1. Introduction

In this book, we examine from an empirical standpoint how the modern criminal justice process in China is functioning and the implications this might have for our understanding of system change. The political, economic and social transformations that have taken place in China over the last half-century have had a major impact upon the methods, institutions and mechanisms used to deal with alleged criminal infractions. Although the period after the founding of the Republic in 1949 was marked by a state-driven, class-based ideology focusing episodically upon ‘enemies’ of the state and ‘counter-revolutionaries’ without the discipline of a system of criminal procedure, symbolized by arbitrary detentions, torture and summary justice\(^1\) (at its height during the notorious Cultural Revolution, 1966–1976, when formal institutions themselves were abolished), from the introduction in 1979 of a Criminal Procedure Law and its successor in 1996 there has been a process of building formal criminal justice institutions and procedures which represent, at least to some degree, a break from the past and which outwardly resemble institutions and procedures in societies based on the rule of law. In this book we analyse the extent to which these changes to the formal legal structure have resulted in changes to the law in practice.

We begin by briefly describing the main features of China’s criminal justice process, its institutions and its procedures as they bear upon public, as opposed to private, prosecutions.

THE CHINESE CRIMINAL PROCESS IN OUTLINE\(^2\)

Investigations into reported crime are conducted by the police (\textit{Gong’an}) or Public Security Bureau (PSB). This is the body which is responsible for deciding whether an incident is or is not a crime and for collecting any and all evidence relevant to the resolution of the matter. If it is not considered a ‘crime’ the police may either take no further action or they may consider that some official action against an individual is still merited utilizing for this purpose various administrative powers described in more detail in Appendix 8 which include detention and ‘re-education through labour’ (\textit{laodong jiaoyang}).

If the police decide that the matter is a crime, they should file the case. They have

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\(^1\) The starting point of serious inquiry into China’s criminal justice system is the pioneering work of Jerome Cohen (1968) who can rightly be said to be the father of the academic study of China’s criminal justice system. As Cohen makes clear, there were significant differences in the state’s position in regard to law and its institutions over this period which witnessed, among other things, the ‘Anti-Rights campaign’ and the ‘Hundred Flowers Blooming’ period. See also Lubman (1969).

\(^2\) See Appendix 1.
powers to detain any suspect and carry out investigative actions such as search of the person or property and may seize relevant material or documentary evidence. If the police decide that it is necessary to detain the suspect, they may submit the case to the People’s Procuratorate (*Renmin Jianchayuan*) and request approval to arrest. If arrest is approved, the police have powers to release the suspect or to detain the suspect (with maximum detention periods fixed by law) while evidence is collected.

Once a case goes forward for prosecution, it is handled by the Procuratorate. The Procuratorate has powers to interview the criminal suspect and, where they deem the evidence deficient, may ask the police to undertake ‘supplementary investigation’. In the event of a prosecution, it is the responsibility of the Procuratorate to draw up a Bill of Prosecution detailing the charges levelled against the criminal suspect and to present the case to the People’s Courts (*Renmin Fayuan*).

As set out in Table 1.1, less serious cases will be dealt with in a Basic Court. Basic Courts are normally located in counties, municipal districts and autonomous counties. Crimes of a more serious character are heard in Intermediate Courts, which are established in capitals or prefectures at the provincial level. Except in certain summary cases, the court sits as a collegial bench (*heyi ting*) and in theory reaches a decision collectively, although in practice the case will be handled by one of their number, referred to herein as the case-responsible judge (*chengban faguan*). Additionally, there is in each court institution a presiding judge (*shenpanzhang*) who may also be the case-responsible judge in an individual case.

In major (*zhongda*) or complex (*yinan*) cases, the case may be passed for advice or decision after the court hearing to the adjudication committee (*shenpan weiyuanhui*) which comprises the President of the Court, Vice-Presidents and the Heads of the Divisions and senior judges. Where this occurs, the decision of the adjudicative committee must also in practice be approved by the head of the division and thereafter by the President of the Court. In practice, the case-responsible judge at the trial will, in this highly bureaucratic setting, defer to his or her superiors.

In parallel with the courts, the Chinese system has political-legal committees at each level. The Party’s political-legal committee (*zheng-fa weiyuanhui*) supervises and directs the work of the police, procuratorate and the courts and can involve itself in law enforcement, court procedure and individual case adjudication. The political-legal committee is usually headed by the local chief of police and includes the deputy party-secretary in charge of political-legal affairs, the President of the court, the head of the procuratorate.

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3. Criminal courts in China are organized at four levels: Basic Court; Intermediate Court; Higher Court; and the Supreme People’s Court. Except for the Basic Court, all courts have both original and appellate jurisdiction.

4. The Court also has an appellate jurisdiction none of which are included in our study.

5. Technically, power and responsibility is vested in the ‘court’ not in individual judges. For this reason, members of the court (such as presidents and division chiefs) have a legitimate right to take part in or review draft opinions before they are released.

6. These will typically include cases involving the death penalty, corruption and bribery cases, economic crimes involving deceit or corruption, cases that might have a major social impact and politically-sensitive cases (including Falun Gong cases).

7. Courts in China are organized into separate divisions to deal with different categories of case such as civil, criminal, economic and administrative.
<table>
<thead>
<tr>
<th>Type of Court</th>
<th>Location</th>
<th>Criminal Jurisdiction</th>
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| Basic People's Courts| In counties, municipalities, autonomous counties, and municipal districts. A basic people's court may set up a number of people's tribunals (renmin fating) according to the conditions of the locality, population and cases. Judgments and orders of these tribunals have the same effect as judgments and orders of the basic people's courts. | ● All first instance ordinary criminal cases, except those that fall under the jurisdiction of courts at the higher levels as stipulated by the Criminal Procedure Law, other laws or decrees;  
● Minor criminal cases that do not need to be determined by trials;  
● Directing the work of the people's mediation committees. |
| Intermediate People's Courts | They are established in prefectures of a province and municipalities | ● Cases of first instance as assigned by laws and decrees;  
● First instance cases transferred from the basic people's courts;  
● Appeals and protests against the judgments and orders of the basic people's courts;  
● First instance counter-revolutionary cases and cases endangering State security;  
● Cases punishable by life imprisonment or death penalty; Criminal cases in which the offenders are foreigners; and  
● Protests lodged by the people's procuratorates in accordance with judicial supervision procedures. |
| Higher People's Courts | Established in provinces, autonomous regions, and municipalities directly under the Central Government. | They have jurisdiction over first instance major criminal cases that 'pertain to an entire province (or autonomous region or municipality directly under the Central Government)'. Their jurisdiction includes:  
● First instance cases transferred from the lower courts;  
● Appeals and protests against the judgments and orders of the lower courts;  
● First instance cases as assigned by laws and decrees; and  
● Protests by the people’s procuratorates in accordance with judicial supervision procedures. |
| Supreme People's Court | The highest court in China.                                               | It has jurisdiction over first instance major criminal cases that ‘pertain to the whole nation’. Its jurisdiction includes:                                                                                           |
and the heads of other ministries or state bureaucracies, such as public security, state security and justice. The desirability of the continuation of the adjudicative and political-legal committees as China develops has been placed on the basis that ‘there may still be a need for adjudication committees in courts where the level of [judicial] competence remains low, or for political-legal committees to ensure that judicial decisions keep with macro-level development goals and that the court has the resources and competence to provide an effective remedy in cases that are often the result of systemic shortcomings in the economy or social welfare system . . .’ (Zhu Suli, 2010). Where the political-legal committee becomes involved, the decision-making is more complex and the ultimate decision may take the form of a directive.8 As Ira Belkin (2007) succinctly put it: ‘Suffice it to say that judicial, prosecutorial and police decisions in the criminal justice system in China are very much part of a larger political process that is extra-judicial and is not transparent.’

