

# Preface

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When the contributions to this volume were written, not all contributors were aware that a major revision of China's Criminal Procedure Law would be passed in March 2012. Perhaps not even the eminent PRC scholars who had participated in the drafting process could then have foretold what lively and passionate public debate the publication of the law's draft revision in September 2011 was to trigger.

There was a shared sense, however, of the timeliness and importance of debating China's criminal justice system at this point. Most contributors would probably have agreed that the criminal justice system was in need of change. With the experience and foresight that come with half a century of committed, distinguished and influential engagement with the law in China, Jerome A. Cohen queried in his introductory reflections 'whether it is desirable to have another reform this year. The political atmosphere is so conservative. Will the result of legislative change be favourable to the protection of the accused? Will it benefit human rights? Or would the changes be adverse?'

Reflection on how change might come about, what might promote and what might hinder it, as well as structural impediments to genuine improvement in the criminal justice process, have inspired many chapters in this volume. Its structure reflects the main concerns arising in the criminal justice process at its various stages, embedded in what we believe to be indispensable perspectives on the comparative and political dimensions of criminal justice. Part I, including the just-quoted 'Introductory reflections' by Jerome A. Cohen and a chapter by Mike McConville, provides comparative perspectives on criminal justice in China. Cohen is able to reflect on the system on the basis of over five decades of distinguished work in and about it. McConville's chapter takes on the challenge of juxtaposing the Chinese system with the Western liberal systems whose interrogation and criticism have been at the heart of his scholarship throughout his career. He draws attention to the need, in China as well as elsewhere, to extend scholarly inquiry to the law as it operates 'on the ground', not only by reference to its 'formal institutions'. Among the differences his analysis points out is, notably, the varying degrees to which liberal Western and the Chinese authoritarian systems are open to corrective public challenges.

Part II, on the investigation of crime, comprises chapters on major aspects of the investigation stage of the criminal process, namely wrongful convictions (He Jiahong and He Ran), the use of torture (Ira Belkin), and the use of eyewitnesses (Thomas Stutsman). He Jiahong provides a careful discussion of major wrongful conviction cases, beginning with the famous case of She Xianglin and drawing on an empirical study of 50 wrongful conviction cases, analysis of which He connects to China's distinguished tradition of scholarly discussions of problems in criminal justice. Belkin's chapter also addresses the She Xianglin case, among others. It shows the intimate connection between coercive interrogation and wrongful convictions, and draws attention to the disturbing fact that popular outrage at police uses of torture is largely limited to cases in which someone later shown to be innocent has been tortured. In connecting torture to social attitudes, Belkin's approach shows some affinity with Stutsman's contribution on the – of course, thus far insufficient – use of eyewitness in the criminal process, a discussion that is sensitive to culturally embedded attitudes toward the law and the courts in China.

Part III, on the prosecution and trial processes, begins with a chapter by Chen Guangzhong, which provides a discussion of major aspects of the reform of the prosecution system, by a scholar widely recognized as one of China's greatest criminal justice scholars and the most important criminal justice reformer in China today. It is followed by Chen Weidong's in-depth study of the advantages of using an independent sentencing procedure. His discussion draws on pilot projects in which he has long been involved as one of the leading criminal justice reformers in China. Ian Dobinson's chapter adds a comparative perspective. It explains the widely different significance of the guilty plea in China, compared to Australia, given the very high rates of confession early on in the Chinese criminal investigation process. Standing in the tradition of critical comparative scholarship, his discussion cautions against facile equations.

Part IV engages with various aspects of criminal defence. Yu-Jie Chen's chapter provides a comparative – and for potential future PRC developments a hopeful – setting for the discussions to follow. Chen shows that Taiwan, overcoming the authoritarian origins of its criminal justice system, has been very successful in improving the protection of the right to counsel. Zuo Weimin and Ma Jinghua's careful empirical study on the role of criminal defence lawyers is followed by Elisa Nesossi's insightful discussion of how constraints affecting criminal defence lawyers translate into limitations on 'access to criminal justice' as lawyers are under pressure to conform to institutional expectations. Zhiyuan Guo's analysis of the role of mental examination processes provides a discussion of a particularly difficult and challenging aspect of criminal defence in some

cases. Lan Rongjie provides an astute, critical discussion of the plight of criminal defence lawyers targeted for falsifying evidence in his chapter on the famous case of the criminal prosecution of defence lawyer Li Zhuang on such charges, in the context of a case that was part of the crackdown on organized crime by the now-demoted Party Secretary Bo Xilai.

