รายงานวิจัยฉบับสมบูรณ์

โครงการ

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“Truth and Procedural Fairness in Chinese Criminal Procedure Law”

โดย รองศาสตราจารย์ ดร.อเล็กซานเดอร์ ซีอตอฟ

เมษายน 2563

สัญญาเลขที่ RSA6280072

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หัวหน้าโครงการวิจัย

รองศาสตราจารย์ ดร.อเล็กซานเดอร์ ซีอตอฟ

สนับสนุนโดย สำนักงานกองทุนสนับสนุนการวิจัย และมหาวิทยาลัยเชียงใหม่

(ความเห็นในรายงานนี้เป็นของผู้วิจัย สกว. ไม่จำเป็นต้องเห็นด้วยเสมอ)

EXECUTIVE SUMMARY

The aim of this research is to examine the way how the search for truth is attempted to be reconciled with the idea of a fair trial or procedural fairness in Chinese criminal law. The conflict between the search for truth on the one hand and guaranteeing procedural rights of the accused is particularly problematic in the Chinese context. China presents an immense diversity of ethnic groups, cultures, and practices. Therefore, this research does not attempt to describe the actual situation in a particular part of China. Rather, it concentrates on the analysis of the legislative materials to see the channels of the resolution of this conflict. The results of this research is beneficial in teaching to enable Thai students to understand better the fundamental principles and ideas of criminal procedural law.

Research utilizes a documentary method of study. The statutory analysis of written law is examined in relation to consistency, coherence and proportionality of legal norms. It also reflects the results of the interviews with Chinese academics and the police. The goals of the legislative acts is elucidated and the content of legal norms is examined in the light of those goals. The study takes into account cultural, philosophical, and socio-legal issues related to the topic of this study.

There two basic questions are addressed in this report. First, is the pursuit for substantive truth in Chinese law done at the expense of the procedural certainty? Second, does this pursuit make impossible an establishment of procedural safeguards of fairness and the rule of law? In the treatment of these two questions, the attention is largely payed to the normative framework. It is evident that any system of criminal justice can be abused. Therefore, this research focuses not on actual application of procedural rules but on analyzing the normative framework to perceive the way how the imperative of finding the truth correlates to the idea of procedural fairness.

The research started in 2018. After collecting information and visiting China, the application was submitted to the TRF at that year, and the funding was obtained in

the following 2019 year. Much of research work has been carried out by collecting and analyzing legislative, judicial, academic and factual materials via the Internet and printed publications. At the same time, several visits to China (altogether four in 2018 and 2019) were made. During those visits, a number of academics from Beijing, Chengdu, and Kunming academic institutions were contacted and the topic of the research was discussed.

The most productive interviews were conducted in the Yunnan Police Academy, where the author was an employee around nine years ago. Having personal acquaintances and the experience of teaching Chinese police has significantly facilitated the understanding of the subject of the current research. There were approximately 20 senior members of the Yunnan Police Academy whom the author has interviewed. Those interviews were conducted often informally. In order not to affect spontaneity and genuineness of conversation, the author did not normally request the permission to mention their names in this research report. Only in the cases of significant contribution did the author suggest to include the names in acknowledgement or as a co-author. The normal response of the interviewed was that it did not matter to them. Since some views were critical of the current policies, I did not mention the names of people who provided the information in this report. The positive information as well as the help with the interviews was given by Professor Xuming who assisted immensely in helping to contact ordinary police officers. A helpful insight was also given by Professor Liu. Many interviewed introduced themselves by their English non-official names, and therefore I did not feel appropriate to request their true Chinese identity.

The anonymity of the interviewees, however, should not be considered as affecting the reliability of the research results. The results, presented in this report, make it clear that the main emphasis has been given to the analysis of law as it is reflected in legislation and judicial interpretations. In this respect, the interviews were

not the main source of information, but rather were used to verify the correctness and the appropriateness of the analysis made by the author.

This analysis was done at the first stage of research with Professor Peter Duff from Aberdeen University who also helped significantly with presenting the results of the research "Truth and procedural fairness in Chinese criminal procedure law" in one of the leading international journals in the field: *The International Journal of Evidence & Proof* (https://journals.sagepub.com/doi/pdf/10.1177/1365712719830704). The content of this paper is reflected in the first chapter of this report, only without the contribution of Professor Duff. All the materials of this first chapter are written by me alone. The reader can compare the differences with the publication in the *International Journal of Evidence & Proof* which is attached in the output section.

Two other chapters are also written independently, and are at the moment in the process of submission to the reputable journals. The second paper is submitted to *Asia Pacific Law Review.* The third paper will also be submitted soon. Further, there is a willingness to expand the scope of this research and relate more to Thai colleagues and compare better and more rigorously Chinese criminal procedural law with Thai criminal procedure. With this purpose, the author has met the deans of law faculties of Thammasat and Payao Universities, Dr. Udom and Dr. Pannarairat who have expressed their interest and at the moment there is consideration of next research projects that can incorporate the results of the current research.

This research presents a first step to a deeper examination and comparing Chinese criminal procedural law to Thai law. Chinese criminal procedural law remains very different from Thailand in many respects. The key difference is the role of police. This report indicates that Chinese police plays a much greater and extensive role than the police in any other countries. The Chinese police has an enormous discretion to initiate criminal or administrative proceedings in dealing with the same type of public wrongdoing which Thai police do not have. Should Thailand adopt some of the features of the Chinese police system as the key mechanism of criminal procedural

law? This adoption would certainly imply the shift within the criminal procedure law from the court to the police. It is apparent that this will be an unwelcomed suggestion in Thailand for many reasons. First, Thai police does not enjoy the same degree of public trust as in China. Second, Thai people are much more cautious in allowing the government to regulate every aspect of their lives. There is, however, one suggestion which would be welcomed in Thailand. Thai police must have a stronger moral image than the one it has nowadays. Higher moral requirements for Thai police are essential for creating trust to the work of police in obtaining true evidence. The Chinese idea that procedural fairness and truth are not competing principles of criminal procedure but the two aspects of achieving social harmony is certainly attractive. Its realization, however, is impossible without ensuring that a police office is a righteous officer. The interviews with some members of Chinese police and the public also show that this ideal is not easily realizable even in China.

During the research, the author had also to explore related areas of criminal law in China and Thailand. Some additional publications have been made. One of them is “Exemptions from punishment in China and Thailand from the perspective of the theory of Leon Petrazycki” published in the leading Russian law journal of St. Petersburg University: *Pravovedenie* 62 (3) (2018, 2019): 570–581. Another publication is "International law and criminalizing illegal trade in endangered species (from the Far Eastern perspective)." In the *Asia Pacific Journal of Environmental Law* 22.2 (2019): 207-227. All these publications are given in the output. Even though they do not directly reflect the topic of the research, they are important to understand the machinery of Chinese criminal justice system as a whole and in its connection to Thailand and international community.

Abstract

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Abstract:

Chinese procedural criminal law is very dynamic and reflects well the changes in Chinese social, political, and economic life. Criminal procedure law is constantly evolving by trying to accommodate various conflicting social needs and demands. The speed of the legislative change is such that many works written not long time ago become outdated. The task of this research is not producing an up-to-date description of Chinese criminal procedure, a description that will be outdated soon by another wave of reform, but to understand the dynamic of the legislative change. There is a need to concentrate not so much on specific provisions of criminal procedure law as on the forces which shape and determine their content.

This study looks at the ideological forces, or the fundamental ideas which shape the structure of the whole of Chinese criminal procedure law. It is argued that social harmony is the key concept to understand the whole structure of criminal justice in China. It aims to underline the fundamental differences between Chinese law on the one hand and Continental legal system (also adopted in Thailand) on the other hand. Even though political and legal contexts of Chinese criminal procedure are very different from those of Thailand, the difficulty of balancing between the public interest in a speedy and successful prosecution of offenders on the one hand and the procedural rights of the accused on the other hand is shared by both countries. The study demonstrates that Chinese law is generally reflects accepted international

standards of human rights in criminal procedure. There are, however, substantial differences in conditions for achieving fairness in criminal proceedings.

Key words: China, criminal law, administrative law, police.

บทคัดย่อ

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บทคัดย่อ:

กฎหมายวิธีพิจารณาความอาญาของประเทศจีนมีความเปลี่ยนแปลงอยู่ตลอดเวลา และมักจะสะท้อนให้เห็นถึงความเปลี่ยนแปลงในสังคม, การเมือง, และเศรษฐกิจของประเทศจีน กฎหมายวิธีพิจารณาความอาญานั้นมักได้รับการพัฒนาอยู่อย่างต่อเนื่อง โดยมีความพยายามที่จะรองรับความต้องการของสังคมที่มีความขัดแย้งกันอยู่ตลอด การเปลี่ยนแปลงทางกฎหมายนั้นมีงานศึกษาจำนวนมากเมื่อไม่นานมานี้แต่ก็ล้าสมัยไปอย่างรวดเร็ว งานวิจัยนี้เองก็ไม่ได้เป็นงานศึกษาของกระบวนพิจารณาความอาญาของประเทศจีนที่ทันต่อยุคสมัยและอาจจะล้าสมัยไปในไม่ช้าเนื่องจากอาจมีการปฏิรูปกฎหมายเกิดขึ้นอีกในเร็ววันนี้ แต่เพื่อทำความเข้าใจถึงพลวัตของความเปลี่ยนแปลงทางกฎหมายจึงมีความจำเป็นที่จะศึกษาบทบัญญัติของกฎหมายวิธีพิจารณาความอาญาฉบับเดิมที่มีการบังคับใช้อยู่ก่อนแล้ว

การศึกษานี้ได้ทำการพิจารณาถึงชุดทางความคิด หรือแนวคิดพื้นฐานที่เป็นตัวกำหนดโครงสร้างของกระบวนการวิธีพิจารณาความอาญาของประเทศจีนทั้งระบบ ซึ่งเป็นที่ถกเถียงกันอยู่ถึงความปรองดองในสังคมอันเป็นกุญแจสำคัญที่จะทำให้เข้าใจถึงโครงสร้างทั้งหมดของกระบวนการยุติธรรมทางอาญาของประเทศจีน โดยจุดมุ่งหมายที่จะเน้นถึงความสำคัญของความแตกต่างพื้นฐานระหว่างกฎหมายอาญาของประเทศจีนกับกฎหมายในระบบประมวลกฎหมาย (เหมือนกับระบบกฎหมายในประเทศไทย) แม้ว่าบริบททางการเมืองและกฎหมายเกี่ยวกับกระบวนพิจารณาทางอาญาของประเทศจีนจะมีความแตกต่างจากกระบวนพิจารณาทางอาญาของไทยอย่างมาก แต่ทั้งสองประเทศต่างก็มีความยากลำบากในการสร้างความสมดุลระหว่างประโยชน์สาธารณะในการดำเนินคดีอาญาของผู้กระทำความผิดอย่างรวดเร็วกับสิทธิของผู้ถูกดำเนินคดีอาญาเหมือนกัน การศึกษานี้แสดง

ให้เห็นได้ว่ากฎหมายของประเทศจีนโดยทั่วไปแล้วนั้นสะท้อนให้เห็นถึงมาตรฐานสากลของสิทธิมนุษยชนในกระบวนการยุติธรรมทางอาญา อย่างไรก็ตามเป็นเรื่องยากที่จะบรรลุเงื่อนไขความยุติธรรมในทางกระบวนการยุติธรรมทางอาญา

คำหลัก: ประเทศจีน, กฎหมายอาญา, กฎหมายปกครอง, ตำรวจ

Content

CHAPTER I

ANALYSIS OF CHINESE CRIMINAL PROCEDURE LAW

Introduction

Chinese procedural criminal law is a fascinating object of study. It is very dynamic and reflects well the changes in Chinese social, political, and economic life. Criminal procedure law is constantly evolving by trying to accommodate various conflicting social needs and demands. The speed of the legislative change is such that many works written not long time ago become outdated. The task of this paper is not producing an up-to-date description of Chinese criminal procedure, a description that will be outdated soon by another way of reform, but to understand the dynamic of the legislative change. There is a need to concentrate not so much on specific provisions of criminal procedure law as on the forces which shape and determine their content. This study looks at the ideological forces, or the fundamental ideas which shape the structure of the whole of Chinese criminal procedure law.

The most prominent idea is that Chinese criminal procedural law is focused on "obtaining objective truth rather than satisfying rules of evidential discovery."[1] This search for truth is the reason why the principles of double jeopardy or *ne bis in idem* are still not accommodated by Chinese law. Until the reform of 2012, there were actually no rules of admissibility.[2] The undergoing reform of the law, however, attempts to reconcile the imperative of establishing truth with the idea of a fair trial.

The Chinese concept of a fair trial is different from its western counterpart. It goes beyond the concept of an individual autonomy and affirms a variety of social and moral values. Chinese procedural criminal law presents a greater unity between law and morals which can lead to a greater efficiency and the acceptance on the part of the public of the outcome of criminal proceedings.

Thus, the subject of this research is to examine the way how the search for truth is attempted to be reconciled with the idea of a fair trial or procedural fairness in Chinese criminal law. The conflict between the search for truth on the one hand and guaranteeing procedural rights of the accused is particularly problematic in the Chinese context. China presents an immense diversity of ethnic groups, cultures, and practices. Therefore, this research will not attempt to describe the actual situation in a particular part of China. Rather, it concentrates on the analysis of the legislative materials to see the channels of the resolution of this conflict.

There two basic questions are to be answered. First, is the pursuit for substantive truth in Chinese law done at the expense of the procedural certainty? Second, does this pursuit make impossible an establishment of procedural safeguards of fairness and the rule of law? In the treatment of these two questions, the attention will be payed to the normative framework. It is evident that any system of criminal justice can be abused. Therefore, this research focuses not on actual application of procedural rules but on analyzing the normative framework to perceive the way how the imperative of finding the truth correlates to the idea of procedural fairness.

Truth v. Fairness

The amount of literature on Chinese criminal procedure law is enormous, and much of it has become outdated with the speed of legislative reform. The literature that deals with the foundational ideas of Chinese criminal procedure tend to focus on two basic issues. The first is the issue of identifying Chinese law within a particular

system of law in general and within a particular model of trial in particular. The second issue is about the extent in which the Chinese criminal procedure law reflects the principle of rule of law, fair trial, and the idea of human rights.

In relation to the first issue, there is a general consensus that China follows an inquisitorial model of trial, although some authors point at the influence of adversarial patterns since the reform of 1996.[3] A number of commentators have noticed the difficulties to combine both inquisitorial and adversarial model in the Chinese legal context.[4] Yu Mou, for example, wrote that "the absence of witnesses in the Chinese court contrasts with this reformed adversarial format."[5] For some Chinese scholars, the inconsistencies between inquisitorial and adversarial systems are of little practical significance. Professor Wei Pei from Beihang School of Law in Beijing in a correspondence with the author expressed a common attitude among Chinese scholars as well as practitioners. According to this attitude, there is no contradiction between adversarial and inquisitorial elements of the revised Chinese law on criminal procedure. A Chinese judge does not have per se the obligation to verify evidence. If there is doubt about the evidence presented in court by the prosecutor or the defense, than the judge has a limited power to collect additional evidence. The way to discover truth is not through confrontation but through cooperation of all participants to the process. Indeed, this view is very clearly articulated in Article 7 of the Criminal Procedure Law (CPL 2012): "In conducting criminal proceedings, the People's Courts, the People's Procuratorates and the public security organs shall divide responsibilities, coordinate their efforts and check each other to ensure the correct and effective enforcement of law."[6]

It is more problematic to identify Chinese criminal procedure law within a particular legal family. David and Brierley suggest that ideology, as embracing philosophical, political, and economic principles, is one of the two main criteria for differentiating legal families.[7] Another is the hierarchy of the legal sources, institutions and methods. It is a mistake to think of procedural law as ideologically irrelevant.

"Criminal procedure, as 'applied constitutional law', is normally one of the most useful branches of law in terms of identifying the ideology of a regime."[8] Indeed, Chinese criminal procedure law possesses a constitutional significance not only because Chinese Constitution does not spell out clearly any legal principles of the criminal procedure, but also because of the enormous public attention that the undergoing reform of the procedural law has received.[9] It is true that the Chinese constitution itself mentions some basic principles of criminal procedure: right to counsel and the publicity of trial (Article 125) as well as judicial independence (Article 126). But those provisions remain very brief and undeveloped. Therefore, the criminal procedure law itself becomes the main source of constitutional significance.

Some scholars describe the modern stage of the development of Chinese law as "breaking off the shackles of ideological domination" or "the abandonment of ideology."[10] However, Chinese law still contains a strong ideological element in it. Article 1 of the Chinese Criminal Procedure Law claims that "maintaining socialist public order" is one of its purposes.[11] Article 6 of the same law requires that "in conducting criminal proceedings, the People's Courts, the People's Procuratorates and the public security organs must rely on the masses." It is evident that the presence of Marxist statements in Chinese criminal law legislation has been gradually reduced.[12] The ideological shift from class struggle to maintaining law and order is apparent to many commentators.[13] An ideological content can be seen not merely in the general political statements of the legislation quoted above, but also in the political and moral values protected or neglected in its provisions. Some writers, for example, note a weak expression of idea of legal autonomy in the procedural structure itself.[14] As Bo Yin and Peter Duff put it: the purpose of Chinese procedural law "is not to resolve conflicts amongst individuals but to achieve a collectivist society and socialist morality."[15] Political doctrine and the influence of the Communist Party in criminal law and process is also acknowledged.[16]

It is apparent to most commentators that Chinese criminal procedure has abandoned the Soviet law model in which "the administration of justice was rendered mainly by the security agencies and special tribunals."[17] Even though China has now adopted many elements of the civil law tradition, the predominance of public law persists. This predominance has a long historical tradition in China. Confucianism also contains an anti-capitalist and to some degree, a socialist sentiment, although not democratic by any means.[18] After the Maoist reaction against Confucianism,[19] the latter experiences a sort of revival in the modern Chinese intellectual culture.[20] It is very difficult to isolate the Confucian element in Chinese socialist system, as Confucianism was never an isolated influence. From the beginning, it was intermingled with the Chinese philosophical tradition of Legalism which also persists in modern China.[21] Thus, Chinese law can be generally classified as a socialist law[22] as including Confucianism and Legalist philosophical traditions. One apparent influence of Confucianism can be seen in the idea that criminal procedural law has an educational function. Article 2 of the CPL states that its aim is "to enhance the citizens' awareness of the need to abide by law and to fight vigorously against criminal acts."[23]

Chinese criminal procedural law has also a peculiar institution, the procuratorate which was adopted from the Soviet law. The role of this institution in criminal law proceedings has attracted a significant attention in the academic literature.[24] It is noted that "as well as participating in the investigation and trial, the procuratorate, unlike its western counterparts, must scrutinize the legality of the trial and supervise the execution of judgements and the activities of correctional institutions."[25] Apart from other functions, this organ is invested with quasi-judicial powers.[26] Its role in solving the conflict between the search for truth and procedural fairness will be examined later in a more detail.

Many authors suggest that Chinese criminal procedure law lacks the idea of a fair trial, sometimes, explaining that by the preoccupation with its inquisitorial

method,[27] and sometimes, by the specifically Chinese structural and cultural contexts of the court's proceedings.[28] The assessment of the fairness of Chinese criminal procedure is often influenced by political views of commentators. The proponents of a liberal democracy deny that the principle of fairness plays a significant role in criminal justice process in modern China.[29] A common conclusion would be that "The prevailing conception of class struggle rooted in the Chinese communist State has caused enduring inconsistency between Chinese criminal procedure and western notions of the rule of law."[30]

Not all authors apply the western notions to describe the Chinese law. Some claim that the idea of a fair trial is not new for China by tracing it to Qing Dynasty, if not earlier.[31] It is acknowledged that the Communist China in its beginning operated with a very different set of ideas from those of the rule of law, fair trial, and human rights.[32] However, since 1978, there are clear signs that the Chinese law and policy makers try to ensure that the principle of fairness (in Chinese understanding) is realized.[33] In more practical terms, the new policy led to the abolition of the reeducation through labor system in 2013[34] which was widely considered as inconsistent with the idea of rule of law and fair trial.[35] In this research, it will be demonstrated how the concept of a fair trial is reflected in the text of the Chinese criminal procedure legislation.[36]

The Exclusionary Rule

If evidence testifies to truth, but it was obtained by inappropriate or illegal means, such as torture, should or should not judges follow it? This issue has been addressed first by the Evidence Rules promulgated jointly by five different judicial and executive government bodies in 2010[37] and then by the 2012 reform of Chinese Criminal Procedure law. Article 54 of the CPL states: "Confessions extorted from a criminal suspect or defendant by illegal means such as torture, testimony of

witnesses and statements of victims collected by violent means, threat or other unlawful means shall be excluded. Physical evidence or documentary evidence that is not collected according to statutory procedures and is therefore likely to materially damage judicial justice shall be subject to correction or reasonable explanations, and shall be excluded if correction or reasonable explanations are not made. Evidence that shall be excluded as found during investigation, examination before prosecution and trial shall be excluded in accordance with the law, and shall not serve as the basis for making prosecution opinions, prosecution decisions and judgments." Even though this article has been criticized for making a distinction between the evidence which must be excluded and the evidence which may be excluded,[38] it is an important procedural safeguard of fairness.

There are two significant problems for a successful application of the exclusionary rule in the Chinese context. The first problem is that the general idea of unacceptance of torture and violence in obtaining evidence may be interpreted differently as the concept of torture and violence depends on certain moral standards affirmed by an individual conscience or moral sense which differs from person to person. For example, interrogating a suspect for many hours late at night did not appear morally wrong to Soviet prosecutors.[39] In China, torture of an innocent is evil, but "torture of someone who ultimately appears to be guilty, however, seems to be something many are prepared to overlook".[40] The second problem is the way law is perceived in China as well as in many other countries of this world. Law is perceived as a command, rather a collection of useful reasons for adjudication. The inadmissibility of evidence obtained through torture, violence, or threat does not well fit into the image of law as a set of detailed instructions supplied by a threat of punishment. For many Chinese critics,[41] it was certainly not enough to express this principle in a statutory form in a country where people are more accustomed to obey specific commands.

The solution to this problems was found in issuing more detailed rules on exclusion of illegal evidence. In June 2017, they were jointly issued by the Supreme People's Court, the Supreme People's Procuratorate, and the Ministry of Public Security.[42] The rules are contained in a document with a very long name: "Notice of the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security and Other Departments on Issuing the Provisions on the Several Issues concerning the Strict Exclusion of the Illegally Collected Evidence in the Handling of Criminal Cases."[43] The problem of the rules being too general still persists since most of its provisions remain rather broad. However, the rules attempted to spell out the mechanisms of excluding illegal evidence.

First of all, the rules emphasize the right of the accused to challenge the legality of the evidence before the procuratorate already at the time of investigation (Article 14), and impose a duty on the investigating organ and the procuratorate to ensure that there was no incident of torture or a forced confession (Article 15 & 17). These provisions, however, require a proof of the facts of torture, violence, etc. The proof, however, is difficult to present. The rules foresee two methods of proof. First, audio-video recording of interrogation is compulsory in the most serious cases (Article 10). Second, a physical examination of the arrested person is required to ensure that he did not suffer any physical violence or torture (Article 13). It would be naïve to believe that the interrogating officers who employ torture would be willing to leave behind any recording or even physical signs available. Jeremy Daum (2017), an expert in Chinese law, refers to some actual cases, when "police or prosecutors who knew that a confession should be excluded have simply conducted a new lawful interrogation to get a confession they could use in court."[44]

The solution to the difficulty of obtaining a proof of torture, violence or its threat would be giving more rights to the accused to challenge the legality of evidence. In view of that, the Rules require that at the commencement of court's proceedings, the court must inform the accused of his right to apply for the exclusion

of illegal evidence (Article 23). According to Article 33 of the same Rules, this evidence cannot be read or cross-examined before the court makes a decision on whether to exclude it or not. Nevertheless, it is clearly stated that if there is no proof that the evidence was obtained illegally, the court will refuse to exclude it (Article 24). If the accused offers a proof of the illegality, then the court must convene a pretrial conference (Article 25).

A pretrial conference system is a new feature of the Chinese criminal procedure law. Article 182 of the CPL, among other things, states: "before the commencement of a court session, judges may convene a meeting with the public prosecutor, the party concerned and his/her defender and agent ad litem to deliberate and consult their opinions on withdrawal, the list of witnesses, exclusion of illegal evidence and other trial-relevant issues." The idea of a pretrial conference resembles to some extent Article 17 of the United States Federal Rules of Criminal Procedure.[45]

Article 26 of 2017 Rules states that if the public prosecutor and the defendant do not reach an agreement on whether the collection of evidence has been legal in the pre-trial conference, and the people's court has doubts about the legality of the collection of evidence, the court shall conduct an investigation during the trial. According to Article 34, if the court has doubts about the legitimacy of the collection of evidence based on relevant clues or materials, and the People's Procuratorate fails to provide a proof or the proof provided cannot confirm the legitimacy of the evidence, and it cannot be ruled out that it was collected illegally, then the evidence should be excluded. Any decision of the court on exclusion of evidence can be appealed to the higher court (Article 40). In other words, the effectiveness of the application of the exclusionary rule depends in the end on the capacity of a Chinese judge to doubt! But what if the judge does not want to doubt, or he does not have time to think of his doubts?

The Judge and Truth

The practice of a Chinese trial saves Chinese judges to a greater extent from the painful experience of a doubt. Most defendants plead guilty.[46] Accordingly, Article 227 of the *Interpretation of the Supreme People's Court on the Application of the Criminal Procedure Law of the People's Republic of China*[47]: "In a case where the defendant has pleaded guilty to charges, after confirming that the defendant understood the facts and charges alleged in the indictment, voluntarily pleaded guilty and knew the legal consequences of the guilty plea, the court's investigation may mainly focus on sentencing and other controversial issues. In cases where the defendant does not plead guilty or the advocate maintains his innocence, the court investigation shall ascertain the facts related to sentencing on the basis of the facts establishing the guilt."

Since a defendant rarely claims innocence, and there are not many controversial issues left, the Chinese trials are notorious for its speed. It takes normally only few minutes.[48] In this situation, it will require a significant effort, first of all by judges themselves to attempt to examine the genuineness of confessions. The Chinese Criminal Procedure Law contains some conflicting principles in terms of the role of judges to question the genuineness of evidence in general and of confessions in particular. Article 49 seems to suggest an adversarial model: "The burden of proof of guilty of the defendant in a public prosecution case shall fall on the people's procuratorate, while that in a private prosecution case shall fall on the private prosecutor."[49] If such is a case, then judges should be satisfied with what procurator serves to their table providing that there are no objections of a defence lawyer.

However, Article 50 clearly displays a rather different role for a judge: "Judges, prosecutors, and criminal investigators must, under legal procedures, gather various kinds of evidence that can prove the guilt or innocence of a criminal suspect or defendant and the gravity of crime."[50] It is noteworthy that a defense lawyer is not mentioned in this provision. Article 191 of the CPL spells the role of judges out in the

following way: “During a court hearing, if the collegial panel has doubts about the evidence, it may announce an adjournment, in order to carry out investigation to verify the evidence. When carrying out investigation to verify evidence, the People's Court may conduct inquest, examination, seal-up, seizure, expert evaluation, as well as inquiry and freeze.”[51] The article does not spell out what exactly Chinese judges can do if they have doubts. One can see again that having a doubt is paramount in the extent the Chinese judges are prepared to carry out their own investigation. Informal interviews with Chinese academics, conducted by the author, indicate that even if the Chinese judges do have doubts, it is rarely expressed in their initiative to investigate further.

One reason for a lack of initiative may lie in a too uncertain implication of Article 191. However, it has received some clarification in the *Interpretation of the Supreme People's Court on the Application of the Criminal Procedure Law of the People's Republic of China.*[52] This interpretation largely deals with the procedural aspects of the decision of the court to collect more evidence, rather than guiding judges in the way and the manner they should carry out their own investigation. For example, Article 66 simply requires from the court to investigate and verify the evidence in accordance with the provisions of Article 191 whose content, as we have seen above, does not appear to be very precise. The only value of Article 66 lies in the duty of the court to inform the parties of the discovery of vital evidence: “when the people's court investigates and verifies the evidence and finds new evidence material that has a significant impact on the conviction and sentencing, it shall inform the procurator, the advocate, the private prosecutor and his legal representative.”

Article 220 is more helpful to describe the process of solving doubts: “If the court has any doubt about the evidence, it may inform the public prosecutor, the parties and their legal representatives, the advocate, and agents ad litem to supplement the evidence or make explanations. If necessary, the court may announce an adjournment to investigate and verify the evidence.” In other words, it

is not a duty but it is within the discretion of the court to request additional information in case of a doubt.

One can see that the Chinese courts have enormous discretion not only to collect additional evidence, but also accept or reject submission of new evidence by the parties. The discretion to reject a submission, however, is burdened by a duty to provide reasons for the rejection: "If during the trial before the court, the parties, their advocates, or agents ad litem request to notify the new witness to appear in court, to obtain new evidence, or apply for re-assessment or inspection, then the name of the witness, the location of the evidence, the explanation in relation to the facts of the case, and the reasons for a new inquest or expert examination shall be provided. If the court deems it necessary to agree, it shall announce an adjournment of hearing; if it disagrees, it shall explain the reasons and continue the trial."[53] The interpretation, however, does not specify the manner and the form in which this explanation must be given.

It is obvious that the solution of judicial doubts can be achieved only through reexamining all relevant materials collected by the procuratorate. It is unlikely, however, that without an assistance of the prosecutor, the court will be able to identify the relevant evidence that is left outside the file submitted to the court by the prosecution.

The Prosecutor and the Truth

It is possible for a private person to initiate criminal proceedings in the court. However, it is the procuratorate who has the sole power to initiate public prosecution (Article 3 of CPL). The Chinese procuratorate takes a unique position in Chinese criminal procedure, since it is not only the public prosecutor but also the public guardian of lawfulness, the authority to approve arrests and the organ empowered to conduct investigation (Article 3 of CPL). In ordinary cases, investigation is carried out by the police: the public security organs, but in serious cases, including extortion

of confession by torture, the procuratorates take the function of investigators alone (Article 18 of CPL). There are reports, however, that from the end of 2016, the procuratorate is undergoing a substantial reform, and that its investigating function is largely being abolished, with more emphasis being made on returning to its main function of legal supervision.[54] There is much uncertainty at the moment with the future function of the procuratorate that illustrate well the fact that the recent transformation of the Chinese criminal procedural law brought more ambiguity than clarity.

For example, Section 18 and 19 of the CPL have been again amended in 2018. The procuratorate retains the power to investigate crimes committed by a public security organ, such as illegal detention, extorting confessions by torture, illegal search, etc.[55] Section 36 has been amended as obliging courts, procuratorates, and the detention centers to inform the criminal suspects or defendants of their right to meet a duty lawyer stationed by a legal aid agency.

Chinese academics speak about three confusions (三乱) when discussing the current reform of the procuratorate system. This condition was described by Zhang Zhihui already in 2011, and it is said to be aggravated as the reform proceeds[56] due to the fact that procuratorates on all levels adopt different policies and practices in implementing the reform. Back in 2011, Zhang Zhihui singled out the confusion in institutional setting (机构设置乱), the confusion in institutional designation (机构名称乱), and the confusion in the mechanism of delegating authority (派出机构). The increase of uncertainty as the reform proceeds may illustrate well the philosophical dictum of Laozi against the preoccupation with the continuous intervention: "leaving muddy waters undisturbed will make it actually clear."[57] The prudent advice of Laozi seems to be largely ignored in contemporary China, as most Chinese academics and practitioners, including Zhang Zhihui and Long Zongzhi argue for more regulations in the hope that new laws make all the process clear and smooth. This hope likely be

in vain considering the need for a greater shift in the fundamentals of Chinese criminal procedure than so far proposed.

There is, certainly, something to be done with the confused role of procuratorate. Guo wrote that "procuratorate in China is not a partisan prosecuting party as in adversarial systems. In contrast, it is not only a judicial organ but also a legal supervisory organ. Thus Chinese prosecutors have the authority as well as the obligation to exclude illegally obtained evidence to ensure the proper administration of criminal justice. However, wearing multiple hats, prosecutors find it difficult to remain as neutral as they should be. In most cases, prosecutors fail to exclude illegally obtained evidence out of a desire to pursue the prosecution."[58] Guo suggests that the unavoidable conflict of roles be solved by separating procuratorates according to their tasks: one section can deal with prosecutions, another with determining admissibility issues.[59]

The view of Guo has been also reflected among a number of leading Chinese academics, such as Chen Ruihua who claimed that "the procuratorate cannot possibly have too great a role in excluding illegal evidence: it plays a greater role representing police and other official investigators in criminal litigation, and stands in an adversarial relationship to the defendant applying to exclude evidence." [60] The attempts to bring clarity into the operation of its diverse functions create a tension within the procuratorate which is based on the strict hierarchical principle and which at the same time has used its discretionary powers to develop extremely diverse practices on the grass roots levels.[61] The attempt to introduce more controls on the way how evidence is collected will certainly be also resisted on the grounds that it would affect the smoothness and speed of criminal proceedings. In many places, procuratorate functions more as "a bridge between the police investigation and court procedures than as a discriminating screen."[62] There is also an uneasiness among the Chinese about the growing number of prosecutors.[63]

The wheel of the Chinese government reforms turns fast and may turn in any direction. It is certainly appropriate that the procurator who has to decide on whether to initiate public prosecution or not, must retain the powers to examine the legality of evidence. The procurator stands nearer to the process of collecting evidence and is certainly better positioned than a judge to decide on truthfulness of evidence which he has to present to the court. During the approval of arrest and the decision to prosecute, the 2017 Rules oblige the procurator in charge to inform the accused of his right to apply for the exclusion of illegal evidence (Article 16). The consequences of the discovery that the evidence was obtained illegaly is that the procurator is bared from sanctioning detentions and initiating prosecution (unless there is another supporting evidence) (Article 18).

The power of the procurator over the detention and prosecution of the accused reveals clearly the nature of Chinese criminal justice. It is certainly not adversarial although there are calls among the Chinese academics to make it more so.[64] Is this system well suited for discovering the truth? Or the partiality of procurator as a prosecutor will likely compromise the truthfulness of evidence submitted to the court? The 2012 reform of the CPL and 2017 Rules may provide sufficient normative means for a procurator to evaluate the legality of evidence submitted by the police. The doubt is whether he or she will be willing not to ignore the facts that may point at its illegality. It is certain that much depends on the willingness of the interrogated person to report the facts of abuse, and also the willingness of the procurators to take such reports seriously. 2017 Rules (Article 14) authorize the procurator to control the process of investigation in relation to illegal evidence not only on the request of the interrogated but also on his own initiative in more serious cases. Yu Mou in his empirical study in an unidentified location of China on how prosecutors and investigation officers work together on the issue of admissibility of evidence concludes: “As long as the written evidence appears lawful in format and conforms to legal requirements, the police case is approved by prosecutors, disregarding

the methods of construction."[65] However, Guo referred in his study to many cases where prosecutors were active in uncovering the illegality of evidence.[66] They do it when authorizing detention and more so when deciding on whether to initiate prosecution or not. In other words, it is not the presence of another procurator loaded with the task to check the admissibility of evidence (as suggested by Guo) that compel Chinese prosecutors to reject evidence whose illegality is apparent. Rather it is the awareness of the problem and the political will to stop the malpractice that moves the current reform of criminal procedure in China.

How long this political will last is a matter of question. Creating an additional controlling mechanism suggested by Guo could certainly prolong this current campaign, but it is unlikely to inspire further efforts. As with 2017 Rules, procedural mechanisms alone are not sufficient to enable procurators to exercise efficient control over the process of investigation. What is essential is the moral authority and their respect in the eyes of the public that would create trust among the accused to report the facts of procedural abuse.

The Defence Lawyer and Truth

If the prosecutor fails to present the facts of the case according to the truth, the role of the defence lawyer becomes paramount. In practice, if a defence lawyer, representing the accused, does not object to evidence, which he does not often, a judge has very little ground for doubting in the truthfulness of the evidentiary materials submitted to him by the prosecution. In theory, it is possible for judges, on their own initiative, to make their own discoveries. Article 226 of *Interpretation of the Supreme People's Court on the Application of the Criminal Procedure Law of the People's Republic of China* states: "During the trial, if the collegial panel discovers that the defendant has surrendered on his own initiative, confessed, or performed a meritorious service, that according to law is a mitigating circumstance, and if there is no relevant evidential materials in the file submitted by the People's Procuratorate,

it shall notify the People's Procuratorate to submit it." It is apparent that this discovery can be hardly achieved without an active involvement of the defence lawyer.

According to Article 42 of the Chinese Criminal Procedure Law: "No defense lawyer or any other person may help a criminal suspect or defendant conceal, destroy or fabricate evidence or collude with a criminal suspect or defendant to make confessions tally, or intimidate or induce witnesses to give false testimony or conduct other acts interfering with the proceedings of judicial organs. Any violation of the preceding paragraph shall be subject to the legal liability in accordance with the law. Any alleged crime committed by a defender in this regard shall be handled by an investigating organ other than the investigating organ handling the case undertaken by the defender."[67] At the same time, the 2012 reform has given defense lawyers more rights in gaining access to evidence. Article 39 states: "Where a defender is of the opinion that the relevant public security organ or people's procuratorate fails to submit certain evidence gathered during the investigation period or period for examination before prosecution while such evidence can prove that the criminal suspect or defendant is innocent or the crime involved is a petty offense, the defender shall be entitled to apply with the people's procuratorate or the people's court concerned to obtain such evidence."[68] In other words, finding truth will depend much not only on the truthfulness and completeness of evidence submitted by the prosecution, but also on the preparedness and persistence of defense lawyers to obtain it.

The powers of the defense lawyers to apply for a disclosure of evidence held by the procuratorate is limited. They can do it only if that evidence can prove that the criminal suspect or defendant is innocent or there is a mitigating circumstance.[69] In this case, the Chinese court, after receiving application of the defence lawyer, can order the procuratorate to hand over any evidentiary materials collected during the investigation, examination and prosecution within 3 days after receiving the letter

of the decision of obtaining evidence.[70] Thus, it is not all evidence which the defence lawyer has the right to access but only the one which can be demonstrated to the court as being important for proving the defendant's innocence or presence of a mitigating circumstance.

Witnesses and Truth

The efficiency of defence lawyers to challenge the truthfulness of evidence submitted by prosecution depends much on their access to witnesses and to the records of their testimony. Much of it remains out of the knowledge or control of the defence lawyer. A witness could be subject to a torture, violence, threat, etc. If so, it is vital that there is an opportunity of cross-examining of witnesses. The fundamental problem faced by the Chinese judicial system of criminal justice is that witnesses are rarely examined in an oral proceeding before the court.[71] There are several reasons why witnesses have been rarely examined in open court proceedings. The most significant one is the unwillingness or fear of the witnesses themselves. To address this problem, the new CPL (2012) put in place a number of measures to protect witnesses including their anonymity.[72] It is difficult, however, for a Chinese law to create an atmosphere in which witnesses will be not compelled but willing to come forward and testify to the truth. Thus, obtaining truth in a particular case will much depend on the moral attitude of witnesses.

Since witnesses rarely attend trial proceedings, it would be natural to expect that defence lawyers should have a greater opportunity to meet them before the trial. Article 41 of the CPL states the following: "Defence lawyers may, with the consent of the witnesses or other units and individuals concerned, collect information pertaining to the current case from them and they may also apply to the People's Procuratorate or the People's Court for the collection and obtaining of evidence, or request the People's Court to inform the witnesses to appear in court and give testimony. With permission of the People's Procuratorate or the People's

Court and with the consent of the victim, his close relatives or the witnesses provided by the victim, defence lawyers may collect information pertaining to the current case from them."

Considering this normative framework, it is not surprising that the modern state of Chinese criminal procedure law is hardly satisfactory from the point of view of the defence. The key problem of Chinese criminal trial is to make true testimonies being heard in an open trial. Despite significant efforts to make it possible, the normative framework will remain powerless to give life to a trial that centered on obtaining the truth.

Conclusion

Chinese law reform of criminal procedure has not stopped with the adoption of 2012 Law. Already in October 2014, the 18th Central Committee of the Communist Party of China announced a new policy[73] to reform Chinese court system generally and criminal justice particularly. There is an awareness that the trial proceedings remain a formality, when the court simply approves the findings presented to it by the procuratorate. In February 2015, the Supreme Court of the PRC published the guidelines of the court's proceedings reform according to which the examination of facts (including cross-examining) must become the central part of the trial.[74]

Despite all these efforts, an open trial with an active participation of witnesses and defence will remain an unachievable goal without a fundamental shift in the way how truth is obtained. At the moment, the main method of obtaining truth is the inquisitorial work of investigators, the procuratorate, and to the least degree, judges. It is difficult to reconcile this way with the concept of procedural fairness which the Chinese written law now tries to reflect. The search for truth and procedural fairness can be reconciled only if truth is obtained through an active and open interaction of the prosecution, victim, and the accused in a public forum. Indeed, this interaction

does not need to be antagonistic and confrontational in the same manner as it is perceived in the West. Adversarial trial carries a sense of mutual hostility. Whatever form will the future adversarial procedure take in China, its future depends not so much on the form and content of legislative acts, as on the readiness and willingness of the participants to be engaged in an open trial.

Unfortunately, the focus of modern Chinese scholarship is rather on how to perfect procedural mechanisms rather than on the fundamental intellectual and moral change of the idea of trial among ordinary people.[75] As a leading Chinese academic, Weidong Chen wrote: "Any perfect modem system and management expertise and any cutting-edge technologies would turn into a pile of waste paper in the hands of a bunch of traditional minded people."[76]

The same conclusion can be applied to the belief of Weidong Chen, Zuo Weimin, as well as other prominent Chinese academic scholars, that the only way to procedural fairness is the increase of the adversarial elements in Chinese criminal procedure.[77] However, the adversarial mechanisms will unlikely work in a society where the police and prosecution on the one side cannot be perceived as an equal party to the defence on the other even if the Chinese judge poses himself as an independent arbiter. To change this system would mean a cardinal departure away from a single-party authoritarian state towards a pluralistic society with independent courts and even independent procuratorate.

It is still possible for the procedural fairness to play a greater role in Chinese criminal justice system within the current political milieu of China. This, however, would be possible not because of introducing a more perfect external administrative and regulatory mechanism controlling the hosts of Chinese police, procurators, and judges. Procedural fairness needs an internal moral foundation shared by the participants in a legal process which cannot be built through the mechanical reform of the governmental system. It might be built by means of reintroduction of the

traditional Confucian values of humanity into the Chinese governmental machinery, but this introduction will unlikely be fruitful in the society driven by the material greed rather than by the love of virtue.

CHAPTER II

WHEN AN ADMINISTRATIVE DELICT ENDS AND CRIME BEGINS: THE DISCRETIONARY POWERS OF CHINESE POLICE TO PROMOTE SOCIAL HARMONY

Key words: China, criminal law, administrative law, police.

Introduction

Having taught police officers both in Thailand and in China, I have been struck by the differences in the police style in those Far-Eastern countries. The first apparent difference is the visible presence of Chinese police which seems to be everywhere, particularly in its Western regions. The news of the recent outbreak of coronavirus in China point at the enormous powers of the Chinese local police to enforce social compliance.[78] It is also the manifestation of power which makes Chinese police different from the Thai counterpart. There are many historical, social, political, and cultural reasons for the differences between them, but there are also some similarities. For example, both states are not liberal democracies. In this paper, I will try to examine Chinese administrative law to show that the form of the law creates a necessity for the police to be more proactive and to play a greater social role. There are certain legal concepts and institutions which can increase the social role of the police even in a liberal state. The existence of a separate regime of administrative liability is one of them. Unlike Thailand, China distinguishes between criminal acts and administrative wrongdoings in a way similar to Germany and Japan.[79] Many offences which are defined as crimes in Thailand are not treated as such in

China. Instead, Chinese police has a significant amount of discretion to apply administrative sanctions instead of initiating more formal, complicated, and lengthy criminal proceedings.[80] It is also true for Thailand that many minor crimes are traditionally dealt by Thai police in an informal way.[81] However, the sanctions of Thai police are expected to be administered in a mechanical way without a prima facie duty to take into account a broader goal of achieving social harmony. In contrast, Chinese law and policy explicitly reiterates that administrative sanctions must pursue the creation of a just and harmonious society.[82] This goal becomes particularly important since China, with its fast development, has created a significant social stress which potentially can destabilize the social life.

Chinese police has been an object of a significant number of research works in English language. Even its brief analysis would lead far beyond the scope of this paper.[83] A number of works on Chinese police treat the idea of social harmony.[84] However, social harmony as the goal of Chinese police has not been examined yet as the principle capable to provide the vital link between administrative and criminal law. Further, China is a very dynamic country. It is without doubt that political reforms within China affect the vitality of social harmony as the principle of the police work. The official policies of the Chinese government under Hu Jintao to promote the ideal of harmonious society has certainly raised the awareness of the importance of this principle.[85] At the time of writing, harmonious society is largely replaced by the ideal of a strict compliance with legal rules.[86] That made some critics argue that the ideal of harmonious society is largely failed in China.[87] Even though this claim might be true, the goal of social harmony continues to be an essential element of Chinese police law. The official policy of the Chinese government can certainly affect this goal but there is an additional reason for social harmony to inform the actions of the police on the grassroots level as long as the present system of police law is in place. The need to apply the principle of social harmony naturally flows from the framework of the criminal and administrative liability in China considered below.

It is certainly not sufficient to affirm *apriori* that social harmony takes the key position in police law enforcement. The second part of this paper will present the result of the conversations with the Chinese police. The aim of those conversations was to find out the inner perspective of the police officers on the meaning and purpose of their work. The conversations were conducted informally and more formally depending on the situation. From the perspective of a sociological research, those interviews may appear not very systematic and accurate. They did not apply any technique ensuring the objectivity of the obtained data. There were two reasons for using a not systematic approach in gathering data. The first reason was rather pragmatic. There must be trust between the interviewer and the interviewed. Bringing well-tailored questionnaires would unlikely make Chinese police sincere in answering sensitive questions.

The second reason was more complex. It was based on the conviction that the task of the present research was not so much to *explain* the police work as to *understand* it. In other words, its methodology was largely built on the tradition of hermeneutics developed by Wilhelm Dilthey[88] whose ideas influenced Max Weber, Karl Jaspers, Martin Heidegger, Hans-Georg Gadamer, Jürgen Habermas, Franz Boas, and many others.[89] The hermeneutic approach pays attention to "all modes of experience in which a truth is communicated that cannot be verified by the methodological means proper to science."[90] The importance of the hermeneutical method is particularly important in conversing with the Chinese police. There are certain understandings which are communicated not verbally, and there are certain statements whose truthfulness is doubtful. A researcher who aims at understanding the works of Chinese police has to rely often on, what the Legal Realists called, a hunch.[91] This is particularly true when there were discussions of violence against the police officers in social conflicts in which the police tried to mediate local disputes. Even though this topic is discussed in official media,[92] it is a very sensitive

topic for a discussion. An informal interaction with Chinese police provided some insights into the role of social harmony in the whole system of law enforcement.

The scope of this paper has certain limitations. It is certainly difficult to make generalizations concerning the whole of China. This country presents a significant variety of conditions and differences. The present research concentrated largely on one province of China: Yunnan, which possesses an immense diversity of social conditions that make achieving social harmony a challenging task. There are many relevant issues which cannot be covered within a single paper. Therefore, only one key issue is chosen: the way how the Chinese police chooses the administrative rather than criminal law mechanisms to deal with various offences, and how this choice is motivated by the search to achieve social harmony.

The Criminal v. the Administrative

As it has been said in the introduction, China distinguishes between criminal and administrative offences. The way how an offence is defined is very important since it determines largely the procedure to be adopted by the police. The procedure for criminal offences is regulated by the Criminal Procedure Law of the PRC.[93] The procedure for administrative offences is regulated by a significant number of legislative and administrative acts. Two of them are of a greater importance: *Administrative Penalty Law of the People's Republic of China 1996, 2017 (*中华人民共和国行政处罚法)[94] and *Public Security Administrative Penalties Law of the People's Republic of China 2005, 2012. (*中华人民共和国治安管理处罚法).[95] The second act of legislation also defines a number of administrative offences and applicable penalties for them. At the time when an offence is reported, the police, if the available facts permit to do so, has to classify it as a criminal case or as an administrative case which is often described as an "order maintenance case". The ratio of administrative offences to criminal offence is generally much higher,

although the difference varies significantly depending on a location and the time. For example, in two months of 1993, Shanghai police received 4700 calls for assistance. "Of these calls, 526 (11.2%) were criminal cases, 2550 (54.3%) were order maintenance cases, 1176 (25.1%) were road traffic cases, 440 (9.4%) were for emergency services, and the rest were unclassified. In essence, the police were involved with order maintenance work over 50% of the time."[96] In other words, the order maintenance cases, i.e. administrative cases, are much more common than criminal cases, and should deserve a closer attention.

Even when the facts are available, it is not always easy to determine which cases are criminal and which are administrative. The content of administrative offences is often too broad and can overlap with a number of common criminal offences. To illustrate this point, several examples can be given. In Inner Mongolia, criminal investigations were initiated against a person who was a diagnosed patient with new coronary pneumonia, but who attempted to hide the fact of his illness, appeared in the public, and initiated the transmission of the illness to others. He is accused of the crime endangering public safety.[97] The offence is contained in the Criminal Law of the PRC, Article 114 and 115. These provisions contain draconian sanctions including death penalty. At the same time, certain provisions of the *Public Security Administrative Penalties Law of the People's Republic of China,*[98] can also be used to impose administrative sanction against the offender. For example, Article 30 of the law penalizes anyone who carries pathogens of infectious diseases with the detention for not less than 10 days but not more than 15 days; and if the circumstances are relatively minor, he shall be detained for not less than 5 days but not more than 10 days. Since there were many administrative regulations issued by the central and local governments following the outbreak of coronavirus, Article 50 (1) of the law also provides a convenient justification for penalizing the offender. It threatens anyone who refuses to carry out the decision or order issued according to law by the people's government in a state of emergency with the fine of not more

than 200 yuan. “If the circumstances are serious, he shall be detained for not less than 5 days but not more than 10 days, and may, in addition, be fined not more than 500 yuan.”

