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III. FACTORS THAT CONTRIBUTED TO THE EXISTING PROBLEMS

As mentioned in Chapter I, (published in December, 2003 issue of *Perspectives*) the motivation for the Chinese leadership to establish a modern legal system was rooted in its desire for faster economic development. Thus, the enthusiasm for reform among the leadership and certain legal professionals reflected more of an appreciation of the instrumental or symbolic value of a modern legal system, rather than an appreciation of the underlying legal principles. Even though both approaches appear to pursue the same end, the detriments of the former are inevitable and they will become apparent as reform efforts deepen. One of the detriments is the danger of form over substance. Eager to demonstrate to the world that China now has a legal system consistent with international legal standards, the leadership has emphasized the “appearance” of modernity over substantive improvements in the legal system. The other detriment is resistance from different players as reform efforts started to threaten their powers and interests. Such resistance may result in inconsistencies or inadequacies in the laws themselves or obstacles during actual implementation that frustrate the ultimate purpose of the reform.

1. The Lack of a Cultural Foundation for the Institution of Lawyers and the Profession of Criminal Defense

a. Early development of the legal profession

Even though theorists widely oppose resorting to cultural differences as a causal explanation for differences in legal systems, China's five-thousand-year history did play an important role in shaping China's current political, legal and social institutions. Unlike judges, procurators or the police, who can be traced to prototypes in China's ancient legal systems, lawyer is an entirely alien concept that has no real equivalent in ancient China. Because the dominant ancient Chinese philosophy—Confucianism—applauded harmony and disdained formal disputes, legal systems in imperial China discouraged litigation and restricted the knowledge of law to the social and political elite.⁸⁹ By the 16th century, there had emerged a group of so-called “Songgun” (litigation

* The research methodology for this paper includes interviews, field trips, and literature search. The author personally interviewed more than 50 people, including procurators from the Supreme People's Procuratorate and a number of provincial or county-level procuracies, prominent criminal defense lawyers in China, judges at provincial or district levels, as well as a large number of law professors from leading law schools and research institutions in China and in the United States. The author has also attended a number of criminal trials and visited several detention centers in China.

⁸⁹. MELLISA MACAULEY, *SOCIAL POWER AND LEGAL CULTURE: LITIGATION MASTERS IN LATE IMPERIAL CHINA 3* (Stanford University Press, 1998).

tricksters) or “Songshi” (litigation masters) that vaguely resembled Western lawyers.⁹⁰ They drafted complaints for litigants and provided legal advice. The pejorative titles these early “legal professionals” had acquired inferred a strong sense of aversion by the general public—these people were mostly in the lower echelons of the literate elite and were often prosecuted for backlogging the courts and subverting the judicial process.⁹¹ If the history of litigation tricksters and masters bore any implication for the future development of China’s legal profession, which would be the dominance of the judicial process by government elite and the general hostility exhibited by the ruling class towards people who provided legal services to private citizens.

The Western type of professional lawyers was first introduced to China at the end of the Qing Dynasty.⁹² The late Qing Dynasty, like the contemporary China, was a period of curious openness and immense influx of Western culture. Under the pressure from the West, the Chinese government established law schools and the first generations of Chinese lawyers started practicing in courts. In 1906, two ministers who were entrusted with the task of revising the laws, Shen Jiaben and Wu Tingfang, drafted a Criminal and Civil Procedure Law consisting of two hundred and sixty articles.⁹³ This Law was generally considered the origin of modern Chinese procedural law, and it was from this point on that criminal procedure became part of the curriculum at imperial academies.⁹⁴ In the Chapter on General Principles of Criminal and Civil Matters, there were nine articles pertaining specifically to the function of lawyers.⁹⁵ Unfortunately, this draft was widely opposed by provincial governors and never became effective. The real development of the Chinese legal profession did not take off until the Nationalists came into power. In order to eliminate extraterritorial rights enjoyed by Western powers in China, the Nationalist government set out to modernize its legal system such that Westerners could no longer use the ineptitude of China’s legal system as an excuse to evade liabilities in Chinese courts.⁹⁶

From the brief review above, one could see that the early development of China’s legal profession followed a drastically different course than that in the West. Western legal tradition originated from the Roman Empire, the first society in human history that recognized the rights of individuals. In the centuries following the Roman Empire, notions such as individual freedom, individual autonomy, and equality before the law continued to develop, and ripened at the height of the European Capitalist Revolution in the 18th century.⁹⁷ The administration of criminal justice underwent a concomitant evolution as the legal process became increasingly democratized under the influence of rights-oriented philosophical thinking.⁹⁸ The legal profession flourished in this process and criminal defense work became an important form of constraint on state power over individuals. Therefore, in many Western countries, the development of the legal profession and criminal defense work was a natural outgrowth of the increasing appreciation of individual rights, and of the need for mutual constraints between individual rights and state power.

This connection had no parallel existence in China. During the initial establishment of the legal profession, China was still a feudalistic society under the rules of emperors and feudal warlords. The social structure was highly hierarchical and class distinctions were rigorously enforced. Traditional teachings placed a high premium on the supremacy of sovereign interest, and acts of

⁹⁰ *Id.* at 19-58.

⁹¹ *Id.* at 91.

⁹² See generally, Chen, *supra* note 35, at 3-10.

⁹³ Zhang, *supra* note 7, at 140.

⁹⁴ Chen, *supra* note 35.

⁹⁵ *Id.*

⁹⁶ VICTOR H. LI, LAW WITHOUT LAWYERS: A COMPARATIVE VIEW OF LAW IN CHINA AND THE UNITED STATES 20-21 (Westview Press, 1978).

⁹⁷ See generally, *supra* note 22, at 26-37.

⁹⁸ *Id.*

sacrificing individual interests for that of the State were applauded as highly virtuous.⁹⁹ Therefore, the basic tenets of democracy, such as political freedom and equality before the law, were viewed as heretic ideas by China's ruling class. The same logic projected that the function of the legal profession would be contradictory to the culture and tradition of imperial China. Many who opposed the reform admonished that the new procedures would entrench the teachings of traditional Chinese philosophers, such as social harmony, familial loyalties and gender differences.¹⁰⁰ Lawyers were analogized to litigation tricksters that had long been blamed for pettifogging trivial disputes and backlogging imperial courts.

Even though legal reform was nonetheless carried forward in China, the Nationalist government was mainly motivated by the law's symbolic value, and the ultimate purpose was to exert control over foreigners on Chinese territory and further solidify the power of the ruling class.¹⁰¹ In Europe, the early development of professional lawyers was significantly fueled by the desire of the public to have the assistance of legal experts in court proceedings, which were becoming increasingly complex in the 14th century.¹⁰² China, however, by transplanting modern criminal procedure and legal profession from the West through a government initiative, skipped the process during which the people came to appreciate and demand such expert assistance. Therefore, from its very inception in China, rather than serving the interest of the people, the legal profession served mostly as an instrument for the government, much like the traditional Chinese view of law as an instrument of control for the ruling class.

Cultural resistance is also embedded in the Chinese attitude towards crimes and criminals. The Chinese society traditionally has very low tolerance for crimes. The ancient criminal process operated with much harshness to the accused, especially the impecunious and the uninfluential.¹⁰³ In fact, the term "law" was equated with "punishment" in ancient China, and the early statutes were mainly sketches of an elaborate system of punishment.¹⁰⁴ Even though the general public were wary of the arbitrariness, cruelty and tyranny in the criminal process, they were not particularly sympathetic to the plight of the accused due to their low tolerance for crimes and hence criminals or those who were likely to be criminals. The suffering of a relatively small number of individuals at the hands of the government was generally considered an acceptable and worthy tradeoff for greater social stability. Criminal defendants were often ostracized by their own communities because they disrupted the much-prized social harmony and tarnished the reputations of their families and friends. Therefore, the Chinese people were not particularly troubled by the dehumanization of criminals or criminal suspects.

The situation was much different in many Western countries, especially in the Anglo-American culture. In addition to satiating the public demand for retribution and deterrence, public criminal trials in the West also permit the ready identification of the same public with the plight of the accused.¹⁰⁵ Such identification originated from the belief that all men are offenders, at least on a psychological level. When the accused is perceived as a "surrogate self", such identification calls for a "fair trial" for him, as people would have demanded for themselves.¹⁰⁶

⁹⁹. Youping Xie, *A Discussion of Procedural Culture—on the Modernization of China's Procedure System*, in *NEW STUDIES ON PROCEDURE LAW—COLLECTION OF PAPERS CELEBRATING PROFESSOR CHEN GUANGZHONG'S 70TH BIRTHDAY*, 235-38 (China Law Press, 2000).

¹⁰⁰. *Id.*

¹⁰¹. See generally, Zhang, *supra* note 7, at 141

¹⁰². Jonathan Rose, *The Legal Profession in Medieval England: a History of Regulation*, 48 *SYRACUSE L. REV.* 1, 8.

¹⁰³. See generally, Jerome Cohen, *The criminal Process in the people's Republic of China: an Introduction*, 79 *HARV. L. REV.* 469 (1966).

¹⁰⁴. Xie, *supra* note 99, at 236.

¹⁰⁵. Goldstein, *supra* note 69, at 1150.

¹⁰⁶. *Id.*

From the above analysis, it becomes clear that the initial development of the legal profession in China took place in the absence of the growth of a modern legal culture. From the very beginning, lawyers and criminal defense work were Western transplants whose real values were not fully appreciated. The lack of cultural acceptance foreboded afflictions in the future.

b. Fate of the legal profession under Communist rule

The legal profession in China underwent a short period of rehabilitation after the People's Republic of China was established in 1949. The purpose of the rehabilitation was to eliminate the so-called litigation tricksters from the Nationalist period and to establish a new system of lawyers based on the Soviet model. China's nascent Communist regime supported criminal defense work at the beginning. In 1950, the Ministry of Justice drafted the Experimental Regulation of Criminal Defense to be implemented in China's three biggest cities: Beijing, Tianjin, and Shanghai.¹⁰⁷ In 1953, Shanghai People's Court established the Office of Public Defenders, designed specifically to help criminal defendants.¹⁰⁸ During the next three years, several temporary regulations were drafted, setting guidelines for the nature, organization, function, and billing standards of the legal profession.

However, the landscape quickly changed in 1957 with the beginning of the Anti-Rightist Movement. In the heat of the Anti-Rightist Movement, anything representing values or beliefs of the capitalist society was sharply criticized and strictly forbidden.¹⁰⁹ Therefore, the symbolic values of a Westernized legal system, which was the main purpose for legal reforms in the earlier decades, became the very ideological foe that the Communist regime sought to eradicate. Absent other appreciation of the importance of lawyers, this profession suddenly had no more reason to justify its very existence, and it was soon abandoned by the leadership and by the Chinese people. Criminal defense lawyers, in particular, were harshly criticized for representing the interests of the enemy and for eroding "precious" class distinctions. Many criminal defense lawyers were themselves prosecuted as criminals or forced to undergo re-education through labor in the countryside.

