

## A challenge to criminal procedure dogmatism and radicalism

----- lessons of China's reforms in the past few decades

Zhang Shuai\*

### 1. Introduction

Influenced by Anglo-American ideas on adversarial legalism, Chinese academia consider it as self-evident and universal that criminal procedure be a fair contest between an equally-armed, partisan prosecutor and defendant before a passive, impartial judge, which has been instilled to all law school students; they have been strongly criticizing the dossier-centered model of Chinese criminal procedure. Concomitantly, Chinese authorities have also carried out a series of criminal procedure reforms that seek to restrain prosecutorial discretion and weaken the function of dossier, including the two rounds of comprehensive reforms on criminal procedure respectively in 1996 and in 2012, so as to satisfy the adversarial dogmas, and therefore alleviate the legitimacy decline of current Chinese criminal justice.

China's relevant reforms on criminal procedure could hardly be considered as successful, since the legitimacy of its criminal justice system has been increasingly challenged by the populace and miscarriages of justice are continually revealed. Moreover, some essential elements of Chinese criminal procedure, for instance the rules regarding the transfer and use of the dossier, have indeed been restored as it was before the relevant reforms, which means that even the Chinese authorities have partly negated such reforms on criminal procedure in the past few decades.

In addition, China's death penalty review procedure can be considered as another counter example against the applicability of adversarial dogmas in China's criminal procedure. On the one hand, it has been radically criticized as *in camera*, *ex parte*, bureaucratic, and therefore incompatible with what is believed the 'general principle' of criminal procedure; while on the other hand it has saved countless lives, and therefore may represent one of the most effective criminal proceedings, or at least be considered as less unsuccessful than any other criminal procedure reform in China during the past few decades.

Based on China's failure in such adversarialization reforms, this paper attempts to warn Chinese reformers and their Anglo-American colleagues against dogmatism<sup>1</sup> that can hardly make for successful criminal procedure reform, and to elaborate, by reexamining the postulates of adversarial dogmas and comparing them with the Chinese reality, how and why China's relevant reforming efforts failed to achieve its

---

\* S. Zhang is a PhD candidate at the Willem Pompe Institute for Criminal Law and Criminology of Utrecht University.

<sup>1</sup> In China's case, such dogmatism lies largely in the worship of self-evident dogmas of adversarial system, which appears to fail the ancient land.

intended consequence; that is, why criminal procedural dogmas applicable to adversarial system can hardly function (if not make things even worse) in a country like China; and what elements determine such compatibility or incompatibility? Furthermore, this paper would like to mention that the applicability of adversarial dogmas are confronted with a challenge even in jurisdictions with long-lasting adversarial tradition given the defining shortcomings of adversarial procedure; whereas many Chinese lawyers still worship their fiction of adversarial criminal procedure, even including its negative effects, which may have further worsened China's situation.

The concluding section will, according to China's lessons, suggest some general principles with regard to the process of criminal procedure reform across jurisdictions and subject matters, focusing on the cautions against legal dogmatism and instrumentalism.

## 2. The story of China's reforms

Once upon a time, at least before 1990s, legitimacy of the Chinese criminal justice system was not a big problem, as most Chinese people stood in awe and respect of the judicial authorities of the People's Republic of China, to which they (especially those who were implicated in criminal cases and their family) humbly referred as 'the Government'; although this does not imply that the (criminal) justice system of China must have worked quite well at that time (rather, it is believed that it generated a tremendous number of miscarriages of justice, especially during the Cultural Revolution). However, continual exposure of judicial corruption and of appalling miscarriages of justice caused by the malfunctioning criminal justice system has badly impaired its legitimacy during the past few decades.<sup>2</sup>

The legitimacy decline has attracted the attention of not only the Chinese authorities but also Chinese academia. The academic mainstream<sup>3</sup> in the domain of criminal procedure has attributed this situation essentially to the lack of adversarial quality in the Chinese criminal justice system; a most typical elaboration of such idea goes like:

'There exists a trial mode centered on the case file in Chinese criminal procedure, in which public prosecutors dominate and control the whole process of trial sessions by reading the case file in their possession. Therefore, court sessions become merely a process of reviewing and affirming the case file, during which not only is the admissibility of the prosecution evidence not subject to any review, but the proving force of the evidence also prevails. As a result, the modern rules of

---

<sup>2</sup> Some occurred during recent years when the legitimacy had been comprehensively challenged, but many turn out to occur indeed upon the time when the legitimacy was firmly believed. Therefore, the problem seems not to lie in that the Chinese criminal justice system does not work as competently as before, but in that more problems, including those existing for long, have been revealed on a more frequent basis. For details of such miscarriages of justice, see He 2016.