One can find more examples of overlapping ambits of administrative and criminal laws. Article 23 of the *Public Security Administrative Penalties Law* penalizes with the fine of not more than RMB 500 yuan and, in some cases, with detention of not more than 10 days those who

“(1) disturb the order of government departments, public organizations, enterprises or institutions, thus making it impossible for work, production, business operation, medical care, teaching or scientific research to go on normally but not having caused serious losses; (2) disturb the public order at stations, ports, wharves, airports, department stores, parks, exhibition halls or other public places.”

Article 277 of the *Criminal Law of the Peoples Republic of China* penalizes with imprisonment of not more than three years as well as with less severe penalties anyone who “by means of violence or threat, obstructs a functionary of a State organ from carrying out his functions according to law”.[99] The word “disturb” (扰乱) is more general and can also involve violence and threat. Article 293 of the law also imposes the same penalty on those who “are making trouble (起哄闹事) in a public place, which causes a serious disorder (严重混乱) of the public place.” It is apparent that the abstract contents of criminal and administrative laws may create an uncertainty on which law should be applied in specific circumstances.

There can be difficulty in distinguishing not only between administrative and criminal offences, but also between the content of different administrative offences that involve different penalties. Disturbing public order proscribed by the second part of Article 23 (quoted above) of *Public Security Administrative Penalties Law* may be easily confused with the offences of Article 26 of the same law which penalizes gang-fighting (结伙斗殴的), chasing or intercepting another person (追逐、拦截他人的),

forcibly taking and obstinately seizing or willfully damaging and occupying public or private property (强拿硬要或者任意损毁、占用公私财物的), or other provocative acts (其他寻衅滋事行为). The confusion may not be vital as the penalty for both kinds of offences is similar: detention for not less than 5 days but not more than 10 days and possibly a fine of not more than 500 yuan. However, Article 26, unlike Article 23, allows the police, if the circumstances are relatively serious, to inflict heavier penalties by detaining the offender for not less 10 than days but not more than 15 days and by imposing a fine of not more than 1,000 yuan.

The content of the latter administrative offence may be also difficult to distinguish from a variety of criminal offences. For example, Article 293 of the *Criminal Law* penalizes with not more than 5 years of imprisonment anyone who (1) assaults any other person at will, with execrable circumstances (随意殴打他人，情节恶劣的); (2) chases, intercepts, reviles or intimidates any other person, with execrable circumstances (追逐、拦截、辱骂、恐吓他人，情节恶劣的); (3) takes or demands forcibly or vandalizes or occupies at will public or private property, with serious circumstances (强拿硬要或者任意损毁、占用公私财物，情节严重的); or (4) makes trouble in a public place, which causes a serious disorder of the public place. For the ringleaders of a repeated action, the punishment can be up to 10 years of imprisonment.

The seriousness of circumstances seems to be the only criteria which allows the police to distinguish between criminal and administrative offences. The question naturally arises: who should decide whether the circumstances are serious enough to warrant the application of criminal sanctions? One would expect the police to do that, but in most cases, there is a binding interpretation issued jointly by the Supreme Court (SPC) and the Supreme People's Procuratorate that attempts to define more precisely the seriousness of the circumstances to initiate the criminal rather than the administrative procedure. These interpretations remind more the acts of legislation. They are general, compulsory, and are not bound to the circumstances of a particular

court's case.[100] The number of those interpretations is very significant, and one police officer acknowledged that it is unlikely that each policeman as well as an ordinary citizen would be familiar with most of them.

"It is reported that by the end of 2013, the SPC had issued 3,351 judicial interpretations and opinions on judicial guidance. Statistics show that by March 2011, the number of valid, existing laws enacted by the NPC and its Standing Committee was 239, and the number of valid, existing administrative regulations promulgated by the State Council was over 690. The number of judicial interpretations seems to be greater than of the laws and administrative regulations."[101]

In relation to Article 293 of the Criminal Law, there is the "*Interpretation of the Supreme People's Court and the Supreme People's Procuratorate on Several Issues concerning the Application of Laws in Handling Criminal Cases of Provocative Trouble*"[102] issued by the Supreme People's Court's 1579th meeting on May 27, 2013, and by the Supreme People's Procuratorate on April 28, 2013 with the effect on July 22, 2013. Article 5 of this interpretation deals specifically with the trouble made in a public place and which causes a serious disorder of the public place. It provides for the police only a general guidance in assessing whether the crime has taken place or not. The police has to take into account the nature of the public place, the importance of the public activities, the number of people being present, time, and the actual impact of the trouble. The police are required to make a comprehensive judgment as to whether it "causes a serious disorder of the public place."

The way how the Interpretation describes execrable circumstances mentioned in Article 293 of the *Criminal Law* quoted above is noteworthy. Article 2 of the Interpretation states: Assaulting others at will and disrupting social order under any of the following circumstances shall be regarded as "execrable circumstances" as stipulated in the first paragraph of Article 293 of the Criminal Law: (1) causing minor injuries (轻伤) to more than one person or trifling injuries (轻微伤) to more than two

persons; (2) causing others to have mental disorders, commit suicide, or causing other serious consequences; (3) repeatedly beating others at will; (4) beating others at will with a weapon that can kill; (5) beating mental patients, the disabled, homeless beggars, the elderly, pregnant women, and minors at will with causing a bad social impact; (6) beating others at will in public places, causing there a serious disorder; (7) other situations with bad circumstances.

Two things are remarkable in this interpretation. The first is that despite the attempt to clarify the content of the criminal offence of assaulting others at will, it introduces other terms that require further interpretation. For example, there is a need to explain the difference between a minor injury and a trifling injury. The Interpretation does not have any reference to other legal materials where the difference may be explained. The second is that the lists of the examples is not exhaustive. It is obvious that the police retain much discretion in determining whether or not there is a case of "causing other serious consequences to victims", "causing a serious public disorder in a public place", "causing a bad social impact", or whether there are "other situations with execrable circumstances."

Theft is one of the most common offences, which is punished both by administrative and criminal law. Article 49 of *Public Security Administrative Penalties Law* defines *administrative* offence of theft as following: "a person who steals, defrauds, forcibly seizes, openly robs, racketeers or intentionally destroys public or private property shall be detained for not less than 5 days but not more than 10 days and may, in addition, be fined not more than 500 yuan; and if the circumstances are relatively serious, he shall be detained for not less than 10 days but not more than 15 days and may, in addition, be fined not more than 1,000 yuan." Article 264 of the *Criminal Law* defines *criminal* offence of theft as following:

"Whoever steals a relatively large amount of public or private property, commits thefts many times, commits a burglary or carries a lethal weapon to steal

or pick pockets shall be sentenced to imprisonment of not more than 3 years, criminal detention or control and/or a fine; if the amount involved is huge or there is any other serious circumstance, shall be sentenced to imprisonment of not less than 3 years but not more than 10 years and a fine; or if the amount involved is especially huge or there is any other especially serious circumstance, shall be sentenced to imprisonment of not less than 10 years or life imprisonment and a fine or forfeiture of property."

It is apparent that the main difference between administrative theft, fraud, snatching and robbery on the one hand and criminal theft, fraud, snatching and robbery on the other hand is the value of the illegally obtained goods, although there can be some other aggravating circumstances which justify an imposition of a criminal law sanction. Similarly to other administrative and criminal offences, the People's Supreme Court was obliged to issue a binding interpretation to specify the line between the administrative and the criminal offence of theft, fraud, snatching and robbery.[103] Some interviewed police officers claimed that this interpretation as well as accompanied local interpretations leave very little space for the police discretion. According to Article 1 of the Interpretation, the threshold of criminal liability for theft is set at the amount between 1000 and 3000 Yuan. The exact amount is given to local authorities to specify depending on their local circumstances. However, Article 2 of the Interpretation gives the power to initiate criminal proceedings if the amount of theft is 50% of the prescribed level in a number of circumstances. They are as following: if the offender:

(1) has been criminally punished for theft before;

(2) received administrative punishment for theft within a previous year;

(3) organized and controlled the theft committed by minors;

(4) committed theft following natural disasters, accidents, or social security events;

(5) stole property from a disabled or a lonely elderly person;

(6) stole property from a patient or his relatives in a hospital;

(7) stole property directed for a disaster relief, emergency rescue, flood control, preferential treatment, poverty alleviation;

(8) caused serious consequences by theft.

Certainly, the last exception gives significant discretion for the police to initiate criminal proceedings in cases which can be dealt only administratively. At the same time, the Interpretation allows the police to apply only administrative sanctions or not to initiate any proceedings against theft in a number of situations. Article 7 states that even if the stolen amount of property is large, the offender may be not punished at all, or punished only by an administrative penalty. There are two layers of conditions for exempting an offender from criminal liability. The first is that the perpetrator must confess his crime, repent (悔罪), return the stolen goods, and pay compensation. The second is that exemption is permitted only if the circumstances are minor, under the following conditions: "(1) a mitigating circumstance is determined by law; (2) an offender have not shared or shared little in stolen goods and is not the principal offender; (3) the victim forgives; (4) other circumstances are minor and not harmful." Further, Article 8 gives discretion not to prosecute those who stole from relatives, if the latter forgive. If criminal proceedings are initiated, the punishment must be lenient.

Thus, even though there appear to be financial thresholds to separate the administrative offence of theft from its criminal counterpart, the police possesses a significant discretion in those criminal cases whose circumstances can be interpreted as minor and not harmful in order not to initiate criminal proceedings, or initiate criminal proceedings in the administrative cases in which an act of theft caused serious consequences.

From this brief treatment of the content of some common overlapping criminal and administrative offences, one can conclude that Chinese law has to admit a very broad leeway for the discretion of police in classifying a particular act as a criminal or as an administrative delict. It is also certain that this discretion is not unlimited, and there are some binding regulations which guide the police in their legal determinations. Considering the amount of those regulations and also the abstract language which they often employ, there is an obvious need for a clearer and more comprehensive principle that informs the police decision-making. I will argue in the following section that the dominant principle is social harmony.

Social Harmony

It is true that social harmony may not always be a guiding principle which directs the discretion of police in China. For example, during the Cultural Revolution, the class struggle determined the policies of law enforcement, although some would argue that at that time there was no law but lawlessness to enforce.[104] Cultural Revolution was short-lived, but social harmony is a part of the tradition which continues to persist.[105] The overall importance of the concept of harmony in the Far-Eastern legal culture has been well discussed since the time of Takeyoshi Kawashima, a prominent Japanese legal scholar of the twentieth century.[106] Since that time, the role and the place of social harmony in policing China became a yielding field of research.[107] Since 2004, social harmony has "developed into a fundamental value of the modern Chinese legal system,"[108] even though Sarah Biddulph, Elisa Nesossi and Susan Trevaskes[109] argued that the recent reforms under Xi Jinping had shifted this policy. "Governing the Nation in Accordance with the Law" gives preference to a strict abidance by legal rules rather than to a flexible search of social harmony. There is evidence that social harmony affects the process of determining whether a public offence constitutes a crime or an administrative delict. Qi Chen, in his recent

work, gave examples when prosecutors and judges manipulated the law to impose a lighter penalty or no penalty at all if there was a social pressure for imposing no punishment.[110] He quotes the words of a prosecutor: "nowadays the first priority for us is to 'maintain social harmony' (weiwen). The government does not care about the law or the trial, it only wants social stability. In criminal cases, as long as the victim is happy, the public is happy, and nobody makes a fuss on the media, we are ok here."[111]

Whatever the impact of the recent legal policies is, there are many indications that the concept of social harmony has been deeply enshrined not only in the practices of the police[112] but also in the legislation that directly affects police work. The rules may not always be clear, as in the case of administrative mediation,[113] and the legislative provisions can be declarative. For example, *Public Security Administrative Penalties Law of the People's Republic of China 2005, 2012,* Article 6 states that "People's governments at various levels shall make comprehensive improvement of public security and take effective measures to dissolve social contradictions, enhance social harmony and maintain social stability." Few years later, the State Council of the PRC issued a white paper on the Socialist Legal System with Chinese Characteristics.[114] One of the main ideas of this document is that social harmony remains a fundamental goal of the Chinese law.

The concept of social harmony is not explicitly mentioned in another important piece of legislation: the *People's Police Law of the People's Republic of China* (1995, 2012).[115] Nevertheless, there are several provisions of this law which are relevant. For example, Article 3 of the law states: "People's policemen must rely on the support of the masses, keep close ties with them, listen attentively to their comments and suggestions, accept their supervision, safeguard their interests, and serve them whole-heartedly." Article 20 of the same law requires from the police officers to play "an exemplary role in observing social ethics" (模范遵守社会公德),

to “be courteous and polite in performing duties” (礼貌待人，文明执), and to show respect for the customs and habits of the masses (尊重人民群众的风俗习惯).

Some of the interviewed members of the public in China thought about all these requirements as a mere propaganda. To find out the view of Chinese police, the author approached the senior teaching staff in the Yunnan Police Academy where he was also teaching around 10 years ago and since that time continued to keep both friendly and working relationships. The Yunnan Police Academy is one of the few Chinese institutions that trains a higher rank of Chinese police. The interviewed senior teaching staff are high rank police officers themselves who are in a constant contact with various levels of police through ordinary graduate courses, and also through post graduate training courses for the working police officers. The views of the Yunnan Police Academy officers concerning the requirements of Article 20 of the Police law are briefly summarized below.

Police’ View of their Ethical Role (Summary)

There is a difference between social ethics (公德) and individual ethics (私德). Social ethics or public morality consists of behavioral standards (行为规范) accepted by the society on what should or should not be done. These standards come from the agreement of the people or accepted customs that are beneficial for the society. They are accumulated in the society during a long period of historical and cultural development. They appear as moral rules (道德准则), cultural concepts (文化观念), and ideological tradition (思想传统). Its function is to hold together public life and to regulate relationship between people. In contrast, individual ethics, or private morality, refers to moral standards and habits which belong to a private life of a particular individual. It is a requirement that Chinese policemen should show set an example how to observe public morality or social ethics by their own action. The words and actions of the police play a strong exemplary role (示范作用). Chinese

police have a duty not only to be good practitioners of social cultural norms, they also must be their good communicators (传播者). Being a good example in observing social ethics has several dimensions. At work, a police officer has to be loyal to his duty, to deny himself for the interests of the society (克己奉公), and serve people. In his life, he must ardently love (热爱) his motherland, work honestly, keep his promises, and treat others with sincerity. In dealing with people, a police officer must show respect, care with love (关爱), ready to help others, harmonious (和睦) and friendly.

Being harmonious has 4 different dimension: the interactive dimension: how police should relate to people; the emotive dimension: with what sense the police should perform their tasks; normative aspect: the emphasis is made here on the strict following the rules; and finally, the fairness aspect with its emphasis on impartiality. For the interactive dimension, there are strict requirements for the Chinese police concerning their dress code and behavior when they are called. They must act quickly, but also in a strict and tidy manner. When arriving at the scene, they must display the characteristics of being reasonable, gentle, polite, and consistent with the standard law enforcement. For the emotive dimension, the police officers must serve people with warmth and enthusiasm (热情). They must learn appropriate language skills. When receiving people, they must be warm and attentive, use polite language (用语文明), and treat people with propriety (礼貌). Such treatment must be afforded to everyone. Sincerity and earnestness are required in all situations. The police must be patient in answering people's questions and earnest in recording people's complaints. In normative dimension, there is a more increasing emphasis on a strict application of law. When receiving a report of an offence from people, there is a duty to hear with earnestness, to inquire carefully to obtain full and complete facts of the offence, to quickly investigate and verify the information, and enforce law with strictness, justice, and politeness. The police are expected to work hard in raising the sense of security among people and their trust in administration of justice. The

fairness aspect is considered through the perspective of impartiality (秉公). It is considered closely with such moral requirements as patience, meticulousness, and the principle of having an appropriate way to solve conflicts (化解有方的原则). The conflicts must be resolved at the earliest possible stage. In solving conflicts, the police has to take into account the attitudes of people. They must be unbiased and do not follow their own affections.

Interpreting the Police Attitudes

This short summery of the Chinese police view on the role of social ethics in their work indicates the important framework which defines and limits the use of discretion by the Chinese police. The police will use their powers in such a way as to enhance and promote trust to their work among the Chinese public. The language used by the interviewed Chinese police officers is full of linguistics concepts which have thousand years of use in the Chinese ethical tradition. The analysis of these concepts would lead us far from the narrow topic of police discretion in criminal and administrative cases. However, understanding the conceptual framework of Chinese police will be incomplete without the realization that their very thought is moved within certain 'Chinese cultural prototypes'.[116] For example, in the concept of police credibility or trust, the interviewed used the term 信力, literally "the power of faith", which is a term originating in the Buddhist tradition. Jiang Zong (江总), a poet of Chen Dynasty (557-589 AD), wrote on the stele of Qixia Temple on She Mountain (摄山栖霞寺碑): "develop wisdom, power of faith and understanding, let each abandon (its) spring shell, and together they will be the cause of blessing."[117] A famous calligrapher Li Yong (李邕) of Tang Dynasty wrote in the introduction to the stele of Guoqing Temple (国清寺碑序): "upholding law supports good deeds done in secret, while the power of faith rectifies the hidden destiny".[118] Of course, it is very unlikely that the Chinese police would have ancient poets and calligraphers in mind when using their

discretion to solve the problems of the present China. The point here is that the language employed by the Chinese police is *not* ethically neutral. It carries along the richness of the Chinese moral tradition.

There are certainly new concepts employed by the police which may not be found in traditional ethics. For example, the police officers mentioned the respect for individual autonomy (自主权) when commenting on the duty of police to respect customs and habits of the masses. Even then, the autonomy was treated as depending on the principle of equality and unity (团结) among the rights and interests of people. The interviewed police meant that someone's customs and habits cannot be treated by a police officer on the basis of his one own individual likes and dislikes. There must be a balance between customs and habits of people on the one hand and the administration of law on the other which has to be carried out according to law and reason (依法依理). The latter appeal to reason is noteworthy, because this term in the Confucian tradition sometimes means *harmony*.[119]

Mediation

In practice, Chinese police strive for the goal of social harmony often by means of mediation. According to Article 21 of *People's Police Law,* Chinese policemen must perform the duty to help citizens in settling their disputes. Remarkably, mediation is used by the police not only in administrative cases, but also in criminal cases. This topic has been considered in a number of writing.[120] Considering the scope of this paper, it is appropriate to look only at one particular issue: whether a successful mediation affect the discretion of police in initiating criminal or administrative proceedings.

The interviewed policemen in Yunnan acknowledged that there are many disputes among people. However, some police officers expressed the view that the role of direct police mediation is decreasing leaving this task to civil mediation and

people's local organization mediation that help people to resolve their disputes. In any case, mediation is perceived as not only and not a main form of settling disputes involving Chinese police. Police is involved in both criminal and administrative processes of mediation, but, according to the interviewed Police Academy lecturers, the involvement in criminal process mediation is largely limited to the police actions to investigate crime and collect evidence which is used later by prosecution and court in deciding disputes between offenders and their victims. In this type of disputes, the role of police is indirect. A more direct role takes place in administrative process, in which the police assists people to settle their disputes by means of licensing proceedings, administrative penalty proceedings, enforcement measures and issuing administrative confirmations.

Police mediation is permitted in the process of imposing an administrative penalty. Article 9 of the *Public Security Administrative Penalties Law of the People's Republic of China 2005, 2012* states: "In respect of acts against the administration of public security, such as brawling and damaging or destroying another person's property, which are caused by civil disputes, if the circumstances are relatively minor, the public security organ may dispose of them through mediation. Where the parties concerned reach an agreement through mediation by the public security organ, no penalties shall be imposed. Where no agreement is reached through mediation or the agreement, although reached, is not executed, the public security organ shall, in accordance with the provisions of this Law, impose penalties upon the persons committing the acts against the administration of public security and notify the parties concerned that they may, according to law, bring a civil action before a people's court in respect of the civil disputes."

I was unable to obtain reliable information on whether the willingness of an offender and his victim to go through mediation procedure affects the decision to initiate criminal or administrative proceedings. When discussing this topic, the interviewed police officers denied the fact that they have such a discretion at all.

Some even affirmed that the law is largely clear when to impose a criminal sanction and when an administrative penalty. According to this view, the application of law has become rather mechanical. They acknowledged that in the recent past, the police had indeed discretionary power, but the recent legal developments have reduced it to minimum if not completely obliterated. This is unlikely true considering the content of related criminal and administrative laws, but it indicates an important shift in the police mind away from a proactive search of social harmony towards an, at least, outward compliance with the regulations in conformity with the higher levels of Chinese government.

At least one surprise came out from the conversations with the police officers in Yunnan. When discussing one of the key-legislative acts, the *Administrative Penalty Law of the People's Republic of China 1996, 2017 (*中华人民共和国行政处罚法),[121] one senior police officer thought it to be a regulation (条例). This was an apparent mistake as the *Law of the People's Republic of China on Administrative Penalty* is not a regulation in a legal sense. However, the mistake is noteworthy, because as many interviewed police officers indicated, this law has very little direct impact on the daily work of many police officers. They act under specific administrative regulations and are hardly familiar with the precise content of this law since it does not contain rules covering specific administrative offences. Those rules are generally issued by the State Council or by the highest administrative organ of the local people's congresses.

Administrative Penalty Law of the People's Republic of China 1996, 2017

It is appropriate to diverge a little from the topic of discretion in initiating criminal or administrative sanctions to explain the role and importance of *Administrative Penalty Law of the People's Republic of China 1996, 2017.* This legislation has received so far a limited academic attention.[122] As it has been mentioned above, it does not contain a specific list of administrative offences and

penalties, and therefore it is not well known by the Chinese police. It is an 'umbrella' law which has a constitutional importance. It contains some principles which inform the whole process of imposition of administrative penalties, describes types and creation of administrative penalty, indicates organs imposing administrative penalty, outlines jurisdiction and application of administrative penalty, and explains the procedure of taking decision on an administrative penalty and its enforcement.

Two principles are fundamental in using discretion: fairness and openness (公正、公开的原则).[123] The failure to comply with these principles renders any use of administrative discretion unlawful. They relate closely to one another. As one professor from Yunnan Police Academy put it succinctly: fairness is the foundation (基础) of justice, and openness is its embodiment (体现). In the view of this professor, the reason for openness is rather pragmatic. It helps to ensure that there are no illicit activities and that the justice is done.

The Chinese law on administrative offences moves from flexibility to a greater rigidity. Many interviewed Chinese policemen, when asked about discretion, kept repeating that they must strictly apply regulations. When inquiring into details of those regulations, the prescribed administrative penalty procedures were the most common examples. These procedures do not abrogate discretion but impose important safeguards for the legality and reasonableness of administrative decisions. The principle of openness particularly applies to the requirement that the police officer who imposes a penalty, must identify himself. The facts on which the penalty is based and the reasons must be also disclosed. The normative acts according to which an administrative penalty applies, must be publicly available (Article 4(3) of the law). An affected person must be informed about the results of an administrative process as well as the availability of legal remedies. These basic administrative procedural rules are beneficial not only to the directly affected person, but also to the general public and the supervisory organs.

A very important provision is contained in Article 3(2) of the same law: “Administrative penalty that is not imposed in accordance with law or in compliance with legal procedures shall be invalid.” Therefore, violation of the above disclosed procedures will result in invalid administrative penalties. The invalidation of the penalty is normally done by the supervisory administrative authority, but it is also can be done by judicial proceedings. According to Article 6 of the law: “citizens, legal persons and other organizations on whom administrative penalty is imposed by administration organs shall have the right to state their cases and the right to defend themselves; those who refuse to accept administrative penalty shall have the right to apply for administrative reconsideration or bring an administrative lawsuit in accordance with law.”

It would be a mistake to think of this law as a mere transplantation of the Western rules to guard citizens from the abuse of administrative powers. The influence is certainly prominent, but the Chinese characteristics are not lacking. Article 5 of the Statute requires from the Chinese police to combine penalty with education, “so that citizens, legal persons and other organizations shall become aware of the importance of observing law.” In other words, Chinese police undertake the role of educators. The senior teaching staff of Yunnan Police Academy acknowledged that this emphasis on educational function of the police constitutes a unique characteristic of Chinese legal system. Administrative punishment is perceived not simply as a tool to achieve social compliance with the commands of the state, but as the means to educate the offender and the public so that unlawful behavior will be prevented and stopped. The role of a Chinese policeman is ‘parental’. Administrative penalty is aimed at the good of the offender in particular and the public in general. Education is the basis and purpose of administrative punishment. One Chinese police officer expressed this thought in a rather declarative manner: “Punishment is the means and a guarantor of education! The two complement each other and cannot exist without each other.”

Whether education will always need punishment as its guarantor, is a matter of educational philosophy. The life of Chinese police is often more prosaic and directed by the procedures which have an educational impact quite independently from the philosophical views of the police. These procedures require that the police should inform the person who is subject to a penalty of the facts, reasons and the legal basis of the administrative penalty before its actual imposition.[124] It is called the notification procedure (告知程序). During this procedure, the police informs the concerned person about the relevant facts, reasons, and legal grounds for imposition of an administrative penalty. In other words, imposition of administrative penalty has a communicative value. The Chinese police are expected to persuade and educate (说服教育). They must appeal to reasoning as well as emotion (晓之以理，动之以情) while explaining the law. According to the provisions of the Law on Administrative Penalty,[125] there is a duty to hear the statements and explanation made by an administrative offender before any administrative penalty is imposed. The intended penalty must be reexamined after the completion of the hearing taking into consideration new information obtained from the statements and explanations of the offender.

When an offender is subject to an administrative penalty, he can appeal for a court review or to a higher administrative agency to review the fairness of the imposed penalty.[126] This procedure adopts an adversarial form (争辩的方式). It is perceived by the Chinese police not so much an essential safeguard against the abuse of administrative powers, as an educational experience during which the parties enrich their experience of knowing, understanding, and keeping the law (知法、懂法、守法). The judicial proceedings are open to the public. People can attend the court's proceedings and learn through observing the process. An interviewed police officer concluded: "court's cases provide another way to combine punishment with education. The public is informed concerning the behavior which is permitted and

which is not. Raising awareness of the public through case reporting is important for ensuring the compliance with law."

If administrative penalty is an educational measure, one would expect that the penalty should be meted out according to the educational needs of the offender. It is also possible that some offences are incidental and should be forgiven. Forgiveness, however, has been mentioned neither in the text of the Statute nor by the interviewed experts of Yunnan Police Academy. Article 27 of this Statute gives the power to the police to give a lighter or mitigated administrative penalty. It states:

A party shall be given a lighter or mitigated administrative penalty in accordance with law, if: (1) he has taken the initiative to eliminate or lessen the harmful consequences occasioned by his illegal act; (2) he has been coerced by another to commit the illegal act; (3) he has performed meritorious deeds when working in coordination with administrative organs to investigate violations of law; or (4) he is under other circumstances for which he shall be given a lighter or mitigated administrative penalty in accordance with law. Where a person commits a minor illegal act, promptly puts it right and causes no harmful consequences, no administrative penalty shall be imposed on him.

Other circumstances mentioned in this article are contained in the *Public Security Administrative Penalties Law 2005, 2012*. Article 12 requires that an administrative penalty must be lighter for the minor offenders who reach 10 years but not 18 years of age. Article 14 allows to the police to lower penalty or not to impose at all on blind and deaf people. Article 19 is of a particular interest: "The penalty to be imposed on a person who commits an act against the administration of public security shall be mitigated, or no penalty shall be imposed on him, under one of the following circumstances: (1) The adverse effects are extremely minor; (2) The person takes the initiative to remove or lessen the adverse effects, and gains the victim's forgiveness (谅解); (3) The act is committed under the coercion or luring by

another person; (4) The person surrenders himself to the police and truthfully states his illegal act to the public security organ; or (5) The person has performed meritorious service (立功). The *Public Security Administrative Penalties Law,* unlike *Administrative Penalty Law of the People's Republic of China*, mentions forgiveness of a victim as a condition for mitigating the penalty or not imposing penalty at all. Other conditions for mitigating an administrative penalty are similar in both pieces of legislation.

The *Administrative Penalty Law of the People's Republic of China* is less known by ordinary policemen than the more commonly applied *Public Security Administrative Penalties Law.* It does not mean that its provisions do not operate at all. The law is handed down by the channel of multiple administrative instructions from the top to the bottom. It is certainly an important development of Chinese administrative law. However, the real life is animated by different spirit than the unselfish desire to ensure fairness and openness of the procedures of imposing administrative penalties. Most police officers are now more concerned about the system of law enforcement quality assessment (执法质量考核考评制度).[127] There are other influences on administrative discretion which neither the law nor the interviewed police officers mentioned – e.g., the influence of the Communist party on administrative decisions. There is evidence that the Communist Party remains the most powerful force that control the activity of law enforcement agencies.[128]

The law does not directly address the problem of inappropriate choice of administrative proceedings, instead of criminal proceedings. An administrative organ has to make a choice between 4 options in dealing with an offender: "After an investigation has been concluded, leading members of an administrative organ shall examine the results of the investigation and make the following decisions in light of different circumstances: (1) to impose administrative penalty where an illegal act has really been committed and for which administrative penalty should be imposed, in light of the seriousness and the specific circumstances of the case; (2) to

impose no administrative penalty where an illegal act is minor and which may be exempted from administrative penalty according to law; (3) to impose no administrative penalty where the facts about an illegal act are not established; or (4) to transfer the case to a judicial organ where an illegal act constitutes a crime."[129]

As it has been indicated in the previous sections, the police retain significant discretion in evaluation of seriousness of circumstances when determining whether to follow administrative proceedings or to initiate criminal process. However, the law demands from the police to draw a clear line between crime and administrative offence: "where an illegal act constitutes a crime, criminal responsibility shall be investigated in accordance with law; no administrative penalty shall be imposed in place of criminal penalty."[130] "If an illegal act constitutes a crime, the administrative organ must transfer the case to a judicial organ for investigation of criminal responsibility according to law."[131] It must be clarified here that the word "judicial organ" (司法机关) includes not only courts, but also procuratorates and the police which investigates crime.[132] This unity of the courts, procuratorate organs and the police is reflected in Article 135 of the Constitution of the PRC: "The people's courts, the people's procuratorates and the public security organs shall, in handling criminal cases, divide their functions, each taking responsibility for its own work, and they shall coordinate their efforts and check each other to ensure the correct and effective enforcement of law."

It is possible that a person receives an administrative penalty first and later faces criminal proceedings despite the legal provisions of Article 7 and Article 22 quoted above. "If an illegal act constitutes a crime, for which a People's Court sentences the offender to criminal detention or fixed-term imprisonment, and if an administrative organ has already imposed administrative detention on him, the length of detention shall be made the same as the term of imprisonment in accordance with law. If an illegal act constitutes a crime, for which a People's Court imposes

a fine on the party, and if an administrative organ has already done so, the amount of the fine imposed by the latter shall be made the same as that by the former."[133]

The lawgiver clearly understood the danger that the police would prefer administrative sanctions rather than labeling offences as crimes: "If administrative organs, for the purpose of seeking departmental gain (单位私利), do not transfer cases to judicial organs for investigation of criminal responsibility as they should do in accordance with law but impose administrative penalty in place of criminal penalty, the administrative organs at higher levels or relevant departments shall order them to make correction; if they refuse to do so, administrative sanctions shall be imposed upon the persons who are directly in charge; persons who practice irregularities for personal gain, cover up or connive at violations of law shall be investigated for criminal responsibility by applying mutatis mutandis the provisions of Article 188 of the Criminal Law."[134] It is noteworthy, that there is not a corresponding provision to the cases when the police wrongfully chooses to initiate criminal proceedings. In other words, the law threatens a lenient police officer, not the harsh one.

It appears that the control over the use of police discretion is largely given to the administrative organs of higher level. Some relevant departments are mentioned but not clearly designated. One would expect the procuratorates to be those departments, since they are defined by the Constitution, as the organ for legal supervision,[135] and they exercise control over the decision of police to initiate criminal or administrative proceedings. According to *Organic Law of the People's Procuratorates of the People's Republic of China* 1979, 1983, Article 5(3), the procuratorate has the function and power "to review cases investigated by public security organs and determine whether to approve arrest, to prosecute or to exempt from prosecution; and to exercise supervision over the investigatory activities of public security organs, to determine whether they conform to law."[136] Further, according to Article 6 of the same law, "People's procuratorates shall, in accordance

with law, protect the citizens' right to lodge complaints against State functionaries who break law and shall investigate the legal responsibility of those persons who infringe upon other citizens' right of the person, and their democratic and other rights."

The *Administrative Penalty Law of the People's Republic of China,* does not mention the procuratorates at all. It appears that its primary goal was not so much to establish an effective system of control over the use of administrative discretion as to create the image of the police acting strictly within the limits of law. Its insignificant value in the sight of the police officers in Yunnan has been discovered by the author rather accidently. A number of police officers, when asked about the content of this law, were unaware of the fact of its very existence. They certainly preferred to discuss a more useful piece of legislation: the *Public Security Administrative Penalties Law.*

Evidence and Social Harmony

The *Administrative Penalty Law of the People's Republic of China* is affirming that the police is under the duty to distinguish clearly between criminal and administrative offences. The distinction must be established on the basis of collecting all appropriate evidence. The law requires that "administrative organs, when discovering that citizens, legal persons or other organizations have committed acts for which administrative penalty should be imposed according to law, shall conduct investigation in a comprehensive, objective and just manner and collect relevant evidence; when necessary, they may conduct inspection in accordance with the provisions of laws and regulations."[137] What is comprehensive, objective and just will largely depend on the perceptions of the police. Some procedural safeguards for objectivity can be seen in the rules that "when administrative organs conduct

investigations or inspections, there shall be not less than two law-enforcing officers," and that "written record shall be made for the inquiry or inspection."[138]

Witnesses and suspected offenders do not enjoy the right to be silent. They "shall truthfully answer the questions and assist in the investigation or inspection; they may not obstruct such investigation or inspection."[139] It is obvious that collecting reliable evidence can hardly be done without trust between the police and the witnesses. In this sense, social harmony is not only the end of administrative process, it is also its precondition. One peculiarity of Chinese police is that one of its units is closely attached to a local community, and the police officer of that unit has to integrate and familiarize himself with the local affairs. The knowledge of people is vital for the assessment of the reliability and trustworthiness of the evidence they provide. In an adversarial system, the trustworthiness and reliability of the witnesses is proven by cross-examination which may be intrusive and aggressive for those who are subjected to it. The inquisitorial system of China is certainly devoid of this painful procedure. The procedure for administrative offences is less regulated than in criminal cases, and the way how evidence is gathered is less formalized. This is exactly the point where a just administrative penalty depends on the information and knowledge of the witnesses. Police officers have to judge whether a witness is reliable or not.

One important aspect tends to be overlooked by the contemporary experts of procedural law, except those writings which deal specifically with admissibility of evidence.[140] It is the link between evidence and moral character.[141] One interviewed police officer in Kunming thought of this link as the most important in his work. An evidence from a man of integrity would be accepted by him with a greater trust than from a person known as a liar. Establishing the link between moral integrity of a witness and the trustworthiness of his evidence is easier to achieve in an administrative process than in the criminal one because the criminal procedure contains stricter rules for admissibility of evidence, and there is a greater emphasis

on its formal expression. In contrast, an administrative procedure is much less formal, and the rules on admissibility are not stringent. Ideally, the relationship between the police and informants are based on trust and on pursuing a common goal. In real life, a true information can be given by an informant of not a high moral standing. The financial motives, fear, selfish ambition may all be a strong motive to provide information to the police. However, there are people in China who cooperate with the police for moral reasons. They do it to achieve social harmony.

A Chinese traditional medicine doctor, Mr Cai, had worked many years as a community police officer in Yunnan before he decided to devote his life to practicing Chinese traditional medicine. The fact that he is not any more a police office, gave him more freedom to express his views on the working of Chinese police to promote social harmony. He confessed that as a police officer he could not know well the content of all administrative regulations passed by the central or local governments. There were too many of them. However, according to him, that did not affect the quality of his or his colleagues' work. They followed not so much specific rules as general principles.

Dr. Cai distinguished 4 principles that had guided his daily work with witnesses, victims and offenders. Firstly, it was *gong* 公. It has a variety of meanings including the requirement of being just (公正), being fair (公平), being open (公开), and meeting the public trust of the people (公众). Secondly, it was *xu* 序, which means to follow the traditional, national, social, and familial orders of China. The third principle was *liang* 良, which means not to violate the principle of being kind, and not to make a partial decision on the basis of selfishness. Dr. Cai explained this principle similarly to the Aristotelian concept of equity that moderates the application of strict justice.[142] For example, when a thief stole something from a supermarket, he would take into consideration the underlying reasons for this behavior. The police action would be different in the situations when the act of theft was motivated by poverty and when it was driven by the desire to satisfy one's desires in an illegal way. In the first case,

he might even try to help the family members to come out of trouble. The last principle was *su* 俗, which means the conventional folk and ethnic customs. For example, carrying knife in public is an administrative offence, but according to Dr. Cai, the police tolerated the practice for some ethnic groups, such as, Jingpo people, who regard it as a very important token of their ethnic identity. This principle also apples to the acts normally prohibited for the police. Drinking during working time is forbidden for a policeman, but on certain occasions such as wedding, funeral, or important ethnic festivals, there could be exceptions. Tattoo is also not allowed for a Chinese policeman, but this could be flexible for Tibetan and Dai policemen. Concrete examples could be various and numerous.

These four principles were used not only to guide the conscience of Chinese police officers, but also to evaluate their work. They gave Dr. Cai flexibility in dealing with offenders, victims, and witnesses depending on a situation. Dr. Cai acknowledged that the situation in the police work had changed since he resigned. He said: "Nowadays, following regulations strictly is more and more emphasized. In many cases, it is a good thing to handle problems according to precise rules. But it could also become rigid and ignore 'human feelings.' For example, a community police officer must have a good relationship with the members of the community in order to perform his duties well. Therefore, participating in weddings, funerals, etc. is a part of the officer's work. However, there are now regulations that restrict policemen to engage with local people. You don't even know whether to accept or refuse when an ordinary person invites you for a meal."

This significant change in the police work has been reflected in many informal conversations with the police officers in Yunnan. The general trend of police work is its increased regulation and detailed control from the government. More specific rules are issued, and the police have to go through a rigid system of evaluation. It affects the effective handling of evidence in administrative and criminal proceedings. The time will show whether this policy is sustainable but the overall

impression that comes from the direct contact with the police in Yunnan is that the public trust towards the police is diminishing in China.[143] The recent developments in China in the light of the coronavirus infection seems to support this conclusion. As Yu Jie commented: "For decades, local governments have made things happen in China. But with tighter regulation of lower-level bureaucrats, civil servants across the system now seem less ready, and able, to provide their input, making ineffective and even mistaken policy more likely."[144]

Conclusion

The existence of two systems of liability for committing public wrongs in China creates the problem of their demarcation. Even though there are attempts to draw a clear line between administrative and criminal offences, there is a large grey area in which the police inevitably has a significant discretion to choose which system of liability to apply. The seriousness of a public offence is accepted in China as the fundamental principle to distinguish the criminal from the administrative offences. In order to make the both systems of liability function well, there must be clear standards to define and measure the seriousness of offences. China oscillates between two alternative policies in defining those standards. The first is to measure the seriousness of offences from the point of view of their impact on social harmony. This policy requires a significant degree of discretion of the police which has to be proactive in identifying and solving social contradictions. The second policy is to give specific descriptions of seriousness for each kind of offence that warrants an application of criminal law. Under this policy, the police must strictly follow those descriptions.

The recent years have seen the official preference for the second policy. The proliferation of the official interpretations issued jointly by the Supreme Court and the Procuratorate Office in some aspects complicate the work of the police. The attention of the police shifts from achieving social harmony in their districts to

a formal compliance with a vast amount of normative documents. The conducted interviews with the police officers in Yunnan indicate that the police is less willing to take a proactive role in defining the borders of criminal and administrative liability. There is an increased unwillingness of the police to play a mediating role in social disputes unless there is a direct duty in a form of a regulation that directly demands an official involvement. The pressure to follow the increased number of regulations weakens and obscures the general vision of social harmony. In a long term, this tendency will lead to a more formal and bureaucratic style of the police work that likely weaken the trust towards the police among the members of the public. The general impact of this tendency will have tremendous consequences on the country in which police is the essential part of social control.

CHAPTER III

PUBLIC SECURITY AND POLICE LAW IN CHINA

Introduction

Chinese police has been an object of a significant number of research works in English language.[145] Since China is a very dynamic country, many academic papers, even written recently, do not reflect the current situation. This paper aims at something more than providing a simple update on the recent status of Chinese police law. This study offers some insights in the role of Chinese police in the society. It affirms that China is a police state despite the argument to the contrary.[146] Police state is often incorrectly defined as "a government that exercises power arbitrarily through the power of the police" with the disregard for the rights of citizens.[147] The problem with this definition is not only that the idea of human rights in China is understood very differently from the Western liberal democracies. It also fails to describe in neutral terms a state in which the police is the principal instrument of government. China fits well into the description of a police state given by Brian Chapman.[148] Chinese state is based upon internal discipline and rigorous control. The population is made to be wholly obedient and responsive to the rulers of the state. According to Brian Chapman, a police state is different from the state with the rule of law which is characterized, among other things, by the existence of independent judiciary that has the effective power of judicial review over the police actions.[149]

I would go a little bit further in developing the concept of a police state by not necessarily binding its definition to the absence of judicial review. In fact, China

has a written law which allows citizens to challenge the acts of the police in a court.[150] It is, nevertheless, generally affirmed that China lacks independent judiciary.[151] The notion of an independent judiciary is a controversial topic often colored by the authors' political biases. Even if we admit that judicial review over the acts of Chinese police is not effective now, China may arrive at the situation when the courts are more proactive and yet the police remains the main form of the social control.

In this paper, I will attempt to outline briefly the 'police state' in China in neutral terms. Instead of approving or disapproving the claim that there is not an independent judiciary in China, which makes the latter a police state, I will argue that the police state in China is formed by the wide spectrum of social functions performed by the Chinese police rather than by the lack of the judicial review. China has an enormous police force which is well organized and managed.[152] "Estimates of police numbers range from a low 1.5 million to a hearty 4 million."[153] It plays a much greater role than police forces in many other countries. It is not only the extensive governmental control of ordinary citizens which makes China a police state. It is also the wide network of personal relationships between the police and the members of the Chinese public.

This network as well as the variety of functions has a single ultimate goal: public security. It is impossible to understand the whole of the Chinese legal system in its dynamic without taking into account the normative importance of the concept of public security. This concept is understood differently in China from the Western legal tradition. In the West, public security is one of the aspects of public order. The Western concept of public order is well described by a Russian philosopher Vladimir Solovyov more than a century ago.[154] For the Western thought, public order is a delineation of freedom of private individuals to act pursuing their own interests. It exists to secure the individual rights and liberties. In China, public order and public security are synonymous. Both express the condition for the stability, greatness and

prosperity of the Chinese nation. The idea of public order in the work of Chinese police is not simply an ideological slogan, it is an essential principle of the Chinese legal system which invigorates and innerves the work of the Chinese police. In order to perceive this work better, let us examine a routine work of an ordinary Chinese police station.

A routine work of a Chinese police station: a case study

A brief illustration of a daily work of a Chinese police station helps to understand the importance of the idea of public security in the Police Law of China. Jinbi police station is placed in the center of Kunming, the capital of Yunnan Province in China.[155] It has eight community police officers. They are responsible for providing security for the community of residents living in 300 apartment buildings. The area is also full of shops and hotels. There were 64 hotels in the police district at the time of the interview. The main responsibility of the community police is to carry put public security management. All police officers have a rich experience. Their task is much larger than reacting to administrative offences. They must be aware of what is happening in their community even up to small security concerns. The key-point of their work is building a good relationship with the community and local residences as well. This gives the community police a sense of accomplishment which also enhances the harmony and sustainability for the operation of the police-community management system. The police officers call their approach of local security management as "the policy of a more harmonious society."

In relation to administrative offences, this policy finds its expression in the zero tolerance tactics towards minor offences. It is claimed that this policy has been successful. The success is measured by the perception of local residents who feel more peaceful and secure. There is an increasing demand for the police to be more effective in communication with parties involved in minor conflicts and to be able to conduct successful mediation. The police feels compelled to resort to mediation in

dealing with minor offences, and to apply law, including court's proceedings, only if mediation fails. For example, during the procedure of dealing with minor conflicts, such as fighting without involving serious injuries, police officer allows the parties to make choice whether to adopt formal court process or simple mediation. Usually, court's proceedings are considered by the parties to be undesirable as they consume time, energy, and money. In contrast, simple mediation for minor social conflicts carries lower costs. In this way, the parties can make their own decisions being motivated by the desire to settle their dispute. The police can play an important role by providing suggestions how to settle the case and supporting the view of the parties whose demands they consider reasonable. The police also play the role of an educator as it informs the parties of the existing law (法律普及者). The effort is made not to substitute the consent of the parties with the police decision of the dispute. It is affirmed that this policy leads to a better adaptability in problem solving but also increases people's consciousness to abide by law. In addition, the relationship between the police officer and the parties is no longer tense due to the change of roles.

A good example is enforcing law in cases of noise that disturbs local residents. A local police station in Kunming receives many complaints about noise, and a lower rank of police finds them comparatively difficult to resolve. If police had to follow the prescribed procedures, there could be many obstacles in enforcing law, and tension in the community will likely persist. Therefore, in such cases, the police prefers to communicate with the parties to settle cases in a less formal way. Sometimes, it involves cooperation of different departments in enforcing law. For example, there was a recent case (May, 2019) of a pharmacist shop actively promoting sales by loudspeakers' advertisement. The residents that live nearby complained to the local police station. The police could not find an appropriate legal provision in *Public Security Administrative Penalties Law of the People's Republic of China* to deal with the advertiser. However, there were some environmental

regulations which could be used in those circumstances to impose a fine. The imposition of fine, however, was not within the powers of the local police but of an environment management authority. The police, in this case, acted as an intermediary between different parties involved including the offender and the environment management authority (环境管理部门). The police, apparently on the behalf of the environment management authority, issued a warning letter to the pharmacy threatening it with penalties unless it would desist from the disturbing advertisement. It monitored the situation and observed that the disturbing activity had indeed stopped.

In another case of a store using loudspeakers that disturbed local residents, the police went several times to the store to give advice but without a positive result. The police noticed that the store received regularly tourists brought by tour buses. The police contacted the local Tourist Administrative Department (TAD) as well as the Market and Municipal Administrative Bureau for Industry and Commerce (MABIC). The agencies applied a joint enforcement measure. A group of officials went to the store trying to persuade the manager to desist from disturbing activity. They also sent a warning letter. To avoid the conflict with the TAD, as its primary customers were tourists, the store stopped using the loudspeakers' advertisement method. These are typical cases showing how police works. The police tries to adapt to the situation by being flexible. They use Chinese traditional military strategy: finding the sensitive part of the enemy and exploit this weakness. These two cases indicate that the Chinese police have to employ experience and skills in communication, cooperation, etc. to successfully settle local disputes.

There are also cases of mental disorder. There are people with mental disorder, particularly those with violent inclinations, who can create danger to society. There was a case when people reported about a person with mental disorder who had violent behaviour. The police concluded that the offender needs medical treatment. At first, the family members of the person did not cooperate. According

to domestic rules on compulsory treatment of mentally ill people in a specialized institution, it is necessary to obtain consent of their family members. Police first contacted the family members and discovered the reason of their unwillingness to send the person to hospital: the family did not have money. Therefore, it was necessary to cooperate with the municipal organ (居委会 literally: neighborhood committee) which assisted in meeting financial costs of medical treatment in a specialized institution. The police acted in this case as an intermediary. The cooperation of the neighborhood committee was also needed to enter the residence in order to forcefully detain the person with a mental disorder. Thanks to this cooperation, the local community has a better sense of security.

The way how police manages social security and solves disputes has been greatly affected by the surveillance technology developments. Kunming Children's Hospital, which is a public management hot spot with intensive traffic and population, locates within the duty area of Jinbi police station. In order to improve the management efficiency, the police persuaded the manager of the hospital to invest money in installing electronic surveillance system. The detection rate of reported offences in the hospital's area has been increased to more than 90% due to its introduction. Shortly after the introduction of the system, a serious case (both criminal and civil) was successfully resolved. It involved a claim of homicide against the hospital staff by a family of a person whose body was found in a toilet room. The family of the deceased created significant disturbance within the hospital demanding vast compensation and threatened criminal prosecution even though there was no evidence that the hospital staff was responsible for the death.

The local police officers assisted in resolving the dispute by submitting electronic video recordings containing evidence that no hospital personnel was involved in the death of the person. It took only half a day to search for the necessary video records. The family accepted the evidence and the hospital was saved from the financial loss and trouble.

The introduction of electronic detectors is claimed to improve the overall sense of security. The police claimed that thanks to electronic detectors, 300 knifes brought by the visitors were confiscated. It is certainly very unlikely that those knifes were brought as a remedy against medical malpractice, however, their possession in public areas is prohibited and constitutes a minor administrative offence.[156] The number of knifes sized by the police gave them a significant sense of achievement.

Dealing with serious or minor offences is not the only main function of the police. They are heavily involved in crime prevention activities. For example, there is a sudden rise in telecom fraud alerts recently. Its rate as a percentage of the total number of crime reports has been increased to the 40 percent. Much work has been done by the local police to make the public aware of such cases. However, criminals use sophisticated fraud techniques. That still leaves the number of such cases high. The police conducts public awareness campaigns to warn people from disclosure of private information.