Today, the Chinese leadership is no longer at war with capitalist values. Since the leadership is eager to attract Western investments, the symbolic values of a modern legal system have been resurrected. Lawyers, as an essential component of a modern legal system, have also received high official recognition as well as broad social acceptance. The legal profession has become one of the fastest growing professions in China. In 1980, there were only 5,500 lawyers in the whole country. The number of lawyers increased to 31,000 in 1989. By the end of 2000, there were 110,000 practicing lawyers in China.¹¹⁰ The top tier of the country's talent pool have been flocking to law schools across the nation, and an increasing number of prominent lawyers have been selected to take official positions in the NPC, the Party Committee, and different branches of the judiciary. However, the vicissitude of the legal profession in the past century cautions against hasty optimism over the revival of an interest in modernizing the legal system. Even though the current reform is accompanied by a wave of right-consciousness among the general public, feudalistic cultural norms still haunt the Chinese people consciously or subconsciously.

¹⁰⁷. Zhang, *supra* note 7, at 143.

¹⁰⁸. *Id.*

¹⁰⁹. *Id.* at 144-45.

¹¹⁰. *A Comparison of the Profession of Lawyers in China and in the U.S.*, at <http://www.chineselawyer.com.cn/article/show.php?cld=517>.

A further complication is the invasion of the Western stereotypes of lawyers as masters of legal technicalities who are enslaved by their own greed and are morally bankrupt. The lucrative aspect of the modern legal profession has caused jealousy from other sectors of the society, including the other two major players in the judicial system, the judges and the procuratorators. Before the introduction of the market economy, judges and procuratorators, government officials not only enjoyed tremendous power, but also captured the top end of income ladder. Now, even though their official status remain untouched, their income level and hence quality of life pale significantly in comparison to those lawyers who are riding high on the enormous legal fees associated with business transactions. The resulting grudges have contributed to overt hostility of procuratorators or judges towards lawyers in the event of a confrontation.¹¹¹ Such hostility is especially pernicious to defense lawyers in a criminal proceeding, because the Procuratorate may use their supervisory power to vent their displeasure with lawyers' superior economic status, as explained in Chapter II, Section 4. Even though the majority of criminal defendants are indigent people, most of those who are fortunate enough to have legal representation are the ones who have been implicated in economic or organized crimes, and are therefore capable of paying exorbitant fees for their legal defense.

It shall be noted that lawyers' social status is contingent upon the specific function they perform. In contemporary China, it's no longer appropriate to conceptualize the practice of law as something homogeneous. The revival of the legal profession was accompanied by a bifurcation in specialization: transaction-based corporate work versus the more traditional litigation-based work. Within the traditional litigation-based work, distinction should also be drawn between civil litigation and criminal defense. There has been little difficulty in accepting corporate lawyers because their emergence was mainly a result of the development of Western-style market economy and their activities are more concentrated in the economic sphere than the judicial sphere—namely, the court system. Thus, rather than conceptualizing them as a new player in the legal system, the public have accepted them willingly as a by-product of the new economy. Civil litigation lawyers have also encountered warm reception by the Chinese public. With increasing right-consciousness among the average citizens, the demand for lawyers who specialize in areas of domestic conflicts, contract disputes, privacy issues and consumer protection lawsuits intensified in the past two decades.

In contrast, criminal defense lawyer is still a particularly difficult concept for the Chinese people to grapple with. Alongside with economic development came the increase in crime rates and in the incidence of corruption. Therefore, tough measures against criminals and criminal activities have received strong public support¹¹². In the past two decades, the Chinese government has embarked on a series of *yanda*, or "strike hard," anti-crime campaigns that are characterized by large-scale arrests and harsh anti-crime tactics; the rules of criminal procedure are often neglected in these processes.¹¹³ These campaigns were initially short-term in nature. However, many observers have noticed that in recent years, "strike hard" campaigns seem to have expanded into year-round policies. The popularity of "strike hard" campaigns demonstrates that in China, the value of crime control is still placed much higher than that of human rights protections. The public still believes that it is a proper compromise to sacrifice procedural protections for a greater social good—a safer society for everyone. The popularity of "strike hard" also reflects the non-popularity of criminal defense work. Not only has the People's Procuratorate resisted the emphasis on criminal defense, the general public have also shown little interest in urging or supporting reforms in this area.

¹¹¹ Interview notes A.

¹¹² For increasing crime rates, see Michael Dutton, *The Basic Character of Crime in Contemporary China*, CHINA Q., Mar. 1997, at 160.

¹¹³ Bruce Gilley, *Rough Justice: Executions Surge in Tough Anti-Crime Drive*, FAR E. ECON. REV., July 4, 1996, at 22-23.

Due to the shortage of criminal defense lawyers, the law in China requires practicing lawyers to handle a limited number of criminal cases per year. Hence, when a lawyer acts in the capacity of a criminal defense lawyer, he is faced with less public support and more government opposition. Therefore, even though lawyers as a whole have acquired relatively high social status in contemporary China, criminal defense lawyers are yet to gain the due respect from the society and from the other players in the judicial system.

2. Ideological Barriers

As mentioned previously, contemporary Chinese criminal procedure possesses the defining attributes of a classic inquisitorial model, and the ongoing reform attempts to absorb some adversarial features into the inquisitorial framework. However, it shall be noted that it is not exactly clear what these widely-used procedural taxonomies, while standing alone, really entail despite numerous efforts by theorists to draw the distinctions between the two. As a few scholars correctly pointed out, because of the distinct geopolitical backgrounds in which these two procedural models have evolved, analytical understandings of these models are often mixed with more historical approaches, hence resulting in much confusion.¹¹⁴ The most basic distinction between adversarial and inquisitorial models is the contrast between “party controlled contest” and “officially controlled inquest.”¹¹⁵ Some scholars have also attributed distinctive socio-political features to these two systems, with the inquisitorial system representing paternalistic or authoritarian ideology, and the adversarial system embodying individualistic or democratic ideology.¹¹⁶ However, models, by definition, are at best crude abstractions of the reality, and therefore it is often difficult to use a single model to describe the criminal justice system in a given country. Nevertheless, for ease of discussion, I will use “adversarial” and “inquisitorial” to describe the basic procedural framework of a given country in the following discussion. Hence, the basic procedural framework for the United States is the adversarial model, and the basic procedural framework for Germany or the former Soviet Union is the inquisitorial model.

In recent years, there has been a trend for countries with the inquisitorial system to adopt practices that are adversarial in nature. China’s criminal procedure reform could be seen as part of this greater trend. Several major reform efforts embodied in the 1996 Criminal Procedure reflected the incorporation of adversarial procedures. For example, the expansion of the function of defense lawyers was guided by the adversarial emphasis on party contest in a judicial proceeding. China’s new trial procedure, including the significant reduction in the amount of evidence to be submitted to the court before the trial, was another major attempt to imitate the adversary system. However, as discussed in Chapter II, these new provisions have often failed to give rise to the anticipated results in practice.

The immediate causes for such failures are multifold: sometimes it was the lack of compulsory measures by the defense counsel over potential witnesses, sometimes it was the inertia of traditional practices by the police or the Procuratorate, and sometimes it was the disjointed nature of certain reform efforts—adversarial practices were incorporated in a piecemeal fashion, which has resulted in the distortion of the function of a singular procedural transplant. It shall be noted

¹¹⁴ Mirjan Damaska, excerpts from the English-language version of *Models of Criminal Procedure*, EREDITA DEL NOVECENTO (forthcoming publication). Professor Damaska noted in his essay that many theorists who followed a more analytical approach to the procedural models nonetheless “found the temptation irresistible to incorporate into their models variously selected features of Anglo-American and continental criminal justice that have no clear connection to the core contrast between accusatorial and inquisitorial form.” For example, the judge-jury division of the trial court is a unique product that has evolved from the Anglo-American criminal justice, and yet it is often mistakenly perceived as a necessary element of the adversarial system.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

that China's inquisitorial tradition is more deeply ingrained than the 50 years of Communist rule—the dominance of inquisitorial features in criminal trials has in fact lasted for more than two thousand years. Therefore, questions arise as to whether it is realistic to have adversarial transplants in an inquisitorial system. How much does it take to break a two-thousand-year tradition? Are the frustrations that defense lawyers experienced a reflection of the conflicting principles between the two procedural models? Could components of the two models co-exist in the same judiciary process and complement each other?

a. The dominance of procedural actions by officials

Many jurists support the connection between the legal process and dominant currents of political ideology. As Damaska put it in his book *FACE OF JUSTICE AND THE PRACTICE OF STATE AUTHORITY*, “political regimes legitimate themselves through the administration of justice that they establish.”¹¹⁷ He noted further that in the criminal process, ideological shifts often influence the degree of protection afforded to the defendant by the state, and that “the peculiar position of the accused in the Anglo-American criminal prosecution has time and again been linked to tenets of classical liberalism.”¹¹⁸

With regard to political regimes, Damaska identified two types of organizations of state authority.¹¹⁹ One is the hierarchical organization, which is characterized by strict ordering of power from the top down and a desire for uniformity. The other is the coordinate organization, which is characterized by wide distribution of authority among roughly equal lay officials.¹²⁰ China's current political system clearly falls into the former category. Sole leadership of the Communist Party is the quintessential foundation of the PRC, and the most important one among the Four Cardinal Principles of the Communist Regime.¹²¹ Most government officials in China are Communist Party members. Party organization superimposes upon that of the government, including the courts and the Procuratorate. Through this extensive network of Party officials, the Communist Party is able to maintain control and uniformity in this vast country. Moreover, the organization of Chinese government is highly bureaucratic and hierarchical. Government branches are swollen with middle-rank officials who do little more than passing on the orders from their superiors; these orders have to be rigorously carried out and deviations are strictly forbidden. Initiatives proposed at the lower level have to go through endless review along the official ladder until they obtain final approval from the top ranks. To a certain extent, the PRC government still bears a strong resemblance to a feudalistic bureaucracy.

Based on Damaska's analysis, such hierarchical officialdom would give rise to a legal process in which officials tend to expand their sphere of activities and monopolize procedural action.¹²² The typical features of such official-dominated trial processes have been vividly described by theorists, “written records assembled at different levels of officialdom play an important role in the decision-making process, and trials are piecemeal, stylized exercises in professional logic with little human drama or warmth.”¹²³ Such characterization cannot be more befitting to the pre-

¹¹⁷ *Id.* at 8.

¹¹⁸ *Id.* at 9.

¹¹⁹ *Id.* at 16-27.

¹²⁰ *Id.*

¹²¹ The Four Cardinal Principles were put forward by Deng Xiaoping in 1979 as the basic principles for the Communist regime. The four principles are, the socialist road, the dictatorship of the proletariat, the leadership of the Communist Party, and Marxism-Leninism and Mao Zedong Thought. Deng Xiaoping, *Uphold the Four Cardinal Principles*, 30 March 1979, *Selected Works*, *op. cit.*, 166-191.

