuit of a guilty plea, the pro forma trial process, predetermined judicial outcomes based on the official dossier produced and marginalised defence practice throughout the criminal process.

Approaching the enquiry from an internal perspective of the legal institutions for the first time within empirical research, this study outlines the key issues with the Chinese criminal justice system through examination of the strategic inter-relationships between the key legal actors, the deep-seated legal culture embedded in legal actions and the structural injustices that follow. Positioning these findings within the Chinese socio-political context, this study reveals that the criminal justice system in China is not a precise truth-finding process, but serves as a State apparatus of social control. The criminal justice system has been structured through the Appraisal System, bureaucratic management, and the central value of collectivism in such a way as to maintain the stability of the authoritarian regime. None of China's criminal justice institutions are capable of functioning independently to protect innocent individuals from being wrongly accused and convicted. Thus, wrongful convictions should not be seen as aberrational or exceptional, but as an inevitable outcome of established deficiencies.

Abbreviations

CCP	Chinese Communist Party
CID	Criminal Investigation Department (UK)
CPB	Criminal Police Brigade (People's Republic of China)
CPL	Criminal Procedure Law of People's Republic of China
PSB	Public Security Bureau (People's Republic of China)

Chapter 1 Introduction

This study seeks to examine one of the most striking features of criminal trials in China: the absence of witnesses in court and the implications that this might have for a better understanding of the Chinese criminal justice system. It does so in the light of empirical research based on a six-month participant observational period and 28 semi-structured interviews covering different regions across China. The introduction of the Criminal Procedure Law 1996 (CPL 1996) is regarded as a milestone in the history of the Chinese legal system, which was seen as ushering in the start of a new era of reform in the direction of an adversarial procedure.¹ The position of the court in criminal proceedings is believed to have been enhanced under the terms of the new reform and prosecutors and defence lawyers are allowed to play a more active and substantial role in the trial.² Differing from many common law countries, where witnesses giving oral testimony in contested trials is normal practice, in China, witnesses not attending the court to physically produce testimony has become routine. Their statements are not delivered orally and cross-examined, but take the form of written documents read out to the court.

As is indicated in other criminal systems that have transformed towards a more adversarial-based procedure, such as Latin America and Italy,³ establishing the trial principle of orality and moving away from reliance on a dossier of written statements are absolutely crucial to their legal reforms. In China, with almost no live testimony in the

¹ Xiao Chen, 'The milestone of the development of China's Criminal Justice: An interview on the reform of Criminal Procedure Law with the director of legal reform panel in the Supreme People's Court of China Zhang Sihan' (1996) 1, *Annual report of China*, 18; Chen Rongbin et al, '1996 nian xingshisusong faxue yanjiu de huigu yu zhanwang (Rethinking and looking ahead 1996 Criminal Procedure Law)' (1996) 1 *Faxuejia (the Jurist)* 69; Huang Taiyun, 'Xingshisusong zhidu de zhongda gaige---Xingshisusong xiugai de jige zhongda wenti shuyao (An important reform of criminal justice system: Restating some important issues)' (1996) *Zhongguo Faxue (Law of China)*, 2.

² See Randall Peerenboom, *China's long march toward rule of law* (Cambridge University Press 2002) 47; also see Michael McConville et al, *Criminal justice in China: An empirical enquiry* (Edward Elgar 2011) 242.

³ See Maria Dakolias, 'A strategy for Judicial Reform: The experience in Latin America' (1995) 36 *Va. J. Int'l L.*, 167; Stephen P. Freccero, 'An introduction to the New Italian Criminal Procedure' (1994) 21 *Am. J. Crim. L.*, 345.

courts, other than that of the defendant, written records gathered by state officials contained in the dossier continue to carry a great deal of weight in judicial decision-making. Given the significant role of case dossiers, this research aims to understand how they are constructed by the police, reviewed by the prosecutor and considered by the courts. By examining the way that the case for prosecution is built and processed, this research hopes to find out whether it is, *ceteris paribus*, safe for the court to rely on the case dossier to determine the guilt/innocence of the defendant.

Since 1996, there have been plenty of follow-up judicial interpretations and regulations promulgated to consolidate the achievement of the legal reform of CPL 1996. In 2012 the passing of the revision of the Criminal Procedure Law (CPL 2012) is seen by many as a continuity of the legal reform which is highlighted by its declaration of the respect of human rights. Whilst there are several studies evaluating the generality of China's progress towards the rule of law,⁴ as well as certain less debated assessments of legal reform in the area of criminal justice,⁵ this study will attempt to examine the values that underpin the criminal system, and the ways in which they continue to dominate and so constrain the possibility of significant change. Comparative accounts from other jurisdictions have indicated there is much still to be done in the legal reform process in China. Importantly, the success of the criminal justice system should be sustained by bona fide legal officials who are committed to upholding the legality of the process and should be founded on an insusceptible system not capable of being affected by undue influences. Legal reform cannot be divorced from the state interest⁶ and successful examples often occur alongside

⁴ See Randall Peerenboom, *China's long march toward rule of law* (Cambridge university press 2002) 46 and Randall Peerenboom, *China Modernizes: Threat to the west or model to the rest?* (Oxford University Press 2007) 40.

⁵ See Mike McConville et al, *Criminal justice in China: An empirical enquiry* (Edward Elgar 2011) 425-453.

⁶ *ibid* 449.

the political will for democracy.⁷ It cannot be attained if it is shackled to a deep-seated political ideology, in which the law is merely a tool for political expediency.

An understanding of the practice of Chinese justice in its socio-political context will contribute to the evaluation of the reform of criminal procedure. This study will offer the observation of legal actors' activities surrounding the construction of criminal dossiers, which lie at the centre of different criminal processes and decisively determine the ultimate issue of guilt or innocence. By examining the integrity and roles of the police, prosecutors and judges, and their relationships; the status of the defence; taking account of the impact of the new legislation 2012, this study will assess whether the legal reforms have effected any change on the operation of the Chinese criminal justice system. It is wise to begin the study with a backdrop to Chinese legal culture and the basic functioning of its legal institutions.

1. The Chinese Collectivism Tradition

Social institutions and criminal processes can be analysed at different levels. To have a better understanding of any criminal justice system, knowledge of the legal culture is an essential prerequisite to grasp the richness and complexity of the whole. In China, the innate idiosyncrasy of the Chinese legal system and the culture that underpins the criminal system are deeply engrained in a traditional value that venerates collectivism. Differing from the western liberal concept that individual rights are deemed as a potent shield to protect citizens from the long arm of the state,⁸ there is no such thing as individual rights

⁷ See Maria Dakolias, 'A strategy for Judicial Reform: The experience in Latin America' (1995) 36 Va. J. Int'l L. 169, 169.

⁸ See Thomas Paine, *Rights of man, common sense and other political writings* (Oxford University Press 1995) 64.

that are possessed by people in the Chinese collectivism tradition.⁹ The classical legal theories of *Li* in ancient China, of which a core doctrine was absorbed and demonstrated in Confucianism, has dominated and fostered Chinese culture for over four thousand years, stretching its influence from guiding legislations of the state to everyone's life routines.¹⁰ *Li* is conventionally translated as rites or rituals,¹¹ a set of rules of morality that safeguards the hierarchical social and familial roles in a strictly ranked society of China.¹² According to the doctrine of *Li*, people are literally defined by their familial and social status. In a family, the elder has complete power over the minor, and in the State, homogenously, the emperor, who was regarded as a patriarch of the nation, had a supreme authority over his subjects.¹³ People are presumed to be born naturally unequal and bound to fulfil their duties based on their social and familial roles to maintain the collective harmony of the society.¹⁴ The welfare of the individual is believed to be in line with the interest of the State.¹⁵ People have no rights, but a duty to keep harmonious social order. It is also unnecessary for people to hold rights against the State, because the benevolent government works purely for the interests of the individual. Robert Weatherly observed:

People deserve protection, but have no need for rights against the government any more than a filial son does against his benevolent father. Moreover, government is assumed to be, under normal circumstances, benevolent. There is, therefore, no need to protect citizens against it. [...]

Subjects were not 'persons'. They were like 'infants' or ignorant children who needed to be raised with a firm hand, to have their decision made for them. (Robert Weatherly, 1999:49-50)

⁹ See Robert Weatherly, *The discourse of human rights in China: Historical and ideological perspectives* (Palgrave 1999) 98.

¹⁰ See Zeng Xianyi et al, *Zhongguo Fazhishi (The history of Chinese Law)* (China's People's University Press 2000) 68.

¹¹ See Randall Peerenboom, *China's long march toward rule of law* (Cambridge university press 2002) 28.

¹² See Cai Dingjian, *Lishi yu Biange: Xinzhongguo Fazhi Jianshe de Licheng (History and transition: The development of legal construction in People's Republic of China)* (China University of Political Science and Law Press 1999) 65.

¹³ See Zeng Xianyi et al, *Zhongguo Fazhishi (The history of Chinese Law)* (China's People's University Press 2000) 65; Cai Dingjian, *Lishi yu Biange: Xinzhongguo Fazhi Jianshe de Licheng (History and transition: The development of legal construction in People's Republic of China)* (China University of Political Science and Law Press 1999) 78.

¹⁴ See Robert Weatherly, *The discourse of human rights in China: Historical and ideological perspectives* (Palgrave 1999) 46.

¹⁵ Ibid.

There is no ethical foundation of human rights in the *Li* system of morality and they were negated in law as well. 'People were passive recipients of the law, rather than active participants within it.'¹⁶ Such collectivism of Chinese culture coincides with the ideology of Marxism which defines an individual as a 'species being'. Marxist scholars expound this concept by suggesting that each individual's self-realisation is ultimately dependent upon society.¹⁷ According to Marxism, the ruling party is the vanguard of the proletariat, which has no special interest of its own, apart from the interests of the working class. As such, to achieve the emancipation of the world, as a 'member' of society, each individual should first and foremost fulfil the duties that are owed to that society in pursuit of the promotion of the greater good.¹⁸ With an identical conception, this ideology is generally accepted and used as guidance in revolutionary practice and the contemporary development of China. The Communist Party of China strenuously advocates the collective interests of the class and encourages people to voluntarily give up any rights which could be adverse to the public welfare. A Communist leader stated:

At no time and in no circumstances should a communist place his personal interests first; he should subordinate them to the interests of the nation and of the mass. [...] Every party member should completely submit himself to the interests of the Party and self-sacrificingly devote himself to the public duty. (Liu Shaoqi, 1980: 89)

Marxism suggests that there is a mutuality of interests between the State as the dictatorship of the proletariat and the people it rules. The way that Marxism perceives rights of the individual dovetails with the heritage of Confucianism. 'While on the surface of things the introduction of Marxism in 1949 constituted a radical break from the past, certain features of Confucianism have continued to have an impact on the Chinese Marxist ways of

¹⁶ Robert Weatherly, *The discourse of human rights in China: Historical and ideological perspective* (Palgrave 1999) 57.

¹⁷ Ibid 93.

¹⁸ Ibid 99.

thinking'.¹⁹ In this classic notion of Marxist collectivism, public power is exercised in the name of the people.²⁰

Such collective values are also eminently epitomised in the practice of Chinese criminal justice, in which human rights have frequently been disregarded in favour of the collective goodness of social control. The accused is required to confess to be allowed for rehabilitation and her reintegration into society. This value pressurises the accused person to comply with the authority rather than to question its lawfulness. As commented upon by McConville (2013):

Legitimacy was enhanced by traditional cultural values emphasizing the importance and value of hierarchical structures, deference to authority, retribution and deterrence and the integration of these into the state apparatus, rather than to serve the interests of the individual or human rights.²¹

In the case of the judiciary, the collective value has provided it with a paradoxical role, where the court is said to be independent of the executive, yet it must enshrine the 'leadership of the Communist Party' as its guideline.²² As a power to review state action, the judiciary has never been given enough weight by the state, which associates closely with the traditional psychological-social attitude that values the authoritativeness of the State. Since human rights were described as 'part of a devious attempt by the ruling bourgeois class to protect its monopoly on political power', the main task of the judiciary is to process criminal cases through to conviction and punishment, rather than to act as any real check upon the legitimacy of the State.²³ Judges are not given the autonomy to make a decision on the case; the key decisions are made by those at the apex of the hierarchy or in

¹⁹ Ibid 130.

²⁰ In China, the police, procuratorate and the court are all titled as of the people. The police are named as the People's police, the procuratorate is named as the People's procuratorate and the court is called the People's court.

²¹ Mike McConville, 'Criminal justice in China and the West', in Mike McConville and Eva Pils (eds.), *Comparative perspective on Criminal justice in China* (Edward Elgar 2013) 50.

²² In China, the judicial independence is ascribed to the court not the judge. Judges do not enjoy any independence either in their decision-making; their status and financial situation is not as secured as their counterparts in the West. Judges' salaries are allocated by the government at the same level.

²³ Steven Lukes, *Marxism and Morality* (OUP 1985) 34

some other administrative structure.²⁴ The value of collectivism, as well as the organisational structure of the criminal process based upon such a principle, is at odds with the concept of an adversarial trial, the rationale of which is built on curbing and the supervision of power rather than the virtue of the state. Whilst the discourse of the Western legal system is constructed upon the disbelief and the unreliability of State officials, the Chinese collectivism tradition is based upon the kindness of human nature.

People at birth are naturally good. Their natures are similar but their habits make them different. (Wang Yinglin, Three character classic)

Since the traditional value and the rationale of the modern trial are irreconcilable, the court fails to act as an independent adjudicator assessing and testing the cases prosecuted by the State to achieve the goal of an accurate outcome. State power which is immune from judicial review, is apt to be capricious and abused. The defendant can then become the vulnerable victim of the system, as the court fails to act against arbitrariness and so weed out potentially innocent defendants in the process. The accused, who is deemed to fail to fulfil her social duty, to have let down both herself and society, and now needs to co-operate in the process of restoration to the community, does not have, or deserve to have any rights to question the system. The defence rights, along with other human rights, are totally negated under this socialist ideology. As the philosophy overwhelmingly stresses the performance of social duties and the superior interests of the public, the realisation of the collective interest has superseded individual rights.

Here a parallel can be drawn from the experience of Japan, whose ancient criminal justice system was greatly influenced by Confucianism, yet has embarked on a diverged path from that of China, enshrining the principle of due process after its exposure to modern Western civilisation.²⁵ In the seventh and eighth centuries, Japan imported the Chinese political and

²⁴ Even though it is provided that court enjoys independence, some administrative power such as political-legal committee which is both administrative and party related, have considerable influence on court's decision.

²⁵ See Tokikazu Konishi, 'Diversity within an Asian country: Japanese criminal justice and criminology', in Jianhong Liu et al (eds.) *Handbook of Asian Criminology* (Springer 2013) 215,216.

legal system which was founded by Confucianism.²⁶ Informed by Confucianism, Japanese ancient legal system was based upon the theoretical grounds that human nature is fundamentally good.²⁷ From the middle nineteenth century onwards, Japanese criminal justice system has undergone major transformation as a result of its encounter with Western democracies. Waves of reform were first initiated by the introduction of European civil law systems (French Law and German Law), later enforced by the occupation of the U.S. after the Second World War.²⁸ Radical changes brought about by the Allied Forces (America) were welcomed without overt resistance from the general public; and political and social values that emphasise the rights of individuals, were promoted and embedded firmly in Japanese society.²⁹ As such, the tradition of Confucianism was severely criticised by scholars and its influence on the legal framework became minimal.³⁰

In comparison with Japan, modern Chinese history is fraught with turbulence and foreign invasions, depriving itself of a stable period of embracing the fruit of legal process which had developed in Western civilisation. With the rule of the Communist regime, China had not been open to ideologies alternative to the collectivism. It was not until the 1980s that China started to experience economic growth supported by the governmental reform and open policies (*gaige kaifang zhengce*). With the modernization of China, the orthodox viewpoint of collectivism has started to be challenged. The right of confrontation introduced by the CPL 1996, advocating a militating of the individual against the collective interest, is not at ease with the harmonized equilibrium that is pursued by tradition. CPL 2012, for the first time, announced the respect and protection of human rights as its basic aim, opening up a pluralist orientation as a guide to deal with the

²⁶ Hiroshi Oda, *Japanese Law*, (OUP 3rd edition, 2009) 13-26. The Japanese legal codes during the *Meiji* Restoration were primarily under the influence of the Chinese legal tradition, especially in the sphere of codification; and the Criminal Code in 1882 was a product of legal transplant drafted by Confucian scholars who had expertise in Chinese law. Paul Ch'en, *The formation of the early Meiji legal order: The Japanese code of 1871 and its Chinese foundation* (OUP 1981) 1-31.

²⁷ Tokikazu Konishi, 'Diversity within an Asian country: Japanese criminal justice and criminology', in Jianhong Liu et al (eds.) *Handbook of Asian Criminology* (Springer 2013) 215.

²⁸ Hiroshi Oda, *Japanese Law*, (OUP 3rd edition, 2009) 2-22.

²⁹ Ibid 22.

³⁰ See Tokikazu Konishi, 'Diversity within an Asian country: Japanese criminal justice and criminology', in Jianhong Liu et al (eds.) *Handbook of Asian Criminology* (Springer 2013) 216.

relationship between the State and the individual citizen.³¹ More defence rights are incorporated into the law, whilst State power has come under supervision and been confined. Whereas these liberalized introductions of individual rights substantially conflict with traditional value, it does not imply that the collective tradition is eclipsed or stifled. On the contrary, it still has an extensive influence on the operation of the legal system, with the potential to continue to undermine these modernized legal notions. As this study unfolds, the traditional view of collectivism and its exemplification in the operation of the criminal process will be further touched upon in relation to the functioning of the system.

2. The Legal Institutions in the Chinese Political Context

To have a better understanding of the Chinese criminal justice system, it is useful at the outset to provide a general account of the roles of the main legal institutions. Although China has claimed to become more adversarial during its legal reform, the general feature of adversariness is very weak within its system. Its process is unilaterally dominated by the activities and decisions of three core State institutions: the police, the procuratorate, and the court. The concept of the Iron Triangle---the coalition of the police, the procuratorate and the judiciary---defines the criminal process in China, leaving the defence with little standing, status and influence within the system.³² The defence has very limited involvement in the pre-trial stage. Her role is constrained to obtaining information and evidence either from her clients or the institutions. Defence lawyers are not allowed to be present at the suspect's interrogations or communicate with the police about the case in the pre-trial stage. Courts are subject to political influences and entangled interest connections with other legal institutions, and as such it is hard to guarantee a neutral and impartial

³¹ See Article 2 of the CPL 2012.

³² This term has been often used by scholars who study Chinese criminal justice system, see Li Enshen, 'The Li Zhuang case: Examining the challenges facing criminal defence lawyer in China' (2010) 24:1 *Columbia Journal of Asian Law*, 129, 161.

judgment. Within the wider socio-political context, the structure of the legal system and the operation of the legal institutions are controlled by the Communist Party. The framework and the practices of the criminal justice institutions have been shaped by the Party's need for social control, presenting some characteristics prioritising the demands of the Party.

2.1 The Police, the Procuratorate and the Courts: The Iron Triangle

In a country where the Communist Party is the only political party entitled to rule, the demarcation between the interests of the State and that of the party is blurred. This leads to a situation where, in many cases, the Party and the State are interchangeable and represent the same authoritative influence upon the operation of legal institutions. In this context, the Chinese criminal justice institutions are similar to their counterparts in some Eastern European countries with a legacy of the Soviet legal culture. The primary function of their legal professions, who owe a strong allegiance to the State, is to serve the interest of the party.³³ It is generally perceived in China that the police, the procuratorate and courts are 'the same family'. The police, prosecutors and judges identify themselves as working on the same battlefield against their common enemy---crime. The Iron Triangle is inquisitorial-orientated institutional relationship, the joint interest of which is to root out offenders by any efficient means. The three institutions have been sometimes likened to 'three stations on an assembly line, processing the raw materials (criminal offenders) and finally passing it along to the next stage---labour reform---in which criminals were to be made into "useful timber" for the construction of socialism'.³⁴

³³ See Ed Cape and Zaza Namoradze, *Effective criminal defence in Eastern Europe* (Legal aid reformer's network, 2012) 451.

³⁴ See Harold Tanner, *Strike hard: Anti-crime campaigns and Chinese criminal justice, 1979-1985* (Cornell University East Asia Program 1999) 31-32.

The three institutions have an overlapping history in the established regime of the People's Republic of China, by which they are defined as the institutions of the people's democratic dictatorship.³⁵ Since the foundation of the People's Republic of China in 1949,³⁶ the legal system has been utilised as an instrument in the fight against counterrevolution.³⁷ Under socialism, crime always has a political meaning and a class character. According to the Communist Party, political factors were inevitably involved when a person committed a crime.³⁸ To deal with any offence, a clear political stance was considered as crucial and the criminal process was controlled and supervised by the Party to maintain 'true justice'.³⁹ Prior to the Cultural Revolution, criminal cases were collaboratively processed by the joint workgroups, which were comprised of police officers, a procurator and a judge.⁴⁰ When crimes were reported, 'the workgroups would leave the office and, in close cooperation with local organisations such as work units, neighbourhood committees, party cells, and the like, dispose of the cases on the spot'.⁴¹ The suspect's conviction and sentence were pronounced by the workgroup; the court was then left with the task of reviewing the conviction and fixing the precise punishment. The sentence was proclaimed and the offender was expected to admit her crime, show repentance, and accept the punishment in front of a mass audience. As criminal justice was viewed as a political affair,⁴² the separation and independence of the roles of the investigation, prosecution and trial vanished. Police, prosecutors and judges were merely different parts of the same entity, leaving no room for impartiality.

³⁵ See also Fu Hualing, 'Putting China's Judiciary into Perspective: Is it independent, competent, and fair?' in Erik Jensen and Thomas C, et al (eds.), *Beyond Common knowledge: empirical approaches to the rule of law* (Stanford University Press 2003) 194-219.

³⁶ The Crime of counterrevolution was finally aborted by the Criminal Law of P.R.C 1997 and replaced by the crime against security of the state in the year of 1997.

³⁷ The term 'counterrevolution' was defined as 'any activity that aims at overthrowing or undermining the democratic dictatorship', see Klaus Muhlhahn, *Criminal justice in China* (Harvard university Press 2009) 179.

³⁸ Klaus Muhlhahn, *Criminal justice in China* (Harvard university Press 2009)192.

³⁹ Ibid.

⁴⁰ Ibid, 193

⁴¹ Ibid.

⁴² Ibid.

This informal workgroup system has de facto a far-reaching consequence upon the contemporary criminal justice practice in China. In the 1980s, as part of the Party's public order maintenance policy, the ultimate judicial work was 'to support and coordinate the police and the procuratorate in the struggle of punishing crimes'.⁴³ Initiated by the central government, a series of 'Hard Strike' (*yanda*) anti-crime campaigns were launched in the early 1980s, with on-going sequences through to the current time.⁴⁴ Politically motivated and legitimised, 'Hard Strike' is a movement to swiftly and harshly combat crime waves.⁴⁵ The processing of cases during the campaigns pursued efficiency and cases were handled in an extremely rapid manner.⁴⁶ During these anti-crime crackdowns, investigation and prosecution were merged and the judiciary became a rubber stamp on the procuratorate's decision on the conviction of the accused.⁴⁷ The accused was treated as a class enemy sabotaging political order and subsequently her procedural rights were curtailed or cancelled. The State showed urgency to punish suspects rather than legitimately administering the criminal process. Serving the political interest and maintaining social control became, and continues to be the joint mission of the police, procuratorate and courts. Rather than the law, they are subordinate to their master, polity.

The fact that the legal officials in the three institutions are all recruited as public functionaries bestows on them a strong sense of shared identity: they are part of the

⁴³ He Yongjun, *The construction of the People's Court: 1978-2005 (Renmin Fayuan Jianshe:1978-2005)*(China Social Science Press 2008) 111.

⁴⁴ There are three nationwide Strike Hard periods in 1983, 1996 and 2001-2003 respectively. However, more Strike Hard campaigns are also launched and still going on locally from time to time restricted to certain specific regions and specific crimes. For example, the Winter Strike Hard carried out in Chifeng city in 2012 cracked down 845 robbery cases, 19 gangsters and arrested 146 suspects. See the report available at <http://news.sina.com.cn/o/2012-12-26/171025900585.shtml>. Analysis of the national campaign of 2001-03 see Susan Trevaskes, 'Severe and Swift Justice in China' (2007) 47 *Brit.J.Criminol.* , 23, 41.

⁴⁵ See Li Enshen, 'The Li Zhuang case: Examining the challenges facing criminal defence lawyer in China' (2010) 24:1 *Columbia Journal of Asian Law*, 129, 150.

⁴⁶ For instance, in the 2001 anti-crime crackdown, the Beijing police investigated 2,095 cases and arrested 1,088 suspects within five days, from October 27 to October 31. See Li Enshen, 'The Li Zhuang case: Examining the challenges facing criminal defence lawyer in China' (2010) 24:1 *Columbia Journal of Asian Law*, 129, 152; See also see Susan Trevaskes, 'Severe and Swift Justice in China' (2007) 47 *Brit.J.Criminol.* 23-41.

⁴⁷ Ibid.

bureaucratic authority seeking social stability and crime control. Article 7 of CPL 1996 is a stipulation that facilitates this coalition stating:⁴⁸

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.

On the surface, this article has provided the three law enforcement agencies with separate accountabilities and interrelated checks to assist and reinforce each other's work. However the ideology of social control that glues the three elements together is evidently accommodated in the law which underlines cooperation rather than a balanced check on day to day practice.⁴⁹

Whilst the police, the procuratorate and the judiciary are closely allied, within the tripartite network, prosecutors and judges have the closest relationship, partially because judges and prosecutors come from a similar training background. Judges and prosecutors need to pass the National Unified Judicial Examination which has been in operation since 2001.⁵⁰ Although the same educational requirement has been applied to defence lawyers, they remain an outsider of the Triangle bureaucracy. Their professional status necessitates representing the suspect who is treated as an enemy of the People, thereby diminishing their political and social standing. The defence role has not been regarded as a necessity to strengthen the integrity of the process.⁵¹ Defence lawyers are alienated and marginalised by state officials working in the criminal justice institutions, who see them as no better than the 'criminals' that they represent.⁵² They are portrayed as professionals whose primary work is to set free criminals by corrupting judges. The defence and the prosecution in

⁴⁸ Article 7 of CPL 1996 remains intact in CPL 2012.

⁴⁹ See Li Enshen, 'The Li Zhuang case: Examining the challenges facing criminal defence lawyer in China' (2010) 24:1 *Columbia Journal of Asian Law*, 129,160.

⁵⁰ See Mike McConville et al, *Criminal justice in China: An empirical enquiry* (Edward Elgar 2011) 379.

⁵¹ Ibid.

⁵² This is comparable to France where defence lawyers are described as an unwelcome auxiliary inferior to the *magistrats* (a collegial bond of the *procureur*, the *juge d' instruction* and the trial judge). See Jacqueline Hodgson, *French criminal justice: a comparative account of the investigation and prosecution of crime in France* (Hart publishing 2005) 114; Also see Jacqueline Hodgson, *Human Rights and French Criminal Justice: Opening the door to Pre-Trial Defence Rights* (Hart publishing 2004) 185.

general are not equally armed, apart from a small proportion of lawyers who have embedded institutional or personal ties with the institutions.⁵³ Defence lawyers and suspects are looked upon as 'second-class citizens in the eyes of the state parties', as they have confronted and challenged the collective authority of the State.⁵⁴

The historically defined unity of the Iron Triangle, that has been forged over fifty years, has proved to be sturdy and difficult to fracture or rebalance.⁵⁵ China's criminal justice system is dominated and operated by a culture of law-enforcement collusion that repels legal representation and resists modification.⁵⁶ In the following sections, a brief background of the separate roles of the legal actors will be presented as a background to the analysis in the subsequent chapters.

2.2 Police Power

Chinese police, or the Public Security Bureau (PSB), is seen as the most powerful of the legal institutions.⁵⁷ The minister of the PSB is a standing member of the Political Bureau of the Central Committee, the core institution at the heart of the leadership system in terms of both power politics and the Party-state's policy coordination.⁵⁸ At a local level, the leader

⁵³ See Sida Liu and Terence C. Halliday, 'Political liberalism and political embeddedness: Understanding the politics in the work of Chinese defence lawyers' (2011) 45:4 *Law and society review*, 831,859.

⁵⁴ Mike McConville et al, *Criminal justice in China: An empirical enquiry* (Edward Elgar 2011) 416.

⁵⁵ See Sida Liu and Terence C. Halliday, 'Recursivity in legal change: lawyers and reforms of China's Criminal Procedure Law' (2009) 34:4 Fall, *Law and Society inquiry*, 911; and also see Victor Li, *Law without lawyers---a comparative view of law in China and the United States* (Westview Press 1978) 54.

⁵⁶ Ibid.

⁵⁷ This has been generally noted by scholars. Chen Xingliang, 'Restrictions and Separation of Power: Police Power in Criminal Justice [J]', (2002) *Law Science (Journal of Northwest Institute of Political Science and Law)* 1 ; Sun Ivan Y et al., 'A comparison of Chinese and the US police cadets' occupational attitudes' (2010) 38:4 *Journal of Criminal Justice* 640, 647.

⁵⁸ See Kenneth Lieberthal and David Lampton, *Bureaucracy, politics and decision making in post-Mao China* (University of California Press 1992) 61.

of the PSB is routinely appointed as the head of the Political-legal Committee, which supervises and deploys the activities of the police, the procuratorate and the courts.⁵⁹

The PSB has a history in close proximity to the centrality of the Party. The first PSB members in the Communist regime were selected from the Intelligence Security Squad of the Party, a secret military agency loyal to the leadership of the Party.⁶⁰ In the early era of the People's Republic of China, the PSB undertook the political role of 'eliminating the enemies and antagonistic elements in the class struggle',⁶¹ enabling the consolidation of the young regime. The police apparatus has had to adapt to the changing context of the 1980s when the Party subdued the ideology of class repression and entered the era of economic reform. However the Party-controlled tradition continues to define the contemporary policing role. The PSB plays a bigger role than the judiciary in Communist politics. Compared to the PSB, the procuratorate and the judiciary have no such representation within the Executive hierarchy. The PSB is operated by a dual leadership system, accountable to both the higher police power, and the integrated parallel leadership of local government and Communist Party Committee of the same level.⁶²

Whilst the policing function is similarly defined in England & Wales as with China, as the maintenance of public order and the prevention and detection of crime, the work of the Chinese police is more comprehensive and the nature of policing is much more complicated. A variety of categories, such as passport control and the fire service that are undertaken by Chinese police, are controlled by the Home office and local councils in England and Wales. Investigation involving major crimes, such as murder and rape, is

⁵⁹ See Mike McConville et al, *Criminal justice in China: An empirical enquiry* (Edward Elgar 2011) 378; see also Chen Ruihua, *The fronting edge of Chinese criminal justice (Xingshi Susong de Qianyan Wenti)* (2nd edn, China Renmin Press 1999) 527.

⁶⁰ Zhang Zhaorui, 'Jincha Lishi Yanjiu Lunyao (The synopsis of the research on the history of the PSB)' (1999) 1 *Jiangxi Gong'an Zhuanke Xuexiao Xuebao (Journal of Jiangxi PSB Training School)*, 91.

⁶¹ Tao Lung-sheng, 'The criminal law of communist China' (1966) 52 *Cornell L. Rev.*, 43, 44.

⁶² The Chinese system of Party controls over the government by using the 'parallel rule': Communist Party members are appointed to the top positions in government agencies, and in each agency all Party members are organised under a Party committee. The hierarchy of government organs is overlaid by a parallel hierarchy of Party committees that enables Party leaders to supervise Party members in the government. See Kenneth Lieberthal and David Lampton, *Bureaucracy, politics and decision making in post-Mao China* (University of California Press 1992) 63.

undertaken by the Chinese Criminal Police Brigade (CPB), a branch of the police force which performs a similar function to the Criminal Investigation Department (CID) in Britain. The majority of less serious crimes are investigated by the local police force in both countries. Perhaps the most salient difference between the two corps of officers who carry out policing work in the two countries is that the spectrum of power that the Chinese police have is very broad and most of them are free from any forms of judicial review.⁶³ The police in China are empowered to impose a wide range of administrative penalties, such as detaining people associated with breaching public order up to 15 days or imposing fines up to 3,000 yuan.⁶⁴ A part of the administrative police powers involve intrusive infringements of an individual's liberty that are even harsher than certain criminal punishments. These powers are exercised at the police's own discretion and there is no clear-cut distinction between the administrative punishment at the police's disposal and criminal coercive measures within the policing power.⁶⁵ The two types of powers tended to be alternated by the police in the course of criminal process as a matter of convenience to maximise the extent of police authority,⁶⁶ avoiding more rigid formalities.⁶⁷ Policing

⁶³ Only a small number of police administrative powers, such as a police fine or other police coercive measures can be reviewed by the administrative court if the relevant person institutes a complaint. The court would not review the police behaviour automatically. Such police power is classified by Li Enshen as a type of pre-trial justice system as a crime control apparatus, however this is highly controversial. Li Enshen, 'Crime control in China's pre-trial system: A political ideology?' (2013) 8:1 *National Taiwan University Law Review*, 141.

⁶⁴ More police administrative power can also be found in the Law of P.R.C on penalties for Administration of Public Security 2005 (*Zhian guanli chufafa* 2005). In China, most minor crimes are not registered officially as prosecutable behaviour and is punished administratively either through the system of reform through education (which has been abolished) or through the issuing of formal police warnings. The police detention here is an administrative measure rather than criminal coercive method. It is not part of the criminal process and not subject to judicial review. It should be mentioned that before December 2013, the police had the power to impose the citizen with punishment of 'reforming through education' (*Laodong jiaoyang*). Reformation through education is a type of administrative penalty, in which offenders were sent to institutions for a period up to three years, deprived of liberty. Differing from prisoners whose penalty is mainly carried out in the prison (or detention centre if the imprisonment is less than one year) offenders who have been decided to be reformed through labour will be constrained in the institution of reform through labour. This practice had been intensively criticised by scholars and human rights activists at national and international level, and it was finally abolished in December 2013.

⁶⁵ These compulsory measures are retained with minor revises in CPL 2012.

⁶⁶ See Zuo Weiming, 'Guibi yu tidai---soucha yunyong jizhi de shizheng kaocha (Avoiding and substituting---an empirical study on the mechanism of search)' (2007) 3 *Faxue* (China legal study), 114.

⁶⁷ For example, the police can use an administrative search rather than research in the criminal procedure to avoid applying for a search warrant. The two types of search can reach the same outcome except the administrative search does not require a search warrant.

practice also suggests that certain types of criminal cases are disposed of via administrative channels rather than through the criminal process,⁶⁸ thereby avoiding any external scrutiny.

In addition to those police powers exercised in England & Wales, such as the search of persons or premises, and the power to seize material evidence, Chinese police are granted five types of compulsory measures pending trial by the CPL 1996: namely summons (*juchuan*),⁶⁹ bail (*qubao houshen*),⁷⁰ residential surveillance (*jianshi juzhu*),⁷¹ detention (*juli*)⁷² and custody (*daibu*)⁷³. Except for custody, which has to be approved and authorised by the Procuratorate, there are few impediments to the unchecked coercive

⁶⁸ These types of crimes usually involve public disorder, offences against the person or property, and acts impairing social administration. See Mike McConville et al, *Criminal justice in China: An empirical enquiry* (Edward Elgar 2011) 26

⁶⁹ According to Article 117 of CPL 2012, suspects who are not detained or in custody can be forced to be brought to specific locations for interrogation for up to 12 hours (for complicated and serious cases up to 24 hours) by use of summons (*juchuan*).

⁷⁰ For alleged minor offences that may not be sentenced with imprisonment or less dangerous suspects who may not endanger society, suspects having serious illness, or female suspects in the period of pregnancy or nursing, the police may allow bail (*qubao houshen*) not exceeding 12 months and attached with legal conditions. The bail in a certain way is similar to the police bail (before and after charge) in England and Wales. To be granted bail, the suspect would be asked to provide certain amount of money or provide a guarantor who has no involvement in the current case, a fixed domicile and a steady income.

⁷¹ Compared to bail, residential surveillance restricts the liberty of suspects to a greater extent in terms that the suspects are not allowed to leave their domicile, meet or communicate with other people without the permission of the police. For migrant suspects who have no fixed abode or suspects who are under investigation for committing crimes involving national security, terrorism and serious corruption; they have to be removed to a designated place to implement the residential surveillance.

⁷² In China, detention (*juli*) and custody (*daibu*) are normally implemented consecutively. Suspects who have been authorised to be in custody are usually preceded with a period up to three-day detention by the police. Once a suspect has been detained, he is sent to the detention centre immediately where he will stay until the end of the trial unless it has been decided differently due to his physical fragility or insufficiency of evidence. Under the CPL 2012, the police are allowed to detain a suspect when one of a fairly wide-ranging set of preconditions are met: a. a suspect is preparing to commit a crime or is in the process of committing a crime or is discovered immediately after committing a crime; b. a suspect is identified as having committed a crime by a victim or an eye witness; c. a suspect has criminal evidence found on his or her person or at his or her residence; d. a suspect is attempting to suicide, abscond or is absconding; e. a suspect is likely to destroy or falsify evidence; f. a suspect does not tell his or her true name and address and his or her identity is unknown; g. is strongly suspected of committing crimes in various places, repeatedly, or in a gang.

⁷³ Some scholars use 'arrest' rather than 'custody' as an English translation term of the fifth compulsory measure '*daibu*', see, for example, Mike McConville et al, *Criminal justice in China: An empirical enquiry* (Edward Elgar 2011). Even though the literal translation of '*daibu*' is arrest, the compulsory measure itself is more similar to the remand in custody in common law. Therefore to avoid confusion, the researcher prefers the term of 'custody'. When the police have detained a suspect, the suspect will be interrogated within 24 hours, after which the police will decide whether to submit a request to the Procuratorate for custody within 3 days, or release the suspect unconditionally or make the suspect subject to either bail or residential surveillance. The Procuratorate has 7 days to approve or reject the request based on article 79 of CPL 2012, which includes the following six types of conditions that the suspect must be in custody if he or she is potentially to be sentenced to a punishment more severe than imprisonment and granting bail cannot prevent him or her from endangering society: a. the suspect is likely to commit further crimes; b. the suspect poses a realistic danger of harming the national security, public safety or public order; c. the suspect is likely to destroy or falsify evidence, interfere with witnesses or falsify statements; d. the suspect is likely to take revenge on the victim, case reporter, complaint; e. the suspect is likely to commit suicide or abscond; f. the suspect is likely to be sentenced to a punishment of a minimum of 10 years' imprisonment, or there is evidence to prove the fact in issue, he or she is likely to be sentenced to a punishment minimum of imprisonment and he or she has a criminal record or his or her identity is unknown.

powers. The police are allowed to make a decision on issues such as granting bail, detaining a suspect, or imposing a residential surveillance order purely at their own discretion and then enforce the implementation of this. In the light of this wide array of coercive measures, the police have unsupervised power and ultimate authority. The wide-ranging coercive power can be depicted in the same way as that described by Louise Christian (1983) thirty years ago when referring to the powers given to the police in London:

What these provisions add up to is the legitimisation of brutal friskings on the street and destructive rampages through people's homes.⁷⁴

Scholars such as Chen Ruihua(1999) have pointed out that the Chinese police are exercising part of the judicial power.⁷⁵ Indeed, a substantial proportion of the intrusive issues that have been decided and enforced by the police should be arbitrated only by the judiciary, which is presumed to be independent with no interest in a given case, so that the fundamental rights of the accused can be safeguarded. However, in the wider socio-political context of China, it cannot be simply interpreted as a misallocation or usurpation of power, but rather as an efficient setup of social control within the Party-state. Having a military character,⁷⁶ today the PSB is a relatively autonomous entity that is committed to the interests of the Party and operates under Party rules.⁷⁷ Its proximity and political loyalty to the Party makes it a heavy-weight within the Iron Triangle, having more power in criminal matters. Due to its sensitivity to Party's policies, the PSB's military character and administrative nature guarantees a speedy implementation of Party's policy within the criminal justice system. The fact that the leader of the PSB routinely heads the Legal-political Committee and oversees the courts and the procuratorate, makes it difficult for the judiciary to supervise policing in the pre-trial stage. The power of the PSB is tied up with

⁷⁴ Louise Christian, *Policing by coercion*, (GLC Police committee support unit 1983) 4.

⁷⁵ Chen Ruihua, *Xingshi Susong de Qianyan Wenti (The fronting edge of Chinese criminal justice)* (2nd edn, China Renmin Press 1999) 527.

⁷⁶ Ibid

⁷⁷ See Mike McConville et al, *Criminal justice in China: An empirical enquiry* (Edward Elgar 2011)379.

the Party's highest interest of social stability, with the tight control over the justice system only being achieved at a tremendous price. The lack of equilibrium of power has led to the police having so much control in the investigation stage that, if an error has occurred, the other actors of the criminal procedure have few measures to redress the error later in the judicial process.

2.3 The Supervisory Role of the Procuratorate

The Chinese procuratorate is a legal institution that was primarily modelled on the Soviet Union system. Basing much of its structural framework upon Lenin's procuratorcy theory, the role of the procuratorate in China is not limited to a prosecution service, but is broadly defined as a legal supervisory body.⁷⁸ According to Lenin's procuratorcy principle, the supervisory powers of the procuratorate include the supervision of the investigation, the supervision of the trial, the supervision of other law enforcement organs and the general supervisory power over all of the public bureaucracies and officials.⁷⁹ Whereas China fully transplanted the Soviet model of the procuratorate at its early stage of the regime, the overriding power of general supervision was criticised as undermining the leadership of the Party, and therefore it was rejected by law.⁸⁰

Today the supervisory function of the procuratorate in the criminal process encompasses four categories: supervision of case registration, supervision of the investigation, supervision of the trial and supervision of law enforcement.⁸¹ On top of these supervisory functions, the procuratorate has also been delegated with several basic roles in the

⁷⁸ Xie Chengpeng and Ren Wensong, 'Sulian Jiancha Zhidu dui Woguo de Yingxiang (The impact of the procuratorate system in Soviet Union)' (2010) 28:7 *Hebei Law Science*, 195.

⁷⁹ Ibid, 197.

⁸⁰ The Organisational Law of the procuratorate 1979 has no provision regarding the power of general supervision. See Ibid, 198

⁸¹ Li Kai and Zhang fan, 'Xingshi Susong Jiandu Gongzuo Yanjiu (The research on the mechanism of procuratorate)', in Mu Ping and Zhen Zhen (eds.), *Jiancha Gongzuo Jizhi yu Shiwu Wenti Yanjiu (Research on the work mechanism of procuratorate and Practical issues)* (China law press 2008) 9.

proceedings, such as the investigation (for certain categories of crimes) and prosecution. These various functions are undertaken by separate departments of the procuratorate.⁸² For instance, the department of prosecution is responsible for bringing both criminal charges to the court and supervising the court by counter-appealing (*kangsu*) judgments containing errors to a higher court. The department of authorisation in the procuratorate undertakes the work of overseeing the legality of investigation, as well as deciding whether or not to approve the custody of a suspect or the extension of custody which has been requested by the PSB. To supervise the enforcement of law, the department of investigation of the procuratorate investigates crimes related to public servants in office. Although partially responsible for detecting crimes, the procuratorate is an integral part of the justice system, which is independent from outside interference, including the government, making it a vertical-led bureaucracy.⁸³

Compared to the adversarial-style criminal process which delegates these functions to separate bodies, this model of supervision, in addition to various procedural duties, represents an extraordinary concentration of power. This is justified by its distinct socialist nature and ideology, which is totally different from the separation of powers seen in Western countries.⁸⁴ According to this socialist model, the procuratorate not only has the status of the public prosecutor, but also has the power of overseeing the trial and subsequent legal enforcement. The essence of the procuratorate's authority comes from this role of supervision.⁸⁵ Unlike the French *procureur* (public prosecutor) or *juge d'instruction* (investigating judge), whose judicial role is seen as a guarantee to safeguard the

⁸² The categories of crimes that is investigated by the procuratorate includes 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, being framed and illegal searches and crimes involving infringement of a citizen's democratic rights committed by state functionaries by taking advantage of their roles and powers. See Article 18 of CPL 2012.

⁸³ See Article 131 of the Constitutional Law of P.R.C.

⁸⁴ See Xie Chengpeng, 'Lun Jianchaquan de Xingzhi (The nature of the power of procuratorate)' (2000) 2 *Faxue (Legal Study of China)* 34.

⁸⁵ *Ibid*

interests of the suspect under the truth-finding ideology,⁸⁶ the Chinese prosecutor does not have the formal judicial status;⁸⁷ and the position as prosecutors and judges cannot be transferred as easily as their counterparts in the French system.⁸⁸ Therefore, whilst this socialist legal theory is designed to ensure the legitimacy of the centralisation of power in the procuratorate, it fails to provide the basic foundation as to why the procuratorate is in a better position than other institutions, such as the court, to supervise the justice system.

As a general supervisory institution with many tasks to carry out, the extent to which various undertakings concern the separation of roles creates ambiguity and tension. Criticism has been levelled at the nature of the power of the procuratorate and its triple identity of investigator, prosecutor and supervisor.⁸⁹ Chen Ruihua (2000), for example, noted that the procuratorate is driven by the ambition of winning the case in the court.⁹⁰ Its role as a crime investigator and prosecutor undermines the status of an independent supervisor.⁹¹ Thus even though the procuratorate is defined as a legal institution of supervision by the constitutional law, this primary function is influenced by its secondary, but dominating role of an accusing party. Concerns are also generated by issues of the procuratorate's supervisory role in the trial. Many scholars believe the supervision of the trial has sabotaged the authority of the court, which would make the prosecutor become 'the judge over judges' and lead to the uncertainty of the adjudication.⁹² The debate has started to probe the nature of the power of supervision, leading to a critical inquiry ---who should supervise the supervisor---the paradox of which seems to have no answer under the

⁸⁶ Jacqueline Hodgson, 'The French prosecutor in question' (2000) 67 *Washington and Lee law review*, 1365. Also see Jacqueline Hodgson, *French criminal justice: a comparative account of the investigation and prosecution of crime in France* (Hart publishing 2005) 68.

⁸⁷ Although the procuratorate is generally classified as a legal institution within the criminal justice system, it does not have the judicial status as its equivalence in the French criminal justice system.

⁸⁸ See Jacqueline Hodgson, *French criminal justice: a comparative account of the investigation and prosecution of crime in France* (Hart publishing 2005) 69.

⁸⁹ See Chen Ruihua, 'Sifaquan de Xingzhi---Yi Xingshi Sifa wei Fanli de Fenxi (The nature of judicial power: an analysis based on the example of criminal justice)'(2000) 5 *Faxue Yanjiu (The legal research of China)* , 30.

⁹⁰ See Chen Ruihua, *The fronting edge of Chinese criminal justice (Xingshi Susong de Qianyan Wenti)* (2nd edn, China Renmin Press 1999) 530.

⁹¹ Ibid.

⁹² Zhang Zhihui, 'Zhongguo Tese Jiancha Zhidu de Lilun Tansuo---Jianchaquan Jichu Lilun 30nian Yanjiu Pingshu (The theoretical exploration of the procuratorate system with Chinese feature: a literature review over the 30 years' procuratorate theory)'(2009) 16 *China legal study (Zhongguo Faxue)* , 150, 155.

current legal system. These considerations have given rise to a more general observation: the power of supervision has created an irreconcilable and fundamental conflict with the criminal prosecution principle both in theory and in practice. As Chen Ruihua (1999) puts it:

It is a Utopian-like myth that a State institution with the responsibility to prosecute and detect crimes is given the mission to supervise and guarantee the uniformity of the enforcement of law, and to rectify the wrongs that are made by other legal institutions.⁹³

As such, the supervisory function of the procuratorate should be reformed, reframed or removed. Just like the reformative proposal in France in 2009, despite a pure judicial iconic figure in the centralised inquisitorial system, the *juge d' instruction* was to be abolished.⁹⁴ The *juge d' instruction* carries out acts of investigation for a small proportion of high profile cases.⁹⁵ This power was proposed to be transferred to the *procureur*.⁹⁶ The *procureur*, who is responsible for a criminal investigation, the *garde à vue* (police detention), and public prosecution, also plays a role as a pre-trial judicial authority, albeit accountable to the Minister of Justice and to the executive.⁹⁷ Similar to the theoretical dilemma facing the Chinese procuratorate, the *procureur's* hybrid function involves investigation and prosecution, and her proximity to the executive has brought her independence as a judicial authority into question.⁹⁸

In the debate over the controversial nature of the Chinese procuratorate, some scholars, such as Chen Weidong (2002), have suggested that the procuratorate should be redefined purely as a public prosecution body, rather than a supervisory institution.⁹⁹ He noted that the powers the procuratorate exercises, such as making a decision on prosecution or

⁹³ See Chen Ruihua, *The fronting edge of Chinese criminal justice (Xingshi Susong de Qianyan Wenti)* (2nd edn, China Renmin Press 1999) 531.

⁹⁴ See Jaqueline Hodgson, 'The French prosecutor in question' (2010) 67 *Washington and Lee law review*, 1363.

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*, 1368.

⁹⁸ See *Medvedyev v France*, Eur. Ct.H. R. (2008).

⁹⁹ Chen Weidong, 'Woguo Jianchaquan de Fansi yu Chonggou---Yi Jianchaquan wei Hexin de Fenxi (Rethink and reconstruct the power of procuratorate: an analysis based on the power of prosecution)' (2002) 24:2 *Legal Research (Faxue Yanjiu)* 3.

counter-appealing a judgment, are ordinary activities of public prosecution and therefore they should not be entitled to the power of supervision. According to his reconstruction of the procuratorate, the power of the procuratorate should belong to the executive even though the Constitution classifies the procuratorate as part of the justice system.¹⁰⁰ This proposal seems to put the procuratorate in the same position as the French *procureure*. Other legal scholars, such as Long Zongzhi (1999), adopted the independent role of the prosecutor, contending that, rather than relying on the governmental control over the prosecution service, the prosecutor should play the role of a judicial officer and safeguard individual liberties.¹⁰¹

Whilst the procuratorate's supervisory role has been criticised and challenged at a theoretical level; in practice the procuratorate has strengthened and consolidated its power of supervision, actively striking back against criticism. Between 2003 and 2007, the Supreme Procuratorate sent regular notices to lower procuratorates, emphasising the importance of 'the primary work of strengthening legal supervision and promoting justice'.¹⁰² The procuratorate's supervisory role was then developed into more detailed policies which were easier to implement and assess.¹⁰³ At a local level, a variety of intervening supervisory models were introduced into the criminal process, which includes earlier engagement into the investigation, setting up of specialised groups to carry out comprehensive supervision, attending the case discussion meeting in the Adjudication Committee and proposing the sentencing of the defendant.¹⁰⁴ Meanwhile, many articles were published to defend the legitimacy of the power of supervision, written by scholars or

¹⁰⁰ See Article 131 of the Constitutional Law of P.R.C.

¹⁰¹ Long Zongzhi, 'Lun Jiancha quan de Xingzhi he Jiancha Jiguan de Gaige (The nature of the procuratorate power and the reform of the procuratorate organ)' (1999) 10:3 *Faxue (China Legal study)*1; Long Zhongzhi, 'Shilun jianchaguan de dingwei---jianpin zhusu jianchaguan zhidu (The role of prosecutor: discussing the system of the head prosecutor)' (1999) *Renmin jiancha (People's Procuratorate)*, 7.

¹⁰² Li Kai and Zhang Fan, 'Xingshi Susong Jiandu Gongzuo Yanjiu (The research on the mechanism of procuratorate)', in Mu Ping and Zhen Zhen (eds.), *Jiancha Gongzuo Jizhi yu Shiwu Wenti Yanjiu (Research on the work mechanism of procuratorate and Practical issues)* (China law press 2008) 6

¹⁰³ Ibid.

¹⁰⁴ Ibid, 5.

state officials who have a background associated with the procuratorate.¹⁰⁵ One of the articles published in the Procuratorate Daily argues:

The fundamental reason why the constitutional law juxtaposes the procuratorate's power of supervision with the power of government and the power of adjudication is not because it wants the procuratorate to share the power of the executive with the government, nor does it want the procuratorate to share the power of the judiciary. The constitutional law does so purely because it wants the procuratorate to supervise the government and the judiciary.¹⁰⁶

Although the debate of the procuratorate's role of supervision represents an upsurge of hope to separate the powers of the procuratorate, the reformative initiative based on theoretical rationale encountered a setback in practice. State officials in the procuratorate firmly defended their position relating to the power of supervision and clung to the theory that was inherited from the Soviet Union. In the face of widespread opposition from the procuratorate, the discourse concerning the rationality of the power of supervision drew to a conclusion around 2008. Since then the criticism of the procuratorate's supervisory power has waned. This event serves as an indication of the entrenchment of power concentration, which reflects the difficulty of legal reform. Lacking in political motivation and interest, the reform agenda cannot gain any consensus from the higher political echelon which could be a contributing factor towards the failure. The procuratorate is created consciously by the state to secure the power control over parallel institutions, the value of which has been embedded in collectivism. As such the centralised supervisory power, rational or not, is on a firm footing and has proved to be unassailable.

¹⁰⁵ Ibid, 14.

¹⁰⁶ Zhang Zhihui, 'Jianchaquan yu Falv Jiandu (The power of procuratorate and its supervisory power)' (2004) 3 *Shanxi jiancha (The Procuratorate of Shanxi)* 76, 76.

2.4 The Lack of Judicial Independence

Unlike western countries, the judiciary in China is not in any sense independent, and it is not supposed to be in the socio-political context of the Party-state. Since the foundation of the People's Republic of China, the independence of the judiciary has been strongly opposed by the Party, and criticised as a bourgeois pretext in conflict with the leadership of the Party. Under the judicial report in the anti-rightist campaign of 1957, the ultimate judicial principle of the leadership of the Party was established, underlining the 'absolute rule that the judiciary must firmly follow and rely on the Party's leadership.'¹⁰⁷ For a long period of time, the leadership of the Party was regarded as the tradition of China's judicial work. An article published by a research group in China, Renmin University, in 1959 announced:

The leadership of the Party over judicial work includes the aspects concerning policy, politics, organisation and expertise. The Party's leadership is absolute, complete and without any restriction or deduction without any minute change. Any phenomena that are opposed to the Party's leadership are absolutely intolerable.¹⁰⁸

In the 1950s, the Party was entitled to intervene in any case that it had an interest in.¹⁰⁹ According to the judicial conference and the Supreme Court's report on the anti-rightists campaign of 1957; 'except for capital cases that should be executed according to the Party's policy on 10/09/1957, if the brother departments (the court, the procuratorate and the police) have any disagreement on how to deal with these cases that are supposed to be approved by the Committee of the Party, they should submit the cases to the Committee of the Party before the trial.'¹¹⁰ Permission from the Party became a routine aspect of the judiciary process. Based on the Party dominated judicial model, the institution of the

¹⁰⁷ He Yongjun, *Renmin Fayuan Jianshe: 1978-2005(The construction of the People's Court: 1978-2005)* (China Social Science Press 2008) 83.

¹⁰⁸ Ibid, 84.

¹⁰⁹ Ibid, 86.

¹¹⁰ Ibid.

Politico-legal Committee was set up to coordinate the working relationship between the police, the procuratorate and the courts, and to give detailed instructions on specific cases, ensuring the supervision of the judicial work in line with the Party's leadership. To accommodate the political framework of the judiciary, the standards relating to judicial appointments also underlined above all else loyalty to the Party. Before 1980, the principles that were employed to elect judges were:

- a. must be loyal to the revolutionary cause; b. must advocate the leadership of the Party and respect its rules; c. must be able to analyse problems and judge right and wrong; d. must be hard-working, responsible and active; e. must be able to understand the law and work report (report to the Party).¹¹¹

For over four decades, a qualified judge may not have needed specific legal knowledge, or higher education. A judge's appraisal focused on whether her 'political awareness' and 'moral quality' were up to the required political standard. Of most importance was that judges should be committed to the Party and operate the court under the Party's rule. As a previous president of the Supreme Court, Jiang Hua recalled:

In January 1975, at a time at the end of the Cultural Revolution, I was moved to work in the court. The People's court had been severely damaged politically, professionally and organisationally. Judicial officials were persecuted and it was chaos. Comrades from the central Party told me: you go and work in the court; the primary job is to understand the Party's policy.¹¹²

In the 1980s, whenever the court system started to recover from the chaotic aftermath of the Cultural Revolution, the political elements remained to be the key condition for judges' appointments. Together, with requirements such as 'good health' and 'some social experience and literacy', 'the high quality of political awareness' continued to be

¹¹¹ Wu Yingzi, *Faguan Juese yu Sifa Xingwei (The role of judges and judicial activities)* (China encyclopaedia Press 2008) 34-35.

¹¹² Ibid.

emphasised.¹¹³ With a lack of professional education and legal training, judicial officers relied heavily on their work experience and political affiliations to handle criminal cases. The judicial function was merely limited to the verification of the prosecution and the imposition of sentences, as opposed to making neutral decisions. Not until the legal reform was launched in the 1990s, especially when the Judges Law 1995 came into force, were higher standards of legal qualification required and educational background, ability, and personal qualities became essential conditions to serve as a judge.¹¹⁴ Whilst political factors, such as dedication to the Party's interest are not compulsory any more, they still weigh substantially in deciding a judge's appointment and promotion. At a local level, judicial officials, especially those in critical administrative positions, such as the president of the court, are appointed, reviewed and removed by the Chinese Communist Party Committee.¹¹⁵ The Political-legal Committee, established in the 1950s, continues to function as a coordinator among the main legal institutions and occasionally intervenes in specific sensitive or influential cases. Inside the judiciary, the historical legacy of the Party intervention model from the last generation has been passed on to the new recruits.

Today the Party's intervention is much more subtle, although it still retains a key influence on the court system. Given the fact that the Party has retreated from power over the judiciary to cultivate a slightly more independent court during the past thirty years, the move has been slow and gradual, with a vestige of old-fashioned political order remaining. Whereas direct political intrusion in the adjudication of a particular case is unusual, obscure interference, such as written notes and telephone calls with specific instructions, is still popular when the court handles certain 'sensitive' cases.¹¹⁶ Parallel with high profile cases in France, in which the *procureur's* accountability to the Minister of Justice and the

¹¹³ Ibid

¹¹⁴ Cai Dingjian and Wang Chenguang, *China's journey toward the rule of law----legal reform: 1978-2008* (Brill Publishing 2010) 221.

¹¹⁵ Fu Hualing, 'Putting China's judiciary into perspective: Is it independent, competent, and fair?' in Erik Jensen and Thomas Heller (eds.), *Beyond common knowledge: Empirical approaches to the rule of law* (Stanford Law and Politics: an imprint of Stanford University Press 2003) 203

¹¹⁶ Ibid, 204-205.

executive results in the Minister being free to issue written instructions to the prosecutor, the *parquet*,¹¹⁷ in China, major cases that involve senior Party leaders or wide social influences are still reported to the Party committee and decided beyond the court.¹¹⁸

Although Article 126 of the Constitutional Law 1982 provided that 'the court exercises the power to adjudicate, free from the interference of the executive, social groups and individuals,' the court is not immune from the influence of the Party, which, on the contrary, is totally deemed as legitimate and should be enshrined in the daily judicial work.¹¹⁹ Whilst it is apparent that the court should be independent from the government pursuant to this provision, this has not been the case in reality. The courts financially rely on local government. Funding coming from the allocation of a central budget, litigation fees and fines, donations, sponsorship, and loans from various sources cannot cover the expenditure of the court's daily operation; therefore about fifty per-cent of the court funding comes primarily from the local government.¹²⁰ Consequently it is necessary for the court to get along with this stakeholder. Although such monetary dependency may be resented by some judges who strive for autonomy, as this means an inconvenient interference from different levels of the executive, they are bound to compromise and acknowledge this relationship of a common interest.

As discussed earlier in this chapter, the court is also subject to the supervision of the procuratorate. Adjudications can be counter-appealed by the procuratorate working at the same level as the court. Although the prosecutor should respect the authority of the

¹¹⁷ In France, the *parquet* is hierarchically accountable to the Minister of justice and the executive. The Minister is free to issue written instructions to the *parquet* and also has the power 'to move, promote or transfer *procureurs* or nominate her own political allies'. Such subordinate role of the *procureur* undermines the political independence of the prosecutor as her role as a judicial officer. See Jaqueline Hodgson, 'The French prosecutor in question' (2010) 67 Washington and Lee law review, 1367.

¹¹⁸ Fu Hualing, 'Putting China's judiciary into perspective: Is it independent, competent, and fair?' in Erik Jensen and Thomas Heller (eds.), *Beyond common knowledge: Empirical approaches to the rule of law* (Stanford Law and Politics: an imprint of Stanford University Press 2003) 204.

¹¹⁹ Chen Weidong, *Criminal Procedure Law* (China Renmin University Press 2004) 75.

¹²⁰ Fu Hualing, 'Putting China's judiciary into perspective: Is it independent, competent, and fair?' in Erik Jensen and Thomas Heller (eds.), *Beyond common knowledge: Empirical approaches to the rule of law* (Stanford Law and Politics: an imprint of Stanford University Press 2003) 204.

adjudicator in the court, the prosecutor maintains a superior, perhaps even an exalted position, supervising the performance of the judge.

In the Chinese social context of collectivism, the concept of an adversarial trial has not been accepted by the State. The court is susceptible to external influences and is powerless in criminal cases, especially those with strong political overtones. Of all the 'inner circle of criminal justice institutions'---the Iron Triangle---the judiciary is the weakest strand, overshadowed by the powerful police and procuratorate.

So far, the term 'trial' in China is still confined to the meaning of interrogation of the defendant by the court,¹²¹ a concept that underlines the substantive judgement of the defendant's behaviour rather than the principle of due process. Although different systems have disparate arrangements in regards to the interpretation of due process, in western jurisdictions, the court has either direct or indirect power to constrain the potential misconduct of the police and prosecutor, upholding the legality of the process. In the inquisitorial system, such as with France, the judicial authority, the *procureur* or the *juge d'instruction*, is responsible for the legitimacy of the pre-trial process. In the adversarial procedure, which is party-based, the judge does not have direct involvement in the pre-trial process; nonetheless it can punish unlawful behaviour in the pre-trial stage by deciding against the admission of the evidence in question. In China, lacking judicial oversight over the pre-trial stage, and having limited enquiries into the lawfulness of evidence in the trial, the court has no supervisory power over the police or the procuratorate. Its primary judiciary function is restricted to confirming the conviction of guilt and imposing the sentence.

¹²¹ See Chen Ruihua, 'Xingshi Susong de Qianyan Wenti (*The fronting edge of Chinese criminal justice*)' (2nd edn, China Renmin Press 1999) 531

3. The Development of Criminal Procedure Law and Legal Reforms

With a long history of codification and the strong influence of the European continental legal model in the early 20th Century, the Chinese legal system has never acknowledged the legal status of case law;¹²² all sources of law in China must be statutory. In ancient China, codes from different legal areas were integrated into comprehensive legal corpuses without being divided into their separate branches.¹²³ Under the impact of modern legal theory in the 20th century, law started to be drafted separately according to different legal departments.¹²⁴ During the time of the Republic of China, one of the most important codes of criminal procedure law was promulgated in 1928, and re-enacted in 1935, with some major amendments. This code of criminal procedure law was one branch of the collection of the Six Laws (*Liufa Quanshu*) that encompassed the traditional Chinese legal system and other countries' models of law.¹²⁵ As soon as the People's Republic of China (P.R.C) was founded in 1949, all laws from the previous *Guomindang* government of the Republic of China were abolished. Due to the state-driven uprising of the anti-rightist campaign launched in 1957, and the subsequent notorious Cultural Revolution (1966-1976), it was not until the late 1970s that a new class-based socialist legal system was gradually set up.

¹²² Many laws were based on the European continental model, such as the laws of Germany, Japan (before the Second World War) and Switzerland. See Albert HY Chen, *An introduction to the legal system of the People's Republic of China* (Butterworths Asia 1992). Many western laws were referred to when drafting the modern criminal law, but Japanese law, which followed the civil law tradition in 20th century and adopted the German legislative model before the US introduced its rules into Japan before Second World War, had most direct impact on the legislation. A Japanese jurist contributed to collect legal references and draft the New Criminal Code of Qing Dynasty in 1906.

¹²³ The noted ones includes Law corpus of Tang Dynasty, a set of legal codes that enacted in 619; Law corpus of Ming Dynasty, a legal code that enacted in 1367; Law corpus of Qing Dynasty, enacted in 1740.

¹²⁴ The current code of criminal law in Qing Dynasty enacted in 1910 was the first code that drafted separately from other areas of law.

¹²⁵ The collections of the Six Laws are the basis of the legal system in Taiwan after the Nationalist Party (*Guomindang*) was defeated by the Communist Party and fled to Taiwan after the civil law.

3.1 The Criminal Procedure Law 1979

The first Chinese Criminal Procedure Law of the People's Republic China, passed in 1979, featured the socialist identification that law is, de facto, an instrument of the dictatorship of the proletariat. The CPL 1979 is mainly comprised of legal principles and rudimental criminal processes, leaving a significant amount of discretion in the hands of the police, the procuratorate and judges.¹²⁶ The criminal process was divided into three separate stages: investigation, prosecution and trial, with the police, the procuratorate and the judge in charge of each phase respectively. The relationship of the three agencies is more a relationship of cooperation and sequence in nature rather than mutual balance and power checking. Defence lawyers are marginalised in the process and the accused is only allowed access to defence lawyers in the trial stage.

One of the celebrated socialist features embodied in CPL 1979 is the emphasis on the so called 'educational role' of law: a common trait that is shared in all socialist jurisdictions.¹²⁷ According to socialist jurisprudence, the primary objective of socialist law, especially criminal law, is to educate, guiding and reforming a changed person who should become selfless, loyal, self-disciplined, cooperative and respectful of the social norms in communal life.¹²⁸ Such a patriarchal philosophy is reflected in CPL 1979 and distinctly exemplified in the function of the trial, the aim of which was not to conclude the verdict of guilt or innocence, but to educate the public to be a good socialist member.¹²⁹ The determination of guilt or innocence was made at the beginning of the proceedings. Therefore, if any doubts about the guilt of the accused occurred at the early stage of the process, the

¹²⁶ Chen Weidong, *Criminal Procedure law in China* (the People's University Press 2004) 40.

¹²⁷ Harold Berman, Susan Cohen and Malcolm Russell, 'A comparison of the Chinese and Soviet Codes of Criminal law and procedure', (1982) 73:1, *The Journal of Criminal Law and Criminology*, 238,238.

¹²⁸ *Ibid.*

¹²⁹ Donald C Clark and James Feinerman, *Antagonistic contradictions: criminal law and human rights in China; China's Legal Reforms* (Clarendon 1996) 65.

procedure would discontinue and the trial would not take place.¹³⁰ When a case came to the court, it meant that conviction had been approved, and it was only waiting for an account of the guilt. Before the trial, the trial judge would receive a file of the case which included all the evidence relating to the defendant and it was their responsibility to review the case file thoroughly before the trial, deciding whether the case should be accepted for trial, sent back with an order for supplementary investigation by the procuratorate, dismissed or sent back with a request that the case be withdrawn.¹³¹ Only when the judges had confirmed the guilt of the accused before the trial, would the trial proceedings commence. This practice was called *Xian Ding Hou Shen* (verdict first, trial second), which had a strong inquisitorial hue.¹³² As such, the function of the trial was symbolic in nature, seeking the propaganda objective of educating the public, 'condemning vice and praising justice'.¹³³

3.2 The Legal Reform of 1996

Since the early 1980s, China started economic reform and embarked on the transition from a planned command economy to an open market system. The open door policy fostered a comparative perspective on the procedural dimension of criminal law development.¹³⁴ With continued economic reform and a rapidly changing and diversifying social structure, the stale class-struggle ideology had been gradually challenged and rejected, whilst other basic democratic values, such as fairness, justice and transparency started to be given more weight by society.¹³⁵ Bearing an evident ideological mark which reflected the socio-political changes in the late 1970s, the class based CPL 1979 could not keep pace with a

¹³⁰ *Ibid.*

¹³¹ See Mike McConville et al, *Criminal justice in China: An empirical enquiry* (Edward Elgar 2011) 134.

¹³² *Ibid*

¹³³ Shanghai Municipal Lawyers Association Research Department, 'Shanghai concentrates on doing a good job of criminal defence work in turmoil-related cases' (1990) 427 *Shanghai Lawyer*, 15, 17.

¹³⁴ Ronald C Keith, *China's struggle for the rule of law* (St. Martin's Press 1994) 144.