<sup>3</sup> The Institute of (Criminal) Procedural Law under China Law Society is undoubtedly representative of China's academic mainstream on criminal procedure. Therefore, the following Chinese citations in this paragraph are mostly from summaries of their annual meetings.

criminal evidence lose their foundations, court sessions cannot play the role as they should, and the mechanism and culture that judgments be reached before the court cannot form. If the case-file-centered mode as such were not stopped, any judicial reform that expects the functioning of court trial will not stand.<sup>4</sup>

Accordingly, they advocate that criminal procedure should be considered in essence as a dispute between individuals and the state, which can be justified and legitimized 'only by a fair contest between individuals and the state';<sup>5</sup> moreover, most basic tenets of Anglo-American adversarial criminal procedure have been enshrined as universal principles of criminal procedure in general, e.g. judges shall be forbidden to collect evidence by themselves and criminal trials shall be centered on direct oral debates,<sup>6</sup> the defense shall be entitled to autonomous and independent right to investigation in pre-trial procedure,<sup>7</sup> the function of the dossier shall be displaced by court debates,<sup>8</sup> the prosecution and the defense shall be equal partisans;<sup>9</sup> and some even explicitly proposed establishing an adversarial system in China,<sup>10</sup> or took such judicial reforms as 'a sound starting point of deeper political reforms'.<sup>11</sup> In brief, most Chinese jurists suggest procedural reforms with reference to the classical model and corresponding tenets of an adversarial system, focusing on restraints on prosecutorial power and concomitant strengthening of defense lawyers' power.

Unsurprisingly, the advocacy as such has been much welcomed by the bar as well as by liberal intellectuals in China, who further develop such ideas and thus imply or even advocate that many institutional settings and even political and legal traditions in China must be subject to radical reforms so as to meet the default settings of an adversarial system. Inspired by such ideas, many Chinese lawyers have, consciously or unconsciously, further distorted the adversarial dogmas and enthusiastically embraced and propagated an absolute conception of formal justice, arguing that the objective truth<sup>12</sup> shall not be pursued as the aim of criminal procedure while the so-called 'legal facts' alone based only on a (Anglo-American-styled) due process will suffice to give rise to justice.<sup>13</sup> They even mistake the visual representation of Justice (Themis) as 'a goddess with her eyes closed', and thus claim that a competent judge shall base his decisions only on what he hears about while turning his back on

---

<sup>4</sup> See Chen 2006, p. 79. The original text is in Chinese. The author has translated the relevant paragraph into intelligible English. The following Chinese citations are in the same case.

<sup>5</sup> In his most influential nutshell book on criminal procedure - 'Justice seen to be done', which has been recognized almost as Chinese criminal lawyers' bible, Chen Ruihua, one of China's leading criminal procedural law professors, has enshrined the Anglo-American self-understanding of the ideal of criminal procedure as the only and universally due form of criminal process. see Chen 2000, p. 68. This book also comprehensively propagates most adversarial dogmas, as universal principle. See other parts of the book.

<sup>6</sup> See Hong 1995, p. 118.

<sup>7</sup> See Ye 2004, p. 122; see also Tian 2013, p. 49.

<sup>8</sup> See Yu 2014, p. 36.

<sup>9</sup> See Chang 2015, p37.

<sup>10</sup> See Wang et al 2003, p. 188.

<sup>11</sup> See Zhang 2009, p. 101-109.

<sup>12</sup> As a Communist country, China is strongly influenced by Marxist epistemology, including in the domain of criminal procedure. Therefore, all the three versions of Chinese criminal procedure code have provided, in Art.2, that the primary task of Chinese criminal procedure is to 'ensure that the facts pointing to crimes are ascertained in an accurate and timely manner', which implies that finding objective truth is held an essential aim of Chinese criminal procedure.

<sup>13</sup> See Liu 2004 (accessed on 28 December 2016); quoted from Zhang 2005, p. 11471.

what obviously can be seen,<sup>14</sup> which implies that gaming the system within the existing framework of law is not only very cool but also righteous to a lawyer. Such distorted ideas about due criminal process can be defined as a Chinese fiction of Anglo - American adversarial criminal procedure. Furthermore, a growing number of the so-called ‘kick-ass faction’<sup>15</sup> of lawyers, as well as of their supporters, tend to demonize the state and the prosecution, and exaggerate the conflict between the prosecution and the defense, which has further intensified the hostility between them.

Such theory and concomitant proposals are very convenient as they generalize specific legal issues, which seem to have also convinced Chinese political and judicial authorities, albeit in a rather implicit way: enlightened by the aforesaid theory with strong Anglo-American influences, Chinese judicial authorities have carried out a series of procedural reforms during the past few decades, aiming at a fairer criminal justice system with more adversarial quality. The essential idea of those procedural reforms lies in adding weight to court sessions and curtailing the weight of pre-trial proceedings. Specifically speaking, public trial *inter partes* was emphasized and the scope of the transferable case file before trial was restricted. However, after the thirty plus years, the reformers find themselves virtually back at the very point at which they began their reforms,<sup>16</sup> while the problems they tried to combat through the reforms remain unsolved. The academic mainstream has attributed this failure to the reforms not being profound and thorough enough; therefore, a new wave of wider-ranging and more radical and ambitious judicial reform campaigns are beginning all over China today. The two themes of these campaigns are 1) correction and prevention of miscarriages of justice and 2) promotion of judicial transparency,<sup>17</sup> especially in criminal justice. Both themes are particularly designed to serve the purposes of restoring the prestige of China's judicial authorities and repairing the flawed legitimacy of the Chinese (criminal) justice system.