Prevention of bullying incidents in local schools is another priority of the local police. In order to tackle the challenges of increasing campus bulling incidents, anti-bulling strategy is adopted. For instance, by means of vigorous publicity activities of the police in the schools, the bullying incidents were timely reported and the perpetrators were deterred. As the result, schools enjoy a greater sense of security and harmony.

The interviews with the Chinese police present the work of Chinese police in a very positive, almost heroic light. There is a strong belief among Chinese public that a Chinese policeman is not simply a watchdog that can bite (which he certainly can and does) but that he is a servant of people. Certainly, there are people in China who do not share this perception, considering police as an oppressive and corrupt institution, but I have never found among the members of German, Russian, Thai, and the British public the same, almost naive idealistic vision of a policeman, a heroic

figure who sacrifices his life for the interests of the society. This image is certainly influenced by the Confucian and Communist traditions. Its force may not last long in the society in which the capitalist economic realities, urbanization, and accompanied alienation of people from one another have made deep inroads. It may also last longer due to the influence of language. The policeman is called often as *minjing* 民警, literally rendered as "people's vigilant one" or "the one who warns people." The word "police" in English as well as in Russian is borrowed from Latin, and it does not carry the same connotations. The Thai word for the police: ตำรวจ, which is borrowed from the Old Khmer language, also does not affirm necessarily a positive meaning, although it connotes well a common Thai word ตรวจ, that is *to inspect*. The influence of language on our moral perceptions is undeniable. The same thing labelled by two different words may easily produce different responses. The peculiarity of Chinese police law and the words used to describe it carries a stronger morally positive linguistic load than Thai, Russian, or English languages that use a more neutral word.

In China, an open criticism of the police work is certainly not a very common thing. There must be some degree of trust that people would share their opinion about the police, especially if it is done to a foreigner. However, there were some former students and colleagues of the author who were willing to be open and direct in their critical attitudes. One must acknowledge, that China always had a tradition of officials and intellectuals who were very courageous to submit critical reports even facing persecution.[157] In some rare interviews, the Chinese police were severely criticized. The critical opinions are still among a minority. However, their voice is important to verify or falsify the idea that the Chinese police is an active harmonizing force of Chinese society.

The content of the critical remarks tend to be very similar. The Chinese police is claimed to be suffering from widespread corruption, nepotism, factionalism, and even inhumanity. In one reported case, an interviewed teacher had a dispute with

a local government official on the legality of a parking car fee he was charged. The interviewee was convinced that the fee was illegal as he was parking on the ground of a private estate where he owned a property. He wrote to the police accusing the local official in extortion. The police came and locked the teacher's car demanding the pay. According to the teacher, the police was not interested in justice. They had a good relationship with the extorting official.

In another case, a couple managed to beget three children at the time when they were allowed to have only one. The husband had to pay a bribe to a senior police officer to get registration papers for the new born children. On both occasions, the husband claimed that the police were taking bribes, yet the police helped him to avoid a heavier penalty for defying the governmental policy "one family - one child". He claimed that the senior police officer was kind, understood his situation and financial difficulty, and asked a reasonable amount. Indeed, this is a good example of bribery promoting social harmony! In this case, the father of the children was not critical of the police, but approving its actions as mitigating the harshness of the governmental policy.

There was a case of a Chinese Christian pastor, who had conducted an unauthorized religious service. The police arrested him and a group of others at the time of the service. They attempted to force the confession by threat of violence (to apply an electric baton) that the group was involved in an illegal religious activity since it was not authorized. The pastor and the others were firm and refused to confess arguing their constitutional right to practice religion freely. After one day of detention, the group was released. The pastor was asked to register his church, which he did, and since then, he claimed good relationship with the Chinese local police. This case is interesting that the Chinese police decided not to impose a penalty on the leaders of an unauthorized Christian group. Rather, facing resistance, they assisted the legalization of the religious assembly.

Thus, the Chinese police has a complex profile. However, there is certain characteristic which is common in the few examples of Chinese police work given above. The Chinese police plays an important role in the daily life of ordinary Chinese people. It may not always achieve social harmony, but it is generally successful in maintaining public order and security.

The concept of Public Security in Chinese Law

The Chinese term 治安 (zhi an) is generally translated as 'public security'. The key legislative act which informs much of the daily routine of the Chinese police work is the *Public Security Administrative Penalties Law of the People's Republic of China 2005, 2012. (*中华人民共和国治安管理处罚法).[158] It mentions the term over 100 times in its 119 articles. However, the law does not define the concept. Its meaning is closely associated with the ideas of public order (公共秩序), and public safety (公共安全) throughout the text of the legislation. The way how the police understands these terms is very important not only for the police but also for the ordinary citizens. For example, Article 8 and Article 9 of the *People's Police Law of the People's Republic of China* (1995, 2012)[159] sates that

"If a person seriously endangers public order or constitutes a threat to public security, the people's policemen of public security organs may forcibly take him away from the scene, detain him in accordance with law, or take other measures as provided by law."

"In order to maintain public order, the people's policemen of public security organs may, upon producing an appropriate certificate, interrogate and inspect the person suspected of having violated law or committed a crime. After interrogation and inspection, the person may be taken to a public security organ for further interrogation upon approval of this public security organ, if he or she is under any of the following circumstances: (1) being accused of a criminal offense; (2) being

suspected of committing an offense on the scene; (3) being suspected of committing an offense and being of unknown identity; (4) carrying articles that are probably obtained illegally. The period of time for holding up the interrogated person shall be not more than 24 hours, counting from the moment he or she is taken into the public security organ. In special cases, it may be extended to 48 hours."

Violations of law, that do not constitute a crime, can be of various nature, and police has a significant discretion to define what conduct is illegal and what is not. Police authorities in several cities, for example, recently announced the ban on small meeting societies playing Mahjong, a popular game, in an attempt to suppress illegal gambling and "purify social conduct".[160] Many people protested calling the game the "quintessence of Chinese culture". Later, the Police had to clarify that only unlicensed parlours would be shut.

Defining what is legal or illegal under broad and imprecise provisions of legislation is not the only 'paradise' for the police discretion when defining the scope of the concepts of public order, public security and public safety. The higher levels of Chinese police can issue comprehensive regulations to ensure public security with the enormous impact on the daily life of ordinary citizens. For example, the Ministry of Public Security issued a "Regulation on cybersecurity supervision and inspections by the police" (公安机关互联网安全监督检查规定).[161] It is claimed to be formulated in accordance with the PRC Cybersecurity Law,[162] but the law describes the authority to issue such regulations only in very broad terms: "State cybersecurity and informatization departments are responsible for comprehensively planning and coordinating cybersecurity efforts and related supervision and management efforts. The State Council departments for telecommunications, public security, and other relevant organs, are responsible for cybersecurity protection, supervision, and management efforts within the scope of their responsibilities, in accordance with the provisions of this Law and relevant laws and administrative regulations."[163]

Article 28 of the same law requires network operators, defined very broadly and imprecisely in Article 76, "to provide technical support and assistance to public security organs and national security organs that are safeguarding national security and investigating criminal activities in accordance with the Law." According to the Regulation, the police supervises and inspects any organization or person who provides internet services to others.[164] It can include any business which offers its customers even a temporal access to the Internet, such as Internet-café, hotels, restaurants, etc. Article 15 of the Regulations gives the power to the police to enter business places, computer rooms, and workplaces and among other things to copy information related to Internet security supervision and inspection matters. Article 27 threatens the persons subjected to supervision and inspection, if they do not obey regulations and public security management with administrative or criminal law sanctions. The Regulation does not specify which penalty applies. The PRC Cybersecurity Law, however, has a number of provisions on penalties in respect to various offences. For example, Article 69 penalizes network operators or its personnel, "if the circumstances are serious," with a fine of between RMB 10,000 and 500,000 if they do not follow the requirements of police to stop dissemination or delete information that is prohibited by laws or administrative regulations; or refusal or obstruct the police in their lawful supervision and inspection; or refuse to provide technical support and assistance to the police.

The further examination of this interesting piece of Chinese law would lead us too far from the issue of this paper. It is sufficient to conclude that the broad definitions of public security, public order, and public safety provide the police with enormous powers to control the daily life of people living in or visiting China. The duty to maintain public order and to stop acts that endanger public order[165] gives the Chinese police the authority which is unimaginable in the most countries of this world.

The way how Chinese police uses this power has become more evident thanks to the outbreak of coronavirus. According to the Financial Times, [166] the Chinese police have used the following measures.

"More than 900km from Wuhan, the metropolis of Wenzhou has been put in virtual lockdown over the past few days. Local regulations permit only one person per family to leave the house every two days to buy food." "Zhuozhou, a city of more than 600,000 people in Hebei province, announced on January 31 that it would shut its freeways after officials discovered a case of coronavirus in the area." "Poyang county in Jiangxi province turned all traffic lights red on Monday and barred any travel on roads, as its neighbouring counties closed all transportation links." "Some local governments have told residents to remain in their homes for days. Heilongjiang province in northern China has threatened the death penalty for anyone caught intentionally spreading the bug."

The Chinese police is not the only institution that enforced these draconian measures of control to protect public security and public safety. However, the multiple images of the deserted Chinese cities during the outbreak of the infection showed the ubiquitous presence and involvement of Chinese police in enforcing the restrictions described by the news reporters. There is a massive use of surveillance technology, including drones, monitoring the compliance with the epidemic prevention measures.[167] The official news reports praise the police for the heroic acts in "the national war against the virus."[168]

There is also the criticism of the police. In a well-publicized case, a Chinese doctor, who had warned about the outbreak of coronavirus and later died from the infection in Wuhan, was censured by the Chinese police for "making false comments" that had "severely disturbed the social order".[169] The Wuhan police made a statement that they acted according the *Public Security Administrative Penalties Law of the People's Republic of China*[170]. The report does not quote the exact provision, but it

was likely Article 25 which states: "A person who commits one of the following acts shall be detained for not less than 5 days but not more than 10 days and may, in addition, be fined not more than 500 yuan; and if the circumstances are relatively minor, he shall be detained for not more than 5 days or be fined not more than 500 yuan (1) intentionally disturbing public order by spreading rumors, making false reports of dangerous situations and epidemic situations or raising false alarms or by other means." The police report indicates, that since the circumstances were not serious, they did not impose any penalty. The death of the doctor caused a significant amount of anger against the police displayed on the social media, which, according to the news reports, was quickly suppressed by the Chinese censors.[171]

It is not only the public that raises some limited criticism of the police work. In a very unusual move, the Supreme Court made a news release criticizing the action of the Wuhan police in suppressing the warnings of the doctor.[172] It is important to underline that there was not any court case involving the doctor. In the Anglo-American legal tradition, the court may take a public stance but there must be a case brought before the court. In the words of Alexis de Tocqueville, "it can only interfere when the conduct of a magistrate is specially brought under its notice."[173] The news release is still an exception. If there is an official disapproval of the actions of the police, it will likely come from the leaders of the Communist party or the party's watchdog "Central Commission for Discipline Inspection".[174]

Public security and human rights

A much greater amount of disapproval comes from the human rights activists. They are often struck by what appears to them as an obvious violation of human rights. However, the claimed violations of the rights become less apparent if we consider the weight of public security considerations which influence many decisions of the police. Public security as an essential part of public order is one of the reasons

for limiting human rights according to the Universal Declaration of Human Rights.[175] One example is Zhenping County Public Security Bureau's imposing a fine on Zhao X.[176] An abstract of the official notice is the following:

Zhao X in the village of Yushuzhuang, Henan Province rented premises to three Uighur people who were selling nan-bread in the locality. Zhao X violated article 91 of the "Counter-terrorism Law of the P.R.C."[177] by not reporting this to the branch public security bureau. He was accused in refusing to cooperate with relevant departments responsible for counter-terrorism security precautions, intelligence information, investigation, or emergency response efforts. More specifically, Zhao X rented premises without authorization and without reporting. The landlord was given administrative detention of 15 days, and a concurrent fine of 1900 RMB. The three Uighurs were "forcibly repatriated to their previous residence in Xinjiang to receive education."

This incident was given by the *China Law Translate* as an example of violation of human rights. There are, however, certain factors which may justify the acts of Zhenping County Police. First, the offender was given the maximum penalty of detention and almost the maximum fine in the cases of a serious violation. This measure is imposed only when there are some serious consequences (严重后果). The notice does not specify the details of those consequences. However, without such consequences, the imposition of penalty is very unlikely. Second, the fact of a forceful repatriation of the tenants to receive education indicates that the police did perceive them as dangerous. Third, the "Counter-terrorism Law of the P.R.C." was introduced in China following the deadly terrorist attack of a group of Uighurs on the railway station in Kunming in 2014.[178] The author happened to be in Kunming at that time, and witnessed the shock and the anger of the Chinese public at the inability of Chinese police to protect them. Fourthly, the incident happened in the countryside of Henan Province which is predominantly populated by Han Chinese. It is possible that the stay of the Uighurs in the village created a social tension. The notice said

that the violation was discovered not by the police itself but through a complaint brought by a local person.

It is certainly premature to allege a violation of human rights in this case without fully understanding the motives of the police action. This action may be well explained by the desire of the Chinese police to secure public order. A senior police officer in Kunming acknowledged that the conflicts between Han Chinese and a Muslim Hui minority can be violent. Kunming, unlike Henan countryside, is a much more culturally and ethnically diverse region, where people have learned to live together and respect the cultural differences. It is possible that the action of the Henan police was an example of an overzealous pursuit of the police duty to guard public security. In any case, it indicates the scope of the police powers to limit the rights of private individuals. One may conclude, that public security sets an effective limitation on human rights in China and creates the condition for the existence of the police state.

Conclusion

Police state can be defined as a government in which securing public order is among the greatest priorities. The rise of the Chinese police state is a recent phenomenon. It is a product of the co-existence of the communist ideology and the capitalist economic reality, in which the state continues to play the defining role. The whole evolution of the Chinese police law appears as a progressing increase of regulation of not only the life of ordinary citizens by the police force, but also the increased regulation and control of the police itself by the central government. The scope of the police duties increases on the basis of proliferating legislation. “Counter-terrorism Law of the P.R.C." applied in the Henan case described above is only one of them. The conversations with the Chinese police clearly indicate that securing public order is the major concern of the central government and the reason

for the increased regulation of the work of the Chinese police. One can also observe that the general government policy to solve complex problems of Chinese society by an increased police regulation creates the dissatisfaction among some members of the public. This dissatisfaction does not always appear to a foreign observer, but it is there and its force will depend on the effectiveness of the Chinese police to secure public order. In a sense, the future of the Chinese communist rule will depend on the effectiveness of the Chinese police and this is exactly what makes China a police state.

CONCLUSION

Chinese criminal procedural law is very dynamic. In 2012, there was its major revision. Chinese law reform of criminal procedure has not stopped with the adoption of 2012 Law. The One of the main purposes of this reform is to secure international standards of procedural fairness. Despite all these efforts, an open trial with an active participation of witnesses and defence will remain an unachievable goal without a fundamental shift in the way how truth is obtained. At the moment, the main method of obtaining truth is the inquisitorial work of investigators, the procuratorate, and to the least degree, judges. It is difficult to reconcile this way with the concept of procedural fairness which the Chinese written law now tries to reflect. The search for truth and procedural fairness can be reconciled only if truth is obtained through an active and open interaction of the prosecution, victim, and the accused in a public forum. Indeed, this interaction does not need to be antagonistic and confrontational in the same manner as it is perceived in the West. Adversarial trial carries a sense of mutual hostility. Whatever form will the future adversarial procedure take in China, its future depends not so much on the form and content of legislative acts, as on the readiness and willingness of the participants to be engaged in an open trial.

The research shows that there is a significant degree of skepticism whether the political system of China is able to secure procedural fairness during criminal trial. It is still possible for the procedural fairness to play a greater role in Chinese criminal justice system within the current political milieu of China. This, however, would be possible not because of introducing a more perfect external administrative and regulatory mechanism controlling the hosts of Chinese police, procurators, and judges. Procedural fairness needs an internal moral foundation shared by the participants in

a legal process which cannot be built through the mechanical reform of the governmental system. It might be built by means of reintroduction of the traditional Confucian values of humanity into the Chinese governmental machinery, but this introduction will unlikely be fruitful in the society driven by the material greed rather than by the love of virtue.

The need for a greater role of moral reasoning comes also from the fact that China has two separate regimes of liability for committing public wrongs. One regime is criminal liability, another is administrative. The existence of two systems of liability in China creates the problem of their demarcation. Even though there are attempts to draw a clear line between administrative and criminal offences, there is a large grey area in which the police inevitably has a significant discretion to choose which system of liability to apply. This discretion is limited. The seriousness of a public offence is accepted in China as the fundamental principle to distinguish the criminal from the administrative offences. In order to make the both systems of liability function well, there must be clear standards to define and to measure the seriousness of offences. China oscillates between two alternative policies in defining those standards. The first is to measure the seriousness of offences from the point of view of their impact on social harmony. This policy requires a significant degree of discretion of the police which has to be proactive in identifying and solving social contradictions. The second policy is to give specific descriptions of seriousness for each kind of offence that warrants an application of criminal law. Under this policy, the police must strictly follow those descriptions. The research concludes that social harmony is a better policy than a strict application of rules.

Criminal procedural law in China cannot be understood without taking into consideration that China is a police state. The definition of a ‘police state’ has to be understood in neutral terms as a state in which public security and public order are given an overriding preference. There is an acknowledgement of human rights in China but their scope is very limited giving the authority to the police to control the daily

life of its citizens in its every aspect. It is not only the extensive governmental control of ordinary citizens which makes China a police state. It is also the wide network of personal relationships between the police and the members of the Chinese public. This network is created to secure public order and stability. Public security is the central concept of Chinese law. It gives a wide discretion to Chinese police to determine the scope of individual rights and duties in general, and also whether or not to initiate criminal proceedings.

This research presents a first step to a deeper examination and comparing Chinese criminal procedural law to Thai law. Chinese criminal procedural law remains very different from Thailand in many respects. The key difference is the role of police. This report indicates that Chinese police plays a much greater and extensive role than the police in any other countries. The Chinese police has an enormous discretion to initiate criminal or administrative proceedings in dealing with the same type of public wrongdoing which Thai police do not have. Should Thailand adopt some of the features of the Chinese police system as the key mechanism of criminal procedural law? This adoption would certainly imply the shift within the criminal procedure law from the court to the police. It is apparent that this will be an unwelcomed suggestion in Thailand for many reasons. First, Thai police does not enjoy the same degree of public trust as in China. Second, Thai people are much more cautious in allowing the government to regulate every aspect of their lives. There is, however, one suggestion which would be welcomed in Thailand. Thai police must have a stronger moral image than the one it has nowadays. Higher moral requirements for Thai police are essential for creating trust to the work of police in obtaining true evidence. The Chinese idea that procedural fairness and truth are not competing principles of criminal procedure but the two aspects of achieving social harmony is certainly attractive. Its realization, however, is impossible without ensuring that a police office is a righteous officer. The interviews with some members of

Chinese police and the public also show that this ideal is not easily realizable even in China.

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[116] Deborah Cao, *Chinese law: A language perspective*. (Routledge, 2016).

[117] The Chinese text: 慧心开发，信力明悟，各捨泉贝，共成福业. See: 舒士俊, *中国南方佛教造像艺术*, 上海书画出版社, (2004), p. 118.

[118]The Chinese text: 护法阴騭而扶持，信力潜运而平正。See also: 《全唐文新編》編輯委員會, 吉林文史出版社, (2000), p. 23.

[119] See James Legge' authoritative translation of *Mengzi*. Wan Zhang II. 10.5. Available online: https://ctext.org/mengzi/ens (last visited 10 February 2020).

[120] Shi-lin Zhao, 'Police Mediation in the Context of Rule of Law,' (2007) *Journal of Political Science and Law*: 6; X. I. A. Gong-yi, 'Research upon Related Problems of Public Security Mediation,' (2005) *Journal of Henan Public Security Higher Academy*: 3; Guy Olivier Faure, 'Practice note: Informal mediation in China,' (2011) 29 *Conflict Resolution Quarterly* 1: pp 85-99; Yan Xiang, 'Criminal mediation in mainland China: a leap from judicial endeavor to legal norm' (2013) 8 *Asian Journal of Criminology* 4: pp 247-256.

[121] English text is available at: https://www.cecc.gov/resources/legal-provisions/administrative-penalty-law-of-the-peoples-republic-of-china and http://en.pkulaw.cn/display.aspx?id=f2ad69fea4bf8d8cbdfb&lib=law (last visited 10 February 2020).

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[123] *Law of the People's Republic of China on Administrative Penalty 1996, 2017.* Article 4.

[124] Ibid. Article 31.

[125] Ibid. Article 32.

[126] Ibid. Article 6.

[127]Lin Li, *The Chinese Road of the Rule of Law* (Springer, 2018), pp 178.
劉紹武, '创新执法质量监督机制科学评估依法行政水平' (2009)《*行政法學研究*》1, pp. 111.

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[130] Ibid. Article 7.

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[133] *Administrative Penalty Law of the People's Republic of China,* Article 28.

[134] Ibid. Article 61.

[135] *Constitution of the PRC. 1982, 2018*. Article 129. http://www.npc.gov.cn/zgrdw/englishnpc/Law/2007-12/05/content_1381903.htm (last visited 10 February 2020).

[136] *Organic Law of the People's Procuratorates of the People's Republic of China 1979, 1983.* http://www.npc.gov.cn/zgrdw/englishnpc/Law/2007-12/13/content_1384077.htm (last visited 10 February 2020).

[137] *Law of the People's Republic of China on Administrative Penalty 1996, 2017.* Article 36.

[138] Ibid. Article 37.

[139] Ibid.

[140] Samuel March Phillipps, *A Treatise on the Law of Evidence*: 9th Ed., (Saunders and Bennings, 1843), Vol. 2, p. 435; James Fitzjames Stephen, *A Digest of the Law of*

Evidence (Georg Chase', 1898), p. 896; Christopher Allen, *Practical guide to evidence* (Routledge-Cavendish, 2008), Chapter 12.

[141] The link between moral character of the witness and trustworthiness of his evidence seemed to play a greater role in traditional systems of law. In the Quran, for example, there is a requirement that witnesses (often two are required) must be righteous (ذَوَا عَدْلٍ), and that a sinful behavior (إِثْمًا) invalidates the trustworthiness of their evidence. Quran. 5. 106-107. The issue whether the attention of Chinese police to the moral character of their informants is a reflection of traditional Chinese law presents a separate topic of academic inquiry.

[142] Aristotle, *Nicomachean Ethics* V, 1137 a 31 - 1138 a 3. John Tasioulas, 'The paradox of equity', (1996) 55 *The Cambridge Law Journal* 3: pp 456-469.

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[148] Chapman, Brian. (2007). "The Police State". *Government and Opposition* **3** (4): 428–440.

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[150] *Law of the People's Republic of China on Administrative Penalty 1996, 2017.* Article 6.

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[162] Ibid.

[163] Cybersecurity Law of the People's Republic of China (2016) English translation is available at: https://www.newamerica.org/cybersecurity-initiative/digichina/blog/translation-cybersecurity-law-peoples-republic-china/

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1. Truth and Procedural fairness in Chinese Criminal Procedure Law	The International Journal of Evidence & Proof	Volume: 23 issue: 3, page(s): 299-315
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4. Public Security and Police Law in China	(Submitted to) Journal of Contemporary China	-
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6. The Concept of Truth and Fairness in Thai Criminal Procedure	(Submitted to) Journal of Law and Society	-

APPENDIX

Article

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Truth and procedural fairness in Chinese criminal procedure law

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Abstract

Chinese criminal procedural law has recently been undergoing rapid transformation. While the search for 'truth', embodied in a confession by the accused, has traditionally dominated the criminal process, efforts are now being made to secure more procedural fairness. This is exemplified by the introduction of rules to render inadmissible at trial confessions extorted from suspects by ill treatment. Unsurprisingly, it has proved difficult to shift the mindsets of the players in the criminal justice process. The new rules have not been fully implemented in many respects and there is still confusion over the criteria to be used by the courts in making decisions about inadmissibility. Further, it has proved difficult to enable defence lawyers to play a more active role in defending their clients and to render it normal for witnesses to testify at trial. This handicaps the drive to secure a better balance between the search for truth and procedural fairness in the Chinese criminal trial.

Keywords

admissibility, China, confessions, criminal procedure, evidence

Introduction

Chinese criminal procedure is a fascinating object of study. It is particularly dynamic at the moment and reflects changes in Chinese social, political and economic life. Criminal procedure law is constantly evolving by trying to accommodate various conflicting social needs and demands. The speed of legislative change in China is such that many recent academic works have already become outdated to a greater or lesser extent. For instance, McConville and Pils (2013) contains a long 'Postscript' (2013: 455–503) commenting on the 2012 revision of the Chinese Criminal Procedural Law (CPL),[1] which

1. Criminal Procedure Law of the PRC (CPL). 1979, 2012. Available at: https://www.cecc.gov/resources/legal-provisions/criminal-procedure-law-of-the-peoples-republic-of-china (accessed 4 February 2019).

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post-dated the contributions to this major volume on criminal justice in China. Therefore, our aim in this paper is not primarily to produce an up-to-date description of Chinese criminal procedure, an account that would soon become outdated because of more reform, but to attempt to understand the dynamic of legislative change. There is a need to concentrate not so much on the specific provisions of criminal procedure law as on the forces which shape and determine their content. This study looks at the ideological forces, or the fundamental ideas which shape the structure of Chinese criminal procedure law, although we will make some more practical, empirically based, observations where particularly relevant.

The most prominent idea in Chinese criminal procedural law is that it is focused on 'obtaining objective truth rather than satisfying rules of evidential discovery' (Yin and Duff, 2010: 1136; see also Zhang and Yang, 2018). This search for the truth is the reason why the principle of double jeopardy, or *ne bis in idem*, is still not accommodated by Chinese law. Reflecting the emphasis on the search for the truth, until the reforms under the '2010 Evidence Rules' (Lewis, 2011: 631; Lin et al., 2017; Sun, 2018) there were in reality few rules on admissibility (Guo, 2017; Lewis, 2011: 650–655). This was extremely significant because in China 'the confession is king' and to secure a confession was, and is, seen as vital in every criminal case (Belkin, 2013: 95; Guo, 2107). The undergoing reform of the law, however, attempts to reconcile the imperative of establishing truth with the idea of a fair trial (Long, 2015b). As we shall see, an important part of this was establishing the principle of admissibility as a practical reality. It is important to note that the Chinese concept of fair trial is different from its western counterpart. It goes beyond the concept of individual autonomy and affirms a variety of social and moral values. Chinese procedural criminal law attempts to present a greater unity between law and morals which aims to lead to an acceptance of the outcome of criminal proceedings by the public (and a greater efficiency).

Thus, the subject of this research is to examine the way in which Chinese criminal procedure attempts to reconcile the search for the truth with the ideal of fair trial or procedural fairness. At the outset, there are two basic questions are to be answered. First, is the pursuit of substantive truth in Chinese law achieved at the expense of procedural certainty? Second, does this pursuit make impossible the establishment of procedural safeguards for fairness and the rule of law? In tackling these two questions, considerable attention will be paid to the normative framework of Chinese criminal procedure because it is evident that, in practice, any system of criminal justice can be abused. Therefore, this research focuses not solely on the actual application of procedural rules but on analysing the normative framework to perceive the way in which the imperative of finding the truth is related to the idea of procedural fairness.

Truth v fairness

The amount of literature on Chinese criminal procedure law is substantial and, as noted above, much of it has become outdated because of the speed of legislative reform. The literature that deals with the foundational ideas of Chinese criminal procedure tends to focus on two basic issues. The first is the attempt to categorise Chinese law generally within a particular family of legal systems (David and Brierley, 1985; Glenn, 2014; Zweigert and Kotz, 1998) and, more particularly, within a particular model of criminal trial (see Yin and Duff, 2010, for further references and discussion of this literature). The second issue concerns the extent to which Chinese criminal procedure law reflects the principles of the rule of law and fair trial, along with the idea of human rights (McConville, 2013).

In relation to the first issue, there is a general consensus that China follows an inquisitorial model of criminal trial, meaning that the emphasis is on finding the truth rather than on the prosecution or defence winning the contest as in the adversarial model (Damaska, 1973). Nevertheless, some authors point to the influence of adversarial ideology since the reforms of 1996 (McConville, 2012: 10). However, this trend has also been noted in European inquisitorial jurisdictions, largely owing to the influence of the European Court of Human Rights, leading several comparative scholars to speculate that the adversarial and inquisitorial traditions are converging (Jorg et al., 1995; McConville, 2013: 50–51; Weigend, 2003).

Nevertheless, significant ideological differences remain between these two models (Roberts, 2008). A number of commentators on Chinese criminal procedure have noted the difficulties of combining both the inquisitorial and adversarial traditions in the Chinese legal context (Capowski, 2011; Liu and Halliday, 2009). Yu (2017a: 69–70), for example, wrote that 'the absence of witnesses in the Chinese court contrasts with this reformed adversarial format'. In this context, it is interesting to note that in Europe, inquisitorial systems have been forced by decisions of the European Court of Human Rights to provide the defence with more opportunity to confront and question prosecution witnesses either at trial or as part of the formal pre-trial procedures.[2]

For some Chinese scholars, the inconsistencies between inquisitorial and adversarial systems are of little practical significance. Professor Wei Pei from Beihang School of Law in Beijing, in correspondence with one of the authors of this article, expressed an attitude common among Chinese scholars as well as practitioners. In her view, there is no contradiction between the adversarial and inquisitorial elements of the revised Chinese law on criminal procedure. A Chinese judge does not *per se* have the obligation to verify the evidence presented at trial. If there is doubt about the evidence presented in court by the prosecutor or the defence, the judge has limited power to demand or collect additional evidence. In Chinese criminal procedure, the way to discover truth is not through confrontation with witnesses but through the cooperation of all official participants in the process. Indeed, this view is very clearly articulated in Article 7 of the CPL: 'In conducting criminal proceedings, the People's Courts, the People's Procuratorates and the public security organs shall divide responsibilities, coordinate their efforts and check each other to ensure the correct and effective enforcement of law.'

We would observe that, in the eyes of most comparative scholars, the Chinese judge's limited involvement in the verification of evidence would be a hallmark of adversarial procedure while the emphasis on cooperation in this regard closely resembles that of inquisitorial ideology (Damaska, 1973, 1986). Therefore, according to Professor Wei Pei, both traditions seem to be comfortably accommodated within Chinese criminal procedure. In our view, however, there still exists an underlying tension: if the trial judge is not satisfied that the cooperative efforts of the parties have produced all the evidence that is, or might be, available, what should he do? Is his essential stance passive, as in the adversarial model, or active, as in the inquisitorial model? Further, how does the defence fit into this schema? In an adversarial model, the role of the defence in gathering and submitting evidence at trial is critical, yet under Article 7 above, the defence is not even mentioned (see Zuo and Ma, 2013; Nesossi, 2013).

In any event, it is difficult to identify Chinese criminal procedure law with a particular legal family. David and Brierley (1985: 20–21) suggest that ideology, as embracing philosophical, political and economic principles, is one of the two main criteria for differentiating legal families. Another possible criterion is the hierarchy of legal sources, institutions and methods. It is a mistake to think of procedural law as ideologically irrelevant because 'criminal procedure, as "applied constitutional law", is normally one of the most useful branches of law in terms of identifying the ideology of a regime' (Yin and Duff, 2010: 1111; see also McConville, 2013). In this context, it is significant that in the United States, criminal procedure is perceived to be an aspect of constitutional law with all the political and ideological baggage which that entails (Whitebread and Slobogin, 2003: ch 1). Similarly, Chinese criminal procedure law possesses constitutional significance. The Chinese constitution itself mentions some basic principles of criminal procedure, for example the right to counsel and the public nature of the trial (Article 125) as well as judicial independence (Article 126). But those provisions remain very brief and undeveloped. Therefore, the criminal procedure law itself has become the main source of constitutional significance. Professor Ji Weidong calls it 'our little constitution' (Balme, 2012: 6) and refers to the enormous public attention that the undergoing reform of criminal procedure law has received in China.

Some scholars describe the modern stage of the development of Chinese law as 'breaking off the shackles of ideological domination' or 'the abandonment of ideology' (Chen, 2008: 75) but Chinese

2. *Kostovski* v *Netherlands* (1989) A 166, 12 EHRR 140.

criminal procedure still contains a strong ideological element. Article 1 of the CPL claims that 'maintaining socialist public order' is one of its purposes. Article 6 of the same law requires that 'in conducting criminal proceedings, the People's Courts, the People's Procuratorates and the public security organs must rely on the masses.' Nevertheless, it is evident that the presence of Marxist or Maoist statements in Chinese criminal law legislation has been gradually reduced (Keith and Lin, 2001: 207). The ideological shift from class struggle to the maintenance of law and order is apparent to many commentators (Chen, 2013: 62). The ideological content of criminal procedure can be seen not merely in the general political statements from the legislation quoted above, but also in the political and moral values protected or neglected in its provisions. Some writers, for example, note a weak expression of the idea of individual legal autonomy in the procedural structure itself. As Yin and Duff put it: the purpose of Chinese procedural law 'is not to resolve conflicts amongst individuals but to achieve a collectivist society and socialist morality' (2010: 1106). The dominant position of the Communist Party and political doctrine in criminal law and procedure is also identifiable and striking (McConville, 2013).

It is apparent to most commentators that Chinese criminal procedure has abandoned the Soviet law model in which 'the administration of justice was rendered mainly by the security agencies and special tribunals' (Yin and Duff, 2010: 1112). Even though China has now adopted many elements of the civil law tradition, the predominance of public law and the public good, rather than private interests, persists (McConville, 2013). This predominance has a long historical tradition in China. Confucianism contains an anti-capitalist and to some degree, a socialist sentiment, although it is not democratic by any means (Guo, 2003: 5). After the Maoist reaction against Confucianism (De Bary, 1998), the latter is experiencing a revival, to a limited extent, in modern Chinese intellectual culture (Bell, 2008: 22). It is very difficult to isolate the Confucian element in the Chinese socialist system, as Confucianism has never been an influence which can be disentangled and viewed in isolation from the rest of Chinese culture. From the beginning, it was intermingled with the Chinese philosophical tradition of Legalism which also persists in modern China (Chen, 2008: 20). Thus, Chinese law can be generally classified within the socialist law family (Yin and Duff: 2010), but also including the Confucian and Legalist philosophical traditions. One apparent influence of Confucianism can be seen in the idea that criminal procedural law has an educational function. Article 2 of the CPL, for example, states that its aim is 'to enhance the citizens' awareness of the need to abide by law and to fight vigorously against criminal acts.'

Against this backdrop, many authors suggest that Chinese criminal procedure law lacks the idea of a fair trial, sometimes explaining this by its adherence to inquisitorial ideology (Simon et al., 2016: 4; see also Nesossi et al., 2016) and sometimes by the specifically Chinese structural and cultural contexts of the court's proceedings (Lu and Miethe, 2007: 21; Chen, 2008: 324). The assessment of fairness of Chinese criminal procedure is often influenced by the political views of commentators. Proponents of a liberal democracy may deny that the principle of fairness plays a significant role in the criminal justice process in modern China (Peerenboom, 2002: 14), a typical conclusion being that '(t)he prevailing conception of class struggle rooted in the Chinese communist State has caused enduring inconsistency between Chinese criminal procedure and western notions of the rule of law' (Yin and Duff, 2010: 1113).

Not all authors, however, apply western notions to describe the Chinese position. Some claim that the idea of a fair trial is not new to China by tracing it back to the Qing Dynasty, if not earlier (Zhang, 2014: 390). It is acknowledged that Communist China at its outset operated with a very different set of ideas from those of the rule of law, fair trial and human rights (Fang and Li, 2017: 10). However, since 1978, there have been clear signs that Chinese law and policy makers are trying to ensure that the principle of fairness (in the Chinese understanding) is realised (Blasek, 2015: 64). In more practical terms, this new policy has led to the abolition of the police power to order re-education through the labour system in 2013 (*Xinhua*, 2013) which was widely considered as inconsistent with the idea of rule of law and fair

trial (Zou, 2006: 186). In the next section, we will try to demonstrate how the concept of a fair trial is now reflected in the texts of Chinese criminal procedure legislation.[3]

The exclusionary rule

If evidence testifies to the truth, but it was obtained by inappropriate or illegal means, such as torture, should or should not judges take it into account in reaching their verdict? The answer to this question reveals a lot about the relationship between truth and procedural fairness in any individual criminal procedure system and that state's ideological stance om balancing individual autonomy and civil liberties against society's need to deal with crime and maintain public order. Therefore, it is extremely significant, particularly in view of the central role of the confession in China, that in 2010 a structured regime to exclude forced confessions was introduced to Chinese criminal procedure 'with great fanfare' (Belkin, 2013: 102) This was achieved through the 2010 Evidence Rules, which were jointly issued by five government bodies and covered separate sets of rules relating to (1) evidence in death penalty cases and (2) the exclusion of illegally obtained evidence.[4] Lewis (2011) provides a detailed account and analysis of the history of these reforms and the reasons behind them (see also Belkin (2013: 98–105). In this context, it is the exclusionary rule which is of interest, and this important new element in Chinese criminal procedure was reinforced by the 2012 reforms to the CPL. Article 54 states:

> Confessions extorted from a criminal suspect or defendant by illegal means such as torture, testimony of witnesses and statements of victims collected by violent means, threat or other unlawful means shall be excluded. Physical evidence or documentary evidence that is not collected according to statutory procedures and is therefore likely to materially damage judicial justice shall be subject to correction or reasonable explanations and shall be excluded if correction or reasonable explanations are not made. Evidence that shall be excluded as found during investigation, examination before prosecution and trial shall be excluded in accordance with the law and shall not serve as the basis for making prosecution opinions, prosecution decisions and judgments.

Even though this article has been criticised for making a distinction between evidence which must be excluded and the evidence which may be excluded (Sun, 2017: 167) (a distinction common in many jurisdictions (Duff, 2004: Roberts and Zuckerman, 2010: ch 5), it is still an important procedural safeguard of fairness.

There are at least three significant problems hindering successful application of the exclusionary rule in the Chinese context. The first problem is that the general idea of the unacceptability of torture and violence in obtaining evidence may be interpreted differently because the concept of torture and violence depends on certain moral standards affirmed by an individual conscience or moral sense which differs from person to person. For example, interrogating a suspect for many hours late at night did not appear morally wrong to Soviet prosecutors (Solzhenitsyn, 2003) nor was 'waterboarding' deemed to be torture by the USA during the Bush presidency (Goldberg, 2007: 213). Guo (2017: 34–37) explains in detail the difficulties that the actors in the Chinese criminal justice system have faced in interpreting what constitutes torture of illegal means under Article 54. Further, in China, torture of an innocent is evil, but 'torture of someone who ultimately appears to be guilty, however, seems to be something many are prepared to overlook' (Daum: 2017).

Second, the suppression of a confession will usually result in the prosecution simply obtaining a new and 'flawless' confession from the accused (Guo, 2017: 48). Daum (2017) describes some cases, when police or prosecutors, knowing that that a confession might be excluded, have simply carried out a new

3. See, for example, Article 227 of CPL. 'Fair trial' (公正审判) is sometimes translated as 'impartiality of trial'.
4. Rules on Certain Issues Relating to the Exclusion of Illegal Evidence in Criminal Cases. Available at: www.duihuahrjournal.org/2010/06/translation-chinas-new-rules-on.html (accessed 4 February 2019).

and lawful interrogation to get an admissible confession. Further, as Guo (2017: 39–40) explains, the accused will usually have made several confessions during the investigation process, both to the police and the Procuratorate, and if one is rendered inadmissible, then there is no consensus as to whether any subsequent confessions are thereby tainted and should be excluded by the court. Finally, there is no 'fruit of the poisoned tree' doctrine in Chinese evidentiary law and a new confession, to replace one that is inadmissible, or physical evidence obtained as a result of an inadmissible confession remain admissible (Daum, 2017: 4–5; Belkin, 2013: 107; Guo, 2017: 39–40).

The third problem lies in the way law is perceived in China, as well as in many other countries, where criminal procedure is perceived as a command, rather than a set of principles for adjudication. The inadmissibility of evidence obtained through torture, violence or threat, does not fit comfortably with the image of law as a set of detailed instructions underpinned by the threat of punishment. It is somewhat vague, particularly in terms of its application. As Guo (2017: 40) observes, not having a 'case law tradition' to rely on, police, prosecutors and judges feel 'helpless' when trying to operationalise the principles underlying the admissibility test when a practice is not 'expressly forbidden'. Therefore, for many Chinese critics of the new law, it was not enough merely to express the principle of inadmissibility in statutory form in a country where people are more accustomed to obeying specific commands backed up by very specific sanctions (Sun, 2018).

There was an attempt to address this problem by issuing more detailed rules on exclusion of illegal evidence. In June 2017, they were jointly issued by the Supreme People's Court, the Supreme People's Procuratorate and the Ministry of Public Security (Yi, 2017). The rules are contained in regulations entitled (Supreme People's Court, the Supreme People's Procuratorate, and the Ministry of Public Security, 2017) *Notice of the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security and Other Departments on Issuing the Provisions on the Several Issues concerning the Strict Exclusion of the Illegally Collected Evidence in the Handling of Criminal Cases.*[5] It is worth noting that the length of the name of this document is not unusual in China and reflects the ideology of cooperation between all state organs in legal regulations. The problem of the rules on admissibility being too general still persists however, because most of the above document's provisions remain rather broad. Nevertheless, the rules do attempt to spell out in more detail the mechanisms for excluding illegal evidence. First of all, they emphasise the right of the accused to challenge the legality of the evidence before the procuratorate at the time of the investigation, in other words before the trial process begins (Article 14), and impose a duty on the investigating organ and the procuratorate to ensure that there was no incident of torture or a forced confession (Articles 15, 17). In order to strengthen the protection now offered to an accused, the new rules also require that at the commencement of the criminal court's proceedings, the court must inform the accused of his right to apply for the exclusion of illegal evidence (Article 23). According to Article 33 of the same Rules, evidence that is disputed because the accused claims that he was mistreated during interrogation cannot be read or referred to in cross-examination before the court makes a decision on whether to exclude it or not. Nevertheless, it is clearly stated that if there is no proof that the evidence was obtained illegally, the court will refuse to exclude it (Article 24).

Whereas these provisions do not require the accused to prove the facts of torture, violence or mistreatment etc. there is a great deal of confusion over the relevant evidential burdens (Guo, 2017: 41–45; Lewis, 2011: 665). It is accepted that the defence must provide some evidence in order to persuade the court to address the question as to whether a confession should be rendered inadmissible on the grounds of the accused's ill treatment. Even this level of information can be difficult for the accused to secure, not least because there is uncertainty over the standard of proof, however minimal,

5. 最高人民法院、最高人民检察院、公安部等印发《关于办理刑事案件严格排除非法证据若干问题的规定》的通知 27.06.2017. Chinese text is available at: http://www.spp.gov.cn/zdgz/201706/t20170627_194051.shtml and https://www.chinacourt.org/law/detail/2017/06/id/149505.shtml (accessed 4 February 2019).

which is required. If this weak evidential burden is met, in theory the prosecution must prove beyond reasonable doubt that the confession was lawfully obtained. To this end, the following methods of proof are envisaged under the 2010 exclusionary law: the provision of the interview transcripts, or audio or video recordings of the interrogation (the latter being compulsory in the most serious of cases); an interrogator testifying in court; or the provision of an official written explanation of the circumstances of the interview. It should also be noted that a physical examination of the arrested person is required to ensure that he did not suffer any physical violence or torture at the hands of the police or other state organs (Article 13 of the CPL). However, it would be somewhat naïve to believe that interrogating officers who have employed such methods are always likely to have recorded the interrogation, and/or retained it, or will admit to anything unlawful in court or have left any physical signs of the mistreatment of the accused. It is worth observing that the only practical solution to the difficulty the accused faces in obtaining proof of torture, violence or its threat would be to require the police to prove that the interrogation was legitimate by producing the audio-video recording of it. If they do not do so, then any disputed confession given by the accused could be deemed inadmissible as evidence against the accused.

In any event, at the moment, if the accused offers some proof of the illegality of his interrogation by the police, then the court should convene a pretrial conference to determine the issue (Article 25). Additionally, Article 182 of the CPL, among other things, now states:

> before the commencement of a court session, judges may convene a meeting with the public prosecutor, the party concerned and his/her defender and agent ad litem to deliberate and consult their opinions on withdrawal, the list of witnesses, exclusion of illegal evidence and other trial-relevant issues.

A pretrial conference system is a new feature of Chinese criminal procedure law but it is worth observing that it is a mechanism which is common elsewhere. For example, pre-trial hearings aimed at settling all evidential issues before the trial starts have been held in Scotland and England, both of which are adversarial systems, for over 20 years (Gordon and Gane, 2018: chs 17, 20; Ormerod and Hooper, 2008: D4, 5, 15). Further, the Chinese model also resembles to some extent Article 17 of the United States Federal Rules of Criminal Procedure (see US House of Representatives, 2016). Guo (2017: 48–49) notes that in practice pre-trial conferences have not worked well in China in terms of excluding illegitimately obtained confessions but, in our view, they could be turned into a more effective, if far from perfect, mechanism as they are in the jurisdictions mentioned above.

Article 26 of the 2017 Rules states that if the public prosecutor and the defendant do not reach agreement on whether the collection of evidence has been legal in the pre-trial conference, and the people's court has doubts about the legality of the collection of evidence, the court shall conduct an investigation during the trial.[6] According to Article 34, if the court has doubts about the legitimacy of the collection of evidence based on relevant testimony or materials, and the People's Procuratorate fails to provide proof of its provenance or the proof provided cannot confirm the legitimacy of the evidence, and it cannot be ruled out that it was collected illegally, then the evidence should be excluded. However, Lewis points out that, traditionally, judges have been reluctant to 'break with the police and prosecutors' (2011: 683), and that senior Chinese academics express 'scepticism' the judiciary will have the 'courage, ability and motivation' to exclude evidence (2011: 689–690). It should be noted the decision of the court on exclusion of evidence can be appealed to the higher court (Article 40). It is evident that the effectiveness of the application of the exclusionary rule depends in the end on the capacity of a Chinese judge to doubt! But what if the judge is not trained to doubt or does not want to doubt?

6. Again note that the law assumes cooperation between the parties rather than conflict as in adversarial system.

The judge and truth

However, the practicalities of the Chinese trial system save Chinese judges to a great extent from the painful experience of doubt because, as in most modern systems of criminal justice, the majority of defendants plead guilty (Dobinson, 2013; Guo, 2017: 1–2, 30–51; McConville, 2012), whether by right as in adversarial systems or in a disguised fashion as in inquisitorial systems (see Weigend, 2008). Accordingly, Article 227 of the Interpretation of the Supreme People's Court on the Application of the Criminal Procedure Law of the People's Republic of China, 2012 states:

> In a case where the defendant has pleaded guilty to charges, after confirming that the defendant understood the facts and charges alleged in the indictment, voluntarily pleaded guilty and knew the legal consequences of the guilty plea, the court's investigation may mainly focus on sentencing and other controversial issues. In cases where the defendant does not plead guilty or the advocate maintains his innocence, the court investigation shall ascertain the facts related to sentencing on the basis of the facts establishing the guilt.[7]

Since a defendant rarely claims innocence, and there are not many controversial issues left, Chinese trials are notorious for their speed, normally taking only few minutes (Sun, 2018). In this context, it would require a significant effort by judges to attempt to examine whether confessions are truly voluntary and the extent to which they are credible and/or reliable. The CPL contains some conflicting principles in terms of the role of judges in questioning the genuineness of evidence in general and of confessions in particular. On the one hand, Article 49 seems to suggest an adversarial model: 'The burden of proof of guilt of the defendant in a public prosecution case shall fall on the people's procuratorate, while that in a private prosecution case shall fall on the private prosecutor.' If such is the case, then judges should be normally be satisfied with what procurator presents in court providing that there are no objections to this evidence by the accused or a defence lawyer. In other words, they would not enquire into the method by which a confession was obtained.

On the other hand, Article 50 of the CPL perhaps implies a rather different and more active role for the judge: 'Judges, prosecutors, and criminal investigators must, under legal procedures, gather various kinds of evidence that can prove the guilt or innocence of a criminal suspect or defendant and the gravity of crime.' Article 191 also envisages a more involved role for judges and spells this out in the following way: 'During a court hearing, if the collegial panel has doubts about the evidence, it may announce an adjournment, in order to carry out investigation to verify the evidence.' It then sets out various powers the People's Court has been granted for this purpose, for example, allowing the court to seek an expert evaluation of scientific evidence. Further, Article 220 of the Interpretation of the Supreme People's Court on the Application of the Criminal Procedure Law of the People's Republic of China, 2012 similarly indicates that if the judge has any doubts about the evidence, active steps should be taken to resolve these:

> If the court has any doubt about the evidence, it may inform the public prosecutor, the parties and their legal representatives, the advocate, and agents ad litem to supplement the evidence or make explanations. If necessary, the court may announce an adjournment to investigate and verify the evidence.' In other words, it is not a duty but it is within the discretion of the court to request additional information where it has doubts about the reliability of the evidence or presumably the method by which it was obtained.