¹³⁵ Xiao Chen, 'The milestone of the development of China's Criminal Justice: An interview on the reform of Criminal Procedure Law with the director of legal reform panel in the Supreme Court of China Zhang Sihan', (1996) 1 *China Annual report*, 25.

fast developing society. The changing nature of crimes in the economic reform years of the 1980s accompanied a very complicated transition within society, including a growing influx of migrants and the significantly reducing dependence on work units.¹³⁶

CPL 1979 was based on a much more simplified and sedentary lifestyle, which was also challenged.¹³⁷ Those basic organisations that the criminal system once relied upon had been changed or dissolved with the implementation of the economic reform. Defects in CPL 1979, as well as the recurring malpractices due to the lack of regulation, such as the large number of detentions beyond the legally proscribed time limits, were strongly criticised by the steadily growing legal professions.¹³⁸ At the time when the CPL 1979 was initially drafted, there was hardly any formal legal profession in China.¹³⁹ Most legal scholars were exiled to remote provinces during the repression of the Anti-Rightist campaign and the Cultural Revolution, and the legal institutions were newly revived with the whole of the criminal justice system being in an infantile stage.¹⁴⁰ After the CPL 1979 was put into practice, lawyers and defendants were almost completely 'lost in diagnostic struggles over how the law actually worked and how it should work.'¹⁴¹ The police, the prosecutor and the judge were cohesively locked together by the natural bond of fighting class enemies, excluding the possibilities of defence lawyers' participation. All these factors indicated the necessity of revising the Criminal Procedure Law which followed the reformatory trend in transitional China.

Nevertheless, it was the increasingly growing significance of Western influence on the legal thinking of reformers, who were engaged in the comparative study of criminal legal development that directly facilitated the revision of the Criminal Procedure Law. Of all the

¹³⁶ See Randall Peerenboom, *China's long march toward rule of law* (Cambridge University Press 2002) 158.

¹³⁷ *Ibid*

¹³⁸ *Ibid*

¹³⁹ See Sida Liu and Terence C. Halliday, 'Recursivity in legal change: lawyers and reforms of China's Criminal Procedure Law' (2009) 34 *Law & Social Inquiry*, Issue 4, 67; also see Victor H Li, *Law without lawyers: A comparative view of law in China and the United States* (Westview Press 1978) 54.

¹⁴⁰ See Sida Liu and Terence C. Halliday, 'Recursivity in legal change: lawyers and reforms of China's Criminal Procedure Law' (2009) 34:4 *Law & Social Inquiry*, 911.

¹⁴¹ *Ibid*.

issues related to CPL 1996 which superseded CPL1979, the presumption of innocence, exemption from prosecution, and the adversarial trial system were the most debated ones, and they were all finally embodied into the new law to some extent, symbolizing a radical departure from CPL 1979. One of the key changes, Article 12 of CPL 1996, for the first time brought the notion of 'presumption of innocence' into the criminal justice system. It provided:

No person shall be found guilty without being judged as such by a People's Court according to law.

Although Article 12 of CPL 1996 had semantically acknowledged the right to be presumed innocent until convicted, it had failed to provide the burden of proof, standard of proof or anything associated with the 'presumption of innocence'.¹⁴² Hence, it was farfetched to say CPL 1996 had formally established the principle of the 'presumption of innocence' in the Chinese criminal justice system. For most scholars, the great contribution of this provision lay in the change that only the court could determine the guilt of the defendant, representing a radical repudiation of the practice in the previous law that the 'verdict comes before the trial'.

Since the role of court had been greatly strengthened in the final decision, the trial was not merely a platform to 'educate the public' or to function as a 'rubber stamp' for the procurator's decision, but became the most crucial element in assessing the validity of the prosecution and determining the ultimate issue of guilt or innocence. It also changed the structure of the criminal process that once was believed to be an assembly line of repressing crimes, in which the court was just one of the three coordinated 'workshops'.¹⁴³ At the centre of the process, the court no longer conducted or participated in

¹⁴² See Mike McConville et al, *Criminal justice in China: An empirical enquiry* (Edward Elgar 2011) 245 and Andrew Ashworth, *Human rights, serious crime and criminal procedure* (Sweet & Maxwell 2002) 34.

¹⁴³ The assembly line and 'three workshops' are often used by Chinese legal scholars or legal actors to describe the three stages of criminal justice, i.e. Investigation, prosecution and trial, see Xu Jingcun, *Xingshi Susong Faxue (Criminal Procedure Law)* I & II (China Law Press 1999) 89.

any pre-trial investigation, but should serve as a more neutral and independent role in scrutinizing the investigation and prosecution.

Under the CPL 1979, for minor offences where the prosecutor believed that, given the circumstances of the offence, the court would convict the accused without imposing sentences, the prosecutor had the power to withdraw the charge while maintaining a criminal record of conviction for the accused.¹⁴⁴ This power of prosecution was challenged for encroaching the court's power of conviction.¹⁴⁵ As a result, it was repealed by CPL 1996. Meanwhile, the range of defence rights was expanded, including defence lawyers meeting with the suspects in investigation, communicating with the suspect, giving legal advice, helping the accused to challenge coercive measures, gathering evidence or applying to the court to gather evidence, accessing the files of the case when the case had come to the scrutiny of the prosecutor's office for charge, representing the accused in the trial and appealing to a higher court.

Another highlight of the legal reform of CPL 1996 was the introduction of the adversarial trial system, which followed the international trend of judicial reform relating to the late 1980s and early 1990s, especially taking account of the influence of the Italian legal reform experience of 1988.¹⁴⁶ According to Article 150 of CPL 1996, the trial judges would not receive the dossier of the case before the trial; instead they would only be given the bill of prosecution, a list of evidence and a list of witnesses, as well as duplicates or photos of major evidence attached to the case. Such an arrangement attempted to prevent the trial judges being preoccupied by the inculpatory evidence so that the adjudication based on the hearing in the trial could materialise. Judges were not allowed to get involved in the pre-trial preparations, such as interrogation, searches and seizures and obtaining expert evaluations, which must be done by the police and the prosecutors only, so that the line

¹⁴⁴ See Article 101 of CPL 1979.

¹⁴⁵ See for example, Zhou Shaoyuan, 'Mianyu qisu de quxiao yu buqisu de gaige (The repeal of withdrawal of charge with criminal record and the decision of not to prosecute)' (1996) 11 *Renmin gongan*, 24.

¹⁴⁶ Chen Rongbin et al, '1996 nian xingshisusong faxue yanjiu de huigu yu zhanwang (Rethinking and looking ahead 1996 Criminal Procedure Law ' (1996) 1 *Faxuejia (the Jurist)* 69.

between prosecution and adjudication had been drawn much more clearly.¹⁴⁷ The role of the judge in the trial had also changed significantly, from being an active interrogator that initiated all the questions and enquiries, to being a passive and impartial arbitrator, presiding over the process of the trial. Meanwhile, the trial proceedings were structured as a contest between the prosecution and the defence: the prosecutors and the defence lawyers could question witnesses in the court in turn and debate with factual as well as legal issues. This laudable change was saluted by many commentators as the beginning of a new era of the adversarial process. Carol Jones (2005) observed:

The 1996 CPL did introduce a number of improved due process rights and made the trial system more adversarial. It abolished 'verdict first, trial second' (a person could be convicted only after a trial). It also enabled legal representation at an earlier stage in the criminal process, gave lawyers a bigger role at trial and made the initial stages of the process (where the suspect was in police custody) more transparent and accountable to law.¹⁴⁸

One principal feature of the adversarial system in the reform of CPL 1996 had been missing: the orality of evidence that is presented before the judges and testified by both parties. Although it provided that the witnesses should appear in court to testify, no matched safeguards or sanctions were provided to ensure its implementation. According to research conducted by He Li (2013) and Huo Shiyong (2013), the revised law has not changed the fact that very few witnesses attend court to testify or that it remains a common feature of Chinese criminal trials that the court relies on case files to adjudicate.¹⁴⁹ As witnesses are absent in the trial and witnesses' statements are read out by the prosecutor in

¹⁴⁷ Despite this, according to article 158 of CPL 1996, the judge is still able to gather and evaluate the evidence by herself during the course of the trial, although such power has been very rarely exercised by the judge in daily practice.

¹⁴⁸ Carol Jones, 'Crime and criminal justice in China 1949-1999', in James Sheptycki and Ali Wardak (eds), *Transnational & comparative criminology* (Glass House Press 2005) 179.

¹⁴⁹ He Li, 'Suggestions on dealing with the failure of witness presenting at court system: in perspective of criminal procedure amendment', (2013) 6 June, *Hebei Law Science*, 186, 187. Huo Shiyong, 'Xinxingsufa shijiaoxia zhengren chutinglvdi de yuanyin ji duice (The reason of the low attendance rate of witnesses at court and its solution from the perspective of the new Criminal Procedure Law)' (2013) 5 *Xingzheng yu Fa (Administration and Law)*, 55.

the court, defence lawyers are denied the opportunity to question prosecution evidence because the testimony is available only in written form and there is no access to the maker of the statements.

Very few defence lawyers engage with the prosecution case through procedural challenges, proffering alternative case theories or the production of defence evidence, mainly because they may be exposed to threats and pressure concerning the lawyers' professional status emanating from legal institutions.¹⁵⁰ Evidence gathered by the defence lawyers is rarely admitted by the court, has no potency to challenge the prosecutor's argument, or influence the judges' decision. Having little hope of defending their clients effectively, most defence lawyers generally focus upon advancing mitigating pleas for leniency towards the defendants.

3.3 The Criminal Procedure Law 2012

As a legislation that seeks to respond to and offer an effective solution to the intensifying issues occurring in the course of the legal reform, the Criminal Procedure Law 2012 (CPL 2012) can be seen as a significant readjustment of the existing strengths of legal actors within the criminal justice system. After 15 years' implementation of CPL 1996, the law which contained numerous elements of conflict, unfulfilled expectations, and a widening

¹⁵⁰ As pursuant to Criminal law 1997, any defence lawyer has the potential of being charged with the crime of providing false evidence in their legal career. In practice, when police and prosecutors failed to prove the guilt of the accused, prosecuting the defence lawyers of the offence of providing false evidence has become another possible channel to reverse the situation. As a consequence, defence lawyers are constantly exposed to threats and pressure concerning their professional status and personal safety emanating from the Prosecutor or the police responsible for the same case. Thus CPL 2012 addressed this problem via a circuitous route: Article 42 (2) stipulates that the police who investigate the case concerning lawyer's misconduct offence should not be the same investigative police dealing with the criminal case that the accused defence lawyer represented. The diversion of investigation is obviously an expedient compromise with the criminal law, which to some extent might have the effect of restricting the repression and persecution of defence lawyers from their direct antagonist police in the same area. However, this has not in any significant way changed lawyers' concern over their safety from the criminal justice system that they are working with. For many defence lawyers, being cautious all the time is still a reliable motto. Instead of adopting a robust strategy of proffering alternative case theories and introducing new evidence, such as witnesses, advancing simple pleas in mitigation is still the first choice of defence lawyers, as it has to be set against a background in which they are subjected to informal harassment measures such as surveillance and violence from both the state and the victims' families.

gap between beliefs and realities, has provoked criticism from both the academics and the legal professionals.¹⁵¹ With the escalation of legal reform, the voices calling for an expansion of defence rights and restraint on state power have been vocal. After two years' deliberation, the revision of the Criminal Procedure Law was introduced. It formulated the 'respect and protection of human rights' as one of its aims and heralded a new era for the criminal justice system in China.¹⁵²

In CPL 2012, defence rights have been enhanced while the power of the police and prosecutors has been curbed. Under the context of CPL 1996, defence lawyers could only play a very limited role in the investigative stage, such as meeting with the suspects and helping them with complaints. Their involvement was not regarded as part of the defence work, but labelled as 'legal assistance'. Even though they were allowed to gather evidence according to the Lawyers Law 2007, the evidence was not admitted by the court due to the lack of legal status of the evidence collector in CPL 1996;¹⁵³ defence lawyers have stepped up to the demand for a clearance of obstacles to enforce the Lawyers Law 2007.¹⁵⁴ With the implementation of the CPL 2012, defence lawyers are entitled to intervene in the investigation officially as soon as the suspect is initially interrogated or has had coercive measures applied to her. The evidence that they have assembled during the investigation is now able to be admitted to courts. The police used to impede defence lawyers from meeting with suspects or routinely record their conversations by dint of law's silence on such practice. Since the enforcement of the new law, apart from cases relating to national security, terrorism and major corruption, defence lawyers are able to meet their clients without being monitored within 48 hours after they have made the request. Video or audio

¹⁵¹ Such as the limited defence rights in investigation, the presumption of innocence not being fully endorsed, lack of protection of witnesses, etc. Many rules fail to address effectively based on the fast development of society.

¹⁵² See Article 2 of CPL 2012.

¹⁵³ As it is indicated, there exists some conflicts of rules between the Lawyers Law 2007 and CPL 1996, which have become the excuses of the state officials of not executing the Lawyers Law 2007. Thus defence rights in the Lawyers Law 2007, such as meeting suspects in the investigation and gathering evidence in the investigative stage have been curtailed in practice.

¹⁵⁴ According to CPL 1996, only legal officials, such as police and prosecutor, and defence lawyers or other recognised defence assistance (those play a defence role for the accused but is not qualified as lawyers, usually for accused in less developed area where lawyers are not enough) are allow to gather evidence.

taped interrogation of suspects has been introduced to supervise the legality of the investigation, and video recording of the police interrogation has become the compulsory for those major cases in which the suspects may have a life sentence or death penalty imposed.

Whereas the introduction of the presumption of innocence in CPL 1996 has been controversially disputed, CPL 2012 has formally assimilated this concept by introducing the burden of proof, the standard of proof and the privilege against self-incrimination. A rule similar to that used in the adversarial system to prevent the conviction of the innocent has been designed, so that the prosecution is obliged to prove beyond reasonable doubt that the defendant is guilty. Having theoretical connections with the presumption of innocence, the privilege against self-incrimination is declared for the first time to outlaw 'any measures of coercion or oppression in defiance of the will of the accused'.¹⁵⁵ New added chapters of special procedure for juvenile cases, procedure of forcible treatment of insane offenders, and settlement of the accused and victims of the public prosecuted cases¹⁵⁶ are also integrated into the new law.¹⁵⁷

CPL 2012 has formulated judicial funding for witnesses' expenses and adopted some measures to safeguard witnesses' personal safety as a means to encourage witnesses to attend the trial.¹⁵⁸ In response to concerns relating to witnesses' fear of violence and

¹⁵⁵ See *Saunders v UK* (1997) 23 E.H.R.R. 297

¹⁵⁶ The settlement agreement of the accused and the victim is inspired by some local practices since 2004 which has been accepted by the Supreme Court even though it is still controversial in legal theory. It highlighted the role of victims who are allowed to have a say in the prosecution decision or the accused's sentencing. Based on the legal practices, the new law rules that for certain intentional crimes carrying a punishment less than three years' imprisonment and some listed reckless crimes carrying a punishment less than seven years' imprisonment, if the accused has sincerely apologised to the victim and compensate the damages caused and has been forgiven by the victims, the prosecutor or the judge may make a formal settlement between them and take it as a legal factor to withdraw the charge or impose a mitigated sentence. Although this novel mode somehow indicates a declining prosecuting and adjudicative process in criminal cases, which permits the private resolution of crimes, the authorities do offer concessions to defendants in exchange for financial compensation of victims who are under no protection of the financial scheme in China.

¹⁵⁷ The law has adopted some very different rules from ordinary adult cases to tailor the speciality of the underage accused. Relaxed prosecution decision of the conditional charge, and protection-oriented measures such as sealing crime records of underage juveniles who carry the punishment of less than 5 years' imprisonment are obviously advances that are conducive to the social reintegration of these juveniles.

¹⁵⁸ According to CPL 2012, expenses such as transportation fees, accommodation fees and cost of meals will be reimbursed by the court and it will be illegal for witnesses' employers to deduct their wages due to witnesses' fulfilling the duty of attending the court to testify. See Article 63 of the CPL 2012.

intimidation, CPL 2012 has introduced the witnesses' special protection scheme for crimes linked to national security, terrorism, Mafia-type organisation and drugs. A range of methods will be employed to protect witnesses from suffering retaliation, such as keeping witnesses' personal information secret, screening witnesses and modulating witnesses' voices from being recognised by the accused in the court, special protection of witnesses' personal and house security, and forbidding specific people approaching witnesses. However, the solutions provided by CPL 2012 to ensure witnesses show up for trial are apparently based upon an assumption that prosecutors and judges want witnesses to appear and testify, which may not be the case. This is evidenced by Article 188 of CPL 2012 which provides that the court has the power to compel witnesses to attend the trial apart from those enjoying exemptive privilege of close kinship, such as spouse and parents. It would not be beyond the legislature's recognition to realise the possibility that the system's reliance on the dossier does not arise from witnesses' reluctance to attend, but is out of the resistance within the criminal system for witnesses to attend. With very few witnesses appearing in court, the legislation that aims to protect and safeguard the rights of witnesses is merely a hollow display. Since the new legislation fails to identify the fundamental causes that hinder the witnesses to testify in the court, it remains symbolic and unattainable, despite the protective system to encourage the witnesses to appear. Although the new legislation has been heralded by many as the dawn of a new reformatory era, more cautious observers may want to wait a while before proclaiming the new law as a success.

This is coupled with the concerns arising from a number of miscarriages of justice in recent years, which have evoked widespread repercussions and condemnations of confession focused investigation, the lack of judicial independence and curtailed defence rights in practice.¹⁵⁹ It is worth mentioning that the majority of reported wrongful convictions came to light when either the 'murdered' victim reappeared, or the real culprit

¹⁵⁹ Among the large number of wrongfully convicted cases, the most prominent ones include those cases of She Xianglin, Nie Shubin, Du Peiwu, Li Jiuming, Teng Xinshan and Zhao Zuohai.

turned himself in at a later date.¹⁶⁰ In the wrongful conviction case of *She Xianglin*, for example, She Xianglin was convicted of murdering his wife. He was released after serving eleven years in prison when his wife returned for a visit home and disclosed that she had run away and remarried in another province. Similarly, Zhao Zuohai served ten years in prison (having earlier had his death sentence commuted) only for the victim to reappear in the village. In the *Du Peiwu* case, Du Peiwu was convicted of murdering his wife and his wife's lover. He was sentenced to the death penalty with a two year reprieve but was acquitted after the real culprit confessed to the murder and the police found the weapon (gun) used to murder the victims. Slightly differently from previous miscarriages of justice, the *Zhang Gaoping* and *Zhang Hui* case was acquitted due to the persistent appeals by a retired prosecutor Zhang Biao, who worked in the prison where Zhang Gaoping and Zhang Hui served their sentence. The prosecutor showed sympathy to Zhang Gaoping and Zhang Hui. After a persistent appeal by the sympathetic prosecutor, the High Court of Zhejiang launched a new investigation, through which DNA comparison was conducted and exonerated the two wrongfully accused. The way miscarriages of justice in China are discovered is highly fortuitous. Systematic mechanisms such as letters of appeal (*xinfang*) and complaints (*shensu*) have rarely caught the attention of legal institutions. In most circumstances, the voices of victims of miscarriages of justice (and their families) are suppressed by local authorities.

Clearly, no substantive measures (such as robust evidential scrutiny or promotion of forensic techniques) have been adopted in CPL 2012 to prevent further miscarriages of justice or to ensure the falsely convicted cases being able to be identified through established mechanisms of the system. On the contrary, the criminal justice system still emphasizes the importance of the written evidence, especially the defendant's confession. Whilst the legislature has made some effort in encouraging witnesses to attend the court,

¹⁶⁰ See He Jiahong, *Wangzhe guilai: xingshi sifa shida wuqu (Resurrection: Ten pitfalls of criminal justice in China)* (Peking University Press 2014).

the issue of the system's dependence on the dossier remains unresolved. The written dossier still lies at the centre of different stages of the criminal process and decisively determines the fate of the accused. Since the system relies heavily on written dossiers, the thrust of this study is to investigate whether the evidence encompassed in the dossier is reliable to make a safe judgement. Furthermore, the legislation of CPL 2012 concerns not merely the trial mode but reaches within the innermost nature of the functioning of the criminal justice system. It is an issue that is entrenched in the socio-political structure and core value system that the law was hard to penetrate. The Chinese criminal justice system resembles the inquisitorial system in many different aspects other than it contains a stronger political tone.¹⁶¹ Thus what Damaška suggested in his comparison between the hierarchical model and the coordinate officialdom in the context of western legal system can be precisely applied here:

a good test to assess the intensity of hierarchical attitudes is to propose the reduction of the evidentiary significance of official documentation. The greater the intensity, the more vehemently such reform proposals will be opposed. If the evidentiary significance of the file is totally and effectively denied, the hierarchical process is no more. (Damaška, 1986:50)

Therefore, the judicial reform of adversarial trial and witnesses attending the trial to testify could be used as an ideal tester to observe and explore the realistic foundation of Chinese criminal justice system; and dossiers of the case---the nerve centre of the whole process integrating various levels of decision making, can be used as a barometer to assess and analyse the nature and the result of legal reform.¹⁶²

¹⁶¹ See the comparison between the Chinese criminal justice and some inquisitorial countries, such as France in this chapter.

¹⁶² See Mirjan R Damaška, *The faces of justice and state authority* (Yale University Press 1986) 56.

Chapter 2 Research Background and Methodology

1. A Review on Previous Research

Since the criminal legal reform of 1996, which represented a shift in China's trial mode to a more adversarial based system,¹ there has been a burgeoning interest within Chinese academia exploring the absence of witnesses in court. A number of scholars have examined the reasons for the small number of witnesses that have appeared in the courtroom and proposed various schemes to address the issue based on models of foreign jurisdictions. For example, Shi Limei (2001) suggests that the reason why witnesses fail to attend trials is because of their reluctance; she believes that due to the imperfection of legal regulation, there has been a lack of legal responsibility in terms of witnesses' expenses reimbursement; she indicates that courts' incompetence in compelling the witnesses to testify also leads to the absence of witnesses at trial. Other scholars, such as Long Zongzhi (1998), Chen Weidong (2001), Zhang Zhongfang (2001), Zhang Hua (2001) and Li Wenjing (2001) imputed the witnesses' absence in trials to China's anti-litigation culture.² They ascribed witnesses' disinclination to testify to the traditional culture of China, by

¹ The reform towards an adversarial system is mainly restricted to the trial rather than the whole criminal process in CPL 1996. In the pre-trial stage, although defence lawyers are given more rights, such as earlier access to the dossier and entitlement to meet suspects in investigation, the pre-trial stage is still largely controlled by the police and prosecutors. Defence lawyers rarely gather evidence by themselves due to the various obstacles that exist in practice and their rights much more limited than their counterparts in common law countries.

² In China, a lot of scholars and lawyers have discussed the reasons why witnesses do not attend the court. See for example, Long Zongzhi, *Xingshi Tingshen Zhidu Yanjiu (The Research on the Trial of Criminal Process)* (China University of Political Science and Law Press 1998) 51; Shi Limei, 'Zhenren chuting zuozheng zhidu yanjiu (The study of witnesses' attending to courts)' (2002) 10:2 *Guojia jianchaguan xueyan xuebao (Legal review of National prosecutor's college)*, 60; Zhou Guojun, 'Xingshi anjian zhenren chuting zuozheng zhidu yanjiu (The study of testifying witnesses' testimony in criminal cases)' (2002) 2 *Zhongguo xingshifa zazhi (China criminal law magazine)* 14; Chen Weidong, 'Rang zhenren zouxiang fating---xingshi anjian zhengren chuting zuozheng zhidu yanjiu (Let witnesses go to the court: The study of witnesses' testimony)' (2007) 19:2, *Shandong jincha xueyan xuebao (Legal review of Shandong Police college)*, 40; Xu Xin, 'Faguan Weishenme Bu Xiangxing Zhenren? Zhenren zai Zhuaxing Zhongguo Sifa Guochengzhong de Zuoyong (Why judges do not trust witnesses? The witnesses' role in the transition of Chinese Criminal Justice)' (2006) 18:3 *Peking University Law Journal*, 337.

which people wish to avoid court trials at all cost. In order to encourage witnesses to testify in courts, a variety of versions of procedural rules were proposed by scholars such as Zhen Zhen (2000), Mu Jun (2000), Wu Haopeng (2000), Fu Mingjian (2000) and Gao Haohan, et al (2000).³ It is worth noting that reasons identified in these studies, such as the limited resources set aside for witnesses' attendance at trial, has gained attention from the legislature. As a result, relevant legal provisions have been incorporated in the revised CPL 2012 to address this matter.

Whilst witnesses' absence in the trial has attracted wide academic interest, most of the legal studies on this subject have adopted a theoretical approach, rather than the use of empirical methods. Consequently, the discussion has been largely conducted without the support of empirical evidence, which yields little insight into the actual reason for the lack of witnesses' live testimony at trial.

The history of empirical legal research in China covers a short space of time. Only in the last decade have there emerged a small number of empirical studies on the Chinese criminal justice system. In many western countries, such as the United Kingdom, generations of legal researchers have been active in enquiring into all aspects of the criminal justice system by using empirical methods. This disparity can be attributed to the late introduction of methodological literature in China and Chinese scholars' faithful devotion to the doctrinal approach.⁴ As a general trend, the majority of Chinese scholars tended to axiomatize certain continental theories to rationalise the semantic notion of the

³ Article 47 of CPL 1996 provides that witnesses' testimonies must be questioned and testified by procurators, victims, defendants and defence counsels; all the testimonies are to be heard and ascertained before they are used as the basis of adjudication. It is a very broad provision of the testifying procedure but it can be used as a general principle of orality in the trial.

⁴ However, in recent years some scholars have started to explore the empirical methodology and some introductory studies have emerged, such as Song Yinghui and Wang Wuliang, *The practice of empirical legal research* (Peking University Press 2009); and Song Yinghui et al, *Exploration into empirical legal research in China* (Peking University 2012); Some scholars started to try using the empirical method to study legal phenomena, such as Wu Yingzi, *Faguan Juese yu Sifa Xingwei (The role of judges and judicial activities)* (China encyclopaedia Press 2008).

law.⁵ Whereas many articles in China have mentioned legal practice in general terms, there has been a lack of empirical data to support such assertions. Understanding of the way in which the criminal process operates in China is in its infancy. The divorce of academic research from legal practice means that there has been a paucity of research findings that could inform on the current legal system as well as providing evaluations of legal reforms.

Of these limited empirical studies, quantitative methods and questionnaires have often been preferred in the majority of instances. For example, in Zuo Weimin and Ma Jinghua (2005)'s study of witnesses' attendance rate, the percentage of witnesses who testified in the court were calculated by using different statistical methods. Statistical tools were used to compare the 'actual attendance rate' and the 'ideal attendance rate' in eight courts in a large city in Southwest China in the year of 2004.⁶ However, the sample pool of cases that had been used to generate the attendance rate of the witnesses was selected on different criteria. On the one hand, the 'actual attendance rate' which they initially calculated was based on a survey of 6810 tried cases without excluding guilty plea cases;⁷ on the other hand, the 'ideal attendance rate' they calculated was derived from 23 contested untried cases⁸. Since these extracted sample cases were basically incomparable, their research was inherently flawed.⁹

⁵ See Zuo Weimin and Wu Weijun, 'Dangdai zhongguo xingsu faxue: yanjiu yangshi de shanbian yu qianzhan(The transition of research model and Chinese legal reform: Debate based on empirical study' (2001)1, *Faxue pinglun (Legal Review)* 62.

⁶ These courts include district courts and intermediate courts. Like England and Wales, most witnesses appear in contested trials in Crown Court. In China, as most criminal cases are first tried in the local district courts and intermediate courts (major serious cases, cases that may be sentenced to life imprisonment or death penalty), therefore local district courts and intermediate courts are focused by most studies on the matter of witnesses' attendance.

⁷ Just as in common law countries, the witnesses' attendance is important mainly in contested trials, cases relating to the guilty plea do not need to proceed to the formal ordinary court. In Zuo Weimin and Ma Jinghua's study, the researchers did not specify whether the 6810 cases in the survey are contested by the defendants or not. If the defendants did not dispute the charged facts and simply admit the case, the number taken into account is meaningless as the witnesses' attendance is not a necessity for the fact finding. It is also not clear from the account of the study whether those witnesses who appeared in the cases, are the key witnesses.

⁸ In Zuo Weimin and Ma Jinghua's study, it is hard to ascertain whether the witnesses they communicated for which party, but from the description, most witnesses are prosecutor's witnesses.

⁹ In their findings, they concluded it was the prosecutors' negative attitude against witnesses appearing in the court and judges' habitual reliance on dossiers that were the key factors. However, this finding is more of speculation than actual reasoning of the data they gathered. The overall methodological process of this study is not very clear.

Another empirical study focusing on witnesses' attendance rate was undertaken by Yi Yanyou (2010) between 2007 and 2008 in Northern China. Using different sampling methods, Yi Yanyou differentiated the contested cases and cases in which the facts were not disputed by the defendant.¹⁰ Yi challenged the stereotypical methods of calculation, which separated victims from the general category of witnesses. In his sample, Yi indicated that out of 183 cases with victims, there were 48 victims that came to the court to testify, which added significantly to the total number of witnesses appearing in court. Then he calculated the key witnesses (including victims)' appearance and concluded that the key witness attendance rate in his sample was 25 per cent, which was significantly higher than expected. However, it is not clear in his sample whether those victims who came to the court were for the purpose of giving testimony in the criminal trial or for the incidental civil claim heard alongside the criminal case.¹¹ If these victims who appeared at trial were merely for the civil action deriving from the defendant's criminal act, they should not be counted towards the number of witnesses who testified in court.

Other empirical literature focuses on the trial mode to examine the system's reliance on written evidence. In Zuo Weimin (2005)'s follow-up study, he observed the trial process of 12 selected cases with witnesses appearing at the court to testify.¹² His findings revealed that even when witnesses did come to the trial to testify, their testimonies were not given sufficient weight by judges. Since judges tended to evaluate witnesses' live testimonies by the written evidence contained in the investigative dossier, their oral testimonies had very limited influence on judicial decision-makings. In his later study, Zuo Weimin (2007)

¹⁰ It needs to be noted that all these studies advocating only key witnesses being required to attend the trial, and therefore non-key witnesses are not required to appear need to be taken into account in the calculation of the attendance rate. Based on the research of Yi Yanyou, *Zhongguo Xingsu yu Zhongguo Shehui (The Chinese Criminal Process of Chinese Society)* (Peking University Press 2010) 79. The key witnesses means the testimonies that those witnesses were given were disputed by the defendants or were crucial to the fact finding and sentencing.

¹¹ In Chinese criminal trial, the victim has the right to file an incidental civil claim if he or she has suffered material losses as a result of the defendant's criminal act. The incidental civil action is heard alongside the criminal trial.

¹² Zuo Weimin, 'Xingshi zhengren chuting zuozheng chengxu: Shizhengyuanjiu yu lilun chanxi (The legal process of witnesses appearing at criminal courts: empirical research and theoretical analysis)' (2005) 6:17 Peking University Law Journal (*Zhongwai faxue*), 641-663.

analysed 50 criminal dossiers taken from 1984, 1994 and 2004 in the police stations, prosecution offices and courts in a middle sized city in Southwest China.¹³ His findings indicate that criminal dossiers, which pass through all stages of the criminal process, play a decisive role in the final conviction of criminal cases. In comparison with the structure of the police dossiers from other jurisdictions (Germany and California, USA), he concluded that investigative dossiers in China play an absolute role at every stage of the criminal justice process, while dossiers in Germany and California only have a similar function in certain aspects of criminal proceedings. He analysed the difference between these jurisdictions from the perspective of the typology of judicial power, judicial purpose and the structure of the criminal justice process. Applying Webber's theory of bureaucratic coordination and Damaška's classification of hierarchical and coordinate officialdom, he suggests that, compared to the practice of other countries, the dossier system is well suited to the criminal justice system in China. This is primarily due to the fact that China's criminal justice system features a close relationship between the prosecution and the judiciary, is investigation-orientated and contains a crime-control ideology. Setting aside certain statements that generalise the inquisitorial and adversarial system in simplistic terms,¹⁴ his research has shed light on important aspects of the current dossier system within the social context of China.

As evidenced above, the empirical study in relation to the witnesses' absence at trial, and the criminal system's heavy reliance upon the written evidence, are largely under-investigated. As a general deficiency, these empirical studies failed to address the basic questions in light of their empirical methods, such as the process of data selection and

¹³ Zuo Weimin, *Zhongguo xingshi juanzong zhidu yanjiu (The study of Chinese dossier system)*, (2007) 6 Faxue yanjiu (Legal studies), 94.

¹⁴ For example, Zuo uses the example of one case dossier in the U.S (California) to represent the adversarial system and uses one case file in Germany to represent the inquisitorial system. This is overly generalised given the complexity and significant variation of the two systems. When analysing judicial purposes between the inquisitorial system and China, his argument was based upon the statement that 'the inquisitorial system aims to balance the purpose of punishing crimes and protecting human rights, at the meantime pursuing the priority of human rights protection', which is also highly generalised and in lack of support of evidence. See Zuo Weimin, *Zhongguo xingshi juanzong zhidu yanjiu (The study of Chinese dossier system)*, (2007) 6 Faxue yanjiu (Legal studies), 94, 111.

ethical issues; therefore there is a failure of academic rigor in these projects and their findings are consequently questionable.¹⁵ These studies intend to understand the *status quo* of the operation of the criminal justice system; but they do not advance any knowledge about the socio-legal reasons that underlie the phenomenon, due to the limitation of the research method.

Compared to the quantitative approach, qualitative methods (such as participant observation and semi-structured interviews) are better suited to studying complex legal processes. For example, participant observation (ethnography) allows the researcher to immerse themselves in the field 'to identify important and relevant issues without the constraint of pre-coded categories'.¹⁶ It is generally believed that qualitative data, such as interviews and observation are conducive to extracting in-depth information on people's daily activities, interior processes and practices.¹⁷

The paucity of empirical research on the Chinese criminal justice system could also be ascribed to the secret and closed nature of the investigation in the criminal process and the lack of transparency of public information within legal institutions. A lot of data of interest and relevant to the comprehension of China's criminal justice system is regarded as sensitive, or beyond sensitive, by the Chinese authorities.¹⁸ Official data is generally not open to the public domain. Nevertheless, this does not mean that such obstacles cannot be overcome, nor that insightful understanding of the system cannot be obtained. In recent years, there have been several scholars starting to use qualitative empirical methods to investigate critical aspects of the criminal justice system. Although these studies are not directly concerned with witnesses' absence in courts, these empirical enquiries are nevertheless relevant and crucial to the understanding of the system's heavy reliance on the

¹⁵ For example, in Zuo Weimin's studies, the reason why the specific institution was chosen has not been addressed at all in his articles. He also gave too much details about the institution in which he conducted his serials of empirical studies, which could result the institution being under public scrutiny.

¹⁶ Jacqueline Hodgson, *French Criminal Justice: a comparative account of the investigation and prosecution of crime in France* (Hart publishing 2005) 10.

¹⁷ See Gale Miller and Robert Dingwall, *Context and method in qualitative research* (Sage publication 1997) 15.

¹⁸ Mike McConville et al, *Criminal justice in China: An empirical enquiry* (Edward Elgar 2011)22.

written dossiers. Xiao Shiwei (2009), for example, has shed light on how criminal judgments are actually made by observations undertaken in a basic court.¹⁹ Ma Jinghua (2009)'s research on how police initially made an inquiry into the suspect (*dao'an*) is based upon 240 case files and 40 interviews with police officers and defence lawyers.²⁰ To understand the functioning of the Appraisal System (*jijian kaohe zhidu*) within the criminal justice system, Zhu Tonghui (2009) undertook participant observation in the police station and a district procuratorate for four months, during which period he also interviewed 11 police officers, 11 prosecutors and 1 congressman.²¹ He Jiahong and He Ran (2013) conducted 1,175 questionnaires to analyse the reasons for wrongful convictions in China.²² In their recent study, Zuo Weimin and Ma Jinghua (2013) have evaluated the extent to which the Chinese defence lawyers have an effect on the outcome of the trial by examining 456 criminal cases files, conducting questionnaires and interviews.²³ In general, these studies have not rigidly followed norms of qualitative methods; specifically none of them have addressed the ethical issues appropriately. Nonetheless, they have promoted inquiries into the daily practice of the criminal process and provided important understandings of the aforementioned aspects.

Hitherto, the most comprehensive empirical study on the Chinese criminal process is Mike McConville et al (2011)'s inquiry on the criminal justice system.²⁴ Mike McConville et al

¹⁹ Xiao Shiwei (2009)'s study has not rigidly followed the empirical norms developed in Western countries. For example, the author did not specify which empirical method has been chosen, although it can be inferred that he conducted participant observation. No ethical issues were mentioned except the name of the court has been anonymised. Although the finding of the research is preeminent, the actual data were not directly quoted or has been fused in such a way with his opinionated views. Xiao Shiwei, *Shenpan shi Ruhe Xingchengde: yi S Sheng C qu Fayuan Shijian wei Zhongxin de Kaocha (How the criminal judgment comes into being: based upon the empirical study of S province C court)* (China Procuratore Press 2009).

²⁰ Ma Jinghua, *Zhongguo xingshi susong yunxing jizhi shizheng yanjiu: Yi zhengcha daoan zhidu wei zhongxin (Empirical study on the operation of Chinese criminal justice system: On the basis of the initial inquiry into the suspect in the investigation)* (Law press China, 2009)

²¹ Zhu Tonghui, 'The Appraisal System in the Criminal Justice System (Xingshi susong zhong de jijian kaohe)' (2009) 1 *Law and Social Science (Falv he shehui kexue)* 5.

²² He Jiahong and He Ran, 'Wrongful convictions and tortured confessions: empirical studies in mainland China', in Mike ConConville and Eva Pils (eds.), *Comparative Perspectives on Criminal Justice in China* (Edward Elgar Publishing Limited 2013) 73-90.

²³ Zuo Weimin and Ma Jinghua, 'The role of criminal defence lawyers in China: an empirical study of D County S Province', in Mike ConConville and Eva Pils (eds), *Comparative Perspectives on Criminal Justice in China* (Edward Elgar Publishing Limited 2013) 234-255.

²⁴ Mike McConville et al, *Criminal justice in China: An empirical enquiry* (Edward Elgar 2011)

(2011) examined the working practices and legal culture that underpin criminal institutions in China by carrying out field research over a six year period beginning in 2001. Court observation and semi-structured interviews with judges, prosecutors and defence lawyers were conducted systematically in 13 basic and intermediate courts throughout China.

In their observation, they found that, out of 1109 defendants whose cases proceeded to trial, only in 2.8 per cent of cases did witnesses provide live testimony, which is consistent with the findings of the majority of researchers in China.²⁵ Mike McConville et al (2011) observed that the reason why witnesses do not enter the trial process is due to the fact that judges and prosecutors cannot control what witnesses will say at trial. Thus judges and prosecutors prefer to rely on witness's written statements, the contents of which are settled, so that they have had the ability to scrutinize and control the case in advance of the trial. Their research concluded that the embedded reasons for the 'paper trial' lies in the systematic and internalized breaching of the law and legal principles by state officials.

Despite the findings supported by a large volume of data, their understanding of the criminal process, especially the pre-trial process, is largely reliant on criminal dossiers and interviews with legal personnel, with direct observation being restricted to courtroom activities. Whilst interviews and archive studies could offer valuable information of the inner practice within the legal institutions, the derived information may be based upon a taken-for-granted version of the answers in question, as it is difficult to distinguish inaccurate information in case files and interviews. Compared to interviews and case files, observational data is generally preferred, given its advantage in contributing uncategorised scope to understanding how institutions function, providing a stable context and focusing on natural occurring activities.²⁶ Therefore angling the lens to the pre-trial procedure and examining the legal actors' preliminary activities, as well as undertaking court

²⁵ It is not clear from McConville et al (2011)'s study whether all these cases were contested by the defendants.

²⁶ As will be discussed later in this chapter, participant observation allows the researcher to explore the interactions of the legal actors during the course of criminal proceedings without hypothesizing the answers deriving from the focus group.

observations, would be a better perspective to observe the criminal justice system in operation.

Apparently the lack of witnesses' live testimony at trial and the courts' reliance on written dossiers are inter-related, or essentially the opposite sides of the same issue. Thus, to understand why witnesses are absent in the court, it is crucial to understand why the criminal justice system is dependent upon written evidence. To date, there has been little systematic knowledge about the criminal dossiers and their role in the criminal process. The literature strongly suggests that the written dossier plays a significant part in influencing the decision-making at every stage of the criminal proceedings; but there has been no empirical evidence on how these dossiers are actually made and to what extent they have shaped the criminal process. Whilst much of the previous research has concentrated on criticising police malpractice, especially the use of torture, these studies have neglected to examine the police's discretion in compiling evidence for use in court.²⁷ Work of Western scholars, such as Sanders (1987) and McConville et al (1991), have demonstrated that the case for prosecution in England and Wales is not the result of the discovery of objective reality, but rather a creation of evidence through interpretation, addition, selection and reformation by official actors.²⁸ Similarly, McConville et al (2011) suggests that police cases in China are also subject to the same process of case construction which involves actively shaping and creating the evidence underpinning the allegations of the prosecution.²⁹

Hence, the question is whether the process of the construction and the written evidence generated are reliable. Since all the prosecution evidence is required to be scrutinised by

²⁷ There are many articles and studies focusing on criticising the use of coercive police methods and police malpractice such as torture. For example, Ire Belkin, 'China's tortuous path toward ending torture in criminal investigations', in Mike McConville and Eva Pils (eds.), *Comparative Perspectives on Criminal Justice in China* (Edward Elgar Publishing Limited, 2013) 91-117; Chen Weidong and Taru Spronken, *The three approaches to combating torture in China* (Intersentia Publishing Ltd 2012); Liu Fangquan, *Zhencha chengxu shizheng yanjiu (Empirical studies on investigations)* (China Procuratorate Press 2010).

²⁸ See Andrew Sanders, 'Constructing the case for the prosecution' (1987)14 *Journal of Law and society*, 229. Mike McConville et al, *The case for prosecution* (Routledge 1991).

²⁹ Mike McConville et al, *Criminal justice in China: An empirical enquiry* (Edward Elgar 2011) 66-105.

prosecutors, can the prosecutor offer sufficient safeguards to ensure the credibility of the evidence? From the perspective of the defence, can defence lawyers build a defence case to deconstruct the prosecution case by attempting to uncover the process by which the evidence against the client came into existence? When it comes to the trial, to what extent does the constructed police dossier influence the judge's decision-making? Given the fact that very few witnesses give testimonies at trial and the dossier is used for trial, these questions have significant implications, as they directly relate to the issue of the integrity of the criminal process.

Given the shortfall of the literature on these matters, this study attempts to approach these questions by following key legal personnel's activities surrounding the construction and application of criminal dossiers. Following the line of inquiry in relation to the functioning of case dossiers, related issues such as the roles and relationships of different legal actors will be investigated and scrutinised. While early research focused on the court trials, the data of this study is collected by directly observing legal officials' daily activities from an internal perspective of the system. By getting inside the legal institutions that are involved in the pre-trial activities, this research aims to provide an insightful analysis as to why witnesses are excluded from trials. Although this study does not attempt to, or offer to, give specific solutions for the problems that confront the progress of legal reform, it sheds light on the reformative agenda of the criminal justice system; specifically to what extent the legal reform has effected realistic change to the operation of the system in everyday cases. This will be of relevance to those monitoring the operation of the current law and extrapolating the future prospects of the Chinese criminal justice system.

2. Methodology

2.1 Methodological Choice

As suggested by JW Creswell (2008), the choice of the research method should hinge on the research questions.³⁰ In keeping with this view, one of my preliminary research plans was to consider which specific approach matches the research question of this study. Like many empirical studies, this research started with a so-called foreshadowed research problem: why is the Chinese criminal justice system so heavily reliant on written dossiers and repellent to the oral testimony of witnesses?³¹ This question was closely associated with the understanding of the internal workings of the Chinese legal institutions, such as the knowledge of how the written dossiers were constructed by the police, how the prosecutors supervised the police investigations, and on what basis did the judges make a decision when balancing between written evidence and the oral statement. After a set of inquiries had been formulated, I realised that many of these key issues had not been properly addressed by prior literature, and previous empirical research had not explored these questions from within the legal institutions of China.

As a research student, I possessed no privileged information in relation to the internal operation of the institutions in the Chinese criminal justice system. Therefore the quantitative research method was rejected, as the important variables and the key influencing factors were simply unknown to me. By the same token, formally structured approaches, such as questionnaires, were also dismissed, as I was uncertain as to what sort of information was useful to be extracted. Since these refined inquiries derived from the research question can be answered by either providing a generalised account of the practices of the legal actors, or a narrative description of events and cases, unstructured or

³⁰ JW Creswell, *Research design: qualitative, quantitative and mixed methods approaches* (Sage Publications 2008) 23.

³¹ Martyn Hammersley and Paul Atkinson, *Ethnography: principles in practice* (Routledge 2007) 21.

semi-structured qualitative approaches, such as participant observation and semi-structured interviews, were most suited to this project.³²

With no prior knowledge of legal practice within criminal justice institutions, I believed the knowledge of complex criminal processes can be best informed by observing, entering a 'real-life' setting of the legal institution and experiencing the interactive situations. Such a position allows the researcher to be an interpreter of the data yielded by the participation and a 'knower' who understands the shared ideology, values and dilemmas of the legal personnel.³³ The open-endedness and exploratory nature of these research methods enables the researcher to identify key issues in the field with sufficient flexibility. Thus, participant observation (or direct observation) was adopted as the guiding method for this study whilst semi-structured interviews were used as a supplementary tool to explore those areas that were not covered by the observation.³⁴ As the primary empirical approach of this study, participant observation (ethnography) is a blend of techniques used to document an analytic account of the organisation under study.³⁵ It usually involves:

the researcher participating, overtly or covertly, in people's daily lives for an extended period of time, watching what happens, listening to what is said, and/or asking questions through informal and formal interviews, collecting documents and artefacts---in fact, gathering whatever data are available to throw light on the issues that are the emerging focus of inquiry. Generally speaking ethnographers draw on a range of sources of data, though they may sometimes rely primarily on one.³⁶

³² Many qualitative studies believe that the 'unknown field' should be conducted by observation. See JW Creswell, *Research design: qualitative, quantitative and mixed methods approaches* (Sage Publications 2008) 24; Viswanath Venkatesh et al, 'Bridging the qualitative-quantitative divide: guidelines for conducting mixed methods research in information system', (2013) 37:1, *MIS Quarterly*, 25.

³³ Jennifer Manson, *Qualitative Researching* (2nd edn, Sage Publications 2002) 85.

³⁴ The term of direct observation may be more accurate than participant observation, as 'the role of the observer who remains a researcher, rather than a participant in the sense of contributing to the goals of the organisation under study'. See Jacqueline Hodgson, *French criminal justice: a comparative account of the investigation and prosecution of crime in France* (Hart publishing 2005) 10.

³⁵ Jacqueline Hodgson, 'The defence of criminal charges' [1988] *PhD thesis of the University of Birmingham*, 90.

³⁶ Martyn Hammersley and Paul Atkinson, *Ethnography: principles in practice* (Routledge 2007) 3.

It is a relatively open-ended approach and begins with an inquiry into some particular area of social life, so that the social world can be studied in its 'nature' state.³⁷ The task of the observation is:

to investigate some aspects of the lives of the people who are being studied, and this includes finding out how these people view the situations they face, how they regard one another, and also how they see themselves.³⁸

Criticism has been levelled at the fact that it is very difficult for the researcher to fully set aside their own perspective in the observation, and thereby participant observation is lacking scientific rigour.³⁹ It is true that participant observation does not match the positivist canons which require a standardised set of data elicitation procedure and the elimination of the effect of the observer. However, by embracing an attitude of 'respect' and 'understanding' towards the social culture, the researcher's own reflective attempts and values that are appreciated allow her to understand and represent the observational subject's experiences and actions more adequately.⁴⁰ As the observation is conducted in ways that are sensitive to the nature of the setting and that of the phenomena being investigated, the primary mission of the observation is to document the events, actions and opinions within a specific social background. In my fieldwork, by observing what happened in the field and how legal actors perceived their own roles, and by examining the context in which various actions of the legal actors took place, and what followed from them, the ethnographic approach provided an access to the meanings that guided their behaviours in this specific socio-political environment. Only through the involvement which the participant observation has offered has the particular ideology that sustained the legal institutions in China been understood. Furthermore, the analysing process also adds to the rigour of this method. After the fieldwork, all the data collected in the site was

³⁷ Ibid. 7.

³⁸ Ibid. 3.

³⁹ See Robert Eillott, 'Evolving guidelines for publication of qualitative research studies in psychology and related fields' (1999) 38 *British journal of clinical psychology*, 216.

⁴⁰ Martyn Hammersley and Paul Atkinson, *Ethnography: principles in practice* (Routledge 2007) 7.

categorised and analysed in an objective manner by using relevant software⁴¹. By following the patterns of the data, the hypothesis of the initial proposal of this project was able to be tested and altered; themes that were critical to this study started to emerge, guiding the argument and structure of each aspect, and leading to the findings presented in this study.

Using an unstructured and descriptive approach, participant observation has a number of merits. It allows the researcher to explore the interactions of the legal actors during the course of criminal proceedings. The observer could be associated with the range of the legal actors' activities, including their daily routines, their conversations, their language, their work habits, the active construction of dossiers and related legal documents in the context of a natural setting. The situational dynamics of the contextual setting can never be fully acquired except for the benefit of multidimensional data yielded by participant observation. Simple details that I perceived during the observation, such as the smell of the detention centre and the physical layout of the interrogation rooms, can contribute greatly to the understanding of the Chinese criminal justice system. This method also enables the observer to immerse herself into the field and adjust the hypotheses in response to the acquired data, altering the research direction towards more pertinent topics when necessary.⁴² For instance, before I started the fieldwork, I believed that the trial would be a crucial part of the prosecutors' work. After I had undertaken a substantial part of the observation and several interviews with judges, I realised that the trial was such a formality that it was the least significant event for prosecutors. Also, prosecutors' decision to charge in the criminal process was greatly influenced by the 'trivial' activities of the prosecutors that otherwise would be ignored, such as their informal conversations in the office or phone calls they made to the judges and the police.

Whilst participant observation has its unique strength in capturing the interactive roles of legal actors, the research question can also be approached from a variety of angles and

⁴¹ The software that I used to analyse the field data is QSR Nvivo 10.

⁴² Jacqueline Hodgson, 'The defence of criminal charges' [1988] *Ph.D thesis of the University of Birmingham*, 91.

conceptualised in alternative ways. As a secondary empirical method, semi-structured interviews, or qualitative interviews, have been integrated into this study to explore the areas that have not been covered by the observation.⁴³ For example, by interviewing the legal actors that I had little opportunity to observe, such as judges and defence lawyers, their roles and the related issues that I would analyse in my study could be probed in greater width. Conducting semi-structured interviews also enables the quality of the observational data to be enhanced through the form of 'triangulation' of methods, so that the validity of the data can be ensured by juxtaposing corroborating sources.⁴⁴ In my fieldwork, a number of interviews were carried out at the end of the observational period when preliminary analysis was also undertaken. Relevant issues that emerged during the observational period were formulated into the interview questions, seeking clarification or confirmation. By checking these questions in the interviews, the data obtained during the observational period was validated and related issues were also investigated in a thorough and informed way. As the interviewees were comprised of different strands of the legal professional, the data I obtained earlier could be cross-checked by having conversations with those legal actors. The interviews contributed to coherent and supporting data, bringing all my findings together as a meaningful unit, and dispelling my concern that the knowledge that I had acquired from the observational site could just be the practice of a particular local procuratorate and its specific culture.⁴⁵

As a secondary method, the semi-structured interview was strategically compatible with participant observation. Since the data yielded from participant observation was situational and interactional, semi-structured interviews could also be designed as contextual in the sense that 'it draws upon, or "conjures up", the social experiences or processes which the

⁴³ Jennifer Manson, *Qualitative Researching* (2nd edn, Sage Publications 2002) 62.

⁴⁴ See Gale Miller and Robert Dingwall, *Context and method in qualitative research* (Sage publication 1997) 39.

⁴⁵ I found out, except for a minority of practices that were based on the rules of different provinces, the legal actors as segregated groups shared an identical role and maintain the same relationship with each other, apart from one field site I visited. All the defendants tried in the appellant court in that particular site (later coded as site G) were allowed to be represented for free. However, defendants in other areas in China do not have such benefit.

researcher is interested in exploring.⁴⁶ Therefore, instead of asking abstract questions, my interviews with legal actors were focused on relevant specific topics in the legal practices of criminal justice. By talking interactively with the interviewees, asking questions, gaining access to their accounts and articulations, analysing their use of language and construction of discourse, this approach allowed the researcher to extract the important information from their experiences and their understanding of the Chinese criminal justice system. Concerns about the 'bias' in the questions could be eradicated by following a model that initiated 'open-ended questions' and followed up with in-depth inquiries into the detail.⁴⁷ For example, the majority of my interview questions were started with 'what do you think about being a police officer/prosecutor/judge', so that the interviewees could speak broadly about their feelings regarding their careers. When they started to mention a topic related to the issues that I needed to explore, I would ask them to explain it in greater detail. By this means, data could be excavated in greater depth and the pitfalls of 'presentational' data could be avoided.⁴⁸

Throughout this study all empirical data are assigned an identification code based upon the resource from which they were collected. In general, the data were drawn either from the field notes recording the observation in site A, which are given the code initiated with APU, or from interviews in ten different field sites (Site A to Site J).⁴⁹ Interview data can be recognised with the code which is the combination of the letter identifying the field sites and the abbreviation of their legal roles (prosecutors are abbreviated as PS, defence lawyers are abbreviated as DL, police officers are abbreviated as PO, judges from district courts are abbreviated as AJ and judges from intermediate courts are abbreviated as TJ). Thus, for example, interview excerpts BPO-2 were extracted from the interview with the

⁴⁶ Mats Alvesson and Dan Kärreman, *Qualitative research and theory development: mystery as method* (Sage publication 2011) 36.

⁴⁷ Jennifer Manson, *Qualitative Researching* (2nd Edition, Sage Publications 2002) 65.

⁴⁸ Jacqueline Hodgson, *French Criminal Justice: a comparative account of the investigation and prosecution of crime in France* (Hart publishing 2005) 10.

⁴⁹ Details of the data resources, including the basic information of the field sites and interviewees, are given in Appendix B.

police officer working in site B. Individual cases monitored in site A during the observation can be identifiable through the code initiated with *CASEA*.

2.2 Participant Observation

2.2.1 Entering the Field

Positioning the observation in the pre-trial stage, rather than the court trial, is a better perspective when discovering the nature of the Chinese criminal justice. Therefore the observational site that was preferred in this study should be one of the legal institutions involved in the pre-trial phase. H. Russell Bernard (2000) pointed out that the most difficult part of conducting participant observation fieldwork is making an entry.⁵⁰ This is particularly true when it applies to the access of a field site in China, where the current political authority tends to treat every source of information regarding the criminal system as sensitive and confidential. As this study is focused on the Chinese criminal justice system's reliance on written dossiers, revealing how the written statements are made in the investigation and how these dossiers are viewed by the prosecutors, would be crucial to the purpose of the observation. Due to the closed nature of the Chinese police investigation, information in relation to the police investigation is treated as a 'State secret'. The police station, one of the most important institutions that dominate the pre-trial stage in the Chinese criminal process, is regarded as an 'exclusive government body', which is not open to researchers. Not having access to the police stations, the procuratorate, or more precisely, the prosecutor's office, which was open to *pro bono* law school trainees, became the choice for my observation.

⁵⁰ H. Russell Bernard, *Social research method: qualitative and quantitative approaches* (Sage publications 2000) 326.

A total of six-month's participant observation was conducted within a prosecutor's office in China. There are two stages of observation in my fieldwork. The first part of the observation, which forms the main body of my data, was conducted from June to September 2012. Since the revised criminal procedure law 2012 came into force in January 2013, follow up fieldwork revisited the same site and was carried out between September and October 2013, during the time in which the new practice of the law was almost settled. With the help of an informal approach, my initial contact was with the Chief Prosecutor in a local procuratorate located in an urban district, in a large city, in China (referred to as site A), with over 630,000 residents in its jurisdiction. As suggested by Eichhorn and Dean (1969), contacting the gatekeeper at the top of the hierarchical organisation has the advantage of ensuring a reasonable amount of cooperation from its members.⁵¹ Indeed, the Chief Prosecutor's highest status in the procuratorate gave me a sense of credibility and facilitated my observation in two of the busiest prosecutor's offices in the procuratorate. Like most procuratorates at a local level, the procuratorate where the participant observation took place was comprised of a number of departments based on the disparate supervisory roles. Of all the departments in this local procuratorate, the department of prosecution, the department of authorisation and the department of anti-corruption investigation were the core sections. The work in the department of prosecution was seen as the most challenging and attractive to ambitious young law school graduates. Due to the heavy workload imposed on those legal professionals, after a few years, waning enthusiasm and the discontent of the limited salary would prompt them to seek less stressful jobs with higher income. As a leader of the department of prosecution told me:

[Field note APU-2] the most important department in the Procuratorate is the prosecution, which is a window to communicate with the society. Prosecution is very challenging work but a good one to demonstrate individual ability. Therefore we put the most vigorous and talented young staff in the position of prosecution. However, the problem is that the turnover

⁵¹ Jacqueline Hodgson, 'The defence of criminal charges' [1988] *Ph.D thesis of the University of Birmingham*, 97.

of the prosecutors is very fast. Once those able and talented young prosecutors have shown their ability, they tend to leave for other departments. Therefore we are an unsettled army ...'

My positioning within the procuratorate later proved to be the ideal choice. I was given unmediated access to the case dossiers pending trial and was allowed to observe closely how the prosecutorial decisions were made in the cases that I had followed. It was worth noting that, because the pre-trial preparation of prosecutors was a transitional procedure connecting the police investigation with the court trial, the scope of my observation was also able to be extended to either end. I was able to speak to the police officers who regularly sent investigative cases to the prosecutor's office or consulted the legal opinions of the prosecutors. I was also given the opportunity to go to the court with the prosecutors and observe trials. That meant that I was able to follow a substantial part of specific cases, as I had seen how the cases were prepared by the police, formulated by the prosecutors, experienced the case trial and examined the final judgement of the cases. This would be otherwise unattainable had I chosen a different institution to observe.

The revised criminal procedure law 2012 was officially promulgated in January 2013. With the new regulations now incorporated within the legislative framework, which could lead to a significant reform in the practices of legal institutions (such as video recording of the police interrogation and the exclusionary rule of illegally obtained evidence), I believed that it was necessary to evaluate the potential impact of the law by revisiting the field. When I returned to the field in September 2013, prosecutors in site A were surprised to see me at the procuratorate, wondering why I had returned, given the fact that I had spent a considerable period of time in the prosecutor's office the year before. After informing them of the purpose of my study, they reacted incredulously and told me that 'I was wasting my time'. As a senior prosecutor commented:

[Field note APU-51] Prosecutor: You are looking for the change [of practice]? There is no change at all. At least I don't feel there has been any change. The trial is just a formality and

our work is still dictated by the Appraisal System. The court cannot make any acquittals.

Within such a framework, what kind of change could there be?

Indeed, after spending several weeks with the prosecutors in site A, I realised that, with the entrenched political-legal structure still in place and with the ideology that underpins the daily practices of the criminal justice institutions unchanged, the revision of the law is unlikely to bring effective improvement in the Chinese criminal justice system. Although certain reformative methods were claimed to be implemented with the enactment of the law, such as increasing the presence of live testimonies in court which includes investigators and expert witnesses, and the requirement that prosecutors should actively exclude unlawfully obtained evidence, in day-to-day practice, the principle of due process has not been embraced by the Chinese legal institutions according to my observation, and these newly introduced measures had mostly been misused or even utilised as a cover up to legitimise the malpractices of the police.⁵² Despite the second stage of my observation indicating that the criminal justice reform failed to yield favourable results, my revisit to the field was nevertheless worthwhile, as it reassured the direction of my study and added strength to my initial findings.

2.2.2 Gaining Rapport and the Role as an Observer

I stayed in one of two prosecutor's offices at each stage of the observation. Both offices I stayed with had an equal caseload and a very similar working style, which made it possible to compare the practices of their work at different times.⁵³ Perhaps due to the fact that I

⁵² Field note APU-47.

⁵³ In both offices, the head prosecutor was taking charge of the work of the associate prosecutors. Their working styles, such as the way they interrogated the suspect and the way they drafted the case report, was very similar. However, because office B was comprised of male prosecutors who were fond of playing computer games at their leisure time (such as lunch time), I found it very hard to initiate a conversation of interest with them. During my second observational stage, I compared the number of cases allocated to the two offices where I stayed. Each prosecutor in the two offices was given an equal number of cases dependent on their work experience and other personal circumstances (for example, female prosecutors in their nursery period were allocated fewer cases than the average prosecutor). The allocation of the cases would take into account the

spent a much longer period of time in the first prosecutor's office (referred to as office A) between June and September 2012, I found it easier to communicate with the prosecutors in that office than the one I stayed in at the later stage of my fieldwork (referred to as office B). Office A was made up of one head prosecutor, three associate prosecutors and one clerk. All the personnel in the office were about my age. This similarity in age aided the relationship, as we were seen as from the same generation.⁵⁴ We shared a common educational background and appreciated similar values in life. Rapport was built gradually both at work and after work, such as going to a cinema as a group or having dinner together occasionally. As H. Russell Bernard (2000) suggested:

It may sound silly, but just hanging out is a skill, and until you learn it you cannot do your best work as a participant observer.⁵⁵

Developing this rapport helped me to integrate into the prosecutor's office and I was soon seen as one of the members of this prosecutor's office. I was given trust, and concomitantly was given more opportunity to see how they operate in arenas other than the office. I was able to accompany them and observe how interrogations were conducted and how the cases that they had prepared were presented to the court. Trust also resulted in ordinary conversations and common behaviours being carried out in my presence. They readily shared their experiences and personal views towards the negative sides of the criminal justice system. This level of acceptance resulted in the head prosecutor openly expressing her resentment towards the case interference from the Political-Legal Committee in front of me:

difficulty of the case. For example, dangerous driving cases were generally regarded as simple cases and bribery cases would be regarded as much more difficult and complex. Normally, prosecutors would be given a similar amount of difficult cases and easy cases.

⁵⁴ In China, the so-called generation includes people whose age difference is within five years. For example, people who were born between 1980 and 1985 were called the early 80's generation. People who were born between 1985 and 1989 were called the 85' generation. Young people who were born between 1990 and 1995 were called the 90's generation. As a social bias to the age groups, the 80's generation are believed to be mature and hard-working while the 90's generation are believed to be naïve and immature.

⁵⁵ H. Russell Bernard, *Social research method: qualitative and quantitative approaches* (Sage publications 2000) 334.

[Field note APU-20] The Political-Legal Committee is just an unlawful organisation. Why should we follow their instructions rather than the law?!

Had I not been seen as a member of their coterie, this statement would have been highly inappropriate. I was also allowed to ask direct questions regarding their daily practices, some of which would be regarded as intrusive, had I asked earlier whenever I had newly entered the field. This gave me excellent opportunities to explore the issues that I was interested in, so that I could conscientiously glean information that related to my research. A similar experience occurred when I revisited the site but was allocated to office B. The majority of prosecutors in office B had knowledge of me already because of my earlier stay in office A the year before. Therefore even though the second stage of my observation was comparatively short, I was given trust by all the prosecutors in the office almost immediately and they treated me as one of them. A genuine social interaction between the prosecutors and myself was established after having spent some time together, which other researchers have also found, commenting on how fieldwork relationships developed into friendships.⁵⁶

I was constantly aware of my neutral role as a researcher in the field. When I was given the chance to observe the panorama of their work, some of which involves some degree of coercive threat and overbearing behaviours towards the suspect, I had to control any expression of criticism and keep recording objectively what I observed. Whilst I had established the ability to maintain a dispassionate role as an observer, I felt a sense of betrayal as a result of the developing friendships. Lofland (1971) referred to the same experience as 'poignancy'. Martyn Hammersley and Paul Atkinson (2007) suggested that the conflicting feelings should be managed for what they are:

Such feelings are not necessarily something to be avoided, or to be replaced by more congenial sensations of comfort. The comfortable sense of being 'at home' is a danger signal.

⁵⁶ Jacqueline Hodgson, 'The defence of criminal charges' [1988] *Ph.D thesis of the University of Birmingham*, 98.

From the perspective of the marginal reflexive ethnographer, there can thus be no question of total commitment, 'surrender', or 'becoming'. There must always remain some part held back, some social and intellectual 'distance'.⁵⁷

On one hand, I was deeply grateful that they had opened every possible door for me to observe; on the other hand, I also felt that this trust was utilised to pave the way for data gathering for research in which their unlawful behaviours in practice would become a crucial part of the subject matter. Nevertheless, this utilisation of trust was totally justifiable. As noted by Bernard (2000):

If all this gaining rapport seems a little manipulative, it's because it is.⁵⁸

They had been informed of the purpose of my observation and the subject of my research at the very beginning of my observation. After consultation with my university supervisor (who acted as a therapist), this feeling of treachery was handled with due care. It was true that to some extent I was a beneficiary of the under-developed empirical study in China. My informants' lack of familiarity with the nature of the fieldwork reduced any barrier toward my role as a researcher. However, as noted by Martyn Hammersley and Paul Atkinson (2007), without the distance and analytical space created by these divided loyalties, my project can be little more than the autobiographical account of a personal conversation. That may be a valuable and interesting document; however it would not be an empirical research.

As an exchange of information, I was constantly asked for my technical opinion on the application of law. Given the fact that I was pursuing a doctorate degree, they presumed my legal expertise was superior to that of the ordinary prosecutor. Although I maintained naivety in the field, and tried to promote myself as a person who was eager to learn, I found that sometimes my educational background gave me an advantage to encourage my

⁵⁷ Martyn Hammersley and Paul Atkinson, *Ethnography: principles in practice* (Routledge 2007) 90.

⁵⁸ H. Russell Bernard, *Social research method: qualitative and quantitative approaches* (Sage publications 2000) 334.

informants to speak to me. This gave me a chance to extend the breadth of my data and observe more prosecutors in other offices. Several prosecutors pointed out certain defects in the Chinese legal system and inquired of me about the similarities in practices within the UK. I was also alerted by prosecutors from other offices about major cases and was asked to attend the court with them. There were some mornings when I arrived at the office earlier than the prosecutors, instead of waiting outside the door of the office I was observing, I was invited in, to chat with prosecutors in other offices of the procuratorate about their individual cases. They always presumed that I focused my study on major and complex cases, and were puzzled by my interest in common criminal cases and informal internal procedures within the criminal process.

2.2.3 The Strategic Skills

Field notes, an essential part of fieldwork, were written every day to record details of the day's events and interactions. Miles and Huberman (1994) were convinced that,

obsessiveness about writing field notes is the way to go.⁵⁹

This was the approach I took in the early stage of fieldwork. When I first entered the prosecutor's office, I was carried along by the general excitement of everything that I saw and heard. Everything I observed in the field was captured in the field notes which became a voluminous record detailing the environment, behaviours and conversations of the legal personnel. The field notes were descriptive of my environment, with chunks of the conversations that I heard being recorded. I had to show interest to sensitive conversations that were taking place, listening attentively with appropriate eye contact and body language, making documentation difficult. On such occasions, information was limited to key words written on a note pad which was later used to refresh the memory, allowing me

⁵⁹ Ibid 356.

to record the majority of the conversation. Verbatim recording was still possible in circumstances in which open files or computer screens obscured the speakers' vision. Perhaps the trickiest environment was note-taking during a prosecutor's interrogation. The period of time spent on interrogation could last many hours and contained a substantial amount of information.⁶⁰ Information such as the prosecutor and the suspects' tone, the kind of language they used and their intensive interactions, were so crucial to my study that I had the irrepressible urge to scribble what was exposed to me in the interrogation room. I took the risk of recording verbatim what I thought would be most valuable, despite the fact that a CCTV camera was in operation and the prosecutor, sitting beside me, was fully aware of what I was doing. I regularly envisioned the scene of being asked to hand over my note pad and being confronted with what I had noted down. Fortunately, perhaps because of the relationships I had developed with the prosecutors, my note taking was tolerated and I was never questioned about what I had written down during the interrogation, albeit there were one or two occasions when I was asked politely about the purpose of my note-taking.

[Field Diary-2] Prosecutor: Did you write down everything that happened in the interrogation?

Researcher: Err...You know...I was just interested in the cases...I think I will discuss these cases in my thesis.

Prosecutor: I hope you did not write down our names.

Researcher: Of course ---definitely not. That is confidential.