However, it is debatable how much to the point the relevant measure is, since most efforts are still geared to improving the openness of court sessions while leaving Chinese criminal justice based on the dossier formed pre-trial. Moreover, the actual effect of such reforms is also hardly satisfactory, if not making things even worse. On the one hand, staff of judicial authorities have no longer been generally considered as avatars of justice from the decent (revolutionary) Government. People even salute and

---

<sup>14</sup> see *ibid.*

<sup>15</sup> In Chinese, ‘死磕派’律师。‘死磕’ (Chinese pinyin, Si Ke) is a slang term etymologically from North Chinese dialect, and means to fight against someone or something forcefully, vigorously, and aggressively, resembling the English slang ‘kick ass’. Accordingly, what the author has translated into ‘kick-ass faction’ of lawyers implies the fact that these criminal defense lawyers act in a rather aggressive and hostile way towards the police, the procuratorate, and the judiciary. For details, see Li 2014, p. 228.

<sup>16</sup> The latest version of Chinese criminal procedure code (V2012) has virtually restored the relevant rules regarding the transfer and use of the case file to its initial pattern as was provided in its 1979 Version. In other words, the attempt to improve the Chinese criminal justice system by eliminating the so-called ‘trial mode centered on the case file’ has failed.

<sup>17</sup> Since 2013, the Supreme People’s Court of China has been enthusiastically promoting the establishment of the so-called ‘three major platforms’, namely ‘the platform for transparent process of trials’, ‘the platform for transparent judgments’, and ‘the platform for transparent information on judgment enforcement’. See 《最高人民法院 关于推进司法公开三大平台建设的若干意见》法发（2013）13号，<http://www.chinacourt.org/article/detail/2013/11/id/1152225.shtml>.

cheer on internet forums for those who dare kill police officers and judges, such<sup>18</sup> typically as Yang Jia<sup>19</sup> and Zhu Jun,<sup>20</sup> comparing them to the heroes in Chinese martial arts fictions (or Chinese version of Robin Hood and his Merry Men) who punish corrupted officials and the unscrupulous rich in their own way where justice cannot be done within the framework of judicial authorities of the state, regardless of the innocence of the deceased police officers and judges. On the other hand, it seems that no matter which side the court is in favor of (especially in criminal cases), people simply do not buy it: leniency seems to be considered as exceptional indulgence towards criminals and associated with imaginary bribery of police officers and judges while draconian punishments are criticized as oppression of poor people; adherence to law and resistance to public opinion is seen as arrogance of the power and disregard of the populace while submission to public opinion is deemed no more than a humiliating failure to cover the dirty secrets. Briefly speaking, legitimacy of the Chinese (especially criminal) justice system has been confronted with a so-called ‘Tacitus Trap’.<sup>21</sup>

Declining legitimacy of the Chinese (criminal) justice system can also be illustrated by the high proportion of vetoes on the working reports of the ‘Two Supreme’s’ (the Supreme People’s Court and the Supreme People’s Procuratorate) during recent years. For example, the passing rates of the 2009 working reports of the ‘Two Supreme’s’ was only 75.3% and 76.8% respectively, which means approximately 700 out of the 3000 representatives of the National People’s Congress (NPC) decided to vote with their feet on the performance of Chinese judicial authorities. Given NPC representatives’ consistent tolerance and harmonious attitude towards the Chinese authorities, such rates look very awful. Moreover, some local people’s congress even failed working reports of local courts. For example, the 2001 Working Report of Shen Yang Intermediate People’s Court, as well as the 2007 Working Report of Heng Yang Intermediate People’s Court, failed the vote of the corresponding local people’s congress, which is quite rare in the history of the People’s Republic of China. To sum up, it transpires that China’s adversarialization/Americanization reforms on its criminal procedure has failed to achieve its intended consequence as is promised, i.e. to materially alleviate legitimacy decline of its criminal justice.

Nevertheless, what could be considered a successful or less unsuccessful criminal procedural reform in China lies in the death penalty review procedure, since it has

---

<sup>18</sup> The list of Chinese judges or police officers killed is even becoming increasingly longer these years. Each time such a tragedy occurred, a large proportion of the populace showed their indifferent or even gloating attitude.

<sup>19</sup> See ‘Chinese cop-killer becomes internet hero’, *Telegraph* 26 August 2008 (available on: <http://www.telegraph.co.uk/news/worldnews/asia/china/2627001/Chinese-cop-killer-becomes-internet-hero.html>, retrieved on 26 February 2017).