Part V discusses punishment regimes external to the criminal justice system, and one of the themes that unites its chapters is a focus on socially or politically marginalized groups (arguably, even corrupt officials, once they have been singled out for investigation, may count among these). Biddulph in her examination of the regime for the treatment of drug dependency and Sapio in her discussion of the system(s) for the policing of petitioners both show how such parallel systems can be used to serve the purposes of punishment and social control. While the treatment of drug dependency is an example of State attempts to bring such treatment under the purview of legal rules, it is in the context of controlling petitioners, in particular, that the State displays one of its darkest sides. Sapio characterizes this situation as one of 'legal erosion' in the presence of an overwhelmingly powerful State. There are many forms of State action that can contribute to such erosion. Uses of criminal defamation prosecutions as a means to define – and perhaps invade – spaces for free expression are discussed by Joshua Rosenzweig, who argues that the State's too-narrow definition of such spaces through defamation litigation against critics is a risky strategy. Fu Hualing, taking a somewhat different angle, discusses China's anti-corruption efforts, relating them to the criminal justice system, while also acknowledging the complexity of measures taken, especially against corruption among officials. Prosecution against corrupt officials, he argues, 'legitimizes the [Chinese Communist Party (CCP)] by demonstrating its political will to fight corruption, but also has the potential to undermine the legitimacy of the CCP by showing to the world that its institutions have rotted to their roots'. In order to win the fight against corruption, the CCP would have to undertake far-reaching reforms safeguarding free speech and judicial independence; 'it is just a matter of whether the CCP is willing to take this step'. Eva Pils' chapter connects back to earlier discussions of criminal defence and shows how human rights lawyers were victimized in the context of forced disappearances during the 2011 'Jasmine' Crackdown. In a brief chapter concluding this section, Cohen argues that 'the criminal process is always used to legitimate government repression . . . every regime, including my own government, has limits. At some point politics takes over.'

Taking a somewhat different approach in his concluding observations, Lubman, reflecting back on his also very long engagement with the criminal justice system in China, emphasizes the importance of legal culture.

‘Legal culture really means what people in society from top to bottom, from bottom to top, think about where law comes from; what the law is for, why it should be obeyed, what are the appropriate contents of the legal system, how are they reacted to, responded to, conformed to or resisted by members of the society or particular strata or classes in society.’ Lubman suggests that some significant differences of criminal justice practices in comparative perspective are due to cultural difference, even as the importance of institutional features of the legal and political system must be recognised.

A postscript by Joshua D. Rosenzweig, Flora Sapio, Jiang Jue, Teng Biao and Eva Pils briefly discusses major aspects of the 2012 Criminal Procedure Law revision. The co-authors argue that there is reason to remain sceptical of the ability of legislative reforms to change the reality on the ground. One of the changes urging this conclusion is the introduction of non-residential ‘residential surveillance’ as a measure the police may impose in certain cases at the criminal investigation stage. Perhaps the most hotly debated aspect of the revision, the introduction of this measure points to the persistently overbearing power of the police in China’s criminal process. Indeed one of the co-authors of the Postscript, Teng Biao, had been subjected to a period of forced disappearance at the hands of the Beijing police only in January 2011; and his experience, as well as the new rules on ‘residential surveillance’, call to mind the above-quoted, uncomfortable, but lucid comment made by Cohen in his introductory observations.

The editors would like to close by expressing their thanks to those who have helped to make the publication of this book possible. All our colleagues at the CRJ, most notably its Research Associate Dr Fu Xin and its Executive Officer Ms Karrie Li, as well as other colleagues at the CUHK Faculty of Law who contributed organizational help with the conference that brought the contributors to this book together, and Fu Xin has provided excellent editorial assistance throughout this project. Stacy Mosher has done a wonderful job in translating the chapters by Chen Guangzhong, Chen Weidong, He Jiahong and He Ran, and Zuo Weimin and Ma Jinghua from the Chinese, and Joshua Rosenzweig has helped generously with the translation of Teng Biao’s contribution and its integration into the postscript chapter. They have helped to make this book a snapshot of, as well as a contribution to, the debate about criminal justice in China, a debate that should and will continue.