As time progressed and more trust was gradually given by the prosecutors, I started to take the chance of making notes in front of them, explaining to them that this was my process of learning. This was approved by the head prosecutor, who was very pleased that I made

⁶⁰ When an interrogation took place in the detention centre, the interrogation normally took a whole morning or a whole afternoon with a minimum of 2 hours. Due to the voluminous information in interrogation, it was impossible to write down the notes afterwards.

the effort to learn their methods of dealing with cases. Although my informants became accustomed to my constant jottings, I was conscious that I should take care. Emerson et al (1995) cited a researcher's experience in an observational research involving divorce negotiation:

On one occasion when finishing up a debriefing ... [the mediator] began to apply some eye make-up while I was finishing writing down some observations. She flashed me a mock disgusted look and said, 'Are you writing this down too!' indicating the activity with her eye pencil.

I was always prepared to justify my note-taking behaviour, and my note pad was purposively covered with trivial reminders. In one instance, after I overheard prosecutors discussing a case, I was writing down what I had just heard whilst the head prosecutor was reading a case dossier. Suddenly she asked me:

What are you writing now? Have you been writing everything that is going on?

I was caught by surprise, but remained calm and answered, 'the question you asked earlier today about whether the charge should be withdrawn or not was very interesting.' She did not enquire further and continued to read her case dossier. Although relieved, I was alarmed by this occasion, which conveyed a warning of the mistrust of my note-taking. From that time I became more cautious about my note pad and the note-taking did not become an issue again. Note-taking was always challenged by the court guardians whenever I went to a trial. On these occasions, the prosecutor would explain to the court guardian that I was learning, which enabled me to continue to write down my court observations without further hindrance.⁶¹ I was always protected by the prosecutors, who treated me genuinely as one of them when we were out of the office.

One of the strengths of this empirical work has been the effective support from my supervisor, whose research experience and profound insights into the data enabled the

⁶¹ Field Notes APU-5 and APU-32.

fieldwork to be conducted in a reflective way. Field notes were sent back on a regular basis and reviewed by my supervisor, who then gave me feedback and advice on the modification of the research design based on what had been discovered in the field. Hence I was able to identify different issues that arose in the field and conscientiously glean relevant data. The focus of the data collection varied from time to time, dependant on the pertinent issues, which might need additional clarification or further exploration. Thus, whilst to some extent participant observation was unstructured and led by the emerging data, having an awareness of the data configuration and constantly adjusting the observational direction, the fieldwork was able to be organised in a rational manner, as well as retain its original flavour. I was familiar with the cultural context in which the fieldwork was carried out, but the regular communication with my supervisor, who approached the data from the perspective of an outsider, allowed me to avoid looking upon the operation of the criminal justice system as natural and self-evident, thereby helping me to conceptualise it as a rather strange environment in certain respects. On the positive side, the fieldwork was carried out in the researcher's own culture without encountering problems such as the linguistic barrier or culture shock. On the minus side, the researcher could more easily be trapped by cultural ethnocentrism, which takes many phenomena for granted, but which a stranger could pick up immediately. Mats Alvesson and Dan Karrenman (2011) believed the empirical research is a difficult enterprise concerning a matter of defamiliarisation:

Defamiliarisation means that we see things not as natural or rational but as exotic and arbitrary, as an expression of action and thinking within frozen, conformist patterns.⁶²

With the guidance of my supervisor, more effort was put into problematizing the daily routines of the legal actors and the ideology that underpinned the Chinese criminal justice system, so that many phenomena could be understood in novel ways. In one instance, I had

⁶² Mats Alvesson and Dan Karrenman, *Qualitative research and theory development: mystery as method* (Sage publication 2011) 44.

to explain to my supervisor why the prosecutors were asked to set a lot of time aside to review and correct the errors in the dossiers of closed cases to ensure they appeared to be rigidly following the law. I began to realise that the cosmetic covering up went to the heart of the Chinese criminal justice, with the cases in the dossier being constructed in a way that appeared lawful. Only when the actual processes were observed closely, could this original feature of the system be revealed.

2.2.4 Managing Marginality

When I had been fully integrated, I became susceptible to role confusion.⁶³ This problem with the role is referred to by Martyn Hammersley and Paul Atkinson (1983) as 'going native'.⁶⁴ The danger associated with role confusion is that 'the task of analysis [would] be abandoned in favour of the joys of participation'.⁶⁵ More importantly, as a consequence, bias may arise from the relationship of over-rapport and frustrate the integrity and orientations of the participant observation. Stein (1964) illustrates such influence of the erosion of role in his reflective account of his study with miners in a gypsum plant:

...The main point is that I associate working-class settings with emotional spontaneity and middle-class settings with emotional restraint. I never quite confronted the fact that the surface men were as much members of the working class as were the miners...The descriptive writing became an act of fealty since I felt that writing about life in this setting was my way of being loyal to the people living in it. This writing came more easily than most of my other writing. But the efforts at interpreting the miners' behaviour as a product of

⁶³ Jacqueline Hodgson, 'The defence of criminal charges' [1988] *PhD thesis of the University of Birmingham*, 110.

⁶⁴ This term has been used since the first edition (1983) of the same book. See Martyn Hammersley and Paul Atkinson, *Ethnography: principles in practice* (Routledge 2007) 87.

⁶⁵ *Ibid.*

social forces, and especially seeing it as being in anyway strategic rather than spontaneous, left me with profound misgivings.

It is crucial that the researcher should maintain a marginal position throughout the observation and minimize the dangers of over-rapport. During my fieldwork, being assigned to the specific prosecutor's offices, I inevitably spent much time with those prosecutors in the two offices and developed strong relationships with them.⁶⁶ After two months working with the prosecutors in office A, they believed I was competent to deal with cases by myself. At that time a prosecutor told me:

You can interrogate the suspect in the detention centre for me tomorrow. Just sign my name.

If you want, you can prosecute this case in the court with me next time.

This request would cause a conflict of roles, and thus it had to be declined. However maintaining the role of objectivity does not necessarily mean a rejection of total immersion, but rather it is more about the awareness of active reflection of the observer's status as an 'ethnographic self'. As suggested by Jennifer Mason (2002):

The issue is not necessarily one of conversion, immersion or not, but a recognition that the ethnographic self is the outcome of complex negotiations. Moreover the definition and location of the self is implicitly a part of, rather than tangential to, the ethnographic research endeavour...A weakness [of ethnographic enquiry] is not the possibility of total immersion, but a failure to acknowledge and critically (though not necessarily negatively) engage with the range of possibilities of position, place and identity.⁶⁷

To avoid spending too much time with the prosecutors in the two offices that I was allocated to, I consciously spoke to prosecutors from other offices in the procuratorate and expanded the spectrum of the observation. Whilst it is true that all successful ethnographers eventually come to rely on one or two key informants in their fieldwork, on certain occasions, the intimate bond within the office contributed to the development of an

⁶⁶ During my observation, one prosecutor moved out of office A and another two prosecutors moved into this office.

⁶⁷ Jennifer Mason, *Qualitative Researching* (2nd edition, Sage Publications 2002) 93.

exclusive relationship which to some extent prohibited me from approaching other informants.⁶⁸ After I had just entered the field, I took the opportunity to chat with prosecutors in other offices when I arrived at the procuratorate very early in the morning. However, the illuminating chats were abruptly discontinued when the head prosecutor I worked with jokingly reminded me 'it is time to go home', meaning that I should go back to 'my office'. I could do nothing but leave the other informant and return to the office.

As I was admitted as a *pro bono* trainee, I was able to focus on certain cases. Observation was often interrupted by having to undertake mundane clerical activity, such as photocopying the dossiers, preparing the bill of prosecution for stamps, recording case information into the case management system and sending the dossiers to the court. I talked politely to the defence lawyers and informed them of the procedures that they had to go through in the procuratorate. Perhaps, because my observational period was not very long (six months in total), I perceived myself as 'an other' who was temporarily working in the procuratorate. Whereas I spent a considerable amount of time with the prosecutors both at work and off work, I had a very clear view in my mind that I would never be one of them. The value towards the whole criminal justice system that I had adopted was significantly different from my informants within the procuratorate. I was silent when they collectively expressed their aversion to defence lawyers and boasted about their 'victory' to enforce a suspect to 'confess'. Rather than the loss of self, I found myself struggling to adapt to the identity disparities between an academic student and the law enforcement officers, from the belief of the ideal model of fairness, to the expediency of processing a case as conveniently as possible. When I finished a daily observation and left the procuratorate building, I felt relieved, but also surprised at being able to deal with the limbo I was positioned in.

⁶⁸ See H. Russell Bernard, *Social research method: qualitative and quantitative approaches* (Sage publications 2000)347.

2.2.5 Ethical Issues

Producing knowledge by conducting empirical research cannot be pursued at all costs. The ethical issues that surround social research are the overarching framework for the researcher, who should conform to the principle of ethics, from the initial stage of her project to the final publication of the findings.⁶⁹ Roth (1962) believes that all research falls on a continuum between the completely covert and the completely open.⁷⁰ In my study, the observation was operated in an overt manner, as the informants in my study knew the purpose of my observation and the project I was undertaking. However, this does not mean I have to disclose *everything* related to the research. This reservation of information is critical to both the research and the observer, as the participant observation is such an unstructured method that it is impossible to identify what would be involved at the negotiating stage and certainly not in any detail. Even during the observational process when the researcher had pinpointed clear issues in the field, divulging information would be inappropriate. It could result in the possibility that people consciously modify or conceal their behaviours, which leads to invalidation of the conclusion of the research.⁷¹ Since the participant observation is carried out in a natural setting, the researcher's control over the research process is also very limited. Sometimes it is impossible to ensure that all participants are fully informed, or to guarantee a freely reached consent. The participants had been informed at the very beginning of the observational period of my role as a researcher. I had also explained my research subject, so that people involved knew the direction of my study. Although they were surprised at the amount and type of details I was interested in, they nevertheless understood that it was all part of my research project.

⁶⁹ See Jacqueline Hodgson, 'The defence of criminal charges' [1988] *PhD thesis of the University of Birmingham*, 115.

⁷⁰ Martyn Hammersley and Paul Atkinson, *Ethnography: principles in practice* (Routledge 2007) 211.

⁷¹ Ibid.

Whilst participant observation rarely inflicts damaging consequences, harm could arise if the researcher is believed to be evaluating one's work, one's life or oneself.⁷² Thus strict adherence to the principle of confidentiality is absolutely crucial to protect those who participated in the study.⁷³ Failing to do so would create stress, provoke anxiety or even damage the reputation of the observed. As a classic example, in Vidich and Bensman's (1958) account of Springdale, a community in upper New York State, not only was this community recognised by some readers, a few individuals who notably played leading roles in local politics were also identifiable, resulting in their behaviours being opened up to public scrutiny.⁷⁴ To avoid potential harm generated by this empirical work, all the names of the legal institutions and the state officials involved were kept confidential. During the course of my fieldwork, all the institutional and personal details involved were recorded anonymously so that people who had participated could not be recognised. The major cases that I have followed were also changed to some extent so that they could not be identified, without altering their original structure. The original data, such as field notes and field diaries, were kept securely and were only accessible by my supervisor and me.

2.3 Semi-structured Interviews

2.3.1 Pilot Interviews

H. Russell Bernard (2000) believes semi-structured interviewing works very well in projects where the researcher has to deal with bureaucrats and elite members of a community, people who are accustomed to making efficient use of their time.⁷⁵ Thus the semi-structured interview is well suited to this study, as most of my interviewees (police

⁷² Ibid. 214.

⁷³ See Jacqueline Hodgson, 'The defence of criminal charges' [1988] *PhD thesis of the University of Birmingham* 115.

⁷⁴ Martyn Hammersley and Paul Atkinson, *Ethnography: principles in practice* (Routledge 2007) 214.

⁷⁵ H. Russell Bernard, *Social research method: qualitative and quantitative approaches* (Sage publications 2000) 191.

officers, prosecutors, judges and defence lawyers) in this project fall into such a category. As a relatively informal style, semi-structured interviews enable the researcher to fully control the content of what she wants to excavate from the interview but leaves both the researcher and her respondents the ability to explore new leads.

In this study, a limited number of pilot interviews were conducted at a time when a substantial amount of data had been obtained by participant observation and I was able to focus attention on specific issues that had arisen. Semi-structured interviews require the researcher to master the techniques of probing and actively procuring data from her respondents. Also as a thematic, topic-centred approach, the semi-structured interview is often built upon a fluid and flexible structure, so that in-depth data can be extracted from the interactional exchange of dialogue.⁷⁶

Although I had familiarised myself with the ethnographic skills in the field and the data that I had collected by observation boosted my confidence in qualitative fieldwork, my first few interviews did not proceed smoothly due to a lack of experience and the use of specific techniques. The interviews were carried out by following a written list of questions and topics that I was eager to explore. The way that these questions were designed was not effective enough to stimulate satisfactory replies. Some of the critical questions were answered in such a brief manner that it closed the opportunity for me to investigate in further depth. Furthermore, while I believed that the questions I asked were crucial and easy to understand, a judge interviewee told me that some of my questions, such as those concerning the admission of evidence and safeguards of the suspects' rights, were 'strange' and he was puzzled why I was interested in such issues. Such a response was beyond what I expected. I was also convinced that there exists an almost insurmountable chasm between the 'western orientated' theory of due process and the real criminal trial in China. Nevertheless, no matter if the respondent's reaction was astounding and problematic

⁷⁶ Jennifer Manson, *Qualitative Researching* (2nd edition, Sage Publications 2002) 62.

(based on how the Chinese criminal process was actually operating, or based on the presumption that a western model should never be imposed upon the Chinese circumstances), the crucial factor is that the researcher must recognise it as such and adapt the questions to the given scenario. With the help of my supervisor, I started consciously tailoring the abstract questions to detailed practices, as well as improving my interview tactics, thus enhancing my capacity to verbalise, interact and remember. I started to alter the general script of questions, so that each topic was started with supportive open questions without threat. People were able to take on board a focused topic in this way whilst being given ample room to define the content of the discussion. Detailed issues, such as questions concerning specific practice or statistical data were followed up by seeking affirmative answers or exploring in greater depth, so that the list of topics were accommodated during the interview but remained open ended.

The experience that was gained from the first few pilot interviews laid a solid foundation for the main interviews conducted after the observation. Twenty-eight intensive semi-structured interviews with police officers, prosecutors, judges and defence lawyers in ten geographic areas (referred to as sites A-J) were undertaken, covering heterogeneous regions across China.⁷⁷ Good interviewing is 'hard, creative and active work'.⁷⁸ It is a complex and exhausting task to plan and respond quickly. Like many other crafts, one would get better at interviewing the more she practices. As an interview involves reactivity and subjectivity, the techniques can be improved by monitoring and reflective criticism, mainly by the interviewer herself. The advice offered by Harry Wolcott (1995) on interviews is pertinent, 'pay as much attention to your own words as you do to the words of your respondents'.⁷⁹ Important as the relevant skills are, the greater challenge of conducting interviews in this study was not simply about interview techniques. As the

⁷⁷ These economic regions include developed East coast areas, the less developed Southern area, large sized urban city districts and relatively remote rural towns.

⁷⁸ Ibid.

⁷⁹ H. Russell Bernard, *Social research method: qualitative and quantitative approaches* (Sage publications 2000) 201.

interviews progressed, various dilemmas appeared. Nevertheless certain aspects of the culture that was embedded in the Chinese criminal justice were able to be penetrated when dealing with these unfavourable predicaments, leading to a better understanding of the system.

2.3.2 Interviewing: Obstacles and Probing Skills

Gathering empirical data in China has never been easy. As one scholar stated, 'useful data is generally not available, and the available data is not very useful'⁸⁰. Such obstacles were most evident when conducting interviews in the field. The tip of being open about the intention of shopping for information, promoted by certain western researchers, failed to apply to the situations that I encountered in China when I sought to interview several defence lawyers in a criminal law firm.⁸¹ The defence lawyers that I approached in the law firm were not impressed with the fact that I wanted to study the dilemma they were facing, which was that a large proportion of defence lawyers had suffered prejudice by the State officials in the Chinese criminal process. Some defence lawyers I approached claimed to be too busy to be interviewed, although I discovered later the same day that they were reading a newspaper or playing computer games. Most of the defence lawyers were anything but friendly, with some expressing annoyance at my research project subject matter. I spent three afternoons sitting in the reception halls of several criminal law firms in vain. I realised that without any pragmatic approaches, such as using the help of established relationships, interviews were simply unavailable. This impediment also hampered Mike McConville et al's (2011) study, and they lamented that the collection of data through official channels in China is fraught with hurdles.⁸² For this reason, my

⁸⁰ Donald Clarke, *Empirical research into the Chinese Judicial System* (Stanford University Press 2003) 165.

⁸¹ See H. Russell Bernard, *Social research method: qualitative and quantitative approaches* (Sage publications 2000) 195.

⁸² Mike McConville et al, *Criminal justice in China: an empirical enquiry* (Edward Elgar 2011) 20.

subsequent respondents were approached by using informal relationships, which seemed to be the only viable path to access informants in the field.

Even though personal contacts had paved the way for many successful interviews, it could not always guarantee access. This was particularly the case when I returned to the field in 2013. Ninety per cent of potential interviewees (most of them were judges) declined my request. In one instance, when I approached a relative who worked in the court for help by introducing some judges for me to interview, I was warned and refused by this relative that 'I should never try to get someone into trouble'. In another case, a defence lawyer had agreed to be interviewed the next day via the help of a previous colleague. I then received a phone call at midnight from my previous colleague who cancelled the forthcoming interview. I learned from the conversation that the defence lawyer had a previous traumatic experience with the public authority which prevented him from saying anything critical to the *status quo*. Whilst it was a shame to lose the opportunity of interviews which could be potentially valuable, the fact that these interviews were cancelled transmitted a stronger meaning in relation to the unbalanced contest of the coercive state power and civil liberty in the daily struggle. As a popular Chinese journalist remarked:

'The Chinese are losing their ability of utterance. [...] I personally believe the root of the problem has originated from the public system which has a major fault in its design. [...] It (the system) believes that people enjoy no freedom of speech in the public domain whilst it has the power to punish those who do speak. It is arrogant, sensitive and self-imposed...It is a self-deceptive giant.'⁸³

The invisible repression of the liberty of speech from the Party-state is omnipresent throughout my study. Out of 28 interviewees only a very few, with a strong sense of political liberalism, spoke fearlessly during the interview, despite the promise that anonymity and confidentiality of their personal information had been repeatedly

⁸³ Li Chengpeng's public speech in Peking University 2012 <<http://www.impactchina.com.cn/guandiankuaibao/shizheng/2012-11-20/14286.html>> accessed 20 November 2012.

confirmed. Vigilance and over-cautiousness were constantly present during most of the interviews, lest any unguarded or inappropriate remarks would procure retaliation from the authorities. Yet in spite of these impediments, I was satisfied that a picture of the Chinese criminal justice was crystallised, by piecing together the data collected from both the observation and the interviews. Thus I am deeply indebted to the generous openness of the few interviewees, who imparted valuable information to me. Without their courage and co-operation this research would not have been concluded.

Besides gaining access to the respondents, successful interviewing also hinges on the techniques of effective probing, that is, 'to stimulate a respondent to produce more information, without injecting the [researcher] so much into the interaction'.⁸⁴ The skills of probing are not easy to grasp and some of them have to be learnt from mistakes. As a fledgling interviewer, one of my least satisfactory interview experiences came from an interview by telephone rather than a vis-à-vis situation. During the interview with a defence lawyer, I found it very difficult to pace the conversation with my respondent, who was used to taking time to reflect before speaking. Instead of using the 'silent probe' and waiting for him to continue, I jumped in with verbal prodding as soon as the silence occurred. When listening to the recorded interview afterwards, I realised the mistake I had made. My respondent was just using the time to gather thoughts before being ready to move on, leading to the potential loss of information. Regrettably, my urge to avoid the 'unbearable awkward emptiness' on the telephone had killed those moments with my interruptions.

With more experience of interviewing in the field, the probing techniques were gradually becoming easier and more natural. In essence, interviewing is a 'conversation with a purpose', which consists of a set of flexible activities that have little difference from social

⁸⁴ See H. Russell Bernard, *Social research method: qualitative and quantitative approaches* (Sage publications 2000) 196.

skills to gain rapport with the respondents.⁸⁵ Although hardly any rigorous planning or detailed engagement are particularly needed in advance, the researcher has to be prepared to 'think on her feet' during the interview itself.⁸⁶ This means the researcher has to 'simultaneously orchestrate the intellectual and social dynamics of the situation' and respond quickly and effectively to ensure that the interview interaction could generate data relating to research questions.⁸⁷ Thus the probing skills are instruments that help to stimulate a social encounter. For example, to make certain sensitive questions less threatening, I tended to precede it with a rambling prelude before the key issue was touched. Whilst phased assertions were utilised to provoke a response, maintaining naivety and seeking further explanations was also an effective method. When certain questions seemed to be obvious to the informants and they started to get irritated, to excavate details, I always backed off with the comment that 'this may seem obvious to you, however I found it quite interesting'. Whereas there were always obstacles to overcome in an interview, the probing techniques nevertheless enhance the coherence of the interaction and made the conversation flow more smoothly.

2.3.3 Ethical Issues

As any social research is not politically neutral and criminal justice is such a value laden subject, the researcher must adopt a stringent moral practice, so that the participants involved in the study are protected and the integrity of the inquiry maintained.⁸⁸ As with the participant observations, ethical issues are also of the utmost importance to the interviews and the researcher should recognise that she has a greater duty to engage in a reflective and sensitive moral research practice. Ethical judgements often follow a set of

⁸⁵ Jennifer Manson, *Qualitative researching* (2nd edition, Sage Publications 2002) 67.

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ Tim May, *Social research, issues, methods and process* (4th edition, Open University Press 2011) 60.

principles which guide the conduct of the research. One such doctrine is the 'informed consent', which refers to a free agreement on the part of the researched to become a subject of the research process.⁸⁹ Many of the ethical guidelines published by professional academic associations underline the fact that gaining the informed consent of participants is very crucial to the research.⁹⁰ Although there are no prescriptions about what the practice should be, it is critical that ambiguous issues should be explained to the respondents. As Murphy and Dingwall (2001) argued:

[...]Indeed, as in much biomedical research, these [consent] forms may offer more protection to the researcher than to the subject in the event of litigation... Signed consent forms may actually jeopardise the confidentiality of participants by making them identifiable. There are genuine difficulties about the means of respecting rights to autonomy and self-determination. The answers depend more on the moral sense of the researcher and their ability to make reasoned decisions in the field than upon regulative codes of practice or review procedures.⁹¹

In my study, consents were negotiated when I started to interview someone for the first time. A written consent form which explained the aims and processes of the research and assured my respondents of anonymity and confidentiality would be asked to be read and then signed by the interviewees.⁹² Interviewing should be based on a complete understanding of the research itself and most respondents were not familiar with the disciplinary and academic skills involved. Prior to the interview, the consent form was further explained in detail using plain language, taking account of areas, such as what contributed to data and the principles of analysis, so that a full comprehension of the study could be obtained by the respondents. The consequences of the research, such as its publication in the public domain and my right to interpret and analyse the data, were also explained before the consent was sought. The identities of my interviewees were protected

⁸⁹ Ibid 62.

⁹⁰ See Jennifer Manson, *Qualitative Researching* (2nd edition, Sage Publications 2002) 80.

⁹¹ Ibid 82.

⁹² There is an exception for this practice, which is the telephone interview that I conducted in the field. As the interviewees could not physically read and sign the consent form before being interviewed, I read out the consent form and explained it to them in detail. They consented orally which was recorded with the interview itself. In this study, three out of 24 interviews were conducted by telephone.

by taking all reasonable steps, such as the security of the storage of the consent forms. Consent forms and the interview transcripts were separately stored to avoid the information being used for purposes other than those intended.

As a standard practice, which has also been proved to be absolutely necessary, all the semi-structured interviews conducted in the research were recorded. Many of my respondents were reluctant to be recorded and were worried that the recorded conversations would be used against them in the future. I would start the interview with a warm-up chat, introducing myself and showing my interest in the respondent's work. When I sensed that they had become more relaxed, I started by saying 'this is really important to my study. I really don't want to distort your view by my poor memory. Would it be possible to record our conversation now?' Most respondents would agree at this stage. This did not mean they were at ease with the recording. The majority of respondents would check the recorder from time to time during the conversation and their tones were slightly nervous at various points. I would always assure them that they had absolute control over the recorder and they could switch it off if they so wished. This strategy invariably worked well and the interview progressed smoothly to its conclusion. On one occasion, when interviewing a judge, he insisted the conversation should not be recorded. Therefore, I painstakingly wrote notes whilst the conversation progressed. Finally he agreed to be recorded, due to my note writing being too distracting to the conversation.

A successful interview was often built on mutual trust. The researcher should be responsible for what is done with the information extracted from the respondents, but must also protect the respondents from becoming emotionally burdened as a result of the interview.⁹³ Ethical concerns also relate to making the respondents comfortable during participation in the research as opposed to inflicting stress. On several occasions, when talking about 'sensitive' topics, I felt obliged to stop my respondents from divulging

⁹³ See H. Russell Bernard, *Social research method: qualitative and quantitative approaches* (Sage publications 2000) 201.

unnecessary personal information, such as the names of individuals, and reassured them about confidentiality. The interviews were handled with extreme care in this study to avoid the participants from suffering an emotional burden, as it was considered that they may later regret their participation and become anxious about the information they had given.

Based on the data collected during the fieldwork, in the next chapter, attention will be focused on the police's construction of case dossiers. Although I did not witness the strategies being used by the police, such as interrogation, information extracted from the interviews and observation in the procuratorate provides adequate foundations for the understanding of police activities surrounding the case dossier, which predestines the outcome of the cases.

Chapter 3 Constructing the Police Case

The object of this chapter is to examine the investigation activities of the police surrounding the construction of the dossier and to understand how the police files are built in China. With almost no reliance on the live testimonies other than that of the defendant, the adjudication in China is essentially based on the written dossier constructed by the police. The case dossier, or the file of the case, is seen as the nervous system of a criminal case, encompassing all the evidence gathered and decisions made in various procedural stages of the investigation. Of all the evidence contained in the dossier, the confession of the accused plays the most decisive role in the adjudication. However, shielded from external scrutiny and lacking an authentication process, the record of interrogation is susceptible to manipulation and falsification. Defence lawyers, who are excluded from the police interrogation and have a diminished role involved in the investigation, could provide very limited help to the accused at her most critical and vulnerable.

1. The Role of the Police and the Appraisal System

As a constituted public body to detect and prevent crimes and enforce the law, the police in many jurisdictions are generally accorded a host of powers to investigate suspected crimes and they are usually able to do so by exercising wide discretion. For example, in England & Wales, within the framework of Police and Criminal Evidence Act 1984, the police are empowered with a considerable range of discretion in relation to stop-search, arrest, charge etc. to effectively control crime.¹ Compared to many other jurisdictions, the Chinese police, the PSB, have been accorded a much more extensive range of powers to combat

¹ Andrew Sanders and Richard Young, *Criminal justice* (4th edition OUP) 60-96.

crimes and they are able to exercise their power with a remarkable degree of autonomy. As discussed in chapter 1, the power that is vested in them is not only limited to criminal coercive measures, such as detaining suspects and keeping them in custody during the criminal process, but also includes imposing a range of intrusive administrative penalties to punish and dispose of minor offences directly.² The vast array of police powers and the status of autonomy conferred by law, enable the police to reinforce their role as a general guardian to maintain the Party-state's security and social order.³

According to Article 50&51 of CPL 2012, police, as well as prosecutors and judges, have the legal duty to obtain both exculpatory and inculpatory evidence to prove the case and to be loyal to the facts.⁴ They have to respond to evidence that exists or which has been obtained. Torture, threats, enticement, deceit or other unlawful methods are not allowed to be used as a means to gather evidence.⁵ To present the factual truth that already is in being, the police should assiduously ensure that 'any citizen relevant to the case, or who has knowledge of the case, has the chance to provide the evidence related objectively and sufficiently'.⁶ Their task is to gather the evidence objectively and put before the court those defendants against whom there is sufficient evidence of guilt.

Whilst in legal rhetoric, the police are depicted as impartial investigators; they are in fact striving officiously to pursue the goal of social control that has been designated by the Party-state. In order to fulfil the State's overriding tenet of crime control, an institutional framework---the Appraisal System (*jixiao kaohe zhidi*) ---has been adopted since 1978, which was devised to incentivise the work of state officials to pursue the success of their

² As discussed in Chapter 1, many administrative cases can be categorised into criminal cases and some administrative penalties, such as reform through labour, which substantially deprived the citizen of the liberty up to three years, are equal to or even harsher than many criminal punishment in Western countries.

³ See Article 2 of the Police Law 1995 of P.R.C.

⁴ It should be noticed here that although the judge, according to the adversarial model of trial, should not be an investigator, her power to gather evidence remains in this article, even though in reality, the judge today rarely gathers any evidence to prove the case facts.

⁵ See Article 50 of CPL 2012.

⁶ Ibid.

convictions.⁷The police, the procuratorate and the court are all subject to the Appraisal System, which, depending on its legal strand, provides a set of performance indicators to evaluate each law enforcement agency's prosecution achievement.⁸ According to certain police officers, each year the number of suspects who should be kept in custody or should result in successful prosecution⁹ would be assigned to each local police station.¹⁰ Each individual police station would apportion its police officers tasks to accomplish this target. Whereas an accomplished task would bring them an advantaged position for training opportunities, promotions and other success in their career, failing to fulfil the task would result in the loss of bonuses and other related sanctions. As the task has been allocated to the overall police station, the implication of an uncompleted task is serious and profound, affecting all the people who work in that particular police station. It would lead to a tarnished reputation for the police station, which, like the individual police officer, would be financially penalised and become disadvantaged in the overall ranking of the police stations in the region. The ranking of the police station is not only related to the future funding of the PSB's operation, but also linked to the political achievement of the local government which, in turn, directly determines the careers of each individual police officer.¹¹

Although the Appraisal System aims to motivate the police to work proactively and to enhance their work performance, the implication of this managerial system is multifaceted, as it stresses the accusing role of the police. Instead of seeking the truth, exculpating evidence is constantly disregarded. In order to secure the authorisation of custody of the accused or to guarantee prosecution, the evidence compiled in the case dossier has to be

⁷ Li Enshen, 'The Li Zhuang case: Examining the challenges facing criminal defence lawyer in China' (2010) 24:1 *Columbia Journal of Asian Law*, 129, 163.

⁸ Ibid.

⁹ There are two criteria that measure whether the task has been fulfilled according to police working in Site A, E and F, that is a. for minor offences, such as dangerous driving cases, the suspect does not need to be remanded in custody, the police must make sure the case is prosecuted; b. for more serious crimes that the suspect should be remanded in custody, the suspect must be authorised to be locked up. Failing in either condition means the police have not fulfilled this given task (Field note APU-6, APU-26, Interview EPO-1, FPO-1).

¹⁰ Interview BPO-1

¹¹ Interview BPO-1.

conviction-orientated.¹² Mike McConville et al's (1991) early study reveals that in England & Wales evidence and case facts are *constructed* rather than discovered by the police.¹³ In fact, in China the police case is also created by selecting, rejecting, evaluating, generating evidence and even fabricating facts.¹⁴ For example, one police officer told me how he dealt with the evidence that might exculpate the suspect:

[Interview EPO-1] Police officer: We don't put the wrong version into the dossier---it only causes confusion. We just put the one which we believe is true [into the dossier]. At the end of the day, we have to try our best to make all the evidence look consistent, so that the prosecution decision or the final conviction can be secured.

This practice was also confirmed by a prosecutor, who was familiar with the practice of the police investigation. He told me that contradictory versions of the facts were often processed by screening the statement that was in the accused's favour.

[Field note APU-1] Prosecutor: The police will not let the witnesses say something different from the suspect's guilty confession! If there were some witnesses' statements that were far away from the fact they [the police] had believed, they would just throw them away.

To fulfil the task of processing high volumes of suspects, the police not only have the ability to select evidence and produce facts, they are also capable of manipulating the criminal procedure and falsifying statistical data. In Chinese criminal procedure law¹⁵ the criminal process starts from the police's case registration (*Li'an*).¹⁶ When a case is reported, the police will take a statement from the person who reports the case, complete a form of

¹² As mentioned earlier, authorisation of the custody of the accused is permitted by the procuratorate. According to the law, there are certain conditions that must be met, such as the evidence to prove the accused has committed a crime that might be sentenced to over 10 year imprisonment or a crime that might be sentenced to imprisonment and the suspect has a criminal record of intentional crime or the identity of the suspect is unclear (Article 79 of CPL 2012).

¹³ See Mike McConville et al, *The case for the prosecution* (Routledge 1991) 36.

¹⁴ See next section of this chapter.

¹⁵ It refers to both CPL 1996 and CPL 2012. There is no change of CPL 2012 in these regulations in CPL 1996.

¹⁶ For crimes related to public servants in office that are investigated by the procuratorate, the criminal process starts from the procuratorate's case registration. See Article 83 of CPL 1996 and Article 107 of CPL 2012. For the convenience of discussion, this thesis will focus on those cases that are investigated by the police.

criminal case registration and report it to the head of the PSB.¹⁷ Only when the case has been filed and registered, can the police investigation commence. Registered cases may not be solved by investigation for a variety of reasons, such as a failure to collect key evidence or unable to detect and arrest the suspect. Whilst it seems quite normal that not every case can be classed as 'cracked' (*po'an*) by arresting and putting the suspect into custody, under the current institutional framework of the Appraisal System, this would be regarded as a failure. To avoid the negative effect in the Appraisal System and the embarrassment in the overall ranking in the region, criminal cases will usually not be registered by the police until the suspect has been arrested and placed in custody.¹⁸ As a result, the police registration book could appear excellent due to such modification. Consequently, the annual statistics derived from the case registration are also unreliable, unable to reflect the actual situation of public order in specific localities. One higher ranked police officer put his views as follows:

[Interview BPO-1] Police officer: Every year we have this competition [of the ranking]. It is just a statistical exercise. [...] It is a bad competition. [...] This is also the same issue as with the case registration. It used to be that only those cases that we can solve can be filed. But then we were told we should file all the cases honestly. However, if it turned out that there are many cases that we cannot really solve or we cannot give to the procuratorate, it will make the statistics for our work look embarrassing. It is all related to the Appraisal System. If there is no competition, everything is much easier. None of the statistics for any police station is reliable because we have to make our work look good. Years ago we did put the real number in the book once. But we ended up last in the ranking. The mayor felt disgraced when he had a meeting with other leaders from different regions. Then we were all criticised

¹⁷ The case reporter could be the victim, the witness, other civilians or the suspect when she turns herself in. The case reporter includes both the natural person and organisations. According to McConville et al (2011)'s study, the majority of cases were reported by the victim and victim's family (36.4% and 16.0% respectively), see Mike McConville et al, *Criminal justice in China: An empirical enquiry* (Edward Elgar 2011) 27.

¹⁸ The Appraisal System uses scores to evaluate each police station's performance. For example, if the police officer in site A failed to investigate all the cases properly, their score would be deducted. There are a host of performance indicators and the aggregated total would be used to rank the performance of all the police stations in a region.

and had a bad time. Everyone in our system knows the statistics from other regions are also fabricated.

It thus becomes impossible to register cases honestly. The Appraisal System requires the police to create an artificial account if they are to survive politically and financially. This issue flowing from the Appraisal System becomes more problematic in areas where residents of the community are static and not migratory, and the resulting crime rate is lower than average. In the absence of an accurate knowledge of the crime rate and crime trends in a specific area, the policing policy, with an artificial target number which is detached from reality, could trigger serious malpractice and also lead to severe injustice. In places where the actual crime rate is low, the unrealistic number of offenders that should be processed each year has exerted great pressure on the local police. In order to 'have a good mark' within the Appraisal System, 'hunting for cases' has become a frequent police activity. As the target number is growing year on year based on the implementation of tasks, the police felt that they were implicated in a vicious circle. One police officer revealed how he thought about this dilemma he was facing:

[Interview FPO-1] Police officer: The pressure (from the Appraisal System) is tremendous. I personally think this is not reasonable. As far as the work itself is concerned, we have to be proactive when dealing with crime. But we are hunting for the crimes. This is not very objective and not humane. We should base our work on the community, the rate of crime, the geographic size of the local area and the current situation. [...] Communities like this one have a very stable residence which we are very familiar with, and the crime rate is actually very low. When we finish this year, we will still worry about what to do next year.

Based on my observation in site A, 90 percent of drug trafficking cases and every case concerning the sale of illegal/legal receipts were investigated using 'buy-and-bust' operations (*diaoyu zhifa*). Together, these make up over 60 per cent of all cases dealt with

in Site A.¹⁹ As one of the most efficient crime hunting methods, this mode of operation is regularly and widely used to fulfil appraisal-related tasks.²⁰ Taking into account insufficient legal training of the police and the limited operational funding, this type of operation had been preferred by the police due to its strength in producing incriminating evidence.²¹ Suspects could be caught 'red handed' and their criminal behaviour was usually set up to be witnessed. As the crime transaction was deployed and controlled by the police, the suspect's confession could be solicited with ease and the case can be secured. Whilst 'buy-and-bust' operations can be justified on the grounds that the accused who sold drugs, or their customers, acted within free choice, in several cases police officers are so desperate to make up numbers that they are suspected of entrapment when the envisaged crime does not proceed according to plan. For example, when interrogated in a drug trafficking case, a suspect angrily reported to the prosecutor that the arresting officer planted the drugs on him.

[Field note APU-16] Prosecutor: Did you tell the truth in the police station?

Suspect: No. The police forced me to say so. What the police wrote was not what I said. [...]
It was my friend who owed me money. He called and asked me out. Then when I met him, he gave me the money. Suddenly the policemen appeared. They put the drugs into my pocket. Then they arrested me and took me to take the photos.

Prosecutor: The police just wanted to fulfil their tasks.

Suspect: They trapped me. [...] They were too anxious to do that. The main police took me back and started to draft the legal documents.

Compared to those complicated and serious cases, the police are more willing to investigate those cases that would be perceived as less challenging. In site A, the police

¹⁹ Drug trafficking cases and selling illegal receipts are two of the biggest category of cases dealt with by the police in Site A. Other major categories of crimes include theft and dangerous driving.

²⁰ According to my four-month observation from June 2012 to September 2012, over 90% of the drug trafficking cases involved 'buy-and-bust' operations. Based on my interview with police from different sites, except for one rural area where the entrapment was less used, in most sites, police entrapments were frequently used as a way to arrest offenders.

²¹ This will be analysed later in the next chapter.

usually focused on a limited category of cases in which the inculpatory evidence is readily available and the confession is easy to extort. Therefore, the police are not only able to select the evidence to construct the case; they also choose to investigate the crimes in which conviction is easy to secure in order to accomplish their task. Of all police investigated cases that had transferred to the procuratorate in site A, drug trafficking, dangerous driving, the sale of (illicit) receipts and theft make up 80 per cent, whereas other types of crimes which are believed to be equally prevalent but require more resources and legal training, such as fraud, were comparatively low in numbers.²² Since the Appraisal System only requires the police to process a given number of cases without distinguishing the crime types, tackling simple crimes may guarantee that the designated task can be implemented with ease. Although the Appraisal System was created to compel the police to work proactively, as a crime-control apparatus its social function is severely restricted. The malpractices of the police, such as falsifying statistics and crime hunting, have contributed to a crisis of police legitimacy and gradually eroded the integrity of the police system.²³

2. The Construction of the Police Case: the Interrogation

With almost no witnesses appearing in the Chinese court, the case dossier created by the PSB provides the key information that the adjudication relies on. Being the nerve centre of the whole criminal process, the case dossier not only encompasses the evidence selected by the police to create an account that is compatible within the Appraisal System, but also integrates various levels of decision making.²⁴ Depending on the stage of the criminal

²² Interview APS-5 (In the interviewed prosecutor believes that the fraud cases were under investigated).

²³ Ivan Sun et al, 'Public assessments of the police in rural and urban China' (2013) 53 *Brit J Criminology* 643, 644.

²⁴ See Mirjan Damaska, *The faces of justice and state authority: A comparative approach to the legal process* (Yale University Press 1986) 56.

process, the volumes of dossier vary significantly in accordance with the specific requirement of the legal institution.²⁵ At the investigation phase, for example, the criminal dossiers include the investigative dossier (*Zhenchajuan*), the investigative working dossier (*Zhencha Gongzuojuan*) and the secret investigative dossier (*Mimi Zhenchajuan*). When the case transfers to the prosecution period, the dossier for prosecution is comprised of the investigative dossiers, the prosecution dossier (*Gongsujuan*) and the procuratorate internal dossier (*Jiancha Neijuan*). At the trial stage, the dossiers used for the judiciary include the investigative dossiers, the legal procedural dossier (*Susongjuan*), and the dossier of appendix (*Fujuan*). Although the constitution of the dossier at various stages differs, only the investigative dossier, which contains evidence gathered by the police would be constructed and applied throughout the whole criminal process. Other types of dossiers are largely utilised as an auxiliary to record relevant aspects of the decision making by the legal institutions. They are served as archives for future reference and are rarely used for the adjudication purpose.²⁶

As the investigative dossier carries a great deal of weight at each criminal stage, this research will mainly focus on the study of the investigative dossier and its implications in the Chinese criminal process.²⁷ The investigative dossier primarily consists of two separate volumes: the volume of procedure (procedure dossier) and the volume of the evidence (evidence dossier). Official documents which are generated during the course of the investigative process, such as the detention warrant and the search warrant, are accommodated in the volume of procedure, whilst the evidence gathered by the police to prove the case facts is contained in the evidence dossier. Albeit there are eight forms of evidence according to the criminal procedure law, such as material evidence and

²⁵ The case dossier system has been well documented by empirical research and has also been observed by the author in the field (Site A). See Ni He, *Chinese criminal trials: a comprehensive empirical inquiry* (Springer 2014) 87-90. Zuo Weimin, 'Zhongguo xingshi anjuan zhidu yanjiu: yi zhengjujuan wei zhongxin (Research on the Chinese criminal case dossiers: on the basis of evidential dossier)', (2007) 6 Legal study (Faxue yanjiu), 95-96. Field note APU-10, APU-13, and APU-15.

²⁶ Field note APU-10.

²⁷ Hereon the dossier used in this study refers only to the investigative dossier if no additional explanations are given.

video/audio materials, in the majority of instances, only one type of evidence in the dossier would be routinely adduced in the court, namely the written evidence.²⁸

The case dossiers that are currently made and used by the legal institutions for decision-making are still old-fashioned paper based files. Whilst in certain areas of China, legal institutions have started to record the investigative dossier digitally as a backup,²⁹ the original paper dossier is still irreplaceable and regarded as the key asset of the criminal justice system.³⁰ Of all the evidence contained in the dossier, the record of the suspect's statement is normally seen as paramount. It not only forms a significant part of the evidence for the prosecution, but determines the disposition of the majority of cases in the court. Since the official record of interrogation plays such a critical role in deciding the outcome of cases, the credibility and the authenticity of the statement is crucial. This section will investigate the integrity of the suspect's statement in order to find out whether the statement has been given voluntarily by the suspect, or is the result of any undue pressure, threats or inducements. Was the statement made in circumstances, which if viewed objectively, would allow the suspect to provide a truthful account without manipulation? Is the statement reliable in that it has been fully and accurately transcribed or recorded? Has the suspect been given ample time to check and correct the transcription of the interrogation before signing it? The answers to these questions could contribute not only to the understanding of the practice of the police investigation, but also reveal the underlying values that sustain the criminal justice system in China.

²⁸ The eight forms of evidence are: 1. material evidence; 2. documentary evidence; 3. testimony of witnesses; 4. Statements of victims; 5. Statements and apologia of the crime suspects and defendants; 6. the opinion of the expert witnesses; 7. written records of inquests, examination, recognition and investigative experiment, etc.; 8. video and audio materials and digital data.

²⁹ As the procuratorate will prepare its own internal dossier when a case is transferred to the procuratorate, the investigative dossier refers to the case dossier that is constructed by the police.

³⁰ Such as the procuratorate in site A started to record the evidence of the dossier into its registration system. However, depending on the development of economy of various areas, many parts of China still rely on the paper dossier.

2.1 The Official Version of Truth

Finding the truth is a difficult task under any given circumstances. In order to ascertain the fact, the adversarial and inquisitorial systems provide different solutions to re-establish the account of the crime.³¹ The inquisitorial system entrusts a neutral law officer with the power to collect relevant evidence to prove the facts,³² whilst the adversarial system relies on opposing parties presenting competing versions of truth, challenging each other's accuracy and thereby ultimately bringing about a composite picture of the truth.³³ Differing from both systems, the Chinese criminal justice does not have a clear theory in regards to the truth-finding process. Nevertheless, the Chinese criminal procedure law appears specifically designed to ensure the factual truth of cases. Truthfulness has been used as a rule to test the admissibility of evidence,³⁴ and state officials 'are obliged to be loyal to factual truth'.³⁵ To ensure that 'all citizens who know the case fact can provide the evidence objectively and sufficiently', criminal procedure law expressly prohibits extorting confession by torture and collecting evidence by threat, enticement, deceit or other unlawful means.³⁶ This has been further strengthened by the introduction of video/audio recording provided by the revision of law 2012.³⁷ According to CPL 2012, the accused is entitled to the privilege against self-incrimination, despite the provision which still requires the accused to 'answer truthfully during police questioning'.³⁸ These rules that have been

³¹ See Thomas Weigend, 'Is the criminal process about truth? A German Perspective'(2003) 26:1 *Harvard Journal of Law & Public Policy*, 157, 158.

³² Jacqueline Hodgson, 'Constructing the pre-trial role of the defence in French criminal procedure: An adversarial outsider in an inquisitorial process?' (2002) 6:1 *International Journal of Evidence and Proof*, 4.

³³ See Thomas Weigend, 'Is the criminal process about truth? A German Perspective'(2003) 26:1 *Harvard Journal of Law & Public Policy*, 157, 158.

³⁴ See Article 48 of CPL 2012, which provides 'all facts that prove the true circumstances of a case shall be evidence'. See also Mike McConville et al, *Criminal justice in China: An empirical enquiry* (Edward Elgar 2011)70.

³⁵ See Article 51 of CPL 2012.

³⁶ The rule regarding the exclusion of illegally-obtained evidence in criminal cases will be discussed in later chapters.

³⁷ According to Article 121 of CPL 2012, video/audio recordings must be used within police interrogations concerning cases in which the accused might be sentenced with the death penalty, life imprisonment or other serious sentences. For other cases, video/audio recorded interrogation is optional.

³⁸ See Article 118 of CPL 2012 and also see interview with the vice director of the committee of law of the National People's Congress Lang Sheng. Interview with Lang Sheng, "no one shall be compelled to self-

laid out to seek the truth seem to imply a belief that the truth is 'there' to be discovered or excavated: by piecing together the evidence, the truth will be restored and presented. However, according to empirical studies, the fact that is presented by the legal actors is usually *constructed*, rather than unearthed or revealed.³⁹ The prosecution case is usually a product created by the police or prosecutors to fulfil the rule.⁴⁰ As we will see in this study, this notion of case construction is evidently embodied in the Chinese criminal process. Despite the fact that legal actors may create different accounts of the case, only the version of the fact constructed by the police and the prosecutor is perceived as 'the official truth' and given credence.

It is true that on certain occasions such as the accused has turned herself in or voluntarily confessed her guilt, the official version of fact may dovetail with the statement that is provided by the suspect. For a number of cases, however, the official version of truth has been contemplated by the police at the very early stage of the investigation. Of all the cases that has been monitored in this study (n=64), 65 per cent of cases were based upon the initial account described by the civilian who reported the crime, which includes the victim, witnesses or other related informants.⁴¹ According to the case dossiers transferred from the police to the procuratorate in site A, 60 per cent of suspects made a confession that was identical to the statement given by the victim or witnesses. In certain evidence dossiers in site A, the accused's main statement was so similar to the victim's testimony, that only the names and dates involved were different.⁴² The statement that the police obtained initially often served as a general guideline for the interrogation, which substantially influenced the formation of the official version of truth. A prosecutor explained this police practice:

incriminate himself" does not contradict "answer truthfully", official public conference addressed to international journalists in regards to the revision of the Criminal Procedure Law 2012 on 15/03/2012, at <<http://lianghui.people.com.cn/2012npc/GB/239293/17332481.html>> accessed on 17th May 2014.

³⁹ See Mike McConville, Andrew Sanders and Roger Leng, *The case for the prosecution* (Routledge 1991) 36.

⁴⁰ Ibid.

⁴¹ The statistic was based on the examining of the witnesses' statement (or other case reporter's statement), which always came at a very early stage of the investigation and the fact given by the suspect at a later stage. This finding is also supported by talking to the police officers who visited the prosecutor's office in site A.

⁴² See field Note APU-5.

[Interview BPS-1]Prosecutor: The police officers always tailor the suspect's statement to the victim's account in practice. They force the suspect to say the same thing as the victim said to them. They would ask the victim initially and then interrogate the suspect in a way that the suspect's statements can dovetail with the victim's statement.

The dangers of this practice hardly require elaboration. There are a host of reasons why credibility should not be attached to the statement of the victim or other witnesses under such circumstances.⁴³ The police may be aware of the risk of the practice, nevertheless it is the most simple and convenient way to secure the case. According to article 104 of the judicial explanation of the Criminal Procedure Law 2012 of the Supreme People's Court (the Judicial explanation 2012),⁴⁴ judgement should be based on the chain of evidence which is built upon evidence relating to each other and pointing to a single fact without reasonable doubt. This is the corroboration rule that provides guidance in regard to the admissibility and the weight of evidence, and the standard of proof of the prosecution case. According to the corroboration rule, the factual truth shall be proven if all the evidence collected by the police and compiled in the dossier arrives at a single conclusion that is beyond any reasonable doubt or without any unexplainable contradiction. Thus by ensuring that the suspect's statements are given in such a way that there is consistency with victims' or other witnesses' statement, the evidence can be corroborated and an undisputable 'truth' can be established.

Nevertheless, in certain cases, the police cannot rely on the victim's account to form the official version of fact, such as murder cases. In such cases, the formulation of the official version of fact would relate to factors such as the probability of conviction and difficulties in proofing. For example, in an intentional assault case (*guyi shanghai*), the victim was in a state of unconsciousness. The suspect was compelled to confess to an intention of rape

⁴³ See Andrew L Choo, *Hearsay and confrontation in criminal trials* (Clarendon press oxford 1996) 12-43.

⁴⁴ This is based on the article 280 of the rules of the People's Procuratorate, which is the same as article 104 of the judicial explanation.

rather than assault, because the case could more easily be proved as rape. However, this intention was vigorously denied by the suspect.

[Field note APU-30]Suspect: The police officer tried to persuade me to confess that I wanted to have sex with the girl. I said no. I would rather confess to a crime with a heavier penalty than an offence with a light one that I never committed.⁴⁵

Such a version of truth is also based on the police's working experience, 'tuition' or 'imagination' contingent on specific circumstances. The police facts formulated thus provide some sort of a link to explain the real evidence found relating to the crime in question. The recent quashed murder conviction of Zhang Gaoping & Zhang Hui revealed the fact that the suspect's confession evidence was made by misleading the suspect to give an account that matched the plots conceived by the police.⁴⁶ To make the confession appear genuine, the suspect Zhang Gaoping was later asked to copy a written confession drafted by the police officer explaining how the murder was executed.⁴⁷ By virtue of whatever traces of information existed, the so called truth, vague or clear, was delineated in advance and utilised as a benchmark for the interrogation. The official version of fact, in this sense, is not an objective and detached existence that is independent from the legal personnel, but is a police construction in the interests of expediency.⁴⁸

⁴⁵ In this case, the suspect would serve longer under the crime of intentional assault than the account of rape.

⁴⁶ In 2003, Zhang Gaoping and Zhang Hui were convicted for rape and murder of a young woman who shared a lift with them in the truck to Shanghai and later found dead. After served sentence for 10 years, in early 2013 Zhang Gaoping and Zhang Hui's case were reviewed and quashed by the High Court of Zhejiang province. In the interview of Zhang Gaoping and Zhang Hui, they told how they were tortured during the police interrogation and finally 'confessed'. Their confession became the key evidence that convicted their crime. The video of public media interview with Zhang Gaoping and Zhang Hui after they were released and compensated by the State <<http://t.cn/zT4BViT>> accessed 04 March 2013. See Han Kang and Liu Yanan, 'Woguo xingshi yuanan faxian jizhi zhi fansi --- yi zhejiang shuzhi jianshaan wei qieru (Rethink about the discovery mechanism of wrongful convictions in China: the murder and rape case of Zhang gaoping and Zhang hui), (2014) 2:29, Journal of Shanghai University of Political Science and Law, pp.1-7.

⁴⁷ Ibid.

⁴⁸ See Mike McConville et al, *The case for the prosecution* (Routledge 1991) 56.

2.2 The Integrity of the Official Record: Manipulating and Falsifying the Written Statement of the Accused

Unlike the law in many adversarial systems, such as England & Wales, in which no statement by an accused is admissible at her trial unless it is shown by the prosecution to be voluntary, there is no requirement of voluntariness within Chinese Law. On the contrary, the suspect has the duty to answer truthfully during police questioning.⁴⁹ Although article 50 of CPL 2012 sets out the privilege against self-incrimination and explicitly prohibits extorting confession by torture, threat, enticement, deceit or other unlawful means, sanctions in regards to the violation of these principles are weak and ineffective.⁵⁰ Furthermore, legal advisers are not allowed to be present during the police interrogation. Despite the introduction of video/audio recording, this only happens in a select number of cases. In the absence of any effective legal safeguards or supervision of the exercise of police power, the police interrogation is shielded from external scrutiny, creating a haven for the arbitrary practice of police power.

The task of the interrogation is to confirm the pre-formulated 'truth' by procuring the confession from the accused and securing it in writing. The recording process during the police interrogation is extremely crucial, given the fact that the evidence dossier plays such an important role in the adjudication. Although according to the law, the suspect is allowed to check, make additions or corrections to the written record of interrogation before she signs,⁵¹ in a process solely controlled by the interrogator, this right is not guaranteed.⁵² With no authentication process or any mechanism to check the credibility of the record, the

⁴⁹ See article 118 of CPL 2012.

⁵⁰ These sanctions include article 247 of the criminal law, which provides that any judicial officer who extorts a confession from a criminal suspect or defendant by torture, or extorts testimony from a witness by violence, shall be sentenced to fixed-term imprisonment of not more than three years or criminal detentions (a type of short term imprisonment). Article 54 of CPL 2012 provides that the illegally-obtained evidence in criminal cases should be excluded. This will be discussed at length in chapter 6.

⁵¹ Article 120 of CPL 2012.

⁵² It is a common phenomenon in Chinese criminal procedure law that there are a lot of legal principles without corresponding legal sanctions or legal remedies.

recording of the interrogation, causes fundamental concern. Similar to the 'off the record' practice between the police and suspects in England & Wales, conversations which serve as a prelude to interrogation would not appear on the written record.⁵³ A defence lawyer divulged to me what his client told him:

[BDL-1 Interview] Defence lawyer: Yesterday I talked to my client, who told me that when he confessed his crime the first few times, the investigating officers did not even write his confession down. That's because they believed that what he said did not conform to the direction in which the investigation was going. So they did not even record it!

Whilst some suspects' statements are taken off the record, other confession statements are manufactured and falsified with the interrogation not even taking place. In the absence of defence lawyers or other effective means to oversee the legality of the process, the police are able to fabricate evidence by attributing to suspects admissions they have not in fact made. Similar claims disputing the credence of statements have been made repeatedly by suspects.⁵⁴ As a general feature of these statements, which suspects claim have been falsified by the police, all elements of the crime in question had been confirmed and included to ensure the finding of guilt. For example, during the prosecutorial investigation, a suspect told the prosecutor what happened to him.

[Field note APU-30]Suspect: I did not hide anything from the police but I know the police fabricated my statement. They told me 'don't worry, it is the same. Just finish this paperwork and you can leave.' I glanced at the statement. It was not what I said. Then they asked me to sign and fingerprint it. They asked me to admit that I had taken the bag with me. I did not. I couldn't admit to something I never did. Why on earth did they do that to me?

The police interrogation record rigidly follows a standardised format. It starts with the information of the duration and the location of the interrogation, the information of the interrogator (s) and the record transcriber, and the notification of the suspect's rights. These

⁵³ See Mike McConville et al, *The case for the prosecution* (Routledge 1991) 58.

⁵⁴ Field note APU-30, APU-32 and APU-40.

are important elements for an interrogation record. According to Article 82 of 'Several explanations on the implementation of the Criminal Procedure Law by the Supreme Court of P.R.C' (Judicial explanation 2012), if this information is missing, the statement is inadmissible as evidence. Without effective supervision, it is difficult to discover whether these elements are counterfeited. For example, an experienced defence lawyer who used to work as a police officer revealed what had happened in police practice:

[BDL-1 interview] Defence lawyer: The workload put on them (the police) is very huge and they are constantly under pressure. Because of such a complex situation, there are many public workers who function like the police but they are not properly qualified police. They have different names, such as the police associates, the public security workers, and public safeguarding workers. They have subcontracted to do the interrogation work for the police. After they (public workers) have undertaken the interrogation, the interrogating police officers just signed their names on the statements. Due to the lack of the qualification as a police officer, their interrogation is invalid and should not be used as evidence. But there is no way to check out whether the people who have interrogated the suspect are the real police. These people are not qualified to interrogate and the statement should not be used in the legal procedure. However, there is no way to supervise this.

Despite the legal provisions, it seems that fabricating information is not perceived as sinister. In fact, to make sure that the details in the official record conform to the legal requirements, some critical elements such as the duration of the interrogation were often left blank until the end of the investigation. Then a date would be selected and put in retrospectively to ensure that the interrogation appeared to have been conducted lawfully. For the police, the most important job for the investigation is to tidy up the written documents compiled in the dossier, so that their investigative work appears impeccable when the dossiers are reviewed.

[Field note APU-18] The police officer in the case explained why he needed to put that date on the record of interrogation even though the date could not match the fact given by other

suspects.

Policeman: [...] the main problem is if we write the time that we took them [the suspects] back to the police station, we have violated the law. According to the law, we have to interrogate the suspects within 24 hours after they are detained. However, the first time I interrogated the other three suspects was three days after they were taken back to the police station. Therefore if I use the time we took them back to the police station and confirmed their status, we have falsely imprisoned them for three days. So I have to put the right date in the statement.

The content of the interrogation is also susceptible to being manipulated in a way that the guilt of the suspect can be secured. The statements are usually set out as if they were straightforward narrative, which disguises the way that they are actually elicited. The interchange between the police and the suspect is by questioning and answering. Some of the answers given by the suspect are so implausible that they were obviously made by the collaborative effort between the police and the suspect. For example, in a fraud case, one of the interrogating records was about the personal information of the victims. In the first interrogation, the suspect confessed the names of eighteen victims, their telephone numbers, bank account numbers and the names of twenty hotels where the fraud took place.⁵⁵ This certainly raises a doubt that the suspect could memorise all these sixteen digit bank card numbers and eleven digit telephone numbers without mistakes. As the fraud activities occurred over a five year period, it also raised suspicion that the accused could remember the precise times and dates that each fraud took place. In another theft case, the suspect confessed the reference numbers of 209 stolen goods, including jewellery, clothes and handbags from a shop when interrogated by the police for the first time.

[Field note APU-6] An excerpt of the record of interrogation (first time) of a theft case:

Police: What did you steal from this shop?

⁵⁵ Field note APU-6.

Suspect: I stole 49 clothes, their serial numbers are: KVI-34-P90, JRV-54-V20, RKI-89-99V, RSK-39K-90K, REK-49-PE3, KVQ-90S-VI3, ISIP-39L-GIS, EKS-E30-SLK, KO0-LD-3L8 [...]. I also stole 59 pieces of jewelleries, their serial numbers are: KOS-39S-SKJ, K39-SKI-SKP, QID-JI3-VIP, SIS-39K-SI3, DI9-3KS-S9S, ISI-SI9-3SI, DI0-D83-SKI, LA9-S9D-3KD, IDK-3K9-S39, [...] I also stole 101 bags, their serial numbers are: IP0-SKI-SKE, KI3-ISS-90S, SI9-SE9-SIV, SIS-DI8-S83 [...]

Police: Did you confess the truth?

Suspect: Yes, I did.

It was inconceivable that the suspect would pay so much attention to the serial numbers used by the shop, unless he had been aided by the relevant evidence produced in the interrogation. In the same case, when the suspect was interrogated for a second time, these large chunks of serial numbers appeared again in the same sequence. As one of the strategies employed by the police, suspects' statements were replicated a couple of times as if the suspect had confessed consistently.⁵⁶ It is believed that these repeated confession records are pre-typed by copying and pasting the suspect's previous statement, since inaccuracies and spelling mistakes contained in the account remained unchanged. A defence lawyer revealed what he knew about the suspect's statement.

[BDL-1 interview] Defence lawyer: There are many interrogation records that are pre-typed before the interrogation. That is why since computers are widely used today, the interrogation statements are worse than they used to be. The police used to record the interrogation by hand. Now we have seen the same spelling mistakes and the same styles of paragraph being repeated in different statements---they just use copying and pasting! I read many of the suspect's statements in the dossier. In the final four statements, the spelling mistakes and paragraphs were exactly the same!

Other inaccuracies occurred in the interrogation records, such as mistakenly putting the

⁵⁶ More than three times for most of the cases, some of them are as many as 8 or 9 times.

victim's name as the suspect's name.⁵⁷ By virtue of article 120 of CPL 2012, the suspect has the right to check the record of statement and make corrections before she signs. In practice, suspects are required to sign their names on each page of the statement often with a thumbprint on top of their names and other corrected areas. On the final page of the statement, the suspect is also asked to write or copy a sentence declaring that 'I have read the above content, which is the same as what I said'. Whilst the record of statement appears genuine with the suspect's hand writing signatures and thumbprints, there is no guarantee that these records of interrogation were conducted verbatim. The end product of these written accounts is usually fraught with various distortions, exaggerations, misunderstandings and falsifications. Quite often suspects complained that they had not been given the time to read the record of interrogation before they signed.

[Field note APU-21] A prosecutor asked a suspect whether she confessed that she had the possession of the drugs.

Prosecutor: [...] You said you wanted to keep them for yourself because you had a quarrel with your ex-boyfriend who had these drugs.

Suspect: No, it is not. I did not say something like that. It is made up by the policeman. They were my boyfriend's and I did not know how to deal with them, so I kept them where they were.

[Field note APU-21] In a drug dealing case, a prosecutor asked the suspect whether he signed the record of interrogation.

Prosecutor: Did you sign the record?

Suspect: No. They did not let me read what they wrote. They forced me to sign my name.

Suspects frequently reported that signatures on the statement were extorted by force or psychological compulsion. Very often, suspects claimed that threats, physical violence or

⁵⁷ As Field Note APU-19 records, a prosecutor found the name of the suspect on cover of the dossier was actually the name of the victim.

even tortures were resorted to, even if they are explicitly prohibited by law. According to the allegations made by suspects, psychological pressure was employed by threatening the families of the suspect. As far as these suspects were concerned, non-cooperation was not only frightening but also selfish and unwise, which might bring harm to their family.

[Field note APU-47] In a trial of a drug trafficking case, the judge asked the suspect whether he confessed in front of the police.

Judge: Defendant, did you tell the truth in that statement?

Defendant: No. I was threatened by the police. When I was in the detention centre, the police threatened me to get the answer that they wanted.

Judge: What did the police do to you?

Defendant: They threatened me and asked me to sign the statement. If I did not sign, my family would be in danger.

Although all the police officers whom I interviewed declared that torture has been diminished significantly in the last few years, certain statistical surveys conducted by Chinese scholars indicate that the employment of torture remains prevalent and the situation is still worrisome. In Sun Changyong (2010)'s study, of 98 detainees in the detention centre, 53 per cent of suspects suffered from torture before they were transferred to the detention centre and 17 per cent of suspects indicated that they suffered serious harm through the use of torture after they were admitted to the detention centre.⁵⁸ During my observation in site A, despite less frequency than previously recorded, suspects still reported that torture had been employed by the police to elicit a confession.⁵⁹

[Field note APU-21] In a robbery case, a prosecutor asked the suspect whether he confessed in front of the police questioning.

⁵⁸ See Sun Changyong et al, *Fanzui xianyiren de quanli baozhang yanjiu (The protection of the suspect's rights)* (China Law 2010) 69.

⁵⁹ During my observation period in the prosecutor's office in site A, only 3 out of 86 suspects claimed that torture had been applied to extort confession from them. This is less than the survey recorded in Sun Changyong et al (2010)'s study.

Suspect: [...] I did not rob anything! I was hung and beaten up by the police. My waist was badly injured. It was so painful. When the preliminary investigating officer asked me, I told him the same thing. I did not rob anything.

Prosecutor: Why did you sign on the statement in the police station?

Suspect: I did not admit it. But they hung me for a couple of days and I had no choice.

The revised criminal procedure law (Article 117) provides that during the course of detention and interrogation, the suspect's meal and resting times should be guaranteed.⁶⁰ Whereas this has been reflected in the records of police interrogation, according to which the interrogator would routinely ask whether the suspect needed a break or a meal, in reality, deprivation of life necessities, such as food, water, sleep or access to toilet facilities, was often reported by the suspect. Consecutive interrogations conducted by different police officers were occasionally carried out in serious cases. As physical harm caused by violence could be used as evidence against the police, deprivation of basic necessities is a preferred method used by the PSB due to its low-visibility. In my research, certain police officers divulged that torture was mostly applicable to high profile cases and with prolific offenders. During a the discussion of the hotly debated Zhu Ling case, an experienced investigative police officer implicitly revealed how the suspect was treated during the police interrogation in an on-line communication:

For such serious cases like this one, there are at least four interrogators, who are the most experienced officers in the police station, conducting the interrogation. 'Taking some measures' is a must. We call it 'adding the catalyst'. Without the catalyst, how can we pry open the mouth of the suspect? Of course, it depends on how we 'put the catalyst'. There are civil ways or less civil ways. It is dependent on the investigator. The suspect may have the choice of speaking or not speaking, but we will definitely have the method to make him

⁶⁰ Like the other legal principles, there is no sanction to address the violation of the article and no legal remedy is provided for the suspect.

peak! There is no hero in the interrogation room. If I am the interrogator, I will not beat him up but I don't believe he will not make a confession and sign on his statement!⁶¹

Based upon such interrogative tactics, it is not surprising that miscarriages of justice repeatedly occurred in China. With the police being the only witness to the interrogation, the suspect's confession is procured in a coercive way and its reliability is called into question. Written statements which are not verbatim will not of course contain details of voice inflection, gesture, and arguments made by both prosecution and defence. Many of these statements in writing are constructed and signed under oppression. In order to fulfil their task under the Appraisal System, police officers utilised a variety of coercive means to produce the evidence against the accused people, who are disempowered and could be potentially innocent.

2. 3 Lecturing, Incarceration and Inconsistent Statements

As has been discussed earlier, the integrity of the interrogation record is compromised by the 'off-the-record' exchange between the police and the suspect. However, these informal conversations are certainly not unproductive. On the contrary, it is part of the essential strategy employed by the Chinese police to elicit guilty admissions from the accused. In China, the 'off-the-record' conversation is called 'lecturing'(*shuofu jiaoyu*). It is an effective process to extract the confession that establishes the guilt. For example, a police officer told me that not every conversation with the suspect can be counted as interrogation. Before the interrogation commences, lecturing the suspect was a necessary step.

⁶¹ Zhu Ling case is an attempted murder case and has been widely debated on the internet. Zhu Ling was a talented university student in one of the top universities in Beijing. She had been poisoned by the usage of thallium in November 1994 and became seriously disabled. It was suspected that her roommate, who was interrogated by the police but later released, committed the murder. However, due to political interference and pressure from the university, the police investigation was ceased even though there is an outcry from the victim's families and society. See Information about Zhu Ling and Chinese Investigation, <<http://zh.wikipedia.org/wiki/%E6%9C%B1%E4%BB%A4%E9%93%8A%E4%B8%AD%E6%AF%92%E4%BA%8B%E4%BB%B6>> accessed 3 August 2013.

[Interview FPO-1] Police officer: [...] Lecturing him (the suspect) is a big part of our work and it is essential for our work. Only after we have done the lecturing, educating him, and he has realised it is his fault, then he would confess to us. That is the goal of our work. That's why I said not every time we have a conversation with him can it be regarded as an interrogation.

Lecturing can be interpreted as educating the accused and waking up his conscience. Like a clergyman, the police officer acts as a moral leader trying to awaken the morality of the suspect, whose degraded legal status is believed to have let down society. Moral education, however, has never been the ultimate purpose of the lecturing. Under the guise of moral lessons, police questioning was often directed towards revealing the vulnerability of suspects and placing them under stress. The lecturing strategy is employed by the police to understand whom they are dealing with and what makes them tick, and to find out about the suspect's background, families and friends, lifestyle, difficulties they face, worries, etc.⁶² The weakness of the suspect, once known by the police, can be availed as an effective weapon to procure the confession.