<sup>20</sup> See ‘Man kills three judges in Chinese court’, *Telegraph* 1 June 2010 (available on: <http://www.telegraph.co.uk/news/worldnews/asia/china/7792896/Man-kills-three-judges-in-Chinese-court.html>, retrieved on 26 February 2017).

<sup>21</sup> The term ‘Tacitus Trap’ comes from the Roman historian Publius Gornelius Tacitus (56-117 AD), who argued that neither good nor bad policies would please people if they resent their government. This was later called the ‘Tacitus Trap’ by some scholars. This is a quite high-profile and popular term among Chinese scholars when they try to describe and explain China’s current problems, which is believed to be invented by some Chinese scholar.

after all saved countless lives,<sup>22</sup> and accordingly achieved its initial goal of ‘less numerous but more cautious execution’. However, this procedure has been radically criticized by many Chinese lawyers as in camera, ex parte, bureaucratic, and therefore incompatible with what is believed the ‘general principle’ of criminal procedure.<sup>23</sup> Such paradox can be considered as another counter example against the relevance of China's adversarialization/Americanization reforms.

### 3. The reasons of China's failure of adversarialization reforms

It involves relevant theories on legal transplants and comparative criminal procedure to discover the reasons why China's Anglo-Americanization/adversarialization reforms in its criminal procedure have failed to alleviate, if not even worsened, the legitimacy decline of its criminal justice. As Legrand argues:

‘... a crucial element of the ruleness of the rule – its meaning – does not survive the journey from one legal system to another... If you will, the relationship between the inscribed words that constitute the rule in its bare propositional form and the idea to which they are connected is arbitrary in the sense that it is culturally determined.’<sup>24</sup>

This implies that a competent comparatist should therefore ‘think of law as a culturally-situated phenomenon and accept that the law lives in a profound way within a culture-specific — and therefore contingent — discourse’.<sup>25</sup> As far as is related to the research questions of this paper, it requires reexamining the legal-cultural postulates of adversarial dogmas and comparing them with the Chinese reality. In so doing, this paper, borrowing a theoretical framework proposed by Langer, perceives the category of adversarial system not only as a unique way to distribute procedural powers and responsibilities between the main actors of the criminal process, but also as a unique procedural culture — a unique conception of how criminal cases should be tried and prosecuted.<sup>26</sup>

In these terms, an ideal adversarial truth-finding bases its legitimacy on dialectical method, on the dispute/competition between two conflicting cases prepared respectively by the two equal parties. Therefore, evidentiary and procedural

---

<sup>22</sup> As is known to all, the statistics regarding execution in China is top secret, so we do not know exactly how many Chinese convicts in death row who might have been executed have survived because of the SPC's retake of the power of death penalty review 10 years ago. According to anonymous Chinese specialists in death penalty, the annual number of execution was estimated to be more than 10 000 before the retake, but now it is believed to have fallen down to only several thousand, very few thousand indeed; in total, 60% of those in death row have been prevented from execution by the SPC's death penalty review during the one whole decade since the retake in 2006. Quoted from Li 2016, accessed on 24 December, 2016. According to the above, it can be estimated that tens of or even hundreds of thousands of lives may have been saved by the SPC's death penalty review during the past decade, which should by all means be considered as a great achievement.

<sup>23</sup> E.g. see Chen 2007, p.96-106.

<sup>24</sup> Legrand 1997, p. 117.

<sup>25</sup> Legrand 1997, p. 124.

<sup>26</sup> See Langer 2004, p. 63. Specifically, the new theoretical framework involves three major dimensions, which are structures of interpretation and meaning, individual disposition, and procedural powers, as well as some additional implications, such as material and human resources, case-management techniques, professional ethics, etc. see Langer, p. 7-17.

responsibilities and powers in adversarial procedure are supposed to be allocated on an equal basis, with the prosecutors in charge of incriminating evidence and the defense in charge of exculpating evidence. In this case, the defense must have full autonomy and sufficient powers to conduct its own investigation. A procedural culture as such tends to be connected with what Damaška has defined as a coordinate officialdom that features lay officials, horizontal distribution of authority, and substantive justice;<sup>27</sup> and after all, a modern adversarial system is premised on a liberal democratic ‘rechtsstaat’.