¹²² Damaska, *supra* note 114, at 53.

¹²³ Inga Markovitz, *Playing the Opposites game: On Mirjan Damaska's the Faces of Justice and State Authority*, 41 *STANFORD L. REV.* 1316.

1996 Chinese criminal process. Because defense lawyers were allowed to participate in the proceeding only 7 days prior to the trial in most cases, the pre-trial proceeding was completely dominated by the police and the Procuratorate. In addition, as described in Chapter II, Section 2, because judges could review the Procuratorate's entire file prior to the trial, judging often took place right there and the subsequent trial process degenerated into sheer formality. Rather than questioning the validity of the procurator's theory of the crime, the defense lawyer's main function was to propose mitigation factors and plead for more lenient sentence. Therefore, government officials, be it the police, the Procuratorate, or the judges, were the ones that dictated the outcome of a trial; the role of the defense lawyer was extremely passive throughout the proceeding.

Even though the 1996 CPL tried to balance the power between the Procuratorate and the defense by allowing earlier participation by the defense counsel and delineating their legal rights, the bigger institutional framework in China has remained the same. The Procuratorate is still a government institution carrying the mandate of the State. Procurators continue to enjoy the confidence and superiority that are commonly shared by state officials, and the other parties in the criminal process reinforce such officialdom by their humble deference to procuratorial actions.

Naturally, the Procuratorate resisted the movement toward empowering the defense. This is not a phenomenon in China alone; rather, it is quite common for a number of European countries that have attempted to adopt certain adversarial procedures. When Italy enacted a new Code of Criminal Procedure in 1989, it incorporated significant adversarial procedures into what had previously been a purely inquisitorial system.¹²⁴ Jurists observed that one of the main difficulties of that reform was with the institution of *Pubblica Ministero*, the Italian equivalent of the Chinese Procuratorate. Much like their Chinese counterparts, the *Pubblica Ministero* was a judicial figure that had the same qualifications, salary and career options as a judge.¹²⁵ They were career bureaucrats who had lifetime positions with almost complete autonomy. Because *Pubblica Ministero* was a very powerful political force in Italy, their substantial participation in the drafting of the 1989 Italian Criminal Code rendered the new code innocuous to the status and function of the institution itself.¹²⁶ To a certain extent, this political drama reenacted itself in China's 1996 reform. The Procuratorate was also one of the main participants in the drafting of the new CPL. Even though the procurators who participated in the drafting process were mostly among China's "new generation" of procurators who had been indoctrinated with Western humanitarian ideologies, in a process where different interests clashed and the authority of the Procuracy was at risk, these procurators played faithful advocates for the bureaucratic institution they belonged to.¹²⁷

Defense lawyers, on the other hand, have no state mandate. As mentioned before, in the early 1990s, lawyers were freed from their previous classification as "state legal workers" and became voluntary legal professionals who can practice on an individual or partnership basis.¹²⁸ At the beginning of 1998, of the 8,300 law firms in China, 20% were partnerships and 10% were co-operatives.¹²⁹ The "privatization" of law firms was seen as a big step toward the liberalization of the legal profession. However, in a country where the government still controls most of the resources and has unchecked power in many areas, such "privatization" also means loss of

¹²⁴ William T. Pizzi and Luca Marafioti, *The New Italian Code of Criminal Procedure: the Difficulties of Building an Adversarial Trial System on a Civil Law Foundation*, 17 YALE J. INT'L L. 1 (1992).

¹²⁵ *Id.* at 30.

¹²⁶ *Id.* at 31.

¹²⁷ Interview note A.

¹²⁸ See discussion in Part I, Section 1.a..

¹²⁹ Randy Peerenboom, *China's Developing Legal Profession: the Implications for Foreign Investors*, CHINA LAW & PRACTICE, 38 (June 1998).

privileges and protections commonly afforded to state employees. In the mid 1980s, All-China Lawyers' Association and its local branches were set up to "protect the lawful rights and interests of lawyers and to further the progress of lawyers' work."¹³⁰ However, since these organizations are non-government in nature, their voice is often tramped by that of the Procuracy in the political process and they are rather ineffective in protecting the interests of lawyers.

b. The truth-finding mechanism

Another major distinction between the adversarial and inquisitorial models of adjudication is the method of truth finding. The adversarial system employs a contest model of proof, which emphasizes the role of the contestants and prescribes rules for what the contestants may do to advance their argument. The inquisitorial system, as implied by its name, uses an inquest model of proof in which a judicial inquirer takes primary responsibility for gathering, testing, and evaluating evidence relevant to the dispute. Therefore, in the transition from inquisitorial to adversarial system, not only is there a shift in the balance of power between different actors, there is also a change in the mode of operation by these actors. In the classic adversarial model, judges shall remain passive adjudicators and refrain from active inquiries at trial, whereas the procurators and the defense have to take initiatives in gathering evidence and exposing flaws in each other's case. More importantly, as many scholars have pointed out, underlying these procedures of truth-finding are epistemological conceptions of how truth can be best constituted, and whether modern criminal procedure is more in tune with current conceptions of truth.¹³¹ Thus, the frustrations that China experienced with the adoption of certain adversarial procedures may result in part from the failure to embrace the adversarial treatment of truth and the truth-finding mechanism.

There are two dominant understandings of truth in Western legal literature: one is the objective truth about a past event, and the other is an estimate of probabilities.¹³² Since the early twentieth century, there has been a widening gap between the ideal of objective truth and the ability to achieve such ideal within existing methods and procedures.¹³³ Supporters of the Anglo-American adversarial system generally believe that it is unrealistic to require finding of absolute truth, *ex post*, in criminal proceedings, and therefore the goal of criminal processes shall be to obtain an estimate of probabilities. In contrast, among legal academics and practitioners in China, the dominant definition of truth is "objective truth."¹³⁴ All law school textbooks in China set objective truth as the standard of proof in criminal proceedings, and it is believed that discovery of objective truth is not only necessary, but also "absolutely possible".¹³⁵ Thus, there is a fundamental disagreement regarding the purpose and ability of the criminal process to discover truth between the Chinese view and the Anglo-American view. The Chinese insistence of objective truth is by no means accidental; rather, it is grounded in China's legal foundation as well as the principles of the inquisitorial system.

From the establishment of the People's Republic of China, the system of proof in China's criminal procedure has been based on Marxist philosophy of materialistic dialectics. The basic

¹³⁰. Interim Regulations of the People's Republic of China on Lawyers, §19 (Jan. 1, 1982), *available at* <http://www.quis.net/chinalaw/prclaw59.html>.

¹³¹. John D. Jackson, *Theories of Truth Finding in Criminal Procedure: An Evolutionary Approach*, 10 *Cardozo L. Rev.* 475, 476 (1988).

¹³². *Id.* at 484.

¹³³. *Id.* at 513.

¹³⁴. Congyi Fan, *Opinions on Objective Truth—a Discussion of the Standard of Proof in Criminal Processes*, in *NEW STUDIES ON PROCEDURE LAW—COLLECTION OF PAPERS CELEBRATING PROFESSOR CHEN GUANGZHONG'S 70TH BIRTHDAY* 331 (China Law Press, 2000).

¹³⁵. *Id.*

theory of materialistic dialectics is that all phenomena and processes contain two unified and yet contradictory aspects, the contradiction between these two aspects is the ultimate drive for any development in the world.¹³⁶ Based on this theory, the correct and only approach to understanding any phenomenon is a scientific approach, that is, to examine the matter with recognition of its internal contradictions.¹³⁷ In the context of criminal procedure, the Marxist scientific worldview believes that objective truth can be ascertained through unification and struggle of two parties, namely the procuratorate and the defense.¹³⁸

Because the Marxist scientific worldview is pivotal to the communist ideology, it is politically unacceptable to officially devalue the importance of objective truth in the administration of criminal justice. A small group of scholars have suggested keeping objective truth as the principal value objective for criminal procedure, while using “legal truth” as the working standard.¹³⁹ Legal truth is defined as the “truth” that can be ascertained through the presentation of evidentiary materials based on the rules of substantive and procedural law. Thus, “legal truth” is closer to the understanding of truth in the Anglo-American system. However, this concept of truth has not been widely accepted among legal practitioners, and some legislators have suggested that adopting a “lower” standard of truth will damage the integrity of the judiciary in the eyes of the Chinese public.

On the other hand, it has been argued that the Continental inquisitorial system is more committed to truth than the Anglo-American adversarial system.¹⁴⁰ The modern development of the adversary system in Anglo-American societies was very much shaped by a sentiment of distrust of government officials and a complementary demand for safeguards against abuse of power.¹⁴¹ Consequently, the Anglo-American adversarial system exhibits more tolerance and compassion for procedural safeguards that may hinder the search for absolute truth. In Damaska’s words, “the adversary system does not consider it ‘unnatural’ to use of the criminal process itself as the appropriate forum for correcting its won abuses, thus making possible the reversal of ‘substantively’ just decisions on ‘technical grounds’”.¹⁴² Even before the development of modern procedural safeguards, the adversary system had allowed jury to acquit the accused against the weight of evidence in situations where the punishment was thought to be unduly severe.¹⁴³ Such practice, according to Damaska, lead to the “evolvment of an idea that criminal procedure may quite justifiably be used to frustrate as well as to enforce the substantive criminal law.”¹⁴⁴ It shall be noted that there is no real counterpart to this phenomenon in the continental history of criminal procedure. Moreover, in the adversary system, since the fact-finders are laypersons from the community, they are more likely to identify and hence sympathize with the dire position of the accused. Thus, the decision of guilt and innocence is not of paramount importance in a criminal proceeding based on the adversarial view; the pursuit of “real truth” are allowed to yield to other “collateral” considerations—human rights protection for example—in many circumstances.¹⁴⁵

In contrast, societies with inquisitorial trial procedures exhibit much less suspicion of public officials in general. To the opposite, judges and prosecutors are often considered to be better at determining the truth because of their professional training. This is of course consistent with the

¹³⁶ See e.g., Xiong, *supra* note 22, at 103.

¹³⁷ *Id.*

¹³⁸ Xiong, *id.* at 104-105.

¹³⁹ Fan, *supra* note 134, at 341.

¹⁴⁰ Mirjan Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*. 121 U. PENN. L. REV. 506, 578 (1973).

¹⁴¹ *Id.*

¹⁴² *Id.* at 584.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 585.