[Interview FPO-1] Police: I put a lot of emphasis on communication skills. It does not affect me at all. I would talk about his family and all the details that are related to him. I would also talk about myself. I have never looked down upon a suspect as a person. I would talk to him on the same level. It will make the relationship more harmonious and lay a solid basis for further interrogation. As the biggest problem that I have encountered, some suspects just would not confess. Then I have to put in more effort until he does. By knowing their history, I can find a way to solve this.⁶³

Whilst the lecturing can be conducted to read the mind of the accused person, the

⁶² According to Mike McConville et al (1991), in the early 1990s, a powerful element of police culture in England and Wales is 'knowing your suspect', learning the suspect's habits, lifestyle, problems etc. I found the Chinese strategy of the lecturing is similar to such culture. See Mike McConville et al, *The case for prosecution* (Routledge 1991) 59.

⁶³ There is a parallel in the practice of French Criminal Justice. For example, a *Juge d'instruction* once said that '[...]The search for the truth is fairly easy, but they (suspects) just refuse to confess.' See Jacqueline Hodgson, 'Constructing the pre-trial role of the defence in French criminal procedure: An adversarial outsider in an inquisitorial process?' (2002) 6:1 *International Journal of Evidence and Proof*, 15.

exploring process is also very stressful and psychologically oppressive. Lecturing and formal interrogation can be used repeatedly to exert pressure on the suspect, until the 'truth' is finally given by the suspect. The suspect may have to face unremitting and persistent accusation in which inculcating evidence, if it exists, is emphasised and where it does not exist, bluff is used. The interrogator's lecture would not cease, until the suspect finally gives in.

[CDL-2 Interview] Researcher: Do you think the suspect confesses honestly in the interrogation every time?

Police officer: 90 per cent will not. It is all about the communication and lecturing.

Researcher: If he still refuses to say...

Police officer: Continue to communicate and lecture until he confesses. It is all about the psychology of communicating.

Such a time-consuming strategy mostly applies to suspects who have been kept in custody. It works hand in hand with the effects of incarceration in the detention centre. The suspect, who fails to confess the 'truth' or gives inconsistent accounts in regard to the facts, would spend a longer period of time confined to the detention centre as a punishment for their uncooperative behaviour, being blamed for slowing down the investigative process.⁶⁴ Such a confinement in the adverse circumstances of the detention centre depletes the strength of suspects, leading them to make a confession. For example, a police officer told me how he used the lecturing to make the suspect admit the guilt. Apparently tremendous pressure had

⁶⁴ According to article 154 to article 158 of CPL 2012, after the suspect has been authorised in custody, normally she can be in custody for less than two months (without being charged). However, if the case is complex, the suspect's time in custody can be extended for another month. For special reasons, if the investigation cannot be finished within the three months, the custodial period can be extended again (depending on how long the police investigation requires) after the Supreme Court reported to the Commission of the Congress. For cases that happen in areas where the traffic situation is complex, major serious gangster cases, cases involving migratory offenders or cases for which it is difficult to gather evidence, the custodial period can be extended up to five months (without being charged). For suspects who could be sentenced to a sentence tariffed higher than 10 years imprisonment, the custodial time can be extended to up to seven months (without being charged). For suspects who do not give their true identities, the custodial time can be counted from the time their identity is found out (without being charged). Therefore, according to CPL 2012, the PSB has sufficient time to utilise during the investigation.

been placed on the accused who had been interrogated on eleven occasions by the police.⁶⁵

[Interview EPO-1] Police: We will lecture him (the suspect) repeatedly. [...] I remember in a robbery case, he did not tell the truth for the first few times. [...] When I interrogated him for the tenth or eleventh time, I let him sit there for a whole afternoon to think about it and talk to me. Then he finally confessed. I have to deal with these cases very patiently. Most of them do not tell the truth initially. So I always put them back to the cell and wait for them to think about it. You have seen the detention centre, haven't you? You understand the situation of being inside. They will do anything to get out of there as quickly as possible.

In many parts of China, the conditions of the detention centre can be depicted as egregiously dreadful. Due to the prevalent use of custody for suspects pending trial,⁶⁶ especially during the 'Hard Strike' periods, all the cells of the detention centre are filled with detainees exceeding its full capacity.⁶⁷ In certain detention centres, as many as twenty people live in a ten square meters' cell with no bed and toilet facility.⁶⁸ Highly congested cells increase the risk of inmate violence.⁶⁹ In order to manage the cells, some detention centres use 'dominant prisoners' (*laotou*) or 'suspect informants' to control other detainees confined in the cells, which could exacerbate the extent of violence in the detention centre.⁷⁰ In 2009, a suspect called Li Qiaoming was found dead as a result of an assault by the 'dominant prisoners' in the detention centre. This was explained by the authorities as 'accidently hitting his head when playing a game of hide-and-seek with other prisoners'.⁷¹ Death, which occurs from time to time in the detention centre, is caused not only by the

⁶⁵ As mentioned earlier, in the Chinese criminal procedure law, there is no restriction on how many times the police can interrogate the suspect.

⁶⁶ Compared to other types of compulsory methods such as bail and residential surveillance, custody has been used most widely. Based on the cases that I observed in the procuratorate, in about two thirds of the cases suspects were put in the detention centre. However, due to the focus of this thesis, this issue will not be analysed thoroughly.

⁶⁷ See Xu Qiyong, 'The Chongqing police arrested over 10,000 people over 80 days, some of the detention centres are overloaded (Chongqing Evening, 22 October 2008)', in Sun Changyong (ed.), *Fanzuixianyiren de quanli baozhang yanjiu* (*The research on the suspect's rights*) (China law press 2010) 70.

⁶⁸ Field note APU-6. Also see Liu Fangquan, *Empirical study of investigative procedure* (*Zhengcha chengxu shizheng yanjiu*) (China procuratorate press 2010) 53-65.

⁶⁹ Sun Changyong, *Fanzuixianyiren de quanli baozhang yanjiu* (*The research on the suspect's rights*) (China law press 2010) 70.

⁷⁰ Ibid

⁷¹ Ibid

violence in the overcrowded cells, but also results from the physical condition of incarceration. In Sun Changyong's study, a former prisoner's memoir, in which he recalled the period of time when he was remanded in custody, provided a revealing account of the condition inside the detention centre:

Some people who had been detained there for three or four years had not had one bite of a vegetable. I stayed in the detention centre for half a year and my hair all went grey. [...] The existing environment in the detention centre was too harsh. Except for death by violence, there were another two reasons: suspects were constantly stressed and the food was not nutritious. The life of the suspect who just arrived in the detention centre was most fragile. After the extreme pressure of the interrogation, the suspect was exhausted physically and psychologically. He had nothing to eat or drink. He was terribly stressed and was extremely vulnerable. We had rarely seen the sunshine there. There was one ray of sunlight in the winter morning (in the cell) for just ten minutes. We took turns to enjoy it. This was etched in my heart.⁷²

The miserable life experiences in the detention centre catalyses the suspect's obedience during the interaction with the police, especially for suspects who initially refuse to compromise. For the majority of cases, the number of interrogations range from three to eleven.⁷³ In some of them, statements given by the suspect are not consistent. Suspects who have a higher number of statements are either involved in serious offences or those recidivists (the so-called 'callus'), who do not give a full admission in earlier stages of the investigation. According to the police, recidivists normally would deny or partially negate the guilty fact in their first few interrogations. However, after several occasions of 'lecturing' and the experience in the detention centre, many of them would concede the 'truth'. In order to smooth out discrepancies in the accounts, the police would normally ask a routine question ---'why did you not confess this earlier'---as a natural transition to explain the previous confession and promote the probative value of the statements in the

⁷² Ibid.71-72

⁷³ Field note APU-34

later stage. Thus all the statements in the dossier would appear coherently consistent and convincing.

[Interview EPO-1] Police officer: Most of them (suspects) do not tell the truth initially.

What they say during the course of the interrogation can be inconsistent.

Researcher: So for those suspects who have changed their account, which one would you rely on?

Police officer: The last one. I would ask him why he did not tell the truth in the beginning.

Then he would say that he had not given the matter his full consideration, balabalabala....If the suspect is put in the detention centre, he will feel dramatically different from when he is in the community. It is very stressful inside.

In CPL 2012, video/audio recording has formally been introduced to supervise the legality of the interrogation and eradicate the use of torture. According to article 121 of CPL 2012, video/audio recording is compulsory for serious cases that would be sentenced to life imprisonment, death penalty or other major crimes. For the majority of less serious cases, the video/audio recording is only an option. It is believed that since the suspect-police interaction during the interrogation would be captured on the camera, this new practice might be used critically by the defence to challenge the integrity of the interrogation and the validity of the confession procured during the process. Nevertheless, it has been warned by cautious scholars that the video recording could also be *manipulable*. For example, when video/audio recording just became a standard practice in England & Wales, John Benyon and Colin Bourn (1986) commented that the voice of the participants in the interrogation in the tape recordings would always betray more than written documents.⁷⁴ Recent psychological science also alerted that policymakers should heed the potential pitfalls and limitations of the video recording. In G. Daniel Lassiter (2010)'s study, he suggested the possibility that the suspect is more visually conspicuous than the interrogator by virtue of the camera perspective, which could lead observers to conclude that

⁷⁴ John Benyon and Colin Bourn, *The police: power, procedures and properties* (Pergamon Press 1986) 147.

incriminating statements made by the suspects are volitional rather than a consequence of excessive pressure being exerted by the interrogator.⁷⁵ Beyond camera perspective, he also analysed personal factors, such as racial bias, 'fundamental attribution error' and stereotype, which could contribute to the false confessions with the interrogation recorded by video.⁷⁶

One year after the practice of video recording had been implemented China's legal practice has gradually ascertained the scholarly concern of the misused recording of the police interrogation. The video recording of the police interrogation is routinely crafted and manipulated, and technical analysis for the entirety of the video/audio recording is either absent or has not been taken seriously by the Chinese judiciary.⁷⁷ Instead of overseeing the police interrogation, these video recordings proffered by the police have been mostly utilised to reinforce the false credibility of the interrogation and put an end to the potential claims from the defendant, who had been inappropriately treated during the interrogation. According to certain defence lawyers, this new practice is 'a total failure of the system'; it is 'not only unable to prevent the employment of torture, due to the fact that the recording has always been processed and falsified, but also has been used in a way to cover up the existence of torture and legitimise the fabricated confession'.⁷⁸ This statement is confirmed by other insiders I had conversations with:

[Interview BDL-1] Defence lawyer: After my client was put in the detention centre, the police did not interrogate him initially. They just talked to him and lectured him. Only when the suspect had collapsed and confessed in the way that they had wanted was the statement recorded and then the so called complete videoing of the interrogation commenced.

[Field note APU-24] A prosecutor told me about the CCTV recording of the interrogation.

⁷⁵ G. Daniel Lassiter, 'Psychological science and sound public policy: Video recording of custodial interrogations' (2010) 8:65, *American Psychologist*, 768,770.

⁷⁶ Ibid 772-775

⁷⁷ Interview GAJ-2 and GAJ-4.

⁷⁸ See the defence lawyer Mao Lixin 'No title' (04 May 2013)

<http://www.weibo.com/p/1005052002687103/weibo?from=page_100505_home&wvr=5.1&mod=weibomore#3697864393477850>accessed 05 May 2013.

Prosecutor: The recording of interrogation is a show! It is called video recording at its entirety but it is not. They can select whatever episode they want to record and clip it in a way they desire.

With the falsified video recording constantly being employed to legitimatise the police investigation which is still fraught with malpractices, there is no surprise that this innovation has been welcomed by the police, as it has been utilised to convince people that 'no torture had been involved during the interrogation'.⁷⁹ The video recording of the police interrogation has largely been misused to conceal the coerced interrogation process and is virtually incontestable in the court.

Another piece of evidence contained in the dossier which carries significant weight in the adjudication is the crime scene evidence. In western countries, the crime scene evidence usually involves collection of physical evidence or forensic analysis from the retrieved evidence from a location related to the crime in question; but in China, the crime scene evidence is a by-product of the suspect confession, which is directly derived from the police interrogation. The most frequently seen crime scene evidence in the dossier is the record of crime scene identification, which belongs to the evidential category of 'written records, inquests and examination, identification and investigative experiments'.⁸⁰ Although it is recognised as a piece of real evidence by law, the purpose of this particular form of evidence is obscure and the evidence itself is highly subjective. Based on the investigative dossiers in site A, most records of crime scene identification are limited to one or two photographs in which the suspect was pointing to a location or an object, such as a building or a vehicle. At the bottom of the picture, an annotation illustrates the meaning of the photo--- 'the suspect was indicating the crime scene'---added with the maker and the date of the record.⁸¹ The probative value of the crime scene identification seems accepted by the court, as similar evidence was seen in almost every single

⁷⁹ Interview BPO-1, DPO-1, FPO-1, HPO-1 and EPO-1.

⁸⁰ See Article 48 of CPL 2012.

⁸¹ Field note APU-14.

investigative dossier. However, revealed by a defence lawyer, who was a former police officer, the way the crime scene evidence was constructed causes serious concerns:

[Interview CDL-1] Defence lawyer: The policeman who has made the record of the crime scene identification or the policeman who maintained the suspects' identification record rarely goes to the court to testify. For the crime scene identification, it is a bit ... [worrisome]. The police would take the suspect to a nominated place and take a photograph of him. That is the so called identification evidence. Actually the suspect has not identified anything at all. The suspect might not even know where the crime scene was and then the police told him where it was. For some migratory offenders, they are not familiar with a place as big as site C. They had no idea where the crime scene in the dossier was.

Real evidence, except for the record of identification of the crime scene or the record of identification of the suspect, is rarely seen in the evidence dossier of the investigation. Tangible evidence which often carries considerable weight in proving the fact in issue will not be attached to the case dossier or adduced in the court. The common practice of the PSB is to capture the real evidence into a photo and include that photo in the evidence dossier (with a short note stating when and where the photo was taken). Once the photo has been taken, the real evidence itself will usually be left in a vault within the police office building.⁸²

3. The Defence Predicament in the Investigative Stage

The participation of defence lawyers in the criminal process is essential in balancing the power between the prosecution and the defence and to safeguard the rights of the accused. Pursuant to Article 6 of the European Convention on Human Rights, the right to legal

⁸² Interview FPO-1 and BPO-1.

assistance is a crucial guarantee of the fundamental right to a fair trial. As a basic requirement of due process rationale, defence lawyers should and are entitled to play a significant role in checking the power of the police by defending the case for the accused, ensuring that innocent individuals are not wrongfully convicted due to their vulnerable position.

One of the most significant achievements in CPL 2012 was to consolidate the defence lawyers' legal rights in the Lawyers Law 2007 by removing the provisional conflicts within the earlier framework of CPL 1996. Prior to the Lawyers Law 2007, meeting with suspects had to be permitted by the authority.⁸³ CPL 2012 reinforced the fact that once the accused has been interrogated or compulsory measures have been taken, defence lawyers should be allowed to meet their clients in the detention centre on production of the lawyers' licence, the introduction letter from the law firm and the letter of representation. Apart from cases involving State security, terrorism, or serious bribery, which require the permission from the leaders of the police, the detention centre should arrange the meeting between the defence lawyer and the suspect within 48 hours.⁸⁴ Services that the defence lawyer can provide during this stage include: giving legal advice to the suspect, petitioning or complaining to authorities on behalf of clients, arranging for bail for the suspect, consulting legal institutions regarding the criminal charges or relevant information from the client.⁸⁵

Despite the rhetorical improvement in law, defence lawyers still face significant marginalisation and discrimination generated by the bureaucratic institutions at this critical stage. The institutional bias against the defence lawyer is not exclusive to the Chinese criminal justice system. In many jurisdictions, defence lawyers' activities have generated

⁸³ This is usually the leader of the police or the prosecutor.

⁸⁴ See Article 37 of CPL 2012.

⁸⁵ See Article 36 of CPL 2012. The defence lawyer is also allowed to gather evidence from witnesses by herself. But many defence lawyers believe gathering evidence often takes place after they have seen the case dossier when the case has been transferred to the procuratorate. Therefore, the defence role in regards to evidence collection will be discussed in the succeeding chapter.

animosity from the police. For example, in France, defence lawyers are often depicted as a role that is associated with corruption, undermining the integrity of the criminal process.⁸⁶ Similarly in the Netherlands, suspicion and mistrust of defence lawyers still linger with the police force.⁸⁷ Even in adversarial systems, such as England & Wales, it has taken a long period of time to establish trust between the police and the defence lawyers.⁸⁸ Compared to Western democracies the antagonism mounted between the police and the defence in China is much more serious than professional prejudice. In fact, the oppositional relationship between the police and the defence lawyer has cost a number of defence lawyers' professional career and their personal liberty, making the criminal defence one of the most high-risk occupations in China.

The major concern from the defence emanates from article 306 (perjury offence committed by the defence counsel) of the Criminal Law 1997, which has been frequently utilised by the police and the prosecution to silence active defence lawyers. The 'sword of Damocles', as it is referred in this article by the community of defence lawyers, provides:

If a defender or agent ad litem destroys or forges evidence, helps any of the parties destroy or forge evidence, or coerces the witness or entices him into changing his testimony in defiance of the facts or gives false testimony in the criminal process, he shall be sentenced to a fixed-term imprisonment of not more than three years or criminal detention; if the circumstances are serious, he shall be sentenced to fixed-term imprisonment of not less than three years but not more than seven years. Where a witness's testimony or other evidence provided, shown or quoted by a defender or agent ad litem is inconsistent with the facts but is not forged

⁸⁶ For instance, in Jacqueline Hodgson (2009)'s study, when responding the proposal that lawyers gain access to their clients at the start of police detention, a police officer stated 'a lawyer lives from his clients and in the past, we often observed that the deontology of the lawyer comes after his own interests and those of his client. [There would be a] risk of accomplices fleeing of searches rendered unless after friends had been informed.' See Jacqueline Hodgson, 'Human rights and French Criminal Justice: opening the door to the pre-trial defence rights' (2009) Warwick SSRN, Warwick SSRN working paper, 20.

⁸⁷ See Taru Spronken, *An EU-Wide Letter of Rights* (Intersentia 2010) 136.

⁸⁸ Suspicion of defence lawyers in the police force had lingered in England and Wales for a long period of time and the trust was only established until the recent two decades. For example, the Commissioner of the Police for the Metropolis in 1970s once said: '[...] A reputation for success, achieved by persistent lack of scruple in the defence of the most disreputable, soon attracts other clients who see little hope of acquittal in any other way. Experienced and respected metropolitan detectives can identify lawyers in criminal practice who are more harmful to society than the clients they represent.' See Mike McConville and Jacqueline Hodgson, *The Royal Commission on Criminal Justice: Custodial legal advice and the Right to Silence* (HMSO 1993) 155.

intentionally, it shall not be regarded as forgery of evidence.

It is believed that this article has put defence lawyers in severe professional jeopardy when they are merely engaged in good defence preparation.⁸⁹ According to the All China Lawyers Association report, a significant number of defence lawyers have been arrested, detained, and prosecuted under Article 306 of the criminal law.⁹⁰ Of these cases in which the defence lawyer was prosecuted, 80 per cent were suspected as retaliatory investigation, as the PSB and the procuratorate that dealt with the perjury offence relating to the defence lawyer were the same ones involved in the case in which the same defence lawyer represented.⁹¹ The retaliatory persecution has a negative impact on the industry of the defence lawyer in China, particularly on the influx of the new defence practitioners. According to the annual survey (2013) conducted by Beijing Shangquan Law firm (referred to as defence lawyers' annual survey), only 11.9 per cent of junior lawyers (who practiced law less than two years) chose to practice criminal law due to the hazardous nature of legal partitioning in the criminal field.⁹²

In order to conciliate the antagonism between the defence lawyer and the criminal justice institutions, particularly after the high profile case of Li Zhuang in 2009,⁹³ the revision of

⁸⁹ See Ping Yu, 'Glittery promise vs. Dismal reality: the role of a criminal lawyer in the People's Republic of China after the 1996 revision of the criminal procedure law'(2002) 35 *Vanderbilt Journal of Transnational Law*, 827, 852

⁹⁰ Defence lawyers are often harassed, intimidated and even prosecuted for doing their work. All China Lawyers Association (ACLA) reported 18, 30 and 31 cases in 1999, 2000 and 2001 respectively and 22 between 2002 and 2004. Individual lawyers, however, have given a much higher estimate. For example, leading lawyers such as Tian Weichang and Mo Shaoping have indicated that as many as 500 lawyers may have been punished for doing their work since 1997, while others reported as many as 100 cases per year. Although lawyers are prosecuted for a variety of criminal offences, falsification of evidence under article 306 has the highest percentage of prosecution from 1999 to 2001 (14 out of 29). The trend continued. Among 22 cases from 2002 to 2004, ten were falsification of evidence charges. It is commonly asserted that about 80 per cent of the cases related to article 306 offences. See Fu Hualing, 'When lawyers are prosecuted: the struggle of a profession in transition'[2007] Social Science Research Network, available at <http://papers.ssrn.com/sol13/papers.cfm?abstract_id=956500> 3-4.

⁹¹ Ibid.

⁹² See Beijing Shangquan Law firm, 'The annual report of the implementation effect of the new criminal procedure law 2013'(2014) <http://www.sqxb.cn/content/details16_1644.html> accessed 09 March 2014.

⁹³ Li Zhuang is a Beijing lawyer who acted as a defence lawyer for one of the alleged leaders of organised crime in Chongqing, Gong Gangmo. Gong faced serious accusations of murder, illegal weapons trade, drug dealing and heading a criminal organisation, which was one of the key cases in the Chongqing's anti-crime campaign. As Li attempted to prepare a defence case based upon the torture that Gong had suffered during the police detention, Li was prosecuted subsequently. During the trial, it was believed that Gong was forced to allege Li had advised him to withdraw prosecution evidence, which eventually led to the charging and conviction of Li for fabricating evidence and obstructing defence evidence. Li was sentenced to 18 months'

criminal procedure law provides that the PSB who investigates the offence that is represented by the defence lawyer who is suspected of committing the perjury should not work in the perjury case in which the same defence lawyer is suspected.⁹⁴ Whilst a proportion of defence lawyers believe that the new law could tackle professional retribution, the majority of defence lawyers are sceptical and are not convinced that such a solution could effectively address this problem.⁹⁵ They believe that the PSB from another district would still take the retaliatory action against the defence lawyer, due to the influence of the procuratorate and the highly bureaucratic police system, by which the leader of the PSB deploys the direction of the investigation.⁹⁶ Indeed, such negative prognosis was ascertained in certain defence lawyer perjury cases occurring after the enactment of CPL 2012. According to the defence lawyers' annual survey, defence lawyers continued to be targeted by the PSB, despite the new legal measures.⁹⁷

As a result, the majority of defence lawyers believe that, with the 'sword' still hanging over them, those enhanced defence rights could even become latent pitfalls for the defence. This problem is particularly prominent with criminal procedure law 2012 expanding the scope of defence lawyers' intervention at various stages of the criminal proceedings, which has consequently increased the chance of conflict between the defence lawyer and legal institutions. Thus, for example, although defence lawyers' meeting with their clients should not be monitored pursuant to the law, many defence lawyers are still advised not to divulge

imprisonment. Li Zhuang case is believed to be the direct reason for adding article 42 of CPL 2012. See Li Enshen, 'The Li Zhuang case: Examining the challenges facing criminal defence lawyer in China' (2010) 24:1 *Columbia Journal of Asian Law*, 129,134-138.

⁹⁴ See Article 42 of CPL 2012.

⁹⁵ According to the defence lawyers' annual survey, 24.5% of defence lawyers (78 defence lawyers) believed that the new law could ease the professional retaliation; however, 240 defence lawyers believe that the retaliatory prosecution is unresolved because of the bureaucratic police system. Beijing Shangquan Law firm, 'The annual report of the implementation effect of the new criminal procedure law 2013' (2014) <http://www.sqxb.cn/content/details16_1644.html> accessed 09 March 2014.

⁹⁶ Ibid.

⁹⁷ For example, in 2013 defence lawyer Zhang Mengshi was suspected of committing perjury for his client in Zhuzhou city, Hunan province. The PSB who investigated the case represented by Zhang also the police in charge of Zhang's perjury case. In the court, Zhang launched a move to challenge the qualification of the police. However, the court dismissed Zhang's challenge, disregarding the law. See Beijing Shangquan Law firm, 'The annual report of the implementation effect of the new criminal procedure law 2013' (2014) <http://www.sqxb.cn/content/details16_1644.html> accessed 09 March 2014.

any defence strategies during the meeting, as the confidentiality of the meeting cannot be guaranteed.

[Interview DBL-1] Defence Lawyer 1: [...] There is another risk with meeting the suspect. When we meet the suspect, the conversation could be bugged. Even though it is said that the meeting should not be heard or recorded, as an experienced lawyer, I deeply doubt that this is the case. I believe that the police would record the conversation.

Defence Lawyer 2: In the detention centre in the rural site, video was installed in every room including the meeting room.

Defence Lawyer 1: What really concerns us is when the conversation is recorded and the police have heard me asking the suspect to change his statement; then we will be in big trouble. Even if they would not produce the recording as evidence, they could force the suspect to confess to what we have talked about in the meeting room. Once the defendant has told the police what we discussed in the meeting room, his statement will become evidence against us. Another concern of the recorded conversation might be if any detailed information is involved in our conversation, which is not yet known by the police during the course of the investigation. The police could then follow up this information and find out more evidence that may be adverse to our client. That's why I always advise the young lawyers not to discuss much about the details of the case even if we are given enough time to meet with the suspect, otherwise the suspect could be in greater trouble.

Such concern expressed by the defence lawyer cannot be regarded as overly cautious. In fact, with the deepening of legal reform, the antagonist relationship between the legal institutions and the defence lawyer are observed to be more intensified than ever before.⁹⁸ A number of defence lawyers reported that criminal justice institutions (particularly the PSB and the procuratorate) had conspired to put undue pressure on suspects or their family to revoke the defence contract to ensure that the defence lawyer is excluded from criminal

⁹⁸ Ibid.

cases.⁹⁹ Consequently, a significant proportion of suspects and their families insisted on not retaining any defence lawyers, due to the influence from the legal institutions. As a result, in certain regions of China, the local defence industry has been severely sabotaged and the accused has been deprived of the right to legal counsel.

As far as the police are concerned, the new legislation has apparently brought new challenges to their daily practice. They complained that now defence lawyers could meet the suspect whenever they want according to the law, which could potentially make the police interrogation strategies become futile. For many police officers, the mission of the defence is imparting knowledge to the accused in order to exonerate her guilt. A police officer expressed his concern in the interview:

[Interview FPO-1]Researcher: What do you think of the safeguards in the CPL 2012, such as the defence lawyer meeting the suspect during the investigation?

Police officer: It will affect the justice. A lawyer can provide legal aid to the suspect. But how does a lawyer offer his service? The lawyer knows the law. As their private conversation is not even monitored, the defence lawyer can collude in the crimes. [...]It will not only affect our work, it will also have an effect on the procuratorate and the court's work. The impact will be massive.

Despite the enmity from the PSB, the majority of defence lawyers confirmed that it became easier to meet the accused during the investigation, compared to the practice before CPL 2012. According to the defence lawyers' annual survey, only 4.1 per cent of defence lawyers (13 defence lawyers) complained that the detention centre did not arrange the meeting within 48 hours after they requested; over fifty per cent of defence lawyers

⁹⁹ For instance, in Chengdu, Sichuan province, as the defence lawyer filed a complaint against the PSB, who refused to arrange a meeting between the defence lawyer and the suspect, the family of the suspect was asked to dissolve the defence contract with his defence counsel. Similarly, in Jiexi, Guangdong province, the local PSB pressurised the close relative of the suspect to terminate the contract with his defence lawyer, who disclosed and complained the illegal conduct of the investigating officers. Very frequently, certain PSB was reported to grant the bail on the condition that the suspect has dissolved the contractual relationship with his defence lawyer. Such hostility from the police is apparently a gross infringement of the defence right of the suspect See Beijing Shangquan Law firm, 'The annual report of the implementation effect of the new criminal procedure law 2013' (2014) <http://www.sqxb.cn/content/details16_1644.html> accessed 09 March 2014.

responded that they were able to meet their clients more than twice during the investigation period.¹⁰⁰ Despite the substantial improvement in accessing their clients, the vast majority of defence lawyers believe that the insulated investigative model and institutional hostility against defence lawyers remain unchanged. Thus when dealing with defence lawyers, the state officials would deliberately create various obstacles whenever possible. Of all the difficulties reported by the defence lawyer during the investigation, the physical condition of the meeting room in the detention centre was the main concern.¹⁰¹

Although the detention centre is in name a separate institution from the PSB, it is *de facto* controlled by the police. It used to be rare for the defence lawyer to interview the suspect during the period of custody; therefore many detention centres lack rooms to facilitate this function. In the report of defence lawyer Wang Faxu, there is only one meeting room available in a detention centre accommodating 250 detainees.¹⁰² In Zhaozhuang city, Shandong province, there is only one meeting room in the detention centre; hence defence lawyers had to queue for a whole day in order to meet their clients.¹⁰³ For detention centres where the meeting rooms are provided, most of them are designed in such a poor fashion that the defence lawyers' meeting with their clients cannot proceed without encountering encumbrance. For instance, the meeting rooms in one of the detention centres in site A were separated by a wall with a small glass window. The suspect and the defence lawyer had to speak very loud, so that they could hear each other. In another detention centre in site A, the suspect and the defence lawyer had to communicate by phone, which could be cut off by the detention centre at any time. Apparently these meeting rooms are specially designed to control the interaction between the defence lawyer and the suspect, rather than

¹⁰⁰ Ibid.

¹⁰¹ 65.4 % of defence lawyers reported that practical difficulties, particularly the arrangement of meeting facilities, were the critical issues when interviewing the suspect. Ibid.

¹⁰² Ibid.

¹⁰³ Ibid.

to protect the confidentiality of the lawyer-client relationship.¹⁰⁴

Other constraints imposed by various detention centres have also created hurdles for the defence lawyer when meeting with the suspect.¹⁰⁵ One of the excuses that has been frequently utilised by the detention centre to prohibit the defence lawyer from meeting the accused is the 'three-type cases' (*sanlei anjian*). According to CPL 2012, when meeting with the suspect, the defence lawyer must obtain the permission from the PSB if the case involves endangering the national security, terrorism or serious bribery.¹⁰⁶ In legal practice, this provision has been reported to be broadly interpreted by the detention centre. Defence lawyers have claimed that, detention centres have tagged ordinary cases as the 'three-type cases' in order to exclude the involvement of the defence lawyer. For example, when a defence lawyer asked which specific type of case that his client was associated, when his application of meeting his client was rejected by the detention centre in Chengdu city, Sichuan province, the detention centre simply could not reply.¹⁰⁷ Whereas according to the law, only the bribery cases involving over 500,000 yuan are regarded as serious, in reality almost all the bribery cases have been labelled as 'serious' in order to prevent defence lawyers giving legal advice to the suspect.¹⁰⁸

A number of 'innovative' methods have been used by the detention centre to avoid the defence lawyer accessing the suspect. Defence lawyers have claimed that certain PSB had disguised the custodian location of the suspect by using a false name when the suspect was

¹⁰⁴ Ping Yu, 'Glittery promise vs. Dismal reality: The role of a criminal lawyer in the People's Republic of China after the 1996 revision of the criminal procedure law' (2002) 35 *Vanderbilt Journal of Transnational Law*, 827,840.

¹⁰⁵ For example, defence lawyers are required to provide extra documents, such as the suspect's marriage certificate and additional files permitted by the Department of Justice to Fengtai detention centre in Beijing in order to meet the suspect; in Haidian detention centre, Beijing, different defence lawyers who represent co-defendants in the same case are not allowed to interview their client on the same day; in Chaoyang detention centre, Beijing, defence lawyers must make an appointment one week earlier before they are allowed to meet the suspect. See Beijing Shangquan Law firm, 'The annual report of the implementation effect of the new criminal procedure law 2013' (2014) <http://www.sqxb.cn/content/details16_1644.html> accessed 09 March 2014.

¹⁰⁶ See Article 37 of CPL 2012.

¹⁰⁷ Beijing Shangquan Law firm, 'The annual report of the implementation effect of the new criminal procedure law 2013' (2014) <http://www.sqxb.cn/content/details16_1644.html> accessed 09 March 2014.

¹⁰⁸ *Ibid.*

admitted into the detention centre.¹⁰⁹In many regions of China, detention centres use limited meeting rooms as an excuse to reject defence lawyers' request to meet the accused.¹¹⁰ In Number three detention centre in Beijing, many defence lawyers' applications to interview the suspect were declined on grounds that the water pipe in the detention centre needed repair. As this explanation has been continuously used to decline the defence request for an extended period of time, many defence lawyers commented that 'the smart water pipe knew exactly what the detention centre wanted.'¹¹¹

Even though the law has explicitly forbidden the monitoring of defence lawyers' meeting with suspects, based on my observation in the detention centre in site A, this has not been the case.¹¹² The practice of privacy varies depending on different regions and is contingent on the sensitivity of the case in question. Defence lawyers have reached the consensus that even though interviewing the suspect has become easier; the defence rights during this process are not guaranteed.

[Interview CDL-2]Defence Lawyer: There have not been many cases in which the policeman has asked to be present in our meeting. Since the Lawyers' Law has been promulgated, the police have been starting to adjust their practice to the new law. [...] For some very sensitive and serious crimes, the police will ask someone to be present in our meeting. So far, I haven't dealt with such cases. My colleagues have told me that the police sent someone to listen to the conversation for serious drug trafficking cases and serious bribery cases.

So far, the law only allows the defence lawyer to meet her client after the suspect has been interrogated by the police or compulsory measures have been taken.¹¹³Defence lawyers are not permitted to see clients prior to the police interrogation. The period of time between suspects having been arrested and then interrogated is most critical, as the suspect is at her

¹⁰⁹ Ibid.

¹¹⁰ Interview CDL-1.

¹¹¹ Beijing Shangquan Law firm, 'The annual report of the implementation effect of the new criminal procedure law 2013'(2014) <http://www.sqxb.cn/content/details16_1644.html> accessed 09 March 2014.

¹¹² See Field note APU-21.

¹¹³ See Article 33 of CPL 2012.

most vulnerable and the prospects of extorting a confession from her are greatest.¹¹⁴ In order to ensure that defence rights have not been infringed by the police at this stage, in England & Wales, the Police and Criminal Evidence Act 1984 provides that a person arrested and held in police custody has a right, upon request, to consult a solicitor privately at any time.¹¹⁵ In China, on the contrary, this crucial stage has been secured by the police power for questioning. According to the law, the first police interrogation should take place within 24 hours from the arrest of the suspect and during this time, the suspect has no right to consult a legal adviser.¹¹⁶ The suspect is also denied legal assistance during the process of police interrogation. The key feature of the interrogation in China is the absolute police control over the suspect. Allowing legal advisers access to the interrogation would inevitably restrain the coercive measures of the police and empower the suspect to resist the psychological compulsion exerted by the police; more importantly, the interrogation record would be less likely to be manipulated.

[Interview BDL-1] Defence lawyer: The most important stage we really care about is the investigation. The evidence has been consolidated in this stage and we don't even know how it is formed. [...] If the investigation is properly designed and we are allowed to be present, a lot of defence work would be solved subsequently. For example there should be a rule that all the suspect's words should be recorded honestly including his negations and defence. If such work has been done properly, there is little work that we would need to do in the later stages.

All of this would be a radical challenge to the current police interrogation practice. If such rights were admitted to law, the whole criminal justice system would endure a dramatic change. In reality, due to the fact that defence lawyers are such a weak group within the Chinese criminal justice system, it is unlikely that they are able to confront the police authority through rights of access to the interrogation. For some defence lawyers, this right

¹¹⁴ See Mike McConville et al, *Standing accused* (Clarendon Press 1994) 72.

¹¹⁵ See Section 58 of the Police and Criminal Evidence Act 1984.

¹¹⁶ See Article 117 of CPL 2012.

is far from usable, due to the increased defence expenses that would occur and the fact that there is currently no mechanism in place to deliver reliable legal advice to those requesting it. It also requires a higher level of police integrity and a lot of detailed questions in regard to how defence lawyers define their role during the interrogation.

[Interview CDL-2] Defence lawyer: If the defence lawyer participated during the interrogation, it would be very good. However, I am quite concerned about my clients. They may have to pay quite a large amount of money for the lawyer's fee. Most clients cannot afford this. Just think about it; the police have to interrogate the suspect within 24 hours after he is arrested. What happens if the police do not question my client when I was there or interrogate him after I have left? Ok, even though they may interrogate the suspect when we are there, we cannot sit there like a suspect ourselves for a long time. Unless the client is extremely rich and he can hire several lawyers, so that we can sit during the interrogation taking our turn, it is not very practical. It may work if a provision is made that only when defence lawyers are present is the interrogation valid. I think this is very difficult to put into practice. But we have to charge him a lot of money in such circumstances because we have to confront the police directly. If the police were to ask some misleading questions, are we allowed to intervene?

Thus, the police interrogation methods have been well-hidden from the defence lawyers and have been treated as a State secret. Defence lawyers are barred from the process of the police interrogation and how the incriminating accounts are constructed in each individual case is shrouded in mystery. Although defence lawyers are now more frequently able to meet their clients in custody than ever before, this has been restrained by the hostile facilities, illicit excuses or secret surveillance in the detention centre, which demonstrates their marginalised status. The investigative process and the suspect are tightly controlled by the police. As a disempowered group, what defence lawyers can do in this stage is very limited.

Summary

My observations suggest that police investigation in China is not designed to detect and discover the truth about a criminal case. Many criminal investigations are initiated due to performance indicators for the purpose of social control. Securing a confession lies at the centre of police investigation. However, my field data indicates that, the confession reflects nothing but a version of what has already been prepared by the police. The statements of the accused are not a verbatim record of the interrogation, but have been distorted, falsified and coloured to enhance the incrimination of the accused. Nonetheless, these written documents are given credence and are perceived as the most crucial piece of evidence used to incriminate the accused, regardless of the manipulation, fabrication and inaccuracies that they contain. The pressures faced by the accused are magnified by confinement and isolation in an extremely adverse environment, which renders the resulting confessions both involuntary and unreliable. Psychologically compulsive devices, such as lecturing, are employed to draw out a confession from the accused suspect by imposing stress, which is magnified by incarceration in an adverse environment.

Given the vast size of China, it is possible that investigative practices may vary. However, with no effective safeguards in place to supervise police conduct during investigations, the reliability of the evidence gathered by the police is hard to guarantee. Compulsory video/audio recording is only applicable to a limited number of offences and, in many instances, fails to accurately reproduce the reality of the interrogation. This dramatic power imbalance between the police and the accused remains unchanged even if the suspect is represented by her defence lawyer. Defence lawyers have been systematically marginalised by the legal institutions and a number of active defence lawyers have been persecuted when they merely engaged in good defence practices. Even with the reform of the law, defence lawyers are still facing significant obstacles in meeting with their clients at this critical stage.

With the same legal culture and ideology continuing to underpin the criminal justice system and dictate the behaviours of the police officers, the introduced practice to check the legality of the process, such as video recordings, is merely another device to gloss over the malpractices occurring in the investigation. The validity of the evidence dossier is legitimised and justified by the status of the investigator: as an authority, the police have been given unconditional trust under the Chinese collectivism tradition. Having no protection for the potentially innocent people involved in the criminal justice system, the seeds of injustice are sown at this early stage, and thrive as the following process unfolds.

Chapter 4 Reviewing the Police Investigation

Chinese criminal procedure is divided into three distinct phases that are dominated by different legal institutions: the police investigation, the prosecution process and the court trial.¹ Taking the perspective of the case file, the three stages of the criminal process can be seen as the construction of the police case, the subsequent prosecutorial review, and the judicial decision making on the basis of the case dossier.² After the police investigation has been completed and the case for prosecution has been created, the case will be transferred to the procuratorate for review.³ After the dossier has been received from the police, prosecutors will engage in a series of activities leading to a decision on prosecution.⁴ This includes an examination of evidence, interrogation of the suspect, interviewing the victims, and finally drafting the case report with regards to prosecuting or not prosecuting the accused. The object of this chapter is to explore whether the prosecutor can effectively oversee the police investigation and verify facts and evidence in the dossier through discharging these tasks at this stage. To investigate these issues, this chapter sets out to understand the role of the prosecutor, and then moves to a more detailed examination of the activities that the prosecutor undertakes to oversee the police conduct and evaluate the strength and persuasiveness of the police case. By scrutinising the prosecutorial activities during preparation of the prosecution case, the police-prosecutor relationship and its implications can be better understood.

¹ Alternatively, the procuratorate is also able to investigate certain categories of criminal cases.

² This to some extent dovetails with a popular saying in China that catches the essence of the institutional relationship of the legal institutions: the police cook the rice, the prosecution carries the rice and the court eats the rice. See Fu Hualing, 'Putting China's Judiciary into Perspective: Is it independent, competent, and fair?' in Erik Jensen and Thomas Heller (eds.) *Beyond Common knowledge: empirical approaches to the rule of law* (Stanford University Press 2003) 196.

³ See Chapter 2, Section 10 (Article 154 to Article 161) of CPL 2012. In China, there is a legal term called 'the completion of investigation', which requires the head police officer to submit the recommendation of the prosecution and to send all the dossiers to the procuratorate. The completion of the investigation should be based on the standard that 'the facts are clear and the evidence is reliable and sufficient'.

⁴ This should be done within one month, which is calculated from the time that the dossier has been received by the procuratorate. For major and complex cases, this legal period can be extended for another half a month. If the case is transferred to another procuratorate the time limit is recalculated from the date of receipt by the receiving procuratorate. See Article 169 of CPL 2012.

1. The Role of the Prosecutor and the Appraisal System

As the legal representative of the prosecution responsible for preparing and presenting a case against individuals who potentially break the law, the prosecutor not only prosecutes the accused on behalf of the State, but is also subject to certain public duties, ensuring the legality of the process and the fairness of the criminal process.⁵ The role of the prosecutor varies, dependant on the traditions of the different legal systems. For example, in England & Wales, due to the historically embedded investigation and prosecution role of the police, the relatively newly created Crown Prosecution Service has little control over the police and police investigation; the role of the prosecutor is limited to fulfil the legal documents of prosecution and presenting the case at trial. In contrast, in inquisitorial countries, such as France, the role of the prosecutor is comparatively powerful: as a component of the judicial authority (the *magistrature*), the prosecutor can not only decide issues regarding the prosecution based upon the evidence, but also enjoys the supervisory power over the police investigation and safeguards the due process rights of the accused.⁶ In chapter 1, we have discussed the supervisory power of the procuratorate in China, which enables the prosecutor to oversee other legal institutions within the criminal justice system. As a supervisory body, the procuratorate has been depicted in Chinese legal rhetoric as an impartial and independent guardian of the enforcement of law, whose task is to ensure that each case is processed with lawfulness and fairness. Article 5 of CPL 2012 provides that the procuratorate exercises the power of supervision, which should not be interfered with by the executive, social organisations or individuals. According to Article 6 of CPL 2012,

⁵ Prosecutors are usually subject to certain rules to ensure the fairness of the criminal process. This is not only demonstrated by their judicial role in inquisitorial systems, but can be generally found in adversarial systems. For example, in the United States, rule 3.8 of the ABA Model Rules of professional conduct requires prosecutors to 'make timely disclosure to the defence of all evidence or information [...] that tends to negate the guilt of the accused or mitigates the offense.' Similar rules can also be seen in England & Wales.

⁶ Jacqueline Hodgson, *French criminal justice: a comparative account of the investigation and prosecution of crime in France* (Hart publishing 2005) 66-79.

prosecutors, as well as police and judges, should base their work on facts and the law, and apply the law equally to each individual citizen. As a legal duty, the prosecutor is obliged to gather both inculpatory and exculpatory evidence by following the legal procedures.⁷ In this regard, prosecutors should review the police case objectively and give relevant instructions assiduously: their mission is to safeguard the correctness of the enforcement of law.⁸

The procuratorate has been delegated part of the investigative task for certain categories of crimes. However, many prosecutors regard themselves primarily as reviewers of the investigative case. When asked about their legal role, many prosecutors emphasized their commitment to fairness, albeit some of them conceding that undue influences were unavoidable.

[APS-2 interview] Prosecutor: My main job is to review the evidence rather than gathering the evidence.

[Field note APU-3] Prosecutor: Although the prosecutor was originated as a party, the arms between the prosecution and defence are too unbalanced. So we have to be fair to them. Just follow the truth. We are not investigative officers; we only review the cases from the police. We must be objective.

[Field note APU-5] Prosecutor: Generally speaking I was taking the role of an independent supervisor. But when I was reviewing the case, I have been influenced by some external factors, which is unavoidable.

It is true that under certain circumstances, the prosecutor had sympathy towards the suspect who shows remorse and pleads guilty, and in those cases they readily welcomed the evidence that would mitigate the sentence of the accused.⁹ However, this neutral image of the prosecutor is premised on the condition that the conviction is secured. As the

⁷ See Article 50 of CPL 2012. Similar Articles also include article 7 of CPL 2012, which provides that the procuratorate, as well as the court and the police, should divide their work responsibly, co-operate with each other and check each other to ensure that the law is enforced correctly and efficiently.

⁸ See Article 7 of CPL 2012.

⁹ Field Note APU-23 (CASEA 23)

prosecutor is given the task to prosecute offenders efficiently, her duty to be objective succumbs to the pursuit of crime control. Prosecutors were observed to be partisan, rather than neutral. In interview, they acknowledged this.

[APS-3 interview] Prosecutor: Frankly speaking, as a prosecutor in China, it is impossible to be a neutral officer. Our job is to accuse and charge the suspect. It is very hard to be neutral, because our workload is very heavy and we feel under pressure all the time. Therefore I think our position is that of an accusing party. Also I don't think we can be a neutral officer because our job is to fight against crime.

[APS-2 interview] Prosecutor: In mainland China, our role should be defined as an accusing party. However, during the criminal procedure, we would try our best to be fair with all cases, which is not contradictory to our role. We cannot work as a neutral officer in the court like the Western countries do.

The prosecutor's role as a rival of the accused has been reinforced by the performance indicators designed by the Party-state. As with the police, prosecutors are also subject to the Appraisal System, which connects the prosecutors' bonuses and promotion opportunities to the conviction rate of prosecuted cases.¹⁰ Ever since the resurgence of the procuratorate in 1978, procuratorates at different levels would be evaluated by the higher procuratorate to assess the success of prosecution. Prosecutors who have a high percentage of conviction rates are more likely to be rewarded internally in the next round of tenures; whilst those whose cases have been acquitted by the court would be marked negatively and subsequently would lose the advantaged position in competing for upcoming bonuses and promotions.¹¹ More seriously, an acquittal would affect all the state officials who work collectively in that particular procuratorate. The acquittal would lead to state compensation for the defendant and a tarnished reputation for the procuratorate, which, like the individual prosecutor, would be financially punished and become disadvantaged in the

¹⁰ Li Enshen, 'The Li Zhuang case: Examining the challenges facing criminal defence lawyer in China' (2010) 24:1 *Columbia Journal of Asian Law*, 129,163.

¹¹ See Zhu Tonghui, 'Xingshi susong zhong de jijian kaohe (The Appraisal System in the Criminal Justice System)' (2009) 1 *Law and Social Science (Falv he shehui kexue)* 5.

overall ranking of the procuratorates in that region. Prosecutors believe that these performance indicators arbitrarily obliterate the division between the prosecution and the adjudication, requiring them to think in the same way as the judge. Since the adjudication is essentially a matter of judgement, with individuals reasonably differing on the weight of the same evidence, the uniform standard adopted by the Appraisal System has been strongly opposed by prosecutors.

[Field note APU-4] Researcher: Would you be evaluated?

Prosecutor: Yes. Every year! They [the higher level of procuratorate] will evaluate every office, every team and every prosecutor! Everyone will be assessed! I think this is so inhuman! They want the conviction rate to be 100%, which is so ridiculous! Having different opinions with evidence is so normal. Everyone should be allowed to have different judgements towards the evidence. But they want us to win every case! This is so unreasonable.

[APS-2 interview] Prosecutor: I think acquittals are very normal. I think the Appraisal System should be discarded. I think the law is a discipline in which there exists differing viewpoints on the same issue. Everyone thinks differently and the criterion of the judgement varies. For the same quality and quantity of evidence, a group of people may think it is sufficient to prove the fact that the suspect is guilty whilst another group may think that there are alternative explanations. I think the acquittal is absolutely normal practice. Due to the assessment, we are not allowed to make any mistakes or have any acquitted cases. Now 'everyone turns pale when the acquittal is mentioned.'¹²This is not right.

Many prosecutors believe that their behaviour is directed and defined by the Appraisal System. They complain that due to the subjectivity of the judgment, when prosecuting cases, they are concerned more about the judge's individual opinion rather than their understanding of the law. This seems to have debased the legal status of the procuratorate

¹² This is from the Chinese idiom: 'when people are talking about the tiger, their face turn pale', meaning that something (such as tiger) is so frightening that it has become a taboo to talk about. Here obviously the prosecutor meant the acquittal is something that makes people depressed.

in the criminal justice system. However a supervisory body that is empowered to oversee the trial, the procuratorate maintains an exalted position and prosecutors believe they should be superior to the adjudicator. Since the prosecutor's achievement is to be evaluated by the conviction rate, it was conceded that the ultimate authority lies in the hands of the court rather than the procuratorate.

[APS-4 interview] Researcher: How do you think of the problems incurred by the Appraisal System?

Prosecutor: Those who designed the assessment model should rethink these problems. [...] due to the appraisal model, the law has been undermined or hollowed. [...] You know the legal work is mostly subjective. So when I have a case, as a prosecutor, if I think the suspect has committed a crime and should be prosecuted, I will prosecute it. When I prosecuted the case to the court, the judge who thinks differently, may acquit the case. We are different legal personnel and have a different way of thinking. The result is absolutely normal. But the consequence is, once he made an acquittal, our work is whitewashed due to the assessment. This has a great effect on us. So we have to be nice to the court even though we have the supervisory power.

From the Party-state's perspective, the managerial Appraisal System has been designed to have an overriding effect in relation to the performance of the prosecutor. The systematic restriction of the prosecutor's autonomy through hierarchical and bureaucratic control is considered necessary in order to guarantee the Party's tenet of social control and to ensure the concentration of power at the apex of the pyramid. The Appraisal System seems a natural structure for the hierarchical context, which artfully fuses together the prosecutor's accountability to the court's decision and the political master.

[APS-5 interview] Prosecutor: As the party that is evaluated, it is obviously very unreasonable. But for evaluators, it is their rational choice. It is for their interest. If there is no Appraisal System, there is no control over those that are supervised. There are a lot of interests embodied in the Appraisal System. A lot of interests! No matter with public aspects

or private aspects. Just because of the Appraisal System, we have to be submissive to the higher level. Just because we have some requests of the higher level, no matter the private things or public things, the higher level can let us work for them. If there is no Appraisal System, no one would care about the higher level.

Despite the discontent of the unreasonable arrangement, prosecutors' routine work has been significantly shaped around the requirement of the assessment. To pursue a high conviction rate, prosecutors are expected to screen out weak cases and only prosecute those cases with evidence that could lead a reasonable judge to convict the defendant. Over the past ten years, the acquittal rate in China has been less than 1%.¹³ An interesting comparison can be juxtaposed by the Japanese criminal justice, in which the conviction rate is equally as high (or even higher).¹⁴ This is primarily due to the fact that public prosecutors in Japan are vested with vast discretion and have 'virtually unlimited' control of the disposition of criminal cases at the every stage of the criminal process.¹⁵ This has resulted in the fact that an extraordinarily high proportion of cases are suspended by prosecutors and over 50 per cent of cases were disposed of before they reached the trial.¹⁶ As such, cases that have been decided to proceed to trial are highly selective.¹⁷ In fact, prosecutors only indict those accused who they are firmly convinced must be convicted and punished.¹⁸

¹³ Data comes from *Zhongguo Falv Nianjian (The China Legal Review)* 2004-2012, China Legal Review Publishing House. From 1998 to 2002, the average acquittal rate is 0.91%. From 2003 to 2012, the acquittal rates in China are 0.65%, 0.30%, 0.26%, 0.19%, 0.26%, 0.80%, 0.78%, 0.21%, 0.22%, and 0.79% respectively.

¹⁴ According to the Research and Training Institute, Ministry of Justice, the rate of judgment of not guilty in Japan was only 0.01% in 2009. See Tokikazu Konishi, 'Diversity within an Asian country: Japanese criminal justice and criminology', in Jianhong Liu et al (eds.) *Handbook of Asian Criminology* (Springer 2013) 217.

¹⁵ Japanese prosecutors wield remarkable discretionary power in the criminal process. According to David Johnson, Japanese criminal justice is the 'paradise for a prosecutor'. The prosecutor in Japan has more control over life, liberty and reputation than any other organisation in Japan. Ishimastu Takeo (1989), a former High Court judge in Japan once observed that the prosecutorial dominance in Japan is 'so complete that the real criminal trials are conducted not by judges in open court but by prosecutors in the offices where charge decisions are made'. See David Johnson, *The Japanese way of justice: Prosecuting crime in Japan* (OUP 2002) 1-47.

¹⁶ According to the Research and Training Institute, Ministry of Justice, in 2009, 52.1% of cases were disposed of in public prosecutor's office. Tokikazu Konishi, 'Diversity within an Asian country: Japanese criminal justice and criminology', in Jianhong Liu et al (eds.) *Handbook of Asian Criminology* (Springer 2013) 217.

¹⁷ See David Johnson, 'Prosecutor culture in Japan and the USA', in David Nelken (ed.) *Contrasting Criminal Justice: Getting from here to there* (Ashgate 2000) 157-194.

¹⁸ Tokikazu Konishi, 'Diversity within an Asian country: Japanese criminal justice and criminology', in Jianhong Liu et al (eds.) *Handbook of Asian Criminology* (Springer 2013) 217.

Compared to Japan, the inner working mechanism in relation to prosecution in China is quite different. The aforementioned internal evaluation system may have made the criminal process appear remarkably efficient.¹⁹ When looking into the cases that have been charged, however, most of them are by no means solid enough to be prosecuted: the prosecution cases would be weakened without the suspect's confession. As these inherently weak cases could not survive a rigorous screening system, it is important to understand how the supervising mechanism of the procuratorate is operating, specifically how the prosecutor oversees the police case and how the prosecution is justified in terms of the amount and quality of the evidence contained in the dossier.

2. Overseeing the Police Case

Article 168 of CPL 2012 set out the objectives that the prosecutor should achieve by discharging tasks in the pre-trial preparation stage.²⁰ It provides that, when reviewing the police case, the procuratorate must ascertain the following requirements:

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 have 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.

¹⁹ This will be discussed in next chapter.

²⁰ This article remains the same under the framework of CPL 1996. See Article 137 of CPL 1996.

CPL 2012 also requires the prosecutor to interrogate the suspect and gather opinions from the victim and her lawyer.²¹ Written opinions presented by the defence counsel, victim and the victim's representative counsel should be included in the dossier.²² The procuratorate can request the police to provide evidence necessary for the trial. If the prosecutor believes that the evidence in question was obtained by illicit methods, an explanation on the lawfulness of the evidence can be requested from the police.²³ In daily practice, in order to oversee the police case, the prosecutor would engage in examining the case dossier, interrogating the suspect, interviewing the victim and drafting the case report. Activities, such as interviewing the victim may not be necessary, depending on the sufficiency of the evidence in the case. Of all the tasks that the prosecutor undertakes, reviewing the case dossier is regarded as fundamental to prosecution work.²⁴

2.1 Examining the Investigative Dossier

The investigative dossier constructed by the police is the key asset in the Chinese criminal process, which contains all the crucial information to determine the fate of the defendant. The absence of witnesses in the Chinese court has been confirmed by the procuratorate during my observation. Of 25 prosecutors in site A, only two prosecutors had come across witnesses in the trial.²⁵ With almost no witnesses appearing in the court to give testimony, the dossier becomes the unique provider of evidence for the adjudication. Having no concerns that the witnesses would give an inconsistent testimony in the court (unlike England & Wales), in the pre-trial preparation in China, the prosecutor's main effort is directed towards assessing the evidence contained in the investigative dossier.

²¹ See Article 170 of CPL 2012.

²² Ibid.

²³ See Article 171 of CPL 2012.

²⁴ See Field note APU12.

²⁵ One of them told me that within eleven years during her prosecutorial career in site A, she had only seen one witness in a trial. See also Interview APS-3.

By reviewing the case dossier, the prosecutor should check whether the evidence has been gathered legally and whether the case is strong enough to be convicted by the court. In relation to the lawfulness of the investigation, the prosecutor's primary concern is limited to the required formalities of the documents compiled in the dossier, such as the dates of suspects' statements being within the legal period, whether the notification about the victim's rights has been included, or whether the suspect has signed on the statements. The prosecutor gives instructions to the police in relation to the completion of the required documents in the dossier. As errors constantly occur in the dossier (such as an omitted criminal record,²⁶ incorrect suspects' names,²⁷ incomplete procedural documentation,²⁸ and apparently falsified victim statements), prosecutors complain about the quality of the dossier on a regular basis.²⁹ However, any deficiency of police work is not regarded as sinister. As long as these documents appear lawful in format, they will be accepted by the prosecutor, disregarding the potential that the evidence in the dossier may be fabricated. For example, in drug trafficking cases, police are required to weigh the drug immediately after it is seized and record the quantity in front of the suspect. In *CASEA 47*, the prosecutor discovered that the record of the quantity of the drug was absent in the dossier. Apparently the police did not weigh the drug when it was seized. Due to the lapse of time, it was impossible to rectify such a procedural mistake. When I asked the prosecutor about the procedural issue of this case, the prosecutor responded calmly: 'It is ok. I will ask the police to sort it out tomorrow.' Just as the prosecutor had expected, the next day the police sent the record of the quantity of the drug with the suspect's signature and a date matched perfectly within the case investigation. During a subsequent conversation with the police, I learnt that they had made the record only after they were given the instruction by the prosecutor. The tactics that the police employed when producing these documents was

²⁶ Field note APU17.

²⁷ Field note APU19.

²⁸ Field note APU18.

²⁹ Field note APU45.

obviously familiar to prosecutors, and they had no intent to investigate the legality of the process of evidence collection. Authenticity seemed to have never become an issue to the prosecutor. So long as these official documents bore a lawful image, they were deemed as proper evidence with probative value.

[Field note APU-17] A prosecutor found that a form notifying suspects of their rights and duties was not signed by the suspect. The form was obviously from another case and mistakenly put in the dossier.

Prosecutor: I have to ask the police to add another form. This is so ridiculous!

Researcher: But the form needs to be signed as soon as the suspect was arrested. How can the suspect sign it now?

Prosecutor: Don't worry. The police can get it done. Usually they won't bother to ask the suspect to sign it. They would sign it by themselves or ask a clerk to sign. Then they would thumbprint it by themselves. No one would really check.

Thus the appearance of the legality of the investigation is the primary concern for the prosecutor, rather than checking the process of evidence gathering. In this regard, a parallel could be drawn from the French criminal justice, in which the *procureur's* supervision of the *garde à vue* (police custody) is mainly a matter of form in compliance with due process requirements, rather than the substantial content, due to the distance and bureaucracy that the *procurer* is positioned in.³⁰ Yet, compared to the French *procurer*, who is reluctant to look into what is behind the presentation of the police work, Chinese prosecutors are found more proactive in terms of the way they accommodate illicit practices. In fact, they are often observed to engage in the production of false evidence by assisting the police. Evidence obtained in an illegal way would rarely be excluded by the prosecutor, or used as an exculpating factor favourable to the suspect. Whilst prosecutors perceive themselves as case reviewers, it seems that they define their own role in an extremely narrow way, which

³⁰ See Jacqueline Hodgson, *French Criminal Justice: A comparative account of the investigation and prosecution of crime in France* (Hart Publishing 2005)143-177.

is similar to a proof-reader of the investigative dossier, rather than an authority that is capable of expressing strong criticisms of police conduct and guarantee the reliability of the evidence produced. They give instructions and advice to the police. Feedback from the prosecutor is always constructive: the essence of overseeing the police case is to enhance the quality of the prosecution case rather than being critical of the police conduct. Thus when an unlawful issue has been identified by prosecutors, they would assist the police to cover up the illegality of the procedure, helping them recycle and legitimise the tainted evidence.

[APS-3 interview] Researcher: Have you ever excluded any illegal evidence when you review the police dossier?

Prosecutor: So far I have never come across any evidence that has been excluded since I have worked as a prosecutor. I have come across an exclusion of evidence on one occasion, when I worked in the department of authorisation of arrestment [custody]. It was a drug trafficking case. On the list of seizures there was no signature of the suspect. That evidence was not accepted.

Researcher: What happened to that evidence?

Prosecutor: They sent it back to the police and the police made the suspect sign on the list.

Despite the supervisory role to oversee the legality of the police investigation, the actual relationship between the prosecutor and the police is more of mutual co-operation, which is built on the bureaucratic coalition. Prosecutors have generally acquainted themselves with the police who work in the same jurisdiction. Some of these work relationships even develop into friendships.³¹ Thus, on several occasions, when the police failed to observe the requirement of the procedure, they would openly resort to the prosecutor for advice and prosecutors were ready to help. In fact, police and prosecutors are allied to strengthen the persuasiveness of the evidence in the dossier and enhance the possibility of conviction.

³¹ Field note APU18, 34 and 45.

[Field note APU-18] In a theft case, a prosecutor asked a police officer why the date written on the course of the arrest procedure was different from the one recorded in the suspect's statement. The police officer explained that the suspect had been unlawfully detained by the police for three days. Therefore in order to make the interrogation appear consistent, they retrospectively put a date on the statement. However, as this date could not match the content of the case, the police officer asked the prosecutor how to deal with the situation [meaning how to cover up the illegal detention]. In reply, the prosecutor said, 'you may consider the bad traffic. Prepare a written statement to explain this discrepancy. It will be fine'. She [the prosecutor] meant that the police could fabricate an account of traffic delay to conceal the unlawful detention.

To ensure that every single legal document was included in the dossier, prosecutors regularly chased the police for additional materials to complete the prosecution dossier. In many circumstances, police responded to the prosecutor's request efficiently, because they needed the case to be charged to fulfil their task in relation to the police appraisal. According to the police internal evaluation system, however, for those suspects that should be detained, once they were authorised to be kept in custody, the task of the police had been discharged. Therefore, for these cases that the police did not depend on the prosecutor to complete their work, prosecutors found it much more difficult to direct the police.

[BPS-1 interview] Researcher: Do you think the police respond to your instructions promptly?

Prosecutor: When we send an outline of the evidence to the police, the police are obliged to gather further evidence. Due to the appraisal policy, the police are reluctant to respond to our instructions once their tasks have been fulfilled. For those cases in which the suspects are in custody; once the custody department has authorised the custody then the police have finished their task. If we were to ask them to gather further evidence after the suspect had been approved to be remanded in custody, they would be annoyed. Their mentality is such that they think the evidence gathering for the case has been completed and there is enough evidence to prosecute the case. They would not bother gathering further evidence.

[APS-4 interview] Researcher: Do the police follow your instructions?

Prosecutor: This issue is related to our appraisal model. The police, the procuratorate and the court all have the appraisal system. The appraisal is not reasonable. For the police, they have the assessment which will set a goal of how many suspects they have arrested. This is not orientated with the citizen's satisfaction. It purely pursues the goal of how many suspects they have 'fought with'. Then the problem is they are utilitarian motivated. Therefore they want to fulfil their task. (Their task is) for instance, how many people have been approved for custody each year. Once the suspect has been in custody, their task is achieved. So the problem occurs that when a case has come to the point that the suspect is authorised to be remanded in custody, it is very hard for us to ask them to gather further evidence. We have no further effect on them. They feel that they are doing a favour for us. But for those cases when the suspect is not detained and in custody, there is no problem to ask them to gather additional evidence. Therefore, this problem is caused by the Appraisal System.

The police's dependency on the prosecutor is mainly built upon the interest attached to the institutional framework of the internal evaluation. This significantly diminishes the prosecutor's authority over the police. As prosecutors rely on the police to gather supplementary evidence to proceed with the prosecution, they often find their control over the police is insufficient. When their instructions or advice are ignored by the police, prosecutors feel powerless and frustrated. Occasionally, in order to keep the case progressing, some prosecutors have to gather the evidence by themselves.

[Field note APU-23] Prosecutor: I have to gather the evidence by myself. The police are reluctant to get the evidence, as their task is done. For those cases, I sometimes have to get the right evidence on my own.

Prosecutors have at times complained that the police falsified evidence which made the chain of evidence incomplete.³² In some cases, the police responded to the prosecutor in

³² See Field note APU37.

such a perfunctory manner that the ambiguous information could potentially mislead the prosecutorial work.³³ Frequently they are dissatisfied with the evidence and disappointed with the quality of the police case. Lacking in professional legal training, the police are criticised by the prosecutor for not being able to gather the correct evidence efficiently.³⁴

[Field note APU-24] Prosecutor: I was very disappointed with the police. As you have seen, the evidence dossier is quite thick now. Actually when the case was just given to me, the dossier was very thin. I read the dossier and developed lots of doubts. [...] After I have interviewed the victim, I was still lost in the unknown fact that the evidence has presented. In fact, even though the case was over, I still feel both the suspect and the victim did not give me the truth. [...] The messages I gathered have become the decisive evidence in this case. I dropped the case due to these text messages. ...It is really a thorny problem that nowadays the police are not adequately trained.

Despite the dissonance in work, so far as prosecutors are concerned, the police are generally co-operative and, on many occasions, actively respond to the prosecutor's instructions. As part of the Iron Triangle, the police and the prosecutor are closely aligned and collaborate with each other. Although in many cases the police are incapable of providing satisfactory evidence, which seems to have undermined the high conviction task assigned to the procuratorate, it does not militate against the construction of the prosecution case but enables the management of cases through the system in an expedient, cost-effective manner.

2.2 Prosecutorial Interrogation

³³ See Field note APU38. It was a case that the police gave the prosecutor a wrong location which was believed to be beyond the jurisdiction of the procuratorate. According to the Criminal Procedure Law, the suspected crime that takes place outside a particular jurisdiction of the procuratorate should be transferred to the procuratorate in charge.

³⁴ Many police are not law school graduates, although they may have a bachelor's degree on certain subjects. After they have been recruited to the police force, they will be trained for a comparatively short period (a couple of months) of time in relation to the law and investigative tactics.

As part of the prosecutorial work, the prosecutor is required to interrogate the suspect when reviewing the case. It is generally believed that prosecutorial interrogation is part of the essential process to verify the fact and evidence in the dossier, which serves the function of supervising the legality of the police investigation.³⁵ Whilst the practice may vary dependant on the habit of each prosecutor, most prosecutors in site A interrogated the suspect after they had reviewed the case dossier.³⁶

The prosecutorial interrogation takes place either in the detention centre (if the suspect has been placed in custody) or within the work place of the procuratorate (if the suspect has been granted bail or residential surveillance). In both situations, defence lawyers are not allowed to be present during the prosecutorial interrogation.³⁷ The layout of the interrogation rooms, which I had a chance to observe, was typically accusatory, highlighting the debased status of the accused. In site A, the interrogation room in the detention centre was a small room, which was separated into two areas by iron bars. Behind the bars, the suspect would sit on a small plastic chair which was attached to the floor with her hands cuffed. The prosecutors would sit outside the iron bars facing the suspect. In the summer, electric fans were provided in the interrogation room, but they were for prosecutor use only.

Compared to the rooms in the detention centre, the interrogation room in the procuratorate was much more spacious and with a different layout. Without iron bars, the prosecutors' seats and desk were positioned on a raised platform at one end of the room. The prosecutor's seats were raised about 60 cm above the floor, overseeing a small chair on the

³⁵ See Chen Weidong, *Xingshi Susong Fa (Criminal Justice Law)* (China Renmin Press 2004) 294.

³⁶ According to McConville et al (2011)'s study, the interrogation periods varied from prosecutor to prosecutor; whilst some preferred to interrogate the suspect before they read the dossier, others would interrogate within three days after they had received the case. See Mike McConville et al, *Criminal justice in China: An empirical enquiry* (Edward Elgar 2011) 122.

³⁷ CPL 1996 and CPL 2012 are silent as to whether defence lawyers are allowed to be present during pre-trial interrogations. However, in legal practice, their presence has been explicitly rejected by legal institutions on the grounds that there is no legal provision supporting this practice.

floor for the suspect. In the interrogation rooms in site A, apart from the small wooden chair of the suspect, there were also 'tiger chairs' with chains and handcuffs and a lockable wooden bar laying across the arms of the chair to prevent the suspect from standing up. Although this 'tiger chair' was not specifically for the suspects interrogated in this room, it had an effect of intimidation.³⁸ Whenever a suspect was taken to the interrogation room, the image of the chair immediately provoked a reaction. A suspect told me of his fear when he was taken to the room to be interrogated:

[Field note APU-20] Suspect: [...] When I just came into the room and saw the chair (he pointed to the 'tiger' chair next to him), I was trembling with fear....