An adverse decision of the collegial bench may be the subject of an appeal (shangsu) by the defendant or a ‘protest’ (kangsu) by the procuracy to a court at the next higher level. Appeals and protests are heard by Higher People’s Courts which are located in provinces, autonomous regions and municipalities directly under the Central Government.

Provision has been made for expediting first instance trials in certain cases. Summary Procedure, under which the trial will be conducted by a single judge, may be applied where the defendant is pleading guilty and the offence charged does not carry more than three years’ imprisonment. Simplified Ordinary Procedure, which may be used in certain

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8 Randall Peerenboom (2010b) states that the intervention of the political-legal committee ‘does not necessarily dictate the outcome of the case’ but rather ‘it recommends action to the court’: p. 80. Our discussions with judges in China suggest rather that where the political-legal committee takes a view, that view is dispositive. No judge that we have spoken to has indicated that he or she would be able to disregard intimations from the political-legal committee whether framed as a recommendation or as a directive.

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Table 1.1 (continued)

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<tr>
<th>Type of Court</th>
<th>Location</th>
<th>Criminal Jurisdiction</th>
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<td></td>
<td></td>
<td>• Interpretation of laws;</td>
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<td>• First instance cases as assigned by laws and decrees;</td>
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<td>• Appeals and protests against the judgments and orders of the Higher People’s Courts;</td>
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<td>• Protests by the Supreme People’s Procuratorate in accordance with judicial supervision procedures;</td>
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<td>• Supervising the work of the lower courts; and</td>
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<td></td>
<td>• Approving death sentences.</td>
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cases where the defendant is pleading guilty, allows the court (which normally is provided only with the ‘major evidence’ by the prosecutor) to read all evidence in advance of trial. These two trial forms are dealt with in greater depth in Chapter 8 infra.

BACKGROUND TO 1996 CRIMINAL PROCEDURE LAW: THE 1979 CPL REFORMS

The introduction of a new Criminal Law (CL) and Criminal Procedure Law (CPL) in 1979 was seen by many as constituting a welcome break from a past marked, even discounting the Cultural Revolution, by arbitrariness in decision-making, torture of suspects and ‘demonstration trials’ in which the outcome had already been decided:9

[B]efore the promulgation of the Criminal Law, we depended on criminal policies in convicting someone of crimes and meting out punishment. We made decisions at our discretion, and the work was strongly characteristic of rule by man. Under such circumstances, the promulgation of the Criminal Law put an end to an era in which there was no law to go by. . . .

Similarly, Wang Hanbin (1996), in welcoming the 1996 CPL reform stated:

We have made significant amendments to the various stages of criminal proceedings, including investigation, prosecution, and adjudication. This is a major development toward protecting the legitimate rights of the parties concerned. The amendments accord greater protection to citizens’ rights and interests under the criminal procedure system and are conducive to correctly meting out punishment for criminals. They address, in a more explicit, concrete, and scientific manner, the issues of how public security organs, procuratorates, and law courts should divide their responsibilities and cooperate and restrain each other.

The police, procuratorate and the courts became responsible for different stages of the criminal process, investigation, prosecution and trial working together under the principle of ‘mutual co-ordination and restraint’ (huxiang peihe, huxiang zhiyue).

The starting point of the criminal process was the apprehension of the suspect by the police. In the immediate past before the 1979 Criminal Procedure Law (CPL), the police powers in this regard were almost untrammelled and they were unrestricted as a matter of practice.10 The 1979 CPL imposed a requirement that, in order to obtain approval for arrest from the prosecutor, the police had to satisfy a high standard namely to show (Article 40) that the ‘main facts of the crime have been already clarified’. There was limited provision to detain ‘an active criminal or major suspect’ prior to arrest where, for example, the individual was in the process of committing a crime, was identified as having committed a crime by a victim or witness or there was a likelihood that he or she would destroy or falsify evidence (Article 41). Following such detention, the police had a maximum of seven days in which to apply to the procuratorate for permission to arrest

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10  During the Cultural Revolution (1966–1976) political mobilization through the ‘mass line’ dominated such that official agencies, including the police, were effectively destroyed. See, Cai Dingjian (1999a).
after which the procuratorate were given up to three days to decide whether or not to approve (Article 48). Additionally, once an arrest had been approved, the total period over which a suspect could be held in custody (including any period covered by pre-arrest detention) was limited to two months, extendable in 'complicated cases', by a further month only upon approval of the procuratorate at the next highest level (Article 92(1)).

Given such a relatively restrictive framework, however, the police continued the practice of widespread resort to detention by utilizing powers outside the 1979 CPL and not requiring the approval of the procuratorate, in particular, the administrative power of 'shelter and investigation' (shourong shencha). Even this power, limited as it was to three months' detention, was routinely flouted and the police were able, without external supervision, to utilize detention in order to secure confessions. Further powers could be invoked 'according to the circumstances of the case' (Article 38, 1979 CPL) including 'taking a guarantee and awaiting trial' and 'supervised residence'. The objective of the police was to secure confessions under the prevailing ideology of 'leniency for confessions; harshness for resistance' (tanbai congkuan; kangju congyan).

On transfer of the case to the procuratorate, Article 97, 1979 CPL provided that the procuratorate had up to one month to decide whether to initiate a prosecution, extendable by two weeks in 'major' or 'complicated' cases. Throughout this time, the suspect would remain in custody and the detention could be further extended by the procuratorate requesting the police to undertake 'supplementary investigation'. Although such an investigation was time-limited to one month, no limit was placed upon the number of such requests that the procuratorate could make.

Following the initiation of proceedings against an accused and transfer of the case to the court, the court would constitute a 'collegial panel' to try the case. The opening of the hearing was not the occasion to inform the court about the charge and evidence: that had already occurred. In advance of trial, the collegial panel would meet to discuss the case and reach a decision on both the nature of the offence and sentence. 'It was normal practice in China that a case was decided before a trial and that those who tried the case might not have the power to make the decision' (He, 2009, p. 319).

The court had to try the case unless there was not 'clear and sufficient evidence' to support the prosecution: if that happened, the court would remand the case to the procuratorate for supplementary investigation. Where it considered that no criminal punishment was necessary, the court could ask the prosecutor to withdraw the case. In cases where there was any doubt or uncertainty, a people's court could undertake its own inquest, examination, search, seizure, crime scene visit and expert evaluation. In short, it was the judge who, through pre-trial investigation, decided on the facts and the law. 'As a matter of law, no court would open a court session if the collegial panel was not certain about the facts, the offence and the sentence' (Fu, 1998, p. 32).

The result was: ‘verdict first, trial afterwards (xian ding hou shen)’. But, as we have noted, the verdict itself was not necessarily the verdict of the court. The collegial panel

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11 See, for a fuller account and sources, Hecht (1996a), pp. 20 ff.
12 Various popular sayings encapsulated this arrangement. 'The police cook the rice, the prosecutor delivers the rice and the court eats it.' Another, on the same lines: 'The prosecutor reads the paper, the defendant's lawyer reads the paper, and the judge has already made up his mind.'
was a subordinate institution and cases were commonly discussed with the adjudication committee or after referral by the Presiding Judge or Head of the Unit through consultation with a higher court. In cases which were considered sensitive, Party officials and other political figures would need to be consulted or would determine the decision through the political-legal committee.