Once again, one can see that judicial doubt is paramount in dictating the extent to which Chinese judges are prepared to carry out their own investigation into the quality of the evidence and the method by which it was obtained. Informal interviews with Chinese academics, conducted by one of the authors,

7. 最高人民法院关于适用《中华人民共和国刑事诉讼法》的解释 (2012年11月5日最高人民法院审判委员会第1559次会议通过) (adopted by the 1559th meeting of the Adjudication Committee of the Supreme People's Court on 5 November 2012) http://www.spp.gov.cn/sscx/201502/t20150217_91462.shtml (accessed 4 February 2019).

indicate that even if the Chinese judges do have doubts, this is rarely expressed in the use of their own initiative to investigate further, confirming the view of Lewis which was described above. Further, in view of the centrality of confessions in China, McConville in a major empirical study found that judges very rarely challenged evidence from confessions (2012: 75). Be that as it may, Article 66 of the 2012 Interpretation imposes a duty on the court to inform the parties of the discovery of any important, new evidence: 'when the people's court investigates and verifies the evidence and finds new evidence material that has a significant impact on the conviction and sentencing, it shall inform the procurator, the advocate, the private prosecutor and his legal representative.' While this provision clearly covers what is often termed 'fresh' evidence, in the sense that it was hitherto completely unknown to any of the parties, it could presumably also include evidence discovered by the judge that, for example, the police used illegitimate means to secure a confession from the accused during his interrogation. However, there is no duty laid upon the court to inform a defendant or a defence lawyer, again indicative of the mindset that the prosecution is a team effort by the state agencies, rather than an adversarial contest.

One can see that the Chinese courts have enormous discretion to collect additional evidence. They also have the power to accept or reject submission of new evidence by the parties. The discretion to reject a submission, however, is burdened by a duty to provide reasons for the rejection:

> If during the trial before the court, the parties, their advocates, or agents ad litem request to notify the new witness to appear in court, to obtain new evidence, or apply for re-assessment or inspection, then the name of the witness, the location of the evidence, the explanation in relation to the facts of the case, and the reasons for a new inquest or expert examination shall be provided. If the court deems it necessary to agree, it shall announce an adjournment of hearing; if it disagrees, it shall explain the reasons and continue the trial (Supreme People's Court, 2012: article 222).

The interpretation, however, does not specify the manner and the form in which this explanation must be given.

It is obvious that, theoretically, the resolution of judicial doubt can be achieved only through an examination of all relevant materials collected by the procuratorate. It is unlikely, however, that without assistance, the court will be able to identify any relevant evidence that is not included in the file submitted to the court by the prosecution. In this regard, the role of a prosecutor and a defence lawyer is paramount in ensuring disclosure to the court of all relevant information in the hands of the police or in the prosecutor's file.

The prosecutor and truth

While it is possible for a private person to initiate criminal proceedings, it is the procuratorate which has the sole power to initiate public prosecution (Article 3 of CPL). The Chinese procuratorate takes a unique position in Chinese criminal procedure, since it is not only the public prosecutor but also the public guardian of lawfulness, the authority to approve arrests and the organ empowered to conduct investigations (Article 3 of CPL). In ordinary cases, the investigation is carried out by the police but in serious cases, including the extortion of a confession by torture, the procuratorate alone performs the function of investigation (Article 18 of CPL). There are reports, however, that from the end of 2016, the procuratorate has being undergoing substantial reform, and that its investigative function is largely being abolished, with more emphasis being placed on its main function of legal supervision (Long, 2018: 147). There is much confusion at the moment about the future function of the procuratorate, which illustrates well the fact that the recent transformation of the Chinese criminal procedural law has brought about a degree of uncertainty to the law.

Chinese academics speak about three confusions (三乱) when discussing the current reforms of the procuratorate system. This condition was described by Zhang (2011) several years ago, and it is said to have been aggravated as the reforms proceeds (Long, 2018: 141) owing to the fact that procuratorates on

all levels adopt different policies and practices in implementing the reforms. Zhang singled out confusion in the institutional setting (机构设置乱), confusion in institutional designation (机构名称乱) and confusion in the mechanism for delegating authority (派出机构). The increase of uncertainty as the reform proceeds might well illustrate well the philosophical dictum of Laozi against preoccupation with continuous intervention: 'leaving muddy waters undisturbed will make it actually clear'.[8] The prudent advice of Laozi seems to be largely ignored in contemporary China, as most Chinese academics and practitioners, including Zhang and Long, argue for more regulations in the hope that new laws make the entire criminal justice process clear and smooth. This hope is likely be in vain considering the need for a greater shift in the fundamentals of Chinese criminal procedure than so far proposed.

There is, certainly, something to be done about the confused role of the procuratorate. Guo (2017: 46–47) explains that the Chinese procuratorate:

> is not a partisan prosecuting party as in adversarial systems. In contrast, it is not only a judicial organ but also a legal supervisory organ. Thus Chinese prosecutors have the authority as well as the obligation to exclude illegally obtained evidence to ensure the proper administration of criminal justice. However, wearing multiple hats, prosecutors find it difficult to remain as neutral as they should be. In most cases, prosecutors fail to exclude illegally obtained evidence out of a desire to pursue the prosecution.

He suggests that this unavoidable conflict of roles be solved by separating procuratorates according to their tasks: one section can deal with prosecutions, another with determining admissibility issues.

The views of Guo have been reflected by a number of leading Chinese academics, such as Chen (2011: 236) who claimed that 'the procuratorate cannot possibly have too great a role in excluding illegal evidence: it plays a greater role representing police and other official investigators in criminal litigation, and stands in an adversarial relationship to the defendant applying to exclude evidence'. This rather belies any idea that the procuratorate has a neutral obligation to exclude suspect confessions. The attempts to bring clarity into the operation of its diverse functions create a tension within the procuratorate, which on the one hand is based on a strict hierarchical principle and which at the same time has used its discretionary powers to develop extremely diverse practices at the grassroots levels (Long, 2018: 141). Any attempt to introduce more controls on the way in which evidence is collected will almost certainly be resisted on the grounds that it would affect the smoothness and speed of criminal proceedings. In many places, the procuratorate functions more as 'a bridge between the police investigation and court procedures than as a discriminating screen' (Lewis, 2011: 652–653). There is also an uneasiness among the Chinese about the growing number of prosecutors (Lixin, 2009: 327).

The wheel of Chinese government reform turns fast and may turn in various directions. It is certainly appropriate that the procurator, who has to decide whether to initiate public prosecution, must retain the power to examine the legality of evidence. The procurator stands nearer to the process of collecting evidence and is certainly better positioned than a judge to decide on the admissibility and reliability of evidence which he has to present to the court. During the process of approving arrest and the decision to prosecute, the 2017 Rules oblige the procurator in charge to inform the accused of his right to apply for the exclusion of illegal evidence (Article 16). The consequences of discovering that the evidence has been obtained illegally is that the procurator is barred from sanctioning detentions and initiating prosecution, unless there is other supporting evidence (Article 18).

The role and power of the procurator reveals clearly the nature of Chinese criminal justice. It is certainly not adversarial. Is this system well suited for discovering the truth? Or does the partiality of the procurator as a prosecutor compromise the truthfulness of evidence submitted to the court? The 2012 reform of the CPL and 2017 Rules may provide sufficient normative grounds for a procurator to evaluate the legality of evidence submitted by the police. The doubt is whether he or she will be willing to ignore facts that may point to the illegality of such evidence. It is certain that much depends on the willingness

8. Chinese text: 孰能浊以静之徐清。孰能安以动之徐生. Daodejing, 15.

of the interrogated person to report the facts of abuse, and also the willingness of the procurators to take such reports seriously. The 2017 Rules (Article 14) authorise the procurator to control the process of investigation in relation to illegal evidence not only at the request of the interrogated but also on his own initiative in more serious cases. Yu (2017b: 631) in his empirical study in an unidentified location of China on how prosecutors and investigation officers work together on the issue of admissibility of evidence concludes: 'As long as the written evidence appears lawful in format and conforms to legal requirements, the police case is approved by prosecutors, disregarding the methods of construction.' However, Guo (2017: 46–47) refers in his empirical study to various cases where prosecutors were active in uncovering the illegality of evidence and concluding that it is inadmissible. They do this when authorising detention and more so when deciding on whether to initiate prosecution or not. As noted above, Guo suggests creating a separate section in the procuratorate to rule on the admissibility of evidence, separate from those responsible for prosecution, in order to avoid any conflict of interest (2017: 46–47). In the cases he mentions, however, it seems that what persuades Chinese prosecutors to reject coerced confession is an awareness of the problem and a political will to stop malpractice in line with the current reform of criminal procedure in China.

How long this political will lasts is open to question. Creating an additional controlling mechanism suggested by Guo could certainly prolong this current campaign, but it is unlikely to inspire further efforts. As with 2017 Rules, procedural mechanisms alone are not sufficient to enable procurators to exercise efficient control over the process of investigation. What is essential is the moral authority and respect they engender in the eyes of the other players in the system and the public, which will enable them to stand up to the police and create trust among accused to report the facts of procedural abuse.

The defence lawyer and truth

In practice, if a defence lawyer, representing the accused, does not object to evidence, which is the normal defence response, a judge has very little ground for doubting the truthfulness or the provenance of the evidentiary materials submitted to him by the prosecution. Dobinson (2013) explains that a defence lawyer will usually see little point in challenging the event because this will very rarely have a positive result in terms of the verdict and is likely to increase the sentence imposed on his client. Further, such actions will open up the lawyer to harassment and possibly even arrest by the authorities (see also Rongjie, 2013). At this point, it is worth noting that in the inquisitorial model, the defence lawyer traditionally has tended towards a passive role as regards the investigation and questioning of witnesses (Field and West, 2003; Hodgson, 2005: ch 4). As we saw above, in theory, it is possible for judges, on their own initiative, to ask for further information or seek it themselves. Further, Article 226 of Interpretation of the Supreme People's Court on the Application of the Criminal Procedure Law of the People's Republic of China, 2012 states:

> During the trial, if the collegial panel discovers that the defendant has surrendered on his own initiative, confessed, or performed a meritorious service, that according to law is a mitigating circumstance, and if there is no relevant evidential materials in the file submitted by the People's Procuratorate, it shall notify the People's Procuratorate to submit it.

It is apparent, however, that such information is more likely to be discovered and disclosed with the active involvement of a defence lawyer, rather than relying on the prosecutor to bring it to the attention of the court or the court making the relevant enquiries itself.

At this stage, it should be noted that according to Article 42 of the CPL:

> No defense lawyer or any other person may help a criminal suspect or defendant conceal, destroy or fabricate evidence or collude with a criminal suspect or defendant to make confessions tally, or intimidate or induce witnesses to give false testimony or conduct other acts interfering with the proceedings of judicial organs. Any violation of the preceding paragraph shall be subject to the legal liability in accordance with the law.

> Any alleged crime committed by a defender in this regard shall be handled by an investigating organ other than the investigating organ handling the case undertaken by the defender.

While this imposes similar duties as an 'officer of the court' on the defence lawyer as elsewhere (Ashworth and Redmayne, 2010: 65, 73), at the same time the 2012 reform has given defence lawyers more rights to gain access to evidence. Article 39 of the CPL states that if the defence thinks that a public security organ or the procuratorate has failed to submit evidence gathered during the pre-trial proceedings which 'can prove that the criminal suspect or defendant is innocent or the crime involved is a petty offense', the defence is entitled to apply to the procuratorate or the court to obtain such evidence. In other words, finding the truth will depend sometimes not only on the truthfulness and completeness of the evidence submitted by the prosecution, but also upon the preparedness and persistence of defence lawyers in obtaining all the relevant evidence. As noted above, however, there are strong incentives for a defence lawyer to remain inactive.

The powers of the defence lawyers to apply for disclosure of evidence held by the procuratorate is limited, as it is elsewhere, to material which is relevant (Ashworth and Redmayne, 2010: 238–248). It important to note, however, that, as is the norm in inquisitorial systems, the defence has access to the case file which has been passed from the police to the procuratorate. As regards any evidence which is not in the case file, the defence can seek disclosure, or discovery (in the American terminology), only if that evidence might show that the criminal suspect or defendant is innocent or there is a mitigating circumstance (Article 224 of the Interpretation of the Supreme People's Court on the Application of the Criminal Procedure Law of the People's Republic of China, 2012). In this situation, the Chinese court, after receiving an application from the defence lawyer, can order the procuratorate to hand over any evidentiary materials collected during the investigation, examination and prosecution, and it must do so within three days after receiving the letter from the court allowing the defence to obtain the evidence. Thus, it is not all the evidence in the prosecution file which the defence lawyer has the right to access but only that which can be demonstrated to the court as being important for proving the defendant's innocence or the presence of a mitigating circumstance. In practice, however, Daum (2017: 5–6) claims that defence lawyers have had little success in securing records of medical inspections carried out upon their clients at detention centres in order to prove allegations of confessions being coerced.

Witnesses and truth

The theoretical capacity of defence lawyers to challenge the background to and truthfulness of evidence submitted by the prosecution depends much on their access to witnesses and to the records of the latter's earlier statements and testimony at trial. Much of this information remains out of the knowledge or control of the defence lawyer. A witness could have been subject to torture, violence, threats, etc. If so, it is vital that there is an opportunity for the defence to cross-examine witnesses. The fundamental problem faced by the Chinese criminal justice process is that witnesses are rarely examined in oral proceedings before the court (Wang and Caruso, 2017). As Lewis (2011: 665) observes, focusing 'attention on in-court-testimony goes against deeply embedded practices in the criminal justice system'. For this reason, Belkin (2013: 104) explains that the new requirement for interrogators (usually the police) to testify in court where there are doubts over the admissibility of a confession is 'unprecedented' and, in the eyes of the police, demeaning to them (see also Lewis, 2011: 665–666). Consequently, interrogators are rarely summoned to court to answer questions about the possible abuse of suspects who have confessed (Daum, 2017: 6–7)

Tradition aside, there are several reasons why civilian witnesses in particular are rarely examined in open court proceedings, a significant factor being the unwillingness or fear of the witnesses themselves. To address this problem, Article 62 of the CPL put in place a number of measures to protect witnesses, including securing their anonymity. It is difficult, however, for the Chinese criminal justice system to create an atmosphere in which witnesses will willingly come forward and testify to the truth rather than

having to be compelled to come to court, feeling anxious if not scared. Thus, obtaining the truth in any particular case will depend to a great extent on the attitude of witnesses to court proceedings.

Since witnesses rarely attend trial proceedings, it would be natural to expect that defence lawyers should have an opportunity to meet them before the trial to evaluate them and their testimony. In various inquisitorial jurisdictions, for example, the Netherlands, witnesses traditionally were usually not called to give evidence at the trial (see Swart, 1993: 298) but the ECHR jurisprudence has disapproved of this practice and, nowadays, while there are various exceptions to the rule that witnesses must be available at trial for cross-examination, in such circumstances the defence must have the opportunity to question witnesses during the pre-trial proceedings (Trechsel, 2005: 305–322). The Chinese position is less clear. Article 41 of the CPL states the following:

> Defence lawyers may, with the consent of the witnesses or other units and individuals concerned, collect information pertaining to the current case from them and they may also apply to the People's Procuratorate or the People's Court for the collection and obtaining of evidence, or request the People's Court to inform the witnesses to appear in court and give testimony. With permission of the People's Procuratorate or the People's Court and with the consent of the victim, his close relatives or the witnesses provided by the victim, defence lawyers may collect information pertaining to the current case from them.

It should therefore be noted that defence access to witnesses and the latter's appearance to answer questions at trial depends either upon witnesses being willing to cooperate before the trial or the court agreeing to them being compelled to appear at trial.

Against this backdrop, it is not surprising that the modern state of Chinese criminal procedure law is unsatisfactory from the point of view of the defence. Quite simply, courtroom culture and broader social attitudes do not perceive it to be the norm that the accused will dispute his or her guilt nor that witnesses will give evidence at trial as a matter of course. In other words, the key problem to be resolved as regards the Chinese criminal trial is to make it commonplace for all testimony to be heard before the judge in open court and for witnesses to accept that this is the usual procedure. Despite significant efforts to make this possible, the new normative framework still remains powerless to give life to a trial that is centred on obtaining the truth without any element of compulsion being involved. Culture and tradition need to change in order to create a meaningful trial.

Conclusion

The reform of criminal procedure in China did not stop with the issue of the '2010 Evidence Rules' and the revisions to the CPL in 2012. By October 2014, the 18th Central Committee of the Communist Party had announced a new policy to reform the Chinese court system generally and criminal justice particularly.[9] There is an awareness that the trial proceedings remain a formality, whereby the court simply approves or 'rubber-stamps' the findings presented to it by the procuratorate. Therefore, in February 2015, the Supreme Court of the PRC published guidelines for the reform of court proceedings according to which the examination of the facts (including cross-examination) must become the central part of the trial. (Sun, 2018). Unfortunately, modern Chinese scholarship tends to focus on how to perfect procedural mechanisms to achieve this rather than on how to change the fundamental intellectual and moral attitude to the idea of trial among ordinary people. As a leading Chinese academic, Chen (2010: 529), wrote: 'Any perfect modern system and management expertise and any cutting-edge technologies would turn into a pile of waste paper in the hands of a bunch of traditional minded people' (see also Long, 2015a). In similar vein are Lewis' comments on the introduction of the exclusionary

9. Chinese text is available at: 中共中央关于全面推进依法治国若干重大问题的决定. (二〇一四年十月二十三日中国共产党第十八届中央委员会第四次全体会议通过) 10 October 2014. Available at: http://cpc.people.com.cn/n/2014/1029/c64387-25927606.html (accessed 4 February 2019).

rules: 'This move will require that assertive actors in the criminal justice system gain a toehold and gradually move the rule from the realm of gloss to substance' (2011: 636).

The same conclusion can be applied to the belief of Chen (2010: 518) and Zuo (2015), as well as other prominent Chinese academic scholars, that the only way to procedural fairness is an increase of the adversarial elements in Chinese criminal procedure. Adversarial mechanisms are unlikely to work in a society where the defence, on one side, is not—and presently cannot—be perceived as an equal party to the police and prosecution, on the other side, even if the Chinese judge poses himself as an independent arbiter. To change this system might require a cardinal departure away from a single-party authoritarian state towards a pluralistic society with independent courts and even independent procuratorate.

In brief, an open trial with active participation of witnesses and the defence will remain an unachievable goal without a fundamental shift in the way how the 'truth' is obtained. At the moment, the primary method of finding the truth is the inquisitorial work of investigators, in securing a confession, the procuratorate, in confirming the accused's confession, and, to a lesser degree, the judges in validating it. It is difficult to reconcile this with the concept of procedural fairness which the Chinese written law now tries to reflect. The search for truth and procedural fairness can be reconciled only if truth is obtained through an active and open interaction of the prosecution, the defence and/or accused, the victim and other witnesses in a public forum. This interaction does not need to be antagonistic and confrontational in the same manner as it is perceived in the West where adversarial trial carries a sense of mutual hostility. Chinese culture and values, as described briefly above, could contribute to a more cooperative and less partisan context for seeking the truth. Whatever form the adversarial aspects of criminal procedure take in China, its future depends not so much on the form and content of legislative acts, as on the readiness and willingness of the participants to engage willingly in an open trial.

However, it is still possible for procedural fairness to play a greater role in Chinese criminal justice system within the current political milieu of China. This would be possible not purely through introducing a more perfect external administrative and regulatory mechanism controlling the hosts of Chinese police, procurators and judges. Rather, procedural fairness needs an internal moral foundation shared by the participants in a legal process which cannot be built through the mechanical reform of the governmental system. It might be built by means of reintroduction of the traditional Confucian values of humanity into the Chinese governmental machinery, but this introduction is unlikely to be fruitful in a society driven primarily by material greed rather than by the love of virtue.

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International law and criminalizing illegal trade in endangered species (from the Far Eastern perspective)

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The article examines international law in relation to international trade in endangered species. It analyzes the major international agreement in this area: CITES (the Convention on International Trade in Endangered Species of Wild Fauna and Flora 1973) in the context of Thailand and China. The article argues that CITES does not sufficiently address the need of those countries to criminalize illegal trade in endangered animals and plants across borders. CITES requires an increased administrative control over the trade which many developing countries are unable to carry out in order to achieve an effective level of protection for the endangered species. Under the influence of CITES, the crime of illegal trade is defined in Thailand and China narrowly as trade in violation of administrative controls. The main argument of this article is, first, that the countries, such as Thailand and China, must adopt a broader concept of the crime of illegal trade in endangered species. Second, there is a need to adopt this concept on an international level in order to facilitate a successful fulfillment of the countries' international obligations.

Keywords: *International environmental law, CITES, China, Thailand, criminalization*

1 INTRODUCTION

Famous Roman jurist Gaius wrote:

> [a]ll nations who are ruled by law and customs make use partly of their own law, and partly of that which is common to all men. For whatever law any people has established for itself is peculiar to that State, and is called the Civil Law, as being the particular law of that State. But whatever natural reason has established among all men is equally observed by all mankind, and is called the Law of Nations, because it is the law which all nations employ.[1]

The main argument of this article is based on the proposition that illegal trade in an endangered species is a crime according to the Law of Nations. The evidence for this comes not only from the fact that many countries penalize illegal trade but also from the perception that this trade is intolerable according to certain basic values of the

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1. Justinian, *Digests*. I. I. 9.

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international community.[2] If this proposition is true, then a comparative approach is warranted to facilitate the identification of the international obligation to criminalize the trade.[3] This identification should not only involve a description of how the obligation is reflected in various national jurisdictions, but should also critically examine the way how international law instruments can facilitate its effective enforcement.

The Far Eastern region plays a significant part in the global commercial exchange of wildlife (live animals and plants) and wildlife products (hides and fur skins, ivory, and other derivatives).[4] Various reports estimate it at the sum of between US$5–50 billion annually.[5] The wildlife trade is driven largely by fashion and hobbies; although medical and pharmaceutical research, as well as educational purposes, play important roles too. Sand joins the claim that the luxury orientation of the wildlife trade is non-essential and even perverse, since it is not an essential need but affluence which moves the trade in wildlife.[6] This perverse business is, to a significant extent, carried out by transnational criminal organizations.[7] There is certainly a necessity to apply criminal sanctions, since criminal acts have to be addressed by criminal law remedies. This article deals with the problem of defining illegal trade in endangered species as an international criminal offence specifically from the Far Eastern perspective. The issue of what trade in endangered species should be internationally criminalized, although raised, is far from settled.[8] Its productive discussion cannot be achieved without looking at the context of specific countries. Exports of wildlife and wildlife products are a significant source of foreign currency revenue for a number of developing countries.[9] Even though it has contributed to depletion and exhaustion of many animal and plant species, the trade itself may not be the main cause of the harm. The destruction of natural habitats brought about by an unsustainable use of the biological resources by humans has caused greater damage to wildlife.[10]

Accordingly, the circumstances found in such countries as Thailand and China favour a broader policy of criminalization in all aspects of environmental protection. I will argue in this article that the definition of illegal trade in endangered species in

2. Christian J Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge University Press, 2005) 141–42. Ragnhild Sollund, 'The Animal Other: Legal and Illegal Theriocide' in Matthew Hall et al (eds), *Greening criminology in the 21st century* (Routledge, 2016) 93–113.
3. Tams (n 2) at 141.
4. Vincent Nijman, 'An Overview of International Wildlife Trade from Southeast Asia' (2010) 19.4 *Biodiversity and Conservation* 1101–14.
5. Peter H Sand, 'Whither CITES – The Evolution of a Treaty Regime in the Borderland of Trade and Environment' (1997) 8 *European Journal of International Law* 29–58, at 29; Rebecca WY Wong, 'The Organization of the Illegal Tiger Parts Trade in China' (2015) 56.5 *British Journal of Criminology* 995–1013, at 995; Tiphaine Bernard, 'La lutte contre le commerce illégal d'espèces sauvages' (2016) 49.2 *Criminologie* 71–93, at 72.
6. Sand (n 5) at 30.
7. Annecoos Wiersema, 'CITES and the Whole Chain Approach to Combating Illegal Wildlife Trade' (2017) 20(3–4) *Journal of International Wildlife Law & Policy* 207–25, at 218.
8. Ibid, 222; Amissi Manirabona, 'La criminalité environnementale transnationale: aux grands maux, les grands remèdes?' (2014) 47(2) *Criminologie* 153–78.
9. International Trade Centre (ITC), *The Trade in Wildlife: A Framework to Improve Biodiversity and Livelihood Outcomes* (ITC, 2015) at 1. Available at <www.cbd.int/financial/monterreytradetech/iucn-wildtrade.pdf> accessed on 3 October 2018.
10. See the *Red Data Books* compiled since 1966 by the Species Survival Commission of the World Conservation Union (IUCN) (Hilton-Taylor, 2000).

those countries remains rather limited. One reason for that is the weakness of the international law instruments which do not require that an illegal possession of specimens of endangered species should be certainly criminalized. Further, international law tends to define illegal trade in endangered species as the trade conducted without an administrative permit. However, it does not address well the situations when a *permitted* trade is harmful to the survival of species.

Certainly, a critic may say that we criminalize things based on conduct we, as a society, find morally reprehensible, not necessarily on 'significance of impact'. Otherwise we would be criminalizing many industries which have considerable impact on the environment but which are often considered quite legitimate such as vegetation clearing, mining and gas extraction, factory emissions, overfishing, cropping and grazing etc. This argument can be certainly correct in some situations. However, the reason for a broad criminalization policy in the Far Eastern countries comes exactly from the harm or danger the international trade in endangered species poses to their very existence.[11] This article does not argue that the presence of harm is always a sufficient reason for criminalization. The importance of harm for criminalization policies is a controversial topic[12] which is beyond the limits of the present inquiry. Instead, my argument for applying the principle of harm to define the criminal offence of international trade in endangered species is contextualized and is largely based on the analysis of the situation in the Far Eastern countries. Its results can be summarized as the following: criminalizing unauthorized trade is not a sufficient remedy to combat illegal trade in endangered species. It must also encompass illegal possession and practices when the trade permits were granted without proper examination of their impact on the well-being of the protected species. Thus, the definition of illegal trade as commerce which has been forbidden by administrative discretion of a state is insufficient to fulfil international obligations to protect endangered species for countries like Thailand or China. The administrative procedure can be defective. What makes it an international crime is not the administrative ban by the state, nor the absence of permission to trade, but the serious damage that this trade brings to the endangered species.

Because the trade in wild animals and plants crosses borders between countries, the effort to regulate it naturally requires international cooperation. Not every transboundary crime is an international crime. A transboundary crime becomes international when its perpetration threatens the public good or interest protected by international law. There is an erga omnes obligation to protect endangered species since they constitute an important value for the international community.[13] Therefore, the main argument of this article presents something more than a simple suggestion that the countries, such as Thailand and China, must adopt a broader concept of the crime of illegal trade in endangered species. There is a need to adopt this concept on an international level in order to facilitate a successful fulfillment of the countries' international obligations. The reason for this is that the relevant domestic laws of many Asian countries, with all their strengths and weaknesses, have been largely determined by the content of international agreements. The Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES) (1973) is seen by many experts as having been successful in controlling trade in particularly

11. It is noteworthy that in Thai and in Chinese languages (อันตราย, 危害) *to harm* and *to endanger* are the same words.
12. See Hamish Stewart, 'The Limits of the Harm Principle' (2010) 4.1 *Criminal Law and Philosophy* 17–35.
13. Tams (n 2) at 139.

well-known species.[14] However, it fails to describe the illegal trade as an international crime in general or objective terms. In order to understand its limitations and impact on the laws of several Asian countries, it is necessary to outline briefly the main features of the Convention.[15]

2 CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED SPECIES OF WILD FAUNA AND FLORA (CITES)

CITES (the Convention on International Trade in Endangered Species of Wild Fauna and Flora) was adopted in 1973 and entered into force in 1975. CITES is one of the largest conservation agreements in existence in terms of the number of the participating states. Currently, there are 183 parties to the Convention.[16] The aim of the Convention is not so much banning the international trade in specimens of wild animals and plants as controlling it. It requires states to protect endangered species through appropriate trade control measures and by monitoring the condition of such species within each country. Monitoring is done by each country's nominated 'Scientific Authority' which determines whether the allowed trade threatens the existing species (CITES, Article IV). Each country must designate a Scientific Authority responsible for monitoring wildlife species within its national borders (CITES, Article IX).

The Convention covers all aspects of the trade ranging from live animals and plants to all products derived from them (Article I). According to the CITES webpage: 'Today, it accords varying degrees of protection to more than 35,000 species of animals and plants, whether they are traded as live specimens, fur coats or dried herbs.'[17] The agreement requires that all import, export, re-export, and introduction of species mentioned in the appendices have to be authorized through a permit system (Articles III–V). Each Party to the Convention must designate one or more 'Management Authority/ies' to be in charge of administering the licensing system (Article IX), separate from the Scientific Authorities that monitor the effects of trade on the status of the species.

In order to be subject to control, species must be proposed for listing at the Conference of the Parties which is the highest body of the Convention (Article XI).

14. Chris Huxley, 'CITES: The Vision' in Jon Hutton and Barnabas Dickson (eds), *Endangered Species, Threatened Convention: The Past, Present and Future of CITES, the Convention on International Trade in Endangered Species of Wild Fauna and Flora* (Earthscan, 2000) 3–12, at 11.

15. There is an extensive literature which provides a thorough analysis of the provisions of the Convention. See some of it: Sudhir K Chopra, 'Introduction: Convention on International Trade in Endangered Species of Wild Fauna and Flora' 1987 (Fall) 5(2) *Boston University International Law Journal* 225–28; P van Heijnsbergen, *International Legal Protection of Wild Fauna and Flora* (iOS Press, 1997); Jon Hutton and Barnabas Dickson (eds), *Endangered Species, Threatened Convention: The Past, Present and Future of CITES, the Convention on International Trade in Endangered Species of Wild Fauna and Flora* (Earthscan, 2000); Willem Wijnstekers, *The Evolution of CITES: A reference to the Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES Secretariat, 11th edition, 2018) available at <https://cites.org/sites/default/files/common/resources/The_Evolution_of_CITES_2018.pdf> accessed on 3 October 2018; Rosalind Reeve, *Policing International Trade in Endangered Species: The CITES Treaty and Compliance* (Routledge, 2014).

16. Updates are available at: <https://cites.org/eng/disc/parties/chronolo.php>.

17. 'What is CITES?' (2017) CITES <https://cites.org/eng/disc/what.php> accessed on 3 August 2017.

They may be proposed for listing by Parties other than the states in which the species are found. The species may be listed despite objections by the host states if there is sufficient (two thirds majority) support for the listing (Article XV). Proposals for new listings often provide the most controversial issues at the Conferences of the Parties.[18]

The species perceived as endangered are grouped in the Appendices according to the degree of perceived endangerment. Different groups of species require different measures of protection. Appendix I contains species that are threatened with extinction if trade is not halted. Trade in wild-caught specimens of these species is illegal (permitted only in exceptional licensed circumstances). Appendix II contains those species which are not necessarily threatened with extinction, but may become so if they are not listed. In order to export the species listed in Appendix II, the exporting Party must establish that the trade will not be detrimental to the survival of the species. An export permit is required (Article IV). Appendix III contains species which are not threatened by extinction globally. The species in this (third) Appendix can be listed by any country which already regulates trade in the species and which believes that it needs cooperation from other countries in order to prevent unsustainable or illegal exploitation. No decision of the conference of the parties is needed. One country can ask other CITES Parties for assistance in controlling the trade by requiring a certificate of origin. If the origin is from the country where the species is listed in Appendix III, an export permit from that Party will be required (Article V).[19]

There has been increasing willingness amongst the Parties to allow some countries to trade in wildlife products by listing them in Appendix II, as opposed to Appendix I, if they manage the species well by ensuring their sustainability. One controversial practice adopted under the Convention is that species may be split-listed,[20] which means that some populations of a species in one country may be on one list with the strongest degree of protection, while some populations of the same species in another country may be on another list with a lesser degree of protection. That can lead to the practice of laundering when the origin of the products is falsely declared as coming from another country with a weaker degree of protection. For example, the African elephant is currently split-listed, with all populations except those of Botswana, Namibia, South Africa and Zimbabwe listed in Appendix I. Elephant populations of Botswana, Namibia, South Africa and Zimbabwe are listed in Appendix II which allows trade under certain restrictions. Listing the species in Appendix I in all countries would prevent the practice of laundering; but it is claimed to be unfair to restrict trade in wildlife products for the states with good management practices.[21]

The structure and principles of CITES are limited to international trade in species only. The Convention leaves largely outside its scope the movement of the specimens which are counted as personal property (Article VII.3), although control is imposed if

18. See, for example, Cameron Jefferies, *Marine Mammal Conservation and the Law of the Sea* (Oxford University Press, 2016) 51.
19. See, generally, CITES.org, 'The CITES Appendices', <www.cites.org/eng/app/index.php> accessed on 5 October 2018.
20. The rule which explicitly allows the species to be split in several appendixes is not found in the text of the Convention. The practice of splitting is a result of creative interpretation.
21. European Commission, 'The CITES Convention and trade in animals and plants' (undated) <www.era-comm.eu/Biodiversity_and_Wildlife_Trafficking/module_1/1_Chapter_9_work.html> accessed on 4 August 2017.

the specimens are acquired by the owner outside his state of residence and being imported into his country. More significantly, it does not deal with habitat loss.[22] The Convention mostly relies on permits. It does not directly promote a sustainable use of wildlife. In this aspect, its approach contrasts with that of the Convention on Biological Diversity (1992) which requires the members to develop appropriate programmes and action plans to meet the purposes of the agreement.[23]

In other aspects, CITES is similar to the Convention on Biological Diversity which does not provide for an enforcement mechanism in the case of non-compliance. However, the administrative body of CITES, the Secretariat, has been successful in initiating trade sanctions for non-compliance, something unseen in the practice of the Convention on Biological Diversity.[24] Both agreements rely much on the action and discretion of the states in enforcing their provisions. For example, CITES requires that an export permit for the species listed in Appendix I (Article III.2) may be issued after 'a Scientific Authority of the State of export has advised that such export will not be detrimental to the survival of that species'. Even though the Convention does not define the 'non-detriment' finding (NDF) criteria required of the national Scientific Authorities when allowing exports of specimens of the endangered species, a number of policies and guidelines were accepted at Conferences of the Parties.[25] Non-detriment findings require a lot of information which the poorer countries are unable to provide.

In the Far East, there are often difficulties, common for all developing countries, in relation to species identification and proof that permit limits have been exceeded.[26] Restricted species often closely resemble non-restricted ones. In some cases, genetic confirmation is required. Not many countries where the offences of illegal catching or collecting the protected specimens take place, can afford the expertise required for identification. Even simple visual inspection may need many experts depending upon the volume of the trade. The problem is aggravated by the fact that CITES does not provide assistance to poorer countries in terms of the capacity building necessary for the effective operation of a permit system.[27] In this context, the use of criminal sanctions can, under certain conditions, be a more effective deterrent to prevent the illicit trade.

22. Solène Guggisberg, *The Use of CITES for Commercially-exploited Fish Species: A Solution to Overexploitation and Illegal, Unreported and Unregulated Fishing?* (Springer, 2015) 89.
23. See Article 6 of the Convention on Biological Diversity (1992) <www.cbd.int/convention/text/default.shtm> accessed 12 April 2018.
24. Peter Sand criticized the Secretariat for a biased approach in initiating sanctions against poorer countries but not against the richer violators such as Japan. See, Peter H Sand, 'International Protection of Endangered Species in the Face of Wildlife Trade: Whither Conservation Diplomacy?' (2018) 20 *APJEL* 5–27, at 23–26; and: Peter H Sand, 'Enforcing CITES: The Rise and Fall of Trade Sanctions' (2013) 22(3) *RECIEL* 251–63, at 261–63.
25. See, CITES.org, 'Non-detriment findings' <www.cites.org/eng/prog/ndf/index.php> accessed 12 April 2018.
26. Dinah Shelton and Alexandre Charles Kiss, *Judicial Handbook on Environmental Law* (UNEP/Earthprint, 2004) 105. The text is available at: <www.elaw.org/system/files/UNEP.judicial.handbook.enviro.law_.pdf> accessed on 13 March 2019.
27. This assistance, however, can be requested based on Article 18 of the Convention on Biological Diversity.

3 CITES AND CRIMINALIZATION OF ILLEGAL TRADE

Important provisions are contained in Article VIII of CITES, which requires that:

> the Parties shall take appropriate measures to enforce the provisions of the present Convention and to prohibit trade in specimens in violation thereof. These shall include measures: (a) to penalize trade in, or possession of, such specimens, or both; and (b) to provide for the confiscation or return to the State of export of such specimens.

The Convention can be interpreted as requiring a certain degree of criminalization of the illegal trade. However, the word 'penalize' might also, in some countries, mean administrative sanctions with very large fines. It is apparent that the text of the Convention does not explicitly make illegal trade in endangered species and possession of its specimens a serious criminal offence which warrants a higher degree of cooperation between criminal law enforcement agencies of various countries. Nor does the Convention call upon the Parties to penalize the government officials who issued the permits without a due examination of their impact on the well-being of the protected species.

Taking into account the circumstances in many Asian countries, several reasons can be put forward why the protection of endangered species needs criminal law. One is economic. This trade is very profitable, and it will not be effectively prevented by administrative or civil law sanctions. Because trade in endangered species is highly lucrative for poachers, criminal law sanctions in the form of substantial fines and prison sentences are necessary to deter violations. Some countries contain provisions threatening up to five years of imprisonment. Seven years are allowed for in India's law.[28]

Further, a reason for the use of criminal law can be purely deontological. Deontological ethics of Buddhism, for example, maintains that protecting rare species is simply a human duty.[29] The destruction of wildlife is evil, and therefore the evil acts must receive retribution in the form of criminal penalties. The moral duty on the part of humankind to protect wildlife may be perceived differently in other ethical traditions. It can be based either on the anthropocentric view (that maintains that the rare animals and plants are important because they give aesthetical pleasure and satisfaction far beyond economic value), or the biocentric view (that maintains the value of other forms of life independently from its importance for humans).

Deontological and economic (consequentialist) arguments can reaffirm each other. They both reflect the view that the endangered species present a value which must be protected. Whether out of economic or deontological reasons, most national laws enacted legal provisions required by Article VIII of the Convention.[30] At the same time, it is reported that the domestic legislation in some countries does not appropriately penalize the illegal trade offences.[31]

28. The Indian Wildlife Protection Act 1972, 1993. Section 51 <www.moef.nic.in/legis/wildlife/wildlife1.html> accessed on 5 October 2018.
29. A concise and brilliant exposition of this duty is found in some ancient Buddhist chronicles which were referred to in the Separate Opinion of Vice-President of the ICJ, Weeramantry: *Hungary v Slovakia*, 1997 ICJ Rep 7, 1997 ICJ 101 <www.icj-cij.org/files/case-related/92/092-19970925-JUD-01-03-EN.pdf> accessed on 28 March 2019.
30. Shelton and Kiss (n 26) at 104.
31. Patrick ten Brink, *The Economics of Ecosystems and Biodiversity in National and International Policy Making* (Routledge, 2012) 333.

It is certainly right that CITES leaves broad margins of appreciation to the member states in criminalizing illicit trade. However, the practices in the Far Eastern countries, as will be demonstrated below, indicate that the text of Article VIII is too vague and uncertain to ensure that sufficient criminal sanctions apply. Further, the issues of illegal trade and illegal possession of the species should not be treated separately as Article VIII of the agreement suggests. I will attempt to argue in the following sections that a lack of definitive provisions in CITES in relation to the obligation of the parties to the Convention to criminalize illegal possession (as well as illegal hunting or collecting protected specimens) has an overall negative impact in the Far East and likely beyond the region. A particular consequence of that is a weak mechanism for international cooperation among national *criminal* law enforcement agencies.[32]

Such a mechanism is vital in dealing with the practice of 'species laundering' when illegally taken protected wildlife is marketed under false claims of having been 'farm-bred', or as originating from a country in which the restrictions do not apply, or claims that the trade is subject to exemptions such as for an experimental or medical use. In these cases, the proof of the animal or plant's origin, or proving the intent of purchasers, is often impossible without international cooperation. The importance of international cooperation and harmonization rises significantly in the context of the increased dependence of the wildlife protection on the content of multiple administrative regulations. In international trade, the number of authorities involved increases dramatically. There are trade authorities who control exports and imports, agricultural authorities dealing with inspection of plants, tax authorities are also involved. Above all, international trade is controlled by the police to prevent smuggling. Co-ordination of all organs involved is an enormously difficult task. The difficulty is aggravated by the fact that some states still lack one or more of the four major requirements for a Party: designation of Management and Scientific Authorities; laws prohibiting trade in violation of CITES; penalties for such trade; and laws providing for the confiscation of specimens.[33] The absence of clear specific provisions obliging the states to criminalize illegal trade and possession of the species creates the situation of a significant discrepancy between various national criminalization policies. This discrepancy is particularly apparent in the Far East. As will be demonstrated below, some countries, such as China, attempts to introduce and apply very strict measures to penalize crimes against protected plants and animals. In contrast, Thailand adopts a much more lenient approach.

4 CITES AND THAILAND

Thailand has been a Party to CITES since 1983, yet until 1991, it did not have sufficient legislation to implement its requirements. In April 1991, the CITES Secretariat presented a detailed report on Thailand's failure to implement the Convention during the period January 1988 to March 1991.[34] Thailand was blamed for permitting illicit trade in live mammals (especially primates), birds, as well as crocodile, snake and lizard skins. Most of the illegal imports of endangered animal species to Thailand

32. Reeve (n 15) at 250.
33. Ibid at 246.
34. CITES Doc. SC.23.51, 'Implementation of the Convention in Thailand and Grenada', by the Secretariat for SC23 (Apr 1991); COP8 Cited in: Reeve (n 15) 110. It is not the only instance when the Secretariat criticized Thailand. See: United Nations Office on Drugs and

came from the neighbouring countries such as Laos, Cambodia and Burma.[35] Before 1992, the main wildlife legislation in Thailand was the Wild Animal Reservation and Protection Act, B.E. 2503 (1960), amended 1972 and the Plants Act, B.E. 2518 (1975). The first Act imposed some limitations on hunting wild animals. The second Act prohibited exports of certain plant species, but these were only fruits, the export of which might have encouraged commercial competition. Imports of orchids were regulated by the Plant Quarantine Act B.E. 2507[36] and should have come to the attention of the Agricultural Regulatory Division. Many of the commonly traded species were not protected by either of the legislative Acts, despite their being listed in the CITES Appendices.

The Secretariat maintained that there was a lack of control in Thailand over the import and export of animals and plants.[37] The management authority for processing export permits often issued blank CITES permits to the exporter who then supplied the necessary information. Physical inspections were not normally carried out and little expertise was available for identifying traded species. All exports were supposed to go through nine designated check points. The Wildlife Conservation Division was the agency responsible for export control. It, however, maintained only a small staff complement at each of these points. Only a few staff members had any training in the identification of wildlife species and products derived from them. In 1991, the CITES Secretariat urged its members to ban trade with Thailand in any specimens of species included in the CITES documents, especially birds. Thailand responded by approving two pieces of legislation which have provided Thai authorities with the legal means for implementing the CITES. In 1992, the Secretariat recommended to lift the trade ban.[38]

The first piece of legislation enacted by Thailand was the Wild Animals Reservation and Protection Act (B.E. 2535, 1992, 2014)[39] which replaced the Wild Animals Reservation and Protection Act 1960 (as amended in 1972). The second piece of legislation was the Plants Act (B.E. 2535, 1992). Several sections are directly related to the CITES Convention. Section 20 of the Wild Animals Reservation and Protection Act provides that trade in conserved wildlife is prohibited unless the wildlife is derived from captive breeding operations. Section 24 directly refers to the Convention

Crime, 'Criminal Justice Response to Wildlife Crime in Thailand' (2017) <www.unodc.org/documents/southeastasiaandpacific/Publications/2017/Thai_Assessment_13_16_May_2017.pdf> accessed on 12 April 2018.

35. Sitanon Jesdapipat, 'Trade, Environment, and Sustainable Development: Thailand's Mixed Experience' in Charles Pearson (ed), *Economics and the Global Environment* (Cambridge University Press, 2000) 526.

36. Thai Government, Plant Quarantine Act B.E. 2507 (1964) English translation available at: <http://web.krisdika.go.th/data/outsitedata/outsite21/file/PLANT_QUARANTINE_ACT,_B.E._2507_(1964).pdf> accessed on 10 March 2018.

37. Department of National Parks, Wildlife and Plants Conservation of Thailand 'CITES and Thailand' (2014) 5. Full text in Thai is available at <www.dnp9.com/dnp9/web1/web/edoc/Xgkdv4nRUYVp.PDF> accessed on 5 October 2018. Abstract in Thai is available at: มานพ เลาห์ประเสริฐ, การดำเนินงานของประเทศไทยเกี่ยวกับไซเตส <www.dnp.go.th/thailand-wen/about_tw/conduct.html> accessed on 5 October 2018.

38. Reeve (n 15) at 111.

39. Thai Government *Wild Animals Reservation and Protection Act B.E.* 2535 (1992, 2014) English translation available at: <http://it2.dnp.go.th/wp-content/uploads/WILD-ANIMAL-RESERVATION-AND-PROTECTION-ACT-NO.-3-B.E.-2557-2014.pdf> accessed on 18 June 2018.

in requiring traders to obtain licenses and certificates when trading in wildlife. Section 47 provides for penalties of up to four years imprisonment and/or a fine of Baht 40,000[40] for illegal hunting, possession and trade in conserved and protected animals. However, the law has been criticized as its protected species are fewer less in number than those protected by the Convention.[41]

The Plants Act (B.E. 2535, 1992) makes more extensive use of the Convention (section 3 and section 29.2). It also contains penal measures. Generally the Plant Act has little coherence in its penal part. The Thai legislator attempted to provide different regimes for, first, controlled seeds (section 14); second, reserved plants (section 30); and, third, conserved plants (section 29.2). There are also plants prohibited for importation (section 32). Illegal trade in each of those plants is penalized by different sanctions (sections 56, 62.3, 63). Originally, the Act had only two objects of regulation: protected seeds and reserved plants. The seeds and the plants were protected because of their commercial value in order to prevent other countries from planting crops similar to those exported from Thailand. Which seeds must be considered protected and which plants must be considered reserved was, and still is, left to the decision of a relevant ministry. The concept of *conserved* plants was introduced later. These plants are identified with those protected by the Convention (section 3 and section 29.2). Thai law does not contain any material definition of the reserved and conserved plants. The first are designated by the relevant ministry and the latter are inscribed in the appendixes of the Convention. It is possible that they can be the same. The problem is that the law imposes very different legal penalties for their illicit trade.

Section 56 of the Plant Act penalizes gathering and sale of controlled seeds with a commercial purpose without a license by imposing a sanction of imprisonment of up to two years and a fine of up to Baht 4,000. 'Seed' is defined very broadly as anything which can be planted or replanted, including fruits (section 3). The unauthorized trade in the reserved plants can be punished by up to three years of imprisonment and a fine of up to Baht 4,000 (section 62). If compared with the sanction against unauthorized trading in the conserved plants protected by the Convention, the difference is striking. Section 61.2 penalizes international trading in conserved plants if done without license by a mere sanction of imprisonment of up to three months and a fine of up to Baht 3,000. No sanction is provided for unauthorized collecting of the conserved plants. If compared with the sanction for unauthorized trading in protected seeds and the reserved plants (such as durian), one can see that protection of endangered plant species does not receive even an equal protection to the plants which have a purely commercial value.

In contrast, the Wild Animals Reservation and Protection Act contains heavier penalties: up to four years of imprisonment or/and fine up to Baht 40,000 for hunting, possessing, or trading of wild animals protected by the law (section 47). Hunting in a Wildlife reserve is penalized by up to five years of imprisonment and a fine of not more than Baht 50,000 (section 53). The penalties are milder for unauthorized traders in a propagated (bred) protected animal, or a derived product from it: two years of imprisonment and a fine of Baht 20,000 (section 50). Simple possession of a propagated animal, or a product derived from it, is penalized with imprisonment of up to one year and a fine of up to Baht 10,000. If trading involves import or export of a

40. 1 USD is approximately equal to 32 Thai Baht.
41. Patricia Moore, Chanokporn Prompinchompoo and Claire A Beastall, 'CITES Implementation in Thailand' (2016) TRAFFIC 4; <www.trafficj.org/publication/16_CITES_Implementation_in_Thailand.pdf> accessed on 18 June 2018.

propagated animal, then the penalty is not more than three years of imprisonment and a fine of Baht 30,000 (section 48). A special characteristic of the Thai Wild Animals Reservation and Protection Act is that it imposes more severe penalties (up to seven years of imprisonment and/or a fine of Baht 100,000) for affecting the quality of the protected natural habitat (section 54).

The penalties may increase significantly if there is involvement of a transnational criminal organization. According to Section 25 of the Prevention and Suppression of Involvement in Transnational Criminal Organisation Act (B.E. 2556 (2013)):[42] 'A person who commits an offence of involvement in transnational criminal organisation shall be liable to imprisonment for a term from four years to fifteen years, or to a fine from eighty thousand baht to three hundred thousand baht, or to both'. A transnational criminal organization is defined in Section 3 of the same law as:

> an organized criminal group who has committed an offence with one of the following characteristics: (1) an offence committed in more than one State; (2) an offence committed in one State but its preparation, planning, direction, support or control of the commission of the offence takes place in another State; (3) an offence committed in one State but involves an organized criminal group that commits an offence in more than one State; (4) an offence committed in one State but has substantial effects in another State.

There appear to be no media reports available on convictions of people involved in illegal trade in endangered species, although the law has been used widely against illegal hunters and much more often against the violators of section 54 (described above).[43] The seizures of wildlife or products derived from it are commonly reported,[44] but there are hardly any reports on court cases. However, in 2016, a Thai court[45] ordered seizure of Thai bank accounts and other assets belonging to Chumlong Lemtongthai, a Thai national who received a 40 year prison sentence in South Africa for rhino poaching and rhino horn trafficking charges.[46] In a related

42. Thai Government, *Transnational Criminal Organisation Act. B.E.* 2556 (2013) English translation available at: <http://web.krisdika.go.th/data/outsitedata/outsite21/file/Prevention_and_Suppression_of_Involvement_in_Transnational_Crime_Organisation_Act_BE_2556_(2013).pdf> accessed on 18 June 2018.