Researcher: You are scared of it? It is not for you.

Suspect: Yes, but it is so horrible. This is so scary. When I saw it, all my hairs stood up....

Due to the adverse conditions in the detention centre in site A, female prosecutors were usually reluctant to interrogate the suspect detained in the detention centre.³⁹ Persistently complaining about the rising caseloads, interrogating the suspect became the 'dirty work'.⁴⁰ Prosecutors tried to reduce visits to the detention centre as much as possible. Cases were allowed to accumulate and after reaching a certain total, the prosecutor would undertake a batch of interrogations. For a few serious cases or cases in which confessions had been withdrawn, interrogations were conducted in a detailed manner, whereas for the majority of cases the prosecutorial interrogation was often confined to formalities rather than thorough enquiry. Time and efficiency were the paramount concerns of the prosecutorial interrogation. To shorten the interrogation and dispose of the case in the most expedient

³⁸ According to the conversation with the prosecutor, the tiger chair (*laohudeng*), the image of which is often associated with torture, in the interrogation room was for the interrogation of suspects who were suspected of committing the white collar crimes in the office. The procuratorate, rather than the police, is responsible for interrogating the crimes involving public servants in office (the white collar crimes). As said by many prosecutors in site A as well as information on the internet (especially the defence lawyers' comments on the Chinese social network Weibo <[http: www.weibo.cn](http://www.weibo.cn)>, prosecutors also inflicted tortures or other coerced methods on the suspect of those white collar crimes in order to obtain their confession. Due to the scope of this study, this issue will not be investigated in depth in this thesis.

³⁹ Due to the abhorrent condition in the detention centre, some prosecutors, especially female prosecutors, were very reluctant to visit the detention centre. In site A, during my observation period, a prosecutor explicitly refused to interrogate any suspect in the detention centre during her pregnancy. See Field note APU12.

⁴⁰ Field note APU11, 14 and 47.

way, questioning was normally formulated beforehand, encouraging the suspect to confirm the account provided in the investigative dossier.

[Field note APU-7] A prosecutor demonstrated how to interrogate the suspect efficiently:

Prosecutor: Firstly we should copy the facts that the police have got in the dossier. For example for these illegal trading receipts, we should ask what types of receipts the accused has sold. Then confirm whether she knows the number of the receipts and whether she has any disputes against the authenticity of the receipts. Then ask the suspect about the face value of the receipts and their resources. Anyway, you should make sure that all the elements of the crime have been supported by her statement. Another example is the drug cases. You should ask them what is the motivation of drug trafficking. You should exclude the fact that the suspect was working as an agent for the drug dealer. The expert report is very important. Always ask them whether they have any disputes against the expert reports. Also remember to confirm that they have no disputes against the weight of the drugs.

[Field note APU-8] When asked about the interrogation procedure, a prosecutor explained to me how she interrogated a suspect in the drug trafficking cases.

Prosecutor: The questions for the drug trafficking is like this: First, you should ask them about the fact. Ask what's happened and how were they arrested. Then ask them about the expert report and whether they have any disputes. Thirdly, ask them what profit they gained from the business. The profit includes the drugs that they might get for themselves. So it is not limited to the money. Fourth, ask them why they sold the drugs. Also remember to confirm the weight of the drug and ask whether they have any disputes. The interrogation of drug trafficking is a piece of cake.

Prosecutorial interrogation is largely a routine and cases are seen as homogenous with only the names and numbers involved being changed. Hardly any zeal in exploring the unique factors of each individual case was demonstrated. The conclusion of the prosecutorial interrogation was also predefined, as the interrogation questions were formulated in a way that the guilty account can be corroborated usually by the suspect's previous confession.

[Field note APU-18] The head prosecutor was demonstrating to the junior prosecutor how to interrogate.

Prosecutor: You should not ask questions at your will. You should lead questions to what the victim said. If the suspect's confession can reflect what the victim and the witnesses said, the statement of the witnesses will be corroborated. Then we can use it against him (the suspect). All the questions you asked should not be too subjective. They should be based on the evidence in the dossier!

As such, rather than verifying the fact and evidence of the police case objectively, the prosecutorial interrogation was often carried out in a way that it would validate the account given by the investigative dossier. On many occasions, questions were formulated in a less perceptive manner by the prosecutor so that the presumption of guilt would be implied. Thus, instead of asking 'did you conduct the theft?' the suspect was asked 'how did you conduct the theft?'; rather than asking whether the transaction generated any profit, the suspect was asked how much profit had she got from the transaction.⁴¹ Questions were deliberately manipulated to lead the suspect to confess in the same manner as her earlier statements during the police interrogation.

Despite the manipulation of the questions during the prosecutorial interrogation, the official record was always ostensibly neat. As with the police interrogation, the prosecutorial interrogation is also consolidated in the form of a written statement which would be included in the internal case dossier of the procuratorate.⁴² When analysing the internal case dossier, the object of the prosecutorial investigation seemed always fulfilled by simply replicating the contents of the police dossier. What was recorded narratively in the statement did not honestly reflect what actually happened during the prosecutorial interrogation. Whilst the statement of interrogation followed a rigid standardised format,

⁴¹ Field note APU12.

⁴² The internal dossier of the procuratorate will not be transferred to the court. It will be used to assess whether the prosecutor has done her job properly. Therefore, if the statement generated by the prosecutorial interrogation is different from the statement in the investigative dossier, the prosecutor is expected to conduct further investigation.

which started with informing suspects of their rights in the criminal proceedings, in all of the interrogations that I observed, none of the suspects had been told of their rights in the criminal process. The written records of interrogation were routinely pre-typed by the prosecutors prior to the interrogation by copying the suspect's previous statements made in front of the police. When a suspect pleaded guilty, the 'ready-to-sign' interrogation record would be printed out and given to the suspect to sign and thumb-print on each page. This practice substantially shortened the duration of the interrogation. Sometimes an interrogation could be reduced to five minutes, when the suspect quickly agreed to plead guilty. Occasionally when the prosecutor wished to probe details not covered by the police, the account given by the suspect would be drafted vaguely and briefly, rather than transcribed in a verbatim or an authentic way. Very frequently in order to corroborate the suspect's earlier statement, the record of conversation was produced by fabricating or distorting the content of the interrogation. In *CASEA 37*, the prosecutor simply fabricated the suspect's confession when the suspect remained silent.⁴³ In another drug trafficking case, the prosecutor wanted to prosecute a woman as an accessory offender involved in a drug transaction. But the suspect denied the guilty fact by claiming she did not know about drug trafficking.

[Field-note APU-31] Prosecutor: How did Mao give the drug to Tang?

Suspect: I was cooking at the time. Our apartment is very small. The chairs were in the left corner...

Prosecutor: [Stopped her] So you wanted to say that you did not see that.

Suspect: Right.

Prosecutor: [Typed 'I did not see how they were selling the drugs but I know they were doing the transaction.'] Did the police weigh the drugs in front of you?

Suspect: No.

⁴³ Field-note APU-20.

One of the tasks delegated to the prosecutor when reviewing the case is to identify whether there is any neglected offence or offenders.⁴⁴ However, in legal practice, this has been compromised due to the fact that time and efficiency is the paramount concern of the prosecutor. Confronted with a growing workload, prosecutors would find any cost-efficient expedient methods of case disposition whenever possible. Thus, when an inexperienced prosecutor referred the police to investigate a new crime which was confessed by the suspect during the prosecutorial interrogation, his referral was discouraged by the senior prosecutor, who told him that he was creating trouble for himself.

[Field note APU-16] The junior prosecutor reported the fraud case to the head prosecutor.

When the junior prosecutor interrogated the suspect in the detention centre, the suspect confessed a new fraud he committed which was not known by the police.

Head prosecutor: Did you put down what the suspect confessed?

Junior prosecutor: Yes, I did.

Head prosecutor: In this case, if you don't want too much hassle or make things difficult, you should not record what he confessed. As long as the paperwork cannot indicate the extra transactions, you don't need to be involved in the trouble. However, since you have written it down, you have no choice now. Next time, don't bother getting the trouble again.

Similarly, in *CASEA 15* the suspect claimed that the crime she was charged with was a result of her being a victim of illegal gambling, but despite reporting this to the police, they did not investigate. This was simply ignored by the prosecutor who showed no interest in exploring the negligence of the police or the offence that was not investigated. When the suspect tried to offer a full account of the accused offence, she was persistently stopped by the prosecutor who wished to finish the interrogation as quickly as possible. For the

⁴⁴ As mentioned in this chapter, Article 168 of CPL 2012 provides that the procuratorate must ascertain whether there are any crimes that have been omitted or other persons whose criminal responsibility should be investigated.

prosecutor, as long as the case was ostensibly matched with the account provided in the police case, there was no point in exploring further details.

[Field note APU-15]Suspect: I was an accountant before. But when I was employed in X company, I was a financial manager. I was doing both the accountants job as well as working as a cashier. You see, this is flawed, as...

Prosecutor: [Stopped her] Ok, I understand what you mean. [Speaking very loud] Listen to me! The financial system of the company is none of our business. Our job is to prosecute the crimes.

Suspect: Ok. I was managing all the financial issues of the company. Then I was involved in a Lottery account one day and I checked it on the website....

Prosecutor: [Stopped her] Stop! I don't want to hear so many details of what you said. Now let me just read what you said in the police station. The fact is you were involved in this gambling game and you had to use the money of the company to invest in this fraudulent trick. How did you invest the money?

Suspect: I used my salary to buy it initially because I believed what it said. On the website it is said the Public Security Bureau and the Taxing Bureau have given credits to the lottery company. So I really trusted it. However, after I was registered as a member of the website, someone kept calling me for money. They even threatened me that if I did not send them the money, they would stop me from taking the National State Official Exams. All what I said can be found in my mobile recordings.

Prosecutor: [Stopped her] All what you said is nothing to do with this case. They are nothing to do with the case.

Of all the measures designed to combat torture,⁴⁵ prosecutorial interrogation is believed to be one of the most effective ways to identify torture and other illicit methods used to extort

⁴⁵ Other approaches to combat torture include the exclusionary rule, detention centre regulation and police interviewing skills, see Chen Weidong and Taru Spronken, *The three approaches to combating torture in China* (Intersentia Publishing Ltd 2012).

confessions during the police investigation.⁴⁶ According to article 171 of CPL 2012, when the procuratorate believes that the evidence is illegally obtained, the procuratorate may ask the police to give an explanation in relation to the lawfulness of the evidence. Some prosecutors in site A emphatically stated that torture and other illegal methods can be tackled by interviewing the suspect.

[BPS-4 interview] Researcher: How do you review the legality of the evidence?

Prosecutor: For example, I would check whether there were two officers during the interrogation and whether the interrogation took place at a legal time and in a legal place. On the other hand, we would listen to the suspect's defence. For example, if a suspect told us that he was tortured during the investigation; then we would ask him for further information such as the names of the interrogation officers, the time that the interrogation took place and the methods that were employed. Based on the information, we would gather further evidence such as the officers' statements, the suspect's statements after detention and the medical reports before he had been admitted to the detention centre. By reviewing all the evidence above, if we believe there is some illegal evidence, we would exclude such evidence and charge it.

[APS-4 interview] Prosecutor: [...] We have to prove that all the evidence we have received has been legally obtained. The legality of the evidence is the precondition to the admission of the evidence. If the evidence in question is not legal, we have to exclude it. The most important way to review the legality of the evidence is by questioning the suspect. The suspect will tell us how the evidence (the confession) was gathered. After the interrogation, we would communicate with the police. If the evidence (the suspect's confession) is claimed to be illegal, we would gather evidence regarding his (the suspect's) status before he was put into the detention centre.

However, when the issue of torture and the use of other illicit methods were brought up by the suspect, the alleged maltreatment of the suspect was simply ignored. Allegations of

⁴⁶ See Chen Guangzhong et al, *Zhonghua Renmin Gongheguo Xingshi Susongfa Xiaogai Tiaowen Shiyi yu Dianping (Annotations and comments on the Revised articles of the Criminal Procedure Law of the People's Republic of China)* (People's Court Press 2012) 242.

police malpractice contained in the suspect's accounts were not explored and the legality of the investigation was not examined for the purpose of excluding the confession in question. Where a suspect made such assertions, the reaction of the prosecutor was either outright scepticism or she ignored it. Thus in *CASEA 34*, the suspect complained---'I was hung and beaten up by the police '---but this was greeted with indifference by the prosecutor; and a similar explanation by a suspect in *CASEA 37*---'the police asked me to cooperate, otherwise my wife would be in trouble' ---was responded to with an accusation that the suspect was lying. These cases were fraught with such allegations, yet in only one case in which the claim of torture was taken seriously and one of his consecutive confessions was excluded by the prosecutor in site A; for the remainder of cases, no record was made of the suspect's account and no further action was contemplated or initiated by the prosecutor.⁴⁷ In the case that the prosecutor confirmed that the suspect was tortured by the police, only one of the accused's confessions was removed from the dossier. Since the suspect's other confessions (the suspect confessed ten times in total) were intact and the evidence derived from the confession was believed sufficient to prosecute the accused, the so called exclusion of illegally obtained evidence did not make any difference to the outcome of the case.⁴⁸

In fact, including the aforementioned case, none of the prosecutors in site A had any experience of undertaking a prosecution of torture against the police, and rarely had they requested an explanation regarding the lawfulness of the evidence from the police.⁴⁹ Prosecutors were inactive in the face of allegations of improper conduct because they

⁴⁷ It was a case not prosecuted by the prosecutors who I observed directly. However, as I had a chance to speak to prosecutors in other office, I was heard of this case and they let me had a look at the report they drafted (Field Note APU-57).

⁴⁸ In this case, it appeared to me that the investigators were not investigated for their torture even though torture is a criminal offence according to the criminal law 1997. Prosecutor who was responsible for this case was extremely cautious when asked about the details of this case, which made it impossible to investigate more about it (Field Note APU-57).

⁴⁹ During the interview, two prosecutors said that the police were asked to produce the explanation of the lawfulness of the evidence gathering. However, this was obviously rare (Interview BPS-4).

shared a similar working style, believing that until the suspects had been 'taught a lesson', they would not confess truthfully.⁵⁰

[Field-note APU-30]Prosecutor: I found our forensic techniques to be really weak. Ordinary evidence such as fingerprinting is rarely used in the court. We rely too heavily on the statements. When I went to interrogate the suspects, they have said to me 'look! The police beat me up. It is still hurting.' Then I have asked them 'do you have evidence that you were beaten by the police?' They don't have of course. So I have said 'I have no way of helping you. Now confess what you did. 'But some of the suspects are really in need of a good beating. They would not tell the truth until they have learned a lesson.

Here we see that, like the police, fabrication and manipulation were also used in the prosecutorial interrogation. Prosecutors are not willing to investigate and sanction the unlawful conduct of the police by excluding illegal evidence or using other disciplinary measures. On the contrary, the prosecutorial interrogation only aims to seek conviction through expedient means, rather than to verify the case fact and evidence prepared by the police. For the majority of cases, suspects' previous statements in the police questioning, which are obtained by use of oppression and manipulation, have not been examined in any sense, but have been further utilised by the prosecutor to proceed with the prosecution.

2.3 Interviewing the Victim

Part of the regular procedure to ascertain the facts and evidence in the dossier, for certain cases such as assault or rape, prosecutors are required to interview the victim during the course of the case review. In site A, victims were routinely questioned by the prosecutor after the prosecutorial interrogation of the suspect.⁵¹ This is due to the fact that the

⁵⁰ This will be discussed in next chapter.

⁵¹ This practice could only be confined to Site A, where crimes other than assault and rape normally do not require questioning of the victim (Interview APS-2).

ideology of the prosecutorial review is to ensure that the evidence in the dossier can corroborate each other, specifically victims' statements dovetailing with the suspect's confession. Thus once the prosecutor has been satisfied that without any contradiction, the victim's statement and other evidence matches the suspect's confession, the chain of evidence is believed to be formed and the prosecution case is ready to be charged. Since the suspect's statements often play an overarching role in proving the facts in Chinese criminal justice, examining the victim's testimony can shed light on the truth and the reliability of the confession.

In practice, interviewing the victim is only limited to a very small proportion of cases. In site A, only victims in rape and assault cases were interviewed routinely by the prosecutor. Since the victim's consent, as well as the specific circumstances, plays a significant role in ascertaining whether the case in question should be prosecuted as rape or not, interviewing the victim during the prosecution review becomes necessary.⁵² For other cases, the victim might be interviewed if the evidence in the dossier appears highly dubious.⁵³ When asked why only certain types of crime require a victim's statement, with hesitation, a prosecutor answered:

[APS-2 interview] Prosecutor: I have no clue why only those two types of crime. It is our practice. But I am thinking that because the rape case is the so called 'one to one' case--- usually only the rapist and the victim know what happened. Interviewing the victim can make us convinced. We can understand the facts of the case as well. For assault cases, we have to inform the victim of his right to compensation.

For certain types of crime, especially rape cases, the prosecutor would examine the victim's statement carefully and would question the victim in great detail. But for many other cases, pressurised by a heavy workload, prosecutors are reluctant to conduct any extra interviews.

⁵² As with the crime of rape in English law, the crime of rape in China also includes the absence of consent of the victim and this is dependent on the actual circumstances in the given case.

⁵³ Field note APU-39.

They believe that, as the police have recorded the victim's statement and notified her of her rights, it would be pointless to question the victim again.

[APS-1 interview] Researcher: Do you think it is necessary to interview the victims or witnesses?

Prosecutor: The most important part of interviewing the victim is informing them of their legal rights, because the victim of the assault is entitled to compensation. Actually I think if they are given a notice of their rights that should be sufficient. Therefore I don't think it is necessary to interview victims either. I think the court can inform the victim of his rights which should not be our job. Most of the evidence has been gathered by the police, I cannot see any point why we need to do it again.

Based on such opinion, in several instances, prosecutors seemed unsure of the purpose of the interview with the victim and their questions were simply a repetition of those that had been asked by the police.⁵⁴ Although according to the law, the prosecutor should heed the opinions of the victim, a victim's needs or requirements were ignored when the interview indicated further investigation was necessary that subsequently increase the prosecutor's workload.⁵⁵ New fact and evidence that emerged during the interview was often disregarded and unrecorded. The fact given by the victim was restricted to the account provided in the dossier. One illustration shows how the interview was conducted:

[Field-note APU-43] A prosecutor was interviewing the victim, a 9 years' old girl who was sexually assaulted by a man. The girl's mother accompanied her in the interview. After the prosecutor checked their personal information, he asked:

Prosecutor: Did she tell the truth in the police station?

Victim's mother: Yes.

Prosecutor: When was that? On the 9th of June?

⁵⁴ This is also found in McConville et al 2011's study, see Mike McConville et al, *Criminal justice in China: An empirical enquiry* (Edward Elgar 2011) 125.

⁵⁵ See Article 170 of CPL 2012.

Victim's mother: I cannot remember the exact date.

Prosecutor: Then I will copy what you said in the police's interview. [He started to copy the record of the interview in the dossier] What happened then?

The victim's mother told the prosecutor what she had seen on that day. However, the prosecutor did not listen to what she said, but concentrated on copying her previous statement in the police station. Rather than what was recorded in the dossier, which maintained that the suspect only sexually assaulted the victim once, during the interview, the victim's mother mentioned that the man sexually assaulted her daughter twice and also stole 2000 yuan from her. But the prosecutor did not record the new information in the statement.

Prosecutor: Do you have any requests for us?

Victim's mother: We are worried if he is released in the future from the prison, he will hurt my child again. He knows my child and I don't want my child to be hurt.

[The victim was seeking help from the prosecutor. But the prosecutor seemed uninterested in exploring her request]

Prosecutor: So you hope the law punishes him. [Typed 'I hope the law punishes him'] OK, Come and sign it here.

After the interview, I asked the prosecutor about her stolen money and the second sexual assault.

Researcher: She said the guy had done this twice to her daughter and he stole the money. But you did not ask her any more detail?

Prosecutor: There is no evidence in the dossier. So it is useless.

Hence, similar to other work that the prosecutor is responsible for, in many cases, interviewing the victim is also conducted perfunctorily. As long as a written record has been made and the procedural formality has been satisfied, the prosecutor's task would be discharged, disregarding whether the evidence and fact have been verified or not. All the prosecutor's activities are influenced by the assessment in the Appraisal System. To

achieve the unreasonably high rate of conviction assigned by the performance indicators, prosecutors behave similarly to the police, and they are unified in their conviction-orientated values. Although the prosecutor has the power to supervise the police and the legal duty to ensure that the investigation is conducted lawfully, in reality, she is not capable of directing and controlling the police, nor is she willing to examine the police case critically. Once the case is decided to be charged, the case dossier is made ready to send to the court after relevant paperwork is completed by the prosecutor. For the prosecutor, reviewing the police case means checking the ancillary paperwork in the dossier to ensure that all the formalities are fulfilled and the evidence appears consistent. Prosecutors, viewing themselves as an opponent of the accused, and with the existence of bureaucratic trust, might not of course be willing to detect the improper conduct of the police through the processes stipulated in law. Legal rhetoric anticipates that the prosecutor takes all necessary steps to ensure that the investigation is conducted legally and the evidence is gathered lawfully, this is clearly not the case.

Summary

Despite the rhetoric of the law, the role of the prosecutor cannot be perceived as a safeguard of the legality of the criminal process or a guarantee of fair treatment of the suspect. As observed in site A, throughout the activities that the prosecutor undertakes, there is no concern relating to the process of evidence gathering---the fairness and legality of which should ensure the reliability of that evidence. For the prosecutors, their supervisory work is to confirm that the available evidence (mostly inculpatory evidence) is in place and it is documented in compliance with legal regulations. As far as the prosecutors are concerned, there has seldom been an issue with the lawfulness of the procedure and the reliability of the evidence. Their tasks are discharged, provided that the

format of the written evidence appears ostensibly legal, no matter if the evidence is collected in a lawful way or not.

Under the current Chinese criminal justice system, prosecutors are closely assessed by the Appraisal System. The internal performance indicators that have been employed to gauge the activities of the prosecutor are the conviction rates, the amount of cases they have processed and other bureaucratic targets that the political system desires. These standards have little concern with the legality of the evidence gathering or the reliability of the evidence, but rather pursuing a result that offenders are efficiently processed and punished, whilst creating a façade that the law is observed. Since the success of the prosecutor's career is defined by their prosecution records, the prosecutor's role has been shaped to meet such demands.

However, as a matter of fact, prosecutors are in a unique position to identify the errors within the criminal process: they communicate with the police frequently and they are obliged to question the suspect during the prosecutorial interrogation. In spite of the acquired knowledge, which frequently indicates that the evidence in question has been gathered in an illicit manner, the vast majority of prosecutors choose to legitimise the process either with acquiescence or actively contrive to fabricate the evidence. Being a part of the Iron Triangle coalition, prosecutors are very much aligned with the police, who share a common interest under the Appraisal System in securing the conviction of the accused. Constrained by the Appraisal System and the bureaucratic alliance, there is little ability for the prosecutor to be a neutral supervisor. Whilst it is possible that prosecutors in other areas of China may behave differently, in the case of the prosecutors I had an opportunity to observe, upholding the rule of law is generally accepted as being unrealistic and impractical, and it could be detrimental to their career, given the immediate target imposed upon the prosecutor and their relationship with the police.

Chapter 5 Pre-trial Decisions Concerning Prosecution

In this chapter, I will examine the prosecutor's role as a decision-maker, rather than just a supervisor of the investigation. Prosecutors bear the ultimate responsibility for the decision to prosecute; weak police cases or cases constructed by falsified evidence could be screened out of the criminal process if this prosecutorial power is exercised properly. By considering whether the prosecutorial discretion works effectively to weed out weak cases, this chapter will examine the operation of the power of not to prosecute in day-to-day practice, taking account of how prosecutors handle the major external influences. Following this line of enquiry, I will investigate what prosecutors do to ensure conviction, when weak cases fail to be weeded out of the system. This involves the acquisition of guilty pleas during the prosecutorial interrogation, a process that facilitates efficient disposition of large volumes of cases. The difficulties that the defence lawyer has to confront at this stage will also be explored, as the prosecution review period is also crucial to defence lawyers, who are expected to access the prosecution evidence or gather further evidence to construct the defence case.

1. The discretionary power not to prosecute

The power of prosecution has serious implications for the parties involved, particularly the defendant and the victim.¹ In terms of prosecutorial discretion, the Chinese prosecution is more similar to the legality approach common to many European countries, albeit certain Chinese scholars argue that the Chinese criminal procedure law is a reconciliation of the

¹ See Frank Belloni and Jacqueline Hodgson, *Criminal Injustice: an evaluation of the criminal justice process in Britain* (Macmillan Press 1999) 104.

principle of legality and the principle of opportunity.² In contrast to the 'opportunity' system in common law jurisdictions where prosecutors usually enjoy unfettered discretion, prosecutors in China cannot dispose of a case based upon general principles such as the public interest. This is due to the fact that potential corruption during the application of the prosecutorial discretion has always been a concern for the legislature. As a result, legal provisions have been made to constrain the suspension of prosecution in avoidance of private negotiations (including corruption) between the prosecutor and the accused. As such, the prosecutor must act rigidly in accordance with certain legal provisions, when determining whether or not to prosecute the suspect; meanwhile, she is granted limited discretion under certain legal circumstances, allowing her to take into account factors of individual cases relevant to making the decision.

The CPL 2012 sets out three gateways through which the decision not to prosecute can be made. The first gateway is non-prosecution absolute (*juedui buqisu*), which includes circumstances such as no crime cases, cases involving a statutory time-bar on the institution of proceedings, deceased or exempted suspect(s), and withdrawn claims from the complainant for a specified type of case.³ If a case falls into one of these categories of non-prosecution absolute, the prosecutor must make a decision not to charge the accused.

The prosecutor can also withdraw a case on the grounds of evidentiary considerations: the second gateway.⁴ Pursuant to article 141 of CPL 2012, the prosecutor can place a charge on the suspect, if she is satisfied that the fact is clear and the evidence is reliable and sufficient. Thus, if the prosecutor is not satisfied with the adequacy of the evidence, she can make a decision not to prosecute. The prosecutor has the power to direct the police to conduct supplementary investigations to gather further evidence. According to article 171

² Wang Jiancheng, 'Lun qisu fading zhuyi he qisu pianyi zhuyi de tiaohu (The reconciliation between the principle of legality and the principle of opportunity)' (2000) 2 *Beijing daxue xuebao* (Peking University review) 90.

³ See Article 15 of CPL 2012.

⁴ In legal theory, this is called non-prosecution because of doubts. See Chen Weidong, *Xingshi Susong Fa* (Criminal Procedure Law) (China Renmin University Press 2004) 302.

of CPL 2012, such an investigation must be carried out within one month from the instruction of the prosecutor and cannot be conducted more than twice. If, after exhausting the means of supplementary investigation, the prosecutor is still unconvinced with the sufficiency of the evidence and believes the case does not meet the conditions for initiation of a prosecution, the prosecutor should decide not to prosecute.

The third gateway to withdraw the case is pursuant to article 173 of CPL 2012, which provides that, 'with respect to a case that is minor and the offender needs not be given criminal punishment or needs to be exempted from it according to the Criminal Law, the procuratorate may decide not to initiate a prosecution'. Whilst prosecutors are required to withdraw the case immediately in relation to the other two gateways, with this final gateway they have the liberty to either proceed with prosecution or drop the case. For this reason, article 173 has been labelled as 'the discretionary decision not to prosecute'.⁵

In law, the prosecutor's decision not to prosecute seems inextricably linked to the prosecution review phase prior to the trial. In fact, the prosecutor is allowed to withdraw the case from the trial even after the case has been prosecuted.⁶ In legal practice, withdrawing the prosecution from the court has been used regularly to avoid the court acquittal. In China, acquittal is not just seen as the court's decision based upon evidentiary or legal considerations; it is an utter negation of the work of the police and the prosecutor, which causes severe fractures within the Iron Triangle coalition. Hence, even though the court is entitled to deliver an acquittal, under most circumstances, it will shift the decision to the procuratorate and suggest the prosecutor withdraw the case when the court wishes to exercise such power. The potential crisis is thus resolved quietly and the harmonious relationship within the bureaucratic institutions can be retained.

⁵ In the Chinese legal theory, this is also called non-prosecution based on discretion respectively, Ibid.

⁶ See Article 242 of the Supreme People's Court on the explanation on the application of the Criminal Procedure Law 2012.

[CDL-1 interview] Judge: An acquittal is impossible within the current context. [...] If the court acquits a case, it means the President of the court and the trial judges have given a negative view on the other professional's work. Therefore, even if we believe that a defendant is innocent, we cannot acquit the case. Normally we will ask the prosecutor to withdraw the case to save face.

Against this background, the prosecutor's decision to withdraw the case becomes the main channel to dispose of cases in which suspects are believed to be innocent. According to the statistics of the procuratorates in Guangzhou, the acquittal rate between January 2000 and November 2002 was 0.09 per cent whilst the rate of the post-charge withdrawal was 1.08 per cent.⁷ Similarly, in Zhejiang province, between November 2003 and November 2006, the acquittal rate of the courts in Taizhou city was 0.16 per cent whilst the rate of the post-charge withdrawal was 0.46 per cent.⁸ The majority of cases in which the suspects were believed as not guilty would be routinely withdrawn by the prosecutor rather than being acquitted by the court. To a certain extent, the judicial power of acquittal has been exercised through the prosecutor's power to withdraw the case.

Due to the internal appraisal system, the acquittal rate in China has been less than one per cent over the course of the last decade. This creates an impression that the prosecution process functions remarkably as an effective screening mechanism to weed out weak cases. In fact, the proportion of cases that are disposed of at the prosecution reviewing stage is very low. McConville et al (2011) found that since the performance evaluation system sets the non-prosecution at a low level, China's non-prosecution rate had been kept at around 3

⁷ In Guangzhou city, between January 2000 and November 2002, out of 27800 cases prosecuted by different levels of Guangzhou procuratorate, 302 cases were withdrawn before the trial whilst only 24 cases were acquitted by the court. See Liu Shaoying et al, Guanyu Chesu Anjian he Wuzuipanjue Anjian de Diaocha Baogao (The research report on withdrawing cases and acquittal cases) (2004) 5 *Zhongguo Xingshifa Zazhi* (The Chinese criminal magazine), 107.

⁸ In Taizhou city, Zhejiang province, from November 2003 to November 2006, out of 18585 cases (28658 defendants), only 3 cases (including 2 of them are so-called historical cases) were acquitted by the court whilst 48 cases (134 defendants) were withdrawn by the prosecutor before the trial. See Huang Qiusheng, 'Taizhoushi Jianchajiguan Anjian zhiliang Diaocha (The research on the quality of the cases prosecuted by Taizhou procuratorate)' (2007) 5 *Zhejiang Procuratorate* 87.

per cent between 1998 and 2004.⁹ Whilst the standard set by the Appraisal System regarding the non-prosecution rate had not been a major concern for the prosecutor in site A, the ratio of cases withdrawn maintained similar minimal figures. For instance, in 2012 the non-prosecution rate in the local procuratorate in site A was only 3.9 per cent.¹⁰

Despite the fact that it can be regarded as a failure to sift out weak cases to improve the efficiency of the trial, the prosecution review can be interpreted as a deliberate mechanism that fits into the Party-state's scheme of social control. As noted by Eva Pils (2013), the development of the current criminal justice in China is somewhere between a 'state of norms' and a 'state of measures'.¹¹ Coercive methods have been utilised to control those believed to be the 'factors of instability' of the regime in order to maintain its political leadership. Yet, to some extent, it reflects, promotes or tolerates certain principles of legality and rule of law.¹² Thus, the threat of prosecution and other criminal proceedings primarily acts as a deterrent and retribution for the purpose of social control, despite embodying some degree of proceduralism. The accused, once being involved in the Chinese criminal justice system, rarely can be filtered out of the system automatically or by the use of lawful means available to her. In this regard, although the CPL 2012 explicitly places a duty on prosecutors to gather both inculpatory and exculpatory evidence

⁹ See Mike McConville et al, *Criminal justice in China: An empirical enquiry* (Edward Elgar 2011) 142.

¹⁰ Due to the way that the procuratorate treated the data, I only obtained the non-prosecution rate in 2012 (by an indirect way, the withdrawn ratio of criminal cases in recent years was believed to be around the same figure), although I was able to access the prosecution rate from 2009 to 2012. In the procuratorate in site A, in 2009 the number of cases registered by the procuratorate is 1893 (involving 2489 suspects) and 1547 cases were prosecuted (involving 1842 defendants); in 2010, the number of cases registered by the procuratorate is 1590 (involving 1900 suspects), and 1305 cases were prosecuted (involving 1644 defendants); in 2011, the number of cases registered by the procuratorate is 2406 (involving 2693 suspects), and 1837 cases were prosecuted (involving 2066 defendants); in 2012, the number of cases registered by the procuratorate is 2298 (involving 2484 suspects), and 2103 cases were prosecuted (involving 2264 defendants). It should be noted that the number of withdrawn cases is not equal to the number that has not been prosecuted in the same year, for a number of reasons. For example, a number of criminal cases registered in the year of 2011 were prosecuted in 2012.

¹¹ Eva Pils, "Disappearing" China's human rights lawyers', in M. McConville and E. Pils (eds.), *Comparative Perspectives on Criminal Justice in China* (Edward Elgar Publishing Limited, 2013) 412.

¹² Fu Hualing and Richard Cullen, 'Climbing the Weiquan ladder: a radicalising process for rights-protection lawyers' (2011) 205 *The China quarterly*, 40, 40.

by following the legal procedures, they are *de facto* under no responsibility to pursue exculpatory lines of inquiry.¹³

Prosecuting the accused is regarded by prosecutors as a routine aspect of their work, rather than a real power. The legal procedure to prosecute the suspect is very simple, whilst withdrawing the case is much more complicated. Virtually all decisions to prosecute can be made independently by prosecutors, as the power to prosecute is largely vested directly into the hands of each individual prosecutor, regardless of their work experience. There is very little scrutiny within the procuratorate relating to the prosecution of the suspect. On the contrary, the decision not to prosecute the accused is determined by the chief prosecutor at the apex of the hierarchy, through a series of bureaucratic procedures. The withdrawal of the charge involves layered bureaucratic procedure: a prosecutor would need to prepare a case report and submit it to the Prosecutors' Committee for discussion; if the case is approved to be withdrawn by the committee, the prosecutor then has to seek the permission from the Chief Prosecutor before the decision not to bring the case forward for prosecution can be validated.¹⁴ In either phase if the suggestion of withdrawal is disapproved, the case will proceed with prosecution. For prosecutors dealing with increasing caseload, time and efficiency become paramount. Prosecutors would deliberately avoid making the decision to withdraw a case on the basis of the prosecutorial discretion.

[APS-4 interview] Prosecutor: For non-prosecution based on discretion, we will consider some. I won't say 'not at all'. But it is just a small proportion. This is decided by the procedure. We are very busy and we have the right to choose the procedure. We have the choice of deciding whether to prosecute a case or not. [...] In fact there are many cases that we don't really need to prosecute. But withdrawing a case is very complex.

¹³ Article 50 of CPL 2012.

¹⁴ The Prosecutors' Committee is comprised of the Chief Prosecutor, vice Chief Prosecutors and other leaders of the procuratorate.

Hence, only in a small proportion of cases is it decided not to proceed to trial. Aside from worries about expediency due to bureaucratic procedures, prosecutors are also subject to external influences which could lead to controversial decisions on whether a case should be taken to trial or not.

1.1 Undue Influences and the Decision not to Prosecute

Drawing upon my observation in the local procuratorate in site A, this section examines the two major external forces that are frequently seen to influence the prosecutor's decision-making. By scrutinising how these factors shape the charging process of the prosecution, the functioning of the procuratorate within the Chinese political-legal context and ideology that underpins the operating of the legal institution, can be better understood.

1.1.1 Prosecutorial Discretion, Vertical Instructions and Their Relationship to the Social Classes

The fact that in China the power to authorise the withdrawal of a charge is enshrined at the apex of the hierarchical pyramid of the procuratorate demonstrates a certain degree of distrust of its legal officials. This arrangement of power revolves around an entrenched assumption of guilt, the instrumental function of the criminal process and the prosecutor's role as an accusing party. With a legal culture strongly emphasizing the punishment of the offender, there seems to be a perceived public desire for retribution of the accused in China.¹⁵ In accordance with such public opinion, many prosecutors affirmed that their major concern was to combat crime.¹⁶ Whilst prosecutors have a duty to review the cases objectively by law, the emphasis on fighting crime usually outweighs other considerations.

¹⁵ Cai Huifang, *Xingshi sifa ji sixing shiyong: ruogan yinan wenti shili poxi (Criminal justice and the application of the death penalty: analysis of complex cases)* (China law press 2009) 45.

¹⁶ Interview APS-2, Field note APU-3 and Field note APU-5.

The prosecution of the accused was always prioritized unless there was strong evidence suggesting the contrary. Therefore, if a decision was made in favour of the suspect, certain questions could be asked of the prosecutor, which, in turn, could influence the prosecutor's discretion.

[APS-4 interview] Prosecutor: What is very strange in China is if you decided to drop a case and you report it, people will think you have gained some benefit from the suspect. Frankly speaking, we don't want to get ourselves involved into trouble. We just choose a convenient way to do it, so I rarely withdraw the cases.

This concentration of the power not to prosecute fails to be a disincentive to abuse the prosecutorial discretion. In day-to-day practice, the vast majority of cases that were withdrawn based upon inappropriate considerations were initiated at the top of the echelon. External influences regularly interfered with prosecutors' actions via higher ranked officials within the procuratorate. It sometimes became imperative for the leader of the procuratorate to entertain the needs of various stakeholders and to coordinate necessary relationships within the polity. This inevitably paves the way for external intervention. The most common form of interference was the department leaders of the procuratorate giving instructions to the responsible prosecutor through telephone calls, or occasionally, a private meeting. As directions were given by the officials at the top of the hierarchy, prosecutors had no choice but to follow them accordingly. On those occasions, the prosecutorial decision not to prosecute was usually based upon an account that fits into one of those gateways leading to the withdrawal of cases. Usually, prosecutors were also required to report the progress and the handling of the case to the leaders of the procuratorate on a regular basis.

In spite of the pressure from the leaders, prosecutors were reluctant to cede their authority to others. Although they had no power to challenge the instruction from the leaders, they were not passive in the face of interference. 'Speedy prosecution' was one of the strategies

adopted by prosecutors in site A to avoid the potential of external intervention. Since the prosecutor's decision on prosecution did not require permission from officers at a higher level, if prosecutors had the knowledge that special instructions would be likely in a given case, they would accelerate the progress of prosecution review, so that the suspect could be charged within a very short period of time. When the belated instruction arrived, the case would have already been transferred to the court, beyond the capacity for interference from the Chief Prosecutor. Such tactics to address external influence were acquiesced in by the Chief Prosecutor or the department leaders of the procuratorate, as they were the very officials taking responsibility for the decision-making. As a prosecutor in site A noted, 'none of the leaders, especially the Chief Prosecutor, wish to be involved with this dirty interference or take a risk of their careers'.¹⁷ Prosecutors were willing to make a decision on their own, rather than being directed by intervening forces.

The suspects who were involved in those problematic cases might not necessarily be important officials. On the contrary, suspects who were officers with prominent jobs could rarely be exonerated by the procuratorate, as those cases normally attracted public attention. Quite often, most of the exculpated suspects involved were related to or had social connection to those in power. In site A, several cases that were directed to be withdrawn were due to the fact the suspects were relatives of various highly ranked government officials.¹⁸ Such unlawful exculpation had incurred disapproval from the prosecutor. One of the prosecutors commented:

[Field note APU-44] Prosecutor: The reason why China is not ruled by law is due to the fact that the law is only an option. It (the criminal law) is not applied to those privileged persons who have more resources and a social network. It only applies to those who are deprived.

Indeed, of the cases monitored in this research (total number = 63), 92 per cent of the

¹⁷ Field note APU-36.

¹⁸ Field note APU-24.

suspects who were prosecuted and convicted were peasants or those that could be categorised as low-income working class. Suspects from the upper/middle class, protected by the network of bureaucracy, would be more likely to be sieved out of the criminal justice system at an earlier stage, whereas those without such social resources would undergo the full force of criminal proceedings. All the prosecutors whom I interviewed admitted that they had to deal with undue influences repeatedly during the course of their work. They reported that the vast majority of suspects whom it was decided not to charge were from better-off families.

The prosecutor's discretion would be less likely to favour the suspects with no shield from a bureaucratic background, especially those who have been remanded in custody. According to the State Compensation Law 2010, the suspect who had been held in custody is entitled to State compensation if her case has been decided not to prosecute by the procuratorate.¹⁹ To avoid State compensation, the decision not to charge would usually not be considered for those cases in which the suspect has been held in custody. In *CASEA 23*, the suspect in custody was a porter who struggled to earn enough money to live. Out of frustration, being drunk one night, he damaged certain trivial public facilities in the street. Despite the fact that the prosecutor was sympathetic with the suspect and believed that the case could be safely dropped due to the minor nature of the offence, the suspect was eventually charged, taking into account the amount of time he had spent on remand. The prosecutor explained:

[Field note APU-22] Prosecutor: There is no chance to exculpate him [the suspect of this minor offence]. All the suspects who have been remanded in custody must be convicted. Otherwise, we have to admit that we made a mistake and State compensation will be likely to be triggered.

¹⁹ See article 17 of the State Compensation Law 2010, which provides that the citizen who had been detained, is entitled to be compensated by the state if his case was decided to be withdrawn, not to prosecute and to acquit in the criminal proceedings.

Apart from the consideration of the potential accountability that the prosecutor had to assume, prosecutors also felt that the criminal justice system should not make allowances for personal circumstances. Acting as upholders of the law, prosecutors tended to implement an ethical faith that the committing of a crime should never be a choice, regardless of the difficulties that people were facing. In many situations, such a belief could be regarded as valid and justified. For example, when a suspect claimed that the reason he had committed the crime was due to the fact that he was under pressure, the prosecutor argued that 'there are many people suffering from various kinds of pressure, but they don't steal a laptop from a shop'.²⁰ In other situations, however, similar statements became more controversial, as the difficulty that the accused was facing was one of those well recognised social problems in China and the suspect who came from a disadvantaged background had little choice but to confront it on her own. Sometimes suspects who were charged with credit card fraud owed debt to the hospital as a result of their or their family members' medical treatment and ended up being prosecuted for their jeopardised financial situation.²¹ Having repeatedly seen similar cases, prosecutors rarely showed any empathy towards those who were financially deprived: 'they should not overdraw the credit card in the first place, knowing that they cannot afford to pay back the money. This is a crime. Why should I be sympathetic?'²²

The prosecutor's discretion not to proceed with prosecution was not applied equally to all suspects. The concentration of power failed to be the right solution to prevent its potential abuse. In a culture where personal relationships are highly valued and trump the legal system, rent-seeking of power (*quanli xunzu*) is inevitable in its prosecution process as

²⁰ Field note APU-25(CASEA 14).

²¹ See for example, Field note APU-23 (CASEA 21) and Field note APU-30 (CASEA 48). It should be noted that in China, for the majority of people, medical expenses are paid privately by the patients. Thus many people struggle to pay any large sum of medical expenditure if they or their family suffer from certain serious diseases.

²² APU-30 (CASEA 48).

well as other sectors of society.²³ With a dramatically widening social stratification,²⁴ those socially and financially deprived groups become the bulk of the population regulated by the criminal law as a means to maintain the stability of the Party-state.²⁵ At the other end of the scale, the elites in possession of the social and financial capital have all sorts of resources to negotiate their journey (including corruption) within the justice system.²⁶ Just as McConville (2013) summarised, the task of the State is 'simply to control the majority of its population which is economically disadvantaged, socially and politically disempowered and without legitimate avenues to rectify injustices.'²⁷

1.1.2 The Coordination of the Political-legal Committee

The procuratorate also has to deal with so called 'appropriate' political influences, when making a decision whether or not to prosecute a suspect. In the Chinese criminal justice system, one of the key concerns over the prosecutorial independence is the relationship between the prosecutor and the political institutions, specifically the Political-Legal committee. Being an institution of the people's democratic dictatorship, the procuratorate must follow the leadership of the Communist Party. In the 1950s, the Political-Legal Committee was set up to give detailed instructions to the legal institutions on specific cases, ensuring that the criminal justice system operated in line with the Party's policies. There had been certain inconsistencies of Party policies regarding the role that the Political-Legal Committee played during the 1980s, and as a result the function of the

²³ Rent-seeking of power is an economic term of corruption, which has popularly been used in the Chinese social context. It means that people in possession of public power use the power to gain personal interests. Mike McConville, *Criminal justice in China and the West*, in Mike ConConville and Eva Pils, eds, *Comparative Perspectives on Criminal Justice in China* ((Edward Elgar Publishing Limited, 2013) 66.

²⁴ In the past few years, China's Gini-coefficients are 0.491 (2008), 0.490 (2009), 0.481 (2010), 0.477 (2011), 0.474 (2012) respectively (data coming from the official statistical department of China).

<http://economy.caijing.com.cn/2013-01-18/112444588.html> . The international warning level of the divide between the rich and the poor is 0.40. In China, the wealthiest 10 per cent of Chinese families earned 55 times more than the least fortunate 10 per cent. The average wage in the best-paid industry was almost 16 times that of the poorest paid, *ibid* 65.

²⁵ See *ibid* 69.

²⁶ See *ibid* 65.

²⁷ *Ibid*.

committee was finally defined as 'the advisor (*canmou*) and assistant (*zhushou*) of the Party' in the purpose of coordinating the working relationship of the legal institutions in 1990.²⁸

The Political-Legal Committee is a very powerful institution, which can intervene in any case that it is interested in and at any stage of the criminal proceedings. Its intervention in the criminal justice system is evident in a number of major or influential cases, in which dissenting views from the legal institutions would be ignored for the purpose of 'heeding the overall situation', a term that is frequently used to refer to crime control and maintaining the stability of the regime.²⁹ According to the legal actors of the procuratorate and the court, as soon as the Political-Legal Committee has been involved in processing a given case, the progress of the case (including prosecution and adjudication) must be reported back to the committee and approved by it before any action is authorised. Once the solution of a given case is formulated by the committee, the procuratorate and the court are *de facto* suspended of the power to make substantial decisions with regard to the outcome. In the name of 'strengthening the leadership of the Party', the Political-Legal Committee is in fact the direct leader of the criminal justice institutions, as a senior judge in China indicated.³⁰

The intervention of the Political-Legal Committee in prosecution is often triggered by a variety of factors. Frequently it is stimulated by the victims or their family who are dissatisfied with the prosecutor's decision on non-prosecution.³¹ Having no prior knowledge of the given criminal case, the Political-Legal Committee often relies upon the victim's singular account to give specific instructions to the procuratorate, without

²⁸ He Weifang, 'Bei xietiao de zhengyi: Xiangjie zhengfawei shuji jianren gonganjuzhang (The coordinated justice: the head of the Public Security Bureau as the leader of the Political-legal committee)' [2010] *Zhongguo xinwen zhoukan (China News journal)* < <http://www.sina.com.cn> > accessed 25/03/2010

²⁹ Zeng Jun and Shi Liangliang, 'Difang zhengfawei xietiao chuli xingshi anjian de kaocha he fenxi (The examination and analysis of the local political-legal committee coordinating criminal cases)' (2012) 2 *Xinan zhengfa daxue xuebao (The southwest University of political science and law review)* 65.

³⁰ Interview ATJ-1. Similar comment is also seen in He Weifang's report, *ibid*.

³¹ This paper will discuss the influence of the victim on the prosecutorial discretion in the next section. The intervention of the political-legal committee and the victim are categorised as different types of influences on the prosecutorial decision-making in this article. However, they are intertwined in many cases.

considering all the evidence in the case. CASEA 22 in site A was a minor assault case involving two neighbouring families. The Political-Legal Committee intervened in this case, based upon an account provided by the victim, and they categorised it as 'complex and influential'. Believing that this case should only be regarded as a civil dispute rather than a criminal offence, the prosecutor in site A decided not to prosecute this case. However, this initial decision was not accepted by the members of the political-legal committee, who insisted on proceeding with prosecution by sending further demands. Although the responsible prosecutor's view was endorsed by the leaders of the procuratorate, it was simply impossible to ignore the instructions from the committee. After assessing the possible consequences, the procuratorate decided to compromise the effect of the interference of the Political-Legal Committee by stalling the implementation of its directions. Frustrated by the influence of the political-legal committee, the prosecutor made a comment about their interference:

[Interview APS-6] Prosecutor: The Political-Legal Committee is part of the Party's bureau.

We [prosecutors in site A] often call it 'the illegal institution'. Indeed, its organisation is not based on law but the political missions. Its intervention is a political interference.

Unfortunately, such political interference is regarded as appropriate in China.

A similar situation occurred in another case reported in Fuquan city, Guizhou province. Due to the interference of the Political-legal Committee, a case proposed to be withdrawn by the procuratorate was implicated in 'very erratic proceedings' after the Political-Legal Committee in Fuquan intervened.³² Based upon the instruction of the political-legal committee, the accused in this case was forced to be prosecuted and convicted in the first instance trial. In the appellate court, the ruling of this case was overturned and the court suggested the case to be withdrawn.³³ However, the appellant court's decision was rejected

³² He Weifang, 'Bei xietiao de zhengyi: Xiangjie zhengfawei shuji jianren gonganjuzhang (The coordinated justice: the head of the Public Security Bureau as the leader of the Political-legal committee)' [2010] *Zhongguo xinwen zhoukan (China News journal)* < <http://www.sina.com.cn> > accessed 25/03/2010.

³³ In the Chinese legal practice, withdrawing the prosecution from the court has been used regularly to avoid the court acquittal. In China, acquittal is not just seen as the court's decision based upon evidentiary or legal

by the Political-legal Committee, who believed that 'both the legal effect and social influence will be discounted substantially provided the defendant is acquitted'.³⁴ Due to the perseverance of the Political-Legal Committee, the appellate court was pressured into changing its decision and convicting the defendant, who was sentenced to ten years' imprisonment.

Having a political status, the legal standing of the Political-Legal Committee is questioned and criticised by legal professionals in China. Unlike the criminal justice institutions, the Political-Legal Committee in China does not take any responsibility for the instructions that it issues nor of the decisions that it is involved with. If the outcome of the case is proved to be wrong, it would be the relevant procuratorate or court that takes the consequences. Thus the influence of the Political-Legal Committee in processing the cases raises great concern on occasions in which its direct involvement was in connection with miscarriages of justice.³⁵ In these notorious cases (such as the She Xianglin and Zhao Zuohai cases) in which the defendants were wrongfully convicted, the Political-legal Committee's inappropriate direction to the procuratorate and the court was believed to be one of the main contributing factors for the unjust outcome.³⁶ This has been linked to the fact that the leader of the Political-Legal Committee is also the head of the PSB in the majority of instances. Having such a dual role for one legal actor, it is understandable that the key interest of the leader of the Political-Legal Committee would be to consolidate the 'achievement' of the police investigation rather than to exculpate the accused person. There

considerations; it is an utter negation of the work of the police and the prosecutor, which causes fractures within the Iron Triangle coalition. As such, even though the court has the power of acquittal, under most circumstances, it will shift the power to the procuratorate and suggest to the prosecutor that she withdraw the case when the court wishes to exercise such power.

³⁴ Li Enshen, 'The Li Zhuang case: Examining the challenges facing criminal defence lawyer in China' (2010) 24:1 *Columbia Journal of Asian Law*, 129, 163.

³⁵ Eminent miscarriages of justice in China, such as, the She Xianglin case and Zhao Zuohai case are intervened by the local political-legal committees. See Chen Guangzhong, 'Bijiaofa Shiye xia de Zhongguo Tese Sifa Duli Yuanze' (The independence of the judiciary in Chinese character in a comparative review') (2013) 27:2 *Bijiaofa yanjiu (the journal of comparative study)* 1, 3.

³⁶ Zeng Jun and Shi Liangliang, 'Difang zhengfawei xitiao chuli xingshi anjian de kaocha he fenxi (The examination and analysis of the local political-legal committee coordinating criminal cases)' (2012) 2 *Xinan zhengfa daxue xuebao (The southwest University of political science and law review)*, 65.

is a tendency of the Political-Legal Committee to prosecute suspects rather than withdraw a case.

If the head of the police is also the leader of the political-legal committee, it follows that the police have been actually accorded an overriding authority above the procuratorate, which by law has the supervisory power over the police. 'This is a very illogical system,' as a member of congress stated when commenting on the misplaced supervisory relationship between the procuratorate and the police.³⁷ Realising this irregular role that the Political-Legal Committee plays in the criminal justice system in China, certain scholars suggest that the local Political-legal Committee should be dismissed or reformed.³⁸ For example, Chen Guangzhong suggested that the local political-legal committee should be repealed completely; meanwhile, the functioning of the Political-Legal Committee at the province level should be retreated to the limit that it does not affect the result of the cases in which the only purpose is to promote the rule of law and the benefit of the State.³⁹ To some extent this has been reflected in the fact that the number of police leaders, who were also the leader of the Political-Legal Committee at the province level, has been halved since 2010.⁴⁰ Legal scholars are not optimistic about this change, as the appointment of the leader of the Political-Legal Committee is subject to policies of the Party, which is difficult to predict, and therefore it is very hard to tell whether this has become a tendency or not.⁴¹

Despite the scholarly criticism and proposals advanced, in day-to-day practice, many prosecutors still believe that it is 'meaningful' to keep the Political-Legal Committee in the

³⁷ He Weifang, 'Bei xietiao de zhengyi: Xiangjie zhengfawei shuji jianren gonganjuzhang (The coordinated justice: the head of the Public Security Bureau as the leader of the Political-legal committee)' [2010] *zhongguo xinwen zhouban* (China News journal) < <http://www.sina.com.cn> > accessed 25/03/2010.

³⁸ For example, Chen Weidong, *Xingshi Susong Fa (Criminal Procedure Law)* (China Renmin University Press 2004) 4.

³⁹ Ibid.

⁴⁰ He Weifang, 'Bei xietiao de zhengyi: Xiangjie zhengfawei shuji jianren gonganjuzhang (The coordinated justice: the head of the Public Security Bureau as the leader of the Political-legal committee)' [2010] *zhongguo xinwen zhouban* (China News journal) < <http://www.sina.com.cn> > accessed 25/03/2010.

⁴¹ Chen Guangzhong, 'Bijiaofa Shiye xia de Zhongguo Tese Sifa Duli Yuanze' (The independence of the judiciary in Chinese character in a comparative review') (2013) 27:2 *Bijiaofa yanjiu (the journal of comparative study)*, 1, 4.

way that it operates, given the complex relationships that the procuratorate has to deal with when exercising prosecutorial discretion.⁴²

[Interview FTJ-1] Prosecutor: Why is there a political-legal committee? That's because some cases are not so easy to deal with. Sometimes it is because the procuratorate or the court does not have such power to handle these cases and we need the Political-Legal Committee to coordinate the complex relationships. [...]The instructions given by the committee may be worked as a protection for us, as long as it does not violate the law.

In the authoritarian setting of China where there is a lack of standard of due process in its criminal justice system,⁴³ the legal institutions function primarily as self-interested entities, whose action is focused on the maximising of its own benefit within the current social-political framework.⁴⁴ As a coordinator, the Political-Legal Committee plays a role to redistribute the interests of the institutional groups on disputed occasions by enforcing a consensus view on behalf of the Party. Whilst a solution would be provided, its quality is by no means guaranteed. The decision is usually based upon debriefs which are summarised by the procuratorate or the court without reference to the evidence of the case and without thorough investigations.⁴⁵ Therefore, the Political-legal Committee has never been, nor could be the ideal coordinator to re-adjust the relationship of the different legal actors in the criminal justice arena. Politically motivated, the primary concern of the Political-Legal Committee is to rein in the legal institutions as devices to maintain the social stability of the regime at the expense of the basic human rights of those who are potentially innocent.

⁴² Field note APU-24

⁴³ Eric C.Ip, 'The supreme People's Court and the political economy of judicial economy of judicial empowerment in contemporary China' (2011) 24:2 *Columbia Journal of Asian Law*, 367, 370.

⁴⁴ The benefit usually includes the operational fees of the institution, the salary and other monetary rewards to the officials and the power of the leader of the institution in the local governmental/bureaucratic area.

⁴⁵ For example, one case debrief submitted to the Political-Legal Committee in Site A was written by the lead prosecutor in office A. The debrief was mainly based upon an investigative account prepared by the police and a brief description of key evidence contained in the investigative dossier. According to a prosecutor in site A, this was standard practice. (Field note APU-34, 35 and 36)

Overridden by the power of the political-legal committee, the procuratorate has not demonstrated any fortitude towards challenging the apparently incorrect directions imposed by its political leaders. Rather than serving the interests of the individual, the procuratorate functions primarily as a state apparatus to pursue a political agenda. Its deference to the arbitrary political authority has undermined the limited autonomy of the prosecution, sabotaged the already flimsy rationality of the criminal justice system, and compromised the predicament of the vulnerable suspects.

2. Decisions on Abbreviated Trial Mode

Whilst the prosecution process fails to function effectively as a screening mechanism, prosecutors are not too concerned about processing a high volume of weak cases. So long as the suspect pleads guilty, the conviction would be secured in the court. With the enactment of the judicial interpretation⁴⁶ 'Several Conditions of the application of the guilty plea procedure by the Supreme Court, the Supreme Procuratorate and the Department of Central Justice In China in 2003' (referenced as judicial rule 2003), the guilty plea procedure was introduced as an alternative to the full adjudication, enabling an abbreviated trial process in which the accused receives a sentence reduction in consideration for her guilty plea. The judicial rule 2003 has been fully incorporated into CPL 2012, substituting the previous simplified trial procedure under the framework of CPL 1996.⁴⁷

The majority of prosecution cases processed in the local procuratorate⁴⁸ are only eligible for the simplified trial if the defendant pleads guilty.⁴⁹ Benefiting from the certainty of

⁴⁶ Judicial interpretation has the binding effect as a law in the Chinese legal system. However, its legal effect is lower than the official law. Therefore when a rule of the judicial interpretation is in conflict with law, the rule in question will not be valid.

⁴⁷ See article 208-215 of CPL 2012. In CPL 2012, the guilty plea procedure has been incorporated into the category of simplified trial procedure with minor changes.

⁴⁸ According to article 209 of CPL 2012, those cases cannot be tried through simplified trial mode: a. the defendant is dumb, blind, deaf or someone who cannot control his behaviour due to the mental illness he is

conviction and the fast dispositive process, the guilty plea procedure is preferred by the prosecutor to successfully prosecute weak cases. Due to insufficient operating resources and lack of forensic capability, the police investigation continues to be confession-orientated.⁵⁰ Without the suspect's guilty plea, these cases may not be able to be convicted given the weakness of the evidence. A prosecutor emphatically stated:

[Interview APS-2] [...] the investigation is not quite up to the standard. For example, with the real evidence, such as the application of the forensic evidence, it is still a weak area. Therefore, if the suspect does not confess, we have to let him go. This is a very important feature in China that we rely on the confession. If you look at all the cases we have dealt with, in 80% of the cases the suspect has pleaded guilty. All the cases rely a lot on the suspect's guilty plea. The most sophisticated evidence we deal with every day is the expert report such as the value assessment of the stolen goods. We rarely use DNA comparison. Even for murder cases, the forensic evidence plays a minor role. [...] Due to the weakness of the forensic evidence, lots of cases cannot be convicted. That's why there are so many claims of the use of torture in the detention centre. The true reason is that we do not have the real evidence to prosecute him. We have to lead him to plead guilty so that the chain of evidence can be formed. If we exclude the suspect's guilty plea, then many cases could not be convicted.

Like consensual justice in other jurisdictions, in order to obtain the suspect's guilty plea the 'negotiation' between the two parties would be initiated by the prosecutor. With no other avenue available for communication between the prosecutor and the accused, the low-visibility process of the guilty plea is embedded in the prosecutorial interrogation of the suspect. While serving as the main locus to clarify any doubts of the case and examine the

suffering; b. the case has major social influence; c. cases with multiple defendants and some of the defendants refuse to plead guilty; d. other cases that are not applicable for simplified trial. Only the cases tried in the basic court can be applied for simplified trial.

⁴⁹ It worth noting that in judicial rules 2003, the abbreviated trial can be applied if the defendant voluntarily pleads guilty. However, in CPL 2012, as long as the defendant pleads guilty and does not dispute the prosecuted case, the simplified trial can be applied. Therefore, according to the rhetoric of CPL 2012, the suspect's guilty plea does not need to be voluntary.

⁵⁰ See Zuo Weiming et al, *Zhongguo Xingshi Susong Yunxing Jizhi Shizheng Yanjiu er: Yi, Shenqian Chenxu wei Zhongxin (The empirical study on the operational mechanism of the Chinese criminal justice II: the focus of pre-trial stage)* (China Law Press 2009) 236.

legality and reliability of the suspect's statement, the prosecutorial interrogation has been used to confirm the earlier police account and to ensure that the accused will plead guilty when she brings the charge.⁵¹

With no defence lawyers being present, the prosecutorial interrogation is the first vis-a-vis encounter between the prosecutor and the accused. For most cases, it is during this critical interrogation that the prosecutor successfully procures the guilty plea from the accused, which automatically leads to an application of the abbreviated trial. Based on my observation, at the beginning of the interrogation, the prosecutor's authority was established, either by body language or the tone of voice, to overwhelm the accused before seeking the defendant's self-condemnation.⁵² In one instance, one of the prosecutors I observed shouted at a suspect before the interrogation commenced, when the suspect was playing with her phone and had her legs crossed.⁵³ She did not realise the prosecutor had come in:

[Field note APU-39] Prosecutor: [loudly shouting] Put down your legs and switch off your phone. The interrogation is solemn and you are a suspect!

In the Chinese guilty plea procedure, there is no nuanced difference between the guilty plea and the suspect's confession; either form of concession would lead to the case being tried in an abbreviated way.⁵⁴ Rather than being interested in and asking about the case facts, the formal prosecutorial interrogation often started with the straightforward question as to whether the suspect would like to make a confession. The prosecutor may ask explicitly whether the suspect wanted to plead guilty, or in a slightly ambiguous way, whether the suspect had told the truth in the police station. If the answer resulted in a guilty

⁵¹ See Article 208 of CPL 2012.

⁵² Or the procurator may take place in a later interrogation, if the suspect has been interrogated more than once. There is no limitation of times for the prosecutor to interrogate the accused. If the accused refuses to plead in the interrogation, it is likely that the prosecutor may try more than once.

⁵³ In China, crossing legs in front of people is regarded as impolite.

⁵⁴ For many countries, confession and the guilty plea have different meanings. In Anglo-American guilty plea was originally based on the assumption that the defendant would admit the charges contained in the accusatory pleading, whereas confession may be referred to different facts.

plea, the prosecutor would acknowledge the suspect's 'wise' choice by reassurance of the benefits of pleading guilty. The interrogation would also be accelerated by simply confirming the main facts.

[CASEA 35] Prosecutor: Will you plead guilty or not?

Suspect: Yes, I do.

Prosecutor 1: Good. Normally if you are well behaved and you would like to pay the fines, the penalty will be light.

[Field-note APU-36]

Prosecutor 2: Do you plead guilty or not? If you plead guilty, you will be sentenced lightly. So behave and confess what you have done.

Suspect: Ok...

More than sixty per cent of the suspects pleaded guilty in the initial prosecutorial interrogation in site A during the period of my fieldwork. Although the majority of suspects did not challenge the account provided by the police, there were a few suspects who denied their guilt when questioned. It was in these disputed cases that tension between the prosecutor and the accused escalated. For example, in a drug trafficking case in which the prosecutor's suggestion of a guilty plea was not appreciated, pressure was exerted by shouting and the use of aggressive tones by the prosecutor.

[Field-note APU-16] Prosecutor: Did you tell the truth in the police station?

Suspect: I didn't...I said nothing.

Prosecutor: [Stopped typing the statement and looked at the suspect] The crime you committed does not carry a heavy penalty.

Suspect: It is nothing to do with the punishment. I am innocent.

Prosecutor: [Angrily looked at him] What?

Suspect: [Explains that he was arrested whilst waiting for his friend].

Prosecutor: [Shouting] What did you say in the police station?

Suspect: I said the same thing in the police station.

Prosecutor: [Flipping the evidence dossier and spoke angrily] You said clearly what happened! Why did you plead guilty in the police station?

Suspect: [spoke loudly] I didn't.

[...]

Prosecutor: [Angrily] I tell you, if you don't plead guilty now, you cannot do that in the court.

Suspect: What? Speak louder?

Prosecutor: [Shouting] Let's see who will win! You will receive a very heavy sentence! You deserve it!

[angrily] Come out and sign your statement!

The suspect was given the statement and he started to read carefully. The prosecutor was very angry.

Prosecutor: [Shouting] Sign it!

Suspect: I haven't finished reading!

Prosecutor: [Angrily] So slow. Can you read more quickly? Why haven't you finished?

Suspect: It is my right to read it!

The prosecutor became so angry that she went out of the interrogation room and called in security. When security came, the suspect had almost finished signing the statement.

Security: Behave! What a manner!

The negation of guilt was regarded as a deviation as it was perceived to be a direct challenge to the prosecutor's authority. Rooted in the tradition of collectivism, the accused is not expected to contest decisions from authority. Any confrontation from the suspect

would be interpreted as 'a wish to escape punishment' by not telling 'the truth', which, the prosecutor believed should be tamed by the penalty of law. For the prosecutor, procuring the guilty plea has become part of her routine job and a basic work skill, which must be mastered to secure the conviction. Failing to obtain the suspect's guilty plea could be seen as incompetence, and the prosecutor might be regarded as not being aggressive enough to undertake the job. On the other hand, if a prosecutor was good at gaining guilty pleas from the suspect, it would be a talent to boast of. However, this would mean more overbearing and oppressive 'strategies' would be adopted. On one occasion, I talked with an experienced prosecutor, who had just come back from an interrogation;

[Field-note APU-32] Researcher: How was your interrogation? Did all the suspects plead guilty?

Prosecutor: Yes. Even those that didn't plead guilty in the police station; they would plead guilty in front of me.

Researcher: Why? Do you have any special techniques?

Prosecutor: Very easy. You just tell them the consequences. You can let them know that you have sufficient evidence to make the accusation. If they do not plead guilty, the result would be adverse to them. They all understand it.

It turned out his technique was not that simple. Later that day, the prosecutor told us (another two prosecutors and myself) what happened:

Prosecutor: Initially the suspect did not plead guilty. He was so confident and arrogant. I was polite to him in the beginning. But then, I was pissed off at his manner... I shouted at him. I gave him a dirty look when he came to sign. I saw his hands were shaking...He was so scared! He pleaded guilty finally. These people should be scorned. They need a good beating before they admit what they have done.

Although physical violence against the suspect was rarely seen during the prosecutorial interrogation, bitter tones, rude language and intimidating movements all contributed to the

oppressive threat to procure the guilty plea. Many guilty pleas were obtained as a result of these forms of coercion. Facing such aggressive behaviour and overbearing 'negotiation', the suspect's choice of plea was not free but rather a submissive response to the powerful threat posed by the prosecutor. A trainee prosecutor described how another prosecutor threatened a suspect to plead guilty:

[Field-note APU-32] At first, the suspect did not plead guilty. The prosecutor was so angry. He thumped the desk and threatened the suspect. Then the suspect was scared. He said his wife was beaten up by the police. He was too angry to tell the truth. But eventually he confessed and pleaded guilty.

Some academics and legal practitioners believed that the guilty plea offers an extra option for the accused, without which she could always resort to the other solution that already exists: the full trial.⁵⁵ In theory, the accused's rights are better safeguarded and her case would be considered in a much more detailed way by the adjudicator. In fact, the existence of the full trial, with the prospect of punishment without any mitigation, intimidated the accused and operated as part of the system of coercion.⁵⁶ By threatening to take the suspect to the full trial, prosecutors persuaded the suspect to admit her guilt, so that the full trial process was avoided.

[CASEA-24] Prosecutor: [Shouting] Do you plead guilty or not? If you don't plead guilty, the ordinary procedure will be applied. Then you will be given a long sentence. Do you know that? If you plead guilty, the abbreviated procedure will be used. You will come out of the prison quickly. Do you enjoy staying in the detention centre?

Suspect: No. No....I will plead guilty.

⁵⁵ For example, Li Yingmin (2012) argues that, as an alternative to full adjudication, the simplified trial process offers the defendant the right to choose trial procedures. Similarly, Zhang Lu (2012) acknowledges that the setup of simplified trials based upon defendants' guilty pleas is an improvement in the protection of human rights. See Li Yingmin, 'Xingshi jianyi chengxue de xinxiuzheng jiqi shiyong tanxi (The revision of the simplified criminal trial and its application)', (2012) 9 *The Chinese Procurators*, 33,35. Zhang Lu, 'Xingshi jianyi chengxu de gaige yu wanshan: yi woguo Taiwan diqu xiangguan lifa wei cankao (The reform and perfection of the simplified criminal trial: in comparison with Taiwan legislations)' (2012) 10 *Law magazine (faxue zazhi)*, 160,161.