Conversely, as the only surviving ancient great empire with its long-lasting Grand Unification, China has retained its unique binary framework of legitimacy building, a moral/ideological Utopia as the shell plus a political Leviathan as the kernel.<sup>28</sup> Such an imperial system is essentially different from the modern western model of liberal democratic ‘rechtsstaat’. To invoke Damaška's theoretical framework about organization of authority, China as a communist country has carried tendencies toward overall hierarchical leadership that features professionalization of officials, strict hierarchical ordering, and technical standard for decision making further than have traditional Continental European systems.<sup>29</sup> Moreover, in pursuit of the common fundamental values of humankind, i.e. the true, the good, and the beautiful, China particularly prioritizes the good: Confucianism is a school of thought concerned with the good;<sup>30</sup> China's traditional political philosophy of the ‘rule of virtue’ was premised and centered on the moral good; the so-called ‘Criminal Decisions according to Chunqiu’,<sup>31</sup> as the most fundamental principle of China's traditional (criminal) justice, also took the moral good as the crucial benchmark of factual decision; the pursuit of the true is even displaced by, or rather equivalent to, that of the good. In other words, what matters in China's traditional conception and administration of (criminal) justice is not what the suspect is proved to have done, but what he is believed to be - a good man or an evil man. Due to such fundamental differences between China and the west (especially the Anglo-American systems) with regard to philosophical outlook and political infrastructure, criminal procedural dogmas applicable to adversarial system can hardly function (if not make things even worse) in China.

First, promotion of the openness of trial sessions contributes little to substantive

---

<sup>27</sup> See Damaška 1986, p. 23-28.

<sup>28</sup> For details of the essence of China's regime, see chapter 8 of my forthcoming dissertation (Transparency and legitimacy in Chinese criminal procedure: beyond adversarial dogmas).

<sup>29</sup> See Damaška 1986, p. 16-22.

<sup>30</sup> ‘The Great Learning (大学)’, as the introductory book of Confucian masterpieces, indicates in its very first sentence that ‘What the Great Learning teaches is: to illustrate illustrious virtue; to renovate the people; and to rest in the highest good. (大学之道在明明德，在亲民，在止于至善。)’

<sup>31</sup> In terms of the administration of (criminal) justice, Imperial China historically based judicial decisions not on *actus reus* per se, but mainly, if not solely, on *mens rea* according to Confucian masterpieces. Such a legal theory and practice was called ‘Criminal Decisions according to Chunqiu (春秋决狱 Chunqiu 春秋 was a major masterpiece of the Confucian school at that time)’, which only examined whether the intent of the accused satisfied Confucian doctrines rather than what he actually did. This theory defined *mens rea* as substantive fact while *actus reus* was considered just as nominal and superficial. In other words, such a system understood the fact only in moral/ideological terms rather than in behavioral terms. ‘Criminal Decisions according to Chunqiu (春秋决狱)’ (criminal) justice system greatly influenced Chinese people's outlook on justice.

public scrutiny, since the professionalization and technical legalism of China's criminal proceedings make its court sessions barely intelligible to the audience. Moreover, such openness plus the traditionally-patterned demonstration of legitimacy that focuses on the good (virtue) more than the true will even hinder the discovery of the truth, since a demonstration of the good or evil is a matter of profiling and propaganda rather than a matter of fact. In that case, the moral judgment on an event will rely mostly on how mainstream media label the actors and frame the story rather than on what truly happened. That is to say, such a traditional outlook on justice that prioritizes the good over the true determines that how the story is told is much more significant than what the story is, and therefore the mainstream media that monopolize the discourse power will become the real judge and 'no one shall be determined innocent unless CCTV (China Central Television) so confirmed openly.'<sup>32</sup> Confrontation will thus become nothing but a struggle between discourse powers while open media coverage will facilitate anything but truth, especially given the fact that the media in China is not independent.

Second, from the dimension of procedural powers, China has very powerful and centralized police forces vested with comprehensive and overwhelming powers of investigation, which have barely been subject to any effective external check; based on the 'Zhuanzheng'<sup>33</sup> theory, their investigative work is in large part oriented to crime control rather than to impartial truth-finding. On the contrary, the defense in China is indeed vested with very limited rights based on the same theory. Briefly speaking, the disparity between China's prosecutorial/investigative and defensive powers is much greater than its adversarial counterparts. However, it transpires that the introduction of adversarial dogmas and the concomitant reforming scheme never touches on the very hard core of China's 'Zhuanzheng' system, or rather what Ringen defines as a 'Controlocracy'.<sup>34</sup> Correspondingly, as the predominant policing power, the investigative/prosecutorial power in China is still overwhelmingly greater than the defensive power, and even much tougher than the juridical power. In other words, the distribution of procedural powers in Chinese criminal process remains much the same as before.

---

<sup>32</sup> In 2006, many suspects were indeed subject to open confession in CCTV during the pre-trial stage, which virtually determined and legitimized their convictions in advance. In these cases, CCTV reporters were so powerful that they were able to meet and interview the suspects in custody whom even their defense lawyers cannot meet. See Tan 2016.