¹⁴⁵ *Id.*

dominance of the criminal procedure by government officials in the inquisitorial system. In addition, because judges are the fact-finders, they are less likely to identify with the accused—“the boundaries of social class which existed between the defendant and the judges contributed to a lack of compassion.”¹⁴⁶ As a result, supporters of the inquisitorial system dismissed many procedural safeguards and technical rules as “unjustified loopholes, unnecessary obstacles of pedant legal etiquette, or impermissible injections of collateral issues into the search for guilt or innocence.”¹⁴⁷

With two thousand years of inquisitorial tradition, the Chinese criminal procedure has fostered similar attitudes towards procedural safeguards among judges and procurators, and these attitudes have fueled various forms of resistance to the strict enforcement of procedural safeguards. Taking torture as an example, the procurators, who are entrusted with the responsibility to supervise police conduct, often side with the police when claims of torture arise. Rather than conduct active investigations into such cases, the procurators often readily accept the denials by the police.¹⁴⁸ Even though the procurators agree with the importance of procedural fairness on the theoretical level, they have found it difficult to insist on the pursuit of procedure fairness at the expense of what they perceive as the objective truth.

It should also be noted that many Chinese legal academics and practitioners have not realized the inadequacies of either the inquisitorial or the adversarial system to procure “real truth”. They still believe that the inquisitorial system—through the production of confession, even if that entails the use of torture or other coercive means—is better at ascertaining truth. This shows that the Chinese fail to understand that even if the continental system is indeed more committed to truth, this does not mean that its factual findings are “*ipso facto* more reliable”.¹⁴⁹ It is very difficult to prove empirically which system is better at ascertaining truth. However, one should understand that the truthfulness of confessions becomes questionable if it is obtained through torture or other coercive means.

In summary, the dominance of the inquisitorial model in China is by no means accidental. The basic elements of the inquisitorial model are well suited to the needs of China’s Communist regime and its intractable bureaucratic machinery, and these elements have also attained acquiescence in the general culture. To a certain extent, the current status of China’s criminal justice system has lent support for the socio-political explanation of procedural models. The inertia and resistance posed by the political system and general culture are not unbreakable—as changes are slowly taking place in these spheres. However, a realistic appraisal of these background conditions does help reformers to better foresee and prepare for the difficulties that may arise in the reform process.

3. Problems in the Legislative Process—Battle of Legal Interpretations and Deficiency in Lawmaking Skills

The power of legal interpretation is of considerable significance because the interpretation often goes beyond a simple rendition of the original statute and injects new substances and meanings into the law itself. There are three forms of legal interpretation in China, judicial interpretation, legislative interpretation and administrative interpretation.¹⁵⁰ Within these three forms, judicial

¹⁴⁶ *Id.* at 586.

¹⁴⁷ *Id.* at 584.

¹⁴⁸ Interview notes A.

¹⁴⁹ Damaska, *supra* note 114, 588. Damaska further noted that many famous German lawyers of the 19th century thought that presentation of evidence through direct and cross-examination was psychologically preferable method of ascertaining the truth at trial.

¹⁵⁰ See generally, Xiaohong Kong, *Legal Interpretation in China*, 6 CONN. J. INT’L L. 491 (1991).

interpretation is generally regarded the weakest,¹⁵¹ but curiously, judicial interpretation is shared by the Supreme People's Court (SPC) and the Supreme People's Procuratorate (SPP). A 1981 Resolution by the Standing Committee of the National People's Congress stipulated that the SPP might interpret questions involving the specific application of statutes and decrees with regard to procuratorial proceedings.¹⁵² It further provides that if the interpretations provided by the SPC and the SPP conflict with each other, both interpretations must be submitted to the Standing Committee for final determination.¹⁵³ Thus, with regard to procuratorial procedures, even if the legislative process yields a relatively balanced product with equitable treatment of a variety of interests, the SPP could potentially use its interpretive power to expand or limit the scope of existing statutes to further their own interests, and that is exactly what happened with the 1996 CPL.

The 1996 CPL, like any statutes, left many issues open for further interpretations during actual implementation. Therefore, soon after the 1996 CPL went into effect, the SPP started drafting its own explanation. As described in Chapter II section 2, one of the major consequences of the SPP Interpretation is that it significantly narrowed the definition of "charging documents" and that of "technical materials," a result that served the Procuratorate's desire to impede counsel access to the files of the accused. Hence, in a battle among different institutions, it was the judicial interpretive power that handed the final victory to the Procuratorate.

Another problem with the legislative process is the deficiency in lawmaking skills. A few legal scholars have observed that many new laws in China often lack 'teeth'—the laws embody the policy ideals that drafters have intended to incorporate, but are deficient in legal remedies or other enforcement mechanisms that are critical for the actual fulfillment of ideals.¹⁵⁴ Using the 1996 CPL as an example, the law is filled with the following three types of provisions: prohibitive provisions, obligatory provisions and authorizing provisions.¹⁵⁵ However, the statutes often fail to specify the legal remedies in the event of non-compliance, be it the commitment of a prohibited action, the non-fulfillment of an obligation, or the interference with the exercise of a legally authorized right or privilege. As a result, successful enforcement of these provisions is largely dependent on the legal knowledge and professional ethics of the particular individuals involved; if an individual does not cooperate voluntarily, the law itself has little coercive power and the injured party has no clear direction as to where to obtain redress. It is therefore no surprise that lawyers have encountered tremendous difficulties in getting access to their clients and to case files, despite the statutory declaration of the lawyers' privileges and the reciprocal obligations on the part of the police or the Procuratorate.

The harm resulting from the lack of judicial remedy is particularly acute when it comes to the legal obligations of the Procuratorate. As mentioned before, the Procuratorate is the supervisory organ in China's judicial system.¹⁵⁶ Despite the negative consequences of this structural arrangement, which will be analyzed in detail in the next section, non-compliance by lawyers or

¹⁵¹ Li Wei, *Judicial Interpretation in China*, 5 WILLIAMETTE J. INT'L L. & DISP. RESOL. 87 (1997).

¹⁵² Resolution of the Standing Committee of the National People's Congress Providing an Improved Interpretation of Law, reprinted in THE LAW OF THE PEOPLE'S REPUBLIC OF CHINA 1979-1982, 251 (The Legis. Aff. Comm'n of the Standing Comm. of the Nat'l People's Cong. of the P.R.C. ed., 1987).

¹⁵³ *Id.*

¹⁵⁴ Interview notes, Chen Ruihua.

¹⁵⁵ Prohibitive provisions often specify what the relevant parties shall not do. See e.g., 1996 CPL Art. 92 ("the time for interrogation through summons or forced appearance shall *not* exceed 12 hours). Obligatory provisions, in contrast, specify what parties must do. See e.g., 1996 CPL Art. 65 ("if it is found that the person should not have been detained, he *must* be immediately released and issued a release certificate"). Authorizing provisions grant certain rights or privileges to the relevant parties. See e.g., 1996 CPL Art. 36 ("defense lawyers may ...consult, extract and duplicate the judicial documents pertaining to the current case and the technical verification material, and may meet and correspond with the criminal suspect in custody").

¹⁵⁶ See discussions in Part II, Section 4.

the police is partially mitigated by procuratorial supervision. Even though theoretically, the Procuratorate is also responsible for policing the conduct of its own members, in reality such self-supervision is almost non-existent. Therefore, misconduct by the Procuratorate often goes unscrutinized.

4. Structural Defects in the Current System

As mentioned before, a unique feature that China has inherited from the Soviet model of criminal procedure is for the Procuratorate to play a supervisory role in the judicial system. The 1979 Organizational Law of the People's Procuratorate stipulated that the People's Procuratorate was the State's legal supervisory organ.¹⁵⁷ In 1982, this setup was officially incorporated into the PRC Constitution.¹⁵⁸ The 1996 CPL also gives specific authorization for the People's Procuratorate to supervise criminal proceedings.¹⁵⁹ The supervisory power of the People's Procuratorate is fairly broad and is generally divided into two parts. One is the supervision of activities of the police, courts, and detention centers. The Procuratorate investigates claims of extortion of confession by torture or other illegal means, reviews the legality of the composition of an adjudicating body, the fairness of the proceedings in a trial, as well as decisions regarding arrest, bail and other pretrial or post-verdict proceedings.¹⁶⁰ The other part is the supervision of non-state participants of the judicial proceeding, including defendants, witnesses, and legal counsels. Activities subject to supervision include fabrication, concealment and destruction of evidence.¹⁶¹ While acting in its capacity as the supervisory organ, the Procuratorate is in charge of both the investigation and the prosecution of the crimes within the scope of its supervisory power.

There are certainly good reasons for having a legal supervisory organ, especially in a country like China that suffers from widespread official misconduct in the judicial process. However, the key question is what is the right form of supervision. In a criminal proceeding, the Procuratorate represents the interest of the State and the people. However, as supervisor of the judicial system, the Procuratorate has to inspect the activities of the other participants as a neutral and objective referee. This creates several problems. First of all, since the accusatory function is the primary function of the procuratorator in a criminal proceeding, it is difficult and unrealistic for a procuratorator to remain neutral in the mean time. Even though the prosecution function and the supervision function are performed by two separate departments within a procuracy, each procuracy is ultimately a functionally integrated single entity under the leadership of one chief Procuratorate.¹⁶² The basic bureaucratic structure of the procuracy determines that genuine internal separation of functions is unattainable. The officers in the two departments are close colleagues with each other and lateral transfers from one department to another occur on a regular basis.¹⁶³ Second, the procuratorator's supervisory power exacerbates the imbalance of power between the state and the accused. This is especially problematic if China is to adopt a more adversarial trial procedure where the two sides of a case are supposed to compete on equal basis. Third, since the judge's conduct is subject to the supervision of the procuratorator, it becomes questionable whether the judge could remain impartial in a trial.

¹⁵⁷ The Organizational Law of the People's Procuratorate of the People's Republic of China, §1 (1979).

¹⁵⁸ The Constitution of the People's Republic of China, art. 129 (1982).

¹⁵⁹ 1996 CPL, art. 8.

¹⁶⁰ CHEN GUANGZHONG, CRIMINAL PROCEDURE (NEW ED.) 68 (China Univ. Law & Politics Press, 1999).

¹⁶¹ *Id.*

¹⁶² Yan Zhao, *The Dilemma for "Judicial Supervision"—Reflections on the Nature of Procuratorial Power*, at <http://chinalawinfo.com/research/academy/details.asp?lid=1770>.

¹⁶³ Interview notes B.

The imbalance of power caused by the supervisory function of the Procuratorate has particularly serious implications at the pretrial stage when the judge has not yet entered the contest arena. In adversarial systems in the United States or England, a judge or a magistrate is often brought into the pretrial process to decide on issues such as pretrial detention or mandatory disclosure. In China, however, the Procuratorate is the adjudicator in such disputes, and there is no formal hearing for each side to present its arguments. As a result, when defense lawyers encounter undue interference with the exercise of their work-related rights or privileges at the pretrial stage, they feel rather helpless because the very person who has interfered with their legal rights were the ones, or close friends of those that are responsible for the resolution of these issues.