It follows that there was limited role for the defence lawyer because a challenge to the case was not simply a challenge to the investigator or the prosecutor but to the court which had already formed a concluded view before the trial. The role of the defence lawyer (then a state employee) was to plead mitigating circumstances or help ‘educate’ defendants as to the error of their ways. If the lawyer wished to argue innocence, this could be done generally only with the prior permission of the government (Gelatt, 1991). In 1983, the Standing Committee of the National People’s Congress promulgated a ‘decision’ (the so-called ‘September 2 Decision’) which effectively took away a defendant’s right to a lawyer in death penalty cases by abolishing the requirement to notify the defendant of the institution of trial. Defence lawyers were subject to harassment by the government and, in 1983, were extraordinarily made part of the prosecution team in the ‘strike hard’ (yanda) campaign against crime (on ‘yanda’ campaigns, see Tanner, 1999 and Trevaskes, 2007a). The malign influence this had on the public image of defence lawyers continued for some years.

By virtue of Article 110, 1979 CPL, under which the Bill of Prosecution would be delivered to the defendant ‘no later than seven days before the opening of the court session’ and the defendant informed of the right to appoint counsel, lawyers could not be involved in a case until a week before the trial at the earliest. In practice, lawyers often had far less time to prepare: whatever the complexity of the case or the volume of documentation involved, lawyers were not accorded access to the records of the collegial panel (which had already determined the offence and punishment) or to evidence uncovered by the court’s investigation. There was no concept of pre-trial disclosure: the duty on the prosecution being to deliver the file and evidence to the court. Occasionally informal meetings occurred between lawyers and prosecutors to identify issues in dispute and, where there was convincing counter-evidence, the prosecutor and judge could be saved from public embarrassment by withdrawing the case.

Under the 1979 CPL, the trial judge was the dominant figure who opened the session, announced the subject matter of the case and introduced the participants. After the prosecutor read out the Bill of Prosecution (including the facts, the offence and the punishment sought), the trial judge questioned the defendant (the prosecutor could also question the defendant with the permission of the judge). By Article 116, 1979 CPL the judge and prosecutor questioned any witnesses or read out testimony of those witnesses not in court, read out conclusions of expert witnesses and documentary evidence. In the absence of prosecution witnesses (the norm), there was little the defence could do.

By Article 115 of the 1979 CPL, the parties and defence lawyers could ask the case-responsible judge to question the witnesses or expert witnesses or ask permission to put their own questions directly. The court was empowered to stop defence questioning if it

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13 Provision was made to allow a lawyer to apply for delay of the trial in complex cases where the time was inadequate but these were rarely granted: Zhou (1994) cited in Fu Hualing (1998).
Criminal justice in China

considered this irrelevant. The court additionally had, by virtue of Article 117, discretion whether to allow the defence to call its own witnesses.

Given the fact that a case was decided before the trial, the trial could only be a ritual, with the parties knowing that any input would be too little and too late. (Fu, 1998, p. 39)

Most defence lawyers at this time worked in state-owned firms and were government employees: their status was low and their motivation lower.

THE CRIMINAL PROCEDURE LAW, 1996

The 1996 Criminal Procedure Law (CPL) was introduced at a time of optimism over the direction of the reform of criminal justice in China with Chinese academics and others persuaded that reform was indeed moving in the direction of greater transparency, an enhancement of the role of the defence and prosecution lawyers and a removal of the ‘decision first’ thinking that had marked the earlier era. It was understandable, therefore, that the rays of hope in the 1996 CPL would attract particular interest from commentators. Writing of the 1996 CPL, Fu Hualing (1998) provided an early overview of the changes that were introduced:

In many respects the [CPL] introduces important changes to the previous procedures and significantly redistributes the existing division of powers within the criminal justice system. It restricts police power and the prosecution’s discretion. It enhances the position of the court and differentiates the roles of judges. It also offers more protection for the rights of the accused and enhances the position of defence lawyers in the criminal process in substantive and procedural aspects. Consequently criminal lawyers are expected to play a more active and meaningful role in criminal law. (p. 31)

Similarly, Carol Jones (2005), in reviewing developments from 1949 to 1999, underlined the advances made but sounded a warning about what was happening in practice:

The 1996 CPL did introduce a number of improved due process rights and made the trial system more adversarial. It abolished ‘verdict first, trial second’ (a person could be convicted only after a trial). It also enabled legal representation at an earlier stage in the criminal process, gave lawyers a bigger role at trial and made the initial stages of the process (where the suspect was in police custody) more transparent and accountable to law. However, since 1997, the number of defendants being represented by a lawyer has declined, mainly because of the harassment lawyers experience when they try to use their new powers. (p. 201)

The promise was that China had taken the first step towards the introduction of an ‘adversary’ system of trial. As Amanda Whitfort (2007) put it:

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15 The quotation omits the reference to Article 12 of the 1996 CPL which provides that no one is guilty of a crime without a people’s court rendering a judgment according to law.
Many of the reforms contained in the 225 articles of China’s Criminal Procedure Law of 1996 were intended to introduce aspects of the adversary system of justice to the prevailing system, which although not inquisitorial, *per se*, had European civil law at its roots (citation omitted).

As Jonathan Hecht (1996a) noted at the time of its passing, the 1996 CPL, whatever the motivations and intentions underlying it (as to which see, Hecht, 1996a and Fu, 1998), had an impact in at least four major areas of the criminal process: pre-trial detention; the right to counsel; prosecutorial determination of guilt; and the trial process.

So far as police detention powers are concerned, the 1996 CPL imposed some restrictions. The powers of the police to ‘take a guarantee and await trial’ and ‘supervised residence’ were restricted to certain types of criminal and time limits were imposed (one year limit on ‘taking a guarantee and awaiting trial’ and six months limit on ‘supervised residence’: Article 58(1)). Further, by omitting mention of ‘shelter and investigation’ from the 1996 CPL, the power was formally abolished. However, the new law extended police pre-arrest detention powers in ways which effectively restored them by other means. For example, Article 61, 1996 CPL provided that the police could detain individuals who ‘do not tell their true name or place of residence or whose identity is unclear’ as well as to individuals who the police ‘strongly suspected’ of wandering around committing crimes or forming bands to commit crimes. Further, the circumstances justifying a two month extension of pre-arrest detention was extended by Article 126 to include ‘major, complicated cases where the scope of the crime is broad and gathering evidence is difficult’, and, by Article 127, an additional two months (giving a total of seven months) could be added for any crime punishable by ten years or longer.

Articles 140(2) and (3), 1996 CPL significantly altered the power of the procuratorate to extend an arrested person’s stay in custody by repeated recourse to requests to the police for ‘supplementary investigation’ by limiting such requests to a maximum of two. On the other hand, the period within which the procuratorate had to decide whether or not to authorize arrest was extended from three to seven days (Article 69(3)).

The former practices under which courts themselves engaged in pre-trial investigation by remanding the case to the procuratorate for supplementary investigation (Article 108, 1979 CPL) and had their own power to discover facts (Article 109, 1979 CPL) were abolished in a reform that was seen to shift the burden of investigation and the adduction of evidence away from the court to the procuratorate:

These changes shift the burden of leading evidence from the court to the procuratorate. Accordingly, the procuratorate alone will be responsible for the validity of the evidence, and the court will no longer examine the evidence prepared by the procuratorate before trial. If this procedural reform is faithfully executed, judges may become neutral arbitrators, who decide a case according to whatever evidence is given in court. (Fu, 1998, p. 44)

For many commentators, the 1996 CPL enhanced the position of the court in criminal proceedings and thus allowed defence counsel to play a more active and meaningful role. It was considered that the 1996 reform had altered the dynamics of the trial so that in future the prosecution would bear the burden of proof (He, 2009, p. 304; and Zhang and Hao, 2005, pp. 97–99).

In cases in which the prosecution decides to institute a prosecution, the new law changed the position with regard to the transfer of evidence. The former practice under
which all evidence was transferred to the court was considered to create such bias in the mind of the judges that there could not be a fair trial: the ‘first impression’, it was said, ‘would be the strongest’. Accordingly, Article 150, 1996 CPL provided that the prosecution would not transfer all the evidence but instead the court would try a case where a Bill of Prosecution includes the alleged criminal facts and has attached a list of evidence, names of witnesses and photocopies or photographs of the ‘major’ evidence.