43. There are a significant number of cases decided by the Supreme Court involving its application: Supreme Court of Thailand. Decision 17282/2555 (2012); Supreme Court of Thailand. Decision 8332/2554 (2011); Supreme Court of Thailand. Decision 9471/2553 (2010); Supreme Court of Thailand. Decision 227/2551 (2008); Supreme Court of Thailand. Decision 227/2551 (2008). Many earlier cases involve the issue of illegal possession: Supreme Court of Thailand. Decision 4103/2547 (2004); Supreme Court of Thailand. Decision 1054/2535 (1993); Supreme Court of Thailand. Decision 1054/2535 (1993); Supreme Court of Thailand. Decision 1054/2535 (1993); Supreme Court of Thailand. Decision 199/2518 (1975).

44. See, for example, 'Thai airport authorities seize hundreds of animals in two separate seizures' (2012) TRAFFIC (The wildlife trade monitoring network) 4 December 2012; <www.traffic.org/home/2012/12/4/thai-airport-authorities-seize-hundreds-of-animals-in-two-se.html> accessed on 18 June 2018.

45. 'Wildlife Trafficking Kingpin Arrested in Thailand' (2018) *New York Times*, 20 January 2018; <www.nytimes.com/2018/01/20/world/asia/thailand-wildlife-trafficking-boonchai-bach.html> accessed on 12 April 2018.

46. The sentence was eventually reduced to 13 years on appeal in 2014, and the offender was granted an early release in September 2018: Simon Bloch, 'Fury at release of rhino "pseudo-hunt" kingpin' (2018) *Mail & Guardian* 28 September 2018 <https://mg.co.za/article/2018-09-13-fury-at-release-of-rhino-pseudo-hunt-kingpin> accessed on 30 September 2018.

case in 2018, Boonchai Bach was arrested in Thailand in connection with the smuggling of rhino horns worth over US$1 million from Africa into Thailand.[47]

From this brief analysis of Thai law, one can easily perceive the lack of comprehensiveness, clarity, accessibility and foreseeability in the way criminal law is applied to transboundary trafficking of endangered species and the products derived from it. Even though possession of specimens of endangered species is criminalized along with its trade, Thai law is heavily dependent on the system of administrative permits which are poorly defined, enforced and are open to abuse. There are no legal sanctions specifically devised for the officials who issued trade or possession permits without due examination of their impact on the preservation of endangered species. As a result, there are no reports of an official being brought to justice for abusing his powers and failing to protect the endangered animals or plants. The effectiveness of criminal law is paralyzed by being entangled in a dense and not transparent net of administrative regulations whose knowledge is beyond the reach of an ordinary Thai police. Indeed, effective policing of the over-complex system of administrative permits can hardly be achieved in the Thai administrative and cultural contexts.[48] The problems become more apparent if there is a need for an international cooperation with the law enforcement officers of others countries; for example, with China. Indeed, there are reports that significant amounts of illegal trade going through Thailand is 'one belted' towards this expanding economic giant.[49]

5 THAILAND AND CHINA: DIFFERENCES IN ENFORCING CITES

The Chinese approach to crimes against wildlife, including illegal trading, is different from Thailand in many aspects. The differences may in some cases hinder international cooperation between these two countries. The most obvious difference concerns penalties. In the past, China's Criminal Law contained the death penalty for the smuggling of endangered species.[50] In one reported case, Bu Luxiao was sentenced to death in 1995 for illegal hunting, repeated speculation, and smuggling of rare and endangered animals in Xishuangbanna Wildlife Natural Reserve in Yunnan Province.[51] He and other defendants were caught smuggling 13 Asian elephant, wild buffalo, and two pairs of ivory tusks. The death penalty in relation to the offence has been abolished in the reform of Criminal Law in 2011. However, the penalty remains severe: up to life imprisonment.

There are more reports on successful prosecutions in China than in Thailand. In 2013, CITES reported, arguably with a sense of approval, that eight Chinese nationals had been convicted and sentenced to three to 15 years imprisonment in Anhui

47. See, 'Wildlife Trafficking Kingpin Arrested in Thailand' (n 45).
48. Fiona Haines, 'Regulatory Reform in Light of Regulatory Character: Assessing Industrial Safety Change in the Aftermath of the Kader Toy Factory Fire in Bangkok, Thailand' (2003) 12.4 *Social & Legal Studies* 461–87.
49. Ibid. 'One Belt, One Road' is an official Chinese strategy to expand economically and politically across the Eurasian Continent. See Peter Ferdinand, 'Westward Ho—The China Dream and "One Belt, One Road": Chinese Foreign Policy under Xi Jinping.' (2016) 92 (4) *International Affairs* 941–57.
50. Deborah Cao, *Animals in China: Law and Society* (Palgrave Macmillan, 2015) 57.
51. See, Charu Sharma, 'Chinese Endangered Species at the Brink of Extinction: A Critical Look at the Current Law and Policy in China' (2005) 11 *Animal L.* 215–54, at 240–41.

Province for smuggling a total of 3.2 tonnes of ivory between 2010 and 2012.[52] The principal offender was also fined Yuan 3-million. All the ivory was bought on the internet and imported into China by falsifying import declarations. It was then offered for sale online to Chinese buyers. In a similar case in Zhejiang Province, 10 Chinese nationals were sentenced to prison for 6.5 to 15 years. Another three Chinese were sentenced to seven to 15 years of imprisonment in Fujian Province for smuggling 7.7 tonnes of ivory from Africa. In Guangdong Province, two people are serving sentences for 12 and 14 years for smuggling 1.04 tonnes of ivory. Those who order ivory tusks are also subject to prosecution. One Chinese was sentenced to 10 years' imprisonment in Beijing for ordering two whole ivory tusks and 168 small ivory carvings. The same report states that nearly 700 individuals were prosecuted in China during 10 years for wildlife offences. The figures, however, may not be seen to be very impressive considering the size of China and the suspected volumes of the illegal trade. The reported case may be a part of an incidental prosecution since China is known for a lack of consistency in criminal law enforcement.[53]

When compared to Thai law, Chinese law is more comprehensive and clearer, although it may not be very accessible and foreseeable. The poor accessibility, similarly to Thailand, is determined by the fact that the imposition of criminal sanctions depends much on the content of various administrative regulations. The poor foreseeability is caused by the enormous discretion in the choice of a penalty conferred on the Chinese judiciary. Article 151 of the Chinese Criminal Law (2011) states that whoever:

> smuggles rare animals whose import and export are prohibited by the state or products made thereof shall be sentenced to imprisonment of not less than 5 years but not more than 10 years and a fine; if the circumstances are especially serious, shall be sentenced to imprisonment of not less than 10 years or life imprisonment and a forfeiture of property; or if the circumstances are minor, shall be sentenced to imprisonment of not more than 5 years and a fine.[54]

The same article penalizes smuggling rare plants or their products with imprisonment of not more than five years or criminal detention, and/or a fine. If the circumstances are serious, the sentence must be not less than five years and a fine. Criminal detention is different from imprisonment in China. According to Article 42 and 43 of the same law, it cannot be longer than six months, and the person is allowed to spend some time at home.

In 2014, the Supreme Court and the Supreme Procuratorate issued a binding interpretation in which the rare animals and plants mentioned in Article 151 are defined as those species which are listed in the Directory of Wild Animals Under Special State Protection (国家重点保护野生动物名录), and the species listed in Appendices I and

52. 'China increases prosecutions in response to illegal trade in elephant ivory' (2013) CITES 29 November 2013 <www.cites.org/eng/news/sundry/2013/20131128_china_ivory_prosecutions.php> accessed on 12 April 2018.
53. Xiumei Wang, Luyuan Bai and Zhijuan Chen, 'Challenges in Investigating and Prosecuting Environmental Crimes in China' in Jose Luis de la Cuesta, Ligeia Quackelbeen, Nina Persak and Gert Vermeulen (eds), *The Protection of the Environment Through Criminal Law – (RIDP – International Review of Penal Law)* (Maklu, 2017) 83–106 at 105.
54. Chinese Government, *Criminal Law of the PRC* (2015). English translation available at: <www.cecc.gov/resources/legal-provisions/criminal-law-of-the-peoples-republic-of-china> accessed on 12 April 2018.

II to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).[55]

The offence of smuggling endangered species is punished more severely by Chinese law than illegal hunting or killing: Article 341 of the Criminal Law penalizes anyone who 'illegally catches or kills precious and endangered species of wildlife under special State protection or illegally purchases, transports or sells such species of wildlife as well as the products thereof' with imprisonment of not more than five years and a fine. The punishment laid down in this provision is still more severe than the one in Thai law, but much lighter than sanctions in the case of smuggling. However, the Chinese law may increase that punishment according to the same article

> [i]f the circumstances are serious, he shall be sentenced to fixed-term imprisonment of not less than five years but not more than 10 years and shall also be fined; if the circumstances are especially serious, he shall be sentenced to fixed-term imprisonment of not less than 10 years and shall also be fined or be sentenced to confiscation of property.

The Chinese Supreme Court issued a binding interpretation of Article 341 earlier in 2000, in which it defined 'precious and endangered specious of wildlife', similarly to its later interpretation of Article 151, as species listed in the Directory of Wild Animals Under Special State Protection, and species listed in Appendices I and II to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) as well as specimen in the first two categories that are artificially bred.[56] This interpretation is also important because it defined in financial terms the differences between ordinary, serious, and especially serious circumstances.

There is a greater contrast between Thai and Chinese law in relation to plants protected by the CITES Convention. The Chinese Criminal Law (Article 344) states that:

> [w]hoever, in violation of the regulations of the State, illegally fells or destroys precious trees or other plants under special State protection, or illegally purchases, transports, processes or sells such trees or plants as well as the products thereof, shall be sentenced to fixed-term imprisonment of not more than three years, criminal detention or public surveillance and shall, in addition, be fined; if the circumstances are serious, he shall be sentenced to fixed-term imprisonment of not less than three years but not more than seven years and shall, in addition, be fined.

That is very different from the penalty of not more than three months of imprisonment foreseen by the Thai law for the same offence. The lightness of the penalty in Thai law makes any extradition proceedings impossible, as the extradition treaty between China and Thailand[57] applies only to offences punishable with more than one year of imprisonment.

55. Supreme People's Court, Supreme People's Procuratorate, *Interpretations on Criminal Cases of smuggling of Laws* (February 24, 2014 of the 1608 meeting of the Judicial Committee of the Supreme People's Court, June 13, 2014 of the Supreme People's Procuratorate Procurator Committee) Sections 10 and 12, Chinese text is available at: <www.chinacourt.org/law/detail/2014/08/id/147937.shtml> accessed on 20 October 2018.

56. Chinese Supreme Court, *Resolution on Several Issues Concerning the Specific Application of Law in the Trial of Criminal Cases Destroying Wild Animal Resources*. 17 November 2000. Chinese text is available at: <http://slga.forestry.gov.cn/slga/2569/46759/7.html> accessed on 20 October 2018.

57. Treaty between the Kingdom of Thailand and the People's Republic of China on Extradition (1993). Article 2. Available at: <www.thailawforum.com/database1/Treaty-of-China-7.html> accessed on 12 April 2018.

Unlike Thailand, China distinguishes between criminal offences and administrative offences of illegal trade. It is common for the Chinese Supreme Court to stipulate that in order for criminal law sanctions to apply, a certain financial threshold of damage must be met. It is not so easy to do in relation to illegal trade in endangered species, although the Supreme Court still defines the level of criminal sanctions depending on the specific volume of the illegal trade.[58] For the administrative sanctions against illegal wild animal trade, China applies the recently amended Wild Animals Protection Law.[59] Administrative sanctions for illegal sale, purchase, or use of wild animals or products obtained from them include confiscations and fines at an amount between two and 10 times their value.[60] In relation to illegal trade in wild plants, the same sanctions can be applied according to the Regulations on Wild Plants Protection, which were also recently amended.[61] Both the Wildlife Animals Protection Law and the Regulations on Wild Plants Protection are based on what Ed Couzens defined as, 'the approach of "categorizing" species'.[62] The administrative organs are obliged to keep a directory which contains a list of the protected species, which has to be approved by the State Council.[63] Thai law also adopts the same approach with one difference, that the earlier editions of Thai legislation attempted to have the lists of the protected species attached to the statutory text.[64] This approach, common for both China and Thailand, was originally endorsed by CITES, by listing each species required of protection in one of the three deferent appendices that require different administrative trade regulation.

At the time of writing, CITES protects 'roughly 5,800 species of animals and 30,000 species of plants'.[65] The problem with this approach is that China and Thailand do not have the capacity to control this trade effectively, even though they may write down impressive legislation. One of the leading Chinese legal experts in the wildlife protection law, Jiwen Chang, has acknowledged that 'a lack of regulatory personnel and a limited regulatory capacity makes it difficult to find and combat all trafficking'.[66] The difficulty to control administratively the trade in each species

58. See Chinese Supreme Court (n 56) and Chinese Supreme Court, *Resolution on Several Issues Concerning the Trial of Cases Related to Territorial Sea Waters Under Chinese Jurisdiction*. 2 August, 2016. Section 6: 'Anyone who illegally acquires, transports or sells corals, quails or other precious or endangered aquatic wild animals and their products in any of the following circumstances shall be deemed to be serious as stipulated in the first paragraph of Article 341 of the Criminal Law: (1) The value is more than 500,000 yuan; (2) illegal gains of more than 200,000 yuan; (3) It has other serious circumstances'. Chinese text available at <www.court.gov.cn/zixun-xiangqing-24271.html> accessed on 20 October 2018.
59. Chinese Government, *Wildlife Protection Law of the People's Republic of China*. Promulgation Date: 2016-7-2. <http://news.xinhuanet.com/legal/2016-07/03/c_129110499.htm> accessed on 12 October 2018; <http://extwprlegs1.fao.org/docs/pdf/chn173552.pdf> accessed on 20 March 2019.
60. Ibid, Article 48.
61. Chinese Government, *Regulations on the Protection of Wild Plants of the People's Republic of China*. Promulgation Date: 2017-03-14. Sections 23–27 <www.forestry.gov.cn/main/3950/20170314/459881.html> accessed on 12 October 2018.
62. Ed Couzens, 'CITES at Forty: Never Too Late to Make Lifestyle Changes' (2013) 22.3 *Review of European, Comparative & International Environmental Law* 311–23, at 311.
63. Chinese Government (n 59) Article 10; Chinese Government (n 61) Section 10.
64. Thai Government (n 39) Section 4.
65. See <www.cites.org/eng/disc/species.php> accessed on 12 October 2018.
66. Jiwen Chang, 'China's Legal Response to Trafficking in Wild Animals: The Relationship between International Treaties and Chinese Law' (2017–18) 111 *AJIL Unbound* 408–12, at 411.

specified in the CITES' appendixes is graphically described by Peter Sand in the 'cactus test' when CITES staff members, in order to check the efficiency of the customs control over the transboundary movements of endangered species, attempted on several occasions to declare for import a cactus plant purchased in Switzerland that was listed on Appendix 2 of CITES. Thai and Chinese officials would likely show more politeness and respect than the Bavarian customs officer, whose 'hilarious reaction' to Peter Sand's request to declare the plant was 'unfit for print'.[67] However, they certainly experience the even greater problem of identifying various specimens because of the lack of expertise.

Even though China has more severe penalties for the illegal trade in endangered species than Thailand, it faces similar problems with the effective implementation of its legislation, particularly when the trade in propagated animals is allowed under certain administrative conditions.[68] In one highly publicized case, judicial interpretations of Chinese courts were criticized for allowing prosecution and punishment of people breeding animals in captivity.[69] In this respect, the question arises whether a different formulation of CITES could assist the developing counties better to meet the Convention's goals.

A similar feature of both Thai and Chinese criminal laws concerning illegal trade in endangered species is that both countries uphold a rather narrow concept of the crime. They criminalize an unauthorized trade, leaving unattended the abuse of the administrative powers which authorize it. There is no specific criminal law penalty for the abuse of powers in authorizing the illegal trade in Thailand, although criminal sanctions are vaguely mentioned in the Chinese law:

> Where departments of wildlife protection or other relevant departments and institutions do not make decisions relating to administrative permits or according to the law; discover illegal behaviour or receive reports of illegal behaviour and do not investigate, or fail to investigate according to the law; abuse their powers of authority; or in any other way fail to conduct their professional duty in accordance with this law, it is the duty of the relevant departments and institutions of the people's government at an equivalent or higher level to stop and rectify this behaviour; the manager responsible and other staff directly responsible shall receive a demerit, a major demerit or a demotion. If there are serious consequences, they shall be fired, and the person in charge should admit responsibility and resign. Where this constitutes a crime, they shall be pursued for criminal responsibility in accordance with the law.[70]

The referred law is Article 397 of the Chinese Criminal Law that can be applied against any abuse of administrative power. It penalizes 'any functionary of a State organ who abuses his power or neglects his duty, thus causing heavy losses to public money or property or the interests of the State and the people'.[71] The penalty is mild compared to the provisions against those who are involved in an unauthorized trade. Under circumstances imprecisely described above, the functionary shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention.

67. Sand (n 24 (2018)) at 16.
68. Chinese Government (n 59) Article 25.
69. See, 'Recording & Review Pt. 3: Are Parrots Bred in Captivity Still "Wild"?' *NPC Observer* (2018) <https://npcobserver.com/2018/08/21/recording-review-pt-3-are-parrots-bred-in-captivity-still-wild/> accessed on 20 October 2018.
70. Chinese Government (n 59) Article 42.
71. Chinese Government (n 54).

There are no official reports that this article was ever used against the functionaries that abused the power to issue permits authorizing trade in endangered species.

6 CITES AND CRIMES AGAINST INTERNATIONALLY PROTECTED INTEREST

One certainly cannot blame CITES for the failure or inconsistency of a state enforcement mechanism in prosecuting persons involved in illegal international trade in endangered species in countries like Thailand or China. However, the approach of 'categorizing' species makes its enforcement problematic in countries such as China and Thailand. The move away 'from the "categorizing" of species toward an approach that affords protection to ecosystems and habitats rather than to selected species'[72] is certainly desirable. There are also less dramatic changes to the Convention which can facilitate some harmonization of law and cooperation between the law enforcement agencies of the individual states. There are several provisions that are still lacking in the text of the agreement, but which would be useful for the new approach.

The first important provision is that the states should make illegal trade of the protected species (and their derivatives) an extraditable criminal offence. That would address the situation where not all species are protected by means of criminal law sanctions; or, if they are, the sanctions are not sufficient to deter. The present wording of Article VIII, referred to above, is arguably too vague. The second required provision is an obligation of the states to designate a specific governmental body responsible for the investigation of the relevant criminal offences within its borders and for giving assistance to other countries in investigating and prosecuting the crime of illegal trade, exactly in the same way, the Convention obliges to designate scientific and management authorities.[73] Much cooperation has been accomplished in practice amongst some states.[74] However, a clear provision in the agreement would provide a good normative basis for such a practice. The third provision would be that mere possession of a specimen of endangered species (and their derivatives) which have been caught or collected illegally within the country or abroad should be considered a criminal offence, if the possessor knew or should have known of its illegal origin. Finally, an intentional or negligent practice of issuing permits to hunt, collect, possess, or make trade in endangered species which endangers its survival should also be internationally criminalized.

Since the protection of endangered species is an erga omnes obligation, there is a need for national courts to exercise extraterritorial jurisdiction in the offences described above.[75] It will certainly run against an old idea of territorial jurisdiction in criminal law which does not permit criminalization of actions committed in a foreign jurisdiction against foreign laws.[76] However, there are many signs of what is, perhaps not always accurately, described as the erosion of state sovereignty.[77]

72. Couzens (n 62) at 311.
73. See, Article IX of CITES.
74. Reeve (n 15).
75. Tams (n 2) at 243.
76. Lindsay Farmer, 'Territorial Jurisdiction and Criminalization' (2013) 63(2) *University of Toronto Law Journal* 225–46, at 232.
77. M Loughlin, 'The Erosion of Sovereignty' (2016) 45(2) *Neth J Legal Phil* 57–81, at 75.

In modern criminal law, there is an important concept of 'offences committed abroad against internationally protected interest'.[78] Certain acts committed in a foreign jurisdiction and against foreign law can be prosecuted in a third country where the defendant abides. In the past, these crimes were largely restricted to such core international crimes as genocide, crime against humanity, war crimes, and the crime of aggression in which environmental considerations are rather marginal.[79] The list of these crimes is expanding and already includes drug offences, human trafficking, etc.[80] It is arguably time to include in this list illegal international trade in endangered species in its broadest meaning, including the illegal possession of the species and the abuse of administrative powers authorizing illegal trade.

The reason for this is obvious. Illegal trade is detrimental to the interest of the international community. Certain species are protected internationally, and their direct destruction by means of hunting and trading violates the international interest in their preservation.[81] If an act of illegal trade is committed, let us say by a Chinese national for example, by breaking Chinese law, but who himself (or his assets) is present in Thailand, the Thai authorities should certainly have jurisdiction since the offence is committed not only against Chinese law but also against an internationally protected interest. The problem with the current state of Thai criminal law is that it does not acknowledge jurisdiction in crimes committed against internationally protected interests at all. Chinese law does contain this principle, providing that it is within international obligations according to an international treaty it agrees to perform.[82] Since CITES does not contain the relevant provision, Chinese law does not allow prosecution of a Chinese national who purchased illegally a derivative of an endangered species in Thailand unless he violates at the same time a Chinese law.

Apart from the global interest in the preservation of endangered species, there is also an international interest to suppress transnational organized crime. It has found its formal expression in the United Nations Convention against Transnational Organized Crime (2000) (UNTOC)[83] to which most countries of the world, including Thailand and China, are parties. The Convention mentions the need for the suppression of the illicit trade in endangered species in its preamble. In an important development in 2013, the United Nations Economic and Social Council (ECOSOC) issued Resolution 2013/40, which

> encourages Member States to make illicit trafficking in protected species of wild fauna and flora involving organized criminal groups as a serious crime, as defined in article 2, paragraph (b), of the UNTOC, in order to ensure that adequate and effective means of

78. German Criminal Code (2013). Section 6. Available at: <www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html> accessed on 12 April 2018.
79. Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law* (OUP, 2014) 32.
80. German Criminal Code (n 53).
81. Wilhelm Wengler, 'Tierschutz und internationales Strafrecht' (1980) 12 *Juristische Rundschau* 487–89 at 487.
82. Chinese Government (n 54) Article 9.
83. United Nations Convention against Transnational Organized Crime (2000) (UNTOC) Available at: <www.unodc.org/documents/middleeastandnorthafrica/organised-crime/UNITED_NATIONS_CONVENTION_AGAINST_TRANSNATIONAL_ORGANIZED_CRIME_AND_THE_PROTOCOLS_THERETO.pdf> accessed on 12 October 2018.

> international cooperation can be afforded under the Convention in the investigation and prosecution of those engaged in illicit trafficking in protected species of wild fauna and flora.[84]

Since many countries consider wildlife crime to be a serious transnational crime, it would be logical to affirm in the main text of the Convention that the crime of illicit trading in endangered species must be prosecuted anywhere in the world regardless of the place it was committed and the nationality of the offenders. For practical reasons, the offence of illegal trade should be expanded as necessarily comprising illegal possession. Therefore, Article VIII of the Convention has to be amended accordingly. Its list of measures should include the confiscation of not only specimens, but also of the financial proceeds from this trade.

There is a need to tie the existing anti-money laundering laws closely to the concept of a crime against an internationally protected interest. This is lacking both in Thai and Chinese legislation. The Anti-Money Laundering Law of the People's Republic of China[85] and the Thai Anti-Money Laundering Act of B.E. 2542[86] can cover proceeds obtained from the illicit trade in endangered species, if there have been violations of Customs-related laws. Only in this case can they be seized and transferred to the state.[87] Even though this law has been used to arrest the proceeds from illegal trade in some cases, research shows that:

> there is a widespread lack of political will to fully prioritise and manage wildlife crime on par with the scale and urgency of the issue. The failure of many jurisdictions to recognise these crimes as transnational organised crimes and to employ the full range of law enforcement tools available – particularly financial investigations – is a short sightedness for which we are paying a heavy price.[88]

One can certainly doubt that the suggested amendments will be made in the nearest future, considering the complexity of the amendment process for any international agreement. However, the suggested changes to the agreement go along with the academic criticism of the Convention's 'inherent weakness in that it focuses too narrowly on species that have been singled-out'.[89] The goals of further criminalization of illegal trade of the protected species and the international harmonization of criminal law of the states can be achieved without a significant change in the text of the Convention. One can even argue that it would be possible without any change in the agreement text at all, considering the importance of the Conferences of the Parties (CoP) and

84. United Nations Office on Drugs and Crime, Freeland. 'Legal Framework to Address Wildlife and Timber Trafficking in the ASEAN region' (2015) 2 <www.unodc.org/documents/southeastasiaandpacific/Publications/wildlife/Legal_Study_WTT_12_13June2015.pdf> accessed on 12 April 2018.
85. Chinese Government, *Anti-Money Laundering Law of the People's Republic of China* (2006) Article 2 <www.npc.gov.cn/englishnpc/Law/2008-01/02/content_1388022.htm> accessed on 10 March 2018.
86. Thai Government, Anti-money Laundering Act of B.E. 2542 (1999), Section 3.
87. For a concise description of anti-laundering provisions in relation to other Thai legislative acts, see: Moore (n 41).
88. United Nations Office on Drugs and Crime 'Enhancing the Detection, Investigation and Disruption of Illicit Financial Flows from Wildlife Crime' (2017) 5; <www.unodc.org/documents/southeastasiaandpacific/Publications/2017/FINAL_-_UNODC_APG_Wildlife_Crime_report.pdf> accessed on 10 March 2018.
89. Couzens (n 62) at 322.

its Resolutions in the development of compliance mechanism.[90] Whether this change is better achieved by a new convention, or by a set of guidelines, protocols, subsidiary compliance bodies, etc. is a question of secondary importance at this moment. A more urgent task is finding an effective solution to the insufficiency of the existing international mechanism of suppressing illegal trade in endangered species in the Far Eastern context and beyond.

7 CONCLUSION

The suggested solution to the weakness of the existing mechanism of suppressing illegal trade in endangered species in countries like Thailand and China would be the establishment of a comprehensive international criminal offence of illegal trade in endangered species. Not only should unauthorized trade in endangered species be criminalized, but also any illegal possession of wild animals and plants; and what is more important: the abuse of administrative powers that authorize them. This measure alone will certainly not be enough. However, from the brief analysis of the laws of Thailand and China offered above, one can easily perceive that international agreements, such as CITES, do shape the laws of the countries in the Far East. The suggested measure will subject national laws and practices to better international scrutiny which will be carried out not only by international organizations but also by domestic courts and law enforcement agencies in all countries of the world.

In relation to the Far East, one can conclude that the use of criminal sanctions against the illegal trade in a broader sense remains generally weak. Jeremy Bentham wrote that the object of criminal law is 'to prevent, in as far as it is worth while, all sorts of offenses; therefore, the value of the punishment must not less in any case than what is sufficient to outweigh that of the profit of the offense'.[91] International trade in endangered species is a very profitable activity. Since the traded species are endangered, the price and consequently profits are high. The high profits tend to attract unscrupulous people. In the context of a developing country such as Thailand, the administrative mechanisms envisaged by CITES are not sufficient. A more concrete suggestion for Thailand would be an increase of penalties in proportion to the profits generated by the illegal trade. In contrast, Chinese law has already put in place sufficiently severe penalties. However, the scope of the offence in Chinese law, similar to Thailand, remains limited to the unauthorized trade only.

The Chinese experience indicates that the severity of punishment alone does not always serve as a sufficient deterrent. There is a need for consistent law enforcement. In this aspect, there is a need for a greater cooperation between the countries affected by the illegal trade. This cooperation is difficult to achieve without law harmonization. This is exactly where a reform of the Convention is highly desirable. There must be an authoritative recognition of the states' obligation to criminalize globally not only the trade itself but also the illegal possession of the relevant species and the abuse of administrative powers in permitting the trade. There are strong moral reasons for this extensive criminalization since there will probably always be people lacking a moral sense who are willing to be involved in it. Therefore, the issue of

90. Sand (n 24 (2013)) at 251.
91. Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Clarendon Press, 1907) Chapter 14, VIII, <http://oll.libertyfund.org/titles/278> accessed on 10 October 2018.

the trade in endangered species is not a purely technical one. It involves a conflict between moral imperatives to protect the environment on the one hand and the greed for profit which feeds on the craving for the possession of rare items on the other.

Criminal law must play an important role in this conflict. It would be naïve to suppose that criminalization alone will provide the most efficient remedy against the illegal trade. However, it can express public censure in the strongest forms in the situation where other remedies are not available or they are not effective. Even though it does not appear that this conflict can be solved through imposing heavy penalties on the offenders alone, criminal law appeals to the moral sense better than does the multitude of detailed complex administrative regulations required by CITES. In this context, the international agreements in this area must have clearer obligations towards criminalizing illegal trade in endangered species.

A more practical suggestion for both countries would be criminalization of illegal trade and possession of endangered animals and plants based not on a 'blacklisting' but on a 'whitelisting' approach.[92] At the moment both countries use their criminal sanctions on the basis of the specific lists of rare animals. The criminal law norms should be constructed in such a way as criminalizing trade and possession of any wild animals and plants that are not permitted explicitly by law. That shift in criminal law would allow a better cooperation between the member states of CITES, and make the rules of criminal law more accessible and foreseeable in conformity with the ideas of the rule of law and human rights. In conclusion, it is important to remember that criminal law mechanisms have been always playing a greater regulatory role in China and Thailand than in the Western democracies. Any international environmental agreement should take this peculiarity into consideration.

92. Couzens (n 62) at 320.

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Exemptions from punishment in China and Thailand from the perspective of the theory of Leon Petrazycki*

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This paper compares legislative provisions of Chinese and Thai laws pertaining to exemptions from punishment. These exemptions must be distinguished from the exemptions from criminal liability. In the latter case, Chinese and Thai courts cannot inflict punishment on a person who is justified or excused in committing an act otherwise defined as a crime. In contrast, an exemption from punishment is granted by courts as an exercise of discretionary powers. Chinese and Thai laws bear similar characteristics in defining the exemptions from criminal liability, but differ significantly in the scope of discretionary powers of courts to exempt from punishments. Chinese law allows judges to have more discretion in not imposing penalties on an offender than Thai law does. The reason for the difference lies in a greater openness of Chinese law to moral considerations to be played in sentencing practices. Thai law is much more influenced by the philosophy of legal positivism. These similarities and differences are discussed in the light of the theory of Leon Petrazycki. It is argued that Petyrazycki's concept of intuitive law as attributive imperatives is important in explaining and justifying the powers of the court not to inflict punishment if it meets the goals of criminal justice. From the viewpoint of the theory of Petrazycki, Chinese law can accommodate better the intuitive law of the public to the exigencies of various social situations. However, Petrazycki's theory alone cannot override many reasons against giving judges extensive powers to apply their intuitive laws to exempt offenders from punishment. There is a plurality of psychological imperatives which may conflict with each other. To resolve those conflicts, it is necessary to draw on the idea of natural law. Even though Petrazycki did not explicitly argue for the existence of the natural law, its existence can be drawn from common psychological imperatives as well as from a striking similarity between various systems of criminal law in such diverse countries as China and Thailand. Many of the legal provisions of their laws display certain common legal paradigms that cannot be only accounted for by the adoption of the Western legal concepts.

Keywords: criminal liability, punishment, Thailand, China, psychological theory of law, Petrazycki.

Introduction

The exemption from punishment is defined here as an exercise of discretionary powers by courts not to inflict penalties on an offender. In this sense, it is different from the exemptions from criminal liability. The amount of literature on the relationship between criminal liability and punishment is enormous. It is commonly asserted that "criminal liability is the strongest formal censure that society can inflict, and it may also result in a

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sentence which amounts to a severe deprivation of the ordinary liberties of the offender"[1]. Therefore, one has to acknowledge that being subject to criminal liability does not always mean to be subject to punishment. As another writer has rightly put it: "'To be liable to punishment' means 'may, according to the rules, be punished.' It does not necessarily mean 'deserved to be punished'. Furthermore, liability need not entail actual punishment any more than being culpable entails actually being blamed. Of course, some pronouncements of desert ('You are to blame for this.') are acts of blaming. The culpability of the agent, however, is a prerequisite of just blaming. In the same way, while 'liable to punishment' is often taken to mean 'will be punished', liability is distinct from actual punishment. It is in this sense that legal liability is understood as candidacy for punishment"[2].

The distinction between being liable to punishment and being deserved to be punished is particularly appropriate to describe the conflict between the official law and the standards of law maintained by one's conscience. There can be many situations when one can see that a person liable to punishment does not deserve it, and a person who deserves it may not be liable. This conflict has been well described by a Russian scholar of Polish descent, Leon Petrazycki[3], more than a hundred years ago. His theory of intuitive law deserves a recognition and attention by the modern philosophy of criminal justice. Its significance becomes more apparent after taking cognizance of Petrazycki's understanding of legal responsibility. His ideas have been explored, to some extent, in several works[4]. However, almost all the books of Petrazycki (his heritage amounts to 35 volumes) are still inaccessible to an English speaking reader. There is only one shortened translation of his two volume work *Theory of Law and State*, published by the Harvard University Press in 1955.

Petrazycki's approach to legal responsibility to some extent reflects the same concern found among the leading British legal theorists, that the treatment of criminal liability often misses the relational dimensions of criminal responsibility (Duff 2007, 15)[5]. Unlike Duff, Petrazycki does not attempt to draw fine distinctions between the meanings of liability and responsibility. Instead, he analyses the moral nature of impulsions that bring about the norms of criminal justice as well as of other branches of law. The implications of his theory for criminal law are particularly of interest in the Far Eastern context, which does not easily accommodates the Western philosophical categories of criminal justice[6].

The application of Petrazycki's theory is limited here to a critical examination of Chinese and Thai legislative provisions on exemptions from punishment. It implies that allowing a broader scope of judicial discretion in exempting offenders from punishment does not mean an admission of arbitrariness and a disregard for the principle of legality. In order to meet the interests of justice in particular cases, the law must give space for judicial discretion. According to this theory, judges are compelled to follow the intuitive law. The problem, however, arises when intuitive laws are conflicting with each other. As it will

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[1] *Ashworth A., Horder J.* Principles of criminal law. Oxford: University Press, 2013. P. 1.

[2] *Sistare C. T.* Responsibility and Criminal Liability. Vol. 7. Heidelberg: Springer Science & Business Media, 1989. P. 17.

[3] *Petrazycki L.* Theory of Law and State. St. Petersburg: Merkushev, 1910.

[4] *Gorecki J.* Sociology and jurisprudence of Leon Petrażycki. Urbana: University of Illinois Press, 1975; Rudzinski A.W. Petrazycki's Significance for Contemporary Legal and Moral Theory // American Journal of Jurisprudence. 1976. No. 21. P. 107–130; *Sadurska R.* Jurisprudence of Leon Petrazycki // American Journal of Jurisprudence. 1987. No. 32. P. 63–98.

[5] *Duff R. A.* Answering for crime: Responsibility and liability in the criminal law. Oxford: Hart Publishing, 2007. P. 15.

[6] For example, Duff's distinction between criminal responsibility and criminal liability does not make sense in Chinese or Thai languages as they mean the same thing. The Chinese term 刑事责任 as well as the Thai term **ความรับผิดในทางอาญา** mean both criminal liability and criminal responsibility.

be demonstrated below, Petrazycki, despite his concern for a rational legal policy, does not offer the solution to reconcile conflicting intuitive laws in relation to exemptions from punishment. It is argued that this basis can be found in the concept of intuitive natural law.

Exceptions from criminal liability in Chinese and Thai laws

In order to understand better the differences between Thai and Chinese laws on the exemptions from punishment, one has to look first at the exemptions from criminal liability as reflected in the respective laws. There is a striking similarity in the exemptions from criminal liability found in Thai and Chinese legislation despite the differences in their expressions. For example, Article 16 of *Criminal Law of the People's Republic of China* (1979, 1997, 2011) states that an act is not a crime if it objectively results in harmful consequences due to irresistible or unforeseeable causes rather than intent or negligence. Thai criminal law (*Thai Penal Code* ประมวล กฎหมายอาญา ฉบับ พิมพ์ พ. ศ. (2558)) does not contain explicitly such a provision. It only states in Section 59 that "a person shall be criminally liable only when such a person commits an act intentionally, except in cases when the law provides that such a person commits an act by negligence, or except in cases when the law clearly provides that such a person must be liable even though committing an act unintentionally." The last part of the Section can be interpreted as allowing criminal liability in cases when there is neither intent nor negligence, if the legislator explicitly chooses so. In other words, Chinese criminal law is more restrictive by forbidding imposition of criminal liability in the cases of harm caused objectively beyond intent or negligence of a person.

From reading Article 16 of Chinese Criminal Law, one may suppose that criminal liability is limited only to the situations of intentional or negligent harm which already occurred. However, the harm principle, is not the only basis for criminalization policies adopted by the Chinese legislators. Article 13 maintains a different principle: crime is an act that endangers (危害) society. In a number of provisions dealing with specific offences, Chinese law criminalizes acts that are done in violation of state regulations even if there are no harmful consequences.[7]

Article 17 of Chinese Criminal Law exempts all minors from criminal liability who did not reach the age of 16 at the time of offence (or 14 years in cases of intentional homicide or injury, rape, robbery, drug-trafficking, arson, explosion or poisoning). However, the court can order the head of the young offender's family or a guardian to discipline (加以管教) the offending youth. Thai law (Section 73) exempts from criminal liability children below 7 years old. The same applies to the children between 7 and 14, but the court has the power to admonish the child, or to give an appropriate order to the parents or guardians, or to hand the child over to a person or organization which is suitable to take care of him.

In relation to mentally ill persons (精神病人), the Chinese law stipulates that they are not liable at a time when they are unable to recognize or control their own conduct. If a mental patient does not lose completely the ability of recognizing or controlling his own conduct, he shall still be liable, although he may deserve a lighter punishment (Article 18). Thai law exempts not only mentally ill people but also any offender who at the time of committing an offence "was not able to appreciate the nature, or illegality of his act (ไม่สามารถรู้ผิดชอบ) or not being able to control himself on account of defective mind (มีจิตบกพร่อง), mental disease (โรคจิต) or mental infirmity (จิตฟั่นเฟือน)" (Section 65). Such a wording can

[7] See for example Article 185a which penalizes the use of public funds (however beneficial or not harmful it might be) in violation of state regulations.

exempt from criminal liability any person who could not appreciate the nature of their actions or were not able to control themselves by any other reason than mental illness. For example, certain defects of mind can be caused by aging (Zarit & Zarit 2012, 5)[8], or by other illnesses not clinically classified as mental illnesses.

The narrow construction of the meaning of mental disorders may had influenced the Chinese legislators when they gave the power to the courts to reduce punishment of old people above the age of 75 (Article 17a). Considering the broad provisions of Section 65, Thai law does not need to offer a different treatment for old people, although there are some provisions which require to consider the age of the sentenced person in relation to social services (Section 30/1), or suspension of imprisonment sentence (Article 56).

Further, Chinese law explicitly excludes intoxicated persons from the exceptions to criminal liability (Article 18). Thai law again offers a more flexible approach exempting from criminal liability those who are intoxicated without their knowledge or against their will, if they are unable to understand the nature of their acts or unable to control themselves (Section 66).

Article 20 of Chinese Criminal Law excludes any person from criminal liability who acted in justifiable defence. It is defined as any act that "a person commits to stop an unlawful infringement in order to prevent the interests of the state and the public, or his own or other person's rights of the person, property, or other rights from being infringed upon by the on-going infringement, thus harming the perpetrator." This, however, must not exceed the limits of necessity. Similarly, Thai Penal Code requires (Section 68) that the defence must be reasonable (กระทำพอสมควรแก่เหตุ) in order to avoid completely criminal liability.

The exclusion of criminal liability on the ground of necessity is similarly regulated by the criminal laws of China and Thailand. Article 21 of Chinese law states that "if a person is compelled to commit an act in an emergency to avert an immediate danger to the interests of the State or the public, or his own or another person's rights of the person, property or other rights, thus causing damage, he shall not bear criminal liability." However, Thai law defines necessity somewhat wider as including, apart from the situations of emergency to avert a danger to the public or private interests, also the situations when a person "is under compulsion or under the influence of a force that he cannot avoid or resist" (Section 67).

One significant difference between Chinese and Thai legislation is that Thai law explicitly excludes criminal liability in cases of a mistake of fact (Section 62). This section has been used by Thai courts to exclude from criminal liability a person who shot a person who thought to be attacking the accused (Thai Supreme Court 1873/2522, p. 1554), a person who forced a woman to sexual intercourse supposing her to remain his lawful wife (Thai Supreme Court 430/2532, p. 395); a person who destroyed a fence of a neighbor mistakenly supposing the fence to be on his territory (Thai Supreme Court 89/2519, p. 53), etc. Nevertheless, the mistake of fact is also known to Chinese criminal law theory and is used in establishing the lack of intent[9], even though it is not expressed in the text of Chinese Criminal Law.

There are some other differences. In a number of offences, particularly related to property, the spouse of the victim is exempted from criminal liability according to Thai Penal Code (Section 71). No such an exemption exists in Chinese law. Another difference is that Thai law (Section 70) exempts from criminal liability anyone who acts in accordance

[8] *Zarit S. H., Zarit J. M.* Mental disorders in older adults: Fundamentals of assessment and treatment. New York: Guilford Press, 2011. P. 5.

[9] *Badar M. E.* The concept of Mens Rea in international criminal law: The case for a Unified Approach. Oxford: Hart Publishing, 2013. P. 188.

with an illegal order of an official, if he has a duty to comply with the order unless that person knows that the order is unlawful. Chinese law does not have a similar provision.

Despite these differences in defining exemptions from criminal liability, Chinese and Thai laws are remarkably similar. How can we explain this similarity between so diverse countries? One reason can be the influence of the Western law through the processes of globalization. However, this explanation may be superficial. The analysis of the exemptions from punishment based on the discretionary powers of courts illustrates the fact that Chinese and Thai criminal law provisions can also be very different.

Exemptions from punishment and the discretionary powers of courts

The exemptions from punishment can be not only mandatory but also be based on the discretion of courts. The line between the exemptions from criminal liability and exemptions from punishment may not always be clear, particularly in the circumstances of specific cases. There are many provisions in Chinese Criminal law which give the power to the courts not to inflict punishment on the defendant who committed an offence. A person, who exceeded limits of necessity while defending oneself or others, according to Chinese law, "shall be given a mitigated punishment or be exempted from punishment" (Article 20, 21). Thai law, in contrast, does not permit a complete exemption from liability unless a criminal act occurs "out of excitement, fright or fear". In this case, the exemption is mandatory (Section 69). In other cases of exceeding justifiable limits, Thai courts are allowed to reduce but not to exempt from punishment completely.

Further, Chinese Criminal Law contains a very flexible provision that "anyone who is coerced to participate in a crime shall be given a mitigated punishment or be exempted from punishment in the light of the circumstances of the crime he commits" (Article 28). In other words, Chinese courts have discretion to exempt or not exempt from punishment those who are coerced in taking part in a criminal activity. A similar provision apples to accomplices who play a secondary or auxiliary role in a joint crime (Article 27). In contrast, Thai law requires that such an accomplice is punished by two-thirds of the punishment imposed for a particular crime (Section 86).

There are other occasions when Chinese law gives discretion to the courts to exempt a person committing an offence from punishment. For example, deaf-mute or blind people can be completely exempted from punishment or the punishment can be reduced (Article 19). Article 22 allows courts, without specifying the reasons, to exempt from punishment those who prepare for a crime but do not commit. This is different from the cases when an offender voluntarily discontinues the crime and effectively prevents the consequences of the crime from occurring, he must be exempted from punishment if no damage is caused (Article 24). In the latter cases, exemption from punishment is mandatory. Thai law contains a similar mandatory exemption. The person who attempts crime but then "voluntarily desists from carrying it through, or changes his mind and prevents the act from achieving its end" must be exempted from punishment (Section 82).

Further, Article 37 of Chinese law states that "if the circumstances of a person's crime are minor and do not require criminal punishment, he may be exempted from it; however, he may, depending on the different circumstances of the case, be reprimanded or ordered to make a statement of repentance, offer an apology or pay compensation for the losses, or be subjected to administrative penalty or administrative sanctions by the competent department." Thai law generally does not give discretion to the courts to exempt from punishment. An exception is in inflicting punishment on an offender over 14 years old but not over 17 years (Section 75) and for attempting crime by acting "out of besotted belief" (โดยความเชื่ออย่างงมงาย) (Section 81). Besotted belief is understood as largely the one which is caused

by a superstition or a belief in magic (Thai Supreme Court, 4495/2546). Chinese contemporary law ignores the use of magic to harm other persons all together, although the ancient law of this country considered the use of sorcery among the ten abominations which were punished the most severely (Tang Code, Chapter 1, Article 6 (5))[10].

Thus, despite many similarities in relation to the exemptions from criminal liability, Chinese and Thai criminal laws differ fundamentally as Chinese law gives judges greater discretionary powers not to inflict punishment on offenders. In this respect, the question arises whether or not Thai law does better by adhering to the principle of legality more strictly than Chinese criminal law. The underlying philosophy of Thai criminal law is following. If law makes an offence liable to punishment, it is obvious that the task of the courts is to enforce law. Criminal law offences must be constructed strictly and applied equally. If there are exceptions from punishment, these exceptions must be specific and clearly articulated in law. Consequently, granting broad discretionary powers to the courts in exempting offenders from punishment goes against the principle of legality[11].

However, the Chinese approach may address better the interests of social policy and even traditional morality not to punish offenders in the cases when the consequences of crime are not serious or the offender does not represent a danger to the society[12]. This can be particularly seen in Article 37 that allows the courts, instead of punishment, to reprimand, to order to make a statement of repentance or offer an apology, or to pay compensation for the losses, etc. It conforms better than Thai law to the idea of a criminal trial as a spectacle of public censure[13] without the necessity to inflict a penalty on a convicted offender.

In Chinese law, as well as in the few discussed instances of Thai law, the nature of the powers of the courts not to inflict punishment is not always obvious. When a court decides not to impose punishment on a person, does it mean that the perpetrator of an act otherwise punishable does not deserve it, or he remains to be blamed but punishment is not inflicted on the considerations of mercy?[14] Is this power the way through which judges can bring their moral perceptions of crime into play? If so, does it not contradict the principle of the rule of law? The theory of intuitive law developed by a Russian legal scholar of Polish descent, Leon Petrazycki[15], contains answers to those questions.

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[10] See also: *Benn C. D.* China's Golden Age: Everyday Life in the Tang Dynasty. Oxford: University Press, 2004. P. 197. — English criminal law until the 18th century was also less tolerant: "all persons invoking any evil spirit, or consulting, covenanting with, entertaining, employing, feeding, or rewarding any evil spirit; or taking up dead bodies from their graves to be used in any witchcraft, sorcery, charm, or enchantment; or killing or otherwise hurting any person by such infernal arts; should be guilty of felony and suffer death" (*Blackstone W.* Commentaries on the Laws of England. Oxford: Clarendon Press, 1769. P. IV, 6).

[11] *Hallevy G.* A modern treatise on the principle of legality in criminal law. Heidelberg: Springer science & business media, 2010. P. 151.

[12] For the influence of social policy and traditional ethics on Chinese law see: *Chen J.* Chinese Law: Context and Transformation. Leiden: Brill, 2015.

[13] *Farmer L.* Making the modern criminal law: Criminalization and civil order. Oxford: University Press, 2016. P. 19; *Seredyńska I.* Insider Dealing and Criminal Law: Dangerous Liaisons. Heidelberg: Springer Science & Business Media, 2011. P. 145–146.

[14] The latter view was advanced by John Tasioulas who considered mercy outside the retributive demands of criminal justice, see: *Tasouilas J.*: 1) Punishment and Repentance // Philosophy. 2006. No. 81. P. 279–322; 2) Repentance and the Liberal State // Ohio State Journal of Criminal Law. 2007. No. 4. P. 485–521; 3) Where is the Love. The Topography of Mercy // Crime, punishment, and responsibility: The jurisprudence of Antony Duff. Eds Cruft R., Kramer M. H., Reiff M. R. Oxford: University Press, 2011. P. 37–53.

[15] *Petrazycki L.* Theory of Law and State.

Psychological theory of Petrazycki and the discretionary power to exempt from punishment

Petrazycki developed his theory of intuitive law on the basis of psychology of moral impulsion. According to him, in order to understand courts' judgements, one has to take into account not only the positive law that is set by the normative facts, that is a legislative directive, a legal custom, a judicial precedent[16]. It is also important to pay attention to the intuitive law which directs judges in making their decisions[17]. Intuitive law is based on a particular psychological experience of a legal obligation which is distinct from pure moral imperatives towards others. "Obligations conceived of as free with reference to others — obligations as to which nothing appertains or is due from obligors — we will term moral obligations. Obligations which are felt as compulsory with reference to others — as made secure in their behalf — we shall term legal obligations"[18].

Thus, the legal obligations are expressed in, as he called it, attributive imperatives, and the moral obligations are expressed in non-attributive imperatives, because such imperatives are not accompanied by a right of the other person involved to the action caused by the imperative. Similarly to the positive law, intuitive law contains imperative-attributive imperatives. But unlike the positive law they are found in human consciousness independently from the normative facts such as a penal code. The intuitive law has a different source of the imperatives, which lies in the convictions and beliefs held by conscience. Both operate, however, together in what Petrazycki calls 'the official law'[19]. They have equally binding force on its subjects. Thus, the intuitive law is identified with the official law: "Insofar as they concern objects within the cognisance of official law, the axioms of intuitive law are acknowledged also by state courts and other organs of state authority. In general the corresponding intuitive law is a constituent part of official law and a fundamental and essential element thereof"[20].