As a result of the Procuratorate's tremendous supervisory power and its tendency to abuse such power for retaliatory purposes, as detailed in Chapter II, Section 4 of this paper, criminal defense is becoming an increasingly dangerous territory. Fearful of retaliatory criminal prosecutions, lawyers are hesitant to take on criminal cases and even if they do, they tend to refrain from engaging in aggressive defense strategies that may instigate fury from the Procuratorate. Such self-censorship renders counsel assistance rather ineffective in many cases.

5. Other Factors

There are a number of other factors that have also contributed to the difficulties for defense lawyers at the pre-trial stage. For example, qualification of legal professionals has been a major problem for China's legal system as a whole. In this discussion, qualification includes legal education, professional experience and legal ethics. Among legal professionals in China, lawyers have the highest qualification in terms of legal education. Most practicing lawyers have Bachelor's degree in law, some have more advanced degrees in specific areas of law. In contrast, there are still a significant number of retired military personnel and former administrative officers acting as judges and procurators. They have never received formal law school training and are poorly informed of modern legal doctrines and practices that are now used as models for China's legal reform. These people are usually more attached to the old procedures and they form the core of the resistance against progressive reforms.

Another factor is the scarcity of financial resources in the criminal justice system. In the absence of plea bargain, most criminal cases in China go to trial.¹⁶⁴ This requires a significant deployment of public resources and it has been extremely costly to the country. Even though China has started exploring simplified procedures for criminal cases, these procedures are still at the experimental stage and successful adoption of simplified procedures at the national level will take a few years to accomplish.¹⁶⁵ Having had to spend tremendous resources to support a gigantic court system and an equally gigantic procuracy, the Chinese government has little left to develop other institutions in the judicial system. For example, even though a public defender's system is crucial for the success of China's criminal procedural reform, the prospect of building such a system is rather slim due to the enormous funding that such a system demands.

As described previously in Chapter II, Section 1, the lack of public funding has also rendered criminal defense a rather unattractive area of practice for financial reasons. Many new law school graduates are lured to careers in booming corporate law firms. Even though each law firm must handle a certain number of criminal cases, lawyers often devote little time or energy to these cases and the quality of criminal defense remains disappointingly low. In Western societies, lawyers who are committed to criminal defense work constitute a major driving force behind the

¹⁶⁴. Interview notes B and C.

¹⁶⁵. See e.g., Huiyong Ma, *Exploring Simplified Procedure in Criminal Cases*, at <http://chinalawinfo.Com/research/academy/details.asp?lid=1768>.

successful adoption of better procedural safeguards. If lawyers in China continue to neglect criminal defense work, it will be the legal academics that are single-handedly pushing for reforms. Moreover, even if new laws are enacted, without the active participation of criminal defense lawyer during the implementation process, it will take much longer to translate laws into actions that convey actual benefits to the accused.

Local enforcement is another major problem. With the development of market economy, it has become increasingly difficult for the central government to exert control over localities. This is true with the judicial system as well. With the exception of a few big cities, it is very difficult for the SPC and SPP to monitor compliance with procedural requirements in local courts and local Procuracy. Unless the accused persistently pursues redress through the appeals process, most procedural violations at the local level remain undetected. Poor enforcement at the local level begs an effective supervision mechanism. However, as discussed in Chapter III Section 4, the existing supervisory mechanism only invites more arbitrariness and more human rights violations of the accused and the defense lawyer.

IV. SUGGESTIONS FOR FURTHER REFORMS

1. Employment of Judicial Remedies during Pre-Trial Proceedings and Diminution of the Supervisory Function of the Procuratorate

Earlier analysis in this paper has revealed that poor enforcement of the CPL has become a serious problem, rendering the new procedural protections immaterial. As Chapter III of the paper has explained, there are two major causes for this problem. One is the lack of legal remedies in the law itself for violations of procedural safeguards,¹⁶⁶ the other is the monopoly by the People's Procuratorate of pre-trial proceedings, exacerbated by their sweeping supervisory power over other participants in the criminal justice system.¹⁶⁷ The analysis evidently calls for clear delineation of the legal remedies for procedural violations and the replacement of the Procuratorate supervision with proceedings before a neutral adjudicator. Because the exact form of legal remedy is dependent upon the specific government branch that is in charge of administering the remedy, I will address the structural changes within the judicial system first.

Despite the obvious pitfalls of the current supervision system, as we contemplate potential reforms, it shall be recognized that the supervisory function of the Procuratorate is mandated by the Chinese Constitution. Unless the Constitutional mandate is repealed through a revision—the latter is unfortunately quite unlikely in the near future—complete abolishment of the Procuratorate's supervisory power could only remain as an alluring speculation. With such constitutional constraint, a forthright plea for the abrogation of the Procuratorate's supervisory power is unwise and unrealistic. As a result, a more feasible proposal at this stage is to introduce earlier judicial involvement and to channel the majority of pre-trial procedural issues from the province of the Procuratorate to that of the courts.

In fact, this is the system currently employed in many Western countries to resolve disputes arising from pre-trial proceedings and to provide redress for violations of procedural provisions. Using the U.S. criminal justice system as an example, judicial involvement starts at the point of arrest. In the absence of imminent need for immediate arrest, a police officer needs to obtain an arrest warrant from a court prior to taking any person into custody.¹⁶⁸ The courts, through the

¹⁶⁶. See discussion in Part III, Section 4.

¹⁶⁷. See discussion in Part III, Section 3.

¹⁶⁸. KAMISAR ET. AL., *ADVANCED CRIMINAL PROCEDURE*, 18 (West Publishing Co., 1994).

actions of the magistrates, also make important determinations as to whether or not there is probable cause to keep a person in detention and whether the suspect can be released on bail.¹⁶⁹ Once a defendant is arraigned, the trial court judge will rule on a broad range of pretrial motions regarding issues such as the sufficiency of the charging instrument, the scope of discovery, as well as the admissibility of evidence allegedly acquired through a constitutional violation.¹⁷⁰ The U.S. system not only allows prompt review of each major step in the pretrial proceeding, it also offers the benefit of neutralizing, to a certain extent, the advantages enjoyed by the prosecution through the use of a nonpartisan adjudicator and an adversarial hearing process.

The basic framework of the U.S. model of pretrial judicial involvement is worthy of adoption. Among the three major difficulties that defense lawyers face in China, access to client is an issue that can be most readily resolved by a judicial hearing within the current court system. The career track of a judge is quite different in China than that in the United States. At any given time, a typical Chinese court always has a number of recent law school graduates that are on the career track to become full-time judges. These relatively inexperienced junior judges can be assigned to hearings regarding access to clients—an issue that is governed by a set of relatively simple rules. Courts shall be authorized to issue orders demanding a party's immediate compliance with the proper procedure regardless of the identity of the transgressor—be it the defense, the police, or the Procuratorate. Violations of court orders shall result in further sanctions of the specific individual(s) involved. Individualized sanctions at this point could avoid antagonizing an entire department and exert more pressure on the responsible individual(s) to promptly comply with the court's order.

The resolution of the other two difficulties for defense lawyers—access to the defendant's file and the right to investigation—requires more legal expertise and more knowledge of the specific case, and therefore shall be handled by the trial judge. The judicial solutions to these two issues will be discussed more extensively in the next few sections.

Of course, the success of judicial involvement in pretrial matters is largely contingent upon the fortification of the court's authority. In China, the People's Procuratorate has long enjoyed equal status as the court, if not higher at certain points of the history. For courts to maintain neutrality on procedural matters that may be directly antagonistic to the Procuratorate's will, courts have to have sufficient power to remain unaffected by the Procuratorate's displeasure. This may take a long time to achieve, but legal reforms in recent years have gained some positive results in elevating the court's status.¹⁷¹ In addition, there has to be an efficient mechanism to enforce and monitor prompt compliance with the court's orders so as to remedy the procedural violations efficiently and to create proper deterrence for future violations.

2. Pretrial Discovery

The most serious problem with China's pretrial procedure today—the difficulties defense lawyers experienced in getting access to the procuratorator's file—results from an attempt to imitate an isolated segment of the adversary system without adopting complementary proceedings that are indispensable for the proper functioning of the adversarial system as a whole. The major consequence of such practice is that defense counsels are ill prepared for the trial and unable to mount an effective defense in the face of incriminating evidence that they are not familiar with. The stark information asymmetry between the defense and the prosecution is an inescapable quandary for any criminal justice system, albeit in the adversarial context, the impact of such

¹⁶⁹ *Id.* at 23-25.

¹⁷⁰ *Id.* at 29.

¹⁷¹ *See* interview notes A.

asymmetry on the defense is particularly pernicious. The inquisitorial and the adversarial systems have come up with different solutions to this problem through their own evolutions. In the United States and England, the main solution is pretrial discovery.

Even though the specific rules of pretrial discovery differ in the United States and in England, the basic frameworks are quite similar. The government, upon request by the defendant, must disclose evidence in the possession, custody or control of the government, subject to certain limitations such as the work product exemption. The purpose of allowing the defense to discover the prosecution's case, as put forward by a former US Supreme Court Justice William Brennan, is to "enhance the truth-finding process so as to minimize the danger that an innocent defendant will be convicted."¹⁷² The rationale behind pretrial discovery is that "the full marshalling by the defense of all the evidence bearing on the truth can occur only if it received notice in advance of trial of both the prosecution evidence that it would have to meet and any possible sources of further evidence uncovered by the state's investigation."¹⁷³ Now, pretrial discovery is widely accepted as an indispensable component of the adversarial system. Therefore, it is no surprise that the 1996 CPL, by leaving out this important procedure segment, has occasioned such adverse impact on the defense.

There has been a lot of discussion on the feasibility of pretrial discovery among legal academics and practitioners in China.¹⁷⁴ A few local courts have taken initiatives to experiment with their own models of discovery, but the experimentation has been limited to civil cases.¹⁷⁵ The Chinese legislature has also taken notice of the overwhelming demand for a discovery mechanism. It is expected that China's first law on evidence, which is currently in the drafting process, will have provisions outlining the procedure for discovery. However, many groups have already voiced doubts about the benefits of pretrial discovery, with the strongest objections coming from the People's Procuratorate. From a historical perspective, the generation of these concerns is of no surprise.

In 1953, at a time when the United States was experimenting with the idea of applying pretrial discovery to the criminal process, Justice Vanderbilt forwarded several arguments against broader criminal discovery in the famous case of *State v. Tune*. He argued that first, greater discovery leads not to more accurate fact-finding but to an increase in perjured testimony by defendants or their witnesses. Second, discovery leads to interference with witnesses, or with the states' ability to procure them. Witness will be reluctant to come forward with information during the investigation of the crime. Finally, broad discovery would put the defense in too favorable a position.¹⁷⁶ The very same arguments are now advanced by the opponents of the discovery mechanism in China.