The 1996 CPL was also seen, by virtue of Article 149, to increase the powers of the collegial panel. Under Article 149, a collegial panel has the right and duty to render a decision after trial. If the panel is unable to make a decision on a complex and important case after a trial, it should submit the case to the adjudication committee for consideration and decision. This was seen (Fu, 1998) to effect two important changes: the collegial panel itself, not the President of the court, is to initiate the process of referring a case to the adjudication committee for decision; secondly, such a referral occurs only after a trial is completed:

The reform of trial procedures will improve the quality of legal representation before and during a trial. Right to counsel is extended to the investigative stage. . . . At the investigative stage, an accused may retain a lawyer to provide legal consultancy. At the prosecution and trial stages, a defendant may retain a lawyer for criminal defence. (Fu, 1998, p. 44)

At the investigative stage, by virtue of Article 96, 1996 CPL a lawyer can be a legal ‘representative’, represent the suspect or lodge a complaint and to apply for bail (a provision subsequently amended by an Interpretation so that a lawyer could, in theory, represent a client following the first police interrogation); at the prosecution or trial stage, a lawyer has the right to read and copy case files, interview witnesses and the victim.16

THE IMPACT OF THE 1996 CPL: THE PROMISE

There is no question that the introduction of the 1996 CPL was seen by many commentators as ushering in the start of a new era in Chinese criminal justice by introducing some concepts familiar to Western jurisdictions and more clearly resembling an adversarial than an inquisitorial trial model.17 Professor Randall Peerenboom (2006) provided an overall assessment of the reforms in this way:

One of the most significant reforms in criminal law was the transition from an inquisitorial system to a more adversarial system in the mid-1990s. In an inquisitorial system, a judge or prosecutor carries out the pre-trial investigation; detention periods tend to be long, with little role for the lawyer, who is often limited to brief visits with the accused after the initial questioning; at trial, the judge actively pursues the truth by questioning witnesses and overseeing the production of evidence. The process is structured as a search for truth conducted by impartial officers of the state. In contrast, in an adversarial system that process is structured as a contest between the parties. Judges are not involved in police investigation; lawyers play a much larger role both

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16 These rights, as we shall see, have been formally extended by the 2007 Lawyers Law.
17 It is interesting to note that in 1992, Italy also sought to incorporate adversarial features into its then ‘pure’ inquisitorial system in order to increase transparency and improve efficiency. For an early evaluation of the problems involved, see Pizzi and Marafioti (1992).

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before and during the trial; and the judge serves as a passive umpire during the proceedings. (p. 844)

To similar effect, Jonathan Hecht (1996a) wrote:

[The reform] demonstrates that China has begun to reorient its basic approach to criminal justice away from a dominant preoccupation with social control toward a somewhat greater concern for the protection of defendants’ rights. It also sets a stricter standard against which government actions, including those that contravene the CPL itself, can be judged. (p. 79)

Similarly, Jennifer Smith and Michael Gompers (2007) stated:

In many respects, the 1996 reforms to the Criminal Procedure Law represent China’s transition to a more adversarial based system, one in which the prosecution and defense play active roles in the pursuit of truth, and the judiciary serves a more neutral and independent role in administering the law. (pp. 111–112)

This overall assessment broadly reflects that of many other commentators. In their view, the central problem of the reform programme has been that ‘implementation has proven exceedingly disappointing’.18 Thus, Professor Albert Chen (1998) writing shortly after promulgation of the 1996 CPL signalled the general concern:19

Given the severe shortage of professionally qualified judges, lawyers, procurators and other personnel involved in the operation of the Chinese legal system today, given the complex interaction between party organs and members on the one hand and law-related institutions and personnel on the other hand, and given the lack of a tradition, custom or habit of abiding by the law on the part of government, party, police and even judicial officers, there is a significant gap between the law-in-the-books and the law-in-action, between enacted rules and actual practice, and between the officially professed ideals and objectives of the legal system on the one hand and on the other hand, its practical management, operation and impact on those who come into contact with it. (p. 152)

Professor Chen went on to point out that the written rules were by no means meaningless and the ‘gap’ identified would shorten as more legally trained people are recruited into the system as its operators and as the officially endorsed ideology of socialist legality penetrates more deeply into the consciousness of officials and citizens alike.

Overall, then, the 1996 CPL was seen as a welcome and radical departure from earlier law. It appeared to have abolished the discretionary power of the police to detain criminal suspects under their administrative powers (‘shelter and investigation’) and placed pre-trial detention within a legal framework; specific (though extendable) time limits for pre-trial detention were set out and made subject to prosecutorial supervision; police powers of arrest, search and questioning of suspects became subject to tighter prosecution

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18 Peerenboom (2006), p. 845. Commentators here are not concerned with defining ‘law’ or, necessarily, advancing a positivistic view of law as a collection of codes, statutes, ordinances or other authoritative texts but rather with examining whether the (perceived) promises in the actual wording of the 1996 CPL, such as the introduction of a presumption of innocence (on which, see text infra), are given meaning in the day-to-day operation of the courts.

control; accused persons were given the right to meet a lawyer at an earlier stage (including in the police station); the role of the prosecutor at trial was expanded; defence lawyers were to be given access to the prosecution case and witness lists; they were also to be allowed to prepare their own case, carry out their own investigations, call witnesses at trial and cross-examine prosecution witnesses.

A key change was said to be the introduction of a ‘presumption of innocence’. Before 1997, trials could open only once the court was satisfied of the guilt of the accused, established by the prosecution or court before trial (‘verdict first, trial afterwards’). After the 1996 CPL, commentators pointed to the fact that the guilt/innocence of the accused was to be established at trial. The presumption of innocence was thought to be encapsulated in Article 12, 1996 CPL which provides:

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

For some, the reforms heralded the introduction of elements of the adversary system into the criminal trial. Judges were to adopt a more supervisory rather than direct, interrogatory, role. Daniel Turack (1999), for example, commented:

[T]he Law of Criminal Procedure makes the criminal trial more adversarial. The court no longer conducts or participates in any pre-trial investigation. It is the Procuratorate that is responsible for the validity of the evidence and for carrying the burden of proof. (p. 53)

Writing of the changes introduced by the 1996 CPL, Daniel Turack (1999) said that as well as intended to prevent the abuse of judicial power and to constitute the cornerstone in administering the PRC’s criminal justice system, they also ‘complement the principle in the new [CPL] that a person is deemed innocent until proven guilty by the courts’.

THE LEGAL IMPACT OF THE 1996 CPL: THE BACKGROUND

A basic theme in much of the writing about the 1996 CPL has been the concern that ingrained habits and attitudes of state officials – police, prosecutors and judges – might subvert the reforms such that ‘the gap’ between the law and practice might grow in the short term and might be difficult to close in the long term. In this regard, Fu Hualing’s (1998) assessment was as follows:

20 See, for example, the commentators referred to by Hecht (1996a) at p. 43, fn. 155.
21 As will be discussed in Chapter 6, infra, many inquisitorial systems are based upon a division of responsibilities in which investigating judges are not involved in the determination of guilt or innocence at trial.
22 Ibid., at p. 54. For a salutary corrective, see Dobinson (2002). While some commentators applauded the abolition of crimes of ‘counter-revolution’, Dobinson describes how the new law simply re-classified these as crimes endangering national security so that, because of the elasticity of the term ‘national security’, ‘successful prosecution could even be easier under the new provisions’ (ibid., at p. 27).
Given the substantial changes made in the Amendment, one cannot help being cynical that the law in practice will definitely be different from the law in the book. How can it be possible for the police to accept genuine external review of arrest after nearly 50 years’ practice of unsupervised arbitrary detention? How can a Chinese judge become accustomed to adversarial proceedings overnight after being an investigator/inquisitor throughout his career as a judge? . . .