⁵⁶ This is also a fact relating to the US plea bargaining. See Bar-Gill, O and Ben-Shahar, O., 'The prisoners' plea bargain dilemma' (2009) 1:2 *Journal of legal analysis*, 737,738.

According to article 67 of the criminal law, if the suspect honestly confesses his guilt, the court may consider a mitigated sentence. Due to the discretionary 'may' and the final judgment which normally was drafted in a very brief and vague way regarding the reasoning for sentencing, it was difficult to know whether a lesser sentence had been imposed on the defendant as the result of the guilty plea and to what extent the sentence of the defendant had been mitigated. For the prosecutor, compelling the suspect to plead guilty was primarily for the suspect's benefit, even though the prosecutor did not know how much the suspect's sentence would be potentially reduced. Prosecutors always firmly promised that mitigation would be presented to the court, which was sometimes exaggerated.⁵⁷ On one occasion, a prosecutor told me that convincing the suspects to confess was a way to 'improve their well-being', and they may come out of the prison more quickly and be able to look after their families. This, however, was premised on the fact that they would be convicted by the court.

[Field-note APU-37] Prosecutor: Did the suspect plead guilty?

Trainee prosecutor: No. He didn't. He said the police treated him badly, so he did not want to plead guilty.

Prosecutor: This is so ridiculous! Pleading guilty is for his own sake! It has nothing to do with the police station. Once he is done [has been convicted and sentenced], he can come out of the prison quickly.

Compared to the police, the prosecutor's manner was mild, as physical violence or torture was less likely to occur. This better treatment worked as a catalyst propitious for the suspect's admission of guilt. For some suspects, pleading guilty, was a sign of trust in the prosecutor and to some degree, an enhanced respect of their own dignity. Being familiar with the suspect's mentality, the prosecutor knew how to utilise that mentality to obtain a

⁵⁷ Field note APU-5 below.

guilty plea. For example, one female prosecutor told me that suspects would voluntarily plead guilty because her manner was more civil to them:

[Field-note APU-32] Sometimes the suspects who did not admit guilt in front of the police would plead guilty before us. They said they did not want to make a confession before the police because they were cruel to them. They (the suspects) like us because they said we were polite and nice. I think they (the suspects) are really funny.

In order to persuade the suspect to confess the same official version of 'truth' as in the case dossier, the strategy of 'carrot and stick' was employed by the prosecutor, which worked reasonably well. The 'carrot' was the promise of mitigation. In China, the public funded legal aid service is only available to a small category of suspects. Since a considerable proportion of suspects come from a background of poverty, they are not able to afford the expense of retaining a defence lawyer. The majority of suspects are unrepresented and cannot get any advice pending the trial. They do not know what kind of punishment to expect. As such, highlighting the mitigation always has an effect on the suspects. However, negation of the facts in the case dossier happens from time to time. In such cases, the strategy of 'carrot' needed to be replaced by the approach of 'stick' to guarantee no escape from the desired outcome. Although on most occasions when the suspect refused to plead guilty, the prosecutor's shouting, yelling and slamming furniture would be used to exert pressure on the suspect, the aggressive manner in which the prosecutor behaved during the course of the interrogation was not the most effective tactic. It was the suspect's previous confession in front of the police, which was signed and thumb-printed, that became the strongest pitch for the prosecutor.

[Field-note APU-15] Prosecutor: You said what you said in the police station was not true, then why did you sign your name on each page? Did you sign them?

Suspect: Yes, I did.

Prosecutor: [Shouting] Then that is what you have said honestly! You have admitted in the police station and you want to change your statement now. [Speaking very loud] I have to tell you, it is useless! You have confessed in the police station and you cannot change it now! You have signed on each page of your statement. Discipline yourself! You cannot get away with it! Now I ask you, where did the 'ice' (the drug) come from?

Once suspects had signed on the statements that admit their guilt, they had little hope to retract those statements and maintain their innocence. In China written documents outweigh oral statements. Whilst many of these written confessions were claimed to be signed under duress by means of threat, oppression or even torture, prosecutors had little interest in investigating these alleged claims; rather they would try to convince the suspect to retain the guilty plea using their own threats of aggravated penalties. Rather than checking the police conduct during the investigation, the prosecutor tidied up the investigative work to ensure that the case was 'ironclad'. Thus, the suspect's previous statement in the investigation was not only unchallenged, but was used as a basis to reinforce its own probative value by the prosecutor. For example, in a drug possession case, the prosecutor wanted the suspect to admit that she kept the drugs for her own use. However, this view was opposed by the suspect by insisting that she held the drugs for her boyfriend.

[Field-note APU-21] Prosecutor: So the police found 10 small bags of 'ice' and 1 bag of 'Magu'⁵⁸. You said you wanted to keep them for yourself because you had a quarrel with your ex-boyfriend who had these drugs.

Suspect: No, it is not. I did not say something like that. It is made up by the policeman. They were my boyfriend's and I did not know how to deal with them, so I kept them where they were.

Prosecutor: I have to warn you that if you constantly change your statement, your penalty will be aggravated.

⁵⁸ A type of drug that contains methyldamphetamine and caffeine. Equivalent to the Class B drug in UK.

[...]

Prosecutor: Why is the statement you give today different from the one you gave in the police station?

Suspect: I did not confess in the police station. Then they (the police) were very furious. They shouted at me. The reason why I kept the drugs was not because I did not want to throw them away but because the drugs are not mine. I didn't know how to deal with it. At least they are not mine.

Prosecutor: Why did you sign the record of interrogation in the police station?

Suspect: They interrogated me for a long time. They forced me to sign it...I had no choice. They wrote down that 'I kept the drug because I wanted to take some whenever I want'. It is not what I said. They persuaded me and explained to me that such writing does not necessarily mean that I wanted to use drugs.

Prosecutor: What you said is useless now. You have signed it and it is too late. You have to say the same thing. Otherwise your punishment will be aggravated.

Claiming innocence or disputing the statements made by the police proved not to be conducive to the defence. On the contrary, it provided an opportunity for the prosecutor to secure the case by preparing further evidence to eliminate the defence. Once illegality of the investigation was alleged, further evidence would be obtained to refute the allegation and to corroborate the written confession and shatter any hope of withdrawing the confession.

[Field-note APU-8] Researcher: What happens if they do not plead guilty even if they admitted this in the police station? Say, if they totally deny the whole fact?

Prosecutor: Then you should ask them why they say such things in the police station. Ask why they change their statement and the reason that they change their statement. If they totally deny the fact, tell them that if they plead guilty, the abbreviated procedure will be applied so

they will be imposed with a lesser punishment. Write down their defence in detail. Then try to eliminate the possibility of their claimed facts by further investigation.

In legal practice, the prosecutor can recommend that the court apply the abbreviated trial when she brings a charge against the defendant. Such a recommendation is implicitly binding on the court.⁵⁹ In the revised provisions of CPL 2012, the voluntariness of the accused has no longer been considered as a prerequisite of the application of the simplified procedure. In fact, once the accused has confessed pending the trial, her free choice at the trial stage has been curtailed and the court hearing will be conducted in an abbreviated manner in most instances.

3. The Predicament in Constructing the Defence Case

It is critical for the defence lawyer to be informed of the prosecution case as early as possible in order to construct the defence case.⁶⁰ In China, the construction of the defence case cannot be started until the case has been reviewed by the procuratorate. Article 38 of CPL 2012 stipulates that the earliest point that defence lawyers are allowed to access the case dossier is the time when the case dossier has been transferred to the procuratorate. The defence lawyer is also allowed to photocopy, scan or take photographs of the case dossier, if the case has been prosecuted. Convenience and sufficient time should be guaranteed when the defence lawyer accesses the case dossier.⁶¹

Before CPL 2012, only the photocopy of a selection of evidence, instead of the complete case dossier would be transferred to the court before trial. Defence lawyers who were

⁵⁹ See Article 211 of CPL 2012, which provides when a court wishes to try a case by using the abbreviated trial, the prosecutor and the defence counsel's consent, must be sought beforehand.

⁶⁰ See Michael McConville et al, *Criminal justice in China: An empirical enquiry* (Edward Elgar 2011) 176.

⁶¹ See Article 47 of 'the explanation of the application of the Criminal Procedure Law 2012 provided by the Supreme People's court'.

entrusted at a later stage⁶² were not able to see all the evidence used for prosecution.⁶³ With the change of the law which requires full transference of the case dossier to the court, the defence lawyer can now access all the prosecution evidence before the trial. Whilst accessing the case dossier at the court is believed to be safeguarded, complaints from the defence lawyer are levelled at the prosecution review stage. Defence lawyers have claimed that prosecutors are reluctant to disclose the prosecution evidence, albeit the law provides the contrary.

[DBL-1 interview] Defence lawyer: It is almost impossible to see the dossiers in the Procuratorate (in site B)! The Procuratorate will only provide the so-called 'objective evidence' to us. The so called objective evidence includes the authorisation of custody, extension of procedure, writ of detention and the expert report. They are not evidence. They do not allow us to see the suspect's confession and other statements. So far I have never seen any statements in the Procuratorate.

Defence lawyers believe that prosecutors deliberately place obstacles when they approach the procuratorate for evidence. Practice in the procuratorate varies from region to region, and various requirements were imposed upon defence lawyers who had to follow these 'local rules' in order to access the case dossier. Invariably, despite many procuratorates allowing the defence lawyer to access the case dossier, certain evidence, especially the digital recordings or videos are generally closed to defence lawyers.

[CDL-1 interview] Defence lawyer: If the case has been passed to the procuratorate, it would be easier for us. There are two work models to access the dossier in Site C. The first one is that the Procuratorate will give us a notice and all the dossiers will be available. Another model is that they would select some evidence in both Dossier A (document dossier) and Dossier B (evidence dossier) for us to photocopy in the Procuratorate. But they will let us see

⁶² This is particularly the case for the defence lawyers appointed by the court. According to CPL 1996, for legal aid cases, the public defence lawyer will not be appointed until the case has been transferred to the court.

⁶³ According to CPL 1996, after the case has been prosecuted, the defence lawyer should access the dossier at the court rather than the procuratorate even though the case dossier was still kept in the procuratorate until the end of the trial. Therefore, the defence lawyer could only see the limited photocopies of prosecution evidence selected by the prosecutor.

more evidence just before the case is sent to the court. Some procuratorates allow us to take photos of the evidence, which is good I think because we are allowed to see most of the evidence in the dossier. It used to be that they would give us some selected evidence in the dossier to be photocopied. Therefore we are not allowed to see all the evidence. We are not allowed to see the videos either.

[CDL-3 interview] Defence lawyer: They would create some hurdles for us in site J. [...] In some courts in Site J, if we request to photocopy the dossier, we are asked to bring the A4 photocopy paper with us. In one procuratorate, we are not allowed to photocopy the dossier and we are only allowed to take pictures of the dossier with our camera, whilst with another procuratorate they have a regulation completely the opposite: we are only allowed to photocopy the dossier but we are not allowed to take pictures. The practice in the court and the procuratorate varies. Even in Site J, the practices are very different from one court to another. Sometimes in the prosecutors' office we are only allowed to access the dossier A which contains the warrants and the writs only. That's meaningless for us. We are not allowed to see the dossier B (evidence dossier) which contains the suspects' confession, witnesses' statements and other real evidence. If we wish to read the dossier B, we have to write an application letter to the leader of the Procuratorate. Only when we are given permission by the leader, are we allowed to see it. You said about the video. We are not allowed to see it at all.

[BDL-1 interview] Defence lawyer: As far as the evidence in the dossier is concerned, the videos, CDs and other digital recordings are not allowed to be seen by the defence as well. [Laughed] Last time we requested to watch the videos, they (the procuratorate) showed us the door! I think this is very problematic--- the court does not allow us to see the videos either.

Such restraints on the disclosure of evidence can be explained by the fact that many prosecutors view themselves strongly as the opponent of the defence lawyer. Defence lawyers have been constantly labelled by the prosecutor as 'unethical', 'hooligan' and

'corruptive', who 'exploit legal loopholes'.⁶⁴ As a group with no political background⁶⁵ or power to influence the decision in the criminal process, the status of defence lawyers is deemed as significantly inferior to the prosecutor.⁶⁶ Controlling the source of evidence and the power of prosecution, prosecutors are used to the low-esteemed standing of the defence lawyer and they frequently remind them of that image. In the prosecutor's office in site A, when a defence lawyer was waiting for a prosecutor to come back (so that he could photocopy the case dossier), the defence lawyer was so nervous that initially he was afraid of walking into the prosecutor's office; after he was invited to wait in the office, he looked so tense that whenever a person came into the office he would stand up immediately.⁶⁷ A prosecutor referred to a defence lawyer as follows:

[APS-6 interview] Prosecutor: Frankly speaking, the defence lawyers that I came across are really of low ethics! [emphasized] They are really of low morality. I do not have any prejudice against lawyers. I rarely see good defence lawyers. I think most lawyers are at the mercy of the bureaucratic institutions. They are of low self-esteem. If they come to the Procuratorate to photocopy the dossiers, we can bully them as much as we want.

The defence lawyer's debased status derives from the fact she was acting on behalf of the suspect. It seems that such submissive relationships are mostly confined to the prosecutor and the defence lawyer retained by the suspect. Lawyers who represent the victim, as

⁶⁴ During my observation in site A, one common 'past-time' of the prosecutors was to denounce the defence lawyers. Field note APU-12. Such common labels used by the prosecutor can also see Hou Shumei and Ron Keith, 'The defence lawyer in the scales of Chinese criminal justice' (2011) 20:70 *Journal of Contemporary China*, 379,389. See also Fu Hualing, 'When lawyers are prosecuted: The struggle of a profession in transition' (2007) Social Science Research Network <http://papers.ssrn.com/sol13/papers.cfm?abstract_id=956500> accessed at 3 September 2013.

⁶⁵ As mentioned in chapter 1, the procuratorate, together with the police and the court, were deemed as 'the institutions of the people's democratic dictatorship'. Compared to state officials, most individual defence lawyers do not have a political background. However, this does not exclude a considerable proportion of defence lawyers being engaged in politics, such as congressional deputies. See Fu Hualing, 'When lawyers are prosecuted: The struggle of a profession in transition' (2007) Social Science Research Network <http://papers.ssrn.com/sol13/papers.cfm?abstract_id=956500> accessed at 3 September 2013. Defence lawyer's political engagement see Liu Sida and Terence Halliday, 'Political liberalism and political embeddedness: understanding politics in the work of Chinese criminal defence lawyers' (2011) 45:2 *Law and society review.*, 831, 832-854.

⁶⁶ See also Fu Hualing, 'When lawyers are prosecuted: The struggle of a profession in transition' (2007) Social Science Research Network <http://papers.ssrn.com/sol13/papers.cfm?abstract_id=956500> accessed at 3 September 2013.

⁶⁷ Field note APU-12.

opposed to the suspect, were often treated with respect and great care by the prosecutor.⁶⁸ In one instance, the victim's lawyer was even able to openly criticise the prosecutor's work to her face whilst the prosecutor kept apologising.⁶⁹ Such a scene was simply unimaginable between prosecutors and defence lawyers.

The prosecutor-defence lawyer relationship does not just consist of contempt; it also involves envy, which contributes to the ultimate reason for the disdain. In parallel with Fu Hualing (2007)'s study, I found that prosecutors tend to 'exaggerate' the income of defence lawyers'---and then become jealous of them. 'Prosecutors are fond of criticising defence lawyers for how much they take for doing so little; then complain how much they, as prosecutors, have to do to make so little'.⁷⁰ Such a theme repeatedly occurred in prosecutors' conversations when they complained about the ever growing caseloads in contrast with their limited salaries.⁷¹

[Field-note APU-15] Prosecutor: I am really tired of my work. We are just a machine and we only got about 3000 yuan per month. The lawyers can earn 10000 yuan for each case. That is such easy money. B (a former prosecutor) used to work in our office and he left last year. He was an able man, so he is a lawyer now. He is so courageous! I just stick to this 'safe' work and do not dare to take a risk.

[Field-note APU-47] Before a court trial started, a prosecutor who was sitting beside me said:

Prosecutor: Look at the trial. From the left to the right are the poor people, the ordinary people and the rich people. The prosecutor on the left only earns 3000 yuan to 4000 yuan per month. The judge is in the middle, earning about 5000 yuan per month. The defence lawyer is on the right. He is the richest.

⁶⁸ Field note APU-20. This was obviously due to the experience that many victims were furiously protesting in the procuratorate.

⁶⁹ Ibid.

⁷⁰ See Fu Hualing, 'When lawyers are prosecuted: The struggle of a profession in transition' (2007) Social Science Research Network <http://papers.ssrn.com/sol13/papers.cfm?abstract_id=956500> accessed at 3 September 2013; Field Note APU-34, 36 and 40.

⁷¹ Field note APU-12 and APU-1.

Researcher: How much does the defence lawyer charge?

Prosecutor: For this case, he will charge a least 30,000 yuan, because he will submit an innocent defence. You can understand why we don't have the passion for our work now. For a whole month we have to process about 15 cases but we are paid so little. If we are paid as much as the defence lawyers, I will work so hard on each case. I will try all my best to achieve justice. Last year, we had a chance to meet prosecutors from Taiwan. They asked me how much we earn. Then they said they earn about 30,000 yuan per month. They were so surprised when they found out how little we earn; especially when they understand the cost of living in [site A] is so high!

This partially explains the resentment felt by the prosecutor, and the way they view their work: a means of survival. Working in a hierarchical environment, prosecutors are pressurised with performance indicators as well as a heavy workload. They are jealous of the defence lawyer's free work style and their high salary, even though they are also aware of the fact that the defence career is fraught with hazards. Power is the main asset that the prosecutor values and has been used to trump the defence lawyer; as such they tend to use it to the maximum when dealing with defence lawyers.

The suppression imposed by the prosecutor is not restricted to her own territory (the prosecutor's office) where defence lawyers often come and photocopy the case dossier. There the defence lawyer has no choice but to behave subserviently in order to access the evidence. Additionally, the professional oppression also applies to situations in which defence lawyers engage in active defence preparation, most specifically when the defence lawyer endeavours to collect evidence in order to challenge the prosecution case. The defence lawyer has the right to gather evidence, and according to article 35 of the Lawyers' Law and article 41 of CPL 2012, she is also allowed to apply for the legal institutions to collect specific evidence. Defence lawyers are also able to take statements from the victims if they have sought consent from the victims or their families and been granted permission

from the procuratorate or the court.⁷² If the evidence that the defence lawyer gathered contains the incapacity of the suspect or alibis, she is obliged to inform the criminal justice institutions promptly.⁷³

In spite of the access provided by legal provisions, defence lawyers are advised not to gather evidence that would contradict the evidence relied upon by the prosecution. The direct danger is from Article 306 of the Criminal Law 1997, which has been used by police and prosecution against active defence.⁷⁴ As reported by Fu Hualing (2007), when exculpatory evidence was sought by defence lawyers against the prosecution case, prosecutions were 'immediately switched to Article 306, abandoning the former charge practice.'⁷⁵ Since 90 per cent of the cases against defence lawyers prosecuted under article 306 had resulted in acquittal,⁷⁶ many scholars believe that prosecutions based on this provision were primarily for professional revenge.⁷⁷ Defence lawyers are prosecuted because they challenge the prosecutorial evidence. The majority of defence lawyers believe that the peril they have to face mainly comes from the prosecutor.⁷⁸

[BDL-1 interview] Defence lawyer: We have to be very cautious about the crime of producing false evidence, which is very intimidating. No lawyers can afford such setbacks. Just imagine that if a lawyer has been thrown into the detention centre for three months, can he undertake more work for a suspect when he comes out? Even if the lawyer has been

⁷² Article 41 of CPL 2012.

⁷³ Article 40 of CPL 2012.

⁷⁴ The discussion of Article 306, see chapter 3.

⁷⁵ Fu Hualing, 'When lawyers are prosecuted: The struggle of a profession in transition' (2007) Social Science Research Network <http://papers.ssrn.com/sol13/papers.cfm?abstract_id=956500> accessed at 3 September 2013.

⁷⁶ Due to the high acquittal rate in this category of cases, Article 306 is deemed as a 'bad article that damages the judicial system' by Hou Shumei and Ron Keith ('The defence lawyer in the scales of Chinese criminal justice' (2011) 20:70 *Journal of Contemporary China*, 379,393). The acquittal rate of cases prosecuted under Article 306 is confirmed as being slightly lower in other studies, which may be based upon different sample years. For example, in Du Xiaoli (2013) 's article on Article 306 of Criminal Law 1997, she claims that 'according to the All Chinese Lawyers Association (ACLA), between 1997 and 2007 108 defence lawyers were prosecuted under Article 306, but only 32 of them were convicted'. See Du Xiaoli, 'Lun "lvshi weizhengzui" zuizhi dulixing de xiaojie: yi xingshisusongfa de xiangying xiugai wei jinglu (The nature and deconstruction of the crime relating to the forge of evidence by defence lawyers: based upon the reform of the criminal procedure law)' (2013) 4, *Legal study (Faxue)* 112, 114.

⁷⁷ Fu Hualing, 'When lawyers are prosecuted: The struggle of a profession in transition' (2007) Social Science Research Network <http://papers.ssrn.com/sol13/papers.cfm?abstract_id=956500> accessed at 3 September 2013.

⁷⁸ Ibid. 41.

acquitted and compensated, no one would take such a big risk. Once the prosecutor has seen some evidence advantageous to the suspect, we are suspected of doing something illegal. Prosecutors often play a big role in persecuting us. Based on these suspicions, if the suspect or the witness gives in due to the use of coercive measures and gives an adverse statement against us, we will be trapped. [...] If the suspect and the witness both cannot resist the stress and tell them it is the lawyer who taught them what to say, very soon it would become a disaster for us.

Facing the high level of prosecution under article 306, there has been an outcry to abolish this article ⁷⁹which is believed to be formulated to criminalise defence lawyers. ⁸⁰ Although CPL 2012 has attempted to attenuate the direct antagonism between the prosecutor and the defence lawyer,⁸¹ persecution and other means of sanction continues to be applied to deter lawyers from engaging in evidence acquisition. Reported on a private blog in August 2013, a defence lawyer named Jiang Jiagao was facing threats and prosecution when he was gathering exculpatory evidence for his client involved in a bribery case.⁸² Similarly, in January 2013, when defence lawyer Yu Ziqiu tried to take a photograph of a scar of his client claimed was a result of torture, his lawyer's licence was detained by the officers working in the detention centre. ⁸³Evidence acquisition has become 'the high voltage zone' for defence lawyers, relegating them to a passive role.⁸⁴ For most defence lawyers, their construction of the defence is restricted to the evidence contained in the official dossier. According to the defence lawyers' annual survey, 65.1 per cent of defence lawyers believe

⁷⁹ See Hou Shumei and Ron Keith, 'The defence lawyer in the scales of Chinese criminal justice' (2011) 20:70 *Journal of Contemporary China*, 379, 392.

⁸⁰ Ibid.

⁸¹ More details see chapter 3. To diminish the negative effect of article 306 of the Criminal Law, particularly after the high profile case of Li Zhuang in 2009, article 42 of CPL 2012 stipulates that 'the defence lawyer suspected of a crime shall be handled by a criminal investigation authority other than the one handling the case in which the defence lawyer provides representation'.

⁸² In order to gather exculpatory evidence, the defence lawyer Jiang Jiagao engaged in evidence acquisition by meeting the defendant 50 to 60 times in the detention centre in the city of Liu Panshui. As Jiang's exculpatory evidence significantly challenged the prosecution case, he was 'warned' by the procuratorate in Liu Panshui and was advised not to go to the court to challenge the case. See <<http://www.weibo.com/zhouze>> accessed at 19 February 2014.

⁸³ Beijing Shangquan Law firm, 'The annual report of the implementation effect of the new criminal procedure law 2013' (2014) <http://www.sqxb.cn/content/details16_1644.html> accessed at 9 March 2014.

⁸⁴ See Sida Liu and Terence Halliday, 'Dancing handcuffed in the Minefield: Survival Strategies of defence lawyers in China's Criminal Justice System', (2008) SSRN working paper <<http://ssrn.com/abstract=1269536>>.

that they had not collected or they should never collect evidence during the pre-trial phase; for those defence lawyers who have the experience of obtaining evidence, 30.4 per cent of them reported that their evidence-gathering activities had been interrupted by state officials.⁸⁵

[CDL-3 interview] Defence lawyer: Gathering evidence by ourselves would be very dangerous and indeed it is a great risk in our country. If we look for the victim or his family and try to seek their pardon, this will be adverse to us. There are a lot of cases in this country where the defence lawyers have been arrested when they tried to gather evidence. So it will be a very dangerous activity in this profession.

[CDL-2 interview] Defence lawyer: We are advised not to ask someone to give his testimony in the court in China. If we have rebutted the evidence that was gathered by the prosecutors and the police in the dossier, they would accuse us with perjury. When we ask someone to go to the court to testify, we have to communicate with the witness. For example, if we ask the witness to go to the court, we may have to pay for his subsistence etc. We don't know the witness personally even though he may be known by the defendant's family. The prosecutors and the court may treat our communication with the witness as bribery or corruption. If the police or the procuratorate does not believe in our evidence, they may find the same witness and force him to give a very hostile statement relating to any change in the statement being due to an act of bribery. The procuratorate and the police are very powerful and they can employ all sorts of coercive measures to mislead the witness. Once the witness has been forced to give a statement against us, we would be in serious trouble. Therefore, if I have to gather further evidence, I would only gather the real evidence which is impossible to concoct.

[CDL-1 interview] Defence lawyer: It is too dangerous to try to gather your own evidence. There are a lot of reasons. [...] So my defence will mostly be focused on the evidence we have accessed from the dossier.

⁸⁵ Beijing Shangquan Law firm, 'The annual report of the implementation effect of the new criminal procedure law 2013' (2014) <http://www.sqxb.cn/content/details16_1644.html> accessed at 9 March 2014.

Despite the high risk in active defence preparation, some defence lawyers will still strive to gather evidence whilst protecting themselves from the potential of prosecution. Defence lawyers indicated that if evidence acquisition was the key to the defence, they would apply to the court or procuratorate to gather evidence on their behalf. However, such a request may very likely be rejected on spurious grounds.⁸⁶ Since testimonial evidence is more likely to be targeted by the prosecution, defence lawyers would try to collect 'objective evidence' such as official documents or record of the crime scene examination. Whenever gathering an oral statement becomes necessary, all possible steps would be taken to ensure that the evidence in question would not raise any suspicion. The following extract from an interview with a defence lawyer explains how they protect themselves from an attack from their opponent prosecutors:

[BDL-1 interview] Defence lawyer: I do not gather new evidence by myself during the criminal proceedings. If I have to gather new evidence, I would gather the documentary evidence or real evidence. I would not touch the oral evidence, as it is too risky. There are lots of cases in which the defence lawyers were arrested by their opponents in the court! As soon as a lawyer had finished his defence work in the court, he was arrested by his opponent prosecutors. The risk to our career is outside of our control. If I dared to gather oral evidence, firstly as a safeguard, I would apply for the full CCTV coverage to show the procedure of my evidence collection. If I know of a key witness who might have known some facts favourable for my client, I would give this information to the police and request them to gather the evidence. Otherwise we could bring the witness to the police station and ask the police to do the interview. That is a safeguard to gather further evidence. I think if we do it in this way, it may help to some extent. But the result may not be ideal. The limitation in the law gives too little room for defence lawyers to practice. Therefore how can we lawyers be enthusiastic about our work?

Based upon such strategies, some defence lawyers manage to collect evidence to construct

⁸⁶ See Zuo Weiming et al, *Zhongguo Xingshi Susong Yunxing Jizhi Shizheng Yanjiu er: Yi, Shenqian Chenxu wei Zhongxin (The empirical study on the operational mechanism of the Chinese criminal justice II: the focus of pre-trial stage)* (China Law Press 2009) 223-233.

a defence case without exposing themselves to the dangers. The following interview extract shows how an experienced defence lawyer successfully refuted the prosecution case by gathering evidence.

[CDL-2 interview] Defence lawyer: For example, with the acquittal case that I mentioned just now, the crime happened during the course of an evening. An eyewitness in this case said he saw the fight from a distance of 30 metres. There was a big fishing lake between the witness and the crime scene. The witness could not have stood in the middle of the lake because the lake was quite deep. As there was no light at the crime scene, it would have been impossible for the witness to see my client's face. Therefore it was illogical to accept that the witness could recognise the defendant and identify him later. So I drew an on-site record of the crime scene and its surrounding environment. I also went there at about the same time of night and made a video of that area. The on-site record of the crime scene made by the police was not as precise as the one I submitted. [...] In this case I also used the google map and the satellite map to corroborate my drawing. I also took into consideration the weather as well. I submitted the weather information on that given night which was without any moonlight. Eventually, the judge acquitted my client based upon my evidence.

Despite the rarity and the difficulties in evidence gathering, some defence lawyers still prove that it is possible to engage in robust defence through evidence acquisition. However, Chinese defence lawyers are facing greater jeopardy in their defence activities than their peers in many Western jurisdictions, and successful defence requires much more courage, experience, commitment, and sometimes luck. In such an adverse environment, most defence lawyers feel that their work is highly constrained which makes their defence work extremely passive. In fact, in the tradition of collectivism, defence lawyers' work has not been fully appreciated.

Summary

Although the decision to prosecute a case rests with the procuratorate, ordinary prosecutors are not accorded the power to withdraw the case---the power not to prosecute lies at the apex of the hierarchy. As a result, the cases that are not proceeded with are a minority, with large volumes of weak cases or cases with fabricated evidence being prosecuted.

This arrangement of power, including the controlled number of withdrawn cases, conforms to the general political agenda of the Party-state. The procuratorate serves as a state apparatus for the purpose of social control. Within such a social-political context, the operation of the procuratorate is fundamentally different from its counterparts in Western democracies. In Western common law criminal justice systems, the component parts of the state, such as prosecution, have been taken on by the professionalisation project, by which 'expertise has secured market position and a degree of immunity from State control'.⁸⁷ The professionalisation project has never been set out in China,⁸⁸ where the prosecution is only a subordinate creation of the state. This subservient status of the procuratorate has a significant impact on the mind-set of the prosecutor and negative effect on their decision-making. Lacking in autonomy, external forces from the political institution or the privileged social classes could routinely permeate through the discretionary process and manipulate the decision-making. Within the hierarchical structure, despite their reluctance, prosecutors struggle to handle these extra-legal influences in a professional manner. In fact, the procuratorate has been operating on the principle of politics rather than the law---the law has only been utilised to justify the social control of the Party-state.

The reason why the discretionary power not to prosecute has not been vested in each individual prosecutor is due to the fact that withdrawing a charge is not a simple issue

⁸⁷ Mike McConville, *Criminal justice in China and the West*, in Mike ConConville and Eva Pils, eds, *Comparative Perspectives on Criminal Justice in China* ((Edward Elgar Publishing Limited, 2013) 51.

⁸⁸ Ibid.

about the application of law or legal techniques, but rather it is a policy-implementing process to coordinate various relationships. In this respect, the present prosecution process has been established 'consciously and deliberately'⁸⁹ to fulfil the purpose of the State. Serving the rights of the individual has not been a concern of the procuratorate. On the contrary, the ideology that underlies the daily practice of the procuratorate---'the need to control the weak and powerless in society '---dominates its decision-making and opens the backdoor for external influences.⁹⁰

Failing to function effectively as a screening mechanism to weed out weak cases, prosecutors rely on the suspect's guilty plea to secure the conviction, by which the simplified procedure becomes the convenient and ultimate outlet to dispose of the case safely. To procure the guilty plea, a range of strategies are employed to assert the authority of the prosecutor and to persuade the suspect to admit the facts constructed in the police dossier. Rather than respecting the suspect's voluntary choice, aggressive and autocratic methods are applied to procure the guilty plea when the suspect fails to respond submissively. Statements were falsified and overbearing tactics used by the prosecutor to obtain the guilty plea. In the absence of legal advisers or any effective safeguards to protect the suspect during the vulnerable and crucial process of prosecutorial interrogation, the suspect's chance of contesting the charge against her is minimal.

Despite the enhanced defence rights in the recent legislations (the Lawyers Law 2007 and CPL 2012), in daily practice, defence lawyers remain substantially constrained in constructing the defence case during this pre-trial phase as a result of various obstacles. Their access to the prosecution dossier has been restricted by different means, and their evidence gathering process is often fraught with hazards. This prosecution review stage reflects the accusing role of the prosecutor, the debased status of the accused in the criminal justice system and the structurally marginalised defence within the socio-political

⁸⁹ Mike McConville et al, *Criminal justice in China: An empirical enquiry* (Edward Elgar 2011) 449.

⁹⁰ Ibid.

context of China. The ideology that directs the scene is the Party-state's desire of social control, which aims to rule the disempowered and maintain social stability by urgently punishing the accused.

Chapter 6 Trials without Witnesses

The trial is often regarded as the last bulwark against injustice.¹ As a number of police cases are constructed by falsified statements, and prosecutors fail to supervise the police investigation effectively and to screen out weak cases, the trial becomes the ultimate safeguard to protect the potentially innocent from wrongful conviction. In this chapter, I will examine whether the court in China is able to identify unreliable evidence and make a decision by exercising its judicial power impartially. In order to assess how the judicial decision is influenced by the evidence produced by the prosecution and the defence, this chapter will examine the hierarchical judicial system in which the court operates and the judge-prosecutor relationship. As trials without witnesses have been the norm in the Chinese criminal justice, I will consider why judges prefer the case dossier to the witness' live testimonies as the basis of the adjudication, even though it is tainted with unreliable evidence. Then legal actors' activities in both the ordinary trial and the simplified trial will shed light on how the 'justice is seen to be done' without witnesses being cross-examined.

1. The Inner Managerial System of the Courts

The Chinese court system is comprised of a hierarchy of four levels of courts, namely the Supreme Court, the high court, the intermediate court and the basic court. Whilst courts at all levels hear first instance criminal cases,² the majority of first instance trials are conducted in the basic court or the intermediate court, leaving the high court and the

¹ T. Ward Frampton, 'The Uneven Bulwark: How (and Why) Criminal Jury Trial Rates Vary by State'(2012) 100 *Cal. L. Rev.*, 184.

² According to CPL 2012, the basic court tries the majority of criminal cases except those which should be tried in higher levels of court. The intermediate court tries first instance cases concerning state security and terrorism, and cases that could be sentenced to life imprisonment or the death penalty. The high court tries very major and influential cases in its jurisdiction as first instance and the Supreme Court tries major cases in China.

Supreme Court to focus on the review of appeal cases and death penalty cases. The court system embodies strong bureaucratic characteristics in which the power to make judicial decisions is essentially concentrated at the apex of the hierarchical pyramid. Whereas in many western jurisdictions the trial judge or the jury is responsible for determining whether the accused is guilty as charged, the power of adjudication in China rests in the hands of certain people or institutions who are not the actual triers of the case. These people or institutions, the so-called 'faceless judges',³ dictating the judgment, include the leaders holding the real power of the court,⁴ the adjudicative committee, and the Politico-legal Committee.⁵

In order to oversee and control the power of adjudication, a unique adjudication process has been applied to all the criminal cases in China: criminal judgments must be validated or decided by the leaders of the court. Normally the leader of the criminal division of the court would view the correctness of the draft judgment, including the verdict, the appropriateness of the sentencing, and the choice of wording in the judgment; albeit she is not the collegiate member trying the case. For simple or minor criminal cases, where the trial judge believes that the defendant should be convicted and the sentence to be imposed is within the correct legal tariff, the draft judgment would be validated quickly, with the sentence of specific cases being adjusted if needed.⁶ Major or complicated cases would be routinely submitted to the adjudicative committee for discussion. The adjudicative committee is the key coterie within the court that is accountable for the decision making of serious criminal cases. It is usually made up of the president and the vice president of the

³ Qiang Shigong and Zhao Xiaoli, 'Shuangchong Jiegouhua Xia de Falv Jieshi: Dui 8 min Zhongguo Faguan de Diaocha (The legal explanation of the dual structure: an inquiry on 8 Chinese judges)', in Liang Zhiping (ed.), *Falv Jieshi Wenti (Questions on legal explanation)* (China Law Press 2010) 237.

⁴ This includes the president and vice presidents of the court (*yuanzhang*), the division-chief judges (*tingzhang*) or the head of certain departments of the court (*zhuren*).

⁵ After the enactment of CPL 2012, gradually the politico-legal committee has had a lesser influence on the adjudication of specific cases in many regions of China, as has been mentioned in a previous chapter. However, this does not exclude the fact that in certain areas, the politico-legal committee still exercises a decisive influence on the decisions of certain cases.

⁶ Wang Biao, *Fayuan Neibu Kongzhi Xingshi Caipanquan de Fangya he Fansi (The methods and reflection of the control of the judicial power within the court system)* (2013) 1 Chinese criminal magazine (*Zhongguo Xingshifa Zazhi*) 74, 76.

court, the leaders of court divisions and other senior experienced judges. The verdict of serious cases, such as cases that could be acquitted, cases that could be potentially sentenced to the death penalty, or cases being counter-appealed by the procuratorate, must be based upon the agreement reached by the members of the adjudicative committee.⁷

Although the members of the adjudicative committee may offer different opinions in regards to issues of the case, the view of the president of the court, carrying substantial weight, exercises an overwhelming influence over the verdict reached by the adjudicative committee.⁸ According to Wang Biao's study, the president of the court has such an overriding effect on the decision of the adjudicative committee, that major cases have had their tone set prior to the meeting, which turns the discussion into a mere formality.⁹ Thus the mechanism of the adjudicative committee is dominated by the leaders of the court, despite it appears to be a representation of the collective will of all senior judicial members.

Due to criticism towards the mechanism of the adjudicative committee in recent years, there has been a tendency for a shift of power from the adjudicative committee to the

⁷ According to 'the advice of the implementation of the reform and perfection of the adjudicative committee of the People's court issued by the Supreme Court (No.3, 2010)', these cases must be submitted to the adjudicative committee for discussion: a. for the Supreme People's Court, criminal judgment that has been validated, however there is an error in the decision which requires change; cases counter appealed by the procuratorate; b. for the high People's court and the intermediate People's court, criminal judgment that has been validated, however there is an error in the decision which requires change; cases counter appealed by the procuratorate, cases that are going to be imposed with death penalty with immediate execution; cases that should be acquitted; the application of the law requires the legal opinion from the higher court; serious cases that should be submitted to the higher court for trial; c. for basic People's court, criminal judgment that has been validated, however there is an error in the decision which requires change; the sentence should be imposed lower than the legal tariffs or the defendant should be immune from any criminal sentence; cases that should be acquitted; the application of the law requires the legal opinion from the higher court; cases which are likely to be imposed with life imprisonment or the death penalty and should be submitted to the higher court for trial; serious cases that should be submitted to the higher court for trial. Besides that, controversial cases, such as members of the collegiate bench cannot make a final agreement due to the disputes; cases with wide social influence; cases that involve difficult legal applications, etc.

⁸ Xiao Shiwei, *Shenpan shi Ruhe Xingchengde: yi S Sheng C qu Fayuan Shijian wei Zhongxin de Kaocha* (How the criminal judgment comes into being: based upon the empirical study of S province C court) (China Procuratore Press 2009) 84.

⁹ Wang Biao, *Fayuan Neibu Kongzhi Xingshi Caipanquan de Fangya he Fansi* (The methods and reflection of the control of the judicial power within the court system) (2013) 1 *Zhongguo Xingshifa Zazhi* (Chinese Criminal Law Magazine), 74,75.

collegiate bench.¹⁰ In certain areas of China, the proportion of cases submitted to the adjudicative committee for discussion has been reported as having reduced over the years. According to Xiao Shiwei (2007), in certain regions of China less than five per cent of criminal cases were decided by the adjudicative committee in the basic court in 2007, whereas this rate was as high as 90 per cent a decade ago.¹¹ The reduction of cases 'tried' by the adjudicative committee is usually attributed to the adjudicative committee's voluntary retreat initiated by the Supreme Court. Nevertheless, it is believed that drawbacks associated with the mechanism of the adjudicative committee have also contributed to this outcome.¹² As a result of the growth in the volume of cases, members of the adjudicative committee can only have a glimpse of the case based on the trial judge's debriefing. Thorough deliberation is impossible given the limited discussion time.¹³ Therefore, the discussion is eventually guided by the trial judge or the leader of the criminal division who is familiar with the case details.

Despite the tendency of power strengthening by trial judges in certain regions of China, it is still too vague to identify who the actual trier of the case is. Xiao Shiwei's (2009) study reveals that many trial judges regularly consult on cases with the leader of the criminal division, the president of the court or experienced senior judges, due to their limited

¹⁰ As the members of the adjudicative committee are not the judges trying the criminal cases, many scholars criticise that this is against the immediate principle of the criminal procedure. See Chen Xinsheng, 'Shenpan Weiyuanhui Taolun jue ding Ge'an de Quexian (The drawbacks of the adjudicative committee in deciding individual cases)' (1999) 2 *Legal magazine (Faxue Zazhi)* 2. Hou Yong, 'Shenpan Weiyuanhui yu Gongzheng Chengxu zhi Jiazhi Chutan (The conflicts between the mechanism of the adjudicative committee and the value of justice)' (2005) 4 *Guizhou University working paper*, 46. However, it should be noted that there is no data to indicate to what extent such a tendency is in operation. In site A, for example, a judge from the intermediate court revealed that such a tendency did not exist in the intermediate court in which she was working (Interview AAJ-1).

¹¹ Xiao Shiwei, 'Jiceng Fayuan Shenpanweiyuanhui "Fangquan" Gaige de Guocheng Yanjiu: Yi dui mou Fayuan Faguan de Fangtan wei Sucai (The research on the retreat of power of the adjudicative committee at basic court: material based on interviews with judges in certain basic court)' (2007) 2 *Law and social development (Fazhi yu Shehui Fazhan)*, 28.

¹² Ibid.

¹³ According to research conducted by Yan Hao (2005), in a basic court in China, the adjudicative committee held meetings 1091 times and discussed 4475 criminal cases within a 5 year period. In each meeting, the adjudicative committee discussed between 4 and 10 cases. On average, each case was discussed for less than a 30 minute period. See Yan Hao, 'Shenpanweiyuanhui Gongneng de Yihua yu Chongzu (The alienation and reconstruction of the function of the adjudicative committee)' (2005) 6 *Xinan Zhengfa Daxue Xuebao (Working paper of Southwest University of Political Science and Law)*, 95.

capacity of independent decision making.¹⁴ Cases that trial judges lack confidence in solving would be reported to the leader of the criminal division and the president of the court. After inquires and deliberation, the president of the court would formulate a proposal for the resolution of the case. This would be observed by the trial judge when drafting the judgment.¹⁵ However, if the case in question (including those cases discussed by the adjudicative committee), is believed to be too complicated that the leaders of the court are not competent to deliver a resolution, a private meeting with the president and the chief judges at the higher level of the court would be arranged. The leaders of the higher court are briefed about the issue and then provide a proposal for the decision.¹⁶ A subsequent discussion of the adjudicative committee would be organised as a formality to legitimise the decision formulated by the court at the higher level.¹⁷ Since the court of second instance has been implicated in the adjudication process of the lower court, the appellant court is unlikely to review the case or amend the judgment if an appeal is initiated by the defendant.¹⁸ As such, for these cases, the defendant's right to appeal has essentially been curtailed and the appeal system exists in name only.

Due to this adjudication process, top officials within the hierarchical court system ensure control of judicial power. Having limited autonomy, the trial judges are restricted to hearing the court trial and drafting the judgment in accordance with the decisions contemplated by the court leaders. Certain trial judges seem content with such arrangements, as they are immune from responsibility arising from the adjudication. In China, the judgment has never been a resolution of the case offered by individual judges,

¹⁴ Xiao Shiwei, 'Jiceng Fayuan Shenpanweiyuanhui "Fangquan" Gaige de Guocheng Yanjiu: Yi dui mou Fayuan Faguan de Fangtan wei Sucai (The research on the retreat of power of the adjudicative committee at basic court: material based on interviews with judges in certain basic court)' (2007) 2 *Law and social development (Fazhi yu Shehui Fazhan)*, 28,37.

¹⁵ Wang Biao, 'Fayuan Neibu Kongzhi Xingshi Caipanquan de Fangya he Fansi (The methods and reflection of the control of the judicial power within the court system)' (2013) 1 *Zhongguo Xingshifa Zazhi (Chinese Criminal Law Magazine)* 74.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ See Mike McConville et al, *Criminal justice in China: An empirical enquiry* (Edward Elgar 2011)198. See also Chen Ruihua, *Xingshi Susong de Qianyan Wenti (The frontier problems of the criminal justice)* (China Renmin Publishing House 2005) 471.

but rather a pronouncement of the court as an institution. Therefore, the adjudicative committee works as a protective canopy, shielding the judges from any potential adverse outcomes.

[GAJ-2 interview] Judge: Generally speaking, I am happy with such arrangements (I mean the adjudication discussion and judgment validated by court leaders), so that I do not need to worry about anything that is beyond my control. [...] Judges are taking risks all the time. So it is good that the chances of risk can be reduced by such working processes.

Similar to the police and the procuratorate, the Appraisal System is also applied to the judiciary, and the court is closely assessed by their higher level. A variety of detailed performance indicators are designed to evaluate the work of all judges in the court. One of the most critical indices of the Appraisal System applied in the court is the rate of overruling.¹⁹ Thus, if the judgment is overruled by the court of second instance (quite often the overruled case is required to be retried by the trial court),²⁰ the trial judge and the respondent leader who validated the judgment would be financially sanctioned and become disadvantaged in their judicial career.²¹ To avoid the potential penalties incurred by the Appraisal System, trial judges readily seek advice from the adjudicative committee to avoid taking such risks.²² In order to ensure that the decision of the court of second instance is consistent with the judgment, the lower court strives to maintain a harmonious

¹⁹ See Xiao Shiwei, 'Jiceng Fayuan Shenpanweiyuanhui "Fangquan" Gaige de Guocheng Yanjiu: Yi dui mou Fayuan Fanguan de Fangtan wei Sucai (The research on the retreat of power of the adjudicative committee at basic court: material based on interviews with judges in certain basic court)' (2007) 2 *Law and social development* (*Fazhi yu Shehui Fazhan*), 28.

²⁰ According to article 225 of CPL 2012, the appellant court can overrule the judgment made by the trial court in two ways: a. if the case fact is correct but the application of the law is wrong, the appellant court should change the judgment directly; b. if the fact is unclear and the evidence is insufficient, the appellant court can either return the case back to the trial court for re-trial or the appellant court can try the case itself. However, if the case is re-tried by the trial court and appealed by the defendant or counter appealed by the procuratorate, the appellant court should make a final decision. In legal practice, if the appellant court overrules the decisions of the trial court, the case would normally be returned to the trial court for retrial.

²¹ Li Enshen, 'The Li Zhuang case: Examining the challenges facing criminal defence lawyer in China' (2010) 24:1 *Columbia Journal of Asian Law*, 129, 164.

²² If the case has been submitted to the adjudicative committee, it would be the leader who made the wrong decision in the meeting of the adjudicative committee who takes the responsibility. The leader of the court will be subsequently demoted or penalised in other ways. See Wang Biao, 'Fayuan Neibu Kongzhi Xingshi Caipanquan de Fangya he Fansi (The methods and reflection of the control of the judicial power within the court system)' (2013) 1 *Zhongguo Xingshifa Zazhi* (*Chinese Criminal Law Magazine*) 24, 26.

relationship with the court of a higher level.²³ Thus, the basic court and the intermediate court communicate on a regular basis. During festivals, judges of the intermediate court will often receive presents from the institution of the basic court.²⁴ The basic court regularly consults with the intermediate court about individual cases and follows its guidance, when determining judgment or sentence. As a result of this relationship, the intermediate court and the basic court appear to merge into one functional unit of this relationship. An appellant judge spoke about the pressure he had to face when changing the first instance decision of the local court:

[GAJ-3 interview] Appellate Judge: [...] The basic court does not want us to change their judgments, which gives us a lot of pressure. It is very hard for me. I would try my best to stick to my principles. But it is very difficult.

Despite the pressure imposed by the trial court, the court of second instance is generally a beneficiary of this arrangement. Leaders at all levels of court always maintain a close relationship, which informally promotes the implementation of criminal policies promulgated from the higher levels.²⁵ Criminal justice policies are thus easily percolated down through the hierarchical process from the Supreme Court to the basic court. Since the court system is not insulated from external influences, extra-legal factors, especially those involving political issues, are often permeated through the hierarchy of the court. The lack of independence and subordinate status frustrates or infuriates some young judges who have become disillusioned within this system.

[Interview GAJ-2] Judge: For a legal person, being a judge is always the dream for most of us. Before I was a judge, I always felt there was a distance between a judge and the ordinary people. The job [of being a judge] sounded very mysterious to me. However as I am an insider in the judicial system, I realise that the court is only a department of the government.

²³ Wang Biao, 'Fayuan Neibu Kongzhi Xingshi Caipanquan de Fangya he Fansi (The methods and reflection of the control of the judicial power within the court system)' (2013) 1 *Zhongguo Xingshifa Zazhi* (*Chinese Criminal Law Magazine*) 24,27.

²⁴ Ibid

²⁵ Ibid. 25.

[...]Although it is said in the constitution that 'one government and two institutions [the court and the Procuratorate]', which means the central government and the two institutions are separated, when it comes to the local level, the court becomes part of the government. It is on a par with the police and other bureaucracies, except that our work is different. The court and the judge are not independent. Therefore the job is not as sacred as we believed. In fact, it is just an ordinary job.

Whilst the court has to respond to various strands of interference, it has never been passive when dealing with external influences. The court would negotiate with different strands of power actively and strive to secure an advantageous position on the political stage, so that its operation is financially adequate.²⁶ In legal practice, the leaders of the court and judges have also learnt how to reduce the negative impact of external influences. Judges and court leaders would strategically use the adjudicative committee to avoid external influences.²⁷ Judges may accelerate the pace of the criminal proceedings, leaving no chance for belated instructions.²⁸ The court constantly reacts, balances different types of interests, and coordinates various relationships with the stakeholders.

[Interview FTJ-1] Judge: I don't believe in this society we have absolute justice. If you ask me whether undue influence exists or not, I would tell you that it is absolutely the case. [...] If you ask me whether anyone has ever tried to corrupt me, I would have to tell you that this is unavoidable. For example, why are there a politico-legal committee and a party? That's because some cases are not so easy to deal with. Sometimes it is because the court does not have such power to handle these cases and we need the politico-legal committee to coordinate the complex relationships.

Of all the relationships that the court has to handle, its involvement with the procuratorate

²⁶ Wang Qinghua, 'Zhongguo Xingzheng Susong: Duo Zhongxin Zhuyi Sifa (Chinese administrative litigation: Judiciary with multiple centres)' (2007) 5 *Zhongwai Faxue (China-Foreign Legal Journal)* 513,514.

²⁷ For example, when judges do not want to let individuals influence the court's decision, they may use the adjudicative committee as a reason to turn down such a request.

²⁸ Xiao Shiwei, 'Jiceng Fayuan Shenpanweiyuanhui "Fangquan" Gaige de Guocheng Yanjiu: Yi dui mou Fayuan Faguan de Fangtan wei Sucai (The research on the retreat of power of the adjudicative committee at basic court: material based on interviews with judges in certain basic court)' (2007) 2 *Law and social development (Fazhi yu Shehui Fazhan)*, 28.

is the most intense. The court generally maintains a close and positive relationship with the procuratorate, which can be seen from their frequent and mutual interplay in the courtroom. In everyday practice, this relationship has been strengthened by benefits exchange, sharing of information and marginalising the defence.

2. The Judge-prosecutor Relationship

Within the tripartite interaction of the Iron Triangle, the judge-prosecutor relationship is defined by law as 'mutual co-operation and mutual supervision (*xianghu peihe, xianghu zhiyue*)'.²⁹ Despite being the trier of the case, the court's power of adjudication is overseen by the procuratorate. In the discourse of procedure law, the procuratoratory supervision of the judiciary primarily indicates the prosecutor's power to counter-appeal against the judgment of the first instance court. If the judicial decision is believed to be incorrect by the prosecutor, a counter appeal will be initiated, and a second instance trial will be launched. Whether or not the judgment of first instance trial would be overruled is determined by the court at a higher level.

The ideology of this dynamic relationship between the judge and the prosecution is its potential to identify errors which have occurred in the judicial system, ensuring the correctness of the enforcement of the law.³⁰ To achieve this goal, key to this model is the independence and impartiality of both institutions. The prosecutor, on the one hand, assumes the role of safeguarding the lawfulness of the criminal proceedings, and is obliged to identify any criminal justice process errors, and to challenge and rectify inaccurate judgments. The judge, on the other hand, whose status and objectives are independent from those of the prosecution, is able to review the case in a neutral manner and make a sound

²⁹ See Article 7 of CPL 2012.

³⁰ Ibid.

decision. Although in legal rhetoric, the prosecutor's role is similar to the *parquet* (the French prosecutor's office), who is regarded as the 'standing judiciary' in French criminal justice system, the prosecutor in China does not have the judicial status or the obligation to follow exculpatory lines of inquiry, despite its supervisory role in identifying procedural errors.³¹

Despite the legal theory, in practice the judge and the prosecutor understand their roles in supervising each other are rather different from this expectation. Framing their roles around the performance indicators, both the judge and the prosecutor strive to avoid the negative effect associated with the Appraisal System. Undesirable outcomes of acquittal and reversal of the judgment are most likely to be caused when there is an antagonism between the two institutions; so the procuratorate and the court at the same level have often entered into an implicit alliance. Thus when a case is going to be acquitted by the court, the court will inform the prosecutor proactively. Once indicated by the court, the prosecutor would withdraw the case immediately,³² or alter the case secretly if the trial has not been heard.³³ If the application of the law is controversially subjective, the court may compromise on its initial decision after negotiating with the prosecutor.³⁴ As an exchange, when errors have been discovered in the judgment, prosecutors would courteously give a hint to the court, rather than initiate a counter appeal.³⁵ Hence, in this mutually beneficial relationship, co-operation, rather than supervision, prevails. Bonded by their respective interest, a beneficial symbiotic relationship is developed.

³¹ See Jacqueline Hodgson, *French criminal justice: a comparative account of the investigation and prosecution of crime in France* (Hart publishing 2005) 67.

³² This is the most common practice. In Taizhou city, Zhejiang province, from November 2003 to November 2006, out of 18585 cases (28658 defendants) only 3 cases were acquitted by the court whilst 48 cases (134 defendants) were withdrawn by the prosecutor before the trial. In Guangzhou city, between January 2000 and November 2002, out of 27800 cases prosecuted by different levels of Guangzhou procuratorate, 302 cases were withdrawn before the trial whilst only 24 cases were acquitted by the court. See Huang Qiusheng, 'Taizhoushi Jianchajiguan anjian zhiliang diaocha (The research on the quality of the cases prosecuted by Taizhou procuratorate)' (2007) 5, *Zhejiang jiancha (Zhejiang Procuratorate)* 87, 89.

³³ Field Note APU 59.

³⁴ Field Note APU 5.

³⁵ Field note APU-24.

[APS-3 interview] Prosecutor: Theoretically speaking, the relationship [between the court and the procuratorate] should be one of mutual supervision. But currently our relationship could be better defined as cooperation.

[APS-5 interview] Researcher: How do you define your relationship with the court?

Prosecutor: I think we should call this as 'mutual games playing'. There is no third arbitrator between the two to have the final say. The two [the procuratorate and the court] have some devices to confine each other and they also have some mutual interest between themselves. The game playing has led to a very special type of relationship.

Being part of the Iron Triangle and working closely with prosecutors, judges have taken on the ideology that is shared by the police and the prosecutor. For many judges the presumption of guilt does assume a universalistic character and is applied generally to defendants. With a lack of judicial independence, judges are all too willing to follow the 'guidance' of the procuratorate in compliance with guilt. In line with the position of the prosecutor, acquittal is seen as a destructive result that should be avoided at all costs.

[FTJ-1 interview] Judge: [...] An acquittal case has huge influence on the society. If a case is announced as being wrongfully prosecuted, the public power will be affected; if we allow an acquittal, the whole legal system will be changed as a consequence; if a lot of acquittal cases have occurred, the whole political system will collapse.

Whilst the result of acquittal itself does not inflict any negative effect on the performance indicators of the judge, acquittal creates significant tensions within the relationship between the court and the procuratorate, and must therefore be resolved out of sight. The court would be tremendously pressurised if it were determined to make an acquittal decision, considering its intimate affinity with the procuratorate. For example, during my observation in site A, I witnessed a 'crisis' in the procuratorate caused by an incidence of potential acquittal, which was subsequently resolved after negotiation between the leaders

of the two institutions.³⁶ The court in site A intended to acquit a defendant who was believed to be inappropriately charged with 'public provocation and disturbance (*xingxun zishi zui*)'.³⁷ When receiving the news, the procuratorate reacted immediately to negotiate with the leaders of the court. Since the trial was concluded, it was too late to withdraw the case from the court. In order to cut losses and avoid an acquittal of the case, the prosecutors offered to trade the acquittal for two potential counter appeals arising from mistakes found in the application of law in two judgments delivered by the court.³⁸ Eventually, an agreement was reached that the court would convict the defendant on the condition that the procuratorate dropped two counter appeals against another judgment.³⁹ As both the court and the procuratorate's interests were tied up in relation to the assessment of the Appraisal System, none of them could afford to take any risk harming the evaluation. This was particularly the case if the leader of the institution wished to be promoted.

[ATJ-1 interview] Judge: [...] The consequence that this (the acquittal) will lead to is the lack of cooperation with the work between the court and the procuratorate. For example when we want them to do a favour for us, such as the extension of the legal period, or amend some minor mistakes in the written judgement, it is hard to make sure they will not get you into trouble. If you push someone to the dead corner, you will have continuous problems.

According to the prosecutors in site A, such a 'trade-off' was not commonly seen in their daily work where co-operation had been the key theme. Unless it is extremely necessary, a counter appeal should never be initiated as it may sabotage the relationship. Yet, the power of counter appeal is a useful shield, guarding the interests of the procuratorate. For most judges, prosecutors are never regarded or treated as a party in the courtroom---they are an authority. Even in the domain of the court, sometimes it is hard to tell who is in charge.

³⁶ Field note APU-6, 7,8,9 and 10.

³⁷ It is a crime similar to the public disorder offence in England and Wales.

³⁸ Field note APU-6 and 7.

³⁹ Field note APU-9 and 10,

[GAJ-1 interview] Judge: There are many things that have happened in China that you can never imagine occurring in other countries. Many years ago, when I was still a court clerk, one day in the trial, a prosecutor found that after the cross-examination and evidence adduced, the result of the case was adverse to him. So he stood up, took all the dossiers and stormed away from the court. [...] Then the court had to adjourn the trial and communicate with the prosecutor afterwards. In the end, the case was settled but the prosecutor's behaviour was really surprising. [...] In our country, the prosecutors are really powerful.

[GAJ-2 interview] Judge: The procuratorate is a very robust institution in our country whose power of legal supervision is extremely mighty, which includes the power of prosecution and the power of counter appealing. [...] There is no such powerful procuratorate in any other countries in this world. In Taiwan, the prosecution is only part of the court system (therefore part of the judiciary): a good working model that we should follow.

[ATJ-2 interview] Judge: In our minds, we try to treat the procuratorate as a party. However, we know that it (the procuratorate) is not an ordinary party. It is very powerful.

Since the reform of 1996, the role of trial judges (or the collegial bench) has changed from active investigators in the trial to passive triers. In spite of the impartial image played by the judge, the trial can sometimes seem to be poorly controlled, due to the judge's tolerant attitude towards the prosecution. On many occasions I have observed that the prosecutor's speech was so emotionally charged that the denunciation of the defendant in the court could be classified as oppressive. Prosecutors have even used bad language during the trial. When the defendant protested at the inappropriate language, the judge simply remained silent.⁴⁰ There were several occasions that the prosecutor usurped the role of the judge and ordered the defence lawyers to 'shut up' when it was their turn to proffer an argument.⁴¹ In the face of the prosecutor's imperious performance in the court, the judge always kept up the acquiescence. As a result of the court conniving with the prosecutor's aggression, the trial *de facto* became an extension of the coercive prosecutorial interrogation.

⁴⁰ Field note APU-61.

⁴¹ Field note APU-12 and APU-64.

[Field-note APU-12] A prosecutor described what happened in the trial.

Prosecutor: The case was obviously a theft, however the lawyer insisted it is a crime of embezzlement. [...]After hearing such stupid comments of the defence lawyer, I was so furious and told the lawyer to shut up. I told him: 'there is no room here for you to give such suggestions. Shut your mouth and be quiet.'

[Field-note APU-62] Prosecutor: In this case, my main job in the trial was to prevent the defendant from speaking. The defendant was so defensive. From time to time, when I gave my view, he would refute me with long stories. I was so angry. So I asked him to shut his mouth several times. [...]The defendant asked the judge to change me as a prosecutor! He said I insulted him by using the swear words. I argued back by saying that the 'F' word was not swearing language, but the local dialect.

Beyond the trial, the judges' befriending behaviour towards the prosecutor is less than discrete. For the prosecutor, the whole process of adjudication, including the judicial deliberation, is open and transparent. The prosecutor and the judge at the same level generally know each other so well that they have familiarised themselves with each other's work style. In fact, some prosecutors and judges work so closely that they have developed personal friendships. The centrality of co-operation was emphasised over and over again during my observation of and interviews with judges and prosecutors. Their collaboration reflects mostly in their frequent communication by phone, through which legal opinions on cases, issues concerning evidence and sentencing are all informally exchanged. Many initial decisions of the case are a product of such casual conversations which involve negotiation and compromise. When a charged fact is unclear, the judge would call the prosecutor asking them to send supplementary evidence or return the case back for further investigation. If the court has run out of its adjudication period, a private negotiation between the judge and the prosecutor would allow the judge to 'borrow' extra time from the earlier stage of prosecutorial review, which inevitably involves falsification of the

registration of legal documents.⁴² Their co-operation is so close and consistent that 'there is no real distinction that can meaningfully be drawn between the two institutions: they are different parts of the same entity', as McConville et al (2011) observe.⁴³ The following extracts from private conversations between a judge and a prosecutor denote how their informal exchange influences the outcome of the case.

[Field-note APU-59] A prosecutor was having a conversation with the trial judge on the phone.

Prosecutor: [Spoke to the judge] I did not want to prosecute this suspect initially. I did this because I was pressurised. [...] I know that it is very hard to convict him just based upon the case fact. But I must prosecute him, I have no choice, you know. Since I have already charged him, why not impose a very light sentence on him, such as the suspension of imprisonment, so that he can come out quickly? As long as he is convicted, it will be alright... You agreed? That's brilliant.

[Field-note APU-34] A prosecutor was discussing a case with the judge on the phone before the trial.

Prosecutor: [Spoke to the judge] I was sympathetic to the suspect. He was poor and he could not earn enough money for his living. [...] You may consider imposing a very light sentence on him, so that he can get out of the prison quickly.

After the phone call, the prosecutor said to his colleague:

⁴² According to article 202 of CPL 2012, the court must announce the judgment within three months after the court has filed the case. For death penalty cases, cases involving civil litigation or cases concerning other difficult situations (see article 156 of CPL 2012), the adjudication period can be extended for another three months after authorisation by the Supreme Court. After the enforcement of CPL 2012, the court is less likely to 'borrow' the legal period from the prosecution due to the extended period permitted by the law. However, such practice was very frequent before CPL 2012 came into force. Before the CPL 2012, however, the court only had one month (or at the latest one and half month) to deliver the judgment after the case has been filed.

⁴³ See Mike McConville et al, *Criminal justice in China: An empirical enquiry* (Edward Elgar 2011)398.

Prosecutor: The judge agreed to what I said and the suspect will be released next month. I like such a work style with the judge whom I am familiar with, so that we can discuss the case and then make a decision together.

This professional connection between the prosecutor and the judge has clear disadvantages to the defence lawyer, who is not a part of the Iron Triangle. Judges normally distance themselves from the defence lawyer, unlike their relationship with prosecutors, lest they are accused of being corrupt. Whilst there is sufficient exchange of information between the prosecutor and the judge, the defence lawyer has been excluded from the machinations of the bureaucratic coalition. Due to the lack of detailed judicial reasoning in many judgments, defence lawyers regularly find themselves uninformed of the decisions made by the court.

[Interview ADL-1] Defence Lawyer: As a defence lawyer, I have no idea whether the evidence the prosecutor adduced has been excluded by the court or not. Also we have no idea whether our view is adopted by the court or not. In China, the judicial judgment is very brief. [...] We are in darkness in regard to the reasoning of the judge.

Such partiality is epitomized by the selection of information that the court relies upon. Whereas the most common vehicle for proof is the prosecution evidence contained in the dossier, which has rarely been challenged, the evidence provided by the defence lawyer is seldom admitted by the court.⁴⁴ Due to this judge-prosecutor relationship and the crime control value that is enshrined by the bureaucratic coalition, witnesses, whose in-court testimony is mainly requested by the defence, are hardly examined in contested trials.

⁴⁴ For instance, a number of prosecutors reported that the evidence offered by defence lawyers was disregarded by the court without an explanation being provided (BDL-1, JDL-1, CDL-2 and CDL-3). This was confirmed by a judge during my interview, who divulged that evidence produced by the defence is usually not given credence unless it is subjected to severe scrutiny (GAJ-4).

3. Trial without Witnesses

The witness' written statements are generally categorised as hearsay evidence in common law countries.⁴⁵ In England, the concern with regards to the unreliability of hearsay statements gave rise to the rule against hearsay, which is one of the most entrenched evidential principles in English law.⁴⁶ In *Teper v. R.*, the Privy Council explained why the hearsay evidence is inherently unreliable:

[Hearsay evidence] is not the best evidence and it is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken to by another witness cannot be tested by cross-examination, and the light which his demeanour would throw on his testimony is lost.⁴⁷

The existence of the hearsay rule can be justified by a number of factors based in human fallibility, such as defects in perception, memory, sincerity, or ability to narrate clearly, of the maker of the statement.⁴⁸ The guiding objective of this principle is the rectitude of outcome. Since the admission of unreliable prosecution evidence could result in the wrongful conviction of an innocent person, such risk should be reduced by exclusion of hearsay evidence.⁴⁹ Given the defect of hearsay evidence, the hearsay rule reinforces the notion of the adversarial procedure by ensuring that an accurate outcome could be achieved.⁵⁰ By cross-examining the witnesses at trial, their story could be completed and rectified, which thereby 'advances the accuracy of the truth-determining process.'⁵¹ Besides the probative issue of the hearsay evidence, the significance of the accused's opportunity to

⁴⁵ However, the hearsay rules are subject to a number of exceptions. For example, in England and Wales, under the Criminal Justice Act 2003, four categories of situations are set out to allow the hearsay evidence being admitted in the court, such as parties' agreement and the court's discretion. See section 114 (1) of Criminal Justice Act 2003.

⁴⁶ According to Wigmore, between 1675 and 1690 the fixing of the doctrine against hearsay rules takes place. See John.H. Wigmore, *Evidence in trials at common law* (vol.5, 1974 Little Brown and Company) 18.

⁴⁷ *Teper v. R.* [1952] AC 480, 486 per Lord Normand

⁴⁸ Andrew L. T. Choo, *Hearsay and Confrontation in Criminal Trials* (Clarendon Press Oxford 1996) 17-29.

⁴⁹ *Ibid.*, p.14.

⁵⁰ D. J. Galligan, More scepticism about scepticism, (1988) 8 *Oxford Journal of Legal Studies* 249, 255.

⁵¹ Sarah Summers, *Fair trials: The European Criminal Procedural Tradition and the European Court of Human Rights* (Hart Publishing 2007) 147.

cross-examine or confront witnesses as to their testimony has also drawn the attention of many scholars. The face-to-face confrontation between accused and accuser is regarded as 'essential to a fair trial in a criminal prosecution',⁵² which has a symbolic meaning that deeply rests within human nature.⁵³ The accused's right to question the witness is also believed to promote openness and guard against coercion,⁵⁴ ensuring that the accused can confront any adverse witness testimony and restrain the capricious use of governmental power.⁵⁵

In spite of the rational basis of the hearsay rule and the importance of the accused's right of confrontation, the hearsay rule has not been introduced into Chinese legal reform, and the accused's right to contest witnesses as to their testimony has never been upheld by law. Instead, witnesses' written statements obtained by the police, for which there is no mechanism ensuring reliability, are still serving as the principal vehicle of proof. Hitherto it is very unusual to see witnesses being examined in the trial, albeit certain safeguards have been adopted in law to encourage witnesses to appear in the court.⁵⁶

3.1 Witness is Absent: the Reluctant Court and the Corroboration Rule

Whilst there are a number of reasons explaining why witnesses do not attend trial, lack of motivation from the judiciary seems to account for a proportion of the low attendance of witnesses in court. Some authors, such as Zuo Weimin et al. (2005) attribute the absence of witnesses to judges' working habit of dossier reading; they believe that judges' stereotypic

⁵² *Coy v Iowa* 487 US 1012 (1988) at 1017.