These concerns are not entirely unfounded. For example, with regard to perjury, it is very difficult to predict the potential increase in the incidence of perjury. On the one hand, the disciplinary mechanisms within China's legal profession is still at its nascent stage and hence relatively weak and ineffective; sanctions by the Lawyer's Associations are only used in rare cases. Thus, an argument could be made that Chinese lawyers will have less ethical concerns to prevent them from engaging in perjurious activities. On the other hand, the Procuratorate has

¹⁷². William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth?* A Progress Report, 68 WASH. U. L.Q. 1, 2 (1990).

¹⁷³. KAMISAR ET. AL., *supra* note 168.

¹⁷⁴. See e.g., Wei Chen, *Suggestions for the Fulfillment of the Burden of Proof on the Procuratorate*, PEOPLE'S COURTS, Feb. 19, 2002; Jianchen Wang, *An Analysis of Pretrial Discovery in China's Criminal Procedure*, YANYUAN COLLECTIONS OF LEGAL LITERATURES, 1999, available at <http://chinalawinfo.com/fxsk/FXKW/articleshow.asp?fid=14310>.

¹⁷⁵. See interview notes B; Yongcai Ma & Yan Liu, *A Different Perspective on Pretrial Discovery*, at <http://chinalawinfo.com/research/academny/details.asp?lid=2986>.

¹⁷⁶. *State v. Tune*, 98 A.2d 881, 884 (N.J. 1953).

enormous discretion in exercising their supervisory power under Article 38 of the 1996 CPL and Article 306 of China's Criminal Code, an issue that has been elaborated in Chapter II, Section 4. Therefore, a different argument could be made that lawyers will refrain from fraudulent acts in fear of being prosecuted under Article 38. The reality seems to suggest that the chilling effect resulting from the prospect of criminal prosecution will probably be greater than the conducive effect produced by the lack of professional disciplines. Of course, if further reforms are undertaken to abridge the supervisory power of the Procuratorate and to enhance internal monitoring and discipline by the lawyers' associations, the reality will be much different. Even so, there is so far no empirical evidence in other countries that supports the supposition of increased incidence of perjury.

Witness cooperation has already been a serious problem in China and the implementation of pretrial discovery may worsen the situation if other measures fail to follow immediately to ameliorate the negative effects. As described in Chapter II, Section 3, the Chinese culture has always harbored strong objection to the idea of testifying against one's acquaintance. If the government has to disclose the names of the witnesses to the defense, witness cooperation can foreseeably become more difficult to obtain. Therefore, some form of compulsory mechanism, such as subpoena power of the courts, has to be instated to ensure witness appearance in trial. Drafters of China's first Evidence Law are currently contemplating such measures. However, concerns have been expressed as to the safety of witnesses. If there is no adequate protective measure and the incidence of purposeful attack of witnesses increases after implementation of compulsory measures, the reform will have a demoralizing and alienating effect on the public. Western countries, such as the United States, have been using Witness Protection Programs to protect witnesses from physical harm. For China to adopt similar programs tremendous resources will be demanded. One alternative solution could be to disclose only the content of witness statement, but keep the identities of witnesses secret until trial; however, this scheme still leaves open the possibility of retaliation during or after the trial. However, it shall be noted that China's problem with witness cooperation has long predated the proposal for pretrial discovery, and to blame it on the prospect of increased incidents of retaliation resulting from pretrial discovery will be to misidentify the source of the problem. The ultimate solution to witness cooperation lies in the implementation of effective compulsory measures and protective methods, not in the simple rejection of pretrial discovery.

Vanderbilt's third argument has also gained much support in the procuracy and among the general public in China. Discovery will inevitably eliminate some of the advantage that the Procuratorate are accustomed to and increase the chance of successful defense. Inevitably, some defendants may abuse their newly acquired discovery privileges to gain unfair advantages and thus evade criminal punishment. As described in Chapter III, the Chinese culture doesn't offer much sympathy to the accused, and the low tolerance for crime prevails over the resentment of intrusive government actions. Therefore, pretrial discovery may encounter some cultural resistance. The Procuratorate also argues that discovery may offer incentives for criminal lawyers to sit on the case and wait for the government to hand over the information. In that case, even with reciprocal discovery—the issue of reciprocal discovery will be discussed in more details later—the defense will be the only one to enjoy any meaningful benefits that discovery may yield.

Despite a limited amount of reasonable concerns in these objections, the advantages of pretrial discovery far outweigh the negative impacts that may result. Experiences in other countries have demonstrated that the adoption of additional protections for the accused has never been free from opposition, and pretrial discovery was no exception. Both the United States and the United Kingdom have had their fair share of the struggle. Therefore, one could see the current debate among different interest groups in China as a necessary transition: there has to be a process to

allow discovery to be fully accepted, even though this process may take much longer in China than in some other countries because China's overall culture is not yet supportive of strong protection for the accused.

Among the proponents of the discovery mechanism, there is yet another point of disagreement, that is, whether it shall be defense-only discovery or reciprocal discovery. Given the overwhelming power of the People's Procuratorate and the severe disadvantages of defense lawyers in China, defense-only discovery certainly offers stronger emotional appeal to those who sympathize with the defense. In addition, many have argued that given the limited investigative power of the defense lawyer, disclosure by the defense might not yield much informational gain for the Procuratorate in reality.¹⁷⁷ Conversely, disclosure obligations on the part of the defense may worsen defense lawyer's already precarious condition by creating more opportunities for arbitrary prosecution of defense lawyers. Even though all of the above are sensible reasons for having defense-only discovery, the development of the discovery mechanism in other countries and the reality in China suggest that defense-only discovery may not be a politically viable option.

Not surprisingly, the debate over the reciprocity of discovery in criminal proceedings is, again, a recurrence of the history.¹⁷⁸ Using the United States as an example, guided by the Fifth Amendment privilege against self-incrimination, the U.S. discovery system started out with defense discovery rights only. However, since the early 70s, there has been a growing trend towards expansion of prosecutorial discovery. Despite strong objections from many legal scholars, the U.S. Supreme Court concluded in *Williams v. Florida* that reciprocal discovery enhances accuracy in fact-finding and efficiency in the administration of criminal justice.¹⁷⁹ Today, the U.S. Federal Rules of Criminal Procedure mandates three types of defense disclosure to the prosecution, notice of alibi defense, notice of insanity defense, and certain types of documents, testimony, and tangible objects that the defense intends to introduce as evidence in his or her case-in-chief at trial.¹⁸⁰ At the state level, the scope of prosecutorial discovery is even broader. Similar transition from defense-only discovery to reciprocal discovery also occurred in the United Kingdom, albeit the transition was much more recent.¹⁸¹

The experience of the United States and the U.K. seems to suggest that reciprocal discovery is an unavoidable outcome of the development of the discovery mechanism. As discussed in previous sections of this paper, despite enhanced awareness of human rights protection in China, crime control and the search for absolute truth still draws more support than human rights protection within the criminal justice system and in the public domain. Moreover, unlike the United States where the Fifth Amendment sets constitutional limits on the scope of prosecutorial discovery, in China, not only is there no such constitutional privilege against self-incrimination, the CPL demands that the accused shall answer questions presented by the police or the Procuratorate *truthfully*.¹⁸² The accused only has the right to refuse answering questions that do not pertain to

¹⁷⁷. See e.g., Wang, *supra* note 174.

¹⁷⁸. See e.g., CHRISTINE VAN DEN WYNGAERT, CRIMINAL PROCEDURE SYSTEMS IN THE EUROPEAN COMMUNITY, 83-84. Butterworths, London, 1993; Eric D. Blumenson, *Constitutional Limitations on Prosecutorial Discovery*, 18 HARV. C.R.-C.L. L. REV. 123 (1983); Mary Patricia Jones, *Proposed Rule 12.3: Prosecutorial Discovery and the Defense of Federal Authority*, 72 VA. L. REV. 1299 (1986); Robert P. Mosteller, *Discovery Against the Defense: Tilting the Adversarial Balance*, 74 CALIF. L. REV. 1567 (1986); *Prosecutorial Discovery under Proposed Rule 16*, 85 HARV. L. REV. 994 (1972).

¹⁷⁹. *Williams v. Florida*, 399 U.S. 78 (1970).

¹⁸⁰. Christopher P. DelRosso & Samuel F. Ernst, *Thirtieth Annual Review of Criminal Procedure II. Preliminary Proceedings: Discovery*, 89 GEO. L.J. 1343, 1374-76 (2001).

¹⁸¹. See e.g., Stanley Z. Fisher, *The Prosecutor's Ethical Duty to Seek Exculpatory Evidence in Police Hands: Lessons from England*, 68 FORD. L. REV. 1379, 1394 (2000). In 1996, England passed the Criminal Procedure and Investigations Act, which finalized a two-stage reciprocal discovery procedure.

¹⁸². 1996 CPL, art. 93.

the case.¹⁸³ In addition, the Procuratorate could be a formidable political force during the legislative process and it may further its interests through subsequent judicial interpretations. Therefore, defense-only discovery is highly unlikely to succeed during legislation. Reciprocal discovery will be much more likely to survive the power contest between the Procuratorate and the supporters of defendants' rights, and in practice, it will provide incentives for disclosure by the Procuratorate, provided that the system is designed such that disclosure by the defense is contingent upon prompt disclosure by the government.

However, it shall be noted that reciprocity does not mean equality. The defense and the Procuratorate occupy vastly different positions in terms of the scope of discovery and the burden of disclosure. Existing systems of discovery, without exception, allows much narrower scope of discovery for the prosecution than for the defense—partly as a result of the principle against self-incrimination. In addition, in some jurisdictions, the defendant's duty to disclose is not triggered until the government complies with the defendant's discovery requests.¹⁸⁴ These rules will help preventing any over-compensation for the Procuratorate resulting from reciprocal discovery.

Finally, supervision of discovery and sanctions for violations of discovery rules shall be carefully designed, especially with regard to the violations by the defense in a system of reciprocal discovery. The last thing that China's defense lawyers need is the opening of yet another arena where they could be subject to retaliatory prosecution. Therefore, disputes arising from discovery shall be subject to judicial review by a court and only the court has the power to impose any sanction for failure to comply with a discovery request; it will be disastrous to extend the supervisory power of the People's Procuratorate over the discovery process. Potential methods of sanction include the granting of additional time for trial preparation to the party who has been disadvantaged by the noncompliance, or the exclusion of a certain type of defense or a certain piece of evidence. Since the rules against perjury apply to the process of discovery, discovery rules shall avoid the creation of any additional individual liability as sanctions against noncompliance. The details of a discovery mechanism tailored to China's reality are beyond the scope of this paper and shall be the subject of a separate and comprehensive study.