Given the ingrained pattern of practice in China’s criminal justice system, the practical impact of the Amendment in protecting the right to counsel will be limited. Efforts to amend the law will not alone guarantee the protection of rights. (p. 48)

To the same effect, Jonathan Hecht (1996a) in a wide-ranging and perceptive overview of the 1996 CPL wrote:

Since the revisions are intended to change ingrained patterns of behavior by law enforcement officials, it seems likely that the gap between the law and the practice of criminal justice in China will actually grow wider, at least in the short term. (p. i)

Similarly, Jennifer Smith and Michael Gompers (2007) stated that:

The greatest obstacle that China faces in achieving lasting reform is not in legislating new laws, but in implementing them. Implementation of laws will entail not only institutional capacity building and training for legal professionals, but a redefinition of the roles of lawyers, judges, prosecutors and police officials within the criminal justice system. (p. 114)

Underlying these assessments is a view that the relevant legal actors and institutions are somehow autonomous although lacking capacity or being victims of long-standing culture. Perhaps it is sufficient to note at this point that an analysis which leaves out of account a Party-centred state and its relevance to the ‘autonomy’ of subordinate institutions lacks persuasiveness.

THE LEGAL IMPACT OF THE 1996 CPL: THE LEGAL REALITY

Randall Peerenboom (2006) has issued some cautionary words to any who embark upon an assessment of the state of China’s criminal justice system today:23

Comparing China against standards of legal systems in the United States or Europe, or worse yet against an idealized version of those legal systems or the utopian, perfectionist requirements of human rights activists,24 will result in bitter disappointment about the lack of rule of law in China. (p. 842)

23 Having said that, Peerenboom adds: ‘But one cannot compare China’s legal system against the standard of other developing states without feeling positive about Chinese accomplishments to date.’ loc. cit.

24 We would only comment here that it may be thought inappropriate to criticize ‘human rights activists’ for ‘utopiamism’ or ‘perfectionism’ given the reality of Chinese criminal justice. External activists adopt various strategies in an effort to highlight deficits without necessarily any expectation that their proposals are going to be adopted immediately. To restrict a reform agenda to that which might be achievable runs the risk of buttressing the very thing that you believe should be overhauled or discarded. At any rate, the applicability of the remark to those activists within China...
We echo those words but think that it is important to go further and, in particular, to avoid some of the weaknesses of ‘the gap’ problem well-known in socio-legal literature.25

While some commentators have viewed the 1996 CPL reforms in very positive ways and at the same time recognized substantial shortcomings in the lived experience of suspects, defendants and lawyers, it would not be appropriate to adopt an analysis which presented the issue as a simple ‘gap’ problem between the law in the books and the law in practice. As, in different ways, McBarnet (1981), McConville, Sanders and Leng (1991), and Dobinson (2002) have emphasized, the problem with law reform (and law reform expectations) is that ‘the law’ (or, at least, specified legal rules) is often not as supposed and ‘the gap’ may well be between practice and an imaginary or idealized state of the law (or ‘legal rhetoric’). A common misreading is to assume that new laws import what Packer (1968) termed ‘Due Process’ values in place of ‘Crime Control’ values when, in reality, no such change may have occurred.

Thus, although ‘shelter and investigation’ was formally removed by Article 69, 1996 CPL and applauded by many commentators as a progressive step, the police were in fact accorded extended powers to detain. The seven days previously allowed were extended to 30 days and the period allowed for the prosecutor to decide whether to authorize arrest extended from three to seven days (giving a total of 37 days); noting that time began to run only from when a person’s identity had been established. Extensions beyond 30 days can also be sought in ‘major’ or ‘complex’ cases. As Carol Jones (2005) notes, the police do not have to abuse the law to detain suspects for long periods, ‘all they have to do [is] use it’. In this analysis, ‘due process’ is seen to be for ‘crime control’.

Professor Jones (2005) further points out that the criminal process only ever applied to one-third of all offenders; two-thirds being dealt with under police administrative powers which give the police almost unfettered discretion to process individuals for alleged infractions short of ‘crime’ (see, further, Appendix 8 infra). Moreover, the 1996 CPL did not prohibit successive use of the various powers of extra-judicial detention. Additionally, as Dobinson (2002) shows, although ‘counter-revolutionaries’ was dropped, its replacement ‘endangering state security’ broadened the capacity of the state to suppress dissent so that individuals may be dealt with by ‘Re-education through Labour’.

We emphasize again that our overall purpose is not to measure ‘the gap’ between the law-in-the-books and the law-in-action but to place our findings in a broader socio-legal framework. This includes an understanding of case construction on the part of the prosecution and defence, including the roles of the police and the courts; and an explication of the link between law and society in the particular context of China.

At the heart of case construction is the understanding that legal actors seek to achieve a particular outcome by utilizing the legal form (see Cicourel, 1968). ‘Cases’ are not pre-formed but rather are the product of decisions taken by the various parties who are who conduct their lives under circumstances the oppressive and dangerous character of which outsiders cannot even imagine is questionable.

25 The revival of interest in research on the sociology of law from the 1960s generated many studies which demonstrated that the effects of normative legal rules or administrative guidelines on human behaviour were indirect and that the impact could be understood only by examining the way in which the rules and guidelines were affected by the social environment. This approach rested upon a number of contestable assumptions, on which see Nelken (1981).
involved in the event which gives rise to the criminal complaint and thereafter process it. This study concentrates solely upon those cases which are constructed to fall within the criminal sphere from the initiating complaint through to disposition. In this process, case construction is an ongoing task of the actors involved (complainants, witnesses, police, prosecutors, judges, defence lawyers and defendants) but one which renders down the complexities of human interaction into relatively simple ‘factual’ accounts which fits the relevant legal category – ‘Guilty’ or ‘Not Guilty’ of an offence known to law.

CRIMINAL CASES

The focus of the research is only upon criminal cases decided in the Basic Courts or the Intermediate Courts. This has a number of important implications. First, as we have briefly mentioned, the focus is upon crime rather than more minor acts, categorized as ‘unlawful’, which fall within the administrative jurisdiction of the police. Crime in this setting is restricted to acts which, under the Chinese understanding, endanger society with serious circumstances or consequences. The distinction between ‘administrative offences’ and ‘crimes’ is, however, arbitrary and the police are accorded almost unfettered discretion to deal with individuals through the ‘administrative’ system of ‘penalties’.

Second, the focus on crime invokes a particular species of law in China and our insights are not necessarily applicable to the general state of law or law reform in China. It is fundamental to an understanding of criminal justice in China that the 1996 CPL was enacted for a prescribed purpose, as set out in Article 1:

. . . of ensuring correct enforcement of the Criminal Law, punishing crimes, protecting the people, safeguarding State and public security and maintaining socialist public order.

This objective is further underscored by Article 2, 1996 CPL:

The aim of the Criminal Procedure Law of the People’s Republic of China is: to ensure accurate and timely ascertainment of facts about crimes, correct application of law, punishment of criminals and protection of the innocent against being investigated for criminal responsibility; to enhance the citizens’ awareness of the need to abide by law and fight vigorously against criminal acts in order to safeguard the socialist legal system, to protect the citizens’ personal rights; their property rights, democratic rights and other rights; and to guarantee smooth progress of the cause of socialist development.