The positive law itself can be considered as a product and manifestation of the intuitive law of those who establish it, although not all of it is directly derived from the intuitive law. "Legislative enactments may be based on considerations of interests and the like, which contradict the intuitive law conscience of the legislators themselves — or of the masses — and nevertheless bring to life the corresponding positive law"[21]. There are also many parts of the positive law which are irrelevant and neutral with respect to the intuitive law: questions of formalities, technical arrangements, and so forth.

Petrazycki's theory contains an explanation and a justification of the discretionary powers of criminal courts to exempt a guilty offender from punishment. According to Petrazycki, the conflict between positive law and intuitive law is inevitable, and that it is in the court room where this conflict has to be settled. Not only may the intuitive law of one of the parties collide with the positive law, but so may the intuitive law of the judges whose role is to represent the intuitive law of the public[22]. The positive law and the intuitive law may coexist in relative harmony. This is a desired condition of the official law. In this context, one of the primary tasks of judges is to achieve this harmony. The intuitive law operates through interpretation of legal rules. "It exerts pressure upon the interpretation and ap-

[16] Ibid. P. 477.
[17] Ibid. P. 486–487, 573.
[18] Ibid. P. 49–50.
[19] *Petrazycki L.* Law and Morality. Cambridge, Mass.: Harvard University Press, 1955. P. 292.
[20] Ibid. P. 293.
[21] Ibid. P. 235.
[22] Ibid. P. 234.

plication of positive law in the direction of securing decisions in accord with (or as little as possible divergent from) the directives of the intuitive law conscience"[23].

According to Petrazycki, the legislation on criminal offences gives only a general pattern within which the intuitive law of the judges operates. The adaptation of general rules to concrete circumstances, the choice of the degree of punishment, or of the sum of an award, the evaluation of facts, — all these are governed by the intuitive law of the judges[24]. He writes: "In the official criminal law of civilised nations, the positive standardisation of punishments ordinarily indicates only the minimum and maximum limits of punishments, and definition of the specific punishments within these limits is left to the conscience of judges — that is to say, to their intuitive law. Even the decision as to whether or not the prisoner deserves punishment and should be recognised guilty (of an act which has been proved) depends on the conscience of judges and the jurors"[25].

Thus, granting a greater degree of discretion to judges in exempting an offender from punishment does not mean that this issue is left to their arbitrary will to impose a penalty or not. In their capacity of a judge, they are bound by the intuitive law of the community. The advantage of a greater extent of the discretionary powers is that there will be less friction points between the intuitive law and the positive law which can render the application of criminal law more efficient. Therefore, the somewhat ambiguous formulations of Chinese criminal law on exemptions from punishment should not be perceived as a violation of the principle of rule of law. Rather, they express the intention of Chinese lawgiver to achieve some degree of social harmony by means of a more flexible approach to the infliction of, and the exemption from, punishment. It is noteworthy that social harmony is considered the ultimate objective of criminal law policy in China along with the rule of law[26]. In comparison, Thai criminal law does not offer a significant leeway to the courts to exempt an offender from punishment completely, although they retain powers to impose a lenient penalty if that is required by their intuitive law.

The implication of Petrazhicki' theory is that the existing discretionary powers to exempt an offender from punishment must not be perceived as a violation of the rule of law, or the principle of a uniform and equal applicability of general legal rules. The problem arises, however, when intuitive laws conflict with each other. In such situations, Petrazhicki was inclined to follow those attributive imperatives which are enlightened by the vision of a more desirable and rational law.

Towards natural intuitive law

Petrazycki did not believe in the existence of immutable, eternal, and universal norms identified with the natural law which the positive law must comply with[27]. He was influenced by the Historical School of Jurisprudence by considering the contents of both intuitive and positive laws as changeable and dynamic. At the same time, he was sympathetic to the movement of the revived natural law[28]. Petrazycki attempted "to initiate and substantiate the idea of the possibility and necessity of creating a special science — the policy of law on the basis of a psychological study of law and its motivational and cultural-educational impact; this science is dedicated, in contrast to the existing jurisprudence, engaged in a

[23] Ibid.
[24] Ibid. P. 293.
[25] Ibid.
[26] *Lijuan Xing*. The Rhyme of History: A Transition of Legal Culture in China Crowned by the Criminal Procedure Law 2012 // Asia Pacific Law Review 23. 2015. No. 1. P. 31–65.
[27] *Petrazycki L.* Theory of Law and State. Ch. IV.
[28] Ibid. Ch. V.

historical study and the practical-dogmatic elaboration of existing law, to the development of the foundations of desirable, rational law and legislation[29].

Even though Petrazycki shared the prevalent skepticism towards the traditional theory of natural law, the search for the ideal of a desirable and rational law effectively places him within it. One can agree with Petrazycki that not all intuitive law is rational and desirable, and therefore, following the traditional terminology, not all intuitive law is natural. Intuitive law can be contradictory since it varies from an individual to an individual[30]. Therefore, in order to rationalize often irrational ethical impulsions that constitute individual intuitive law, one has to identify the standards of what is rational and desirable for the humankind. This is particularly important since the intuitive law is seen largely as the force which determines the appearance, change, and the destruction of positive law[31]. The discussion of the relationship between intuitive law and positive law is beyond the scope of this paper. The Petrazycki's ideas on their relevance to natural law has been considered to some extent somewhere else[32]. At this point, it is important to emphasize that the idea of intuitive natural law can be helpful in considering the exemptions from criminal liability and from punishment.

The similarities, such as found in Chinese and Thai criminal laws on exemptions from criminal liability, can be explained on the basis of psychological impulsions (in the meaning of Petrazycki's theory) which give rise to those exemptions. The justifiable defence and necessity are considered universally to be grounds for the exclusion of criminal liability. If it is so, then why not to define them as the requirements of intuitive natural law as well as positive law? Petrazycki himself would claim that these requirements are only common among, what he called, "civilized nations"[33]. It is true that not every intuitive law (particularly among the barbarians preferring the standards of strict liability) would justify or excuse "objectively wrongful actions"[34] in self-defence and necessity. However, already in the Biblical law of Moses (who allegedly lived somewhat sixteen hundred years before Jesus), we find the idea of justifiable killing in self-defence (Exodus, 22, 2–3). Jesus himself maintained that a person is not guilty of breaking sacred laws, whose violation was often punished by death, if acting out of necessity (Mathew, 12:14). In other words, there are some demands of intuitive law which cannot be reduced only to a particular civilized stage of legal development.

The idea of intuitive natural law seems logically flows from Petrazycki's search for the science of legal policy and for a better operation of criminal law in general. It is also important as an intellectual platform for a critical analysis of diverse contemporary practices of exempting from punishment. It helps to identify the reasons for possible exemptions.

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[29] Ibid. P. 378–379. — The Russian text runs as following: "Впрочем, в некоторой части новейшей литературы (последнего десятилетия XIX и начала XX столетия) появилось вновь признание естественного права, казавшегося окончательно и решительно устраненным из сферы научной мысли, и даже идет речь «о возрождении естественного права». Автор этого сочинения пытался путем ряда специальных исследований и основанных на них общих соображений возбудить и обосновать мысль о возможности и необходимости создания на почве психологического изучения права и его мотивационного и культурно-воспитательного действия особой науки — политики права, в частности — в области гражданского, цивильного права — цивильной политики, посвященной, в отличие от существующей юриспруденции, занимающейся историческим изучением и практически-догматической разработкой действующего права, разработке начал желательного, рационального права и законодательства".

[30] Ibid. P. 381–382.

[31] Ibid. P. 395–396.

[32] *Shytov A. N.* Conscience and love in making judicial decisions. Heidelberg: Springer Science & Business Media, 2001.

[33] *Petrazycki L.* Theory of Law and State. P. 104.

[34] The term is sometimes used in American criminal case law: In re Levasseur, 737 F.3d 814 (1st Cir. 2013).

Among the competing ethical imperatives on what and who should be excluded from punishment, the theory of Petrazycki would cogently require an appeal to a purer and nobler intuitive natural law.

Conclusion

Even though the positive law of diverse countries such as China and Thailand contain similar provisions on the exemption from criminal liability, there is a significant difference in relation to the discretionary exemptions from punishment. Chinese law allows judges to have more discretion in not imposing penalties on an offender than Thai law does. The reason for the difference lies in a greater openness of Chinese law to moral considerations to be played in sentencing practices. Thai law is much more influenced by the philosophy of legal positivism. Its credo is that "there is no straightforward moral or social test of whether conduct is criminal. The most reliable test is the formal one: is the conduct prohibited, on pain of conviction and sentence?"[35]. Petrazycki's approach challenges this commonly held belief. The test is found in the intuitive law that is experienced in attributive imperatives of our consciousness.

In this aspect, Chinese law can accommodate better the intuitive law of the public to the exigencies of various social situations. There can be many reasons against giving judges extensive powers to apply their intuitive laws to exempt offenders from punishment. There is a plurality of those imperatives which may conflict with each other. These reasons, however, will significantly lose their strength, if this discretion is limited by the precepts of natural law intuitively grasped by every moral agent. Even though Petrazycki did not argue for the existence of the natural law norms, its existence can be drawn from the force of attributive imperatives as well as from a striking similarity between various systems of criminal law in such diverse countries as China and Thailand.

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[35] *Ashworth A., Horder J.* Principles of criminal law. P. 5.

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Освобождение от наказания в Китае и Таиланде в свете теории Льва Петражицкого*

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В статье сравниваются законодательные положения уголовного права Китая и Таиланда в отношении освобождения от наказания, которое следует отличать от освобождения от уголовной ответственности. При освобождении от уголовной ответственности наказание невозможно. Напротив, при освобождении от наказания последнее возможно, но оно не налагается по судебному усмотрению. Законы Китая и Таиланда имеют сходство в определении освобождений от уголовной ответственности, но существенно различаются в отношении дискреционных полномочий судов по освобождению от наказаний. Китайское законодательство, в отличие от тайского, позволяет судьям иметь больше свободы действий не налагать наказания на нарушителя. Причина различий заключается в большей открытости китайского законодательства к моральным соображениям, которые следует учитывать в практике вынесения приговоров. На тайское право гораздо больше влияет философия правового позитивизма. Эти сходства и различия обсуждаются в свете теории Льва Петражицкого. Утверждается, что концепция интуитивного права, разработанная Петражицким, имеет важное значение для объяснения и оправдания полномочий суда освобождать от наказания, если это соответствует целям уголовного правосудия. С точки зрения Петражицкого, китайское право может лучше приспособить интуитивное право общественности к нуждам различных социальных ситуаций. Тем не менее теория Петражицкого сама по себе не может преодолеть многие доводы, по которым судьи не должны иметь широких полномочий применять свои интуитивные эмоции для освобождения нарушителей от наказания. Существует множество психологических факторов, которые могут конфликтовать друг с другом. Чтобы разрешить эти конфликты, необходимо опираться на идею естественного права. Несмотря на то что Петражицкий прямо не апеллировал к существованию естественного права, последнее можно вывести

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из общих психологических факторов, а также из поразительного сходства между различными системами уголовного права в таких разных странах, как Китай и Таиланд. Многие правовые положения их законов отражают определенные общие правовые парадигмы, которые не могут быть объяснены только принятием западных правовых концепций.

Ключевые слова: уголовная ответственность, наказание, Таиланд, Китай, психологическая теория права, Петражицкий.

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PUBLIC SECURITY AND POLICE LAW IN CHINA

Abstract

The paper argues that China is a police state understood in neutral terms as a state in which public security and public order are given an overriding preference. There is an acknowledgement of human rights in China but their scope is very limited giving the authority to the police to control the daily life of its citizens in its every aspect. It is not only the extensive governmental control of ordinary citizens which makes China a police state. It is also the wide network of personal relationships between the police and the members of the Chinese public. This network is created to secure public order and stability. Public security is the central concept of Chinese law. It gives a wide discretion to Chinese police to determine the scope of individual rights and duties.

Key words: China, police, administrative law, human rights.

Introduction

The news of the recent outbreak of coronavirus in China point at the enormous powers of the Chinese local police not only to enforce social compliance but also in the public obedience to the police orders and even an active public participation in that enforcement.[1] This compliance is achieved on an enormous scale. Indeed, the current crisis has proved that China has an enormous police force which is well organized and managed.[2] It appears that the reasons for such a peculiarity is not fully understood by a non-Chinese observer even though Chinese police has been an object of a significant number of research works in English language.[3] The unsatisfactory explanation of this phenomenon is aggravated by the fact that the state of Chinese police law and administration is in a constant transformation. For example, the official policies of the Chinese government under Hu Jintao to promote the ideal of harmonious society had a significant impact

[1] Financial Times, 'Chinese villages build barricades to keep coronavirus at bay', Accessed February 10, 2020, https://www.ft.com/content/68792b9c-476e-11ea-aeb3-955839e06441.
[2] For general description of Chinese police structure see: Kam C. Wong, *Police reform in China* (USA: CRC Press, 2011); Xiaohai Wang, 'Empowerment on Chinese police force's role in social service', (USA: Springer, 2015), pp. 40-55.
[3] A comprehensive analysis of the literature is found at Suzanne E. Scoggins, 'Policing Modern China', *China Law and Society Review* 3(2), (2018), p. 79-117.

on the style of police work.[4] At the time of writing, harmonious society is largely replaced by the ideal of a strict compliance with legal rules.[5] Since China is a very dynamic country, many academic works, even written recently, do not reflect the current situation. This paper aims at something more than providing a simple update on the recent status of Chinese police law. This study offers some insights in the role of Chinese police in the society. It affirms that China is a police state despite the argument to the contrary found among a number of writings.[6]

I use the term 'police state' in a neutral meaning. Police state is often incorrectly defined as "a government that exercises power arbitrarily through the power of the police" with the disregard for the rights of citizens.[7] The problem with this definition is not only that the idea of human rights in China is understood very differently from the Western liberal democracies. It also fails to describe in neutral terms a state in which the police is the principal instrument of government. China fits well into the description of a police state given by Brian Chapman.[8] Chinese state is based upon internal discipline and rigorous control. The population is made to be wholly obedient and responsive to the rulers of the state. According to Brian Chapman, a police state is different from the state with the rule of law which is characterized, among other things, by the existence of independent judiciary that has the effective power of judicial review over the police actions.[9]

There is only one defect of Chapman's definition of the police state. Police state can co-exist with the availability of judicial review. Therefore, one has to go a little bit further in developing the concept of a police state by not necessarily binding its definition to the absence of judicial review. In fact, China has a written law which allows citizens to challenge the acts of the

[4]Li Shi, Sato Hiroshi and Sicular Terry, eds., *Rising inequality in China: Challenges to a harmonious society* (UK: Cambridge University Press, 2013); Zheng Yongnian and Sow Keat Tok, 'Harmonious society and harmonious world: China's policy discourse under Hu Jintao', *Briefing Series* 26, (2007), pp. 1-12.; Susan Trevaskes, 'The shifting sands of punishment in China in the era of "Harmonious Society"', *Law & Policy* 32(3), (2010), pp. 332-361.

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[6] Xuezhi Guo, *China's Security State: Philosophy, Evolution, and Politics* (Cambridge University Press, 2012), p. 156. William A. Callahan, *China: The pessoptimist nation* (UK: OUP Oxford, 2009), p. 25.

[7] Elise K. Tipton, *The Japanese police state: The tokko in interwar Japan* (USA: University of Hawaii Press, 1990), p. 14.

[8] Brian Chapman, 'The Police State', *Government and Opposition* 3(4), (2007), pp. 428–440.

[9] Ibid. 430-431.

police in a court.[10] Certainly, one can argue that this is a law in the books, not law in action.[11] Indeed, it is generally affirmed that China lacks independent judiciary.[12] The notion of an independent judiciary is a controversial topic often colored by the authors' political biases. Even if we admit that judicial review over the acts of Chinese police is not effective now, there are no grounds to believe that China will never arrive at the situation when the courts are more proactive and yet the police remains the main form of the social control.

In this paper, I will attempt to outline briefly the 'police state' in China in neutral terms. Instead of approving or disapproving the claim that there is not an independent judiciary in China, that makes her a police state, I will argue that the police state in China is formed by the wide spectrum of social functions performed by the Chinese police rather than by the lack of the judicial review. It is, certainly, beyond the scope of a single paper to describe and to analyze all functions in this continent-size country with all its diversity and local differences. "Estimates of police numbers range from a low 1.5 million to a hearty 4 million."[13] It plays a much greater role than police forces in many other countries. It is not only the extensive governmental control of ordinary citizens which makes China a police state. It is also the wide network of personal relationships between the police and the members of the Chinese public.

This network as well as the variety of functions has a single ultimate goal: public security. It is impossible to understand the whole of the Chinese legal system in its dynamic without taking into account the normative importance of the concept of public security. This concept is understood differently in China from the Western legal tradition. In the West, public security is one of the aspects of public order. The Western concept of public order is well described by a Russian philosopher Vladimir Solovyov more than a century ago.[14] For the Western thought, public order is a delineation of freedom of private individuals to act pursuing their own interests. It exists to secure the individual rights and liberties. In China, public order and public security are synonymous. Both express the condition for the stability, greatness and prosperity of the Chinese

[10] *Law of the People's Republic of China on Administrative Penalty 1996, 2017.* Article 6.
[11] For the classical distinction of law in books and law in action see: Roscoe Pound, 'Law in books and law in action', *Am. L. Rev.* 44, (1910), p. 12.
[12] Chang Wang and Nathan H. Madson, *Inside China's Legal System* (UK: Chandos Publishing, 2013), p. 72; Katrin Blasek, *Rule of law in China: a comparative approach* (Springer Berlin Heidelberg, 2015), 72; Linda Yueh, *China's growth: The making of an economic superpower* (Oxford University Press, 2013), p. 1.
[13] Suzanne E Scoggins, 'Policing Modern China', *China Law and Society Review* 3(2), (2018), pp. 79-117. At 81.
[14] Соловьев В.С., Право и нравственность. Очерки из прикладной этики, *Works,* (Peterburg Prosveschenie, 1914) 8. P 123.

nation. The idea of public order in the work of Chinese police is not simply an ideological slogan, it is an essential principle of the Chinese legal system which invigorates and innerves the work of the Chinese police. In order to perceive this work better, let us examine a routine work of an ordinary Chinese police station.[15]

A routine work of a Chinese police station: a case study

A brief illustration of a daily work of a Chinese police station helps to understand the importance of the idea of public security in the Police Law of China. The account of Jinbi police station that is given below is obtained through a series of interviews conducted by the author in summer 2019. Jinbi police station is placed in the center of Kunming, the capital of Yunnan Province in China. It has eight community police officers. They are responsible for providing security for the community of residents living in 300 apartment buildings. The area is also full of shops and hotels. There were 64 hotels in the police district at the time of the interview. The main responsibility of the community police is to carry put public security management. All police officers have a rich experience. Their task is much larger than reacting to administrative offences. They must be aware of what is happening in their community even up to small security concerns. The key-point of their work is building a good relationship with the community and local residences as well. This gives the community police a sense of accomplishment which also enhances the harmony and sustainability for the operation of the police-community management system. The police officers call their approach of local security management as "the policy of a more harmonious society."

The interviews with the Chinese officers indicate that the concept of social harmony is the key to understand the work of Chinese police and also its success in ensuring social compliance. Police is certainly not alone who is guided by the goals of achieving harmonious society. Qi Chen, in his recent work, gave examples when prosecutors and judges manipulated the law to impose a lighter penalty or no penalty at all if there was a social pressure for imposing no punishment.[16] He quotes the words of a prosecutor: "nowadays the first priority for us is to 'maintain social harmony'

[15] I would like to express my gratitude here to Professor Xuming from the Yunnan Police Academy for making me familiar with the daily work of Chinese police, for his contacts, arrangements, and translations. All information below is the result of informal interviews with the police officers of Jinbi police station in Kunming.
[16] Qi Chen, *Governance, Social Control and Legal Reform in China* (UK: Palgrave Macmillan, 2018), pp. 123.

(weiwen). The government does not care about the law or the trial, it only wants social stability. In criminal cases, as long as the victim is happy, the public is happy, and nobody makes a fuss on the media, we are ok here."[17] It is certainly the sentiment which could be seen among Jinbi police officers.

In relation to administrative offences, the desire to achieve social harmony finds its expression in the zero tolerance tactics towards minor offences. It is claimed that this policy has been successful. The success is measured by the perception of local residents who feel more peaceful and secure. There is an increasing demand for the police to be more effective in communication with parties involved in minor conflicts and to be able to conduct successful mediation. Jinbi police officers affirmed that mediation is one of the majour tasks of their work. According to Article 21 of *People's Police Law,* Chinese policemen must perform the duty to help citizens in settling their disputes.[18] Remarkably, mediation is used by the police not only in administrative cases, but also in criminal cases. This topic has been considered in a number of writing.[19] The police feels compelled to resort to mediation in dealing with minor offences, and to apply law, including court's proceedings, only if mediation fails. For example, during the procedure of dealing with minor conflicts, such as fighting without involving serious injuries, police officer allows the parties to make choice whether to adopt formal court process or simple mediation. Usually, court's proceedings are considered by the parties to be undesirable as they consume time, energy, and money. In contrast, simple mediation for minor social conflicts carries lower costs. In this way, the parties can make their own decisions being motivated by the desire to settle their dispute. The police can play an important role by providing suggestions how to settle the case and supporting the view of the parties whose demands they consider reasonable. The police also play the role of an educator as it informs the parties of the existing law (法律普及者). The effort is made not to substitute the consent of the parties with the police decision of the dispute. It is affirmed that this policy leads to a better adaptability in problem solving but also increases

[17] Ibid.
[18] *People's Police Law of the People's Republic of China (1995, 2012).* English translation is available at https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/92664/108061/F-1334361595/CHN92664%20Eng.pdf, accessed February, 10, 2020.
[19] Shi-lin Zhao, 'Police Mediation in the Context of Rule of Law', *Journal of Political Science and Law* 6, (2007); X. I. A. Yi Gong, 'Research upon Related Problems of Public Security Mediation', *Journal of Henan Public Security Higher Academy* 3, (2005); Guy Olivier Faure, 'Practice note: Informal mediation in China', *Conflict Resolution Quarterly* 29(1), (2011), pp. 85-99; Yan Xiang, 'Criminal mediation in mainland China: a leap from judicial endeavor to legal norm', *Asian Journal of Criminology* 8(4), (2013), pp 247-256.

people's consciousness to abide by law. In addition, the relationship between the police officer and the parties is no longer tense due to the change of roles.

A good example is enforcing law in cases of noise that disturbs local residents. A local police station in Kunming receives many complaints about noise, and a lower rank of police finds them comparatively difficult to resolve. If police had to follow the prescribed procedures, there could be many obstacles in enforcing law, and tension in the community will likely persist. Therefore, in such cases, the police prefers to communicate with the parties to settle cases in a less formal way. Sometimes, it involves cooperation of different departments in enforcing law. For example, there was a recent case (May, 2019) of a pharmacist shop actively promoting sales by loudspeakers' advertisement. The residents that live nearby complained to the local police station. The police could not find an appropriate legal provision in *Public Security Administrative Penalties Law of the People's Republic of China*[20] to deal with the advertiser. However, there were some environmental regulations which could be used in those circumstances to impose a fine. The imposition of fine, however, was not within the powers of the local police but of an environment management authority. The police, in this case, acted as an intermediary between different parties involved including the offender and the environment management authority (环境管理部门). The police, apparently on the behalf of the environment management authority, issued a warning letter to the pharmacy threatening it with penalties unless it would desist from the disturbing advertisement. It monitored the situation and observed that the disturbing activity had indeed stopped.

In another case of a store using loudspeakers that disturbed local residents, the police went several times to the store to give advice but without a positive result. The police noticed that the store received regularly tourists brought by tour buses. The police contacted the local Tourist Administrative Department (TAD) as well as the Market and Municipal Administrative Bureau for Industry and Commerce (MABIC). The agencies applied a joint enforcement measure. A group of officials went to the store trying to persuade the manager to desist from disturbing activity. They also sent a warning letter. To avoid the conflict with the TAD, as its primary customers were tourists, the store stopped using the loudspeakers' advertisement method. These are typical cases

[20] Public Security Administrative Penalties Law of the People's Republic of China 2005, 2012. English and Chinese texts are available at https://www.cecc.gov/resources/legal-provisions/public-security-administration-punishment-law-chinese-text, Accessed February 10, 2020.

showing how police works. The police tries to adapt to the situation by being flexible. They use Chinese traditional military strategy: finding the sensitive part of the enemy and exploit this weakness. These two cases indicate that the Chinese police have to employ experience and skills in communication, cooperation, etc. to successfully settle local disputes.

There are also cases of mental disorder. There are people with mental disorder, particularly those with violent inclinations, who can create danger to society. There was a case when people reported about a person with mental disorder who had violent behaviour. The police concluded that the offender needs medical treatment. At first, the family members of the person did not cooperate. According to domestic rules on compulsory treatment of mentally ill people in a specialized institution, it is necessary to obtain consent of their family members.[21] Police first contacted the family members and discovered the reason of their unwillingness to send the person to hospital: the family did not have money. Therefore, it was necessary to cooperate with the municipal organ (居委会 literally: neighborhood committee) which assisted in meeting financial costs of medical treatment in a specialized institution. The police acted in this case as an intermediary. The cooperation of the neighborhood committee was also needed to enter the residence in order to forcefully detain the person with a mental disorder. Thanks to this cooperation, the local community has a better sense of security.

The way how police manages social security and solves disputes has been greatly affected by the surveillance technology developments.[22] Kunming Children's Hospital, which is a public management hot spot with intensive traffic and population, locates within the duty area of Jinbi police station. In order to improve the management efficiency, the police persuaded the manager of the hospital to invest money in installing electronic surveillance system. The detection rate of reported offences in the hospital's area has been increased to more than 90% due to its introduction. Shortly after the introduction of the system, a serious case (both criminal and civil) was successfully resolved. It involved a claim of homicide against the hospital staff by a family of a person whose body was found in a toilet room. The family of the deceased created significant disturbance within the hospital demanding vast compensation and threatened criminal prosecution even though there was no evidence that the hospital staff was responsible for the death.

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[21] Shao, Yang, et al. 'Current legislation on admission of mentally ill patients in China.' *International journal of law and psychiatry* 33.1 (2010): 52-57.
[22] Jianhua Wu, Luo Xin and Su Jin, 'Video Surveillance Commanding Management System for Police Based on GIS [J]', *Bulletin of Surveying and Mapping* 11, (2011), pp. 67-70.

The local police officers assisted in resolving the dispute by submitting electronic video recordings containing evidence that no hospital personnel was involved in the death of the person. It took only half a day to search for the necessary video records. The family accepted the evidence and the hospital was saved from the financial loss and trouble.

The introduction of electronic detectors is claimed to improve the overall sense of security. The police claimed that thanks to electronic detectors, 300 knifes brought by the visitors were confiscated. It is certainly very unlikely that those knifes were brought as a remedy against medical malpractice, however, their possession in public areas is prohibited and constitutes a minor administrative offence.[23] The number of knifes sized by the police gave them a significant sense of achievement.

Dealing with serious or minor offences is not the only main function of the police. They are heavily involved in crime prevention activities. For example, there is a sudden rise in telecom fraud alerts recently. Its rate as a percentage of the total number of crime reports has been increased to the 40 percent. Much work has been done by the local police to make the public aware of such cases. However, criminals use sophisticated fraud techniques. That still leaves the number of such cases high. The police conducts public awareness campaigns to warn people from disclosure of private information.

Prevention of bullying incidents in local schools is another priority of the local police.[24] In order to tackle the challenges of increasing campus bulling incidents, anti-bulling strategy is adopted. For instance, by means of vigorous publicity activities of the police in the schools, the bullying incidents were timely reported and the perpetrators were deterred. As the result, schools enjoy a greater sense of security and harmony.

The interviews with the Chinese police present the work of Chinese police in a very positive, almost heroic light. There is a strong belief among Chinese public that a Chinese policeman is not simply a watchdog that can bite (which he certainly can and does) but that he is a servant of people. Certainly, there are people in China who do not share this perception, considering police as an oppressive and corrupt institution, but I have never found among the

[23] There are a number of laws and regulations. The most commonly used is the Public Security Administrative Penalties Law of the People's Republic of China 2005, 2012. Article 32. English and Chinese texts are available at https://www.cecc.gov/resources/legal-provisions/public-security-administration-punishment-law-chinese-text,accessed February 10, 2020.

[24] Hongwei Zhang, et al, 'Social bonds, traditional models and juvenile attitudes toward the police in China', *Policing: An International Journal of Police Strategies & Management* (2014).

members of German, Russian, Thai, and the British public the same, almost naive idealistic vision of a policeman, a heroic figure who sacrifices his life for the interests of the society. This image is certainly influenced by the Confucian and Communist traditions. Its force may not last long in the society in which the capitalist economic realities, urbanization, and accompanied alienation of people from one another have made deep inroads. It may also last longer due to the influence of language. The policeman is called often as *minjing* 民警, literally rendered as "people's vigilant one" or "the one who warns people." The word "police" in English as well as in Russian is borrowed from Latin, and it does not carry the same connotations. The Thai word for the police: ตำรวจ, which is borrowed from the Old Khmer language, also does not affirm necessarily a positive meaning, although it connotes well a common Thai word ตรวจ, that is *to inspect*. The influence of language on our moral perceptions is undeniable. The same thing labelled by two different words may easily produce different responses. The peculiarity of Chinese police law and the words used to describe it carries a stronger morally positive linguistic load than Thai, Russian, or English languages that use a more neutral word.

In China, an open criticism of the police work is certainly not a very common thing. There must be some degree of trust that people would share their opinion about the police, especially if it is done to a foreigner. However, there were some former students and colleagues of the author who were willing to be open and direct in their critical attitudes. One must acknowledge, that China always had a tradition of officials and intellectuals who were very courageous to submit critical reports even facing persecution.[25] In some rare interviews, the Chinese police were severely criticized. The critical opinions are still among a minority. However, their voice is important to verify or falsify the idea that the Chinese police is an active harmonizing force of Chinese society.

The content of the critical remarks tend to be very similar. The Chinese police is claimed to be suffering from widespread corruption, nepotism, factionalism, and even inhumanity. In one reported case, an interviewed teacher had a dispute with a local government official on the legality of a parking car fee he was charged. The interviewee was convinced that the fee was illegal as he was parking on the ground of a private estate where he owned a property. He wrote to the police

[25] Denis Crispin Twitchett and John King Fairbank, *The Cambridge History of China* (Cambridge University Press, 1978) 7(1), p. 163.

accusing the local official in extortion. The police came and locked the teacher's car demanding the pay. According to the teacher, the police was not interested in justice. They had a good relationship with the extorting official.

In another case, a couple managed to beget three children at the time when they were allowed to have only one. The husband had to pay a bribe to a senior police officer to get registration papers for the new born children. On both occasions, the husband claimed that the police were taking bribes, yet the police helped him to avoid a heavier penalty for defying the governmental policy "one family - one child".[26] He claimed that the senior police officer was kind, understood his situation and financial difficulty, and asked a reasonable amount. Indeed, this is a good example of bribery promoting social harmony! In this case, the father of the children was not critical of the police, but approving its actions as mitigating the harshness of the governmental policy.

There was a case of a Chinese Christian pastor, who had conducted an unauthorized religious service. The police arrested him and a group of others at the time of the service. They attempted to force the confession by threat of violence (to apply an electric baton) that the group was involved in an illegal religious activity since it was not authorized. The pastor and the others were firm and refused to confess arguing their constitutional right to practice religion freely. After one day of detention, the group was released. The pastor was asked to register his church, which he did, and since then, he claimed good relationship with the Chinese local police. This case is interesting that the Chinese police decided not to impose a penalty on the leaders of an unauthorized Christian group. Rather, facing resistance, they assisted the legalization of the religious assembly.

Thus, the Chinese police has a complex profile. However, there is certain characteristic which is common in the few examples of Chinese police work given above. The Chinese police plays an important role in the daily life of ordinary Chinese people. It may not always achieve social harmony, but it is generally successful in maintaining public order and security.

[26] Susan Greenhalgh, 'Science, modernity, and the making of China's one-child policy', *Population and development review* 29(2), (2003), pp. 163-196.

The concept of Public Security in Chinese Law

The Chinese term 治安 (zhi an) is generally translated as 'public security'. The key legislative act which informs much of the daily routine of the Chinese police work is the *Public Security Administrative Penalties Law of the People's Republic of China 2005, 2012. (*中华人民共和国治安管理处罚法).[27] It mentions the term over 100 times in its 119 articles. However, the law does not define the concept. Its meaning is closely associated with the ideas of public order (公共秩序), and public safety (公共安全) throughout the text of the legislation. The way how the police understands these terms is very important not only for the police but also for the ordinary citizens. For example, Article 8 and Article 9 of the *People's Police Law of the People's Republic of China* (1995, 2012)[28] sates that

"If a person seriously endangers public order or constitutes a threat to public security, the people's policemen of public security organs may forcibly take him away from the scene, detain him in accordance with law, or take other measures as provided by law."

"In order to maintain public order, the people's policemen of public security organs may, upon producing an appropriate certificate, interrogate and inspect the person suspected of having violated law or committed a crime. After interrogation and inspection, the person may be taken to a public security organ for further interrogation upon approval of this public security organ, if he or she is under any of the following circumstances: (1) being accused of a criminal offense; (2) being suspected of committing an offense on the scene; (3) being suspected of committing an offense and being of unknown identity; (4) carrying articles that are probably obtained illegally. The period of time for holding up the interrogated person shall be not more than 24 hours, counting from the moment he or she is taken into the public security organ. In special cases, it may be extended to 48 hours."

Violations of law, that do not constitute a crime, can be of various nature, and police has a significant discretion to define what conduct is illegal and what is not. Police authorities in several cities, for example, recently announced the ban on small meeting societies playing Mahjong, a

[27] Public Security Administrative Penalties Law of the People's Republic of China 2005, 2012. English and Chinese texts are available at https://www.cecc.gov/resources/legal-provisions/public-security-administration-punishment-law-chinese-text, accessed February 10, 2020.
[28] *People's Police Law of the People's Republic of China (1995, 2012)*. English translation is available at https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/92664/108061/F-1334361595/CHN92664%20Eng.pdf, accessed February 10, 2020.

popular game, in an attempt to suppress illegal gambling and "purify social conduct".[29] Many people protested calling the game the "quintessence of Chinese culture". Later, the Police had to clarify that only unlicensed parlours would be shut.

Defining what is legal or illegal under broad and imprecise provisions of legislation is not the only 'paradise' for the police discretion when defining the scope of the concepts of public order, public security and public safety. The higher levels of Chinese police can issue comprehensive regulations to ensure public security with the enormous impact on the daily life of ordinary citizens. For example, the Ministry of Public Security issued a "Regulation on cybersecurity supervision and inspections by the police" (公安机关互联网安全监督检查规定).[30] It is claimed to be formulated in accordance with the PRC Cybersecurity Law,[31] but the law describes the authority to issue such regulations only in very broad terms: "State cybersecurity and informatization departments are responsible for comprehensively planning and coordinating cybersecurity efforts and related supervision and management efforts. The State Council departments for telecommunications, public security, and other relevant organs, are responsible for cybersecurity protection, supervision, and management efforts within the scope of their responsibilities, in accordance with the provisions of this Law and relevant laws and administrative regulations."[32]

Article 28 of the same law requires network operators, defined very broadly and imprecisely in Article 76, "to provide technical support and assistance to public security organs and national security organs that are safeguarding national security and investigating criminal activities in accordance with the Law." According to the Regulation, the police supervises and inspects any organization or person who provides internet services to others.[33] It can include any business which offers its customers even a temporal access to the Internet, such as Internet-café, hotels, restaurants, etc. Article 15 of the Regulations gives the power to the police to enter business

[29] Ellen Jin. 'Mahjong: Police clamp down on China's most loved game'. *BBC*, October 24, 2019, accessed April 7, 2020, https://www.bbc.com/news/world-asia-china-50162766.
[30] Laney Zhang, 'China: New Regulation on Police Cybersecurity Supervision and Inspection Powers', November 13, 2018, accessed April 7, 2020, https://www.loc.gov/law/foreign-news/article/china-new-regulation-on-police-cybersecurity-supervision-and-inspection-powers-issued/.
[31] Ibid.
[32] Cybersecurity Law of the People's Republic of China (2016). English translation is available at https://www.newamerica.org/cybersecurity-initiative/digichina/blog/translation-cybersecurity-law-peoples-republic-china/, accessed April 7, 2020.
[33] Ministry of Public Security, 'Regulation on cybersecurity supervision and inspections by the police' (公安机关互联网安全监督检查规定) No. 151, 2018, Article 8, accessed April 7, 2020, http://www.gov.cn/gongbao/content/2018/content_5343745.htm.

places, computer rooms, and workplaces and among other things to copy information related to Internet security supervision and inspection matters. Article 27 threatens the persons subjected to supervision and inspection, if they do not obey regulations and public security management with administrative or criminal law sanctions. The Regulation does not specify which penalty applies. The PRC Cybersecurity Law, however, has a number of provisions on penalties in respect to various offences. For example, Article 69 penalizes network operators or its personnel, "if the circumstances are serious," with a fine of between RMB 10,000 and 500,000 if they do not follow the requirements of police to stop dissemination or delete information that is prohibited by laws or administrative regulations; or refusal or obstruct the police in their lawful supervision and inspection; or refuse to provide technical support and assistance to the police.

The further examination of this interesting piece of Chinese law would lead us too far from the issue of this paper. It is sufficient to conclude that the broad definitions of public security, public order, and public safety provide the police with enormous powers to control the daily life of people living in or visiting China. The duty to maintain public order and to stop acts that endanger public order[34] gives the Chinese police the authority which is unimaginable in the most countries of this world.

The way how Chinese police uses this power has become more evident thanks to the outbreak of coronavirus. According to the Financial Times, [35] the Chinese police have used the following measures.

"More than 900km from Wuhan, the metropolis of Wenzhou has been put in virtual lockdown over the past few days. Local regulations permit only one person per family to leave the house every two days to buy food." "Zhuozhou, a city of more than 600,000 people in Hebei province, announced on January 31 that it would shut its freeways after officials discovered a case of coronavirus in the area." "Poyang county in Jiangxi province turned all traffic lights red on Monday and barred any travel on roads, as its neighbouring counties closed all transportation links." "Some local governments have told residents to remain in their homes for days. Heilongjiang province in northern China has threatened the death penalty for anyone caught intentionally spreading the bug."

[34] See: *People's Police Law of the People's Republic of China (1995, 2012).* Article 6.
[35] 'Chinese villages build barricades to keep coronavirus at bay', accessed February 6, 2020, https://www.ft.com/content/68792b9c-476e-11ea-aeb3-955839e06441.

The Chinese police is not the only institution that enforced these draconian measures of control to protect public security and public safety. However, the multiple images of the deserted Chinese cities during the outbreak of the infection showed the ubiquitous presence and involvement of Chinese police in enforcing the restrictions described by the news reporters. There is a massive use of surveillance technology, including drones, monitoring the compliance with the epidemic prevention measures.[36] The official news reports praise the police for the heroic acts in "the national war against the virus."[37]

There is also the criticism of the police. In a well-publicized case, a Chinese doctor, who had warned about the outbreak of coronavirus and later died from the infection in Wuhan, was censured by the Chinese police for "making false comments" that had "severely disturbed the social order".[38] The Wuhan police made a statement that they acted according the *Public Security Administrative Penalties Law of the People's Republic of China*[39]. The report does not quote the exact provision, but it was likely Article 25 which states: "A person who commits one of the following acts shall be detained for not less than 5 days but not more than 10 days and may, in addition, be fined not more than 500 yuan; and if the circumstances are relatively minor, he shall be detained for not more than 5 days or be fined not more than 500 yuan (1) intentionally disturbing public order by spreading rumors, making false reports of dangerous situations and epidemic situations or raising false alarms or by other means." The police report indicates, that since the circumstances were not serious, they did not impose any penalty. The death of the doctor caused a significant amount of anger against the police displayed on the social media, which, according to the news reports, was quickly suppressed by the Chinese censors.[40]

It is not only the public that raises some limited criticism of the police work. In a very unusual move, the Supreme Court made a news release criticizing the action of the Wuhan police

[36] James Griffiths and Nectar Gan, 'China's massive security state is being used to crack down on the Wuhan virus', CNN, February 11, 2020, https://edition.cnn.com/2020/02/10/asia/china-security-police-wuhan-virus-intl-hnk/index.html.
[37] Kun Cao and Hongbin Yue, 'Zhao Kezhi: Creating a Safe and Stable Environment for Winning the Epidemic Prevention and Control Blockade'. People's Daily, accessed February 04, 2020, http://politics.people.com.cn/n1/2020/0204/c1001-31571103.html.
[38] 'Li Wenliang: Coronavirus kills Chinese whistleblower doctor'. accessed February 04, 2020, https://www.bbc.com/news/world-asia-china-51403795.
[39] Xinhua, '8 people detained for rumors: no warning, fine or detention according to law'. January 29 2020, Accessed February 04, 2020. http://www.xinhuanet.com/2020-01/29/c_1125510476.htm
[40] Samuel Wade, 'CORONAVIRUS "RUMOR" CRACKDOWN CONTINUES WITH CENSORSHIP, DETENTIONS' February 12, 2020, accessed April 4, 2020. https://chinadigitaltimes.net/2020/02/coronavirus-rumor-crackdown-continues-with-censorship-detentions/.

in suppressing the warnings of the doctor.[41] It is important to underline that there was not any court case involving the doctor. In the Anglo-American legal tradition, the court may take a public stance but there must be a case brought before the court. In the words of Alexis de Tocqueville, "it can only interfere when the conduct of a magistrate is specially brought under its notice."[42] The news release is still an exception. If there is an official disapproval of the actions of the police, it will likely come from the leaders of the Communist party or the party's watchdog "Central Commission for Discipline Inspection".[43]

Public security and human rights

A much greater amount of disapproval comes from the human rights activists. They are often struck by what appears to them as an obvious violation of human rights. However, the claimed violations of the rights become less apparent if we consider the weight of public security considerations which influence many decisions of the police. Public security as an essential part of public order is one of the reasons for limiting human rights according to the Universal Declaration of Human Rights.[44] One example is Zhenping County Public Security Bureau's imposing a fine on Zhao X.[45] An abstract of the official notice is the following:

Zhao X in the village of Yushuzhuang, Henan Province rented premises to three Uighur people who were selling nan-bread in the locality. Zhao X violated article 91 of the "Counter-terrorism Law of the P.R.C."[46] by not reporting this to the branch public security bureau. He was accused in refusing to cooperate with relevant departments responsible for counter-terrorism

[41] People's Supreme Court, 'The problem of dealing with rumours about the infection a new coronavirus. This article makes clarifications', People's Court News and Media Corporation, January 28, 2020, accessed April 4, 2020, http://www.xinhuanet.com/politics/2020-01/28/c_1125508460.htm.
[42] Alexis de Tocqueville, 'Democracy in America 1835 (Transl. by Henry Reeve)', Vol. I, Chapter V, Part II,, http://www.gutenberg.org/files/815/815-h/815-h.htm.
[43] Kam C. Wong, *Police Reform in China* (CRC Press, 2011), pp 20-21.
[44] Universal Declaration of Human Rights 1948. Article 29. accessed April 4, 2020, https://www.un.org/en/universal-declaration-human-rights/.
[45] The translation of the Police Notice is available on China Law Translate website, 'Terrorizing those who Rent to Uighurs?', September 11, 2018, accessed April 4, 2020, https://www.chinalawtranslate.com/en/10038-2/.
[46] Standing Committee of the National People's Congress, Counter-Terrorism Law of the PRC, December 27, 2015, Article 91: 'Refusal to cooperate with relevant departments counter-terrorism safety precautions, intelligence information, investigation, or response and handling efforts, is given a fine of up to 2,000 yuan by the relevant departments; where serious consequences are caused, 5-15 days of detention is given, and a fine of up to 10,000 yuan may be given concurrently', accessed April 4, 2020, The Chinese text is available at: http://www.pkulaw.cn/fulltext_form.aspx?Db=chl&Gid=261788.

security precautions, intelligence information, investigation, or emergency response efforts. More specifically, Zhao X rented premises without authorization and without reporting. The landlord was given administrative detention of 15 days, and a concurrent fine of 1900 RMB. The three Uighurs were "forcibly repatriated to their previous residence in Xinjiang to receive education."

This incident was given by the *China Law Translate* as an example of violation of human rights. There are, however, certain factors which may justify the acts of Zhenping County Police. First, the offender was given the maximum penalty of detention and almost the maximum fine in the cases of a serious violation. This measure is imposed only when there are some serious consequences (严重后果). The notice does not specify the details of those consequences. However, without such consequences, the imposition of penalty is very unlikely. Second, the fact of a forceful repatriation of the tenants to receive education indicates that the police did perceive them as dangerous. Third, the "Counter-terrorism Law of the P.R.C." was introduced in China following the deadly terrorist attack of a group of Uighurs on the railway station in Kunming in 2014.[47] The author happened to be in Kunming at that time, and witnessed the shock and the anger of the Chinese public at the inability of Chinese police to protect them. Fourthly, the incident happened in the countryside of Henan Province which is predominantly populated by Han Chinese. It is possible that the stay of the Uighurs in the village created a social tension. The notice said that the violation was discovered not by the police itself but through a complaint brought by a local person.

It is certainly premature to allege a violation of human rights in this case without fully understanding the motives of the police action. This action may be well explained by the desire of the Chinese police to secure public order. A senior police officer in Kunming acknowledged that the conflicts between Han Chinese and a Muslim Hui minority can be violent. Kunming, unlike Henan countryside, is a much more culturally and ethnically diverse region, where people have learned to live together and respect the cultural differences. It is possible that the action of the Henan police was an example of an overzealous pursuit of the police duty to guard public security. In any case, it indicates the scope of the police powers to limit the rights of private individuals. One may conclude, that public security sets an effective limitation on human rights in China and creates the condition for the existence of the police state.

[47] 'Four sentenced in China over Kunming station attack', *BBC*, September 12, 2014, accessed April 4, 2020, https://www.bbc.com/news/world-asia-china-29170238.

Conclusion

Police state can be defined as a government in which securing public order is among the greatest priorities. The rise of the Chinese police state is a recent phenomenon. It is a product of the co-existence of the communist ideology and the capitalist economic reality, in which the state continues to play the defining role. The whole evolution of the Chinese police law appears as a progressing increase of regulation of not only the life of ordinary citizens by the police force, but also the increased regulation and control of the police itself by the central government. The scope of the police duties increases on the basis of proliferating legislation. “Counter-terrorism Law of the P.R.C." applied in the Henan case described above is only one of them. The conversations with the Chinese police clearly indicate that securing public order is the major concern of the central government and the reason for the increased regulation of the work of the Chinese police. One can also observe that the general government policy to solve complex problems of Chinese society by an increased police regulation creates the dissatisfaction among some members of the public. This dissatisfaction does not always appear to a foreign observer, but it is there and its force will depend on the effectiveness of the Chinese police to secure public order. In a sense, the future of the Chinese communist rule will depend on the effectiveness of the Chinese police and this is exactly what makes China a police state.

Manuscript - anonymous

WHEN AN ADMINISTRATIVE DELICT ENDS AND CRIME BEGINS: THE DISCRETIONARY POWERS OF CHINESE POLICE TO PROMOTE SOCIAL HARMONY

Abstract

China has two separate regimes of liability for committing public wrongs. One regime is criminal liability, another is administrative. The existence of two systems of liability in China creates the problem of their demarcation. Even though there are attempts to draw a clear line between administrative and criminal offences, there is a large grey area in which the police inevitably has a significant discretion to choose which system of liability to apply. This discretion is limited. The seriousness of a public offence is accepted in China as the fundamental principle to distinguish the criminal from the administrative offences. In order to make the both systems of liability function well, there must be clear standards to define and to measure the seriousness of offences. China oscillates between two alternative policies in defining those standards. The first is to measure the seriousness of offences from the point of view of their impact on social harmony. This policy requires a significant degree of discretion of the police which has to be proactive in identifying and solving social contradictions. The second policy is to give specific descriptions of seriousness for each kind of offence that warrants an application of criminal law. Under this policy, the police must strictly follow those descriptions. The paper argues that social harmony is a better policy than a strict application of rules.

Key words: China, criminal law, administrative law, police.

Introduction

Having taught police officers both in Thailand and in China, I have been struck by the differences in the police style in those Far-Eastern countries. The first apparent difference is the visible presence of Chinese police which seems to be everywhere, particularly in its Western regions. The news of the recent outbreak of coronavirus in China point at the enormous powers of

the Chinese local police to enforce social compliance.[1] It is also the manifestation of power which makes Chinese police different from the Thai counterpart. There are many historical, social, political, and cultural reasons for the differences between them, but there are also some similarities. For example, both states are not liberal democracies. In this paper, I will try to examine Chinese administrative law to show that the form of the law creates a necessity for the police to be more proactive and to play a greater social role. There are certain legal concepts and institutions which can increase the social role of the police even in a liberal state. The existence of a separate regime of administrative liability is one of them. Unlike Thailand, China distinguishes between criminal acts and administrative wrongdoings in a way similar to Germany and Japan.[2] Many offences which are defined as crimes in Thailand are not treated as such in China. Instead, Chinese police has a significant amount of discretion to apply administrative sanctions instead of initiating more formal, complicated, and lengthy criminal proceedings.[3] It is also true for Thailand that many minor crimes are traditionally dealt by Thai police in an informal way.[4] However, the sanctions of Thai police are expected to be administered in a mechanical way without a prima facie duty to take into account a broader goal of achieving social harmony. In contrast, Chinese law and policy explicitly reiterates that administrative sanctions must pursue the creation of a just and harmonious society.[5] This goal becomes particularly important since China, with its fast development, has created a significant social stress which potentially can destabilize the social life.