3. Broader Scope of Criminal Defense and Tougher Measures against Procedural Violations

Despite the increased awareness of procedural fairness and conscious efforts to improve procedural safeguards within China's criminal justice system, criminal defense is still very much preoccupied with substantive criminal law. In other words, the scope of criminal defense is limited to the presentation of exculpatory evidence during the trial and mitigation evidence during the sentencing phase; the fairness of the pretrial proceedings and the fairness of the criminal trial itself, have not become integral parts of a defense lawyer's representation of the accused.¹⁸⁵ This phenomenon demonstrates that conceptually, procedural safeguards still remain very much as rights-oriented "technicalities" of a modern criminal procedure, their significance in human rights protection, reliability of the testimony, and ultimately the fairness of the trial has not been fully appreciated.

Actions of police and the Procuratorate are ultimately motivated by the desire to find the person responsible for the crime and convict whom they believe is the criminal. Therefore, for deterrence purposes, the most powerful penalty, aside from personal liabilities, would be one that

¹⁸³ *Id.*

¹⁸⁴ For example, this is the rule prescribed by the U.S. Federal Rules of Criminal Procedure. See FED. R. CRIM. P. 16(b)(1)(A)-(C).

¹⁸⁵ See e.g., Mingyuan Wang, *Procedural Defense in Criminal Defense*, LEGAL DAILY, available at <http://chinalawinfo.com/fzdt/xwnr.asp?id=4325>; see also, interview notes, Ruihua Chen.

directly influences the outcome of the criminal trial. For adversarial systems specifically, without procedural defense, the fairness of the party contest will be severely degraded if the government were to retain its advantage procured through illegal means. Conversely, procedural defense also offers incentives for the accused to reveal illegal actions by the government. If the accused derives no personal benefit from challenging government action, he may be inclined to keep illegal governmental actions secret so as not to offend the police or the Procuratorate, in the hope that his 'cooperation' will be rewarded with more lenient treatment during detention or during the trial. Hence, in the absence of procedural defense, not only would the police and the Procuratorate continue using illegal means to extract confession or to secure conviction, such practices would also remain undetected in most cases due to the lack of incentives on the part of the accused to reveal such information. Therefore, the integration of procedural defense is crucial for deterring illegal actions by the government and enhancing human rights protection for the accused.

In many countries, procedural defense takes the form of exclusionary rules,¹⁸⁶ and China has also contemplated some form of exclusion. Article 43 of the 1996 CPL stated that "[i]t shall be strictly forbidden to extort confessions by torture and to collect evidence by threat, enticement, deceit or other unlawful means."¹⁸⁷ The Supreme People's Court later on stated in its interpretation of the CPL that witness testimony, victim statement or defendant confession obtained by torture, threat, enticement, deceit or other illegal means are not admissible at trial.¹⁸⁸ It shall be noted that the Supreme People's Court's interpretation only reaches testimonial evidence, it has purposefully excluded tangible object obtained by illegal means from the scope of exclusion. The same dichotomy between testimony and tangible objects is observed in the organic rules of the Supreme People's Procuratorate,¹⁸⁹ and these rules further specify that if the People's Procuratorate identifies any illegal means of obtaining evidence, it shall order the responsible party to conduct a new investigation pursuant to its advice; if necessary, the Procuratorate may assume investigation itself.¹⁹⁰ In addition to the apparent lack of rules governing illegally obtained tangible evidence, there has been little success in applying exclusionary rules to illegally obtained testimony due to insurmountable difficulties in proving illegal police actions during investigation.¹⁹¹ Because of the tremendous power and political status of the People's Procuratorate and the Public Security Bureau—the latter being China's police department, and the underlying alignment of interests among the police, the procuracy, and the criminal courts, the pursuit of claims of illegal government actions by the courts have so far been rather sluggish. As a result, China's exclusionary rule remains as yet another empty promise on the book, with little or no practical impact.

Difficulty in proving police illegality is a difficult task even in countries with a long history of exclusionary rules. The prospect of exclusion often prompts police to lie about past incidents, which has become one of the major attacks by opponents of exclusionary rules. However, there are several steps that could be taken to improve the application of exclusionary rules in China.

¹⁸⁶ England, Australia, New Zealand, Canada, Germany and France all have some form of an exclusionary rule. *See e.g.*, James Stribopoulos, *Lessons from the Pupil: A Canadian Solution to the American Exclusionary Rule Debate*, 22 B.C. INT'L & COMP. L. REV. 77, 106 (1999).

¹⁸⁷ 1996 CPL, art.43.

¹⁸⁸ Interpretation by the Supreme People's Court on Issues regarding Implementation of the Criminal Procedure Law (1998), art.61, *reprinted in* LATEST JUDICIAL EXPLANATIONS OF THE LAW'S OF THE CRIMINAL JUSTICE SYSTEM, 104 (Chinese Univ. L & Pol. Press, 1998).

¹⁸⁹ Rules of Criminal Procedure by the Supreme People Procuratorate (1998), art.265, *reprinted in* NEW REGULATIONS REGARDING THE IMPLEMENTATION OF THE CRIMINAL PROCEDURE LAW BY THE POLICE, THE PROCURATORATE AND THE COURT, 304 (China Procuratorate's Press, 1999).

¹⁹⁰ *Id.*

¹⁹¹ *See* discussion in Part II, Section 1.

First of all, defense lawyer's right to investigate police illegalities shall be affirmed and protected by law. The witnesses to police actions are likely to be officers and inmates at the same detention center, and neither is likely to be cooperative in the investigation: the officers may be unwilling to testify against their colleagues and friends, or to take a stand against a practice that they themselves may have engaged in; whereas the fellow inmates may be concerned about their own fate in the hands of the officers at the detention center, and they have nothing to gain from testifying against the police. The current authorization of the lawyer's right to investigate, as detailed in Chapter II, Section 3, is way too narrow and too ambivalent for effective investigation under such tough circumstances. As soon as an officer is implicated in an alleged violation, the officer shall be temporarily transferred to a different unit so as to reduce the apprehension of retaliation by inmates whom the officer used to be in charge of. In extreme cases of police brutality, it may be necessary to initiate a separate criminal action against the particular individuals involved, such that the proof of the defendant's claim of illegality may be obtained through the government's investigation in the other lawsuit. Again, it is important to isolate the liability to the specific officer responsible for the illegal action rather than imputing the whole police department so as to minimize the tendency of collusion within the police department to cover up illegal actions by individual officers.

Secondly, once a procedural defense is raised, the law should place the burden of proof on the government. This will offer incentives for the police or the Procuratorate to maintain records that may prove their innocence if a claim is raised later on during the trial. Of course, one may argue that this rule would also provide incentives to falsify records. However, it shall be noted that even in the absence of exclusionary rules, the police were already engaged in a variety of practices, including covert forms of torture and falsified interview notes, to shield themselves against claims of illegality. The shift in the burden of proof may worsen the situation, but not to a much greater extent. Therefore, the benefit of the positive incentives resulting from the shift in burden of proof is likely to exceed the consequences of negative incentives.

Thirdly, improvement in counsel access to the accused may also facilitate the gathering of evidence against the government. There are two different aspects to improved access. One is a quantitative improvement, contingent upon ease of access. If the accused wishes to meet with his counsel immediately after being tortured by the police, the counsel shall be able to get access to the accused without any unnecessary delay. Ease of access may lead to increased frequency of attorney-client meetings, therefore providing the attorney with more opportunities of obtaining information on what has transpired during the detention. Frequent meetings may also force the police to refrain from torturous acts that may leave physical mark or overt psychological disturbances on the accused. The other is a qualitative improvement, contingent upon strict enforcement of attorney-client confidentiality. The law shall proscribe police presence during attorney-client meetings such that the accused will be more forthcoming with any claims against the government.

Finally, the distinction between testimony and tangible objects shall be reformulated. If there shall be any dichotomy in treatments of illegal government actions at all, it is to be between illegal actions that violate fundamental human rights and illegal actions of a lesser degree. Therefore, testimony or tangible objects obtained through torture shall be equally subject to exclusion, whereas evidence obtained through a lesser form of illegality, for example, the lack of a search warrant, may be subject to alternative forms of sanctions. Experience in the United States has revealed that judges in general are unwilling to let real criminals go free on technicalities and they often create exceptions contingent upon the strength of the specific case, which has led to continued narrowing of the application of exclusionary rules.¹⁹² Therefore, for

¹⁹². See e.g., *supra* note 186, at 84.

actions that do not amount to outrageous forms of human rights violation, a weaker form of exclusionary rule or alternative sanctions may be more suitable in proportion and more effective in practice.¹⁹³ One such alternative could be to incorporate procedural requirement into the internal evaluation process of the police and the Procuratorate. For example, successful challenges of official procedural violations will result in negative points for the specific government officer involved, and the accumulative score will affect the decisions as to the officer's promotions or salary increases at the annual review.

4. Establish A System of Immunity for Criminal Defense Lawyers and Enhance the Disciplinary Function of the Lawyers' Associations

The dual role of a lawyer—both as a zealous advocate for the client and as a major player in the legal system—demands that the legal profession be accorded with special protections against undue interference with faithful representations of the clients, and at the same time, with strict professional disciplines against unethical conducts that may jeopardize the integrity of the legal system. There is often a thin line between zealous advocacy and deceitful representations, and hence the above two goals may sometimes be at odds with each other. It is not easy to strike a proper balance between these two occasionally conflicting goals. In many countries, these two goals are achieved through a combination of different tactics: litigation immunity against allegations of injurious statements by lawyers during legal proceedings, an elaborate code of professional responsibilities, and sanctioning of improper conducts by presiding judges. In China, the balance is now severely tilted towards punishment of lawyers who are believed to have engaged in illegal activities, and the investigation and discipline of lawyers are dominated by the People's Procuratorate, the official supervisory organ of the judicial system.¹⁹⁴ Section 1 of this chapter has proposed a diminished role for the People's Procuratorate as a supervisory organ. A couple of other approaches may be adopted to enhance the balance between protection and discipline of lawyers.

Litigation immunity, which protects attorneys against legal responsibilities arising from injurious statements made during judicial proceedings, has been widely accepted as an indispensable mechanism for the protection of litigation attorneys. The immunity is deeply rooted in the Anglo-American legal tradition where, as early as the fourteenth century, the English courts began to uphold immunity based on the concern that justice would be impaired if the players in the legal proceeding could be sued for statements made during the discharge of their public duties.¹⁹⁵ Many countries have adopted some form of litigation immunity by now, though the specific rules—the scope of immunity and the conditions for obtaining immunity—may vary.¹⁹⁶ It is believed that litigation immunity will afford attorneys the “utmost freedom of access to the courts” without fear of being harassed by subsequent civil lawsuits.¹⁹⁷ Given the predicament of

¹⁹³. The exclusionary rules employed in the United States is of the strongest form—absolute exclusion. Other countries have used weaker forms such as discretionary exclusion or relative exclusion, which allows consideration of factors such as the gravity of the case and fairness of the final outcome if exclusion is applied. For discussions of these alternative forms of exclusionary rules and other alternative remedies for illegal police conduct, see e.g., Randy E. Barnett, *Resolving the Dilemma of the Exclusionary Rule: An Application of Restitutive Principle of Justice*, 32 Emory L.J. 937 (1983); Kuk Cho, *The Japanese “Prosecutorial Justice” and Its Limited Exclusionary Rule*, 12 Colum. J. Asian L. 39 (1998); Stribopoulos, *supra* note 186.