<sup>33</sup> The Chinese constitutional notion of the so-called 'people's democratic dictatorship', which is formally deemed the nature of the state of China. In the Chinese context, 'dictatorship' here corresponds to a special Chinese term 'Zhuanzheng' (专政), which literally means dictatorship or oppressive governance. It is a rather communist concept enshrined in Art.1 of the Chinese Constitution, invented by Mao and actually based on Lenin's revolutionary theory about 'Class Struggle'. In China, as well as in other (former) communist countries, this used to be a noble word that reflected the old generation's Marxist or Communist ideals. Even today, this idea still constitutes the formal foundation of China's constitution, although it receives less emphasis than before. Given the disapproving connotation of its official English translation in a western context, this paper would rather refer to it as its original Chinese wording, 'Zhuanzheng'.

<sup>34</sup> 'Controlocracy' is the special name that Stein Ringen gives to China's regime, which refers to the sophisticated and effective system of the Chinese dictatorship which does not tell everyone everything they must do, but does control that they do not do what they must not, and which does so in great detail. see Ringen 2016; In fact, Chinese ancient intellectuals gave a more vivid name to the Chinese conventional authoritarian regime as such, namely the so-called 'Qin Pattern' named after the Qin Dynasty that invented and entrenched such a regime.

Third, from the dimension of procedural language, i.e. the structures of interpretation and meaning, as well as from the dimension of individual disposition, to a substantial extent Chinese prosecutors have functioned as legal assistants of the police based on the ‘Zhuanzheng’ theory, and their supervisory function is mostly with regard to the judiciary rather than the police, usually if a decision of acquittal or lenience is given. In other words, the partisanship of Chinese prosecutors is even greater than that of their US counterparts. Moreover, it transpires that, influenced by distorted adversarial dogmas, increasingly both police investigators and public prosecutors and the authorities tend to perceive criminal trials as a contest between the so-called two ‘parties’, and thus take the defense as their adversary or even enemy. Some inherent pitfalls of adversarial system, such as the so-called ‘combat effect’,<sup>35</sup> have even been seen by many as a symbol of universal civilization. In other words, it seems that, just as Legrand reminds us,<sup>36</sup> the real meaning of adversarial dogmas does not survive the journey from their home countries to China. As a result, criminal lawyers in China would prefer to win the case rather than discover the truth. Furthermore, such an adversarial procedural culture will have a subtle but profound implication on professional ethics, under which the prosecution tends to take it as just to use their overwhelming procedural powers to ‘bully’ the defense, e.g. to intentionally overlook or withhold exculpatory evidence, so as to win the case. Meanwhile, such distorted adversarial procedural culture and professional ethics will in turn change the distribution of procedural responsibilities. For instance, China's judiciary is in a relatively weak position. It used to have some investigative function so as to guarantee a better-grounded truth-finding, but that function has been greatly curtailed by recent judicial reforms. Now trial judges in China barely conduct active collection or verification of evidence as they used to, while on most occasions just watch how the prosecution prevail over the defense by withholding exculpatory evidence, since they tend to perceive themselves as merely passive umpires of the game according to their self-understanding of the adversarial procedural culture and professional ethics. Generally speaking, both the judiciary and the prosecution have unintentionally, openly shirked their procedural responsibilities to discover the truth that may have been favorable to the defense, and left them to the poor defense who lack the necessary procedural powers to assume such procedural responsibilities.

Last, in terms of special case-management techniques, China has historically relied upon a sophisticated written dossier system to deal with various kinds of public affairs, including criminal trials. However, inspired by the adversarial procedural language which emphasizes oral debate in criminal proceedings, the use and transfer of the dossier have been subject to varying restrictions, which hinders internal transparency<sup>37</sup> in Chinese criminal procedure, while the defense lack the autonomy to

---

<sup>35</sup> ‘Because adversary procedure remits to partisans the work of gathering and presenting the evidence, each side operates under an incentive to suppress and distort unfavorable evidence, however truthful it may be.’ This can be defined as a combat effect. See Langbein 2003, p. 103.

<sup>36</sup> See Legrand 1997, p. 117.

<sup>37</sup> The transparency *inter partes* (in an inquisitorial system, also including the judiciary) in criminal cases, involving in large part information exchange between the defense and the prosecution; at stake is the right to discovery /duty of disclosure in adversarial procedure or the right of access to the dossier/case file in inquisitorial/quasi-inquisitorial procedure.

conduct their own investigation. Moreover, fascinated by the adversarial discourse of equal arms and fair contests that advocates a lawyer-dominated criminal procedure, many Chinese defense lawyers act in a quite hostile fashion towards the prosecution, and even towards the judiciary, while they actually lack necessary material and human resources to compete with them; this has only put them in a more unfavorable situation and eventually impaired the interests of their clients.

It therefore transpires that the introduction of (distorted) adversarial dogmas and the concomitant reforming scheme may have made things even worse in China. The advocacy of (distorted) adversarial procedural culture and the concomitant professional ethics has resulted in an imbalance between procedural powers and responsibilities, which has further broadened the already-too-broad disparity between investigative/prosecutorial and defensive powers in Chinese criminal procedure. Moreover, blind faith in the adversarial language of contests *inter partes* and oral disputes, which, though did put the trial sessions to the forefront, has neglected, or rather failed to feature the adversarial character of the pre-trial setting, may have further worsened the existing lack of (internal) transparency and impartiality in Chinese criminal procedure.