⁵³ Sarah Summers, *Fair trials: The European Criminal Procedural Tradition and the European Court of Human Rights* (Hart Publishing 2007) 146.

⁵⁴ M Berger, 'The deconstitutionalisation of the confrontation clause: A proposal for a prosecutorial restraint model' (1991) 76 *Minnesota Law Review*, 560.

⁵⁵ *Ibid.*

⁵⁶ See chapter 1

dossier-reading model naturally expelled the principle of using oral evidence.⁵⁷ Other scholars, for example Mike McConville et al. (2011), have suggested that judges have the mentality of wanting to block live testimony in order to control the result of the trial.⁵⁸ With the contents of the witness statements being settled, judges have had the ability to scrutinise them in advance of the trial.⁵⁹ This view was endorsed by some judges and prosecutors I interviewed, although their objections to witness cross-examination were almost invariably based upon the untrustworthiness of the witness testimony. Due to the judge-prosecutor alliance, witnesses' oral testimony that could potentially undermine the prospect of conviction would be proactively excluded by the court in order to avoid acquittal.

[Interview BPS-1] Prosecutor: Sometimes the defence lawyer applies for witnesses' to attend the court. However if we prosecutors do not think the witness' testimony is conducive to uncovering the crime, we would make an objection to the application. [...] Due to the defence lawyer's private negotiation with the witnesses, they (witnesses) would go to the court to change their previous statements against us. In such cases, we would be in a very passive position. If the witness' previous statements can be corroborated with the defendant's confession, we would make a request to the court not to admit the witness' live testimony. The court would always grant our objections.

[Interview GAJ-4] Researcher: Have you ever tried any cases that the witnesses came to the court to testify?

Judge: Yes, we have, but very few. [...] I think there is only one case per year. There were some requests on the witnesses' appearance by the defence lawyer, but I did not permit it.

⁵⁷ Zuo Weiming and Ma Jinghua, 'Xingshi zhenren chutinglv: yizhong jiyu shizheng yanjiu de lilun chanshu (shang)' (The criminal witness attendance rate: an elucidation of empirical research (i)) [2005] *Zhongguo faxue (China legal review)* June 166,167.

⁵⁸ Mike McConville et al, *Criminal justice in China: An empirical enquiry* (Edward Elgar 2011) 246.

⁵⁹ Ibid.

Why? Witnesses would change their statements in the court due to their private negotiation with the defence lawyers. They wanted to overturn the case.⁶⁰

The judge-prosecutor relationship apparently plays a vital role in the judge's reluctance to allow witnesses to enter the courtroom, as often the live testimonies requested by the defence (and rejected by the court) aimed to prove a fact adverse to the prosecution case. Allowing the witness to testify in the court, especially those who gave a statement against the defendant previously could potentially undermine or ruin the prosecution case. As witness cross-examination has not prevailed in the Chinese court, sophisticated examination skills, such as impeaching a party's own witness, have not been recognised by its statutes or mastered by the legal actors.⁶¹ The judge lacks the skills and knowledge to handle such situations. To prevent the defence from discrediting the prosecution witness publicly in the court, the request advanced by the defence would be dismissed on the grounds that bringing the witness to the court would create confusion and mislead the court. On occasions, the judge would suggest that the prosecutor conducts further investigation relating to the disputed witness, if she believes that the witness's potential testimony contains value to the case. In such a situation, the defence view would be channelled into the prosecution evidence to be admitted. As far as the court is concerned, the evidence that is presented by the prosecutor would automatically be given credibility, which derives from the authoritative status of the procuratorate.

[Interview ADL-1] Defence lawyer: In a white collar case I got a clue about getting some information that would be useful for our client. So we approached the witness and took a statement from the witness. We presented the witness' statement to the court before the trial. However, the court did not subpoena the witness to the court. On the contrary, the court exposed the evidence to the prosecution and asked the prosecutor to check the witness' statement. Therefore, it is mainly about how the prosecution would examine the evidence

⁶⁰ Here the judge implied that there has been negotiation to persuade the witness to tell the truth or to lie in order to support the accused.

⁶¹ This is similar to the unfavourable and hostile witnesses in English evidence law. See S.3 of the Criminal Procedure Act 1865, s6 of the Civil Evidence Act 1995, and s 119 of the Criminal Justice Act 2003.

unilaterally. Only when the prosecutor has approved the evidence, may the court admit the evidence.

According to defence lawyers, the court may grant the application of a witness' attendance, if a defence lawyer intended to bring in a new witness to give testimony. This could be understood by the fact that the implication of the new witness is to shed light on the truth, rather than openly discrediting the prosecution evidence. Once the judge has received the application of testing the new witness from the defence, she would forward the information to the prosecution. Very often, a further investigation may be requested by the prosecutor to review the new evidence, and the trial would be postponed.

[Interview CDL-2] Defence lawyer: In terms of the defence witnesses, the court has rarely turned us down if we bring in a new witness unless the court thought it was unnecessary. But it is very unlikely that a request for the prosecutor's witnesses to appear in the court will be successful, as there are written statements from them already in the dossier. They always say that the police have followed the law and procedure; therefore all the evidence is admitted.

The judges' preference for written statements must also be seen as a logical and necessary consequence of the managerial system of the judiciary in the context of China. As mentioned earlier in this chapter, under many circumstances the judge who hears the trial is not the one ultimately that decides the case. Since the trial judge's individual experience in the court (her perception of the witness testimony and her assessment of the demeanour of the witness) cannot be expressed within court documentation, the witness' attendance in the court cannot aid the decision makers in determining the truthfulness of the witness statements. Compared to the witnesses' live testimony, the static statements compiled in the dossier is more suited to the review procedure followed by the leaders of the court.

In fact, the trial judge does have limited discretion with regard to the admissibility of evidence. The rule of corroboration, which requires that the evidence used to convict the defendant must be supported by other evidence, is imposed so that trial judges do not have

the capacity to access the evidence based upon their own belief.⁶² In legal practice in China, the rule of corroboration is primarily concerned with quantitative rather than qualitative standards. This requirement of quantity is often described as 'the chain of evidence' (*zhengju suolian*).⁶³ Therefore if the testimonial evidence is not buttressed by other evidence, or is outnumbered by the pieces of evidence used to prove the contrary, it is likely that the witness' entry to the courtroom would be potentially blocked.⁶⁴

[Interview GAJ-1] Judge: We cannot just believe what they (the witnesses) said in person. We have to review other evidence. If what they have said in the police station was confirmed to be true, we have to admit their previous statements. If the witnesses' statements and other evidence, such as the real evidence, can corroborate the defendant's confession, we have to admit what they said in the statements instead of what they said in person (in court). The most crucial thing is that the fact must be ascertained by the chain of evidence. If the witnesses' statements and other evidence are against the defendant, we will make a decision which is adverse to the defendant.

According to article 195 of CPL 2012, to convict the defendant, the *corpus delicti* must be clear and the incriminating evidence should be reliable and sufficient. In order to be 'reliable and sufficient' (*queshi chongfen*), evidence that is used to prove the guilt fact must be legally obtained and corroborated by supporting evidence.⁶⁵ No conviction can be sustained on the basis of confession evidence alone.⁶⁶ Based on the rhetoric of the law, it

⁶² The corroboration rule can be found in the standard of proof, which is 'the fact is clear and the evidence is sufficient' (*Shishi qingchu, zhengju queshi chongfen*), reference by many judicial interpretations.

⁶³ The chain of evidence has been routinely used by the judge to show that the proof of guilt has reached the standard required by law. See article 53 of CPL 2012. According to the theory of evidence in China, the chain of evidence is also required to be 'closed'. The argument of standard of proof in China, see Li Xueguan, 'Lun xingshi zhengming biao zhun jiqi cengcixing (On the standards of proof in criminal cases and its hierarchy)' (2005) 5, *China Legal study (Zhongguo faxue)* 125; Chen Guangzhong and Chen Haiguang, 'Xingshi zhengju zhidu yu renshilun: Jianyu wuqulun, falv zhenshilun, xiangdui zhenshilun shangque (Criminal evidence system and the ideology: Discussions on the mistakes, legally constructed truth and comparative truth)' (2001) 1 *China Legal study (Zhongguo faxue)*, 37.

⁶⁴ This is clearly different from the evidence law in England, which has no general principle that a defendant cannot be convicted on a single piece of uncorroborated evidence. See Roderick Munday and Nicola Padfield, *Evidence* (6th edn, OUP 2009) 57.

⁶⁵ The reliability and sufficiency of the evidence is explained in article 53 of CPL 2012, which elucidates that 'all facts leading to the conviction and sentencing should be proved; the inculpatory evidence is proved to be true based upon legal procedure, and the guilty fact has been proved beyond reasonable doubt on the basis of the overall evidence adduced'.

⁶⁶ See article 53 of CPL 2012.

could be assumed that the standard of evidence would be high enough to avoid miscarriages of justice with multiple pieces of evidence being required to convict.⁶⁷ However, this is far from being the case in the context of China. The rule of corroboration does not have specific meaning nor does it imply any particular technique to assess the adequacy of evidence.⁶⁸ In fact, there is no specific *sine qua non* in regards to the extent of corroboration.⁶⁹ It does not require that the supporting evidence comes from an independent source.⁷⁰ Hence the so called 'self-corroborating confession', which allows the facts known only to the defendant as a result of her participation in the crime, could be admitted as supporting evidence to prove the guilt of the defendant.⁷¹ For instance, the identification of the crime scene that derives from the confession could be used to support the confession evidence. As long as details of the confession evidence are roughly supported by other evidence, the defendant's confession can be used as the primary evidence to secure the conviction.⁷²

[Interview GAJ-2] Judge: If the details of one piece of evidence are shown in another piece of evidence, the evidence is corroborated. The details may not be exactly the same, for example, the time. That is because the witness and the defendant may have different perceptions. As long as they are roughly matched and it is convincing, (the conviction is secured). For example, if the victim said his phone was stolen and gave a description of the phone. If the detail of the phone could be reflected in the defendant's confession and he also

⁶⁷ This viewpoint could be seen in Frank Belloni and Jacqueline Hodgson, *Criminal injustice: An evaluation of the criminal justice process in Britain* (Macmillan Press 2000) 159-162.

⁶⁸ The different meanings of corroboration in jurisdictions in the United States and the United Kingdom could be seen in Mike McConville, *The royal commission on criminal justice: corroboration and confessions, the impact of a rule requiring that no conviction can be sustained on the basis of confession evidence alone* (HMSO 1993) 51-65.

⁶⁹ For example, in England, the corroborative evidence must be independent which confirms the guilty fact in some material particulars. According to the New Jersey test in the United States, the corroboration would be provided by 'independent proof of facts and circumstances which strengthen or bolster the confession and tend to generate a belief in its trustworthiness, plus independent proof of loss or injury.' Ibid, 61

⁷⁰ This is very similar to the New Jersey and Scottish test. See Mike McConville, *The royal commission on criminal justice: corroboration and confessions, the impact of a rule requiring that no conviction can be sustained on the basis of confession evidence alone* (HMSO 1993) 51-65.

⁷¹ The detail of the self-corroborating confession, ibid

⁷² This was found in almost all the dossiers at Site A during my period of observation. The evidence of the accused's confession forms the crucial part of the dossier (Field note APU-17,18 and 22). Without confessions from the accused, the prosecution's case would fall apart, as other types of evidence cannot meaningfully prove alleged crimes. This is also shown in McConville, et al (2011). See Mike McConville et al, *Criminal justice in China: An empirical enquiry* (Edward Elgar 2011) 70-97.

confessed how he stole the phone, he should be convicted.

Given the coerced-compliant circumstances of the investigation in China, corroborating the confession evidence with witnesses' statements poses no particular problem. As mentioned in chapter 3, there is little safeguard in the Chinese investigation to ensure the voluntariness of confession and reliability of the prosecution evidence. In many instances, the defendant's confession was based upon the victim or the witness' account and was used to incriminate the accused. With the official record of the police interrogation being susceptible to manipulation, the written documents contained in the dossier can be easily found to bolster each other in a crafted method so that the guilt of the defendant is established. The following prosecutor's instruction in relation to how to fabricate the statement reveals how it works:

[Field-note APU-63] A prosecutor was teaching three police officers how to make the confession evidence out of the witness's statement.

Prosecutor: My dear colleague, I have to tell you something very important. Don't always use copy and paste when you make the suspect's confession based upon the witnesses' statements. If you make identical statements, people would doubt the authenticity of their testimonies. Details, such as the precise time, can be slightly different, because witnesses' memory varies and they cannot remember the time and other details exactly. If you make the details a little bit different, their statements are more convincing.

According to my study of 63 convicted cases in site A,⁷³ of 50 cases (n=79%),⁷⁴ certain particulars of the defendant's confession, such as the description of the stolen item and the time that the crime took place, was confirmed by statements of witnesses (including the victim). Apart from 29 cases involving the 'buy-and-bust' police operation, in which it was reported that the suspect was caught in the act of committing a crime, in the remaining 21

⁷³ These judgements were received up to 30th May 2012 to all the defendants in the judgements that were convicted.

⁷⁴ The other 13 cases in this sample are drink and drive cases. The confession evidence in those cases was believed to be supported by the medical report in regard to the serum test and the police's statements.

cases, the victim's statement could only prove that a crime was committed rather than implicating the actual perpetrator. However, the defendant's confession was believed to be corroborated by the witnesses' statements according to the judgment, which did not give any detailed explanation. Two cases had multiple witnesses' statements, which involved significant contradictions in their details.⁷⁵ Yet, these important inconsistencies were not challenged by the defence, and were disregarded by the court. Of all 63 cases, no forensic evidence in the form of material objects discovered at the crime scene was produced. Excluding the drink and drive cases, the majority of cases (n=49 cases) had an expert's conclusion, such as the assessment of the value of the stolen items, despite its peripheral relevance in pointing towards the involvement of the defendant in the offence. In all these cases, the police's statements describing how the arrest was carried out (*zhuahuo jingguo*) was taken into account by the judgment, which determined it to be part of a chain of evidence, even though it had no immediate bearing on the commitment of the crime.⁷⁶

As part of the court managerial system, the rule of corroboration has been utilised to facilitate hierarchical review. With the power of adjudication centralised in the hands of court leaders, the 'fact' should be able to stand the test of repeated scrutiny, rather than the short-lived trial proceedings. Thus the integrated case dossier in which pieces of evidence appear to confirm each other has been the ideal choice for bureaucratic supervision. In so doing, the autonomy of the trial judge has been substantially curtailed, as what happened in the trial may not dictate the outcome of the case.

[Interview ATJ-1] Judge: What is important in China is that the evidence must be corroborated, so that a chain of proof can be established. The effect of this kind of proof

⁷⁵ One of the cases (CASEA 23) involved an assault of a man in a market. According to one witness, the victim and the accused had a fierce argument before the assault took place. However, according to the victim, he (the victim) did not say anything when the accused hit him. Another case (CASEA 25) was about the sexual assault of a young girl, in which the mother of the victim stated that the assault happened twice, whilst the child (11 years' old) maintained that the assault only took place once.

⁷⁶ This is reflected in a number of judgements that I saw in the field. Without giving detailed reason why the evidence is believed to be corroborated, in all the judgements of convicted cases, almost as a set format, the judge wrote 'the court believes that the fact is clear and the evidence is reliable and sufficient, the evidence is corroborated.'

system is that it can be examined and checked repeatedly. Therefore, if you see it you will make a conclusion; if I see it I will make the same conclusion. (That is) the mechanism of the control of judicial power in China. It emphasizes the repeatable examination of the same judicial result. It (the system) is based on this.

As such, there is no surprise that the conviction rate in China has been steadily high and the prosecution case is easily approved by the court.⁷⁷ Since the credence and accuracy of the evidence are tested by supporting documents in the dossier, rather than relying on observing the witness's demeanour and assessing the live testimony, calling the witness to give testimony becomes unnecessary. Also, subpoenaing the witness to testify would increase the administrative work for the court and slow down the trial process.⁷⁸ Due to the high volume of cases in many local courts, and taking account of the fact that judges are paid by the number of cases they process, efficiently trying the case by reviewing the written evidence, rather than looking for the truth, is preferred by the judge.

[Interview ATJ-1] Researcher: Have you ever asked the witness to the court to testify in a contested case---I mean if the lawfulness of the evidence is not questioned by the defence?

Judge: Are you insane? We are so busy. Who will do that? We have to deal with a lot of cases each month.

[Interview APS-6] Prosecutor: [...] the court has never doubted about the witnesses' statements in the dossier. The court admits what they (the witnesses) said in the dossier automatically. The judge wants to close the case quickly. [...] I don't think the court bothers to look into whether what the witness said is true or not anyway.

Due to such an arrangement, the defendant is not given the opportunity to examine witnesses at trial. Instead, prosecution dossiers have been heavily relied upon to make decisions. For both judges and prosecutors, the trial (either the formal trial or the

⁷⁷ According to the available official statistics of China, the conviction rates in recent years are: 99.86% (the year of 2008), 99.98% (the year of 2009), 99.9% (the year of 2010). See *Law Yearbook of China* (Press of Law Yearbook of China 2009) 166; *Law Yearbook of China* (Press of Law Yearbook of China 2010) 159; *Law Yearbook of China* (Press of Law Yearbook of China 2011) 202.

⁷⁸ For example, the court has to notify the witness in advance and organise the reimbursement of the witness's traveling.

simplified trial) is not important. In fact, for many of them, the court hearing is merely a formality which legitimises the judicial decision.

3.2 The Ordinary Trial: the Presentation of Statements

Two types of trial procedures are available under the framework of CPL 2012.⁷⁹ For the guilty plea cases, if the fact is clear, and the evidence is sufficient enough to convict the defendant, a simplified trial procedure will be applied.⁸⁰ The alternative to the simplified trial is the ordinary trial procedure, which is applied to a wider range of cases. Following the trend worldwide to avoid full adjudication, the application of the simplified trial in China has significantly gained momentum in recent years. Whilst the employment of the ordinary trial procedure has substantially shrunk in the first instance court, it is still widely utilised for cases which are regarded as major, influential, or serious, as well as cases for appellate trial.

The ordinary trial is presided over by a collegial panel, which is either composed of three professional judges or a mixture of judges and lay judicial assessors.⁸¹ This ordinary trial procedure consists of five stages: the opening session, court investigation, court debate, defendant's final statement, and the court's final remark. The opening session is an introductory stage that informs the defendant of the names of the legal actors in the courtroom and her procedural rights, as well as checking the basic information about the defendant. During the court investigation, evidence from both parties is adduced and

⁷⁹ Alternative to the public prosecution, there is a private criminal prosecution which is brought by the aggrieved party, usually the victim or the victim's close family. See article 204 to 207 of CPL 2012. These private criminal prosecutions are limited to minor criminal cases and only account for a small proportion of the criminal cases in China. Due to the theme of this thesis, this study does not intend to explore this area of the Chinese criminal justice system.

⁸⁰ See article 208 of CPL 2012. Although the law is equivocal in terms of who should decide 'the fact is clear and the evidence is sufficient', it can be implied that this should be made by the judge, rather than the prosecutor, who reviews the case dossier in advance of the trial.

⁸¹ When there is a mixture of professional judge and lay judicial assessors, the trial should be presided by the professional judge.

contested; and, if there are any, summoned witnesses should be cross-examined at this stage.⁸² Following the court investigation is the court debate, which provides a forum for both parties to argue their legal views.⁸³ After the court debate, the defendant will be asked to give a final statement. This is usually a time for the defendant to express her remorse or plead for leniency.⁸⁴ The trial concludes with judge's final remarks, which gives a fixed date to announce the judgement and the defendant's right to appeal.

With the vast majority of trials having no live witnesses, the court hearing is essentially about presenting the written statements.⁸⁵ The evidence adduced by the prosecutor usually includes the confession statements elicited from the accused, the statements taken from the witnesses, expert conclusions, records of inquests and examinations, and photographs of the crime scene.⁸⁶ The evidence produced in the court is paper based, therefore the trial process is tightly controlled and is lacking in drama. Forensic evidence is seldom demonstrated in a detailed manner. 'Real' evidence in the form of material objects, such as scientific evidence discovered at the crime scene, is rarely adduced.⁸⁷ In seeking to establish its case, the prosecution mainly relies upon the confession evidence,⁸⁸ with other pieces of evidence, such as the victim's statement confirming the guilt of the defendant. Since the major part of the court trial is about reading out these statements fully or selectively, unpredictable events are unlikely to occur in the courtroom. The hearing is often packed with monotonous presentations.⁸⁹ This is particularly the case if the prosecutor has a substantial number of dossiers to read out and no significant confrontation is offered by the defender.

⁸² See article 192 of CPL 2012.

⁸³ See article 193 of CPL 2012.

⁸⁴ This is summarised by my observation in the court trial in site A (Field note APU-5, 32, 40, 46, 47, 50, 52, 53, and 56).

⁸⁵ Field note APU-46,47, 48, 50,51 and 53.

⁸⁶ Field note APU-46,47, 48 and 50.

⁸⁷ Field note APU-46,47, 50 and 54. Interview APS-1,2,3 and 6.

⁸⁸ Field note APU-46,47,50,51 and 53.

⁸⁹ Field note APU-46,47,50,51, 53, 57,58, 60 and 63.

[Field-note APU-63] Prosecutor: Yesterday's trial was so long winded. I had such a thick dossier and I read statement after statement. The judicial assessor told me that I should prepare a cup of tea to keep me awake.

[Field-note APU-48] Prosecutor: It was a case with lots of volumes to the dossier. The court borrowed a trolley from the supermarket to carry the dossiers. There were three trolleys! I had to read the evidence out in the court, which made my throat so sore.

[Field-note APU-46] Prosecutor: I have to admit that if I listen to a case tried by ordinary procedure that is not prosecuted by myself, I would doze off easily. I understand why some judges fall asleep in the court.

A significant proportion of defendants are not represented by defence lawyers.⁹⁰ The legal aid scheme only covers a small category of criminal cases,⁹¹ and the retained defence lawyers are often expensive.⁹² For most defendants who come from the lower social class, the lawyer's fee is simply unaffordable. In site A, in a sample of 144 defendants (involved in 120 criminal cases), tried in a basic court, there were only 24 defendants (involved in 19 cases) who were assisted by defence lawyers in the ordinary procedure.⁹³ These cases represented by defence lawyers were concentrated on the 'white collar' crimes, such as bribery and embezzlement. The ratio of representation was higher in the intermediate court, because more severe sentences, such as the death penalty or life imprisonment, which was covered by legal aid, were potentially going to be imposed on the defendant.⁹⁴

⁹⁰ It is estimated that roughly 80 per cent of defendants in China are not represented by counsel at all. See Ira Belkin, 'China's tortuous path toward ending torture in criminal investigation', in McConville and Eva Pils (eds.), *Comparative Perspectives on Criminal Justice in China* (Edward Elgar 2013) 97.

⁹¹ According to article 34 of CPL 2012, only the juvenile cases; or cases in which the defendant has limited or no capacity; or is blind, deaf or dumb; or might be sentenced to life imprisonment or the death penalty, can be appointed a free defence lawyer by the state. However, in a particular province in the East of China, the legal aid scheme covers much wider remit. According to my interview, in Site G, all the defendants in the second instance are appointed with defence lawyers.

⁹² In Site A, a less well developed area in China, defender charges 10,000 yuan (about 1000 pounds) minimum per case. (Interview GAJ-3)

⁹³ This sample was drawn from the criminal court (including juvenile cases) between June and July 2012. This figure is similar to the finding of Mike McConville et al (2011). See Mike McConville et al, *Criminal justice in China: An empirical enquiry* (Edward Elgar 2011) 293.

⁹⁴ As mentioned in footnote 72, the defendant who is likely to be sentenced to life imprisonment or the death penalty should be appointed with a duty lawyer by the state. However, no official data was accessible to the researcher.

[Interview ATJ-1] Judge: Only 10% to 20% of defendants are represented (in site A). [...] Those white collar cases have more defence lawyers involved. For most theft and robbery cases, the defendants are usually in a very bad financial situation. They cannot afford a lawyer. All the juvenile cases are represented.⁹⁵ Apart from those cases, most defence lawyers are retained privately by the defendant or his family.

It can be seen therefore that a significant number of cases that are tried in the first instance are lacking in adversarial spirit. The strength of the prosecution and the defence is severely unbalanced in those cases, as the unrepresented defendant has not been given any legal advice at all, nor does she have any opportunity or ability to prepare a defence case. In the absence of witnesses, the ordinary trial procedure is accusatorial in nature. Many defendants, without professional advice, are extremely vulnerable in the court and unable to challenge the prosecution case at all. The following case is an example that demonstrates the typical responses of unrepresented defendants.

[Field-note APU-35] (A case of provocation and disturbance)

Judge: Defendant, do you have any evidence to adduce.

Defendant: [Behaving confused] I don't know...No.

Judge: All the prosecution evidence is legally gathered and they have followed the legal procedure. They are objective and genuine. The court will admit all the evidence that has been adduced by the prosecutor. Now we move on to the court debating.

[...]

Judge: Defendant, do you have any opinions regarding your conviction of the crime?

Defendant: No.

⁹⁵ According to Article 267 of CPL 2012, the court, the procuratorate and the police must appoint defence lawyers for juvenile cases if the suspect does not retain a private lawyer. It is noteworthy that the revised criminal procedure law has significantly improved the protection for the juvenile suspect, such as the legal aid scheme, the introduction of appropriate adult and the suspect's criminal record concealment. Relevant discussion see Stephanie Persson, 'China Talks Juvenile Justice Reform: A Constructivist Case Study' [2014] *Columbia Public Law Research Paper* (14-374).

Judge: Prosecutor, do you have a sentencing suggestion?

Prosecutor: Since the defendant has confessed his guilty behaviour honestly, we suggest the Article 67(3) of criminal law should also be applied. Based on all these facts, we suggest the court sentence the defendant to the fixed term imprisonment of between 6 months and 18 months.

Judge: Defendant, do you have any opinions regarding your sentencing?

Defendant: No.

For cases that the defendant is legally represented, the quality of the defence services varies significantly, depending on the skill of the defence lawyer and the sense of responsibility of the individual lawyers. My observation in site A was in line with the finding of Mike McConville et al (2011)'s study, lawyers retained by the defendant or her family were generally found to be more diligent and proactive than defence lawyers appointed by the legal institutions.⁹⁶ Given the *pro bono* feature of the legal aid work in China, legal aid lawyers are usually lacking in enthusiasm or motivation. According to the Legal Aid Regulations, law firms are imposed with the obligation to provide free legal work for certain categories of vulnerable defendants. The defence lawyer appointed by the law firm is often not remunerated for their legal work, and sometimes they have to pay for expenses such as travelling expenses.⁹⁷ To minimise the cost generated by representing these cases, many legal aid lawyers are reluctant to take the case seriously or actively prepare for the case. In many legal aid cases, the defence lawyer's performance during the

⁹⁶ See Mike McConville et al, *Criminal justice in China: An empirical enquiry* (Edward Elgar 2011) 336. My observation at site A also indicated that retained defence lawyers were generally more active in pre-trial preparations and were engaged in activities such as coming to the prosecutor's office to photocopy prosecution evidence and meeting with their clients. In comparison with appointed defence lawyers, retained defence lawyers were more strategic at court and were more persistent in pursuing sentence mitigations. Instead of merely pleading for leniency based upon the defendant's family background, the mitigation requests put forward by retained defence lawyers were usually more evidence-based, centring around facts such as that the defendant turned herself in or has previously done legally recognised meritorious service (Field note APU-41,42,44,45,52 and 54).

⁹⁷ See Legal Aid Regulations of People's Republic of China. According to article 28 of Legal Aid Regulations, the defence lawyer who refuses to accept legal aid cases without proper reason, or terminate legal aid cases without authorisation, may be subjected to admonishment or suspension of licence. However, according to some defence lawyers, the government started to subsidise their costs in recent years albeit the funds are still very limited.

course of the trial is below expected standards.

[Interview ADL-1] Researcher: Are you paid for legal aid cases?

Defence lawyer: No. It is our duty (to do the legal aid work) and we cannot charge fees. It is for the public benefit. It emphasises our duty to do so. So we must make that sacrifice.

[Interview ATJ-1] Judge: Defence lawyers are generally useless...Above all, the legal aid lawyers are the worst. They just come to finish off their work by pleading leniency. They cannot give any effective legal opinions in the court for most cases.

Retained defence lawyers, on the contrary, possess greater resources to deal with their cases. They also have the opportunity to intervene in the case at an earlier stage and thus are able to construct the defence case within the time available. Despite these advantages enjoyed by the retained defence lawyers, the quality of the defence work offered by the defender cannot be guaranteed. Whilst some defence lawyers engaged in proactive case preparation, and thus were able to provide persuasive argument in the court, many defence lawyers acted more perfunctorily, and their defence strategies demonstrated in the court were intrinsically problematic.

In Mike McConville et al (2011)'s study, many defence lawyers were found to be generally inactive at trial and were submissive to the prosecution and the court, with their main strategy being to enter a plea for leniency.⁹⁸ Whereas the scale of my research involving a total of 12 represented court trial observations in two sites, which was much smaller than that of McConville et al (2011), the findings relating to the effectiveness of defence strategies in the first instance trial closely replicated those of McConville et al (2011)'s study. I found that a significant proportion of the defence strategy was basically focused on the defendant's co-operative disposition, such as voluntary surrender, meritorious services or the defendant's good attitude in admitting her guilt. Although these were valid legal arguments that could potentially lead to mitigation, a negative consequence of this was

⁹⁸ See Mike McConville et al, *Criminal justice in China: An empirical enquiry* (Edward Elgar 2011) 317-350.

that, the defence was unable to build a solid foundation to challenge the prosecution case even if there was a realistic possibility to create a robust defence.

McConville et al (2011) diagnosed that the Chinese defence lawyer has to either choose 'challenging the system through a genuine engagement with the prosecution case', or 'submitting to the inevitability of conviction' to earn the reduction in sentence by playing contrition.⁹⁹ Due to such a dilemma, the majority of defence lawyers typically took the conservative approach in the court, rather than challenged the prosecution case vigorously. Despite being in the minority, robust defence that aims to deconstruct the prosecution case by disputing the legality of the procedure or the lawfulness of the prosecution evidence does exist. A number of defence lawyers, especially human rights lawyers (*weiquan* lawyers), have suffered a cost to their liberty, safety and career for their commitment and for the legal values in which they believe.¹⁰⁰ Thus before criticising the passivity of the defence lawyer and their self-preservation, it is crucial to understand that these defence lawyers are fighting alone in a hostile environment where 'strong and independent advocacy is not expected and mechanisms for judicial review of unjust laws are weak'.¹⁰¹ The Iron Triangle is not ready for the genuine openness of being challenged.¹⁰² As an outsider of the legal institutions, defence lawyers struggle to find a suitable position within the system. They have very limited ability to gather evidence on their own behalf and may face various restrictions on accessing the dossier. To fulfil their job as a criminal law defender, they may run the risk of retaliatory prosecution against themselves or even

⁹⁹ Ibid. 318.

¹⁰⁰ See Fu Hualing and Richard Cullen, 'Climbing the Weiquan Ladder: a radicalising process for Rights-Protection lawyers', (2011) 205, March *The China Quarterly*, 40-59; Eva Pils, "'Disappearing" China's human rights lawyers', in Eva Pils and Mike McConville (eds.) *Comparative perspective criminal justice in China* (Edgar 2013) 411-438; Jerome A. Cohen, 'Politics and criminal justice', edited in Eva Pils and Mike McConville (eds.) *Comparative perspective criminal justice in China* (Edgar 2013) pp.439-443. Lan Rongjie, 'Killing the lawyer as the last resort: the Li Zhuang case and its effects on criminal defence in China', in Eva Pils and Mike McConville (eds.) *Comparative perspective criminal justice in China* (Edgar 2013) 304-320.

¹⁰¹ Eva Pils, "'Disappearing" Chin's human rights lawyers', in Eva Pils and Mike McConville (eds.) *Comparative perspective criminal justice in China* (Edgar 2013) 415.

¹⁰² Elisa Nesossi, 'Compromising for 'justice'? Criminal proceedings and the ethical quandaries of Chinese lawyers', in Eva Pils and Mike McConville (eds.) *Comparative perspective criminal justice in China* (Edgar 2013) 256-275.

becoming one of the 'being disappeared' by the authorities.¹⁰³ They have exposed themselves to the dangers of persecution purely because of their intention to gather evidence in favour of her client.¹⁰⁴ Certain scholars believe that it is a little exaggerated to label the Chinese defence lawyer as an 'endangered species'.¹⁰⁵ However, the chilling result of certain high profile cases has given a clear signal that 'no lawyer is safe from prosecution if she stands in the way of government conviction of alleged criminals.'¹⁰⁶ Hitherto it may be early to assess the actual effect of the strategy of Article 42 of CPL 2012 on addressing the tension between the defence lawyer and the legal institutions.¹⁰⁷ For the sake of safety, the consensus of opinion arrived at by many defence lawyers is that they should adopt the skill of self-censorship and step away from zealous criminal representation.¹⁰⁸

Against such a background, it is understandable that active defence work is very rarely seen in the Chinese court. For the few dedicated defence lawyers who strive to obtain the best possible result for the defendant, the adjudication often falls short of expectation due to the fact that many decisions have already been pre-determined. In *CASEA 64*, the defendant was accused of selling drugs to a drug user (the police informant).¹⁰⁹ The defence lawyer intended to exclude the defendant's confession---the key inculpatory evidence---by alleging that the confession was elicited by torture. To attest to the legality of the disputed interrogation, the prosecutor produced a video recording of the

¹⁰³ Eva Pils, "'Disappearing' Chin's human rights lawyers, in Eva Pils and Mike McConville (eds.) *Comparative perspective criminal justice in China* (Edgar 2013) 411-438.

¹⁰⁴ For example the Li Zhuang case in Chapter 5.

¹⁰⁵ Hou Shumei and Ron Keith, 'The defence lawyer in the scales of Chinese criminal justice' (2011) 20:70 *Journal of Contemporary China*, 379, 395.

¹⁰⁶ Lan Rongjie, 'Killing the lawyer as the last resort: The Li Zhuang case and its effects on criminal defence in China', in Mike ConConville and Eva Pils, eds, *Comparative Perspectives on Criminal Justice in China* ((Edward Elgar Publishing Limited, 2013) 319.

¹⁰⁷ See article 42 of CPL 2012. This has been discussed in chapter five. See also Joshua Rosenzweig et al, Comments on the 2012 revision of the Chinese Criminal Procedure Law, in Mike McConville and Eva Pils (eds.), *Comparative Perspectives on Criminal Justice in China* (Edward Elgar 2013) 500-502.

¹⁰⁸ Lan Rongjie, 'Killing the lawyer as the last resort: The Li Zhuang case and its effects on criminal defence in China', in Mike ConConville and Eva Pils (eds.), *Comparative Perspectives on Criminal Justice in China* ((Edward Elgar 2013) 319.

¹⁰⁹ This case was tried in October 2013 in site A, ten months after CPL 2012 came into force.

interrogation. This video was challenged by the defence, and it was proved to be artificially made after the interrogation. With the details of the fabricated video supporting what the defendant had alleged initially, the defence lawyer argued that the defendant's confession in the police station should be excluded.

[Field-note APU-53] Defence lawyer: The video recording was believed to be the record of the first interrogation. It only lasts 10 minute and 8 seconds. According to the written record of interrogation, the interrogation should have lasted for two hours. From the video, we can see the cigarette, lighter and drug in the picture, which support what the defendant said just now. The defendant made it very clear earlier that the police used the cigarette to entice him to make a confession. Besides that, the record of drug weight has no other evidence to support it. From what we saw on the video, the defendant had already signed the record when the interrogation was conducted. Therefore, we request the court to exclude the evidence.

Facing the convincing reasoning of the defence, the prosecutor asserted that the confession evidence in question was corroborated by other evidence, and the video recording should be treated as a separate piece of evidence to bolster the confession. In other words, the prosecutor suggested that the video recording should be relied upon to support the content of the confession, notwithstanding it was fabricated by the police.

Prosecutor: The defendant's first interrogation was supported by the witnesses' [the police informants] statements and the video recording. It is reliable. [...] Furthermore, the video that I produced should not be used as a recording to prove the legality of the interrogation. I adduced this video as a piece of *separate* evidence to corroborate what the defendant confessed during the police interrogation. From the video recording, we could hear what the defendant said, which was the same as what the police wrote in the record. It should be treated as a backup of the interrogation process, rather than a piece of *separate* evidence.

Despite the apparent deficiency in this repudiation, the prosecutor's view was endorsed by the court in the final judgment, in which the confession was deemed reliable and the

defendant was convicted based upon this confession evidence. It is noted that although the exclusionary rule has been formally integrated into the criminal procedure law, there is no indication that the application of excluding illegally obtained evidence by the court is more common than it used to be.¹¹⁰ According to the CPL 2012, when the issue of illegally obtained evidence is raised (usually by the defence), it is incumbent upon the prosecution to prove beyond reasonable doubt that the disputed evidence is obtained lawfully.¹¹¹ Whilst the rhetoric of this provision seems auspicious for the defendant, the judicial practice in reality, revealed the contrary. After I had a brief conversation with the prosecutor charging this case, it was very clear that the conviction of the case had been settled prior to the trial. Before this case was tried, the judge (or the court leaders) had set the tone and decided that this case was not open to an alternative solution. As the prosecutor responsible for this case indicated:

[Field-note APU-51] Prosecutor: [...] This case will be convicted for sure. If the judge was not going to convict the case, she would have communicated with me before the trial. It has been pre-decided, as most other cases are.

Indeed, for many cases, the trial process is basically a formality, through which the pre-determined outcome is transmitted and ritually legitimised. In this sense, the old practice of 'verdict first and trial second' has prevailed to date.¹¹² This was evidenced in the judges' celebration of the revised article 172 of CPL 2012, which restored the old practice of CPL 1979, in which judges are able to read the prosecution dossier before the trial. CPL 1996

¹¹⁰ According to Ira Belkin, one of the critical defects of the exclusionary rule initiated by the judicial notice in March 2010 was that it lacked the recognition of status in law. See Ira Belkin, 'China's tortuous path toward ending torture in criminal investigation', in Mike McConville and Eva Pils (eds.), *Comparative Perspectives on Criminal Justice in China* (Edward Elgar 2013) 105-107. See also Zhang Bin, 'Woguo feifa zhengju peichu guize yunyong de shida jishu nanti: jianping guanyu banli xingshi anjian paichu feifa zhengju ruogan wenti de guiding' (Ten technical problems of applying exclusionary rule in China: analysing the regulation of excluding illegally obtained evidence when dealing with criminal cases) (2010) *Zhongguo xingshifa zazhi* (China criminal Magazine) 74.

¹¹¹ See article 53-58 of CPL 2012. Despite the burden to prove beyond reasonable doubt having been introduced by CPL 2012, it is rarely implemented in judicial practice. With the same token, it is highly doubtful whether the same standard of proof can be understood and applied by judges when dealing with the exclusionary rules.

¹¹² Mike McConville, Criminal justice in China and the West, in Mike McConville and Eva Pils (eds.), *Comparative Perspectives on Criminal Justice in China* (Edward Elgar 2013) 35.

tried to enhance the role of the trial in judges' decision-making by denying their access to the dossier before the court hearing.¹¹³ This practice was also introduced as a method of protecting the defendant against being biased from the judge often reading the prosecution dossier in advance of the trial. With none of the safeguards in connection with the centrality of the trial in place, such an attempt of impartiality proved to be unsuccessful.¹¹⁴ Occasionally judges would 'borrow' the dossiers from the prosecutor before the trial if the pending case was considered as major and influential.¹¹⁵ As the trial continued to be *pro forma*, CPL 2012 again allows judges to view the prosecution dossier before the trial.¹¹⁶ This revision has been heralded by the trial judges at all levels, as it is believed to be suited to the legal practice in China.¹¹⁷ When interviewed, certain judges openly expressed that their decision relied upon the prosecution dossier, rather than the court hearing.

[Interview ATJ-1] Judge: The Chinese judges do not rely on the evidence that is adduced in the court. [...] They are responsible for the truth that is embodied by the dossier. Do we dare to make a judgment just by hearing the witnesses' testimony in the court? No. No judge has the courage to do this in China.

The judge's statement conforms to the outcome of 42 cases I sampled in site A. By comparing the judgment with the Bill of Prosecution, it was not difficult to pinpoint that

¹¹³ This was introduced to prohibit the old practice of 'verdict first, trial second' in the 1979 regime. However, such practice was criticised by some scholars. They believed that this practice substantially curtailed the defence rights to access the dossier. Because the court did not retain the dossier before the trial, defence lawyers who could not access the dossier in the procuratorate were deprived of the chance to review the dossier at court. See for example, Chen Weidong and Hao Yinzong, 'Woguo gongsu fangshi de jiegouxing quexian jiqi jiuzheng (The structural defect and its adjustment of the prosecution in China) (2000) 4, *Faxue Yanjiu (Legal Research)* 101. However, in the guilty plea procedure, the trial judge was allowed to read the case dossier before the trial. See Article 6 of 'Several Conditions of the application of the guilty plea procedure by the Supreme People's Court, the Supreme People's Procuratorate and the Department of Central Justice 2003'.

¹¹⁴ The delayed transference of dossiers to the court emphasising the centrality of the court is presumed on the basis of the equal arm of both parties, especially the defence's rights in the investigation; the availability of the witness, and the autonomy of the trial judge. However, none of these elements existed within the framework of CPL 1996.

¹¹⁵ Interview BPS-1.

¹¹⁶ As described in chapter 3, this includes the evidence dossier and the document dossier. Before CPL 2012, only the photocopies of the main prosecution evidence, the list of witnesses, and the catalogue of evidence were sent to the court before trial.

¹¹⁷ Based upon my interview with judges and field observation (informal conversations with judges), 23 out of 25 judges were extremely pleased with the result that CPL 2012 allows them to read the dossier in advance of the trial. One judge even told me that the whole criminal tribunal was relieved by the fact that they were given the opportunity to read the dossier before the trial (GAJ-4). Only two judges expressed concerns about developing biased views against the defendant.

the judicial decisions (both the verdict and the sentence) were perfectly in accordance with those suggested by the procuratorate in the majority of instances. Although four cases with multiple charges resulted in partial acquittal, the major accounts of crime charged by the prosecutor were convicted. For the vast majority of cases, the sentence imposed by the court was within the scope proposed by the procuratorate.

Comparison of the outcome of the judgment and the Bill of Prosecution in site A,¹ June to September 2012

	n	%
<u>Verdict:</u>		
Total number of cases charged by the procuratorate	42	100
Cases partially convicted by the court	4	9.5
Cases convicted as the charge		
maintained in the Bill of Prosecution by the court	38	90.5
<u>Sentencing:</u>		
Total number of cases charged by the procuratorate	42	100
Sentence imposed within the recommended		
scope of the Bill of Prosecution	41	97.6
Sentence imposed beyond the recommended		
scope of the Bill of Prosecution	1	2.4

Note 1: The sample of cases were randomly selected and followed by the author during the period of observation. The judgments were all made by the basic court in site A. Of these cases, 12 cases were appealed by the defendant. However, the second instance judgments were unable to be tracked by the researcher.

Note 2: This includes the multiple charges of the defendants in which the court only convicted a proportion of the charges. Whilst in those circumstances the acquittal does exist, this is generally tolerated by the Appraisal System. The Procuratorate would not be penalised as long as the defendant was convicted for at least one account.

The trial in China rarely has the function as a forum of information exchange, as the prosecution monopolises the source of evidence. Yet, the unilateral channel of information is not limited to the prosecution dossier, because judges will accept additional evidence that is produced by the prosecutor if any doubt arising from the case needs to be addressed. For instance, the judge may notify the prosecutor to provide further statements from witnesses, if the defence lawyer requests the witnesses to be cross-examined in the court.

[Interview ATJ-2] Judge: After the prosecutors have sent us all of the dossiers, we would read the dossiers thoroughly many times. We may have further questions. If the questions cannot be resolved, we would ask the prosecutors to send further evidence to us. [...] If we have any inquiries, they (the police and prosecutor) would respond immediately and give us a satisfactory answer.

Interestingly, some defence lawyers revealed that since judges readily take into account the prosecution evidence, mitigating evidence could be more easily admitted if they could persuade the prosecutor into accepting certain 'benign' defence evidence, as long as the evidence would not exonerate the defendant. Due to the possibility that the defence evidence adduced would be potentially rejected by the court, converting the defence evidence to prosecution evidence would substantially reduce resistance from the court.

[Interview CDL-1] Defence lawyer: The way the judge treats us is completely different from the way they treat the evidence of the prosecutors. If certain issues have been mentioned by the prosecutors, they will be taken into account by the judge. However, if the prosecutors

have not mentioned the exculpatory factors, it will be very hard for this to be admitted by the judge, as the judge does not listen to us. [...] Therefore once we have spoken to the prosecutors, these exculpatory facts would be accepted (by the judge).

Whereas prosecution evidence would be routinely admitted as a basis for the judicial decision, evidence produced by the defence, if there was any, must be scrutinised through the strictest possible procedure.¹¹⁸ The automatic admission of the prosecution evidence and the probative value that was attached to it should be understood within the general context of the Appraisal System in China, through which judges are under pressure to comply with the requirement for a low acquittal rate.¹¹⁹ As one part of the entity of the Iron Triangle, courts have different roles compared to their counterparts in western jurisdictions. Independence and autonomy are absent in the Chinese scenario. Whilst the function of the court is defined as correctly enforcing the law, under many circumstances, my observation suggests it means assisting the prosecution to convict the defendant.¹²⁰

[Interview GAJ-3] Judge: In fact, in the criminal cases, the prosecutor and the defendant are not on the same level. Apart from a few exceptional cases, we would admit the prosecutorial evidence automatically.

[Interview ATJ-1] Researcher: Do you naturally believe the prosecution evidence?¹²¹

Judge: No. Not naturally. But sometimes you have to believe it. If you don't believe it, you will have a lot of problems. If you do not believe it, what else can you do? Can you make an acquittal? It is not allowed within this legal system. Well, in most circumstances, it is unnecessary.

As a result, the formal trial, which receives a high level of attention by the legal actors in Western jurisdictions, has often been disregarded by the Chinese legal professionals. As far as prosecutors are concerned, the critical part of processing the case is external to the

¹¹⁸ GAJ-2

¹¹⁹ See Mike McConville et al, *Criminal justice in China: An empirical enquiry* (Edward Elgar 2011)358.

¹²⁰ See Article 7 of CPL 2012.

¹²¹ This question was not designed as a leading question, but rather based upon the content of the conversation with the judge, who talked about her close relationship with the procuratorate previously (Interview ATJ-1).

trial (such as their private communications with the judge), rather than the court hearing itself. Since the conviction has been secured for most cases prior to the trial, the efficiency of the trial has become paramount, which turns the trial into a mere formality.

[Field-note APU-32] Prosecutor: The trial is just a show! There is nothing substantial in it. I remember last time when I was in the trial and I hadn't started to give my prosecution speech, the judge suddenly knocked his judicial mallet and said 'now it is time to close the trial.' Just observe trials. They are so fast. [...] The judges just want to finish the trial as fast as possible. Every time I go to the trial, I don't even prepare. [...] If we want to secure the conviction, communicating with the judge is far more important than the trial.¹²²

Defence lawyers are also seen to be aware of the perfunctory nature of the trial. No matter what level of skill or commitment they present at trial, the final decision is beyond their control.¹²³ As a marginalised group, defence lawyers have been discriminated against institutionally, not just by the judge, but also by others affiliated to the court, such as court guards.¹²⁴ Their argument at trial might be curbed and their right to question the prosecution case might be curtailed by the judge.¹²⁵ In certain instances, the defence lawyer's diligent performance and intensive arguments have resulted in an aggravated sentence imposed by the judge who thought that her lengthy argument defied the purpose of efficiency.¹²⁶ There are some courts where judges gave the impression of impartiality, with defence lawyers being given equal opportunity to elaborate on their legal views in the trial; nonetheless these seemingly objective court hearings are still predetermined and the result is irreversible.¹²⁷

¹²² This was extracted from a field note recorded on 26 July 2012, before CPL 2012 came into force.

¹²³ Interview CDL-1, CDL-2, and CDL-3. See also Mike McConville et al, *Criminal justice in China: An empirical enquiry* (Edward Elgar 2011) 376.

¹²⁴ Many defence lawyers protested that their bags and documents had to go through security checks before they were allowed to enter the courtroom whereas the prosecutors are not submitted to this procedure. Some defence lawyers also indicated that they were badly treated by the court guards, including violent assault, in the courtroom. See Shen Hong lawyer 'Micro Blog' 21 January 2014 <<http://www.weibo.com/shenhong1020>> accessed at 21 January 2014.

¹²⁵ Interview CDL-1, CDL-2, and CDL-3.

¹²⁶ Field note BPU-34.

¹²⁷ Interview CDL-1, CDL-2, GAJ-3 and GAJ-4.

[Interview JDL-1] Defence lawyer: I think my right to speak in the court is protected. We can speak a lot in the court and have a lot of opportunities to communicate. But if we analyse the result, the court normally does not accept lawyers' opinions.

[Interview CDL-1] Defence lawyer: With the case that I mentioned about to you just now, when we were in the high court, we believed that any person who listened to our view would change the previous conviction or sentence. However the judge just said the reasons that we gave could not influence the result of the judgment.

Hence the trial in China is largely a show case, which does not dictate the outcome of cases.¹²⁸ For most of the cases, the final decision has been determined in advance. If it is deemed to be unsafe by the judge, further action will be required by liaising privately with the prosecutor, so that the case will be disposed of without proceeding to the trial. As a result, the trial is merely a process that legitimately transforms the defendant into a convicted person.

3.3 The Simplified Trial

Whilst there are several factors shaping the phenomenon that very few witnesses are cross-examined in the Chinese court, the prevalence of the simplified trial is perhaps one of the most salient causes. It has led a decline in the number of formal trials in recent years, as a result, witnesses do not attend the trial. According to the revised simplified trial procedure in CPL 2012,¹²⁹ the trial process can be substantially abbreviated, if the fact is believed to be clear, the evidence is sufficient, and the defendant, who pleads guilty, has no dispute

¹²⁸ This finding is parallel to Mike McConville et al (2011)'s study. See Mike McConville et al, *Criminal justice in China: An empirical enquiry* (Edward Elgar 2011) 376.

¹²⁹ As mentioned in Chapter 5, the revised simplified trial has combined the previous summary trial and the guilty plea procedure under the framework of CPL 1996. Therefore, there is no doubt that the application of the simplified trial has expanded substantially.

with the application of the simplified trial procedure.¹³⁰ A majority of defendants admit guilt and agreed to the implementation of the simplified trial to dispose of their cases. According to my observation in the procuratorate in site A, approximately 82 per cent of the prosecuted cases were tried with the simplified procedure for the first instance. Interviews with legal personnel from wider geographic areas of China confirmed this general trend of application in the basic court.¹³¹ Since these defendants have no dispute to the charge, it is unnecessary to bring the witnesses to the court.

Key to this simplified procedure is the efficiency of the trial, with the court trial lasting between five and twenty-five minutes on average.¹³² Similar to the formal trial proceedings in which five main stages occur: the opening session, court investigation, court debate, defendant's final statement, and conclusion, the simplified procedure proceeds with the same sequence but without substance. After checking the defendant's information, including her criminal record, the court would ask the defendant whether she wishes to plead guilty.¹³³ When a positive response is given by the defendant, the prosecutor will be asked to read out the Bill of Prosecution, which consists of a brief description of the defendant's alleged criminal conduct and the charge(s) of the defendant. In the simplified procedure, court investigation, the most time-consuming and complicated stage involving evidence adducing and cross-examination, has been dramatically condensed: without touching upon any details, only the catalogue of the evidence will be pronounced by the prosecutor, and confirmed by the defendant. In the court debate, the prosecutor would suggest an appropriate sentence to be imposed on the defendant, taking into account the defendant's plea. Then the defendant is urged to give a final statement, expressing her remorse, pleading for leniency, or an opportunity to reform her life. The trial is concluded

¹³⁰ See article 208 to article 213 of CPL 2012.

¹³¹ Interview APS-1, GAJ-2, GAJ-3 and FTJ-1.

¹³² This is based on my observation of court trial. Field note APU-29, 33,35-39, and 40-47.

¹³³ Alternatively, this question can be asked after the prosecutor reads out the Bill of Prosecution.

with the judge's final remarks, including informing the defendant of her right to appeal.¹³⁴

It can be seen from this procedure that this type of trial is not designed to shed light on the relevant fact, but rather it is created to ascertain the guilty plea. It is a trial by dossier, with very few variables. Due to the formality of this trial process, many judges draft the judgment prior to the court hearing, resurrecting the old practice of 'verdict first, trial second' in CPL 1979.

[Field-note APU-34] Prosecutor: [...] The defendant already pleaded guilty. The trial judge contacted me and said that he has made the judgment before the trial. The trial is a show, really.

Judges feel compelled to draft the judgment beforehand, given the mechanism of the Appraisal System and the *pro forma* nature of the simplified trial. For instance, in site A, one of the performance indicators of the Appraisal System is the rate of immediate pronouncement of judgment, which requires a proportion of judgments being delivered immediately after the trial. This efficiency orientated assessment is apparently in conflict with the internal managerial system of the court, according to which all the judgments should be validated by the court leader. As a result, having the validated judgment in advance of the trial becomes the only rational solution for the judge who is accountable for the case.

[Interview ATJ-1] Judge: [...] one of the assessment categories of the Appraisal System is 'the rate of pronouncing the judgment in court.' This is so artificial apparently. The rate in our court is as high as 80 percent, 90 percent or even 100 percent. How can this be possible? It (the Appraisal System) has ignored the fact that the judgment has to be approved by the court leaders. Therefore, there is only one possibility: the written judgment has been drafted and permitted before the trial. [...] But what is the point of the court hearing?

As mentioned earlier in chapter 3, in order to fulfil their appraisal-related tasks, the police

¹³⁴ This is summarised by my observation in the court trial in site A (Field note APU-5, 32, 40, 46, 47, 50, 52, 53, and 56).

tend to target a standard set of crimes, in which the confession evidence is easier to procure so that the conviction is secured.¹³⁵ These crimes constitute the bulk of the investigations and therefore the majority of simplified trials. A limited category of crimes, such as theft, drug trafficking, and dangerous driving, accounts for more than fifty per cent of cases tried in the basic court.¹³⁶ As these types of cases are repeatedly seen in the court and processed with a standardised format of written evidence, the adjudication has become a highly efficient routine. For many judges, the criminal cases that they habitually hear have lost their uniqueness; and the defendant, whatever their life circumstances are, is merely treated as an object. Unsympathetic to the accused, the judge has acquired 'the capacity of anesthetizing her heart and of making decisions in her official capacity that she might never make as an individual.'¹³⁷ This is reflected in the following final statement of the defendant who wished to express her remorse:

[Field-note APU-56] Defendant: I wrote a statement of remorse... Can I read it out? It shows my deep reflection during this period.

Judge: You can read out your remorse... But don't read it all. Just pick out the most important bits.

Defendant: [Started to read his confession] I brought harm to the victim and I will voluntarily undertake the punishment imposed on me. I will be a reformed person after this trial...

Judge: [Interrupted the defendant abruptly] That's enough. The trial is over.¹³⁸

The indifferent attitude of judges towards the accused could be understood taking account of the high volume of the caseload in the court. With an increasing number of cases being investigated and prosecuted, the court is pressurised into disposing of cases as efficiently as possible. Judges, like their fellow prosecutors, are paid by the number of cases they

¹³⁵ See chapter 3.

¹³⁶ This is not only based upon my observation in site A, but also interviews (ATJ-1, FTJ-1, GAJ-2, GAJ-3) in other regions of China.

¹³⁷ Mirjan R Damaška, *The faces of justice and state authority* (Yale University Press 1986) 19.

¹³⁸ Such interruptions from the judge were very commonly seen during my observation.

process. As an alternative to the full adjudication, simplified trials are therefore favoured by the court. Cases are disposed of as if on a conveyor belt and expediency has been ceaselessly pursued. In the courtrooms in site A, it was very normal to see a judge try five to ten guilty plea cases in a row, with each case lasting between five to twenty minutes. With the acquittal being exceptional, judges are predisposed to a belief of guilt. Judges are void of any incentives to prepare the case carefully or understand the circumstances of the defendant who has pleaded guilty. The revised simplified trial in CPL 2012 no longer requires the judge to look into the voluntary element in relation to the admission of guilt.¹³⁹ Thus once the defendant confirms her guilty plea, no matter how it is procured and whatever consequence it means to the accused, the case will arrive at a determination on the ultimate issue---the sentence, with speed.

Similar to the ordinary trial procedure, only a small number of cases are represented by defence lawyers in the simplified trial.¹⁴⁰ For those cases in which the defence lawyer intervenes, personal attributes of the defendant, who was almost invariably poor, uneducated, and with family obligations, formed the key theme for the defence.¹⁴¹ Apparently this defence strategy was rarely accepted by the judge given its limited relevance to the defendant's criminal responsibility.

[Field-note APU-5] Defence lawyer: Please do consider that the defendant has written a letter of apology. His parents are very poor peasants and they are not in good health. They are in need of a carer....

Judge: [interrupted the defence] Defence lawyer, make your statement brief!

¹³⁹ The defendant's voluntariness is not the prerequisite of the application of the simplified trial according to CPL 2012. See article 208 of CPL 2012. According to the judicial rule 2003, the defendant must voluntarily accept the application of the guilty plea procedure if it is applied by the court. See article 4 of Judicial Rule 2003.

¹⁴⁰ Based upon my observation in site A, only 15 per cent of guilty plea cases were represented. Currently I have no data with regards to other regions in China. However, I believe this to be a fair assumption because the defendant who is not represented is more likely to plead guilty.

¹⁴¹ This is also noted in Mike McConville et al (2011)'s work. See Mike McConville et al, *Criminal justice in China: An empirical enquiry* (Edward Elgar 2011)320.

According to my observation, a large proportion of defence lawyers preferred a guilty-plea orientated case as it did not require much proactive defence preparation.¹⁴² Whilst this defence practice should be understood within the context of the constrained Chinese criminal justice system, in which the conviction is almost inevitable and challenging the prosecution case might not be worthwhile, the presumption that the defendant is guilty is often shared by some defence lawyers.¹⁴³ During my interviews, I found that a few defence lawyers had an equivocal or even negative attitude toward their clients. The high conviction rate apparently reinforced the ambivalence of defence lawyers' social recognition. Certain defence lawyers tend to assume the guilt of the accused, especially those who are in custody and have been prosecuted. This is illustrated in the remarks of a successful lawyer, who had an excellent record of defending major cases:

[Interview ADJ-1] Defence lawyer: The police will initiate the investigation only when the suspect's conduct is highly suspicious. For example, many fraud cases are not investigated by the police because these cases are not up to the standard of requiring investigation. There are many criminal cases that are not investigated. For those cases that are investigated, most of them are certainly criminal acts and the defendants are guilty. That is why there are very few acquittals. There are some miscarriages of justice, but they are exceptional. The best thing they (the accused) should do is to tell the truth and plead guilty.

It is hard to imagine that the defendant could resist her defence lawyer's pressure to confess the truth or plead guilty.¹⁴⁴ When the defence lawyer's efforts are directed towards processing the accused by means of a guilty plea, the defendant has little chance to dispute the disposition of her case that was agreed by the other courtroom actors. For those defendants who are pressurised into pleading guilty during the prosecutorial interrogation,

¹⁴² This is shown in a few cases that I observed when the prosecutor interrogated the suspect. For example, in CASEA 23, the accused complained that the defence lawyer did not support him to 'tell the fact', in which he denied the guilty charge but rather focused on his co-operative attitude. In another case, CASEA 33, the accused told the prosecutor that his defence lawyer asked him to 'confess truthfully' rather than 'arguing the unnecessary minor details', including the inconsistencies of the witness's statements, so that he could obtain mitigation.

¹⁴³ See Mike McConville et al, *Criminal justice in China: An empirical enquiry* (Edward Elgar 2011) 318.

¹⁴⁴ This finding is very similar to the defence practice in England, see Mike McConville, Jacqueline Hodgson et al, *Standing accused* (Clarendon Press 1994).

once a guilty plea has been entered, there is no room within the current system that allows the accused or their defenders to withdraw the guilty plea. Since CPL 2012 does not consider the voluntariness of the guilty plea when applying for the abbreviated process, the accused has lost her right to opt for the trial procedure once the confession evidence is procured. The perfunctory simplified trial, the confession-based investigation approach, and the guilty-plea orientated prosecution strategy accelerates the progression of criminal cases towards the final conviction. With little room for any effective counter checks in this process, a typical crime control model continues to function through the use of the simplified trial, operated by its legal institutions unified in their conviction-orientated values.

Summary

The dossier construction in the pre-trial interrogation and prosecution preparation is crucial in shaping the case that comes before the court. Given the minimum impact of the defence intervention in the pre-trial phase, the trial could become a forum where the evidence from both parties is presented and tested through cross-examination and the issue of guilt or innocence decided by an impartial judge. Yet, with the lack of judicial independence, this has been far from the case in the context of China. Due to the managerial system of the court and the close judge-prosecutor relationship, court hearings in China are *pro forma* in nature. Whether it be the ordinary procedure or the simplified trial, the hearing is largely a formality to process the pre-determined decision validated by the court leaders. On the majority of occasions, the hearing itself may be characterised as the trial of the dossier, given the absence of defence witnesses or other positive evidence such as forensic evidence. Prosecution dossiers, which contain falsified or manipulated written statements against the defendant, are routinely accepted by the judge without considering the

reliability of the evidence. Justified by the rule of corroboration, in cases where defence witnesses are allowed to testify, their written statements taken by the police still outweigh their in-court testimonies on the majority of instances. For most cases, the conviction has been the inevitable outcome, regardless of whatever valuable evidence has emerged favouring the defendant in the court. The systematic acceptance of the prosecution case represents in practice, a presumption of guilt that the defence is never able to displace. Being marginalised by the system, many defence lawyers are treated unfairly and their evidence is rarely considered in the adjudication. No matter which level of skill or commitment they present at trial, the final decision is simply beyond their control.

The function of the judiciary in China should not be analysed in a similar way as its equivalence in most Western jurisdictions. As part of the Iron Triangle, it is a functional bureaucracy which serves to maintain social control rather than a neutral institution promoting the rule of law. It is designed to fulfil the purpose of the State and is subject to the hierarchical management driven by a number of performance indicators. Having interwoven interests with the procuratorate, courts and procuratorates use their bond to shirk responsibility and share information at the exclusion of defence lawyers.

Chapter 7 Conclusion

This thesis has been written at a time when there have been several major reforms of the criminal justice system that have taken place. Following the revision of the Criminal Procedural Law in 2012, the new administration of Xi Jinping has launched a new round of 'strategic deployment (*zhanliu boshu*)' to accelerate the construction of the socialist rule of law; and a more radical reformative agenda has been introduced to enhance prosecutorial and judicial professionalism.¹ Meanwhile, for many observers, the replacement of the legally trained technocratic President of the Supreme People's Court, Zhou Qiang, for the former Party cadre figure, Wang Shengjun, signals a promising transition.² Whilst these legal reforms have opened up a significant potential for the future, first and foremost, it is crucial to understand the status quo of the current system in daily practice and identify the key issues which need to be addressed. In this final chapter, I will draw together reflections from this empirical study in order to analyse the main deficiencies of the criminal justice system. This would be a useful starting point to evaluate the on-going reforms, which will be conducted in light of the findings of this study.

1. Functional Deficiency: Conceptualising the Structural Injustice of Chinese Criminal Process

This study has arisen out of a commonly seen phenomenon in the courtroom in China: the absence of witnesses. Nine years on from the initial legal reform of 1996, which claimed to

¹ See the communiqué from the fourth plenum of the eighteenth National Congress of the CCP held in October 2014.

² Randall Peerenboom, 'The battle over legal reforms in China: Has there been a turn against law?' (2014) 2:2 *The Chinese Journal of Comparative Law* 188, 189.

transform the criminal process in the direction of an adversarial system, the criminal justice system today still relies significantly on written dossiers to operate, rather than the use of witnesses' oral evidence. Hitherto it is abundantly clear that the claimed legal reform in the direction of an adversarial system is merely window-dressing. As an essential feature of the adversarial tradition, orality has never been reinforced in the Chinese legal practice, nor is there any suggestion of introducing rules against hearsay. Similarly core principles enshrined in the common law jurisdictions, such as 'equality of arms' between prosecution and defence, are also absent in the Chinese criminal justice system. Against the socio-political background, all the evidence has indicated that there has never been a political will to transplant 'foreign' rules from the adversarial system; instead, the entrenched existing legal culture, fostered by the political climate, continues to dominate legal practice towards the purpose of conviction.

With the way that the case dossiers are created, scrutinised and used at different stages of the criminal process being analysed, it is easy to endorse the concept that cases in the criminal process are *socially constructed*, rather than an objective entity that exists outside the criminal process itself. As demonstrated in preceding chapters, the construction of a police case involves addition, selection, reformulation and even fabrication of the information in order to comply with the legal requirement. Given the interest of legal actors who choose to use a certain legal form in order to achieve a particular objective, the construction of the case is apt to be a partisan process.³ In England & Wales, for example, the police have engaged in selecting and creating evidence to construct a case against the accused.⁴ The partiality of the construction of the prosecution case in England & Wales is compatible with the nature of the adversarial system, which is designed to achieve justice through the confrontation of both parties. In the adversarial system, the defendant is entitled to the defence counsel throughout the criminal proceedings, who is able to engage

³ Mike McConville et al, *The case for prosecution* (Routledge 1991) 11-12.

⁴ Ibid 36-54.

in various activities to deconstruct the case for prosecution.⁵ Safeguards of due process, such as the exchange of information and disclosure, are set up to ensure that the defendant is put on an equal footing with the State.⁶ Those trying criminal cases are neutral and their sole role is to make a decision based upon the court hearing. At the adversarial trial, live testimony is generally required, so that lawyers are able to expose falsehood and inaccuracies through cross-examination of witnesses' testimony.⁷ Both parties can take part in the process of case construction and their cases are allowed to be evaluated without prejudice at trial. Due to these mechanisms built upon the antagonistic relationship of both parties, justice can be achieved.

Similarly to England & Wales, the building of the police case in China is also a partisan process to fulfil the objective within its specific socio-political context.⁸ However, different from the adversarial model, the constructing process in China is exclusive to official officers with only the police and the prosecution being allowed to partake in the construction of cases. As has been indicated throughout this study, the defence is largely marginalised by the criminal justice institutions, deprived of the opportunity to build a defence case at a parallel level. The legal aid scheme only covers a small category of defendants, resulting in about 80 per cent of defendants not being represented by defence lawyers.⁹ The vast majority of defendants observed in this study coming from the lower social class had few resources to influence their journey through the criminal justice system.¹⁰ Due to their financial status and being ineligible for legal aid, they were often unable to afford a defence lawyer to safeguard their rights in the criminal proceedings. For those suspects who were able to retain defence lawyers, their representation was unlikely to bring about any substantial change to the outcome of the trial, given the constrained role

⁵ Mike McConville and Jacqueline Hodgson et al, *Standing accused* (Clarendon Press 1994) 10

⁶ However, it is noted that prosecution disclosure is only required in Crown court. In the magistrates' courts the accused have no legal right to have the prosecution case disclosed prior to trial.

⁷ Thomas Weigend, 'Is the criminal process about truth? A German Perspective' (2003) 26:1 *Harvard Journal of Law & Public Policy*, 157, 158.

⁸ Mike McConville et al, *Criminal justice in China: An empirical enquiry* (Edward Elgar 2011) 433.

⁹ Detailed discussion see chapter 5.

¹⁰ Detailed analysis of undue influence on the Prosecutor's discretion see chapter 5.

that they were allowed to play. Active preparation for defence cases, such as evidence acquisition, has proven to be hazardous for defence lawyering in China. Various obstacles have been set up by legal authorities to undermine defence work. For such reasons, defence lawyers have been unable to bring witnesses to trial to challenge the prosecution case.