Chinese police has been an object of a significant number of research works in English language. Even its brief analysis would lead far beyond the scope of this paper.[6] A number of works on Chinese police treat the idea of social harmony.[7] However, social harmony as the goal

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[1] *Financial Times* 'Chinese villages build barricades to keep coronavirus at bay' (6 February, 2020) https://www.ft.com/content/68792b9c-476e-11ea-aeb3-955839e06441 (last visited 10 February 2020)

[2] Guoxiang Sun, 'Research on the subordinate and independent character of the judgement on unlawfulness of administrative offences.' In Jichun Shi (ed) *Renmin Chinese Law Review: Selected Papers of the Jurist* (法学家) Volume 7, (Edward Elgar Publishing, 2019), pp 110-137.

[3] Kam C. Wong, *Police Reform in China* (CRC Press, 2011), pp 300-303.

[4] David M. Engel, and Frank E. Reynolds, *Code and Custom in a Thai Provincial Court: The Interaction of Formal and Informal Systems of Justice* (Association for Asian Studies, 1978).

[5] Thomas W. Simon, Chuan Feng, & Leyton P. Nelson, *China's Changing Legal System: Lawyers & Judges on Civil & Criminal Law* (Palgrave Macmillan, 2016).

[6] A comprehensive analysis of the literature is found at Suzanne E. Scoggins, 'Policing Modern China' (2018) 3 *China Law and Society Review* 2: pp 79-117.

[7] Luo Haocai & Song Gongde 'The Public Law Construction of a Harmony Society [J]' (2004) 4 *Chinese Legal Science* 6; Allan Y Jiao, 'Police and culture: A comparison between China and the United States' (2001) *Police quarterly* 2: pp 156-185; H. E. Jie, 'Taking the Victims' Interests into Consideration, Promoting Social Harmony - Also on the System of Criminal Reconciliation' (2006) *Journal of Kunming Teachers College* 2. E. Li, 'China's new counterterrorism legal framework in the post-2001 era: Legal development, penal change, and political

of Chinese police has not been examined yet as the principle capable to provide the vital link between administrative and criminal law. Further, China is a very dynamic country. It is without doubt that political reforms within China affect the vitality of social harmony as the principle of the police work. The official policies of the Chinese government under Hu Jintao to promote the ideal of harmonious society has certainly raised the awareness of the importance of this principle.[8] At the time of writing, harmonious society is largely replaced by the ideal of a strict compliance with legal rules.[9] That made some critics argue that the ideal of harmonious society is largely failed in China.[10] Even though this claim might be true, the goal of social harmony continues to be an essential element of Chinese police law. The official policy of the Chinese government can certainly affect this goal but there is an additional reason for social harmony to inform the actions of the police on the grassroots level as long as the present system of police law is in place. The need to apply the principle of social harmony naturally flows from the framework of the criminal and administrative liability in China considered below.

It is certainly not sufficient to affirm *apriori* that social harmony takes the key position in police law enforcement. The second part of this paper will present the result of the conversations with the Chinese police. The aim of those conversations was to find out the inner perspective of the police officers on the meaning and purpose of their work. The conversations were conducted informally and more formally depending on the situation. From the perspective of a sociological research, those interviews may appear not very systematic and accurate. They did not apply any technique ensuring the objectivity of the obtained data. There were two reasons for using a not systematic approach in gathering data. The first reason was rather pragmatic. There must be trust between the interviewer and the interviewed. Bringing well-tailored questionnaires would unlikely make Chinese police sincere in answering sensitive questions.

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legitimacy' (2016) 19 *New Criminal Law Review*, 3: pp 344-381; Jue Jiang, 'The Family as a Stronghold of State Stability: Two Contradictions in China's Anti-Domestic Violence Efforts' (2019) 33 *International Journal of Law, Policy and the Family*, 2: 228-251; Randall Peerenboom, 'Out of the Pan and into the Fire: Well-Intentioned but Misguided Recommendations to Eliminate All Forms of Administrative Detentions in China,' (2004) 93 *Northwestern University Law Review* 3: 991-1104; Elisa Nesossi, 'The Politics of Torture and Miscarriages of Justice in Contemporary China,' (2016) 11 *Journal of Comparative Law* 2: pp 166-185.

[8]Shi Li, Hiroshi Sato, & Terry Sicular, eds. *Rising inequality in China: Challenges to a harmonious society*. (Cambridge University Press, 2013); Yongnian Zheng & Sow Keat Tok. 'Harmonious society and harmonious world: China's policy discourse under Hu Jintao' (2007) 26 Briefing Series, pp 1-12.; Susan Trevaskes, 'The shifting sands of punishment in China in the era of "Harmonious Society".' (2010) 32 Law & Policy 3: pp 332-361.

[9] Sarah Biddulph, Elisa Nesossi, & Susan Trevaskes. 'Criminal justice reform in the Xi Jinping era' (2017) 2 *China Law and Society Review* 1: pp 63-128.

[10] Cheng Li & Eve Cary 'The Last Year of Hu's Leadership: Hu's to Blame?' (2011) 11 *China Brief* 23.

The second reason was more complex. It was based on the conviction that the task of the present research was not so much to *explain* the police work as to *understand* it. In other words, its methodology was largely built on the tradition of hermeneutics developed by Wilhelm Dilthey[11] whose ideas influenced Max Weber, Karl Jaspers, Martin Heidegger, Hans-Georg Gadamer, Jürgen Habermas, Franz Boas, and many others.[12] The hermeneutic approach pays attention to "all modes of experience in which a truth is communicated that cannot be verified by the methodological means proper to science."[13] The importance of the hermeneutical method is particularly important in conversing with the Chinese police. There are certain understandings which are communicated not verbally, and there are certain statements whose truthfulness is doubtful. A researcher who aims at understanding the works of Chinese police has to rely often on, what the Legal Realists called, a hunch.[14] This is particularly true when there were discussions of violence against the police officers in social conflicts in which the police tried to mediate local disputes. Even though this topic is discussed in official media,[15] it is a very sensitive topic for a discussion. An informal interaction with Chinese police provided some insights into the role of social harmony in the whole system of law enforcement.

The scope of this paper has certain limitations. It is certainly difficult to make generalizations concerning the whole of China. This country presents a significant variety of conditions and differences. The present research concentrated largely on one province of China: Yunnan, which possesses an immense diversity of social conditions that make achieving social harmony a challenging task. There are many relevant issues which cannot be covered within a single paper. Therefore, only one key issue is chosen: the way how the Chinese police chooses the administrative rather than criminal law mechanisms to deal with various offences, and how this choice is motivated by the search to achieve social harmony.

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[11] Wilhelm Dilthey, *Selected Works*, *Hermeneutics and the Study of History*. Vol. 4 (Princeton University Press, 2010).
[12] Ilse Nina Bulhof, *Wilhelm Dilthey: A hermeneutic approach to the study of history and culture* (Martinus Nijhoff, 1980).
[13] Hans-Georg Gadamer, *Truth and Method* (Continuum, 1989), XI.
[14] Julius Paul, *The Legal Realism of Jerome N. Frank: A Study of Fact-Skepticism and the Judicial Process* (Martinus Nijhoff, 1959), p 78.
[15] *Legal Daily,* 'Obstacles to law enforcement cases: heavy punishment for violent attacks on police makes sense' (31 January 2018) (Chinese) http://www.xinhuanet.com/2018-01/31/c_1122343513.htm (last visited 10 February 2020).

The Criminal v. the Administrative

As it has been said in the introduction, China distinguishes between criminal and administrative offences. The way how an offence is defined is very important since it determines largely the procedure to be adopted by the police. The procedure for criminal offences is regulated by the Criminal Procedure Law of the PRC.[16] The procedure for administrative offences is regulated by a significant number of legislative and administrative acts. Two of them are of a greater importance: *Administrative Penalty Law of the People's Republic of China 1996, 2017 (*中华人民共和国行政处罚法)[17] and *Public Security Administrative Penalties Law of the People's Republic of China 2005, 2012. (*中华人民共和国治安管理处罚法).[18] The second act of legislation also defines a number of administrative offences and applicable penalties for them. At the time when an offence is reported, the police, if the available facts permit to do so, has to classify it as a criminal case or as an administrative case which is often described as an "order maintenance case". The ratio of administrative offences to criminal offence is generally much higher, although the difference varies significantly depending on a location and the time. For example, in two months of 1993, Shanghai police received 4700 calls for assistance. "Of these calls, 526 (11.2%) were criminal cases, 2550 (54.3%) were order maintenance cases, 1176 (25.1%) were road traffic cases, 440 (9.4%) were for emergency services, and the rest were unclassified. In essence, the police were involved with order maintenance work over 50% of the time."[19] In other words, the order maintenance cases, i.e. administrative cases, are much more common than criminal cases, and should deserve a closer attention.

Even when the facts are available, it is not always easy to determine which cases are criminal and which are administrative. The content of administrative offences is often too broad and can overlap with a number of common criminal offences. To illustrate this point, several examples can be given. In Inner Mongolia, criminal investigations were initiated against a person who was a diagnosed patient with new coronary pneumonia, but who attempted to hide the fact of

[16] Criminal Procedure Law of the PRC (CPR). 1979, (2012). https://www.cecc.gov/resources/legal-provisions/criminal-procedure-law-of-the-peoples-republic-of-china (last visited 10 February 2020).
[17] Administrative Penalty Law of the People's Republic of China 1996, 2017. English text is available at: https://www.cecc.gov/resources/legal-provisions/administrative-penalty-law-of-the-peoples-republic-of-china and http://en.pkulaw.cn/display.aspx?id=f2ad69fea4bf8d8cbdfb&lib=law (last visited 10 February 2020).
[18] Public Security Administrative Penalties Law of the People's Republic of China 2005, 2012. English and Chinese texts are available at https://www.cecc.gov/resources/legal-provisions/public-security-administration-punishment-law-chinese-text (last visited 10 February 2020).
[19] Kam C Wong, *Police reform in China* (CRC Press, 2011), p 6.

his illness, appeared in the public, and initiated the transmission of the illness to others. He is accused of the crime endangering public safety.[20] The offence is contained in the Criminal Law of the PRC, Article 114 and 115. These provisions contain draconian sanctions including death penalty. At the same time, certain provisions of the *Public Security Administrative Penalties Law of the People's Republic of China,*[21] can also be used to impose administrative sanction against the offender. For example, Article 30 of the law penalizes anyone who carries pathogens of infectious diseases with the detention for not less than 10 days but not more than 15 days; and if the circumstances are relatively minor, he shall be detained for not less than 5 days but not more than 10 days. Since there were many administrative regulations issued by the central and local governments following the outbreak of coronavirus, Article 50 (1) of the law also provides a convenient justification for penalizing the offender. It threatens anyone who refuses to carry out the decision or order issued according to law by the people's government in a state of emergency with the fine of not more than 200 yuan. "If the circumstances are serious, he shall be detained for not less than 5 days but not more than 10 days, and may, in addition, be fined not more than 500 yuan."

One can find more examples of overlapping ambits of administrative and criminal laws. Article 23 of the *Public Security Administrative Penalties Law* penalizes with the fine of not more than RMB 500 yuan and, in some cases, with detention of not more than 10 days those who

"(1) disturb the order of government departments, public organizations, enterprises or institutions, thus making it impossible for work, production, business operation, medical care, teaching or scientific research to go on normally but not having caused serious losses; (2) disturb the public order at stations, ports, wharves, airports, department stores, parks, exhibition halls or other public places."

Article 277 of the *Criminal Law of the Peoples Republic of China* penalizes with imprisonment of not more than three years as well as with less severe penalties anyone who "by means of violence or threat, obstructs a functionary of a State organ from carrying out his functions

[20] *Xinhua* "Inner Mongolia: a newly diagnosed patient with new coronary pneumonia was investigated for concealment." (8 February 2020). Retrieved from http://news.cctv.com/2020/02/08/ARTICahQyy1gYMJnkc3BRgsW200208.shtml?spm=C73544894212.P99766666351.EogkW3VdRtw6.2 (last visited 10 February 2020).
[21] *Public Security Administrative Penalties Law of the People's Republic of China*. Article 30 or Article 50.

according to law".[22] The word "disturb" (扰乱) is more general and can also involve violence and threat. Article 293 of the law also imposes the same penalty on those who "are making trouble (起哄闹事) in a public place, which causes a serious disorder (严重混乱) of the public place." It is apparent that the abstract contents of criminal and administrative laws may create an uncertainty on which law should be applied in specific circumstances.

There can be difficulty in distinguishing not only between administrative and criminal offences, but also between the content of different administrative offences that involve different penalties. Disturbing public order proscribed by the second part of Article 23 (quoted above) of *Public Security Administrative Penalties Law* may be easily confused with the offences of Article 26 of the same law which penalizes gang-fighting (结伙斗殴的), chasing or intercepting another person (追逐、拦截他人的), forcibly taking and obstinately seizing or willfully damaging and occupying public or private property (强拿硬要或者任意损毁、占用公私财物的), or other provocative acts (其他寻衅滋事行为). The confusion may not be vital as the penalty for both kinds of offences is similar: detention for not less than 5 days but not more than 10 days and possibly a fine of not more than 500 yuan. However, Article 26, unlike Article 23, allows the police, if the circumstances are relatively serious, to inflict heavier penalties by detaining the offender for not less 10 than days but not more than 15 days and by imposing a fine of not more than 1,000 yuan.

The content of the latter administrative offence may be also difficult to distinguish from a variety of criminal offences. For example, Article 293 of the *Criminal Law* penalizes with not more than 5 years of imprisonment anyone who (1) assaults any other person at will, with execrable circumstances (随意殴打他人，情节恶劣的); (2) chases, intercepts, reviles or intimidates any other person, with execrable circumstances (追逐、拦截、辱骂、恐吓他人，情节恶劣的); (3) takes or demands forcibly or vandalizes or occupies at will public or private property, with serious circumstances (强拿硬要或者任意损毁、占用公私财物，情节严重的); or (4) makes trouble in a public place, which causes a serious disorder of the public place. For the ringleaders of a repeated action, the punishment can be up to 10 years of imprisonment.

[22] *Criminal Law of the Peoples Republic of China 1979, 2017.* English translation is available at https://www.cecc.gov/resources/legal-provisions/criminal-law-of-the-peoples-republic-of-china (last visited 10 February 2020).

The seriousness of circumstances seems to be the only criteria which allows the police to distinguish between criminal and administrative offences. The question naturally arises: who should decide whether the circumstances are serious enough to warrant the application of criminal sanctions? One would expect the police to do that, but in most cases, there is a binding interpretation issued jointly by the Supreme Court (SPC) and the Supreme People's Procuratorate that attempts to define more precisely the seriousness of the circumstances to initiate the criminal rather than the administrative procedure. These interpretations remind more the acts of legislation. They are general, compulsory, and are not bound to the circumstances of a particular court's case.[23] The number of those interpretations is very significant, and one police officer acknowledged that it is unlikely that each policeman as well as an ordinary citizen would be familiar with most of them.

"It is reported that by the end of 2013, the SPC had issued 3,351 judicial interpretations and opinions on judicial guidance. Statistics show that by March 2011, the number of valid, existing laws enacted by the NPC and its Standing Committee was 239, and the number of valid, existing administrative regulations promulgated by the State Council was over 690. The number of judicial interpretations seems to be greater than of the laws and administrative regulations."[24]

In relation to Article 293 of the Criminal Law, there is the "*Interpretation of the Supreme People's Court and the Supreme People's Procuratorate on Several Issues concerning the Application of Laws in Handling Criminal Cases of Provocative Trouble*"[25] issued by the Supreme People's Court's 1579th meeting on May 27, 2013, and by the Supreme People's Procuratorate on April 28, 2013 with the effect on July 22, 2013. Article 5 of this interpretation deals specifically with the trouble made in a public place and which causes a serious disorder of the public place. It provides for the police only a general guidance in assessing whether the crime has taken place or not. The police has to take into account the nature of the public place, the importance of the public

[23] Thomas W. Simon, Chuan Feng, & Leyton P. Nelson, *China's Changing Legal System: Lawyers & Judges on Civil & Criminal Law* (Palgrave Macmillan,2016), p 59.
[24] Ibid.
[25] Supreme People's Court. The Interpretation of the Supreme People's Court and the Supreme People's Procuratorate on Several Issues concerning the Application of Laws in Handling Criminal Cases of Provocative Trouble. 1579th meeting on May 27, 2013. Chinese text is available at: http://www.sdjcy.gov.cn/html/2013/gjflfg_0722/7981.html (last visited 10 February 2020).

activities, the number of people being present, time, and the actual impact of the trouble. The police are required to make a comprehensive judgment as to whether it “causes a serious disorder of the public place.”

The way how the Interpretation describes execrable circumstances mentioned in Article 293 of the *Criminal Law* quoted above is noteworthy. Article 2 of the Interpretation states: Assaulting others at will and disrupting social order under any of the following circumstances shall be regarded as "execrable circumstances" as stipulated in the first paragraph of Article 293 of the Criminal Law: (1) causing minor injuries (轻伤) to more than one person or trifling injuries (轻微伤) to more than two persons; (2) causing others to have mental disorders, commit suicide, or causing other serious consequences; (3) repeatedly beating others at will; (4) beating others at will with a weapon that can kill; (5) beating mental patients, the disabled, homeless beggars, the elderly, pregnant women, and minors at will with causing a bad social impact; (6) beating others at will in public places, causing there a serious disorder; (7) other situations with bad circumstances.

Two things are remarkable in this interpretation. The first is that despite the attempt to clarify the content of the criminal offence of assaulting others at will, it introduces other terms that require further interpretation. For example, there is a need to explain the difference between a minor injury and a trifling injury. The Interpretation does not have any reference to other legal materials where the difference may be explained. The second is that the lists of the examples is not exhaustive. It is obvious that the police retain much discretion in determining whether or not there is a case of “causing other serious consequences to victims”, “causing a serious public disorder in a public place”, “causing a bad social impact”, or whether there are “other situations with execrable circumstances.“

Theft is one of the most common offences, which is punished both by administrative and criminal law. Article 49 of *Public Security Administrative Penalties Law* defines *administrative* offence of theft as following: “a person who steals, defrauds, forcibly seizes, openly robs, racketeers or intentionally destroys public or private property shall be detained for not less than 5 days but not more than 10 days and may, in addition, be fined not more than 500 yuan; and if the circumstances are relatively serious, he shall be detained for not less than 10 days but not more than 15 days and may, in addition, be fined not more than 1,000 yuan.” Article 264 of the *Criminal Law* defines *criminal* offence of theft as following:

"Whoever steals a relatively large amount of public or private property, commits thefts many times, commits a burglary or carries a lethal weapon to steal or pick pockets shall be sentenced to imprisonment of not more than 3 years, criminal detention or control and/or a fine; if the amount involved is huge or there is any other serious circumstance, shall be sentenced to imprisonment of not less than 3 years but not more than 10 years and a fine; or if the amount involved is especially huge or there is any other especially serious circumstance, shall be sentenced to imprisonment of not less than 10 years or life imprisonment and a fine or forfeiture of property."

It is apparent that the main difference between administrative theft, fraud, snatching and robbery on the one hand and criminal theft, fraud, snatching and robbery on the other hand is the value of the illegally obtained goods, although there can be some other aggravating circumstances which justify an imposition of a criminal law sanction. Similarly to other administrative and criminal offences, the People's Supreme Court was obliged to issue a binding interpretation to specify the line between the administrative and the criminal offence of theft, fraud, snatching and robbery.[26] Some interviewed police officers claimed that this interpretation as well as accompanied local interpretations leave very little space for the police discretion. According to Article 1 of the Interpretation, the threshold of criminal liability for theft is set at the amount between 1000 and 3000 Yuan. The exact amount is given to local authorities to specify depending on their local circumstances. However, Article 2 of the Interpretation gives the power to initiate criminal proceedings if the amount of theft is 50% of the prescribed level in a number of circumstances. They are as following: if the offender:

(1) has been criminally punished for theft before;

(2) received administrative punishment for theft within a previous year;

(3) organized and controlled the theft committed by minors;

(4) committed theft following natural disasters, accidents, or social security events;

(5) stole property from a disabled or a lonely elderly person;

(6) stole property from a patient or his relatives in a hospital;

(7) stole property directed for a disaster relief, emergency rescue, flood control, preferential treatment, poverty alleviation;

[26] Supreme People's Court. The Interpretation of the Supreme People's Court of the Supreme People's Procuratorate on Several Issues Concerning the Application of Laws in Handling Criminal Cases of Theft. 1571st meeting of the Supreme People's Court Judiciary Committee on March 8, 2013. https://www.spp.gov.cn/zdgz/201304/t20130403_57894.shtml (last visited 10 February 2020).

(8) caused serious consequences by theft.

Certainly, the last exception gives significant discretion for the police to initiate criminal proceedings in cases which can be dealt only administratively. At the same time, the Interpretation allows the police to apply only administrative sanctions or not to initiate any proceedings against theft in a number of situations. Article 7 states that even if the stolen amount of property is large, the offender may be not punished at all, or punished only by an administrative penalty. There are two layers of conditions for exempting an offender from criminal liability. The first is that the perpetrator must confess his crime, repent (悔罪), return the stolen goods, and pay compensation. The second is that exemption is permitted only if the circumstances are minor, under the following conditions: "(1) a mitigating circumstance is determined by law; (2) an offender have not shared or shared little in stolen goods and is not the principal offender; (3) the victim forgives; (4) other circumstances are minor and not harmful." Further, Article 8 gives discretion not to prosecute those who stole from relatives, if the latter forgive. If criminal proceedings are initiated, the punishment must be lenient.

Thus, even though there appear to be financial thresholds to separate the administrative offence of theft from its criminal counterpart, the police possesses a significant discretion in those criminal cases whose circumstances can be interpreted as minor and not harmful in order not to initiate criminal proceedings, or initiate criminal proceedings in the administrative cases in which an act of theft caused serious consequences.

From this brief treatment of the content of some common overlapping criminal and administrative offences, one can conclude that Chinese law has to admit a very broad leeway for the discretion of police in classifying a particular act as a criminal or as an administrative delict. It is also certain that this discretion is not unlimited, and there are some binding regulations which guide the police in their legal determinations. Considering the amount of those regulations and also the abstract language which they often employ, there is an obvious need for a clearer and more comprehensive principle that informs the police decision-making. I will argue in the following section that the dominant principle is social harmony.

Social Harmony

It is true that social harmony may not always be a guiding principle which directs the discretion of police in China. For example, during the Cultural Revolution, the class struggle determined the policies of law enforcement, although some would argue that at that time there was no law but lawlessness to enforce.[27] Cultural Revolution was short-lived, but social harmony is a part of the tradition which continues to persist.[28] The overall importance of the concept of harmony in the Far-Eastern legal culture has been well discussed since the time of Takeyoshi Kawashima, a prominent Japanese legal scholar of the twentieth century.[29] Since that time, the role and the place of social harmony in policing China became a yielding field of research.[30] Since 2004, social harmony has "developed into a fundamental value of the modern Chinese legal system,"[31] even though Sarah Biddulph, Elisa Nesossi and Susan Trevaskes[32] argued that the recent reforms under Xi Jinping had shifted this policy. "Governing the Nation in Accordance with the Law" gives preference to a strict abidance by legal rules rather than to a flexible search of social harmony. There is evidence that social harmony affects the process of determining whether a public offence constitutes a crime or an administrative delict. Qi Chen, in his recent work, gave examples when prosecutors and judges manipulated the law to impose a lighter penalty or no penalty at all if there was a social pressure for imposing no punishment.[33] He quotes the words of a prosecutor: "nowadays the first priority for us is to 'maintain social harmony' (weiwen). The government does not care about the law or the trial, it only wants social stability. In criminal cases, as long as the victim is happy, the public is happy, and nobody makes a fuss on the media, we are ok here."[34]

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[27] O. Hansen, 'Legality and Lawlessness in China: An Analysis of Chinese Criminal Law and Procedure', (1980) 6 *Poly L. Rev.*, p. 46.
[28] Samuli Seppänen, *Ideological conflict and the rule of law in contemporary China: useful paradoxes*. (Cambridge University Press, 2016), p 31.
[29] Takeyoshi Kawashima, 'Some Reflections on Law and Morality in Contemporary Societies', (Oct, 1971), 21 *Philosophy East and West,* No. 4, Symposium on Law and Morality: East and West, pp 493-504.
[30] Suzanne E. Scoggins, 'Policing Modern China', (2018) 3 *China Law and Society Review* 2, pp 79-117; Sarah Biddulph, Elisa Nesossi & Susan Trevaskes, 'Criminal justice reform in the Xi Jinping era', (2017) 2 *China Law and Society Review* 1, pp 63-128.
[31] Lijuan Xing, 'The Rhyme of History: A Transition of Legal Culture in China Crowned by the Criminal Procedure Law 2012', (2015) 23 *Asia Pacific Law Review* 1, pp 31-65. At 38.
[32] Sarah Biddulph, Elisa Nesossi & Susan Trevaskes,'Criminal justice reform in the Xi Jinping era', (2017) 2 *China Law and Society Review* 1, pp 63-128.
[33] Chen Qi, *Governance, Social Control and Legal Reform in China* (Palgrave Macmillan, 2018), pp 123.
[34] Ibid.

Whatever the impact of the recent legal policies is, there are many indications that the concept of social harmony has been deeply enshrined not only in the practices of the police[35] but also in the legislation that directly affects police work. The rules may not always be clear, as in the case of administrative mediation,[36] and the legislative provisions can be declarative. For example, *Public Security Administrative Penalties Law of the People's Republic of China 2005, 2012,* Article 6 states that "People's governments at various levels shall make comprehensive improvement of public security and take effective measures to dissolve social contradictions, enhance social harmony and maintain social stability." Few years later, the State Council of the PRC issued a white paper on the Socialist Legal System with Chinese Characteristics.[37] One of the main ideas of this document is that social harmony remains a fundamental goal of the Chinese law.

The concept of social harmony is not explicitly mentioned in another important piece of legislation: the *People's Police Law of the People's Republic of China* (1995, 2012).[38] Nevertheless, there are several provisions of this law which are relevant. For example, Article 3 of the law states: "People's policemen must rely on the support of the masses, keep close ties with them, listen attentively to their comments and suggestions, accept their supervision, safeguard their interests, and serve them whole-heartedly." Article 20 of the same law requires from the police officers to play "an exemplary role in observing social ethics" (模范遵守社会公德), to "be courteous and polite in performing duties" (礼貌待人，文明执), and to show respect for the customs and habits of the masses (尊重人民群众的风俗习惯).

Some of the interviewed members of the public in China thought about all these requirements as a mere propaganda. To find out the view of Chinese police, the author approached the senior teaching staff in the Yunnan Police Academy where he was also teaching around 10 years ago and since that time continued to keep both friendly and working relationships. The Yunnan Police Academy is one of the few Chinese institutions that trains a higher rank of Chinese

[35] Xiaoyu Yuan, *Restorative justice in China: Comparing theory and practice* (Springer, 2017), pp 101.
[36] Lijuan Xing, 'The Rhyme of History: A Transition of Legal Culture in China Crowned by the Criminal Procedure Law 2012', (2015) 23 *Asia Pacific Law Review* 1, pp 31-65. At 39. Guodong Du & Meng Yu, 'Mediation in China: Past and Present' (2019, August 11). Retrieved from https://www.chinajusticeobserver.com/a/mediation-in-china-past-and-present (last visited 10 February 2020).
[37] State Council of the PRC, 'Socialist Legal System with Chinese Characteristics', (2011), Available at http://www.gov.cn/zwgk/2011-10/27/content_1979526.htm (last visited 10 February 2020).
[38] People's Police Law of the People's Republic of China (1995, 2012). English translation is available at https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/92664/108061/F-1334361595/CHN92664%20Eng.pdf (last visited 10 February 2020).

police. The interviewed senior teaching staff are high rank police officers themselves who are in a constant contact with various levels of police through ordinary graduate courses, and also through post graduate training courses for the working police officers. The views of the Yunnan Police Academy officers concerning the requirements of Article 20 of the Police law are briefly summarized below.

Police' View of their Ethical Role (Summary)

There is a difference between social ethics (公德) and individual ethics (私德). Social ethics or public morality consists of behavioral standards (行为规范) accepted by the society on what should or should not be done. These standards come from the agreement of the people or accepted customs that are beneficial for the society. They are accumulated in the society during a long period of historical and cultural development. They appear as moral rules (道德准则), cultural concepts (文化观念), and ideological tradition (思想传统). Its function is to hold together public life and to regulate relationship between people. In contrast, individual ethics, or private morality, refers to moral standards and habits which belong to a private life of a particular individual. It is a requirement that Chinese policemen should show set an example how to observe public morality or social ethics by their own action. The words and actions of the police play a strong exemplary role (示范作用). Chinese police have a duty not only to be good practitioners of social cultural norms, they also must be their good communicators (传播者). Being a good example in observing social ethics has several dimensions. At work, a police officer has to be loyal to his duty, to deny himself for the interests of the society (克己奉公), and serve people. In his life, he must ardently love (热爱) his motherland, work honestly, keep his promises, and treat others with sincerity. In dealing with people, a police officer must show respect, care with love (关爱), ready to help others, harmonious (和睦) and friendly.

Being harmonious has 4 different dimension: the interactive dimension: how police should relate to people; the emotive dimension: with what sense the police should perform their tasks; normative aspect: the emphasis is made here on the strict following the rules; and finally, the fairness aspect with its emphasis on impartiality. For the interactive dimension, there are strict requirements for the Chinese police concerning their dress code and behavior when they are called.

They must act quickly, but also in a strict and tidy manner. When arriving at the scene, they must display the characteristics of being reasonable, gentle, polite, and consistent with the standard law enforcement. For the emotive dimension, the police officers must serve people with warmth and enthusiasm (热情). They must learn appropriate language skills. When receiving people, they must be warm and attentive, use polite language (用语文明), and treat people with propriety (礼貌). Such treatment must be afforded to everyone. Sincerity and earnestness are required in all situations. The police must be patient in answering people's questions and earnest in recording people's complaints. In normative dimension, there is a more increasing emphasis on a strict application of law. When receiving a report of an offence from people, there is a duty to hear with earnestness, to inquire carefully to obtain full and complete facts of the offence, to quickly investigate and verify the information, and enforce law with strictness, justice, and politeness. The police are expected to work hard in raising the sense of security among people and their trust in administration of justice. The fairness aspect is considered through the perspective of impartiality (秉公). It is considered closely with such moral requirements as patience, meticulousness, and the principle of having an appropriate way to solve conflicts (化解有方的原则). The conflicts must be resolved at the earliest possible stage. In solving conflicts, the police has to take into account the attitudes of people. They must be unbiased and do not follow their own affections.

Interpreting the Police Attitudes

This short summery of the Chinese police view on the role of social ethics in their work indicates the important framework which defines and limits the use of discretion by the Chinese police. The police will use their powers in such a way as to enhance and promote trust to their work among the Chinese public. The language used by the interviewed Chinese police officers is full of linguistics concepts which have thousand years of use in the Chinese ethical tradition. The analysis of these concepts would lead us far from the narrow topic of police discretion in criminal and administrative cases. However, understanding the conceptual framework of Chinese police will be incomplete without the realization that their very thought is moved within certain 'Chinese cultural prototypes'.[39] For example, in the concept of police credibility or trust, the interviewed

[39] Deborah Cao, *Chinese law: A language perspective*. (Routledge, 2016).

used the term 信力, literally “the power of faith”, which is a term originating in the Buddhist tradition. Jiang Zong (江总), a poet of Chen Dynasty (557-589 AD), wrote on the stele of Qixia Temple on She Mountain (摄山栖霞寺碑): "develop wisdom, power of faith and understanding, let each abandon (its) spring shell, and together they will be the cause of blessing.”[40] A famous calligrapher Li Yong (李邕) of Tang Dynasty wrote in the introduction to the stele of Guoqing Temple (国清寺碑序): "upholding law supports good deeds done in secret, while the power of faith rectifies the hidden destiny”.[41] Of course, it is very unlikely that the Chinese police would have ancient poets and calligraphers in mind when using their discretion to solve the problems of the present China. The point here is that the language employed by the Chinese police is *not* ethically neutral. It carries along the richness of the Chinese moral tradition.

There are certainly new concepts employed by the police which may not be found in traditional ethics. For example, the police officers mentioned the respect for individual autonomy (自主权) when commenting on the duty of police to respect customs and habits of the masses. Even then, the autonomy was treated as depending on the principle of equality and unity (团结) among the rights and interests of people. The interviewed police meant that someone’s customs and habits cannot be treated by a police officer on the basis of his one own individual likes and dislikes. There must be a balance between customs and habits of people on the one hand and the administration of law on the other which has to be carried out according to law and reason (依法依理). The latter appeal to reason is noteworthy, because this term in the Confucian tradition sometimes means *harmony*.[42]

Mediation

In practice, Chinese police strive for the goal of social harmony often by means of mediation. According to Article 21 of *People's Police Law,* Chinese policemen must perform the

[40] The Chinese text: 慧心开发，信力明悟，各捨泉贝，共成福业. See: 舒士俊, *中国南方佛教造像艺术*, 上海书画出版社, (2004), p. 118.
[41]The Chinese text: 护法阴騭而扶持，信力潜运而平正。See also: 《全唐文新編》編輯委員會, 吉林文史出版社, (2000), p. 23.
[42] See James Legge’ authoritative translation of *Mengzi*. Wan Zhang II. 10.5. Available online: https://ctext.org/mengzi/ens (last visited 10 February 2020).

duty to help citizens in settling their disputes. Remarkably, mediation is used by the police not only in administrative cases, but also in criminal cases. This topic has been considered in a number of writing.[43] Considering the scope of this paper, it is appropriate to look only at one particular issue: whether a successful mediation affect the discretion of police in initiating criminal or administrative proceedings.

The interviewed policemen in Yunnan acknowledged that there are many disputes among people. However, some police officers expressed the view that the role of direct police mediation is decreasing leaving this task to civil mediation and people's local organization mediation that help people to resolve their disputes. In any case, mediation is perceived as not only and not a main form of settling disputes involving Chinese police. Police is involved in both criminal and administrative processes of mediation, but, according to the interviewed Police Academy lecturers, the involvement in criminal process mediation is largely limited to the police actions to investigate crime and collect evidence which is used later by prosecution and court in deciding disputes between offenders and their victims. In this type of disputes, the role of police is indirect. A more direct role takes place in administrative process, in which the police assists people to settle their disputes by means of licensing proceedings, administrative penalty proceedings, enforcement measures and issuing administrative confirmations.

Police mediation is permitted in the process of imposing an administrative penalty. Article 9 of the *Public Security Administrative Penalties Law of the People's Republic of China 2005, 2012* states: "In respect of acts against the administration of public security, such as brawling and damaging or destroying another person's property, which are caused by civil disputes, if the circumstances are relatively minor, the public security organ may dispose of them through mediation. Where the parties concerned reach an agreement through mediation by the public security organ, no penalties shall be imposed. Where no agreement is reached through mediation or the agreement, although reached, is not executed, the public security organ shall, in accordance with the provisions of this Law, impose penalties upon the persons committing the acts against the

[43] Shi-lin Zhao, 'Police Mediation in the Context of Rule of Law,' (2007) *Journal of Political Science and Law*: 6; X. I. A. Gong-yi, 'Research upon Related Problems of Public Security Mediation,' (2005) *Journal of Henan Public Security Higher Academy*: 3; Guy Olivier Faure, 'Practice note: Informal mediation in China,' (2011) 29 *Conflict Resolution Quarterly* 1: pp 85-99; Yan Xiang, 'Criminal mediation in mainland China: a leap from judicial endeavor to legal norm' (2013) 8 *Asian Journal of Criminology* 4: pp 247-256.

administration of public security and notify the parties concerned that they may, according to law, bring a civil action before a people's court in respect of the civil disputes."

I was unable to obtain reliable information on whether the willingness of an offender and his victim to go through mediation procedure affects the decision to initiate criminal or administrative proceedings. When discussing this topic, the interviewed police officers denied the fact that they have such a discretion at all. Some even affirmed that the law is largely clear when to impose a criminal sanction and when an administrative penalty. According to this view, the application of law has become rather mechanical. They acknowledged that in the recent past, the police had indeed discretionary power, but the recent legal developments have reduced it to minimum if not completely obliterated. This is unlikely true considering the content of related criminal and administrative laws, but it indicates an important shift in the police mind away from a proactive search of social harmony towards an, at least, outward compliance with the regulations in conformity with the higher levels of Chinese government.

At least one surprise came out from the conversations with the police officers in Yunnan. When discussing one of the key-legislative acts, the *Administrative Penalty Law of the People's Republic of China 1996, 2017 (*中华人民共和国行政处罚法),[44] one senior police officer thought it to be a regulation (条例). This was an apparent mistake as the *Law of the People's Republic of China on Administrative Penalty* is not a regulation in a legal sense. However, the mistake is noteworthy, because as many interviewed police officers indicated, this law has very little direct impact on the daily work of many police officers. They act under specific administrative regulations and are hardly familiar with the precise content of this law since it does not contain rules covering specific administrative offences. Those rules are generally issued by the State Council or by the highest administrative organ of the local people's congresses.

Administrative Penalty Law of the People's Republic of China 1996, 2017

It is appropriate to diverge a little from the topic of discretion in initiating criminal or administrative sanctions to explain the role and importance of *Administrative Penalty Law of the*

[44] English text is available at: https://www.cecc.gov/resources/legal-provisions/administrative-penalty-law-of-the-peoples-republic-of-china and http://en.pkulaw.cn/display.aspx?id=f2ad69fea4bf8d8cbdfb&lib=law (last visited 10 February 2020).

People's Republic of China 1996, 2017. This legislation has received so far a limited academic attention.[45] As it has been mentioned above, it does not contain a specific list of administrative offences and penalties, and therefore it is not well known by the Chinese police. It is an 'umbrella' law which has a constitutional importance. It contains some principles which inform the whole process of imposition of administrative penalties, describes types and creation of administrative penalty, indicates organs imposing administrative penalty, outlines jurisdiction and application of administrative penalty, and explains the procedure of taking decision on an administrative penalty and its enforcement.

Two principles are fundamental in using discretion: fairness and openness (公正、公开的原则).[46] The failure to comply with these principles renders any use of administrative discretion unlawful. They relate closely to one another. As one professor from Yunnan Police Academy put it succinctly: fairness is the foundation (基础) of justice, and openness is its embodiment (体现). In the view of this professor, the reason for openness is rather pragmatic. It helps to ensure that there are no illicit activities and that the justice is done.

The Chinese law on administrative offences moves from flexibility to a greater rigidity. Many interviewed Chinese policemen, when asked about discretion, kept repeating that they must strictly apply regulations. When inquiring into details of those regulations, the prescribed administrative penalty procedures were the most common examples. These procedures do not abrogate discretion but impose important safeguards for the legality and reasonableness of administrative decisions. The principle of openness particularly applies to the requirement that the police officer who imposes a penalty, must identify himself. The facts on which the penalty is based and the reasons must be also disclosed. The normative acts according to which an administrative penalty applies, must be publicly available (Article 4(3) of the law). An affected person must be informed about the results of an administrative process as well as the availability of legal remedies. These basic administrative procedural rules are beneficial not only to the directly affected person, but also to the general public and the supervisory organs.

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[45] To my knowledge, it was not examined since a comprehensive, although outdated analysis of Yong Zhang, 'The Development of the Chinese Administrative Penalty System: A Comparative Perspective with Japanese and Taiwanese Law', In: Paul van der Velde & Alex McKay (eds) *New Developments in Asian Studies* (Routledge, 1998), pp 158-188.

[46] *Law of the People's Republic of China on Administrative Penalty 1996, 2017.* Article 4.

A very important provision is contained in Article 3(2) of the same law: "Administrative penalty that is not imposed in accordance with law or in compliance with legal procedures shall be invalid." Therefore, violation of the above disclosed procedures will result in invalid administrative penalties. The invalidation of the penalty is normally done by the supervisory administrative authority, but it is also can be done by judicial proceedings. According to Article 6 of the law: "citizens, legal persons and other organizations on whom administrative penalty is imposed by administration organs shall have the right to state their cases and the right to defend themselves; those who refuse to accept administrative penalty shall have the right to apply for administrative reconsideration or bring an administrative lawsuit in accordance with law."

It would be a mistake to think of this law as a mere transplantation of the Western rules to guard citizens from the abuse of administrative powers. The influence is certainly prominent, but the Chinese characteristics are not lacking. Article 5 of the Statute requires from the Chinese police to combine penalty with education, "so that citizens, legal persons and other organizations shall become aware of the importance of observing law." In other words, Chinese police undertake the role of educators. The senior teaching staff of Yunnan Police Academy acknowledged that this emphasis on educational function of the police constitutes a unique characteristic of Chinese legal system. Administrative punishment is perceived not simply as a tool to achieve social compliance with the commands of the state, but as the means to educate the offender and the public so that unlawful behavior will be prevented and stopped. The role of a Chinese policeman is 'parental'. Administrative penalty is aimed at the good of the offender in particular and the public in general. Education is the basis and purpose of administrative punishment. One Chinese police officer expressed this thought in a rather declarative manner: "Punishment is the means and a guarantor of education! The two complement each other and cannot exist without each other."

Whether education will always need punishment as its guarantor, is a matter of educational philosophy. The life of Chinese police is often more prosaic and directed by the procedures which have an educational impact quite independently from the philosophical views of the police. These procedures require that the police should inform the person who is subject to a penalty of the facts, reasons and the legal basis of the administrative penalty before its actual imposition.[47] It is called the notification procedure (告知程序). During this procedure, the police informs the concerned person about the relevant facts, reasons, and legal grounds for imposition of an administrative

[47] Ibid. Article 31.

penalty. In other words, imposition of administrative penalty has a communicative value. The Chinese police are expected to persuade and educate (说服教育). They must appeal to reasoning as well as emotion (晓之以理，动之以情) while explaining the law. According to the provisions of the Law on Administrative Penalty,[48] there is a duty to hear the statements and explanation made by an administrative offender before any administrative penalty is imposed. The intended penalty must be reexamined after the completion of the hearing taking into consideration new information obtained from the statements and explanations of the offender.

When an offender is subject to an administrative penalty, he can appeal for a court review or to a higher administrative agency to review the fairness of the imposed penalty.[49] This procedure adopts an adversarial form (争辩的方式). It is perceived by the Chinese police not so much an essential safeguard against the abuse of administrative powers, as an educational experience during which the parties enrich their experience of knowing, understanding, and keeping the law (知法、懂法、守法). The judicial proceedings are open to the public. People can attend the court's proceedings and learn through observing the process. An interviewed police officer concluded: "court's cases provide another way to combine punishment with education. The public is informed concerning the behavior which is permitted and which is not. Raising awareness of the public through case reporting is important for ensuring the compliance with law."

If administrative penalty is an educational measure, one would expect that the penalty should be meted out according to the educational needs of the offender. It is also possible that some offences are incidental and should be forgiven. Forgiveness, however, has been mentioned neither in the text of the Statute nor by the interviewed experts of Yunnan Police Academy. Article 27 of this Statute gives the power to the police to give a lighter or mitigated administrative penalty. It states:

A party shall be given a lighter or mitigated administrative penalty in accordance with law, if: (1) he has taken the initiative to eliminate or lessen the harmful consequences occasioned by his illegal act; (2) he has been coerced by another to commit the illegal act; (3) he has performed meritorious deeds when working in coordination with administrative organs to investigate violations of law; or (4) he is under other circumstances for which he shall be given a lighter or mitigated administrative penalty in accordance with law. Where a person commits a minor illegal

[48] Ibid. Article 32.
[49] Ibid. Article 6.

act, promptly puts it right and causes no harmful consequences, no administrative penalty shall be imposed on him.

Other circumstances mentioned in this article are contained in the *Public Security Administrative Penalties Law 2005, 2012*. Article 12 requires that an administrative penalty must be lighter for the minor offenders who reach 10 years but not 18 years of age. Article 14 allows to the police to lower penalty or not to impose at all on blind and deaf people. Article 19 is of a particular interest: "The penalty to be imposed on a person who commits an act against the administration of public security shall be mitigated, or no penalty shall be imposed on him, under one of the following circumstances: (1) The adverse effects are extremely minor; (2) The person takes the initiative to remove or lessen the adverse effects, and gains the victim's forgiveness (谅解); (3) The act is committed under the coercion or luring by another person; (4) The person surrenders himself to the police and truthfully states his illegal act to the public security organ; or (5) The person has performed meritorious service (立功). The *Public Security Administrative Penalties Law,* unlike *Administrative Penalty Law of the People's Republic of China*, mentions forgiveness of a victim as a condition for mitigating the penalty or not imposing penalty at all. Other conditions for mitigating an administrative penalty are similar in both pieces of legislation.

The *Administrative Penalty Law of the People's Republic of China* is less known by ordinary policemen than the more commonly applied *Public Security Administrative Penalties Law.* It does not mean that its provisions do not operate at all. The law is handed down by the channel of multiple administrative instructions from the top to the bottom. It is certainly an important development of Chinese administrative law. However, the real life is animated by different spirit than the unselfish desire to ensure fairness and openness of the procedures of imposing administrative penalties. Most police officers are now more concerned about the system of law enforcement quality assessment (执法质量考核考评制度).[50] There are other influences on administrative discretion which neither the law nor the interviewed police officers mentioned – e.g., the influence of the Communist party on administrative decisions. There is evidence that the

[50]Lin Li, *The Chinese Road of the Rule of Law* (Springer, 2018), pp 178.
劉紹武, '创新执法质量监督机制科学评估依法行政水平' (2009)《*行政法學研究*》1, pp. 111.

Communist Party remains the most powerful force that control the activity of law enforcement agencies.[51]

The law does not directly address the problem of inappropriate choice of administrative proceedings, instead of criminal proceedings. An administrative organ has to make a choice between 4 options in dealing with an offender: "After an investigation has been concluded, leading members of an administrative organ shall examine the results of the investigation and make the following decisions in light of different circumstances: (1) to impose administrative penalty where an illegal act has really been committed and for which administrative penalty should be imposed, in light of the seriousness and the specific circumstances of the case; (2) to impose no administrative penalty where an illegal act is minor and which may be exempted from administrative penalty according to law; (3) to impose no administrative penalty where the facts about an illegal act are not established; or (4) to transfer the case to a judicial organ where an illegal act constitutes a crime."[52]

As it has been indicated in the previous sections, the police retain significant discretion in evaluation of seriousness of circumstances when determining whether to follow administrative proceedings or to initiate criminal process. However, the law demands from the police to draw a clear line between crime and administrative offence: "where an illegal act constitutes a crime, criminal responsibility shall be investigated in accordance with law; no administrative penalty shall be imposed in place of criminal penalty."[53] "If an illegal act constitutes a crime, the administrative organ must transfer the case to a judicial organ for investigation of criminal responsibility according to law."[54] It must be clarified here that the word "judicial organ" (司法机关) includes not only courts, but also procuratorates and the police which investigates crime.[55] This unity of the courts, procuratorate organs and the police is reflected in Article 135 of the Constitution of the PRC: "The people's courts, the people's procuratorates and the public security organs shall, in handling criminal cases, divide their functions, each taking responsibility for its

[51] Yuhua Wang, 'Empowering the police: how the Chinese Communist Party manages its coercive leaders', (2014) *The China Quarterly* 219: pp 625-648.
[52] *Administrative Penalty Law of the People's Republic of China,* Article 38.
[53] Ibid. Article 7.
[54] Ibid. Article 22.
[55] The Chinese Government. 'China's judicial system' 2017-11-08 http://www.gov.cn/guoqing/2017-11/08/content_5238058.htm (last visited 10 February 2020).

own work, and they shall coordinate their efforts and check each other to ensure the correct and effective enforcement of law."

It is possible that a person receives an administrative penalty first and later faces criminal proceedings despite the legal provisions of Article 7 and Article 22 quoted above. "If an illegal act constitutes a crime, for which a People's Court sentences the offender to criminal detention or fixed-term imprisonment, and if an administrative organ has already imposed administrative detention on him, the length of detention shall be made the same as the term of imprisonment in accordance with law. If an illegal act constitutes a crime, for which a People's Court imposes a fine on the party, and if an administrative organ has already done so, the amount of the fine imposed by the latter shall be made the same as that by the former."[56]

The lawgiver clearly understood the danger that the police would prefer administrative sanctions rather than labeling offences as crimes: "If administrative organs, for the purpose of seeking departmental gain (单位私利), do not transfer cases to judicial organs for investigation of criminal responsibility as they should do in accordance with law but impose administrative penalty in place of criminal penalty, the administrative organs at higher levels or relevant departments shall order them to make correction; if they refuse to do so, administrative sanctions shall be imposed upon the persons who are directly in charge; persons who practice irregularities for personal gain, cover up or connive at violations of law shall be investigated for criminal responsibility by applying *mutatis mutandis* the provisions of Article 188 of the Criminal Law."[57] It is noteworthy, that there is not a corresponding provision to the cases when the police wrongfully chooses to initiate criminal proceedings. In other words, the law threatens a lenient police officer, not the harsh one.

It appears that the control over the use of police discretion is largely given to the administrative organs of higher level. Some relevant departments are mentioned but not clearly designated. One would expect the procuratorates to be those departments, since they are defined by the Constitution, as the organ for legal supervision,[58] and they exercise control over the decision of police to initiate criminal or administrative proceedings. According to *Organic Law of the People's Procuratorates of the People's Republic of China* 1979, 1983, Article 5(3), the

[56] *Administrative Penalty Law of the People's Republic of China,* Article 28.
[57] Ibid. Article 61.
[58] *Constitution of the PRC. 1982, 2018*. Article 129. http://www.npc.gov.cn/zgrdw/englishnpc/Law/2007-12/05/content_1381903.htm (last visited 10 February 2020).

procuratorate has the function and power "to review cases investigated by public security organs and determine whether to approve arrest, to prosecute or to exempt from prosecution; and to exercise supervision over the investigatory activities of public security organs, to determine whether they conform to law."[59] Further, according to Article 6 of the same law, "People's procuratorates shall, in accordance with law, protect the citizens' right to lodge complaints against State functionaries who break law and shall investigate the legal responsibility of those persons who infringe upon other citizens' right of the person, and their democratic and other rights."