#### 4. Conclusion: lessons of China's reforms

The failure of China's adversarialization/Americanization reforms on criminal procedure indicates that many Chinese lawyers' conscious or unconscious presupposition that the American system must be the most advanced and universally applicable system since America is the most powerful country of the globe is groundless. In fact, the defining shortcomings of adversarial systems, such as the truth-impairing 'combat effect' and fairness-damaging 'wealth effect'<sup>38</sup> have already given rise to reflection and reform on the system even in their home countries.<sup>39</sup>

Ironically enough, many Chinese lawyers still worship their fiction of the adversarial system and even take the two aforesaid negative effects as something desirable. Consequently, China's adversarialization/Americanization not only fails to achieve the advantages of adversarial procedure since it can hardly establish what should underlie the system, but even causes more severe disadvantages of the system within China's cultural-specific discourse. Of course, many Chinese lawyers are indeed aware that what underlie China's criminal procedure do not underpin an adversarial system. They still propose such reforms because they take them as the so-called 'sound starting point of deeper political reforms'. Legal instrumentalism as such is tantamount to putting the cart before the horse. It can hardly change the mind of political decision-makers, but only cast doubt on the real motivation and intention of legal reformers, which may in turn hinder a sound legal reform.

In sum, China's lessons, specifically indicating the adverse effects of (distorted)

---

<sup>38</sup> 'Adversary criminal procedure privatizes the investigation and presentation of evidence. Such a procedure is intrinsically skewed to the advantage of wealthy defendants, who can afford to hire the most skilled counsel and pay for the gathering and production of defensive evidence.' This can be defined as the so-called wealth effect of adversarial system. See Langbein 2003, p. 102- 103.

<sup>39</sup> For instance, the introduction of CPS in England and the introduction of disclosure mechanism in Scotland.

adversarial dogmas in the Chinese context, have warned us against criminal procedure dogmatism and radicalism. However, if looking at the whole picture of comparative criminal procedure in the world, we will find that China is not alone. In this sense, the author has a feeling of watching a funny drama in which the male and female leads take the wrong scripts, reading each other's lines. He also recalls a popular Chinese adage: 'One is usually inclined to find one's spouse worse than others' while one's children better.' It seems that lawyers, such typically as Sir William Blackstone<sup>40</sup> and most Chinese lawyers of my grandfather's generation, used to preferably see their own procedural systems as their children, but now tend to view them as their spouses.

Unlike them, the author would rather compare a procedural system to a pair of shoes. Just as another Chinese ancient adage goes, 'Shoes need not be in the same size, but fit the feet; likewise, (political-legal) systems need not be in the same style, but benefit the people.' The author would extend this metaphor in a sense that shoes should at least not too small even if unfit; likewise, (political-legal) systems should at least not annoy the people even if unbeneficial.

In these terms, some general cautions must be mentioned with respect to criminal procedural reforms: first, dogmatism and radicalism should be avoided and what underlie criminal procedure must be taken into account; second, a sound legal reform had better be a 'Pareto Improvement',<sup>41</sup> in other words, it should prioritize a less undesirable or less unfavorable scheme; last but not least, a sound legal reform should be premised on the existing political reality without any a priori preference.

## 5. References

### **Blackstone**

W. Blackstone, *The Oxford Edition of Blackstone's Commentaries on the Laws of England Commentaries on the Laws of England*, Oxford: Oxford University Press 2016.

### **Damaška 1986**

M.R. Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process*, New Haven: Yale University Press 1986.

### **He 2016**

J He, *Back from the Dead—Wrongful Convictions and Criminal Justice in China*, Hawai'i: University of Hawai'i Press 2016.

---

<sup>40</sup> He firmly believed that 'Trial by jury ever has been, and I trust ever will be, looked upon as the glory of English law ... it is the most transcendent privilege which any subject can enjoy, or wish for, that he cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbors and equals.' Blackstone, p. 379.

<sup>41</sup> A Pareto Improvement is a neoclassical economics, an action done in an economy that harms no one and helps at least one person. The theory suggests that Pareto improvements will keep adding to the economy until it achieves a Pareto equilibrium, where no more Pareto improvements can be made. Similarly, a Pareto Improvement in legal reforms should at least guarantee that no negative effect will be further caused. This should be treated as the bottom line of any sound legal reform, especially given the Murphy's Law.

**Langbein 2003**

J.H. Langbein, *The Origin of Adversary Criminal Trial*, Oxford: Oxford University Press 2003.

**Langer 2004**

M. Langer, 'From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure', *Harvard International Law Journal* 2004, vol. 4, nr. 1.

**Legrand 1997**

P. Legrand, 'The Impossibility of 'Legal Transplants'', *Maastricht Journal of European and Comparative Law* 1997, vol. 4, p. 111-124.