The Chinese criminal justice system is an adverse environment for defence lawyers to practise in. As a result of the criminalisation emanating from article 306 of the Criminal Law, and the use of informal tactics (such as the use of discrediting, de-registration, torture in black jail and psychiatric hospitals, and enforced disappearance), defence lawyers who take a radical stance to challenge prosecution cases, such as checking the witnesses' statements in the prosecution dossier, are likely to be silenced for their criticism of the system.¹¹ Due to these circumstances, many defence lawyers have taken on the skill of self-censorship, thereby avoiding zealous criminal representation. Even though defence lawyers have generally opted out of proactive defence work, various hurdles are still laid out during their routine activities, such as the difficulties encountered during interviewing clients in the detention centre and accessing the prosecution dossier. It is worth noting that most of the hindrance has been deliberately set up to undermine the defence work. As long as the hostile culture against defence lawyers remains within the system, such difficulties will always trouble defence lawyers. In this sense, even though CPL 2012 has attempted to attenuate or remove certain obstacles, such as retaliatory prosecution and issues concerning access to the dossier or suspects in custody, 'innovative' strategies have been devised to create new quandaries for defence lawyers.¹²

In the Chinese criminal process, the building of the prosecution case has largely been operated on the presumption of guilt, with no effective safeguards in place to protect the

¹¹ Mike McConville, 'Criminal justice in China and the West', in Mike McConville and Eva Pils (eds.), *Comparative perspective on Criminal justice in China* (Edward Elgar 2013) 55-62; Fu Hualing, 'Human rights lawyering in Chinese courtrooms' (2014)2:2 *The Chinese journal of comparative law*, 270-288.

¹² Detailed accounts see chapter 3 and chapter 5.

rights of the accused individuals. My analysis of the case dossiers in Site A reveals that exculpatory evidence is generally ignored, and inquiries regarding the potential innocence of the accused have rarely been conducted.¹³ The way that cases are created is primarily through the making of investigative dossiers at the pre-trial stage. Evidence compiled in the case dossiers is mainly comprised of multiple statements. Forensic evidence or other forms of real evidence are rarely used to establish the link between the suspect and the occurrence of the crime. The confession records extracted from interrogations was crucial to the construction of dossiers and the ultimate disposition of cases in court. As discussed in chapter 3, the official version of 'truth' was formulated on the basis of the early account provided by the victim or relevant witness, with the subsequent interrogation gearing towards securing confessions to affirm the official version of 'truth'. No voluntary rule of confession exists within the law to regulate the police interrogation; instead, suspects had the 'duty to confess truthfully'. Suspects were forced to give incriminating statements repeatedly under the joint effect of incarceration and oppressive interrogation techniques, such as 'lecturing', so that the confessions could be corroborated with other statements pointing to the guilt of the accused. To ensure its alignment with other inculpatory evidence, the recording process of the police interrogation was fraught with distortion, manipulation and falsification. With only a small proportion of criminal cases being video-recorded and with no defence lawyer being present, the police interrogation was largely immune from external supervision, allowing a variety of oppressive tactics (including torture) to be employed to produce an incriminating account. In this way, written materials compiled in the dossier were created to meet the evidential needs of convicting the accused. Given the actual process of how the investigative dossier was made, there is no surprise that exculpatory evidence, such as witnesses' testimony, that could prove the

¹³ Detailed accounts and analysis see chapter 3 and chapter 4. Despite this, in legal practice, certain mitigating evidence, such as meritorious performance or evidence showing that suspects turned themselves in has been generally accepted by the police and the prosecutor.

innocence of the accused, has been constantly rejected to ensure that the settled version of 'truth' formulated by the police is unchallenged.

The prosecutor has been depicted in legal rhetoric as an impartial guardian of the legal procedure, overseeing the police investigation, the trial and subsequent legal enforcement. However, this neutral role has never been implemented in practice. Prosecutors are more influenced by their group interests, most specifically the benefits associated with the Appraisal System, rather than the official purpose of the criminal justice system defined in law. As an acquittal has a detrimental effect on their career, pursuing conviction has been such an immediate objective for prosecutors that examination of the investigative dossier is in fact an exercise in correction of errors within dossiers.¹⁴ In this respect, the process of case construction has extended into the prosecution review stage. With oversight in this context being confined to a paper exercise and the prosecutor working alongside the police, as long as the required formalities of the written documents compiled in the dossier unanimously indicated the guilt of the suspect, the prosecution case was complete. The police were not only given a free hand in constructing the case against the accused, they were also assisted by the prosecutor so that tainted evidence could be recycled and legitimised.¹⁵ During the prosecution review process, the prosecutor was obliged to search for the truth by interrogating the suspect. However, observational accounts in this study indicated that this opportunity to check the veracity of the police evidence became a quest to ensure a guilty plea. In order to secure the conviction, the prosecutorial interrogation had been exploited by prosecutors to elicit a guilty plea from the suspect. Defendants' guilty pleas appear to be an explanation as to why witnesses rarely appear at trial. A significant proportion of cases were disposed of by defendants' guilty pleas, with only a small number of cases being actually tried with cross-examinations and court debate. As such, there was no need to introduce witnesses in the court.

¹⁴ Detailed discussion see chapter 4.

¹⁵ Similar practice can also be found in other jurisdictions, such as France. See Jacqueline Hodgson, *French criminal justice: a comparative account of the investigation and prosecution of crime in France* (Hart publishing 2005) 161-177.

Due to the dominant role played by the police and the prosecution in shaping the evidence, there has been a lack of functional equivalence of defence construction in the pre-trial stage to formulate a competing version of fact. In most instances, key evidence including witnesses who provided statements to the police are controlled by the prosecution and are simply unapproachable; thus the defence is unable to affirm the veracity of the official statements and construct the defence case.¹⁶ In fact, the pre-trial criminal process is not particularly concerned with the value of rectitude, which could be achieved either by testing antithetic accounts provided by opposing parties, or through a neutral investigative process that is conducted by an authoritative judicial officer. In many ways, the criminal justice in China is similar to the inquisitorial system, particularly from the perspective that they both allow information to be imported from the pre-trial investigation into the trial, so that the momentum of the truth-finding process is mainly kept at the pre-trial stage.¹⁷ However, differing from the inquisitorial model, the investigation in China is not conducted, nor directly instructed by a judicial figure to ensure the rights of the accused. On the contrary, it is an insulated process solely controlled by the police driven by the crime control model. Aligned with the police, Chinese prosecutors are de facto an accusing party, with specific targets for convictions; and their supervisory role over the police investigation is retrospective and primarily bureaucratic.

Perhaps the most detrimental aspect of the Chinese criminal justice system is that none of the criminal justice institutions is able to effectively prohibit the potentially innocent accused from being convicted and punished. The facts which could be revealed by cross-examining witnesses' oral testimonies, has been concealed by the manufactured written dossiers. As has been demonstrated throughout this research, both police and prosecutors are driven by the interests associated with performance indicators, and there is no expectation that they should operate in an alternative manner. Due to constrained

¹⁶ More detailed discussion in this respect see chapter 6.

¹⁷ Thomas Weigend, 'Is the criminal process about truth? A German Perspective'(2003) 26:1 *Harvard Journal of Law & Public Policy*,164.

prosecutorial discretion, the majority of police cases cannot be screened out of the criminal process but proceed to trial, despite the fact that their evidence is intrinsically weak and unreliable. There has been a seamless transition from the dossier for prosecution to the evidence used to determine whether the defendant is guilty as charged. Since CPL 2012, judges have been allowed to read the prosecution dossier before the trial, which makes the day-in-court trial basically a *pro forma* performance. Lacking in judicial independence, the decision of the adjudication has been (or would be) determined by the leaders of the court.¹⁸ In the absence of witnesses, the court hearing is merely a ritual of presenting the written statements in the prosecution dossier, through which the pre-conceived conviction becomes legitimised. As the court and the procuratorate are closely allied, prosecutors are de facto insiders of the judicial process (and may even be invited to participate in the judicial deliberation). Evidence adduced by the prosecution would be routinely admitted and relied upon as the basis of adjudication, whereas defence evidence, if there was any, would be strictly scrutinised during the trial. In the rhetoric of law, the role of the court in China is defined as correctly enforcing the law;¹⁹ yet in the majority of instances, the function of the judiciary amounts to assisting the prosecution to complete the conviction.

Due to such functional deficiency, any potentially innocent individual is unable to step out of the criminal justice system once they are involved in the process.²⁰ The entire Chinese criminal process is framed by the written dossier constructed by the police; thereby witnesses' oral testimonies are jettisoned by the system. Whilst these case dossiers are accorded a high degree of credibility by the trial court, they have been carefully constructed against the accused by the police and the prosecution. There is no legitimate process available to ensure the authenticity of the transcripts of pre-trial interrogations and other acts of investigation; in contrast, empirical evidence in this study suggests that the

¹⁸ The leaders of the courts include the head administrative officers of the departments of the courts, president and vice presidents of the courts. See chapter 6.

¹⁹ See article 7 of CPL 2012.

²⁰ This of course excludes those social elites in possession of the social and financial capital which enable them to negotiate their lives with those senior officers within the legal institutions. See the analysis of the undue influence on the prosecution in chapter 5.

documentary evidence compiled in the dossier is susceptible to distortion and falsification.²¹ In the majority of instances I observed that allegations by the accused of their torture, and other illicit means relating to evidence gathering, were routinely disregarded or repressed by the procuratorate, and defence lawyers' challenges on the unlawfully obtained evidence were rarely successful due to the pressure to ensure convictions.

For many Chinese prosecutors, the truth equates with confession, which partially explains why the accused's self-incriminating statement is highly valued and why alternative accounts, such as witnesses' oral testimonies, are excluded from the system. Since the reliability of the coerced statements is dubious, decisions made on the basis of such evidence could likely result in wrongful convictions. The danger of weak prosecutorial and judicial supervision has been powerfully demonstrated in a number of miscarriage of justice cases.²² Since witnesses' live testimonies are largely excluded from criminal proceedings, prosecutorial and judicial supervision are unable to displace the dominance of the sheer volume of police cases. The written evidence constructed to dovetail the witness' confession does not, of course, contain details of voice inflection and the demeanour of the maker of the statement. It is therefore unlikely to expose the potential unreliability of the evidence it provides. Prosecutors and judges, who have the responsibility to scrutinise the evidence, to ensure the correctness of the enforcement of law, and to set aside judgments which fail to work in accordance with the law,²³ have generally failed to do so due to the framework within which crime is prosecuted and tried in China. In this regard, the criminal justice system in China is structurally weak. Therefore it is not surprising that there are repeated occurrences of miscarriages of justice in China.

²¹ See chapter 3.

²² There are a number of miscarriage of justice cases in which the prosecution and judges has been blamed for its lack of scrutiny in examining the police evidence. She Xianglin case is one of the most notorious wrongful conviction case, in which the conviction of She was proved to be wrong when his 'murdered' wife reappeared a few years after the conviction; Zhang Gaoping and Zhang Hui is another miscarriage of justice case, which was finally quashed in March 2013.

²³ Article 242 and 243 of CPL 2012.

Reported cases of wrongful convictions (including prominent cases such as *She Xianglin* and *Teng Xinshan*) generally share a similar pattern, the key features of which have underlain this study thus far. After suspicion is raised by the use of groundless information, the investigation starts with the 'official version of truth' formulated by the police.²⁴ With no reliable scientific evidence or sophisticated forensic analysis,²⁵ the formulated 'truth' is reinforced by extorting confessions from the accused. In all reported instances, torture was used to obtain coerced confessions. Prosecutors in these cases failed to effectively check the reliability of the evidence they provided. In the following court hearings, no witnesses were cross-examined and the defence counsels were unable to offer meaningful assistance to help defendants escape the crime that they did not in fact commit. As a result, the false confessions were relied upon as key evidence to convict the defendant. In certain cases, such as *She Xianglin* and *Teng Xinshan*, the court was reluctant to deliver an acquittal despite the fact it had identified flaws in the evidence provided. Instead, the court chose to convict the defendant and commute the sentence imposed (usually from the death penalty with immediate execution to a two-year reprieve). This 'play safe' strategy has been prevalently used where grounds for reasonable doubt have been genuinely established.²⁶ These defendants should not be convicted due to the unsatisfactory evidence but they were nevertheless found guilty and heavy penalties were imposed upon them.

Apart from the Zhang Gaoping and Zhang Hui case, in which the falsely convicted were eventually exonerated through DNA comparison,²⁷ the vast majority of wrongful

²⁴ For example in *Teng Xinshan* case, the police officer was certain that *Teng* was the murder, purely based upon the fact that the police had overheard that *Teng* 'had a causal life style' and was disliked by the locals.

²⁵ It should be noted that in China there is a lack of neutral forensic institution, as most of the forensic technical institutions are affiliated with the police or the procuratorate. According to certain uncertified report, the expert conclusion could be easily manipulated against the accused.

²⁶ Li Xunhu, 'Bolun zhuangtai zhong de sixing anjian zhengming biao zhun (The standard of proof of the death penalty cases)' (2011) 29: 4 Tribune of Political science and law, 54,84.

²⁷ In Zhang Gaoping and Zhang Hui case, after serving their sentence for ten years, their murder case was re-opened thanks to a retired prosecutor Zhang Biao's persistent appeal. The real evidence contains the perpetrator's DNA was found to match the DNA of an offender who was executed for another murder case. This result has acquitted Zhang Gaoping and Zhang Hui. See Han Kang and Liu Yanan, 'Woguo xingshi yuanan faxian jizhi zhi fansi --- yi zhejiang shuzhi jianshaan wei qieru (Rethink about the discovery mechanism of wrongful convictions in China: the murder and rape case of Zhang gaoping and Zhang hui), (2014) 2:29, Journal of Shanghai University of Political Science and Law, pp.1-7.

convictions have come to light purely coincidentally, such as when the supposedly-murdered victim has been found alive or the true perpetrator has eventually been arrested for other, unrelated offences and subsequently confessed to the murder of the victim.²⁸ It is worth noting that these reported wrongful convictions are capital cases which attract significant public attention.²⁹ The injustices present in a greater number of ordinary cases dealt with in a similar manner have rarely been publicly identified. Given the systematic failure of the current criminal justice structure, wrongful convictions should not be seen as aberrational or exceptional, but rather the inevitability of an established deficiency.

Within the current criminal justice system, this unjust process has been structured through the Appraisal System, the bureaucratic management, and the central value of collectivism, which drives the operation of Chinese criminal justice in the direction of social control.³⁰ The institutional audit system has successfully tied frontline legal staff with the general goal of processing large volumes of cases in an expeditious and cost-effective manner. The core value of collectivism also plays a crucial part in consolidating the edifice of the system and has been evolved into the emphasis of social stability, at the expense of individual rights. In order to guard their interests under the Appraisal System, criminal justice institutions have strategically aligned themselves together to avoid the potential loss caused by 'internal friction'. Whilst certain State officials have occasionally demonstrated a level of resentment or reluctance in comporting with the latent rules (such as the target for conviction, institutional corruption and political influences) designed by this controlling mechanism, they still conscientiously observe the hierarchical order and act subserviently to those in power.³¹ As this underlying value has been interpreted as maintaining the social stability and has been transmitted from, and reinforced by, day-to-day practice, most legal

²⁸ See Liu Pingxin, *The causes and approaches of wrongful convictions (Xingshi cuoan de yuanyin yu duice)* (China Legal Press 2009) 15

²⁹ Or perhaps because of these wrongfully convicted people were imposed with death penalty, which gained attention from the public and became well-known.

³⁰ This finding is in line with the study of Mike McConville et al (2011). See Mike McConville et al (2011) *Criminal justice in China: An empirical enquiry* (Edward Elgar 2011) 450-453.

³¹ Detailed accounts on state officials' reactions on the hierarchical order and undue influences, see in chapter 5.

personnel have integrated the concept of controlling the disempowered (including the accused, human rights defenders, petitioners, critics and political dissidents), and it is unlikely that they will behave in an alternative way departing from these habitual routines.

Differing from many Western democracies, where due process is very much enshrined in its legal practice, in China, due to the lack of individualist tradition, the criminal proceedings are not conceptualised in a manner that pays due respect to the interests of the accused. As discussed in chapter 1, China is a State in which individualism is generally absent and the collective interests of the State are emphasised, and which has been projected in the veneration of the hierarchical structure and deference to authority.³² This legal culture, which dictates and constrains how the law is legislated, interpreted and observed, and how the legal process is formed and upheld, is also accountable to the actions of state officials which is not receptive to alternative behaviours.³³ The criminal justice system, the Iron Triangle of the three legal institutions, relied upon such hierarchical structure to achieve stability of society, rather than protecting individual rights. As far as the Party-state is concerned, it would be impossible to construct a criminal justice system that is devoted entirely to respecting the rights of the individual accused, as this would defeat the instrumental function of the criminal process. State officials have accepted this ideology and have fully applied it to daily practice. Thus the criminal process is merely an apparatus to achieve social order of the State.

As part of the analytical discourse, the way that the Chinese criminal justice system operates has demonstrated its structural weakness: none of the criminal justice institutions is capable of functioning independently to preclude innocent individuals from being accused and convicted. Nevertheless, it is worth noting that China is not the only country that is involved with flagrant violations of its own law within its criminal justice system. In

³² Mike McConville, 'Criminal justice in China and the West', in Mike McConville and Eva Pils (eds.), *Comparative perspective on Criminal justice in China* (Edward Elgar 2013) 50.

³³ See chapter 1; this is also discussed in Li Jianming, 'The in-depth causes for wrongful convictions: Analysis on the basis of the stage of prosecution (Xingshi cuoan de shencengci yuanyin: Yi jiancha huanjie wei zhongxin de fenxi)' (2007) 3 *China legal study*, 31.

fact, a number of Western countries have the experience of combating similar injustices in their history, such as systematic use of torture in the U.S in the 1930s.³⁴ Even today, coercive police strategies are still sporadically seen in certain Western jurisdictions, such as the Netherlands.³⁵ In countries such as France, for example, empirical evidence also suggested that prosecutors exercise inadequate oversight of the police in practice: the *procureur's* supervision is limited to artificial compliance with due process formalities, rather than a genuine concern with the appropriate treatment of the accused.³⁶ There is no perfect criminal justice system; but there are systems with fewer drawbacks. The evolution of criminal justice is often seen as a process guided by rationality and propelled by legal reforms.³⁷ As it stands, the criminal justice system in China seemingly requires effective prescriptions to address these systematic issues and respond to calls for more accurate decisions and fairer procedures.

2. Criminal Justice Reforms

Given the structural weakness of the Chinese criminal justice system, it appears amply clear that further reforms are required to address the key issues of the criminal justice system. The reason why witnesses' oral testimonies are excluded by the system is due to

³⁴ For example, in the 1920s and 1930s, the so-called 'third degree', an idiomatic expression for obtaining confessions by torture was standard police practice in interrogating criminal suspects in America. See Ire Belkin, 'China's tortuous path toward ending torture in criminal investigation', in Mike McConville and Eva Pils (eds.), *Comparative perspectives on criminal justice in China* (Edward Elgar 2013) 113; More discussion about the application of torture in recent years in the US., see also Stanley Cohen, 'Neither honesty nor hypocrisy: The legal reconstruction of torture', in Tim Newburn and Paul Rock (eds.), *The politics of Crime Control: Essays in honour of David Downes* (OUP 2006) 297-317.

³⁵ For example, in the Netherlands, the police could interrogate the suspect for lengthy periods of time in 'a room with photographs of the dead victim together with photographs of the suspect's family on the wall'. During the police interrogation, coffee and cigarettes are often offered to create a good atmosphere. See Taru Spronken, 'The investigative stage of the criminal process in the Netherlands', in Ed Cape and Jacqueline Hodgson et al (eds.), *Suspects in Europe: Procedural rights at the investigative stage of the criminal process in the European Union* (Intersentia 2007) 161.

³⁶ See Jacqueline Hodgson, *French criminal justice: A comparative account of the investigation and prosecution of crime in France* (Hart 2005).

³⁷ See Richard Nobles and David Schiff, *Understanding miscarriages of justice: Law, the media and the inevitability of a crisis* (OUP 2000) 230.

the fact that there has been a lack of sufficient and effective legal representation of the defendant to challenge the consolidated prosecution case in the form of written dossier. Therefore, the focus of any criminal justice reform could be in the direction of removing constraints on defence lawyers, enhancing the defence rights and expanding the scope of the legal aid scheme, so that the vast majority of defendants are eligible to free legal counsel.

To a certain extent, the Lawyers Law 2007 and the CPL 2012 have identified this problem and strengthened the rights available to the accused. However, as has been discussed previously, these safeguards are far from being adequate. Defence lawyers today are still prosecuted for being involved in robust defence practice including evidence acquisition.³⁸ The defence rights of interviewing suspects in the detention centre or accessing prosecution dossiers remains vulnerable in legal practice. The legal aid scheme runs on the basis of defence lawyers' pro bono services. Most importantly, given the Appraisal System and the judge-prosecutor relationship, cases presented by defence lawyers rarely have a real impact on the judicial decision, making the overall defence work unnecessary and wasteful. The Iron Triangle institutions that dominate the criminal process serve a similar function of social control, leaving no room for impartiality. In this view, whilst there are multifaceted issues within the criminal justice system that need to be addressed, the social control functions and the presumption of guilt which underpins the operation of the system should be given priority on the reformatory agenda, so that more witnesses can appear at trial, exculpatory evidence can be admitted and tainted evidence is able to be excluded from the system.

2.1 The Chinese Debate over the Model of the Criminal Justice System

³⁸ See chapter 3.

Interested commentators have long been aware of the functional deficiency in the criminal justice institutions.³⁹ Over the last decade, a variety of reformative plans have been proposed by Chinese academics to promote impartiality and independence of the judiciary and the procuratorate. These proposals, without exception, are based upon normative principles from Western legal systems. However, there has been a scholarly divergence regarding which model China should follow. Although the legal reform in 1996 has made it abundantly clear that the criminal justice system is moving towards the adversarial system, many academics believe that the principle of the adversarial model is generally incompatible with the current system, which shares more in common with the inquisitorial model, due to the State-driven process and the 'legal tradition of factual truth'.⁴⁰ Some of the academics, such as Shi Pengpeng (2014), even go so far as to attribute the failure of the legal reform (such as status quo of the defence practice) to following the 'wrong system', arguing that if the inquisitorial model were used, criminal justice reform could be implemented with greater ease, because the defence rights in the pre-trial stage are similarly restricted in the inquisitorial system.⁴¹ Such remarks appear to have confused the end of the legal reform with its means: criminal justice reform was introduced to achieve certain objectives, rather than being made for the sake of change itself. Although the obstacles that have stemmed from legal tradition should be taken into account, it is nevertheless unjustifiable to use the legal culture to legitimise the dysfunctions of the

³⁹ See for example, Xu Jingcun, *Criminal procedure Law* (I) (China law press 1999) 63-64; Wang Jiancheng and Wang Mingda, 'Xingshi susong zhineng yanjiu (Studies on the functions of the Criminal justice system)' (2001) 1 (*Zhengfa luntan: Zhongguo zhengfa daxue xuebao*) *Political-legal forum: China University of Political Science and Law review*, 3-11; Zuo Weimin and Wan Yi, 'Woguo xingshi susong zhidu gaige ruogan jiben lilun wenti yanjiu (Study on several basic theoretical issues of the criminal justice reforms)' (2003) 4, *China legal study (zhongguo faxue)*, 134-145.

⁴⁰ See for example, Shi Pengpeng, 'Wei zhiquan zhuyi bianhu (Defending for the inquisitorial system)' (2014) 2 *China Law study (Zhongguo faxue)*, 298-302; Wang Haiyan, 'Fawenhua gongxing, xiangyixing yu woguo xingshi susong moshi zhuanxing (The common nature and alienation of legal culture and our transition of criminal justice model)' (2006) 23: 5 *Zhengfa luntan: Zhongguo zhengfa daxue xuebao*) *Political-legal forum: China University of Political Science and Law review*, 149-159; Li Changlin, 'Xingshi susong boshi de lifa xuanze (The legislative choice of the model of criminal process)' (2007) 2 *Gansu Political-legal college review*, 59-64; Fan Chongyi, 'Xingshi susongfa zaixiugai de liding sikao (Rational re-thought about the revision of Criminal Procedure Law)' (2006) 23:5 *Zhengfa luntan: Zhongguo zhengfa daxue xuebao*) *Political-legal forum: China University of Political Science and Law review*, 124-133; Wang Jiancheng, 'Xingshi susong zaixiugai guochengzhong xuyao chuli de jige guanxi (A few relationships that needs to be dealt with during the process of legal reform)' (2007) 4 *Faxujia (Jurist)*, 16.

⁴¹ Shi Pengpeng, 'Wei zhiquan zhuyi bianhu (Defending for the inquisitorial system)' (2014) 2 *China Law study (Zhongguo faxue)*, 298, 299;

system. Also it is worth noting that legal culture has been a mouldable element during the course of legal transplantation rather than a decisive factor; thus if properly directed and cultivated, legal culture can adapt to the new system.⁴² Abandoning the original reformative direction would be inadvisable: it would not only lead to vagueness of the legal objective, but would also interrupt the continuity of the reform and would discard the progress and experience obtained from the reformative process to date.

Whereas certain academics have disapproved of the adversarial system, other scholars in China tend to blur the distinctions between the two legal traditions. Rather than committing to one legal model, certain reformative proposals downplay the disparity of the two traditions and emphasize their commonness. They argue that the adversarial system and the inquisitorial system, as a general trend, are converging; hence it is the shared principle of the two systems, such as judicial independence and equality of defence and prosecution that China should learn from and inject into its reformative agenda.⁴³ It is true that the criminal procedures of proof cannot be perceived as exclusive 'binary opposition' and in many instances the terms such as 'adversarial' and 'inquisitorial' fail to capture the characteristics of the criminal process in the common law and civil law traditions.⁴⁴ This is particularly the case since the European Court of Human Rights has governed in European jurisdictions and the two systems have been subjected to general principles such as the right to fair trial (Article 6 of the European Convention on Human Rights), leading towards a 'realignment of existing processes of proof'.⁴⁵ Despite the realignment in the European Convention on Human Rights, the distinction between the two predominant legal traditions

⁴² For example, Italy had a long legal tradition of inquisitorial system before the criminal justice system was transformed into adversarial system in 1988. During the course of legal transition, legal culture played an important part, but was eventually adapted to the new system. Similar examples can also be found in some Latin American countries.

⁴³ See for example, Zuo Weimin and Wan Yi, 'Woguo xingshi susong zhidu gaige ruogan jiben lilun wenti yanjiu (Study on several basic theoretical issues of the criminal justice reforms)' (2003) 4, *China legal study (zhongguo faxue)*, 134-145.

⁴⁴ John Jackson, 'The effect of Human Rights on criminal evidentiary processes: Towards convergence, divergence or realignment' (2005) 68 *MLR* 737, 747.

⁴⁵ Ibid. See also Sarah Summers, *Fair trials: The European Criminal Procedural Tradition and the European Court of Human Rights* (Hart Publishing 2007) 178-183; John Jackson and Sarah Summers, *The internationalisation of criminal evidence: beyond the common law and civil law traditions* (Cambridge University Press 2012) chapter 1-3.

remains significant, most particularly in the pre-trial process. This has been outlined by certain comparative empirical research accounts, which have demonstrated the diverging legal culture, institutional setups and legal principles.⁴⁶ As Maximo Langer (2004) suggested, the two systems are not only dichotomised ways of distributing powers and responsibilities between the main actors of the criminal process, but also as 'two cultures—two different conceptions of how criminal cases should be tried and prosecuted'.⁴⁷ Thus, although the fair trial principle shared by both systems should be fully endorsed, the difference between the two legal traditions, such as the function, ideology and accountability of the prosecution service, is still pronounced in day-to-day practice and should also be taken into account when legal transplants are suggested. Many scholars have also attempted to reconcile opposing values of the criminal process, such as crime control and due process, and efficiency and justice.⁴⁸ However, none of these proposals successfully explained how these values can be balanced in legal practice.⁴⁹ Therefore, it provides no effective guidance for legal reform.

In recent years, with the growing popularity of empirical research in Chinese studies, scholars such as Zuo Weimin (2009) observe that legal reform should be based upon the operation of the Chinese criminal justice system whilst assimilating foreign practices.⁵⁰ Although no concrete reformative proposal has yet been advanced on the basis of the suggested empirical investigation, cautious scholars have been aware of the political limits and the underlying obstacles in legal practice. With the progression of the legal reform,

⁴⁶ See for example, Jacqueline Hodgson, *French criminal justice: a comparative account of the investigation and prosecution of crime in France* (Hart publishing 2005).

⁴⁷ Maximo Langer, 'From legal transplants to legal translations: The globalisation of plea bargaining and the Americanization thesis in Criminal Processes' (2004) 45 *Harvard International Law Journal* 1.

⁴⁸ Xu Binlong, 'Zhongguo xingshi susong moshi: Cong chuantong zouxiang xiandai' (Chinese criminal justice model: From traditional to the model)' (2006) 7 *Xinan minzu daxue xuebao* (*Southwest minority University law review*) 44; Wang Jiancheng, 'Xingshi susong zaixiugai guochengzhong xuyao chuli de jige guanxi (A few relationships that needs to be dealt with during the process of legal reform)' (2007) 4 *Faxujia* (*Jurist*) 17-18. It should be noted that scholars such as Wang Jiancheng, hold borderline position: they approve one type of legal model, but the same time, they suggest that China should also learn from the other legal system.

⁴⁹ Xu Binlong, 'Zhongguo xingshi susong moshi: Cong chuantong zouxiang xiandai' (Chinese criminal justice model: From traditional to the model)' (2006) 7 *Xinan minzu daxue xuebao* (*Southwest minority University law review*), 44.

⁵⁰ Zuo Weimin, 'Fanshi zhuanxing yu zhongguo xingshi susong zhidu gaige: jiyu shizheng yanjiu de taolun (the transformation and Chinese criminal justice reform: An discussion based upon empirical research)', (2009) 2 *China Law study*, 118-125.

Chinese scholars have realised that the political environment has repeatedly thwarted these legal principles.⁵¹ Due to the political scrutiny they are facing, reformative plans that have been advanced are pragmatically compromised to avoid being criticised as radical or ignoring the Chinese social context. Hitherto reformative measures suggested by Chinese scholars have been carefully framed within the domain of abstract normative principles. As Long Zongzhi (2005) commented on criminal justice reform, legal reform should 'entertain the interested, consolidate the progress, reconcile working mechanisms and seek breakthroughs'.⁵²

2.2 Criminal Justice Reform in the Political Context

In contrast to the constrained approach which constrains Chinese scholars, observers outside China have positioned the criminal justice reform within the political context. For example, Mike McConville et al's (2011) study categorises the legal reform of the criminal justice system into two types, namely changing the law itself and a more fundamental systematic change. On the one hand, they have been disillusioned by the reform of law, as they believe that such an attempt is often 'based upon false assumptions about what the legal process actually is and thus puts the focus on the wrong issue'.⁵³ After examining why CPL 1996 could not honour its promise of bringing adversariness into the criminal justice system, they commented:

Changing the law has not in any significant way changed the behaviour of courtroom actors in ordinary everyday cases, let alone those infused with clear political

⁵¹ For example, although judicial independence as a general principle is widely acknowledged by academics, it has been a political taboo to discuss judicial independence in China, due to the leadership of the Party. Also Party regulations such as *shuanggui* on corruption cases committed by state officials have still been frequently used before the formal investigation, which is not justifiable in criminal process.

⁵² Long Zongzhi, *Paihuai zai Chuantong yu Xianzai zhijian: Lun xingshi susongfa de zaixiugai* (*Lingering between the tradition and the modern: the revision of the criminal procedure law*) (Law Press China 2005) 20.

⁵³ Mike McConville et al, *Criminal justice in China: An empirical enquiry* (Edward Elgar 2011) 449.

overtones. [...]The most obvious impact of the 'reform', accordingly, is less on the actions of state officials than the fact that they have to account for their actions in ways that comport with the new requirements. (McConville, 2011: 450-451)

On the other hand, they observe that overhauling the political system, leading to the democratization of the State, challenges the institutionally-embedded culture, making it too formidable to realize.⁵⁴ This has clear resonance since the incidence in 2013 after the new administration took power. When Xi Jinping became the general secretary of the CCP, there has been a major backlash sabotaging the push for constitutionalism in the official media.⁵⁵ During the debate on Constitutionalism, leaked contents of the official circular '*Briefing Concerning the Situation in the Ideological Sphere*' (also known as Document 9) and a number of other articles from the Party's official mouthpieces such as *Qiushi*,⁵⁶ attacked liberal reformers who promote constitutional democracy as 'Western hostile forces'. Universal values such as human rights have been denigrated and essential elements that foster democratic nations, such as free press, civil society, neoliberalism, and constitutional democracy, have been ruled out as options for Chinese society.⁵⁷ The chilling result of this political debate sent a clear message that prohibits China from being 'westernised'.⁵⁸ Whilst Xi Jinping has launched an anti-corruption purge to regain the legitimacy of the regime of the Party, there has been a lack of interest from the central authority to initiate democratic reforms.⁵⁹ On the contrary, the out-dated socialist legacy,

⁵⁴ Ibid 450.

⁵⁵ The full account of the incident see Lance Gore, 'The political limits to judicial reform in China' (2014) 2:2 *The Chinese Journal of Comparative law*, 213.

⁵⁶ See for example, 'Overview of the Constitution', *Qiushi theory* < <http://www.qstheory.cn/ztck/2013nd/xzxs/> > accessed at 12 November 2013.

⁵⁷ Cathy Burke, 'China aims to stamp out "western Constitutional Democracy"', Newsmax (19 August 2013) <<http://www.newsmax.com/Headline/china-stamps-western-democracy/2013/08/19/id/521211/>> accessed at 19 January 2014; This article was also cited by Lance Gore, 'The political limits to judicial reform in China' (2014) 2:2 *The Chinese Journal of Comparative law*, 213.

⁵⁸ Wang Jiangyu, 'Judicial reform and political development in China: An introduction by the managing editor', (2014) 2:2 *The Chinese Journal of Comparative law*, 185,187.

⁵⁹ There are 148931 people convicted of corruption related crimes between January 2008 and August 2013. Among them, 32 are senior officials above provincial level. Lu Yuanqiang, '5 nian 32 min shengbuji yishang tanguan luoma (Five years, 32 officials above provincial level are convicted for corruption)', *Global Financial Post* (*Guoji jinrongbao*) 32 October 2013 < http://paper.people.com.cn/gjjrb/html/2013-10/23/content_1313441.htm> accessed 7 July 2014. The discussion on the relationship of anti-corruption and

such as the class struggle ideology, the mass line and Maoist' theory of continuous revolution, was once again resurrected to prioritise the single-party rule.⁶⁰

There has been a political constant throughout the criminal justice reforms since 1996, namely the unchallengeable leadership of the Communist Party. As far as criminal justice reform is concerned, political impediment has been *the* main obstacle traversing the reform. The social control function of the criminal justice institutions, the allied tripartite network of the Iron Triangle and the managerial Appraisal System are all derived from the political needs of the Communist regime. In this respect, the function of the legal institutions is fundamentally different from the Western idealism about the rule of law: they are setup as a state apparatus to ensure the 'internal solidarity' of the State and control 'the weak and powerless in society'.⁶¹ Nevertheless, there remains a hiatus in which the extent of due process can be increased within the criminal justice system. In fact, as Lance Gore (2014) suggested, 'between the rule of law and rule of the Party, there is substantial space for judicial reforms, and a certain dose of legality in a globalised market economy may actually help the authoritarian regime to consolidate its rule'.⁶² However, this requires a more liberalised stance from the Party with a more relaxed control over the criminal justice institutions such as the courts and the procuratorates.

Despite the incident of the assault on constitutionalism in the press, there have been positive signs for the transition of the criminal justice system in the future. For Western observers, the legally trained new President of the Supreme People's Court Zhou Qiang replacing his predecessor Wang Shengjun (who has no legal education) indicates that the judicial reform will restore its tradition of liberal legality.⁶³ In 2013, the notorious

the rule of law, see Ivan Krastev, *Shifting Obsessions: Three essays on the Politics of anticorruption* (Central European University Press 2004) 43-71.

⁶⁰ See Lance Gore, 'The political limits to judicial reform in China', (2014) 2:2 *The Chinese Journal of Comparative law*, 213, 230.

⁶¹ Mike McConville et al, *Criminal justice in China: An empirical enquiry* (Edward Elgar 2011) 449.

⁶² See Lance Gore, 'The political limits to judicial reform in China', (2014) 2:2 *The Chinese Journal of Comparative law*, 213, 231.

⁶³ Before Wang Shengjun became the President of the Supreme People's Court, his predecessor Xiao Yang introduced the judicial reform in the direction of judicial independence. However, this promising reform of

administrative penalty of reform through labour, which accorded the police the power to deprive any individual of liberty for up to four years, was finally abolished. For over half a century, millions of people,⁶⁴ including petitioners and political dissidents, had suffered the imposition of this heavy police penalty being accused of minor social disorder offences, without being prosecuted and tried.⁶⁵ The abolition of the police penalty should significantly improve China's human rights status. In 2014 alone, fourteen wrongfully convicted cases have finally been corrected;⁶⁶ and the high profile murder case of Nie Shubin, which was claimed to be committed by someone else, has finally been reopened after the potentially innocent had been executed nineteen years ago.⁶⁷ Although the re-investigation of the case of Nie Shubin has been criticised for being belated and involving official cover-ups, the courts' courage to correct the miscarriages of justice should be acknowledged.

Additionally, some of the newly added measures in CPL 2012 have made impressive strides towards compliance with international conventions. In the new chapter of juvenile justice in CPL 2012, for instance, international standards, such as the juvenile suspect's social background investigation; parental or appropriate adult's participation in the criminal

liberal legality was undermined when the Party-system cadre Wang Shengjun became the President of the Supreme People's Court. Wang introduced many controversial schemes, such as the Grand mediation, the Three Supremes doctrine, aiming to strengthen the Party's leadership on the judicial system. For a more detailed account and comments see Titus Chen, 'Reformulating Justice: The political logic of the Post-1999 Judicial reform in China and its implications for the rule of law'(2010) 45 *Taiwanese Journal of Political Science*, 69-106; Randall Peerenboom, 'The battle over legal reforms in China: Has there been a turn against law?'(2014) 2:2 *The Chinese Journal of Comparative law*, 188,212.

⁶⁴ Reform through labour was applied in practice since the 1950s. In 1966 over 40,000 people were imposed with reform through labour; during the Hard Strike movements, over 321, 000 people were imposed with reform through labour. According to Wang Gongyi (the Director of the institution of justice in the Department of Justice), each year, the maximum number of people who were imposed with reform through labour is over 300,000 and the minimum is 5000. Before the reform through labour was abolished, there were 60,000 people actively serving this penalty in 2013. Lin Ping, 'Over 60,000 people are still serving the reform through labour' (2012) 18 October 2012 <<http://legal.people.com.cn/BIG5/n/2012/1019/c42510-19315475.html>> accessed at 02 February 2014.

⁶⁵ People who were imposed with the penalty of reform through labour were not only imprisoned but also forced to work. A lot of people were imposed with reform through labour due to social control reasons rather than committing any offences, such as those who practiced Fa-Lungong (which has been categorised as an evil religion) or persistent petitioners.

⁶⁶ Ma Yunfang et al, 'Youcubijiu!shibada yilai quanguo gedi jiuzheng zhongda yuanjia cuoan 23 qi (Correct the wrongs! Since the Eighteenth CCP Congress 23 miscarriages of justices have been corrected)', *Peipai News* <http://www.thepaper.cn/newsDetail_forward_1282995>accessed at 22 December 2014.

⁶⁷ *Xinjingbao*, 'Nie Shubin de muqin: Ruo fucha zaisheng kexu yuanshen jiang shensu daodi (The mother of Nie Shubin: If the judgment was affirmed after the re-investigation, I will appeal for my whole life', <<http://news.sina.com.cn/c/2014-12-14/023031282544.shtml>> accessed at 16 December 2014.

proceedings; sealed juvenile records; and application of a compulsory legal aid scheme, have been successfully internalised and codified within the criminal procedure law.⁶⁸ Whilst there still exists significant problems with regards to defence lawyer's access to the dossier during the prosecution review stage; there has been evident improvement in this perspective since the implementation of CPL 2012.⁶⁹ According to the implementation report of CPL 2012, more than half (60.8%) of the respondent defence lawyers expressed that they had no problem with accessing the dossier at the prosecution review stage, and in a number of procuratorates across different regions of China, defence lawyers are now able to access prosecution dossiers digitally; and more facilities are provided for this service.⁷⁰ During my interviews in the field, I was also repeatedly told that as a general trend, there were fewer obstacles that defence lawyers had to overcome in order to access the dossier over the last two years in comparison to previous years.

As this research was drawing towards a close, a new round of legal reform was initiated by the administration of Xi Jinping in an attempt to enhance prosecutorial and judicial professionalism. In November 2013, the third plenum of the eighteenth National Congress of the Chinese Communist Party (CCP) announced reformative plans to clear financial and managerial obstacles incurred by local protectionism. This includes strengthening accountability of judges and prosecutors, implementing rigid selective procedures for judicial appointments, and centralised funding for the procuratorates and the courts at and below the provincial level.⁷¹ Following the third plenum of the eighteenth National Congress, a new platform for reform ---'the Chinese Communist Party Central Committee Decision concerning Some Major Issues in Comprehensively Deepening Reform (the

⁶⁸ See Stephanie Persson, 'China talks juvenile justice reform: A constructivist case study' (2014) February, Columbia Law school, Public law and legal theory working paper group (Paper number 14-374).

⁶⁹ See chapter 5.

⁷⁰ According to the Report, 15.8% of defence lawyers had no problem in accessing the dossier, and 42.8% of defence lawyers thought they had no problem reading the dossier, but thought the cost (photocopying fees and travelling fees) was the most significant problem. See Beijing Shangquan Law firm, 'The annual report of the implementation effect of the new criminal procedure law 2013' (2014) <http://www.sqxb.cn/content/details16_1644.html> accessed at 9 March 2014.

⁷¹ Zhang Jian and Liu Xueyu, 'Liushengshi shidian sifa tizhi gaige, faguan tiaochu putong gongwuyuan xulie (Pilot project of judicial reform carried out in six provinces, judges are filtered out of ordinary civil servant catalogue)' (2014) *Jinghua shibao* (*Beijing-China report*) 16 June 2014.

Decision)'---was established to recommend further detailed measures toward reform. Some of the suggested schemes, such as strengthening the authority for the trial judges and sorting out relationships between the courts at hierarchal levels, are seen as crucial to increase the judicial independence.⁷² With a piloting scheme in six provinces carrying out these proposed measures, the communiqué from the fourth plenum of the eighteenth National Congress of the CCP held in October 2014 proclaimed the 'strategic deployment (*zhanliu boshu*)' of accelerating the construction of socialist rule of law, promoting the authority of the Chinese justice system.

This reform apparently could be the very catalyst to transform the social control function of the criminal justice institutions. If the judicial reform is able to enhance the professionalism of judges and prosecutors by promoting elements that sustain judicial independence (including the authority, accountability, capability and autonomy of the courts), more potentially innocent individuals involved in the criminal process could be filtered out of the system and the reform of the criminal justice system becomes possible. However, experience from other jurisdictions such as Taiwan and Latin America indicates that judicial reform can be highly political in nature and its success hinges on 'the way in which multiple (interested elites) actors have interacted under the authoritarian judicial system'.⁷³ Differing from the judicial reforms in Taiwan and Latin America, there is no political democratization in conjunction with this reform in China.⁷⁴ Therefore the major obstacle is not the normative techniques that will be used, but the lack of political will to subject itself to the new judicial system. As Randall Peerenboom (2014) has noted, so far, the Decision has not addressed the relationship between the judiciary and the Party institutions (such as the political-legal committee), nor does it loose control of politically

⁷² Randall Peerenboom, 'The battle over legal reforms in China: Has there been a turn against law?' (2014) 2:2 *The Chinese Journal of Comparative law*, 188, 198.

⁷³ Weitseng Chen, "'Sir, We suggest you be fired': Lesson for China from Taiwan's judicial reforms" (2014) 2:2 *The Chinese Journal of Comparative law*, 289, 313.

⁷⁴ Pilar Domingo and Rachel Sieder, *Rule of Law in Latin America: The international promotion of judicial reform* (University of London Press, 2001) 148-152; Weitseng Chen, "'Sir, We suggest you be fired': Lesson for China from Taiwan's judicial reforms" (2014) 2:2 *The Chinese Journal of Comparative law*, 289, 308.

sensitive cases involving human rights activists, dissidents or high profile politicians such as Bo Xilai.⁷⁵

Compared to the successful judicial reform in Taiwan, in China there has also been a lack of a solid community of lawyers as an external force to pursue the judicial independence.⁷⁶ As analysed in this study, Chinese lawyers, especially human rights lawyers and criminal justice lawyers, who should play a significant role in promoting the reform, have been a weak group alienated and attacked by the State. Meanwhile, the competence (or capacity) of the current judicial system and the bonded tripartite relationships of the legal institutions also make the judicial reform extremely difficult. In legal practice, judges and prosecutors are still directed by the Appraisal System orientated by crime control, and there is no sign that this audit system is going to be abolished. Given all these concerns, the likelihood is that this judicial reform will not be able to steer the system through these difficulties even though it shows great promise.

Due to the political limitations of these legal reforms, it would be an uphill task to correct the structural failure of the criminal justice system, unless there is a fundamental social and political change in China. In this sense, I generally endorse McConville et al (2011)'s view and agree with the point that legal reform cannot be a standalone process detached from the 'underlying political economy and its core value system'.⁷⁷ The criminal justice system in China was not created on the basis of due process to protect the rights of the accused, but rather as a functional part of the State apparatus. This research has demonstrated that the key mechanisms that drive the criminal justice process (the dossier system, bureaucratic management and official audit which are cemented by the collective ideology venerating hierarchical authority and emphasize the control of the deprived) are built with

⁷⁵ Randall Peerenboom, 'The battle over legal reforms in China: Has there been a turn against law?'(2014) 2:2 *The Chinese Journal of Comparative law*, 188, 199.

⁷⁶ Weitseng Chen, ' "Sir, We suggest you be fired": Lesson for China from Taiwan's judicial reforms"(2014) 2:2 *The Chinese Journal of Comparative law*, 289, 308.

⁷⁷ Mike McConville et al(2011) *Criminal justice in China: An empirical enquiry* (Edward Elgar 2011) 450.

the purpose of strengthening the political leadership.⁷⁸ The criminal justice system mainly acts as a deterrent and imposes retribution for the purpose of social control. The way that the police case is constructed, the tightly controlled non-prosecution rate, the extremely high proportion of conviction rate and the legal institutions' discrimination against suspects and defence lawyers, have made any legal safeguards. As a component part of the Party-state, the Chinese criminal justice system epitomises the nature of the political regime, reflecting the basic relationship between the State and its citizens, transmitting the central ideology of social control.

2.3 A Few Realistic Suggestions for the Revision of Law

Legal reform is not a panacea and cannot provide a solution for *every* problem; especially those systematic issues imbedded within deep-seated legal culture. Occasionally, 'legal reform ends up being the answer to problems caused by legal reform'.⁷⁹ The most representative example of this is the repealed rule under CPL 1996 which prevented judges from reading the prosecution dossier and therefore forming biased opinions against the defendant before the trial. This was introduced in order to ensure that both defence and prosecutors' performance during the trial could actually dictate the outcome of the judicial decision, without unilaterally relying on the basis of the prosecution case. However, this rule has failed due to the fact that it is not only unable to sever the link between the prosecution dossier and the judicial decision, but it had caused difficulties in allowing defence lawyers to access the prosecution evidence at the trial stage.⁸⁰ Despite its benign intention, the law which restrains judges from viewing untested prosecution evidence

⁷⁸ Detailed discussion see chapter 3 to chapter 6.

⁷⁹ Mike McConville, Andrew Sanders and Roger Leng, *The case for the Prosecution* (Routledge 1991) 194.

⁸⁰ As being discussed in Chapter 6, since the prosecution dossiers were not transferred to the court before the trial, the defence lawyer appointed by the court could not consult prosecution case at the trial stage before CPL 2012. They could only rely on the copies of evidence selected by the prosecutor.

cannot guarantee fairness of the trial, nor could it motivate judges to explore the truth by calling witnesses to give live testimony. The fact that judges still relied upon the prosecution dossier to adjudicate the case, despite the law indicating that this habitually shaped judicial behaviour, is not directly linked with their legal percept. In fact, it is more concerned with the judge-prosecutor coalition, the bureaucratic managerial system, and the underlying social control ideology. The crime control orientated values and mechanisms are firmly intertwined, making the entrenched practices unlikely to be changed.

Nevertheless there are still issues that can be remedied by changing the law. The example of Japan has demonstrated that it was possible to establish the principle of due process through effective legal reforms within a country where the collectivism tradition dominated. The revision of law on certain matters is less likely to cause controversial outcomes, as they are more concerned with legal techniques than the moral values underlying it. The idea of applying justice 'in accordance with the law' has, to a certain extent, been accepted by modern society.⁸¹ Despite the authoritarian regime, China is a society blended with liberal streams, and to a certain degree it promotes and tolerates the rule of law.⁸² Hence, it is not totally meaningless to talk about the change of law and there are plenty of areas that need to be addressed urgently by reforming the law. For example, since the enactment of CPL 2012, it has been reported that expert witnesses have started to come to the court to testify.⁸³ This is mainly because the revised law provides that a disputed expert report can no longer be admitted by the court, unless the expert actually comes to the court to testify.⁸⁴

One of the most obvious reasons why many state officials disobey criminal procedure is simply due to a lack of legal consequence relating to a breach of law. Thus, when the

⁸¹ Susan Trevaskes, 'Severe and Swift justice in China' (2007) 47:1 *Brit.J. Criminol.*, 23,23.

⁸² Fu Hualing and Richard Cullen, 'Climbing the *Weiquan* Ladder: A radicalizing process for rights-protection lawyers' (2011) 205 March, *The China Quarterly*, 40, 40.

⁸³ Liu Chang and Zhou Nan, 'Zhongguoshi zhuanjia zhengren chuting: Gongjia buzai longduan sifa jiating huayuquan (Expert witnesses come to the court in the Chinese style: The State no longer monopolises the decision of expert report)' (2013) 4 July (Nanfang Zhoumo) South Weekend Post, <<http://www.infzm.com/content/92056>>, accessed at 3 April 2014.

⁸⁴ article 187 of CPL 2012.

suspect has been interrogated persistently over twelve hours, no legal consequence would occur to remedy the infringement of the rights of the accused, due to a lack of relevant provisions. During my observation in the prosecutorial interrogation, several suspects reported that they were not allowed to take a rest during the police interrogation, which had continued for over twelve hours.⁸⁵ Defence lawyers also affirmed that even though they wanted to file a complaint for such a contravention of law, no further action would be undertaken due to the silence of law.⁸⁶ Additionally, in the Chinese Criminal Procedure Law (no matter CPL 1996 or the refined version of CPL 2012), the language that has been used is vague, infinitely flexible, or even contradictory, which leaves ample room for the legal institutions to circumvent the rules. Therefore, even though the law has clearly provided that during the police interrogation, the suspect's meals and necessary resting time should be guaranteed, there is no specification as regards to what can be counted as 'necessary resting time' and in what way these rights of the accused can be safeguarded.⁸⁷

More controversially, the law requires the suspect to 'confess truthfully' during the police interrogation on the one hand; yet on the other hand, it also states that suspects are entitled to the right against self-incrimination.⁸⁸ The use of language and conflict of rules create sufficient ambiguity for malpractice and sets no limits on the arbitrary nature of police conduct. Empirical evidence in this study suggests that during both police interrogations and prosecutorial interrogations, suspects were still obliged to give confessions to comport with the 'official version of truth' formulated by the police. As these problems can be regarded more as a matter of normative drafting skill, they should be comparatively easy to resolve. Nevertheless they are crucial problems that should be addressed efficiently to strengthen the rights available to suspects.

⁸⁵ Field note APU-34, 35, 42 and 44.

⁸⁶ See Interview BDL-1.

⁸⁷ See article 117 of CPL 2012.

⁸⁸ More discussion on this conflict of law see chapter 3.

The finding of this empirical research also suggests that the law should take further steps to remove the constraints on defence lawyers and provide effective control over police powers during the investigation process.⁸⁹ This study has repeatedly demonstrated that defence lawyers have been inappropriately treated by hostile state officials. As a result the defence lawyering as an industry has been significantly subjugated due to the hazards of this profession. If no urgent policies are implemented to restrain hostile persecution, defence lawyers will eventually be an 'endangered species'.⁹⁰ Such situation would require abolition of article 306 of criminal law, which has frequently been utilised by police and prosecutors to take retaliatory action against defence lawyers.⁹¹ Given the fact that many defence lawyers have been investigated and prosecuted as a result of robust defence strategies (such as confirming witnesses' statements in the dossier), the law should completely forbid police and prosecutors from prosecuting defence lawyers in relation to normal legal activity.⁹² The law should also enshrine lawyer-suspect confidentiality and require detention centres to provide sufficient facilities for such purpose. Whereas changes in these legal norms might not thoroughly transform the structure of the criminal justice system, some of these egregious effects caused by the repression of defence lawyers could be potentially avoided or minimised.

3. Concluding Remarks

⁸⁹ A number of Chinese and international scholars have proposed different versions of new Criminal procedure law or detailed reforming schemes. See for example, Xu Jingcun, *Scholarly drafted Chinese criminal procedure law and reasonings* (Zhongguo xingshi susong xuezhe nizhidao jiqi lifa liyou) (China law press 2005); Chen Weidong, *Model code of criminal procedure* (China Renmin University Press, 2011); Randall Peerenboom, 'Out of the Pan and into the Fire: Well-intentioned but misguided recommendations to eliminate all forms of Administrative detention in China' (2003) 98 *North-western University Law Review*, 991; and Mike McConville et al (2011) *Criminal justice in China: An empirical enquiry* (Edward Elgar 2011) 446-450.

⁹⁰ See Hou Shumei and Ron Keith, 'The defence lawyer in the scales of Chinese criminal justice' (2011) 20:70 *June Journal of Contemporary China*, 379-380.

⁹¹ The harm of defence lawyers caused by article 306 of criminal law, see chapter 5.

⁹² See chapter 3 and chapter 5.

A lot of data relevant to the comprehension of China's criminal justice system is regarded as sensitive by the Chinese authority, due to the closed nature of the criminal process and the lack of transparency regarding public information within legal institutions.⁹³ This has made the study of the Chinese criminal process particularly difficult. Existing empirical research has investigated issues relating to the operation of the system from a variety of angles; but none of these studies approached the enquiry through an internal perspective of the criminal justice institutions. Focusing on the written procedures, this study has investigated how the cases for trial are constructed and used at different stages of the criminal process through observing the daily practice of the institutions. Whilst witnesses' absence at trial and the system's heavy reliance on written evidence have always been acknowledged by current literature, the reasons behind it, whether the constructed evidence is reliable and how cases for trial are actually shaped, have never been systematically explored before. Given the fact that the written evidence determines the ultimate issue of guilt or innocence of the accused, this study has analysed these questions, leading to the task of examining the structural context of the system.

It is worth noting that this study also has its own shortcomings and has confronted obstacles similar to those found by other empirical research: the data collected from the field sites may not fully represent the variety of practices across the vast landscape of China, albeit interviewees were deliberately selected from different parts of China. The knowledge of this problem has been versed throughout this study and I hope this deficiency can be better addressed in future research undertaken on a more comprehensive scale. Nonetheless, this research has managed to outline the criminal process through examining the strategic inter-relationships of the key legal actors, deep-seated legal culture embedded in the legal actions and the structural injustice that follows, by positioning it within the socio-political context. This research aims to break new ground on this under-investigated area and to stimulate debate on key matters of the system.

⁹³ Mike McConville et al, *Criminal justice in China: An empirical enquiry* (Edward Elgar 2011) 22.

The system of criminal justice in China is not a precise truth-finding process, in which scientific evidence can be meticulously relied upon and witnesses' testimonies are skilfully cross-examined in order to discover the truth. Within its cultural context, the Chinese criminal process is a one-way system directed at achieving a final conviction. Nonetheless, the criminal justice system is also open to reforms and, hence, it is possible that it will not remain the same over time. While the system cannot displace its key function as a State apparatus for social control, realistic legal reform is still possible in the hiatus within the political regime.⁹⁴ For instance, better legislative drafting skills are required for ensuring sound and accurate provisions, so that operation of law can achieve concrete objectives. This reform may involve features such as enhancing the efficacy of the safeguards provided by law, ameliorating the relationship between the defence lawyer and criminal justice institutions, and reinforcing the rights of defendants. There is no doubt that plenty of work still needs to be done to complete the reform process in China. Given the embedded legal culture that has been shaped through the day-to-day practice of state officials in China, any meaningful transformation of the current system is likely to be slow and, hence, can only be measured over a longer historical period.

⁹⁴ In January 2015, the Central Political-Legal Work Meeting (zhongyang zhengfa gongzuo huiyi) was held to remove the shackle of the Appraisal System within the legal institutions. The audit indicators that have been used to measure the work of legal institutions, such as conviction rates, prosecution rates, custody rates and arrest rates will be abolished in 2015 throughout China. Chen Jieren, 'Abolishing the audit system of the criminal justice institutions: a big leap of human rights protection' (2015) Yangcheng evening post 23-01-2015, accessed on 01 March 2015 at <http://www.humanrights.cn/cn/dt/gnbb/tt/t20150123_1212285.htm>

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Appendix A: Glossary of Chinese Legal Terms and Institutions

Chinese Legal Terms

Summons (*juchuan*): Suspects who are not detained or are not held in custody can be forced to be interrogated at their domiciles or to be brought to specific locations for interrogation (Article 117 CPL 2012). The police or the procuratorate that conducts the interrogation should produce their work identification. It should be noted in the interrogation record if a suspect is identified at the crime scene. A summons or consecutive summons lasts for up to 12 hours; for major and complex cases which require summons or an arrest, summons or consecutive summons should not exceed 24 hours. A summons cannot be used to falsely imprison the suspect. Suspects' meals and necessary rest should be guaranteed during the summons.

Bail/Guarantor (*qubao houshen*): For alleged minor offences that may not be sentenced with imprisonment, or less dangerous suspects who may not endanger society, suspects having serious illness, or female suspects during the period of pregnancy or nursing, rather than holding the suspect in custody, the police 'may' allow the suspect to obtain bail pending trial provided: (a) the alleged crime is one punishable by public surveillance, criminal detention or supplementary punishment, or (b) they would be a given fixed term imprisonment at least but during release on bail or under residential surveillance, they would not endanger society (Article 65 of CPL 2012).

Residential surveillance (*jianshi juzhu*): An alternative to granting bail. Compared to bail, residential surveillance restricts the liberty of suspects to a greater extent in terms that the suspects are not allowed to leave their domicile, meet or communicate with other people without the permission of the police (Article 72 of CPL 2012). According to Article 73 of CPL 2012, migrant suspects who have no fixed abode or suspects who are under investigation for committing crimes involving national security, terrorism and serious corruption, have to be removed to a designated place to implement the residential surveillance.

Detention (*xingshi jülü*): A coercive measure that precedes 'custody' (*daibu*) and is not an arrest in law. Suspects who have been authorised to be in custody are usually preceded with a period of up to three days detention by the police. Once a suspect has been detained, he is sent to the detention centre immediately where he will stay until the end of the trial unless it has been decided differently due to his physical fragility or insufficiency of evidence. Under the CPL 2012, the police are allowed to detain a suspect when one of a fairly wide-ranging set of preconditions are met: (a). a suspect is preparing to commit a crime or is in the process of committing a crime or is discovered immediately after committing a crime; (b). a suspect is identified as having committed a crime by a victim or an eye witness; (c). a suspect has criminal evidence found on his or her person or at his or her residence; (d). a suspect is attempting to commit suicide, abscond or is absconding; (e). a suspect is likely to destroy or falsify evidence; (f). a suspect does not tell his or her true name and address and his or her identity is unknown; (g). is strongly suspected of committing crimes in various places, repeatedly, or with a gang (Article 80 of CPL 2012).

Custody (*daibu*): When the police have detained a suspect, the suspect will be interrogated within 24 hours, after which the police will decide whether to submit a request to the Procuratorate for custody within 3 days, or release the suspect unconditionally, or make the suspect subject to either bail or residential surveillance. The Procuratorate has 7 days to approve or reject the request based on article 79 of CPL 2012, which includes the following six types of conditions that the suspect must be in custody if he or she is potentially to be sentenced to a punishment more severe than imprisonment and granting bail cannot prevent him or her from endangering society: (a). the suspect is likely to commit further crimes; (b). the suspect poses a realistic danger of harming the national security, public safety or public order; (c). the suspect is likely to destroy or falsify evidence, interfere with witnesses or falsify statements; (d). the suspect is likely to take revenge on the victim, case reporter, complainant; (e). the suspect is likely to commit suicide or abscond; (f). the suspect is likely to be sentenced to a punishment of a minimum of 10 years' imprisonment, or there is evidence to prove the fact in issue, he or she is likely to be sentenced to a punishment minimum of 6 months' imprisonment and he or she has a criminal record or his or her identity is unknown. Some scholars use 'arrest' rather than 'custody'

as an English translation term of the fifth compulsory measure '*daibu*' (see for example, Mike McConville et al, Criminal justice in China: An empirical enquiry (Edward Elgar 2011)). Even though the literal translation of '*daibu*' is arrest, the compulsory measure itself is more similar to the remand in custody in common law. Therefore to avoid confusion, the study uses the term of 'custody'.

Counter-appeal (*kangsu*): If procuratorates identify errors in judgments of the court at the same level, they are required to counter-appeal against the erred judgment to the court at a higher level (Article 217 of CPL 2012). The counter-appeal should be initiated by submitting a counter-appeal notice to the trial court whilst the counter-appeal is scrutinised in the procuratorate at a higher level. When the trial court receives the counter-appeal notice, it should send the dossiers to the court at a higher level and send the copy of the counter-appeal notice to the respondent party. If the procuratorate at a higher level believes that the counter-appeal is incorrect, it may withdraw the counter-appeal notice (Article 221 of CPL 2012). Under the Appraisal System, if the procuratorate successfully counter-appeals an erred judgment, the procuratorate will be credited and rewarded whereas the court will be penalised for its mistake.

Institutions

The Public Security Bureau (PSB) (*gong'an*): The legal term for the Chinese police --- the most powerful institution within the criminal justice system in China. The PSB is empowered to impose a wide range of administrative penalties, including intrusive infringements of an individual's liberty that are even harsher than certain criminal punishments. Apart from the police powers exercised in England & Wales, such as the search of persons or premises, and the power to seize material evidence, Chinese police are granted five further types of compulsory measures pending trial by the CPL 2012: namely summons (*juchuan*), bail (*qubao houshen*), residential surveillance (*jianshi juzhu*), detention (*juliu*) and custody (*daibu*). Except for custody, which has to be approved and authorised by the Procuratorate, the police are allowed to make a final decision on issues without external scrutiny.

Procuratorate (*jianchayuan*) or the People's procuratorate (*renmin jianchayuan*): The Chinese prosecution agency which is modelled on the Soviet Union system. The procuratorate is empowered with the supervisory role that includes the supervision of case registration, supervision of the investigation, supervision of the trial and supervision of law enforcement.

The Adjudicative Committee (*shenpanweiyuanhui* or abbreviated as *shenweihui*): The key coterie within the court that is accountable for the decision making in serious criminal cases. It is usually made up of the President and the Vice President of the court, the leaders of court divisions and other senior experienced judges. The verdict of serious cases, such as cases that could be acquitted, cases that could be potentially sentenced to the death penalty, or cases being counter-appealed by the procuratorate, must be based upon the agreement reached by the members of the Adjudicative committee. According to 'the advice of the implementation of the reform and perfection of the Adjudicative committee of the People's court issued by the Supreme Court (No.3, 2010)', these following cases must be submitted to the adjudicative committee for discussion: (a). for the Supreme People's Court, criminal judgment that has been validated, however there is an error in the decision which requires change; cases counter appealed by the procuratorate; (b). for the high People's court and the intermediate People's court, criminal judgment that has been validated, however there is an error in the decision which requires change; cases counter appealed by the procuratorate, cases that are going to be imposed with the death penalty with immediate execution; cases that should be acquitted; the application of the law requires the legal opinion from the higher court; serious cases that should be submitted to the higher court for trial; (c). for basic People's court, criminal judgment that has been validated, however there is an error in the decision which requires change; the sentence should be imposed lower than the legal tariffs or the defendant should be immune from any criminal sentence; cases that should be acquitted; the application of the law requires the legal opinion from the higher court; cases which are likely to be imposed with life imprisonment or the death penalty and should be submitted to the higher court for trial; serious cases that should be submitted to the higher court for trial. There are other controversial cases without categorisation that can be brought to the Adjudicative Committee, which include members of the collegiate bench cannot make a final

agreement due to the disputes; cases with wide social influence; cases that involve difficult legal applications.

The Prosecution Committee (*jianchaweihuanhui* or abbreviated as *jianweihui*): The key coterie within the procuratorate that is accountable for the decision making of major or serious criminal cases. It is comprised of the chief prosecutor, associate chief prosecutors, specialised prosecutors and other responsible leaders of departments of the procuratorate. All members of the committee should be qualified as a prosecutor. According to article 3 (2) of the Procuratorate Organisation Law, all levels of the procuratorates should establish the procuratorate committee to discuss major cases and other important issues. If a prosecution case is proposed to be withdrawn by a prosecutor, the prosecution committee should discuss the case first and make an initial decision; if the prosecution committee agree that the case should be withdrawn, the case will be forwarded to the chief prosecutor to make a final decision.

The Political-legal Committee (*zhengfaweiyuanhui* or abbreviated as *zhengfawei*): A political institution established by the Chinese Communist Party to give guidance and coordinate the relationship between criminal justice institutions. The political-legal committee was established by the Party in the 1950s to give instructions to legal institutions. During the 1980s, the power of the political-legal committee has been gradually constrained and restricted to providing guidance to and coordinating the legal institutions. But in the 1990s, the function of the political-legal committee was strengthened and the power was expanded to discussing and intervening with major and serious cases. For a long period of time, the head of the police had routinely been the leader of the political-legal committee, although this practice has been changed at the provincial level since the third plenum of the eighteenth National Congress of the Chinese Communist Party in November 2013.

Appendix B: Data Sources

Field Site Coding

Site A: Central district inside a major city.

Site B: Middle size city including rural outskirts (approx. 1,050,000 inhabitants).

Site C: Middle size city including rural outskirts (approx. 6,446,000 inhabitants).

Site D: District in a major city.

Site E: City and surrounding urban area.

Site F: Developed urban area in a major city.

Site G: Developed urban area in a major city.

Site H: Rural area in a small town (approx. 200,000 inhabitants).

Site I: Central area in a major city.

Site J: Small town in a rural location (approx. 2,100,000 inhabitants).

APU: Field note from a basic procuratorate in site A.

CASEA: Monitored cases drawn from Site A.

Interviewees (With Biographical Notes where Available)

APS-1: Junior prosecutor in site A---3 months' experience.

APS-2: Senior prosecutor in site A---7 years' experience.

APS-3: Junior prosecutor in site A---2 years' experience.

APS-4: Senior prosecutor and a leader of the prosecution department of a basic procuratorate in site A---3 years' experience.

APS-5: Senior prosecutor in site A---7 years' experience.

APS-6: Senior prosecutor in site A---6 years' experience: floating post; working in different departments of a basic procuratorate in site A and 3 years' experience working in the department of prosecution in the same procuratorate.

BPS-1: Senior prosecutor in a basic procuratorate in site B---6 years' experience.

FPS-1: Senior prosecutor in a basic procuratorate in site F---experience not known.

BDL-1: Senior defence lawyer in site B---34 years' experience.

CDL-1: Junior defence lawyer in site C---2 years' experience.

CDL-2: Junior defence lawyer in site C---3 years' experience.

CDL-3: Junior defence lawyer in site C---2 years' experience.

JDL-1: Senior defence lawyer in site J---7 years' experience.

IDL-1: Senior defence lawyer in site I---7 years' experience.

ATJ-1: Senior criminal judge in a district court in site A---3 years' experience.

FTJ-1: Senior criminal judge in a district court site F---3 and a half years' experience.

GAJ-1: Senior criminal judge in a district court in site G, the leader of the criminal court---experience not known.

GAJ-2: Senior criminal judge in a district court in site G---3 years' experience.

GAJ-3: Junior criminal judge in an intermediate court in site G---3 months' experience.

GAJ-4: Senior criminal judge in an intermediate court site G---5 years' experience.

GTJ-1: Senior criminal judge in a district court in site G---6 years' experience.

BPO-1: Senior police officer in a district police station in site B---20 years' experience.

BPO-2: Senior police officer in a district police station in site B---6 years' experience.

BPO-3: Senior police officer and the head of a district police station in site B---8 years' experience.

DPO-1: Senior police officer in a district police station in site D---7 years' experience.

EPO-1: Junior police officer in a district police station in site E---3 years' experience.

FPO-1: Senior police officer in a district police station in site F---11 years' experience.

HPO-1: Senior police officer in a district police station in site H---over 20 years' experience.