As these provisions make clear and as Fu Hualing (2003) observes, crime in China ‘is seen not simply as a violation of criminal law but also as a political challenge to the role of

26 For illustration of the magnitude of discretion, under the Security Administration Punishment Regulations, 1986, ‘Whoever disturbs social order, endangers public safety, infringes upon citizens’ rights of the person or encroaches upon public or private property, if such an act constitutes a crime according to the Criminal Law of the People’s Republic of China, shall be investigated for criminal responsibility; if such an act is not serious enough for criminal punishment but should be given administrative penalties for public security, penalties shall be given according to these regulations.’ It should be noted that, many of the ‘rights’ incorporated into the 1996 CPL (whatever their actual value to the individual) are not available to an individual subject to this administrative system of penalties.

Satnam Choongh, Pinky Choy Dick Wan, Eric Chui Wing Hong and Carol Jones - 9780857931917
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the Chinese Communist Party (CCP) and to the socialist system’. In the light of this, it is necessary to confine our study to its proper domain and not draw assumptions about other areas of Chinese law which may need to be viewed through a different lens.

Thirdly, for the reasons stated by Peerenboom (2006), in seeking to explain why lawyers have been routinely denied access to their clients, prosecutors have refused to provide defence lawyers access to the whole dossier, defence counsel are unable to question witnesses because they do not appear at trial and the high confession rate results in lawyers seeking of leniency, crime in China requires a special understanding:

[W]hat distinguishes criminal law from other areas of law is the lack of public support for criminal law reforms; the majority of the citizenry sees such reforms as harming, rather than furthering, their interests. At the same time, there is little political support for criminals. The government has responded to the fears of the public by acceding to demands to crack down on crime. Thus, interest group politics explain much of China’s harsh approach to crime, much as they account for the war on crime in other states. (p. 846)

We will discuss the overall relevance of Peerenboom’s explanation in due course but for the present we can note that, at the same time as the 1996 ‘reform’ was in process, China was able to launch another ‘strike hard’ (yanda) campaign designed to underscore the certainty and celerity of punishment under which thousands of individuals were subject to arbitrary arrest, compulsory interrogation and show trials, with many incarcerated individuals suffering execution (Shu, 1996; Tanner, 1999; and Note, 1985). Subsequent campaigns have been launched when the State feels that it needs to address ‘problems’, as by establishing ‘social hygiene’ in advance of major events such as the Beijing Olympics in 2008 or in dealing with ethnic unrest in Xinjiang.

A NOTE ON PREVIOUS RESEARCH

There has been a substantial body of research into the legal reforms in China over the past 50 years and scholars have advanced various accounts at a theoretical level in an effort to explain what has happened. While early research had to rely upon studying China ‘at a distance’ (Whyte, 1983), more recently scholars from Western countries and, increasingly from within China, have been able to secure access for research through interviewing individuals and analysing materials derived from courts and other institutions within Mainland China itself. The following account is indicative only and much other research is discussed at relevant points later in the text.

Lu and Miethe (2002) sought to examine the impact of legal representation on pre-trial and sentencing decisions in a sample of 237 theft cases drawn from one district court. They found that there was substantial under-representation, with only some 20

27 See also, Michelson (2008) whose analysis showed significant increase in criminal-related matters in the Lawyer Bao columns coincident with ‘strike hard’ campaigns.

28 The claim that the government responds to public demands to crack down on crime seems to invert the reality, namely that public perceptions of crime are largely a creation of government propaganda which also constructs ‘public concern’ at times of its choosing, a factor not unique to China.
per cent of defendants having the benefit of a defence lawyer. The presence of a lawyer did not appear to affect decisions on pre-trial detention or the sentences imposed. Decisions on pre-trial detention were based on such factors as seriousness of offence, confession, residential status and education, while sentencing was based upon offence seriousness and multiple offending rather than whether the defendant was represented by counsel. They also found, however, that although defence lawyers have not been a major social force in affecting case outcomes, where they advance defences which do not challenge the legitimacy of the system (such as a defence based on character), the defence is more likely to be affirmed by the court. By comparison, where the defence challenges the system by, for example, challenging the ‘facts’ presented by the prosecution, the court is unlikely to accept the defence. They concluded that defence lawyers in China were, nevertheless, ‘moving toward more aggressive and effective defence’ (at p. 278).

In an extension of their study, Lu and Miethe (2003) took a sample of 1009 criminal cases before and after the reform and analysed the relationship between confessions and disposition. They found that most cases (79 per cent pre-1996 and 67 per cent post-1996) included a confession by the defendant. Confessions deemed to express real remorse were awarded more lenient sentences in line with China’s policy to reward repentance.

In a study restricted to death penalty cases, the Max Planck Institute (2006) undertook interviews with 25 defence lawyers in Beijing and Guizhou, all of whom had a formal legal education with a degree from a law school, specialized in criminal cases and had at least five years professional experience. Additionally, the researchers analysed 322 case files drawn from four Intermediate Courts across China. The research concluded that during the investigative stage defence lawyers have a marginal role: at first instance trial their influence is modest and at the appeal stage such limited influence is mostly informal and based on out-of-court communications with the judicial organs.

In analysing lawyers’ representation of criminal suspects and defendants in the lawmaking and implementation of China’s CPL since 1979, Liu and Halliday (2009) examined: (i) archival materials on the history of the reform process; (ii) online ethnographic data from a nationwide Internet forum hosted by the official All-China Lawyers Association; and (iii) in-depth interviews with lawmakers and practitioners in the criminal justice system (lawyers, police, procurators, judges and legal academics). Bearing in mind that the Internet forum used by Liu and Halliday (2009) is subject to official censorship, their analysis showed that, notwithstanding this and other possible constraints, lawyers using the forum spoke in a forthright manner on a range of topics including the courts, the police and the absence of the rule of law or democracy (see also, Halliday and Liu, 2007). Overall they found that the basic procedural rights of criminal suspects and defendants are poorly protected and that defence lawyers face considerable obstacles in representing their clients.

Lu and Drass (2002) found that residential status (being a local or a migrant) significantly affected pre-trial detention (but not sentencing outcome). Migrants received pre-trial detention at a rate of 92 per cent compared to local residents at 62 per cent.

Research on sentencing (Lu and Drass, 2002; Lu, Liu and Crowther, 2006; and Lu and Liang, 2008) has found that, in general, the principal determinant of sentencing, across a wide range of offences, is offence severity.
Pitman Potter (1999) in a wide-ranging review of legal reforms, whilst pointing to positive aspects, underscored a general problem of implementation in the face of reduced technical competence and corruption. William Alford's work on Chinese lawyers analysed the burgeoning numbers, problems in their education, ethical understanding and the recourse by some to bribing judges (Alford, 1995). Susan Trevaskes (2003) has described how sentences were often announced at mass rallies and Lu and Miethe (2007) has reported that capital offences tend to be committed by young males of low social status. Sida Liu's study of a lower court in Hebei Province shows how judicial day-to-day work is only loosely coupled with the formal roles of judges and that the judicial decision-making process is contingent upon the historical origins of the judiciary, administrative influence, and the legal consciousness of local communities (Liu, 2006).

All research is subject to limitations and the existing literature on China is no exception. Perhaps the most important limitation is that we lack systematic and comprehensive national statistics on criminal cases in China and existing data are neither reliable nor accessible (Lu and Kelly, 2008; Dicks, 1995). Many scholars (e.g., Lu and Miethe, 2002) have been forced to rely upon a local source, or upon selective criminal cases made public and accordingly, as the researchers acknowledge, the cases may not be typical having been in all likelihood presented to showcase the system and 'educate' the public (Lu, Liu and Crowther, 2006).

Nonetheless, what has been achieved to date is impressive and we are indebted to all those who have in different ways sought to throw light on an area of great social importance to the people of China. What we have attempted, to add to the growing literature, is a more systematic and comprehensive study than has hitherto been attempted.