The *Administrative Penalty Law of the People's Republic of China,* does not mention the procuratorates at all. It appears that its primary goal was not so much to establish an effective system of control over the use of administrative discretion as to create the image of the police acting strictly within the limits of law. Its insignificant value in the sight of the police officers in Yunnan has been discovered by the author rather accidently. A number of police officers, when asked about the content of this law, were unaware of the fact of its very existence. They certainly preferred to discuss a more useful piece of legislation: the *Public Security Administrative Penalties Law.*

Evidence and Social Harmony

The *Administrative Penalty Law of the People's Republic of China* is affirming that the police is under the duty to distinguish clearly between criminal and administrative offences. The distinction must be established on the basis of collecting all appropriate evidence. The law requires that "administrative organs, when discovering that citizens, legal persons or other organizations have committed acts for which administrative penalty should be imposed according to law, shall conduct investigation in a comprehensive, objective and just manner and collect relevant evidence; when necessary, they may conduct inspection in accordance with the provisions of laws and regulations."[60] What is comprehensive, objective and just will largely depend on the perceptions of the police. Some procedural safeguards for objectivity can be seen in the rules that "when

[59] *Organic Law of the People's Procuratorates of the People's Republic of China 1979, 1983.* http://www.npc.gov.cn/zgrdw/englishnpc/Law/2007-12/13/content_1384077.htm (last visited 10 February 2020).
[60] *Law of the People's Republic of China on Administrative Penalty 1996, 2017.* Article 36.

administrative organs conduct investigations or inspections, there shall be not less than two law-enforcing officers," and that "written record shall be made for the inquiry or inspection."[61]

Witnesses and suspected offenders do not enjoy the right to be silent. They "shall truthfully answer the questions and assist in the investigation or inspection; they may not obstruct such investigation or inspection."[62] It is obvious that collecting reliable evidence can hardly be done without trust between the police and the witnesses. In this sense, social harmony is not only the end of administrative process, it is also its precondition. One peculiarity of Chinese police is that one of its units is closely attached to a local community, and the police officer of that unit has to integrate and familiarize himself with the local affairs. The knowledge of people is vital for the assessment of the reliability and trustworthiness of the evidence they provide. In an adversarial system, the trustworthiness and reliability of the witnesses is proven by cross-examination which may be intrusive and aggressive for those who are subjected to it. The inquisitorial system of China is certainly devoid of this painful procedure. The procedure for administrative offences is less regulated than in criminal cases, and the way how evidence is gathered is less formalized. This is exactly the point where a just administrative penalty depends on the information and knowledge of the witnesses. Police officers have to judge whether a witness is reliable or not.

One important aspect tends to be overlooked by the contemporary experts of procedural law, except those writings which deal specifically with admissibility of evidence.[63] It is the link between evidence and moral character.[64] One interviewed police officer in Kunming thought of this link as the most important in his work. An evidence from a man of integrity would be accepted by him with a greater trust than from a person known as a liar. Establishing the link between moral integrity of a witness and the trustworthiness of his evidence is easier to achieve in an administrative process than in the criminal one because the criminal procedure contains stricter rules for admissibility of evidence, and there is a greater emphasis on its formal expression. In contrast, an administrative procedure is much less formal, and the rules on admissibility are not

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[61] Ibid. Article 37.
[62] Ibid.
[63] Samuel March Phillipps, *A Treatise on the Law of Evidence*: 9th Ed., (Saunders and Bennings, 1843), Vol. 2, p. 435; James Fitzjames Stephen, *A Digest of the Law of Evidence* (Georg Chase', 1898), p. 896; Christopher Allen, *Practical guide to evidence* (Routledge-Cavendish, 2008), Chapter 12.
[64] The link between moral character of the witness and trustworthiness of his evidence seemed to play a greater role in traditional systems of law. In the Quran, for example, there is a requirement that witnesses (often two are required) must be righteous (ذَوَا عَدْلٍ), and that a sinful behavior (إِثْمًا) invalidates the trustworthiness of their evidence. Quran. 5. 106-107. The issue whether the attention of Chinese police to the moral character of their informants is a reflection of traditional Chinese law presents a separate topic of academic inquiry.

stringent. Ideally, the relationship between the police and informants are based on trust and on pursuing a common goal. In real life, a true information can be given by an informant of not a high moral standing. The financial motives, fear, selfish ambition may all be a strong motive to provide information to the police. However, there are people in China who cooperate with the police for moral reasons. They do it to achieve social harmony.

A Chinese traditional medicine doctor, Mr Cai, had worked many years as a community police officer in Yunnan before he decided to devote his life to practicing Chinese traditional medicine. The fact that he is not any more a police office, gave him more freedom to express his views on the working of Chinese police to promote social harmony. He confessed that as a police officer he could not know well the content of all administrative regulations passed by the central or local governments. There were too many of them. However, according to him, that did not affect the quality of his or his colleagues' work. They followed not so much specific rules as general principles.

Dr. Cai distinguished 4 principles that had guided his daily work with witnesses, victims and offenders. Firstly, it was *gong* 公. It has a variety of meanings including the requirement of being just (公正), being fair (公平), being open (公开), and meeting the public trust of the people (公众). Secondly, it was *xu* 序, which means to follow the traditional, national, social, and familial orders of China. The third principle was *liang* 良, which means not to violate the principle of being kind, and not to make a partial decision on the basis of selfishness. Dr. Cai explained this principle similarly to the Aristotelian concept of equity that moderates the application of strict justice.[65] For example, when a thief stole something from a supermarket, he would take into consideration the underlying reasons for this behavior. The police action would be different in the situations when the act of theft was motivated by poverty and when it was driven by the desire to satisfy one's desires in an illegal way. In the first case, he might even try to help the family members to come out of trouble. The last principle was *su* 俗, which means the conventional folk and ethnic customs. For example, carrying knife in public is an administrative offence, but according to Dr. Cai, the police tolerated the practice for some ethnic groups, such as, Jingpo people, who regard it as a very important token of their ethnic identity. This principle also apples to the acts normally prohibited for the police. Drinking during working time is forbidden for a policeman, but on certain occasions

[65] Aristotle, *Nicomachean Ethics* V, 1137 a 31 - 1138 a 3. John Tasioulas, 'The paradox of equity', (1996) 55 *The Cambridge Law Journal* 3: pp 456-469.

such as wedding, funeral, or important ethnic festivals, there could be exceptions. Tattoo is also not allowed for a Chinese policeman, but this could be flexible for Tibetan and Dai policemen. Concrete examples could be various and numerous.

These four principles were used not only to guide the conscience of Chinese police officers, but also to evaluate their work. They gave Dr. Cai flexibility in dealing with offenders, victims, and witnesses depending on a situation. Dr. Cai acknowledged that the situation in the police work had changed since he resigned. He said: "Nowadays, following regulations strictly is more and more emphasized. In many cases, it is a good thing to handle problems according to precise rules. But it could also become rigid and ignore 'human feelings.' For example, a community police officer must have a good relationship with the members of the community in order to perform his duties well. Therefore, participating in weddings, funerals, etc. is a part of the officer's work. However, there are now regulations that restrict policemen to engage with local people. You don't even know whether to accept or refuse when an ordinary person invites you for a meal."

This significant change in the police work has been reflected in many informal conversations with the police officers in Yunnan. The general trend of police work is its increased regulation and detailed control from the government. More specific rules are issued, and the police have to go through a rigid system of evaluation. It affects the effective handling of evidence in administrative and criminal proceedings. The time will show whether this policy is sustainable but the overall impression that comes from the direct contact with the police in Yunnan is that the public trust towards the police is diminishing in China.[66] The recent developments in China in the light of the coronavirus infection seems to support this conclusion. As Yu Jie commented: "For decades, local governments have made things happen in China. But with tighter regulation of lower-level bureaucrats, civil servants across the system now seem less ready, and able, to provide their input, making ineffective and even mistaken policy more likely."[67]

[66] The same conclusion is reflected in a number of recent publications on Chinese police: Ivan Y. Sun et al. 'Trust in the Police in Rural China: a Comparison Between Villagers and Local Officials' (2019) 14 *Asian Journal of Criminology* 3: pp 241-258; Yuning Wu et al. 'Group position, consciousness and perception of police fairness among urban residents in China.' (2019) 42 *Policing: An International Journal* 4: pp 640-653. Guangzhen Wu & Francis D. Boateng, 'Police perception of citizens and its impact on police effectiveness and behavior', (2019) 42 *Policing: An International Journal* 5: pp 785-797.

[67] Yu Jie, 'Centralisation is hobbling China's response to the coronavirus' *Financial Times* (5 February 2020) https://www.ft.com/content/1a76cf0a-4695-11ea-aee2-9ddbdc86190d (last visited 10 February 2020).

Conclusion

The existence of two systems of liability for committing public wrongs in China creates the problem of their demarcation. Even though there are attempts to draw a clear line between administrative and criminal offences, there is a large grey area in which the police inevitably has a significant discretion to choose which system of liability to apply. The seriousness of a public offence is accepted in China as the fundamental principle to distinguish the criminal from the administrative offences. In order to make the both systems of liability function well, there must be clear standards to define and measure the seriousness of offences. China oscillates between two alternative policies in defining those standards. The first is to measure the seriousness of offences from the point of view of their impact on social harmony. This policy requires a significant degree of discretion of the police which has to be proactive in identifying and solving social contradictions. The second policy is to give specific descriptions of seriousness for each kind of offence that warrants an application of criminal law. Under this policy, the police must strictly follow those descriptions.

The recent years have seen the official preference for the second policy. The proliferation of the official interpretations issued jointly by the Supreme Court and the Procuratorate Office in some aspects complicate the work of the police. The attention of the police shifts from achieving social harmony in their districts to a formal compliance with a vast amount of normative documents. The conducted interviews with the police officers in Yunnan indicate that the police is less willing to take a proactive role in defining the borders of criminal and administrative liability. There is an increased unwillingness of the police to play a mediating role in social disputes unless there is a direct duty in a form of a regulation that directly demands an official involvement. The pressure to follow the increased number of regulations weakens and obscures the general vision of social harmony. In a long term, this tendency will lead to a more formal and bureaucratic style of the police work that likely weaken the trust towards the police among the members of the public. The general impact of this tendency will have tremendous consequences on the country in which police is the essential part of social control.

THE CONCEPTS OF TRUTH AND FAIRNESS IN THAI CRIMINAL PROCEDURE

Abstract

Criminal procedure law in every country is constantly evolving by trying to accommodate various conflicting social needs and demands. This study looks at the ideological forces, or the fundamental ideas which shape the structure of the whole of Thai criminal procedure law. It examines the way how the search for truth is attempted to be reconciled with the idea of a fair trial or procedural fairness in Thai criminal law. The conflict between the search for truth on the one hand and guaranteeing procedural rights of the accused on the other is particularly problematic in Thai context. Thai law does not accept general moral principles which would justify a broad discretion in accepting or rejecting evidence on the ground that it was obtained unlawfully. As the result, there is an attempt to build a sophisticated system of rules that can accommodate the interests of justice and fairness in different situations.

Keywords Thailand, criminal procedure law, evidence, truth, fairness.

Introduction

Thai procedural criminal law is an interesting object of study since it tries to accommodate both inquisitorial and adversarial model of trial. It was first enacted in 1934 but it has been continuously revised reflecting the changes in Thai social, political, and economic life. Criminal procedure law in every country is constantly evolving by trying to accommodate various conflicting social needs and demands. In the last ten years, Thai law underwent 5 major revisions.[1] The speed of the legislative change is such that many works written not long time ago become quickly outdated. The task of this paper is not producing an up-to-date description of Thai criminal procedure, a description that will be out-of-date soon by another way of reform, but to understand the inner dynamic of the Thai criminal procedural law. There is a need to concentrate not so much on specific provisions of criminal procedure law as on the forces which shape and determine their content. This study looks at the ideological forces, or the fundamental ideas which shape the structure of the whole of Thai criminal procedure law.

The basic principles of Thai criminal procedure code are not indigenous. Thai criminal procedure is a product of the westernization of Thai law.[2] Several fundamental ideas underlie the whole normative structure of a contemporary code of criminal procedure. The first one is that criminal procedure must be set up in such a way as to guarantee as much as possible a true discovery of all elements of a criminal offence.[3] The second idea is that an accused must receive a fair trial which is closely connected with the idea of human rights.[4] This idea affirms the concept

[1] For updates see: http://www.krisdika.go.th/wps/portal/general
[2] A. Petchsiri, 'A Short History of Thai Criminal Law since the Nineteenth Century' (1986) 28 *Malaya L. Rev.* 134.
[3] R. A. Duff, L. Farmer, S. Marshall, and V. Tadros, *The trial on trial: volume 1: truth and due process* (2004).
[4] S. J. Summers, *Fair trials: The European criminal procedural tradition and the European Court of Human Rights* (2007).

of an individual autonomy. These two ideas may enter into conflict, particularly in the cases of the admissibility of evidence obtained illegally.

Thus, the subject of this research is to examine the way how the search for truth is attempted to be reconciled with the idea of a fair trial or procedural fairness in Thai criminal law. The conflict between the search for truth on the one hand and guaranteeing procedural rights of the accused on the other is particularly problematic in Thai context, as procedural practices are significantly depending on political upheavals experienced in Thai recent history. Therefore, this research will not attempt to draw generalizations in relation to the actual practice in a particular time of Thai legal history. Rather, it concentrates on the analysis of the legislative materials and some cases to see the channels of a possible resolution of this conflict.

The conflict between the search for truth on the one hand and procedural fairness on the other has attracted attention of enormous literature whose survey would require a multivolume work. It is important, however, to offer here a short description of general trends and approaches to the subject. It is generally acknowledged that there is a dynamic in relation between the search of truth and fair trial. Some scholars perceive the different degree of preference for either of them as depending on the guiding political ideology, or even as the foundational element for distinguishing between various legal systems.[5] It is asserted that the civil law tradition with its inquisitorial model of trial pays a greater attention to the search for truth, while common law with its adversarial model gives a greater weight to procedural fairness.[6] This gives rise to a different role of a judge particularly in the way he handles evidence. The inquisitorial system gives more power to the judge to search for additional evidence, while in the adversarial system, the judge is

[5] See: B. Yin and P. Duff, 'Criminal Procedure in Contemporary China' (2010) 59 *International and Comparative Law Quarterly*. 1117.
[6] J. McEwan, 'The Adversarial and Inquisitorial Models of Criminal Trial' in A. Duff, L. Farmer, S. Marshall, V. Tadros (eds.) *The Trial on Trial Volume 1 Truth and Due Process* (2004) 51-70 at 56.

simply an impartial arbiter who stands above all including the state power.[7] Some scholars perceive this difference as fundamental in distinguishing common law and civil law systems.[8]

The search for truth justifies broad powers given to the investigators, prosecutors and judges to discover whether the accused is truly guilty or not. Fair trial puts limits on those powers. In the U.S. these limits have been largely developed within the constitutional doctrine of a due process which was also a subject of extensive scholarly discussion. Fairness of the criminal process as well as its outcome is often described by a not less abstract term as reasonableness.[9] The view that the inquisitorial system favours the search for truth more than the adversarial system has been challenged. Elisabetta Grande wrote that two systems search for the truth by using different paths, and they have different assumptions about what type of truth can be discovered by means of a criminal procedure.[10] The inquisitorial system pursues an ontological or substantive truth, while the adversarial system does not believe in the existence of ontological truth and seeks, what the author calls "interpretive truth."[11]

The way how truth and fairness are perceived can vary significantly depending on philosophical, political, and moral views of the authors. Joel Samaha described them as a "balance of values—between ends and means. Or, to be more precise, the balance between result and process. In criminal procedure, the "ends" side of the balance consists of the search for the truth to obtain the correct result in individual cases. The correct result has two dimensions: (1) catching,

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[7] E. Christodoulidis, 'Communication and Legitimacy in the Courtroom' in *The Trial on Trial Volume 1 Truth and Due Process,* eds. A. Duff, L. Farmer, S. Marshall, V. Tadros (2004) 179-202 at 186.
[8] E. Grande, 'Dances of Criminal Justice: Thoughts on Systemic Differences and the Search for the Truth' in Jackson, John D., and M. Langer (ed.) *Crime, Procedure and Evidence in a Comparative and International Context: Essays in Honour of Professor Mirjan Damaska* (2008) 145-164.
[9] G. C. Thomas III, *Double jeopardy: the history, the law* (1998) 22.
[10] E. Grande, 'Dances of criminal justice: Thoughts on systemic differences and the search for the truth,' Jackson, John, y Otros, *Crime, Procedure and Evidence in a Comparative and International Context, Essays in Honour of Professor Mirjan Damaska* (2008) 146.
[11] E. Grande, id., p.147.

convicting, and punishing guilty people and (2) freeing, as soon as possible, innocent people caught up in government efforts to control crime. Keep in mind these words of the late Professor Jerome Hall (1942) as we make our journey through the law of criminal procedure: [Criminal law's] "ultimate ends are dual and conflicting. It must be designed from inception to end to acquit the innocent as readily as to convict the guilty. This presents the inescapable dilemma of criminal procedure . . . that the easier it is made to prove guilt, the more difficult it becomes to establish innocence." (728) At the "means" end of the end-means balance is the commitment to fairness in dealing with suspects, defendants, and offenders in all cases. In our constitutional democracy, we don't believe in catching, convicting, and punishing criminals at any price. According to one court, "Truth, like all other good things, may be loved unwisely, may be pursued too keenly, may cost too much" (Pearce v. Pearce 1846, 950)."[12]

Others, on the contrary, perceive both truth and fairness as the means of justice. "Now the trial is seen as "both a means of identifying a defendant as an offender, and a means to protect defendants against abuse of state powers."[13] The conflict between two principles has been recently intensified in the West in the context of the War on Terror.[14] This conflict has become at the centre of a number of legal decisions in national and international courts, particularly the European Court of Human Rights, which has attracted enormous amount of literature.[15]

The discussion of the role of truth in the criminal procedure law becomes more complex with the development of the communicative theory of criminal trial. In that theory, the shift from

[12] J. Samaha, *Criminal Procedure* (2012) 7.
[13] M. Hildebrandt, 'Trial and 'Fair Trial': From Peer to Subject to Citizen' in *The trial on trial: Volume 2: Judgement and calling to account*, eds. A. Duff, L. Farmer, S. Marshall, V. Tadros (2006) 15-36 at 15.
[14] A. Duff, L. Farmer, S. Marshall, V. Tadros, *The trial on trial: Volume 3: Towards a Normative Theory of the Criminal Trial* (2007) 1.
[15] N. Jayawickrama, *The judicial application of human rights law: national, regional and international jurisprudence* (2002); A. Amatrudo and L. William Blake, *Human rights and the criminal justice system* (2014); S. J. Summers, *Fair trials: The European criminal procedural tradition and the European Court of Human Rights*. (2007).

discovering the truth whether crime is committed and the defendant is guilty to the communication of public censure is apparent.[16] In the past, criminal procedure in general and trial in particular were perceived as a simple application of preexisting rules of criminal law to a specific case. Establishing the truth was the main goal of trial. The proponents of the communicative theory call it "a standard account of trial.[17]

The idea of fair trial is that there are certain rights of the defendant that the state must not violate: "the most salient aspect of our 'fair trial' is the fact that the procedure by which citizens are identified as offenders not only constitutes but also limits the competence of the state in criminal matters."[18] These rights are particularly prominent in the tradition of Common law where there is a right to the trial by jury. The latter was often perceived to be unreliable as "a finder of truth", but was still defended as a guarantee against the abuse of political power and as a sacred expression of the participatory democracy.[19] At the same time, it is asserted that the experience of jury can be helpful in establishing the truth.[20]

The academic discussion on finding the proper balance between truth and fairness considers largely the Western systems of criminal justice. Thailand's system has attracted very little attention. A number of works in English language on Thai criminal procedures were

[16] S. Veitch, 'Judgment and Calling to Account: Truths, Trials and Reconciliations' in *The trial on trial: Volume 2: Judgement and calling to account,* eds. A. Duff, L. Farmer, S. Marshall, V. Tadros (2006) 155-172.; R. Nobles and D. Schiff, 'Theorising the Criminal Trial and Criminal Appeal: Finality, Truth and Rights' in *The trial on trial: Volume 2: Judgement and calling to account,* eds. A. Duff, L. Farmer, S. Marshall, V. Tadros (2006) 243-260.
[17] A. Duff, L. Farmer, S. Marshall and V. Tadros, *The trial on trial: Volume 3: Towards a Normative Theory of the Criminal Trial* (2007) 5.
[18] Ibid. 16.
[19] See: B. Schäfer and O. K. Wiegand, 'It's Good to Talk—Speaking Rights and the Jury' in *The trial on trial: Volume 2: Judgement and calling to account,* eds. A. Duff, L. Farmer, S. Marshall, V. Tadros (2006) 117-134 at 118.
[20] T. Hörnle 'Democratic Accountability and Lay Participation in Criminal Trials' in *The trial on trial: Volume 2: Judgement and calling to account* eds. A. Duff, L. Farmer, S. Marshall, V. Tadros (2006) 135-154 at 140.

published many years ago and are now largely outdated.[21] The issue of human rights and fair trial has received critical attention recently, although this attention has not resulted yet in a deep academic analysis of the whole normative structure of Thai criminal procedure law.[22] A number of interesting studies have been done in the context of a specific problem, for example, the practice of fair trial in transnational criminal proceedings. In those studies, the issue of truth and fair trial are unavoidably raised. For example, in one study,[23] the decision of the Constitutional Court of Thailand was analyzed on its correspondence to the principle of fair trial. The Constitutional Court had to examine the constitutionality of the *Act on Mutual Assistance in Criminal Matters* B.E. 2535 (AMACM)[24] in relation to the admissibility of evidence obtained abroad but which could not be cross-examined during the trial in Thailand.[25] A provision of the legislation was declared unconstitutional because it allowed a criminal court to admit evidence without according the accused an effective opportunity to challenge it.[26]

There are many works published on the subject in Thai language which are not available to international readership. However, not many of them try to analyze the fundamental principles

[21] See: J. Huston, 'A Preliminary Survey of Criminal Procedure in Thailand' (1964) 16 *Syracuse Law Review.* 505-544; N. Morris, "Human Rights and the Criminal Law in South-East Asia," (1958) 1(1) *Tasmanian University Law Review*. 68-79.

[22] A. Harding, 'Thailand's Reforms: Human Rights and the National Commission' (2006) 1(1) *Journal of Comparative Law.* 88-99.

[23] K. Jayangakula, 'The Practice of Thai Courts on the Right to a Fair Trail through Transnational Criminal Proceeding' (2016) 2(3) *Social Science Asia*. 73-84 at 74, 83.
<http://doi.nrct.go.th/ListDoi/Download/229231/44790ebbad88d237708530ede2fe30cd?Resolve_DOI=10.14456/ssa.2016.21>

[24] English translation is available at:
<https://www.unodc.org/cld/en/legislation/tha/the_act_on_mutual_assistance_in_criminal_matters_b.e._2535/section_1-42/the_act_on_mutual_assistance_in_criminal_matters_b.e._2535.html>

[25] See Constitutional Court of Thailand. Decision no. 4/2556 (2013). Thai text is available at:
<http://www.constitutionalcourt.or.th/occ_web/download/article/file_import/center4_56.pdf>

[26] K. Jayangakula, 'The Practice of Thai Courts on the Right to a Fair Trail through Transnational Criminal Proceeding' (2016) 2(3) *Social Science Asia*. 73-84.

of criminal procedure law in their dynamic interaction.[27] Similar to the publications in English language, those studies often cover specific issues, for example, restorative justice in the practice of criminal courts,[28] the legality of the orders of the military government which deal with criminal law and procedure,[29] the powers to control the decision of a prosecutor not to prosecute the accused,[30] or the role of new technology in the criminal procedure.[31] Even though the issues of truth and fair trial are being raised, it does not appear that the conflict between these two fundamental principles has been systematically examined.[32] Before examining this conflict, it is important to grasp some unique principles of Thai criminal procedure when compared to other countries of the world.

The uniqueness of Thai criminal procedural law

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[27] ฉัตตมาศ วิเศษสินธุ์, 'การศึกษาเปรียบเทียบการสืบสวนสอบสวนตามกฎหมายวิธีพิจารณาความอาญาของประเทศไทยกับประเทศมาเลเซีย' (2017) 7(14) *al-Hikmah Journal of Fatoni University*. 93-100. <http://www.e-majallah.ftu.ac.th/index.php/alhikmah/article/view/201/178>

[28] ศิริชัย กุมารจันทร์, กรกฎ ทองขะโชค และ เอกราช สุวรรณรัตน์, 'กระบวนการยุติธรรมเชิงสมานฉันท์และสันติวิธีในศาลจังหวัดชายแดนใต้' (2017) 8(2) *AU Law Journal.* 68-88. <http://www.assumptionjournal.au.edu/index.php/LawJournal/article/view/3135/2014>

[29] นนทชัย โมรา, 'ลำดับชั้นทางกฎหมายของประกาศคณะปฏิวัติ : วิเคราะห์ตามหลักนิติรัฐ' (2017) 1(1) *วารสารนิติศาสตร์และสังคมท้องถิ่น*. 1-25. <http://www.e-journal.sru.ac.th/index.php/llsj/article/view/810/619>

[30] พุฒิพร เจียรประวัติ, 'คำสั่งไม่ฟ้องถ่วงดุลได้ด้วยใคร' (2017) 12(39) *Research and Development Journal Loei Rajabhat University.* 1-2. <https://www.tci-thaijo.org/index.php/researchjournal-lru/issue/view/8902>

[31] คณพล จันทน์หอม, 'การนำเทคโนโลยีสารสนเทศมาใช้ในการฟ้องด้วยวาจา' (2015) 8(1) *Naresuan University Law Journal.* 88-113. <https://doi.org/10.14456/nulj.2015.4>

[32] An exception might be an interesting work of Jiraporn Adchariyaprasita and Paiboon Chuwattanakij who critically examined the role of truth in Thai criminal trial through a Thai novel with a Feminist perspective. See: จิราภรณ์ อัจฉริยะประสิทธิ์ และ ไพบูลย์ ชูวัฒนกิจ, '"ความจริง" ในกระบวนการยุติธรรมทางอาญาไทย: มุมมองทางกฎหมายในวรรณกรรมเรื่อง รากบุญ ของ ช่อมณี' (2018) 10(2) *CMU Journal of Law and Social Sciences*. 23-46. <https://www.tci-thaijo.org/index.php/CMUJLSS/article/view/108630>

The peculiarity of Thai criminal procedural law has been well presented and explained by Phromphan Chonthawornphong.[33] The author conducted a comparison between Thai law on the one hand and the laws of the U.S., England, Australia, and Germany on the other hand in relation to the admissibility of evidence that has been wrongfully obtained. The unique characteristic of Thai law consists in an attempt to distinguish between "the evidence that has arisen not duly" (ที่เกิดขึ้นโดยมิชอบ) from "the evidence that has arisen duly but has been derived by acting wrongfully or has been derived by means of the data arisen or derived wrongfully" (ที่เกิดขึ้นโดยชอบแต่ได้มาเนื่องจากการกระทำโดยมิชอบ หรือเป็นพยานหลักฐานที่ได้มาโดยอาศัยข้อมูลที่เกิดขึ้นหรือได้มาโดยมิชอบ).[34] It seems that the meaning of this obscure legal clause is "an evidence which has been lawfully available but which was unlawfully obtained." The first category of evidence is strictly excluded while the second category may be admitted if it is more advantageous in rendering justice.

The distinction is comparatively a recent development of Thai criminal procedure. It was introduced by the Amendment of the Criminal Procedure Code Act (No. 28) in 2008.[35] The language of the enacted Section 266/1 certainly lacks clarity. It is not surprising, therefore, to observe that a Thai academic has a difficulty in distinguishing these two concepts. Phromphan Chonthawornphong attempted to clarify the difference by singling out 6 types of the evidence that has arisen not duly and 3 types of evidence that has arisen duly but was derived wrongfully.[36] The 6 types of the first category are the following: 1) evidence is obtained through inducement, promise, threat, deception;[37] 2) confession or statement made at the time of the arrest;[38] 3) taking

[33] พร้อมพรรณ ชลถาวรพงศ์, 'การรับฟังพยานหลักฐานที่ได้มาโดยมิชอบตามประมวลกฎหมายวิธีพิจารณาความอาญา' (2560) <http://www.library.law.chula.ac.th/home/file.aspx?ID=949>
[34] Thai Criminal Procedure Code. Section 226/1.
[35] Thai text is available at: <https://library2.parliament.go.th/giventake/content_law/law070251-1.pdf>
[36] พร้อมพรรณ ชลถาวรพงศ์, op. cit. n. 9, p. 234.
[37] Thai Criminal Procedure Code. Section 226.
[38] Thai Criminal Procedure Code. Section 84.

a statement from the accused without informing him of his rights;[39] 4) evidence obtained from children without following the prescribed procedure;[40] 5) evidence obtained from entrapment; 6) evidence obtained from wiretapping an induced conversation.[41] The 3 types of the second category are following: 1) evidence obtained from unlawful arrest, search, or seizure; 2) "the data was arisen or derived wrongfully";[42] 3) evidence obtained from wiretapping a not induced conversation.

The offered above categorization of different types of illegal evidence reflects the practices of Thai courts to some extent.[43] However, its superfluity is apparent. The circumstances of real life are so diverse and the complexity of the interests of justice can be so complicated that making a fair judicial decision in relation to admissibility of unlawful evidence for the interests of justice cannot be solved by a detailed list of exceptions. The judges must exercise discretion. This necessity of discretion is well expressed in the English case of *Karuma v. R* in which the defendant was convicted for unlawful possession of weapons with the evidence that was obtained unlawfully (the police did not have the authority to search).[44] Even though its test of admissibility has now been replaced in English law,[45] it is appropriate to present it here in full as expressing a more flexible approach. Lord Goddard stated:

"In their Lordships' opinion the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained. While this proposition may not have been stated in so many words in any English case there are decisions which support it, and in their

[39] Thai Criminal Procedure Code. Section 134/4.
[40] Thai Criminal Procedure Code. Section 133 bis.
[41] The last two types are not explicitly mentioned in Thai CPC.
[42] Thai Criminal Procedure Code. Section 226/1.
[43] Phromphan Chonthawornphong herself referred to the decision of the Supreme Court of Thailand (2281/2555) which did not fit well into a rigid classification. พร้อมพรรณ, op. cit, n.9, p. 239.
[44] *Kuruma Son of Kaniu (Appeal No. 35 of 1954) v The Queen (Eastern Africa)* [1954] UKPC 43
[45] Kelly Pitcher, *Judicial responses to pre-trial procedural violations in international criminal proceedings*, (2018) 181-260. At 224.

Lordships' opinion it is plainly right in principle…. There can be no difference in principle for this purpose between a civil and a criminal case. No doubt in a criminal case the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused…. If, for instance, some admission of some piece of evidence, e.g., a document, had been obtained from a defendant by a trick, no doubt the judge might properly rule it out." But he might not. There must be a complex balance between the interests to discover the truth on the one hand and treating the accused fairly.

In Thailand, there is a general reluctance to acknowledge openly that there cannot be a clear-cut rule for admissibility of evidence. The job of Thai judges is to apply rules strictly, and there is a fear of the painful work of balancing competing interests that protected by law. The term of "Panglossianism", introduced by Frederick Schauer and taken from a novel character in Voltaire's novel,[46] applies well to Thai judicial practices. According to Schauer, a Panglossian judge or official is the one who fails to perceive the truth that law is a matter of competing rights and interests. This distorted picture of law "may not only hurt all of us, but also harm the very goals, policies and rights that the Panglossian is shortsightedly attempting to protect."[47] A Thai judge tends to perceive law as a body of clearly defined rules which must be applied in a uniform manner. There is something more than a cognitive dissonance in facing the view that law is driven by contradictions. The roots of Pangossian attitude, as Schauer thought, are not only rooted in a psychological uneasiness in facing the conflict, but also in the vision of law. An English judge can also accept the view that law is a body of consistent and coherent rules. However, he still stands

[46] F. Schauer, 'Rights, Constitutions and the Perils of Panglossianism' (2018) 38(4) *Oxford Journal of Legal Studies.* 635-652.
[47] F. Schauer, id., 652.

in a better position to reach a fair decision than a Thai judge for, at least, one particular reason. Thai law lacks the idea of equity as it was formulated by Aristotle:[48]

> "What concerns equity and the equitable - how equity stands in relation to justice and the equitable in relation to the just-is the next thing to speak of. For they appear, to those who examine them, to be neither simply the same thing nor each in a different genus… For the equitable, though it is better than the just in a certain sense, is just, and it is not because it belongs to a different class of thing that it is better than the just. Therefore, the just and the equitable are the same thing, and although both are serious, the equitable is superior. This is what produces the perplexity, because although the equitable is just, it is not what is just according to law. The equitable is instead a correction of the legally just. The cause of this is that all law is general, but concerning some matters it is not possible to speak correctly in a general way. In those cases, then, in which it is necessary to speak generally, but it is not possible to do so correctly, the law takes what is for the most part the case, but without being ignorant of the error involved in so doing. And the law is no less correct for all that: the error resides not in the law or in the lawgiver but in the nature of the matter at hand. For such is simply the stuff of which actions… This is in fact the nature of the equitable: a correction of law in the respect in which it is deficient because of its being general. For this is the cause also of the fact that all things are not in accord with law: it is impossible to set down a law in some matters, so that one must have recourse to a specific decree instead."

English law received direct and often indirect influence of the Aristotelian ideas.[49] Even though Thai traditional law in the past had some idea of equity, it was often lacking in its

[48] Aristotle. *Nicomachean Ethics*. V. 10. 1137a, b.
[49] A. Cromartie 'Epieikeia and Conscience' in Lorna Hutson (ed) *The Oxford Handbook of English Law and Literature,* 1500-1700 (2017) 320, 321.

application.[50] With the reception of the Western law, the neglect of equity in favour of *jus strictum* became apparent.[51] This is particularly obvious in the resistance of some Thai academics to the idea that Thai judges may exercise broad discretion in relation to the 'evidence that has arisen not duly.'[52] The study of common law, particularly of the U.S. law turns into a futile attempt to derive from precedent law a precise list of situations when the evidence must be excluded.[53] This futility comes not only from the fundamental differences existing between the tradition of Common law and the system of civil law based on codes and different role of judges. The existence of objectively universal standards of admissibility of law is difficult to prove as law is largely a product of a particular set of political, economic, and cultural circumstances. Each country has its own dynamic in shaping the overall legal structure as well as the specific practices of admissibility of evidence.

Thus, there is a need for Thai lawyers to look at the rules of evidence not as a universal machine-like technology which can and must be used everywhere in the same way. Rather, the rules on admissibility of evidence have to be examined in a certain context. Nor possible is it to reduce the examination of those rules within a conflict between "Due Process Model" and "Crime Control Model".[54] In real life, both models may coexist without contradicting each other. The conflict between the truth and the procedural rights is more complex and can involve different ideologies.

The idea of truth and fairness in Thai Criminal Procedure

[50] F. C. Darling 'The evolution of law in Thailand' (1970) 32.2 *The Review of Politics.* 197, 203.
[51] P. Kasemsup, 'Reception of Law in Thailand-A Buddhist Society' in *Asian Indigenous Law,* ed. M. Chiba (2009) 267, 288.
[52] พร้อมพรรณ, op. cit, n.9, p.242.
[53] พร้อมพรรณ, id., p. 243.
[54] H. Packer, *The limits of the criminal sanction* (1968) 163.

The idea of truth held by Thai judges is, at its best, grasped in comparison to English law of the past. The dictum of Lord Goddard quoted above is certainly based on the idea that the primary task of judges is to find out the truth. The fundamental questions he has to answer are the following. Is it true that the offence took place? Is it true that the defendant committed the offence? Is it true that there are no circumstances which excuse the offender completely or partially for what he has done? If some evidence is obtained in an unlawful way but it helps to answer these questions, then, according to Lord Goddard, it should be admissible. However, such admission should not be unfair to the defendant. In other words, the search for truth must not lead to unfairness.

If fairness limits the search for truth, then its definition becomes paramount. It would be a vain thing to look for a uniform definition of fairness not only in Thai but also in English legal literature.[55] It seems that Givelber and Farrell were right in conceptualizing fairness in terms of a sentiment.[56] Therefore, it is understandable that Thai law does not contain the definitions of fairness. However, the idea of fair trial is explicitly affirmed in Section 8 of the Thai Criminal Procedure Code.[57] There are many provisions in this legislation which are generally associated with the idea of fair trial: the right to have a defence lawyer,[58] the right to examine the evidence,[59] the right to be silent,[60] and the right to contact relatives upon the arrest.[61]

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[55] G. P. Fletcher, *The grammar of criminal law: American, comparative, and international: volume one: foundations* (2007) 136.
[56] D. Givelber and A. Farrell, *Not guilty: Are the acquitted innocent?* (2012) 94.
[57] Thai text: นับแต่เวลาที่ยื่นฟ้องแล้ว จำเลยมีสิทธิดังต่อไปนี้ (๑) ได้รับการพิจารณาคดีด้วยความรวดเร็ว ต่อเนื่อง และเป็นธรรม English translation of the provision: From the time of being sued, the defendant has the following rights: 1. to receive a speedy, continuous and fair trial.
[58] Thai Criminal Procedure Code. Sections 7 and 8 (2).
[59] Thai Criminal Procedure Code. Section 8 (4-6).
[60] Thai Criminal Procedure Code. Section 83.
[61] Thai Criminal Procedure Code, id.

It is apparent that all these procedural rights do not in any way limit the powers of the court to find out the truth. Moreover, they are necessary preconditions to obtain a fuller view of the facts of the case. This vision of truth as not conflicting with fairness is well reflected in the famous book of John Steward Mill: *On Liberty*[62] who was passionate that nothing is neglected "that could give the truth a chance of reaching us."[63]

The analysis of Thai major legislation: Thai Criminal Procedure Code indicates that Thai legislators have a similar if not identical vision of truth. Section 166 and Section 172 both require that the proceeding continue only after the defendant is brought to the court and "the court believes that this is *truly* the defendant." [64] The same articles state that the court "should question the defendant whether it is *true* that he committed the offence."[65] Section 176 is of a particular importance as it requires from the court to hear supporting evidence in the cases where the defended pleaded guilty if the charged offence is serious (above 5 years of imprisonment) "until the court is satisfied that it is *true* that the defendant committed the offence."[66] Section 226/3 requires exclusion of hearsay evidence unless "it is believable from the condition, nature, source and circumstantial fact of such hearsay evidence that *the truth* of the case may be proved by such evidence" (emphasis added). Section 227 provides a general rule that "the court shall exercise its discretion in considering and weighing all the evidence taken. No judgement of conviction shall be delivered unless the court is certain that it is *true* that the offence is committed and the defendant is the offender."[67]

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[62] J. S. Mill, *On Liberty* (1859) <https://www.gutenberg.org/files/34901/34901-h/34901-h.htm>

[63] J. S. Mill, id., p. 40.

[64] Emphasis is added. This is literal translation of Thai text: เมื่อศาลเชื่อว่าเป็นจำเลยจริงแล้ว

[65] Emphasis is added. This is literal translation of Thai text: และถามว่าได้กระทำผิดจริงหรือไม่

[66] Emphasis is added. This is literal translation of Thai text: ศาลต้องฟังพยานโจทก์จนกว่าจะพอใจว่าจำเลยได้กระทำผิดจริง

[67] Emphasis is added. This is literal translation of Thai text: อย่าพิพากษาลงโทษจนกว่าจะแน่ใจว่ามีกำรกระทำผิดจริงและจำเลยเป็นผู้กระทำความผิดนั้น

In other words, both truth and fairness are well reflected in Thai Criminal Procedure law. When the real conflict begins, is when the evidence is obtained in violation of the procedural safeguards of individual liberty.

Unlawfully obtained evidence in Thai criminal cases

It has been already stated above that Thai law does not allow admission of evidence that has been obtained through unlawful means.[68] However, in some cases, vaguely formulated as when "the evidence that has arisen duly but has been derived by acting wrongfully or has been derived by means of the data arisen or derived wrongfully,"[69] the courts are permitted to admit it "if it will be more advantageous in rendering justice than being disadvantageous due to an impact on the standard of criminal justice system or basic right and liberty of people."[70] If we construct the meaning of this clause as permitting admission of an evidence which has been legally available but which was unlawfully obtained, then all evidence that could have been obtained lawfully falls into this category. That includes confession or statement made at the time of the arrest;[71] taking a statement from the accused without informing him of his rights;[72] evidence obtained from children without following the prescribed procedure;[73] evidence obtained from some types of entrapment; and evidence obtained from wiretapping an induced conversation.[74] This would expand the limits of the admissibility to the extent far beyond those drawn by Phromphan Chonthawornphong.[75] It

[68] Thai Criminal Procedure Code. Section 226.
[69] Thai Criminal Procedure Code. Section 226/1.
[70] Thai Criminal Procedure Code, id.
[71] Thai Criminal Procedure Code, id., Section 84.
[72] Thai Criminal Procedure Code, id., Section 134/4.
[73] Thai Criminal Procedure Code, id., Section 133 bis.
[74] The last two types are not explicitly mentioned in Thai CPC.
[75] พร้อมพรรณ, op. cit, n.9, p. 234.

does not mean that all such evidence will necessarily be admitted, but only that Thai judges must exercise broad discretion to meet the requirements of justice.

Thai language as well as its normative expression of law does not distinguish between just and fair as some English speaking academics may do.[76] 'Just' in Thai is ยุติธรรม, while 'fair' is ธรรม. The difference lies only in a preposition, and the meanings are almost synonymous. The sense of fair and just in Thai language have strong Buddhist or even Hinduist contours. Its Sanskrit equivalent is dharma which relates not so much to a moral sentiment of fairness and justice (in the meaning of David Hume)[77] as to a due course of action. As a result, a fair trial is not the one which the moral sense of the accused or the public accepts, but a trial which conforms to a due pattern. This linguistic peculiarity favours a positivist approach to the concept of a fair trial. A due pattern is prescribed by law, and there is not an apparent need for a judge to search his conscience and apply his moral sense in deciding on whether unlawful evidence is incompatible with the idea of fair trial. A priori, it is already incompatible. Such a perception of fairness certainly does not always deaden the moral sense of Thai judges.

One of the leading cases in relation to the admissibility of evidence obtained unlawfully is the case of Mr Somchai[78] who sued two persons for maladministration,[79] extortion,[80] and trespass.[81] The defendants contested the accusation. The trial court found the second defendant guilty and sentenced him to 3 years of imprisonment. The charges against the first defendant were dismissed. A peculiarity of this case was that the second defendant went to talk to Mr Somchai

[76] G. P. Fletcher, *The grammar of criminal law: American, comparative, and international: volume one: foundations* (2007) 136.
[77] D. Hume, *A treatise of human nature* (1739) III. II.
[78] Thai Supreme Court. 2281/2555 (2012).
[79] Thai Penal Code. Section 157.
[80] Thai Penal Code. Section 337.
[81] Thai Penal Code. Sections 362, 364, 365.

and a witness after criminal proceedings had been initiated. He secretly taped the conversation without them being aware that the conversation was recorded, and then submitted it as an evidence of his innocence. The trial court rejected it as unlawful. The Appeal Court overturned the decision on the grounds that the evidence of the defendant was admissible.

The plaintiff appealed to the Supreme Court. The Supreme Court agreed with the Appel Court that unauthorized recording is a forbidden practice and the evidence should not be generally admitted according to Section 226. However, the reason for admitting evidence was not that it helps to establish the truth of the accused innocence. The main reason which judges of the Supreme Court put forward was the fact that the defendant was not acting in a capacity of a government official, and therefore this exclusionary rule did not apply. Thai concept of a fair trial, or, perhaps, we should call it a *dharmic trial*, does not concern in this case with the wrongfulness of clandestine taping per se. A due pattern of collecting evidence applies only to officials since historically dharma was never egalitarian, and different classes of people have different dharmas. In the end, the court also mentioned Section 226/1 arguing that the use of evidence was more beneficial to the administration of justice than the disadvantages caused by the impact on the standards of the criminal justice system. One certainly must commend the overturning the decision of the trial court. What is surprising to see, however, the attempt to limit the rule on inadmissibility of secret taping to officials only. If suppose the recording was done by an acting official in this case (although it is very unlikely to be done in favour of the defendant), would the decision of the Supreme Court be different despite the fact that the evidence clearly points at the innocence of the accused? Would it be better to openly and honestly acknowledge the broad discretion of judges to admit any evidence that is reliable in establishing the truth?

No doubt that many cases when the evidence was obtained by inducement, promise, threat, deception or other unlawful means in the meaning of Section 226 of the Thai Criminal Procedure Code should not be admitted. However, it may not always be clear whether evidence has been obtained in such a way. Does a statement of a police that the accused will be punished severely if he does not confess crime constitute a threat? Or a statement that if an offender by disclosing other perpetrators will receive a lenient penalty, constitute a promise? The Supreme Court[82] affirmed that such a statement is not a threat or promise in the meaning of Section 226.

Thus, Thai courts do have significant leeway in interpreting the provisions on admissibility of evidence according to their moral sense. Nor are they disregarding the inner perception of the accused. In an old case,[83] a defendant, together with her husband, was arrested being found in possession of a fake banknote. A friend of the husband told the defendant that if she confesses, her husband will be released, and she, being a female, would not receive any punishment. The court did inflict punishment, and the defendant appealed claiming her innocence. The Appeal Court overturned the decision. The Supreme Court concurred, arguing that this confession was not, as the court put it, "a heartfelt confession."[84] The insensitivity to whether the confession is heartfelt or not would prevent judges to perceive the truth. In other words, the reliability of evidence depends on the ability of judges to have a sympathy with the accused.

There are a number of cases in which the requirements of a due procedure were sacrificed for the sake of truth. In one case, the search warrant wrongfully indicated the number of the house to be searched.[85] The police officer corrected the mistake of the warrant issued by the court at the spot and conducted the search even though he was not authorized to make such corrections. The

[82] Thai Supreme Court. 6243/2554 (2011).
[83] Thai Supreme Court. 102/2474 (1931).
[84] Thai text: ไม่ใช่คำรับโดยน้ำใสใจจริง
[85] Thai Supreme Court. 5144/2548 (2005).

Supreme Court admitted that such mistake may invalidate the search warrant, yet the evidence obtained by the unlawful search was declared admissible. In another case,[86] the police officers conducted a search of a suspect of the offence of receiving stolen property.[87] The search was conducted with the violation of the procedure prescribed by Section 102 and Section 103 of Thai Criminal Procedure Code. The search warrant did not contain the details of what is to be searched. The court of the first instance admitted the evidence as the proof of the guilt of the defendant. The appeal court overturned the decision and dismissed the case. The Supreme Court reversed the decision of the appeal court and agreed that the evidence must be admitted even though the search warrant was defective. The Supreme Court affirmed that the failure to follow the prescribed procedure may impair the reliability of the obtained evidence, yet that does not invalidate completely the usefulness of the evidence in establishing the truth. The courts must be cautious in relying on it, but it does not mean that it has to be outright rejected if it supports other evidence of the guilt of the defendant.

The same line of reasoning was applied in the cases in which the issue was whether the evidence of a minor should be admitted if it was collected in violation of Section 133 bis. This section requires that a minor must be interviewed 'separately in an appropriate place with attendance of a psychologist or social welfare worker, a person requested by the minor, and a public prosecutor." In one murder case,[88] the trial court dismissed the case because the requirements of Section 133 bis were not fulfilled in questioning the witness who was 13 years old, even though the defendant made confession. The Appeal Court and the Supreme Court overturned the decision, arguing that the analogous requirements in relation to hearing a minor

[86] Thai Supreme Court. 837/2483 (1940).
[87] See Section 357 of Thai Penal Code.
[88] Thai Supreme Court. 5294/2549 (2006).

witness were fulfilled during the court's proceedings, and that there were other evidence (confession) pointing at the guilt of the accused.

However, in an earlier case,[89] the Supreme Court dismissed the case stating that the failure to follow the requirements of Section 133 bis gives rise to the provisions of Section 226 of the Criminal Procedure Code. The brief report of the case, which is available on the official website,[90] does not indicate that there were any facts of any inducement, promise, threat, or deception in collecting evidence. A similar decision was taken by the Supreme Court recently in a murder case, where a witness was 17 years old.[91] Thus, the Thai law is contradictory and not consistent. It is natural that the interests of fairness are so diverse to warrant a different outcome of cases where the prescribed procedure was not followed. What is regretful, however, that the reports of these cases lack any general principles justifying the contradicting results of judicial deliberation.

Conclusion

Truth is certainly a central category of Thai criminal procedure law. Similarly to other countries, the search for truth is limited by the requirements of a fair trial. However, Thai law does not accept general moral principles which would justify a broad discretion in accepting or rejecting evidence on the ground that it was obtained unlawfully. As the result, there is an attempt to build a sophisticated system of rules that can accommodate the interests of justice and fairness in different situations.

[89] Thai Supreme Court. 4209/2548 (2005).
[90] See: <https://deka.in.th/view-113225.html>
[91] Thai Supreme Court. 1273/2559 (2005).

The introduction of Section 226/1 in Thai Criminal Procedure Code allows judges to accept some evidence which was obtained in violation of prescribed procedures, but there is uncertainty how this provision relates to a general prohibition of unlawful evidence in Section 226 of the same law. The reasons for the uncertainty lies not only in the vagueness of the statutory language, but also to the fact the Thai concept of fairness is overwhelmingly positivistic. The moral sense of judges on what is fair and what is not does not play a significant role in making their decisions.