¹⁹⁴. See Part III, Section 3.

¹⁹⁵. Judith Kilpatrick, *Regulating the Litigation Immunity: New Power and A Breath of Fresh Air for the Attorney Discipline System*, 24 ARIZ. ST. L.J. 1069, 1072 (1992).

¹⁹⁶. Wang et al., *supra* note 75.

¹⁹⁷. See e.g., *Silberg v. Anderson*, 786 P.2d 365, 370 (Cal.1990) (supporting the immunity doctrine and stating that “[g]iven the importance to our justice system of ensuring free access to the courts, promoting complete and truthful testimony, encouraging zealous advocacy, giving finality to judgments, and avoiding unending litigation, it is not surprising that ... the litigation privilege, has been referred to as 'the backbone to an effective and smoothly operating judicial system'"); see also *Marsh v. Ellsworth*, 50 N.Y. 309, 312 (1872).

criminal defense lawyers in China, litigation immunity may facilitate the improvement of China's criminal justice system in two other aspects.

First, even though litigation immunity is primarily designed to protect attorneys from claims of defamation, in actual operation, immunity also forecloses, to a certain extent, inquiries into the truthfulness or maliciousness of statements made in the protected context.¹⁹⁸ In China, defense lawyers are often threatened by the possibility that if they make statements on behalf of the accused that are not objectively truthful, they will be subject to criminal prosecution for perjury or fabrication of records. Crimes of perjury or fabrication require the necessary mental element in order to find culpability. If the defense lawyer offers an honest defense based on the information he has obtained, even though his statements may not be objectively truthful because of inadequacy of information or flaws in the source of the information or the information itself, the lawyer shall not be held liable because he doesn't have the requisite mental element. To hold such practice criminal will certainly have a huge chilling effect on defense lawyers, preventing them from offering the best positive case for their clients. However, this distinction between knowing fabrication and honest representation based on faulty information is often neglected, or purposefully ignored when the Procuratorate investigates attorney misconduct. Therefore, to accord immunity to statements by defense lawyers made in the protected context may produce the added benefit of reducing the incidence of wrongful or retaliatory prosecution of defense lawyers and make them less encumbered by the concern of potential criminal liability.

Second, litigation immunity is especially important in an adversarial context where party contest demands each side to make the best effort to present its case. The success of an adversarial system, both in terms of its truth-finding ability and its protection of legal rights of the accused, is to a great extent predicated on zealous advocacy by both parties. Therefore, if China wants to adopt a more adversarial trial proceeding, which is one of major purposes of the ongoing criminal procedure reform, litigation immunity becomes an important prerequisite.

Opponents of litigation immunity may argue that immunity will have the negative impact of increasing incidence of perjury and other deceitful practices in the judicial process. However, there are other mechanisms that are designed to detect and deter such practices. First of all, the trial proceeding itself is a truth-finding process. A major responsibility of the judge is to extract truth from the presentations made by the opposing parties in the criminal trial, especially in an adversarial trial proceeding where the trial itself is a test for unfair tactics and deception. Second, the criminal violations defined in Article 306 of the Chinese Criminal Code are not abrogated by litigation immunity. Immunity is only offered to *statements* and *publications* made in the protected context, it does not preclude investigation or prosecution of perjury or other purposeful illegal actions under Article 306. Therefore, serious malfeasance will nonetheless be subject to thorough investigation and proper punishment. Third, professional responsibility guidelines and professional disciplines should channel attorney conducts in the right direction. This issue will be explored in more details later. Forth, the presiding judges also bear the responsibility of monitoring the conducts of both parties and administering necessary sanctions whenever someone fails to comply with the proper procedure. Therefore, as proponents of litigation immunity have argued, the immunity protects lawyers "from liabilities when zealousness accidentally crosses the bounds of truth or the rules," but "when such transgressions exceed reasonableness," additional safeguards, such as criminal prosecution and professional discipline, will "provide protection for the society."¹⁹⁹

¹⁹⁸ Kilpatrick, *supra* note 195, at 1073.

¹⁹⁹ *Id.* at 1081.

During the drafting of the Lawyer's Law in 1991, the Minister of Justice proposed an immunity provision, which stated that "the statements made by lawyers during the criminal defense in accordance with the law shall not be subject to legal liability. Lawyers shall not be detained, arrested, interrogated or prosecuted for their lawful activities during criminal litigation."²⁰⁰ However, the final draft, which was passed in May of 1996, did not fully adopt the proposed immunity provision. The final legislation only offers a general stipulation that the rights and privileges of defense lawyers are protected by law and that the bodily rights of lawyers shall not be infringed during their practice.²⁰¹ Such general statements have been proved insufficient in protecting defense attorneys, and stronger and more specific protections, such as litigation immunity, is necessary for the healthy development of the profession of criminal defense.

In addition to the establishment of litigation immunity, China should strengthen the disciplinary power of the Lawyer's Association and make professional discipline, as opposed to criminal prosecution, the primary means of monitoring lawyers' activities and punishing illegal conducts. Internal discipline by the lawyer's associations has two great advantages over disciplines through criminal punishment. First, given the complexity of attorney-client relationship and the dual royalties of lawyers to the clients and to the legal system as a whole, it is often difficult to come up with a bright-line rule delineating what is permissible. Because the leadership of the Lawyers' Associations is practicing attorneys themselves, they are more informed of the myriad forms of dilemmas lawyers may encounter in their practice, and hence are capable of designing more refined and more reasonable disciplinary rules for lawyers than what a criminal code could offer. The Rules of Handling Criminal Cases promulgated by the All-China Lawyers' Association in 1998 is a good example of professional regulation. The Rules of Handling Criminal Cases has twelve chapters and 189 articles.²⁰² It offers extremely detailed and comprehensive guidance for each step during a criminal proceeding and for various scenarios that may occur during the representation. Second, some conducts, though inappropriate, do not amount to the degree of criminal liability. Therefore, professional disciplines, with punitive devices such as suspensions and fines, are more suitable for mild transgressions and are less likely to exert too much chilling effect on zealous advocacy.

The proper form of management of the legal profession has been a hotly debated issue since rejuvenation of the legal profession in the late 1980s. The Chinese legislature had contemplated a stronger role for lawyers' association in controlling the activities of its own members. The 1996 original draft of the Lawyer's Law submitted to the NPC contained a provision stipulating the establishment of a disciplinary committee within the lawyers' association.²⁰³ The committee would be composed of members of the bar as well as officials from the courts, the People's Procuratorate, and the Ministry of Justice (MOJ), and it would be responsible for investigating and punishing conducts in violation of professional ethics and discipline. However, due to objections from many members and local People's Congresses, this provision was deleted in the final draft of the Lawyers' Law and the legal profession is now under the due regulation of the MOJ and the Lawyers' Association.

Many commentators observed that the failure to delegate more powers to the Lawyers' Association was mainly motivated by deeply ingrained distrust of lawyers and of their ability of self-regulation.²⁰⁴ This distrust might be justifiable in the late 1980s or the early 1990s when the

²⁰⁰ Wang et. al, *supra* note 75, at 1.

²⁰¹ *Id.*

²⁰² Li Si, *The Power of Promulgating Professional Regulations and Disciplining Lawyers Shall Belong to the Lawyers' Association*, at <http://www.chineselawyer.co.cn/article/show.php?cId=904>.

²⁰³ Shaomo Dong, *The Reform and Improvement of the Legal Profession*, LAWYERS' CHRON., Feb. 2002, available at <http://www.chineselawyer.com.cn/culture/Show.php?cId=56>.

²⁰⁴ *Id.*

Lawyers' Associations just came into being and the leadership of these associations was still grappling with the nature and purposes of their organizations. However, with the expansion of the legal profession and the maturing of the Lawyers' Associations, the time is ripe for Lawyers' Associations to take on a more assertive role in managing and disciplining their own members.

V. CONCLUSION

In the area of criminal defense, the 1996 CPL has largely failed to realize its initial promise. The early involvement of defense lawyers in the charging process did not translate into effective trial preparations during this period. As described in Chapter II of this article, the immediate causes of the failure of the 1996 reform fall into two large categories. One is the deficiency of complementary measures in the law that could help ensure proper exercise of the rights of defense lawyers. Examples in this category include the lack of a discovery mechanism, the lack of subpoena power by the courts to compel witness participation in the trial, and the lack of financial resources to support criminal defense work. Since China is trying to adopt a more adversarial trial procedure, some of these problems also reflect the danger of importing singular segments of a foreign system. Adoption of the adversary system in a piecemeal fashion could alter the original functions of the transplanted procedures.

The other category of immediate causes is the tremendous institutional resistance from the People's Procuratorate. The peculiar status of the Chinese Procuracy offers a variety of ways to counter reform efforts: the Procuratorate has used its judicial interpretive power to modify the scope of certain provisions in the 1996 CPL; it has used its supervisory power to discourage defense lawyers from investigating false confessions or testimonies; and it has taken advantage of its discretion at the pre-trial stage to interfere directly with the function of defense lawyers.

Given these two major categories of causes, it becomes clear that further reform measures shall focus on the implementation of complementary procedures and the restriction of the power of the Procuratorate, both of which have been proposed in Chapter IV. However, if one looks beyond these immediate causes, one will see that the ultimate challenge for China is its legal culture. Even though the Chinese people have been quite deft at adopting Western-style market economy and life styles, their conceptions of the truth and the truth-finding mechanisms, their low tolerance for crimes and criminals, and their self-contradictory attitudes towards government bureaucracy—an odd mixture of despise and deference—have proved to be rather immune to Western influences. Since democracy and respect for human rights are the very basis for a modern adversarial system, it will be very difficult for the Chinese leadership and public to accept a more adversarial criminal procedure if these cultural attitudes persist, and the procedural reform will remain splintered as it is now.

Cultural changes take an extremely long time to develop. For China, there will be additional difficulties from the fact that some of the new ideas will endanger the very foundation of Communist rule. Even though China's leadership has been open to legal reforms in specific fields of law—with the exception of the Chinese Constitution—it may not be so supportive if legal reforms start to challenge the sole leadership of the Community Party.

On a more optimistic note, China is undergoing a transition period. So far the transition has encompassed China's economic regime and legal system, but political changes are not entirely impossible. The frustrations and confusions with the current criminal procedure reform are characteristic of a transition period, during which reform efforts are confronted with resistance from old ideologies and institutions. By taking a few small steps at a time—even though that may result in the kind of anguish defense lawyers have suffered in the aftermath of the 1996

CPL—China may eventually move closer to a modern criminal procedure that affords the accused adequate protections.

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