**Li 2014**

Y. Li, *The Judicial System and Reform in Post-Mao China: Stumbling Towards Justice*, Surrey: Ashgate Publishing Limited 2014.

**Ringen 2016**

S. Ringen, *The Perfect Dictatorship: China in the 21st Century*, Hong Kong: Hong Kong University Press 2016.

**Chang 2015**

常峰, '依法治国背景下的刑事诉讼改革——中国刑事诉讼法学研究会 2015 年年会观点综述', 载《人民检察》2015 年第 23 期 (F. Chang, 'Criminal procedure reform in the context of the rule of law —— Summary of the 2015 annual meeting of the institute of criminal procedural law affiliated to China Law Society', *People's Procuratorate* 2015/23).

**Chen 2007**

陈瑞华, '通过行政方式实现司法正义? ——对最高人民法院死刑复核程序的初步考察', 载《法商研究》2007 年第 4 期 (R. Chen, 'Justice through administrative means? —— a preliminary examination of the death penalty review procedure of the Supreme People's Court', *Legal-commercial Research* 2007/4).

**Chen 2006**

陈瑞华 '案卷笔录中心主义——对中国刑事审判方式的重新考察', 《法学研究》, 2006 年第 4 期 (R. Chen, 'The dossier-centered model —— reexamining the approach to Chinese criminal trial', *Legal Research* 2006/4).

### **Chen 2000**

陈瑞华,《看得见的正义》,中国法制出版社,2000 (R. Chen, *Justice seen to be done*, China Legal Publishing House 2000).

### **Hong 1995**

洪道德,‘中国法学会诉讼法学研究会 1994 年年会综述’,载《中国法学》1995 年第 1 期 (D. Hong, ‘Summary of the 1994 annual meeting of the institute of procedural law affiliated to China Law Society’, *China Legal* 1995/1).

### **Li 2016**

李蒙,‘收回死刑复核权后取得了哪些成就?’民主与法制杂志微信公众号,2016-10-26 (M. Li, *Achievements after retaking the power of death penalty review*, *Journal of Democracy and Law in its WeChat digital column*, 26 October 2016).

### **Liu 2004**

刘路,‘黄静案:闭上眼睛的司法女神’,载天涯社区 2004-12-11 (L. Liu, *Huang Jing Case: Themis, eyes closed*, Tianya online forum, 11 December 2004).

### **Tan 2016**

谭敏涛:‘未经央视公开定调,对任何人都不得确定无罪’,载《律政评论》微信公众号,2016-01-24 (M. Tan, *No one shall be determined innocent unless CCTV (China Central Television) so confirmed openly*, WeChat digital column of Legal commentary, 24 January 2016).

### **Tian 2013**

田野,‘聚焦实务新问题 推动刑诉法贯彻执行——中国刑事诉讼法学研究会 2013 年年会综述’,载《人民检察》2013 年第 22 期 (Y. Tian, ‘To focus on new practical problems and promote the implementation of criminal procedural law —— Summary of the 2013 annual meeting of the institute of criminal procedural law affiliated to China Law Society’, *People's Procuratorate* 2013/22).

### **Wang et al, 2003**

汪建成等,‘中国法学会诉讼法学研究会 2002 年年会综述’,载《中国法学》2003 年第 1 期 (J. Wang et al, ‘Summary of the 2002 annual meeting of the institute of procedural law affiliated to China Law Society’, *China Legal* 2003/1).

#### **Ye 2004**

叶青, ‘完善诉讼法律,维护司法公平——2003 年中国诉讼法学研究会年会观点综述’, 载《法学》2004 年第 2 期 (Q. Ye, ‘To improve procedural law and maintain fair justice —— Summary of the 2003 annual meeting of the institute of procedural law affiliated to China Law Society’, *Legal* 2004/2).

#### **Yu 2014**

喻建立, ‘理论与实践并重的刑事诉讼法学——中国刑事诉讼法学研究会 2014 年年会观点综述’, 载《人民检察》2014 年第 22 期 (J. Yu, ‘Criminal procedure that emphasizes both theories and practices —— Summary of the 2014 annual meeting of the institute of criminal procedural law affiliated to China Law Society’, *People's Procuratorate* 2014/22).

#### **Zhang 2009**

章武生, ‘我国政治体制改革的最佳突破口: 司法体制改革’, 载《复旦学报(社会科学版)》, 2009 卷 1 期 (W. Zhang, ‘The best starting point of China's political reform: judicial reform’, *Journal of Fudan University [Social Science Edition]* 2009/1).

#### **Zhang 2005**

张建伟, 《司法竞技主义——英美诉讼传统与中国庭审方式》, 北京大学出版社, 2005, Kindle 电子书版本 (J. Zhang, *Legal adversarialism —— Anglo-American procedural tradition and Chinese trial model*, Peking University Press 2005, Kindle Version).