PRACTICE AND THEORY

Much of our ultimate interest is on understanding and explaining the criminal justice system in theoretical terms, but we do not shy away from policy considerations. This project has relevance to those monitoring the operation of the current law and assessing what is needed to enable those charged with its operation to fulfil the aims of the legislators and/or law reformers. The findings will hopefully provide a better understanding of the obstacles to change as well as the areas of greatest default. To better enable criminal justice actors to operate the system and meet the new expectations placed upon them, many donor organizations and countries have offered China assistance, particularly in the area of capacity-building. While some of the early assistance focused on law reform, more recent initiatives have involved practical training programmes for judges, prosecutors and police officials, some of which has been delivered out-of-country. Attempts have also been made, for example, to show Chinese judges and officials how trials work in the Anglo-American system of criminal justice, how to better understand the implications of allowing torture and how to imagine and provide for its eventual removal from the process and how to re-align the training of police officers and re-fashion working relationships between police and the procuratorate. Our project has relevance to identifying areas where assistance can be more effectively targeted in the future.

In practical terms, the project has sought to create a detailed mapping of criminal
Introduction

justice through observing courts at work and interviewing key actors involved in the day- 
to-day running of the courts. Among its tangible outcomes, the project sought to:

(1) provide an empirical account of the practices of criminal courts in relation to the 
organization and management of court cases;
(2) provide a factual account of the daily workings of the 1996 CPL to guide future 
reform debates;
(3) afford a more objective means of evaluating the nature, reliability and persuasiveness of the evidence that constitutes the case for the prosecution;
(4) examine the extent to which there is unmet legal need in criminal justice;
(5) establish a factual basis for initiatives involving the rights of individuals and the responsibilities of officials in the criminal justice system;
(6) enable more precise targeting of aid and assistance by development agencies; and
(7) introduce a more rigorous empirical research tradition into Mainland Chinese scholarship and policy-making.

There has been much talk of an ‘adversarial system’ being introduced into China in place of its inquisitorial system.29 It is not the purpose of this research to advocate the introduction of an adversary model or to compare it with an inquisitorial model but rather to examine the quite separate question whether claims made that the 1996 CPL introduced greater adversariness into China have any foundation in reality.

We would also point out that, as we mention at various stages in the text, many of the features which are evident in the Chinese system are not necessary features of ‘inquisitorial’ systems as is often implied by commentators. Thus, for example, significant continental European systems are marked by an independent judiciary, the presumption of innocence, the principle of orality at the hearing, with the burden of proof clearly placed upon the prosecution (Delmas-Marty and Spencer, 2005).

Increasingly, for both inquisitorial and adversarial systems to operate successfully there is broad consensus that a number of things need to be in place, as conveniently set out in the European Convention on Human Rights, particularly Article 6:

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

29 There are in fact very different principles and practices evident in systems that fall within the broad inquisitorial family. Moreover, inquisitorial systems do not necessarily operate in the way people imagine or, indeed, in the way that they are usually portrayed. See, for example: Hodgson (2006). The same caveats need to be entered in respect of ‘adversarial’ systems.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:
   (a) to be informed promptly, in a language which he understands and in detail, of the
       nature and cause of the accusation against him;
   (b) to have adequate time and the facilities for the preparation of his defence;
   (c) to defend himself in person or through legal assistance of his own choosing or,
       if he has not sufficient means to pay for legal assistance, to be given it free when the
       interests of justice so require;
   (d) to examine or have examined witnesses against him and to obtain the attendance
       and examination of witnesses on his behalf under the same conditions as witnesses
       against him;
   (e) to have the free assistance of an interpreter if he cannot understand or speak the
       language used in court.

Thus, the principle of ‘equality of arms’ demands that those without sufficient funds

to hire a lawyer be granted legal aid. A trial with adversarial elements also assumes

the presence of adversaries – another issue we explore is whether accused persons

have ready access to a defence lawyer and/or the attitude of the local legal profession-

als to becoming involved in criminal defence work. The project also seeks to deter-

mine how lawyers become involved in defence work, as, for example, by nomination/

selection by the accused or by court assignment. Even where lawyers are ready and

willing to act, a further question is whether they can mount an effective defence, i.e.

do they have the resources and know-how required to investigate and construct a case

for the defence?

Similarly, the 1996 CPL seemingly requires prosecution lawyers to play a more adver-

sartrial role. A further question is whether and how far prosecutors have been able to meet

these requirements. Is there evidence in their performance that they have received training

in evidence presentation and advocacy? Are they aware of the rules/practices regarding

disclosure of prosecution evidence and if so, what (if anything) hinders adherence to

such rules?

Finally, the 1996 CPL is said to have altered the role of the judiciary. One question

this project addresses is whether and how judges in China’s courts have adapted to their

new environment and is there evidence in their performance that they received and

benefited from judicial training, for example, in the conduct of trials? Has the produc-

tion of evidence in open court led to the development of judgments based on judicial

reasoning?

OUTLINE OF FIELDWORK

Our analysis arises from a long-term study of those aspects of the system to which we

were able to secure access. For reasons which are well-documented, the collection of

data outside of those provided through official channels is fraught with difficulties and, as

we shall see, along with others before us, the information to which we could obtain

unmediated access was not unrestricted.
Beginning in 1994, following an invitation to Mike McConville by the doyen of Chinese Criminal Procedure, Professor Chen Guangzhong, to attend a conference to discuss possible reform of the 1979 Criminal Procedure Law, exploratory overtures were made to see whether it would be possible to launch an empirical project to look at what would happen after reforms were put in place. After protracted discussions, the research started in 2001 and continued in the field until 2006, with limited follow-up visits taking place from 2007 to 2009.

The kind of data we set out to collect includes such items as: whether the defence had been given reasonable time to prepare case/access to prosecution file; the length of time the suspect had been held in detention pre-trial; whether or not the accused was represented by a lawyer; whether oral evidence from witnesses was led in court or whether the case was a ‘paper trial’ only; how many witnesses were called, to what did they testify, whether they were cross-examined and by whom; whether questioning of prosecution witnesses by the defence indicated that the defence lawyer had prepared a foundation for the questioning; whether the defence produced witnesses and if so how many; whether they were cross-examined and if so, on what basis; whether any of the parties produced tangible evidence, forensic evidence or expert witnesses and if so how such evidence was presented and dealt with at trial; whether the case was subject to adjournments and if so how many/how long; whether the trial judge(s) adopted a supervisory or interrogatory role at trial; the length of the trial itself; whether the court had a system for summoning witnesses, and if so, how this operated; what involvement the judge had in the trial, e.g. by ruling on questions of admissibility and by questioning witnesses; how and what judgment was delivered and whether reasons were given.

The research sought to examine across China the working practices and philosophies that underpin China’s two principal criminal courts: the Intermediate People’s Court (which deals with more serious first instance trials of criminal offences) and the People’s Basic Court (which deals with less serious crimes). Ultimately, we were able to look at 13 courts throughout China including large cities, county areas, developed and less-developed regions (further details are provided in Appendix 2). This cannot be said to be completely representative of practices across the whole of China, but we are satisfied that the sites represent a fair cross-section and include some of the biggest and most influential areas of the country as well as regions that are less developed and cannot be expected by reason of their local economies to be concurrent with latest legal thinking.

In each site, we sought access to case files relating to at least 50 of the most recently-completed first instance cases, to observe whatever trials were being conducted during the currency of the site visit, and sought semi-structured interviews with Judges, Prosecutors and Defence Lawyers (further details of our research instruments are set out in Appendices 3–7). We were indeed fortunate that we were given unmediated access to the case files and to all court cases that we were able to observe during the research periods. In general, we were successful in securing interviews with key state justice system

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30 Professor Chen Guangzhong was then President of The China University of Political Science and Law in Beijing and, as China’s leading scholar on criminal procedure was an active voice in promoting reform prominently through a symposium held in 1991 the papers of which were published as Chen (1992).
31 We did not include appellate cases which can be heard in the Intermediate Court.
Criminal justice in China

actors although, not unexpectedly, approaches to a few individuals for interviews were declined. We also undertook interviews with defence lawyers although they proved a more elusive target, either because few were to be found in the environs of the court or because they had little time or inclination to give the research priority in their lives. It was not possible, because of the arrangements that we had made, to interview any defendants, a limitation that we hope will be made good by others.

Entry into each site was preceded by informal approaches made by Chinese colleagues to key personnel to pave the way for our field researchers. What must be borne in mind at all times is that a lot of data that would be of interest and relevance to an understanding of China’s legal system are regarded as sensitive or beyond sensitive. It is remarkable that we were able, through the good offices of our Chinese colleagues, to obtain access in the way that we did. Fortunately, their extensive network created the opportunities for us in all of the areas for which we had expressed a preference. Despite those helpful introductions, a great deal rested on the skills of our researchers in gaining actual access and in putting into effect the research instruments. Without their field work skills none of the research could have gone ahead.

In each site, we extracted data from the case files held by the court on a systematic basis through a Case Analysis Form (see Appendix 3) which had been prepared through a process of discussion with experts in Chinese criminal procedure. A major advantage of this approach is that, by concentrating on recently-completed files, the danger of file-corruption, whether by intention or because of the researcher-effect, is avoided. A major disadvantage is that the files were prepared for other purposes and accordingly data relevant to our inquiry might not be included in the files at all or not recorded systematically from region to region.

In each site we undertook a semi-structured analysis using a Court Observation Form (see Appendix 4) and applied this to any first instance trials that were being processed by the courts during the currency of the research. The strength of this approach includes the fact that none of the key actors (prosecution, defence or court) could prepare in advance for the presence of the researcher and, indeed, some (such as defence counsel) were unaware of the identity of the researcher. The disadvantages include the fact that we could not thereby draw a random sample of cases nor could we guarantee to know the outcome of cases observed since the judgment might be given after an adjournment and our departure from the field site (see Appendix 2).

Our interviews with key justice personnel were entirely dependent upon the agreement of the individuals we approached. It was not possible to draw a sample from within each group: the researchers had to be content with establishing a long-term relationship of trust with individuals and persuading them to agree to an interview. We were conscious that, without formal approval, our approaches could place individuals at personal risk and, despite undertakings of confidentiality and anonymity, this doubtless contributed

32 It is possible that some of the parties who had given consent (usually, the Presiding Judge) could have adjusted their behaviour in the presence of the researcher. For reasons which will become clear, we do not think that this, if it occurred at all, had any significant impact upon the research. At least we are confident that, after a short period in the field, our researchers came to be accepted by the participants so that little ‘presentational’ data were offered as against ‘research data’ that we were trying to collect.
to the fact that a few declined our invitation. Mostly, however, they agreed to be inter-
viewed although, understandably, this sometimes took place away from the work site in
restaurants or other social settings where privacy was more likely to be secured.33

An overview of the data underpinning our research is set out in Tables 1.2 and 1.3.

We again stress the limitations of this research. Professor Donald Clarke (2003) has
rightly cautioned the research community about the care needed in gathering empirical
research. Indeed, a great deal of valuable qualitative research has been gathered in informal settings. See, for example, Flood (1983).

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Table 1.2 Fieldwork data from 13 sites

<table>
<thead>
<tr>
<th>Site</th>
<th>Case File Analysis</th>
<th>Courtroom Observations</th>
<th>Interviews with Judges</th>
<th>Interviews with Prosecutors</th>
<th>Interviews with Lawyers</th>
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Table 1.3 Fieldwork data from different level of courts

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<th>Intermediate Court</th>
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<td>Courtroom Observations</td>
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<tr>
<td>Total</td>
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<td>130</td>
</tr>
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</table>

33 This is far from unusual as a research experience. Indeed, a great deal of valuable qualitative research has been gathered in informal settings. See, for example, Flood (1983).
research data and the importance of appreciating the limitations of data in respect of the complexities of the Chinese legal system:

What we already know, in the form of reliable data, about the Chinese legal system is not much. Useful data are not generally available, and the available data are not very useful. (p. 165)

In part, therefore, the present research is an attempt to respond to this deficit in knowledge of Donald Clarke’s further injunction that:

. . . a priority in an empirical research agenda at this stage of our understanding should be further study of the actual functioning of China’s various legal institutions so that we have a better idea of what questions to ask. (p. 181)

The reader should be clear, therefore, that this book does not aspire to be definitive or predictive: what it tries to do is provide as rigorous an account as was possible in the circumstances facing the research. It deliberately chose to paint a broad picture and in consequence it does not offer a close study of any local court with its specific culture nor does it document the plight of suspects, individual defendants, individual lawyers or ‘activists’ (see Human Rights Watch, 2008; Savadove, 2006; Wang, 2006; and Cohen and Chen, 2010a and 2010b).

It does, however, attempt to go beyond a study of ‘the rule of law’ and similar abstractions, responding to Randall Peerenboom’s critique of research in China (Peerenboom, 2006):

Scholars must complement studies relying on abstract variables like rule of law with specific studies that break these variables down into more discrete institutions and practices. Separate studies should focus on each of the major actors: the judiciary, prosecutors, police and correctional officers, and other legal professions . . . (p. 863)

We will return in the concluding chapter to wider implications of our study but note at this point that criminal justice writing on China has given rise to contrasting explanations at the level of meta-theory. Thus, for example, Pitman Potter (2004) in reviewing the major contributions of Stanley Lubman (1999) and Randall Peerenboom (2002) summarizes the contrasting positions of two broad schools of thought thus:

Lubman suggests that Communist Party dominance constrains the role of law to such an extent that China cannot be said to have a legal system. Peerenboom suggests that the economic reforms undertaken since the later 1970s, coupled with changing popular expectations, will require the party to rely increasingly on law and thus lay the foundation for a recognizable rule of law system. (p. 468)

In different ways, nonetheless, all these writers remind us of the relationship between law and underlying social norms and practices and the fact that for many people ‘. . . the

34 The importance of social connections in China may be a large factor in conditioning the operation of general rules and regulations at the locality. See, for example, Gold, Guthrie and Wank (2002) suggesting that legal reform remains conditional on local culture.
meaning of law still depends on conditions and outcomes of performance in practice’ (Potter, 2004).

STRUCTURE OF THE BOOK

We begin our account with the way in which allegations of crime come to the notice of the police, whether by citizen-report or by pro-active detective work on the part of the police (Chapter 2). In Chapter 3, we examine the various powers available to the police to gather evidence, detain and question suspected individuals. We then, over the next two chapters, look at the way in which the case for the prosecution is assembled by the police (Chapter 4) and the procuratorate (Chapter 5) in advance of the trial. In Chapter 6, we examine what, if anything, judges do before the trial given that they have now been assigned a more neutral role in the re-structured criminal process. In Chapter 7, we turn to the preparations defence lawyers make before trial. In Chapter 8, we describe in outline how trials are set-up in the Chinese process, including the physical lay-out of courts, the rules that govern proceedings and the personnel of the law. We then turn in Chapter 9 to the findings arising out of our case file analysis of the court records in some 1144 cases. After this, we turn our attention to first instance trials that we observed (227) during our fieldwork and describe the activities of the prosecution (Chapter 10) and defence (Chapters 11 and 12) in that regard. In Chapter 13 we examine the outcome of trials that were observed in terms of such matters as whether the judgment was immediate or delayed, whether the prosecution was able to establish its case and for which offence and, if so, with what outcome in terms of sentence. Chapter 14 attempts to examine the institutions of criminal justice and their relationship to one another. In Chapter 15, we draw together our findings and make an assessment of the criminal justice process as a whole.